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EMBRYO, NOT FOSSIL: BREATHING LIFE INTO THE PUBLIC TRUST IN WILDLIFE

*Susan Morath Horner**

In a world older and more complete than ours they move finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings; they are other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendor and travail of the earth.

Henry Beston (1888-1968) American Nature Writer

It is with some trepidation that this article on the public trust in wildlife is presented. Without a doubt, the public trust doctrine has been one of the most frequently studied topics in the legal literature. Since Joseph Sax's landmark article,¹ dozens of articles have been penned on various aspects of

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1. See Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

the topic.² It is necessary to ask oneself whether anything meaningful can be added to the existing body of legal scholarship.

What has brought about this author's decision to add a few cents to the debate is that, curiously absent from the mountain of literature on the public trust is any cohesive guidance to either the courts or the practitioner on the specific attributes, parameters, and implications of this enormously important doctrine. While the public trust doctrine has been universally accepted as a viable part of our legal heritage in the late Twentieth Century, it is anything but a working tool in the practices of public interest and conservation advocates across the nation.

In studying the literature and case law one sees why this is so. First, because the public trust doctrine is largely judicially made, and therefore applied on a case by case basis under principles of judicial restraint, practitioners have not been left with any clear authority either as to the resources to which the doctrine should apply, or its necessary features.³

Second, the potential breadth of the doctrine can be daunting. Full understanding and implementation of the public trust principles has the power to reshape wholly our approach to the management of trust resources. Persons who fear the loss of private property rights and other presumed freedoms at the hands of conservationists have sometimes found the public trust doctrine threatening.⁴

Third, as yet there has not been any in-depth study of the procedural vehicles through which the public trust doctrine can be asserted. Without a grasp of appropriate procedure and such fundamental issues as standing to

2. In the first fifteen years following its publication, Sax's article ranked among the forty-nine most frequently-cited law review articles of the previous forty years. See Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1551-53 (1985). The second fifteen years have shown no abatement in the popularity of the topic. For an excellent overview of the doctrine, in addition to Sax, several other writings are recommended. See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989) [hereinafter Wilkinson, *Headwaters*]; Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989); Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law* 19 ENVTL. L. 515 (1989); Anna R. C. Casperson, Comment, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357 (1996); and Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CAL. DAVIS L. REV. 269 (1980) [hereinafter Wilkinson, *Public Trust Doctrine*].

3. Historically the public trust doctrine has been found to apply most easily to water resources and their accompanying fauna, which in turn has led appropriately to the general recognition of the trust principle with respect to wildlife, discussed in more detail *infra*, Part I, D. But there has been much legitimate argument in support of a general application of the doctrine to all natural resources. See, e.g., Dunning, *supra* note 2 (public trust doctrine not only provides public access to navigable waters, but also to other related natural resources); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989) (using the public trust doctrine as an overall framework for dealing with wildlife and wildlife habitat); Wilkinson, *supra* note 2, *Public Trust Doctrine*.

4. See, e.g., James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989).

sue within the trust doctrine, few practitioners in the public interest sector, acting with limited resources, will have the resolve to file cases in this arena. Yet without such cases, the doctrine will continue to be only vaguely understood and under-utilized. This is particularly so in light of the emphasis over the past thirty years on the fragmented, resource-specific, statutory authorities (mostly federal) which now fill the practitioners' legal toolboxes, and are viewed as much safer and surer bets in resource litigation.⁵ In contrast, the public trust doctrine, if it can be found in the practitioner's toolbox at all, lies dusty and rusty, buried under the more handy and better-understood devices.

The purpose of this article, then, is to make the debate more meaningful. We must stop merely "paying lip service" to the public trust doctrine in wildlife. Although the specific origins of the doctrine are sometimes difficult to discern,⁶ the idea that the government holds certain natural resources in trust for the benefit of all people cannot be, with intellectual honesty, the subject of legitimate controversy any longer.⁷ What is needed now is a conscientious and concerted effort to turn the discussion toward understanding the elements and boundaries of the doctrine with regard to wildlife. In short; what must the government do, and what is it prohibited from doing, in order to fulfill its trust responsibilities?

Equally important is to provide a model for the meaningful enforcement of the trust. For this we must look to the law of trusts. Under established trust principles, if there is a trust, there must be one or more identifiable trustees. If there are trustees, there are also beneficiaries. If there are beneficiaries, the beneficiaries have a right to enforcement of the trustee's fiduciary obligations. In the public trust context this means identifying with

5. See, especially, the Clean Air Act of 1970, 42 U.S.C. §§ 7401 – 7671 (1994 & Supp. II 1996); the Clean Water Act (Federal Water Pollution Control Act) 33 U.S.C. §§ 1251 – 1387 (1994 & Supp. 1997); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997); National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 – 4370d (1994 & Supp. III 1997); Pollution Prevention Act of 1990 (PPA), 42 U.S.C. § 13101 – 13109; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 – 136y (1994); Safe Drinking Water Act of 1974, 42 U.S.C. §§300f – 300j (1994); Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§1201 – 1328 (1994); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1994 & Supp. III 1997) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

6. See *infra* Part II.

7. One commentator has said:

As fascinating and informative as . . . discussions are [regarding the origin, development, scope, and proper application of the doctrine] the debate about the origins of the public trust doctrine is largely of academic historical interest, because it has been so clearly acknowledged by all American courts and therefore exists as a binding legal principle.

JACK H. ARCHER, ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* 5 at n.16 (1994).

clarity the rights of the public to challenge government action that does not comport with trust obligations.⁸

Part I introduces the central theme of this article, that by recognizing the applicability of the public doctrine to wildlife we are not charting new territory—the rights of the public are there to be enforced. However, our wildlife managers and other state officials who have the power to impact wildlife resources must be educated and guided so that they may understand and routinely fulfill the duties implicit within their trust responsibilities.

Part II briefly reviews the historical foundations of the doctrine, with the purpose of putting today's public trust doctrine in the appropriate perspective. While recognizing the importance of the ancient roots of the doctrine, this article approaches them with the view that such roots have limitations in their ability to guide management of natural resources in the Twenty-first Century. It is therefore necessary to take a proactive approach to recognition of the doctrine through legislative or constitutional enactment that superimposes specific trust responsibilities on our resource managers.

Part III sets out the specific statutory or constitutional guidance which it is asserted will be needed for the proper management of wildlife resources in the public trust. It is suggested that by limiting the political influences that now impede management of resources in the public trust, and adopting many conventional principles of trust administration, we may begin to give meaningful life to the doctrine, yet still keep the trust fluid in its ability to meet changing circumstances.

Finally, Part IV examines the experiences of a few states that already have embraced the public trust doctrine, through either legislation or constitutional amendment. Through this overview some conclusions will be drawn as to what works, what does not work, and whether other states should have concern over the overt adoption of the doctrine.

I. INTRODUCTION: THE STATES' DUTY TO PROTECT WILDLIFE

The day does not seem wholly profane in which we have given heed to some natural object.

Ralph Waldo Emerson (1803-1882)
American essayist and poet

8. Much of what is said in this article with respect to defining the public trust doctrine in wildlife is applicable to the management of any resource found to be held in the public trust.

Recognizing Both Rights and Duties

Professor Meyers, in his 1989 article, was one of the first commentators vigorously to embrace the specific application of the public trust doctrine to wildlife management.⁹ He accurately noted that while there is little doubt that from the historical standpoint the public trust doctrine is applicable to wildlife, currently few, if any, states actively use the doctrine to protect wildlife or wildlife habitat.¹⁰

Most cases that have addressed the public trust in wildlife have focused on whether a state had the power to enact laws regulating the resource, and what might be the limits of such authority.¹¹ Courts have rarely addressed what obligations might co-exist with such authority.¹²

One cannot overstate the importance of these cases. They provide the essential underpinnings of the doctrine needed by the advocate to move the issue to the next obvious level, that is, to go beyond the states' legitimate *right* to manage wildlife in the public trust, and to impose upon them the corollary *duties*. The standard of care owed by the trustee to the trust beneficiaries is the highest the law.¹³ It is only logical that, inasmuch as the states have so frequently invoked trust concepts to justify their actions, they not be permitted to ignore or dodge their corresponding obligations.

9. See Meyers, *supra* note 3.

10. *Id.* at 728-31.

11. Government initiatives based on the public trust doctrine have been one of the most important areas of development of the doctrine. See Richard J. Lazarus, *Changing Conceptions of the Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986), and cases cited therein. Lazarus notes that in the 1970s and 1980s the government was the party invoking the doctrine in the vast majority of cases. *Id.* at n.82. It may be significant that, as discussed in Part IV, the trend is somewhat different in those states that have elaborated on the doctrine by constitutional or statutory authority. In the United States Supreme Court the debate most often has centered around conflicts between the states' authority to regulate the resource in the public trust, and the Commerce Clause of the U.S. Constitution, or other federal constitutional rights. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (finding state regulation regarding the transport for sale of minnows outside the state to be repugnant to the Commerce Clause); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (portion of Nebraska statute regulating withdrawal of ground water violated the Commerce Clause where it was not shown to further conservation and preservation); *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1977) (upholding a state system for the issuance of hunting licenses for nonresidents, in face of challenges under the Privileges and Immunities Clause and the Equal Protection Clause).

While not always specifically addressing the confines of the public trust doctrine, many cases have upheld state regulatory actions based on notions of state trustee ownership. See, e.g., *Clajon Prod. Co. v. Petera*, 70 F.3d 1566 (10th Cir. 1995); *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir. 1969); *Collopy v. Wildlife Comm'n*, 625 P.2d 994 (Colo. 1981); *O'Brien v. Wyoming*, 711 P.2d 1144 (Wyo. 1986).

12. A few jurisdictions have begun to acknowledge the state's corresponding duties. See, e.g., *In re Stuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) ("Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people."); *Nat'l Audubon Soc'y v. Super. Ct. of Alpine County*, 658 P.2d 709 (1983).

13. See *infra*, Part III.

While the affirmative duty to protect trust resources has not often been the focal point of the case law, it is not a new aspect of the public trust doctrine. The famous and still leading case of *Illinois Central R.R. v. Illinois*,¹⁴ struck a mortal blow to the government's ability to privatize public trust resources.¹⁵

The trust obligations which the *Illinois Central* court wrote about did not simply give the state permission to revoke an earlier privatization of the resource. Of equal importance was the conclusion that the state's trustee relationship to the resource not only allows, but mandates, that the state take action to protect the public trust resources, and it may not abdicate that duty. The Court stated:

The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of peace.¹⁶

Justice Field concluded that "[s]uch abdication is not consistent with the exercise of that trust which *requires* the government of the State to preserve such waters for the use of the public,"¹⁷ and that "[e]very legislature *must*, at the time of its existence, *exercise the power* of the State in the execution of the trust devolved upon it."¹⁸

The states have been quick to assert their "rights" with respect to public trust resources, including wildlife. Unfortunately, their corresponding "duties" have not been as readily accepted.¹⁹

14. 146 U.S. 387 (1892).

15. The State of Illinois filed a suit in equity to allow it to rescind a previous grant of the Lake Michigan waterfront to the Illinois Central Railroad.

16. 146 U.S. at 453.

17. *Id.* (emphasis added). For recent cases regarding the states' inability to privatize resources see *San Carlos Apache Tribe v. Super. Ct.*, 972 P.2d 179 (Ariz. 1999) and *Weder v. San Juan County*, 958 P.2d 273 (Wash. 1998).

18. 146 U.S. at 460 (emphasis added).

19. We may be seeing the results of pressure by extractive industries on the states to write certain aspects of the public trust doctrine out of state law. A striking example comes recently from the state of Idaho. In 1996, Idaho adopted legislation purporting to limit the public trust doctrine to any resource other than the beds of navigable waters. Idaho Code §§ 58-1202, 1203. See generally M. Blumm, H. Dunning and S. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 *ECOLOGY L. Q.* 461 (1997).

Idaho's attempt to abdicate any trust responsibilities beyond those specifically stated could be subject to legal challenge. Following the lead of *Illinois Central*, such a challenge might be made on the basis that Idaho and other states took their statehood on equal footing with the other states of the union, and is no more able to abdicate its public trust responsibilities than it can deny equal protection or due process. *Illinois Central*, 146 U.S. at 434. Under the equal footing doctrine, each state, upon entry into the Union, is deemed to have been given the same rights as the original thirteen states which were governed by the English common law. See, *Northwest Ordinance*, Maxwell's Code, XII ("And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its

The Public Trust Doctrine Need Not Be "Expanded" to Wildlife

In 1989 Professor Meyers advocated extending the public trust doctrine to encompass all wildlife, in an effort to avoid the pitfalls of what has always been a homocentric approach to wildlife preservation and management.²⁰ He argued that of all natural resources, wildlife is perhaps the most similar to water with regard to the difficulty of possession—in the traditional sense, and that there is a sound historical basis for extension of the doctrine.²¹

Meyers is accurate in these observations. However, although this article favors the adoption of specific statutory or constitutional language designed to establish the governing parameters of the public trust doctrine in wildlife, it departs in a subtle but important way from the idea of "extending" the doctrine.

At the turn of the millennium, it can no longer be debated seriously that wildlife is held in trust for the public by the states.²² Accordingly, there is no need to "extend" the doctrine to this "resource." The trust is there to be enforced.²³

To the academician this may sound like semantics, but it is an essential point for the public, the politician, the practitioner, and certainly the judiciary to grasp. Not only is there ample rationale for the application of the

delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever."); see also, ARCHER, *supra* note 7, at 9. *Pollard's Lessee*, 44 U.S. 212 (1845) (nullifying a federal grant of intertidal Alabama land made prior to statehood, finding the federal government to be restricted to the role of caretaker of the future state's interest).

Archer suggests that the states may have the power to limit or expand their trusteeship. See ARCHER, *supra* note 7, at 9. Such a right was recognized recently in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Complete refusal by a state to recognize its trustee duties, however, seemingly would conflict with *Illinois Central*. See also, *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842) (regarding navigable waters and their underlying soils).

20. See Meyers, *supra* note 3, at 727.

21. *Id.* at 729-30.

22. See *infra*, Part II. There is no reason that the federal government, to the extent that it has acted to preempt state management of wildlife, whether on federally owned lands or otherwise, should not be subject to the same fiduciary constraints as the states. The Department of Interior, Bureau of Land Management is to be applauded for explicit (if quiet) adoption of the doctrine:

The Secretary of the Interior reaffirms that fish and wildlife must be maintained for their ecological, cultural, historical, aesthetic, scientific, recreational, economic, and social values to the people of the United States, and that these resources are held in the public trust by the Federal and State governments for the benefit of present and future generations of Americans.

43 C.F.R. § 24.1.

23. The traditional use of the term "resource" in speaking of the objects of nature is curious. It reflects the homocentric view of nature that characterizes mankind's relationship with the world since recorded time. We assume that that which is found in nature is to be used in some fashion by us. Fortunately, this view seems to be on the wane. There is greater movement, both practical and spiritual, toward valuing the resource simply because it is part of God and creation, not because we can make money through it or put it toward our creature comforts.

doctrine to wildlife management, the states have had an unequivocal duty to manage wildlife in trust for all people since at least the Nineteenth Century.²⁴ Accordingly, there is no need to chart new waters in enforcing the states' trustee relationship with respect to wildlife. What is lacking is a clarification of the mechanics of the doctrine in the making of decisions affecting wildlife. Moreover, it must be understood that because wild animals in their natural state are subject to neither private ownership nor actual state ownership, but "belong" to everyone,²⁵ claims of private property "takings" as a result of wildlife regulation in the public trust fall flat.²⁶ Therefore, a statutory or constitutional recognition of the public trust doctrine will not create a new body of substantive law nor constitute an assault on private property rights.

The Public Trust Doctrine is Not Extinct.

The second point at which this article diverges from the comments of some other writers is that it challenges the suggestion that because the roots of the public trust doctrine lie amongst the ruins of the Roman Empire, it is an instrument of a bygone era, hopelessly ineffective for meeting modern-day resource challenges. Certainly our society is not that of Emperor Justinian in the Sixth Century,²⁷ nor his predecessors. Nor are we confronted with the religious and political mayhem of Sixteenth and Seventeenth Century England through which we received many aspects of our law.²⁸ The ancient Greeks, Romans, and pre-colonization Europeans had almost no understanding of, or probably even interest in, the maintaining of healthy biological systems.²⁹

However, the peculiar view that the mere age of the public trust doctrine makes it useless, or perhaps even dangerous,³⁰ is not borne out by a thorough analysis of the trust vehicle. It must not be forgotten that our system of law was built on the common-law traditions that developed over many centuries to meet the demands of an increasingly complex society. The overshadowing of these traditions by complex statutory schemes is a very recent phenomenon.

Viewing the doctrine as no more than a fossilized relic also ignores the beauty and flexibility of the trust relationship in the law. As will be ex-

24. See *infra*, Part II.

25. See, e.g., *Pierson v. Post*, 3 Cai. R. 174 (N.Y. Sup. Ct. 1805), and discussion *infra*, Part II, D.

26. See, e.g., *Clajon Prod. Co. v. Petera*, 70 F.3d 1566, 1566 (10th Cir. 1995); *Collopy v. Wildlife Commission*, 625 P.2d 994, 994 (Colo. 1981). See generally *Casperson*, *supra* note 2, at 357.

27. See *infra*, Part II.

28. See *id.*

29. See *id.*

30. See *Lazarus*, *supra* note 11, at 634; Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991).

plored in detail,³¹ application of traditional trust principles to the public trust doctrine can serve to restore public faith in the integrity of its resource managers, correct shortcomings in administrative procedure, and still allow a flexible approach to changing conditions and increases in scientific knowledge. In short, utilized properly the public trust doctrine can serve as an umbrella of authority and guidance over other resource-specific statutory authority. It is thoroughly possible to mold the public trust doctrine into a workable tool for modern day wildlife management, and there is no need to be apologetic about it.

A review of the historical bases of the doctrine is useful to set the stage for modern tactics.

II. DEVELOPMENT OF THE DOCTRINE

[T]here is indeed a chasm which separates man and animal, and . . . if that chasm is to be bridged, it must be man who does it by means of understanding. But before we can understand, we must know; and to know, we must love. We must love life in all its forms, even in those which we find least attractive.

Jacques Cousteau (1910 - 1997)

Roman Antecedents

It seems to be universally accepted that the public trust doctrine in Anglo-American jurisprudence has its most obvious roots in early Roman civil law. Most notably, perhaps because it was the first freely available text, foundations of the doctrine are usually traced to the Digests of Emperor Justinian in the Sixth Century.³² Some commentators have found these roots to extend further back to the writings of earlier emperors, and even to the ancient Greek doctrine, in particular the natural law philosophies of Greek Stoicism.³³

In the centuries preceding Justinian's rule, private law had been divided into three parts: 1) *jus civile*, or civil law, meaning "[t]hat law which

31. See *infra*, Part III.

32. See generally Meyers, *supra* note 3, at 728; Wilkinson, *Headwaters*, *supra* note 2, at 429; Kent D. Morihara, Comment, *Hawai'i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177 (1997). In 528 A.D., Emperor Justinian ordered a commission to codify Roman common law. From this commission, two handbooks emerged and were published in 533 A.D., the Digest and the Institutes, the latter of which was a handbook dedicated for the use of law students. Within the Institutes, a provision emerged recognizing that the public has community rights to certain natural resources. *Id.* at 181 n.12, citing David C. Slade, PUBLIC TRUST DOCTRINE-101, THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES 55, 58-60 (1991).

33. See Stephen Wise, *The Legal Thinghood of Non-Human Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 489-505 (1996).

a people establishes for itself . . . peculiar to it," 2) *jus gentium*, which was intended as that which all peoples abide by regardless of their "nationality," and 3) *jus naturale*, which applied to both mankind and animals but seemed to be characterized largely by what we might call the instinctive nature of beings to behave in a certain way.³⁴ As to the "natural law" the *Digest* stated that:

Jus naturale is that which nature has taught to all animals, for it is a law not specific to mankind but is common to all animals—land animals, sea animals, and the birds as well . . . So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law.³⁵

From these definitions it would seem that the *jus naturale* had little if anything to do with the presence, or the absence, of rights. It was, however, a recognition of the liberty of the natural world. "In harmony with Stoic natural law ideas incorporated into classical Roman law, both the *Institutes*³⁶ and the *Digest* assumed that wild nonhuman animals lived in a 'natural state of freedom' or 'natural state of liberty.'³⁷

Seeds of the public trust doctrine have been found in other Roman classifications. Professor Sax writes of the classifications of *res nullius* and *res communis*.³⁸ Categories such as these probably were a response to what the Romans conceived to be the physical nature of things that were abundant and not amenable to private possession, and therefore not the subject of purchase, sale, exclusion, or possession.³⁹ The natural law pertaining to commonly held things predated the civil law of man.⁴⁰

The corollary principle was that by the capture of an animal, either alive or dead, one could in fact reduce it to one's possession—"fish and animals which, once caught, undoubtedly became the property of those into whose power they have come."⁴¹

34. See *id.* Justinian's DIGEST, appearing in 533 A.D., incorporated Gaius's bifurcation and Ulpian's trifurcation of Roman law. *Id.*

35. *Id.* at 500 n.181 (citing Dig. 1.1.1.3-4).

36. The INSTITUTES of Emperor Gaius was the most important Roman text of law prior to Justinian's DIGEST. See *Id.* at 493. It was the first to divide the law into the now-familiar categories of persons, things, and actions. *Id.* (citing Dig. 1.5.3 (Gaius, Institutes, book 1)).

37. *Id.* at 504 (citations omitted) ("But those fish which live in a lake or beasts which roam in an enclosed wood are not in our possession, because they are left in their natural state of liberty.")

38. See Joseph Sax, *Liberating the Public Trust Doctrine*, 14 U.C. DAVIS L. REV. 185, 186 (1980) [hereinafter Sax, *Liberating*].

39. See *id.* at n.6; see also *Geer v. Connecticut*, 161 U.S. 519, 522 (1892) (noting that things were classified by the Roman law into public and common. The latter embraced animals *ferae naturae*, which, having no owner, were considered as belonging in common to all the citizens of the State).

40. See Wise, *supra* note 33, at 523 (citing DIGEST, Book 41, Tit. 1).

41. See *id.* at 504 n.216 (citing Dig. 41.1.14 (Neratius, Parchments, book 5)). "Once 'occupied' nonhuman animals remained private property, even if snatched away by other nonhuman animals, so

Accordingly, the Roman law undisputedly contains the foundations for the modern view that wildlife is owned by no one. However, there is little to help us cope with modern day threats of species extinctions, issues of the humane treatment of wildlife, or guidance to the “management” of wildlife. By all accounts these things were foreign to Roman thinking and might themselves be contrary to the natural law. It is certainly difficult to find in these antecedents any glimmer of an actual trust relationship.

Medieval View and the Development of the Common Law

The development of the trust doctrine in England and Europe during the ten centuries between the fall of the Roman Empire and the settlement of the New World⁴¹ is complex and multi-faceted, making it difficult to draw reliable conclusions. Various commentators have found threads of the Roman principles of natural law throughout the legal codes of medieval Europe, and indeed, throughout the world.⁴²

In England, public ownership of natural resources may have taken a slightly different course than on the continent. It has been noted that by the Thirteenth Century portions of Justinian’s writings dealing with the public nature of certain resources had found their way to England, and some elements were embodied within the Magna Carta.⁴³ However, the English

long as they could be retrieved, until and unless they regained their natural liberty by escape.” *Id.* at 504-05 (citations omitted).

42. In the Eleventh Century, French law declared that “the public highways and byways, running water and springs, meadows, pastures, forests, heaths and rocks . . . are not to be held by lords, . . . nor are they to be maintained . . . in any other way than that their people may always be able to use them.” Sax, *Liberating*, *supra* note 38, at 189 (citing M. BLOCH, FRENCH RURAL HISTORY 183 (1966)).

Lazarus notes in particular the Spanish 13th Century Code, *Las Siete Partidas*, and the *Recopilación de Leyes de los Reinos de los Indias*, and that generally the customs of most European nations during the Middle Ages reflect aspects of the doctrine. See Lazarus, *supra* note 11, at 634 (citing B. DOBKINS, THE SPANISH ELEMENT IN TEXAS WATER LAW 74-75 (1959); J. VANCE, THE BACKGROUND OF HISPANIC-AMERICAN LAW—LEGAL SOURCES AND JURIDICAL LITERATURE OF SPAIN 98 (1943)). Lazarus states that “[t]his compilation of preexisting Spanish law was enforceable in all of Spain’s overseas territories now included in the United States (such as parts of Texas, New Mexico, Arizona, California, Nevada, Utah, Oklahoma, Colorado, Kansas and Wyoming.)” *Id.* at 634, n.14. See also Jan S. Stevens, *The Public Trust: A Sovereign’s Ancient Prerogative Becomes the People’s Environmental Right*, 14 U.C. DAVIS L. REV. 195, 197 (1980) (citing LAS SIETE PARTIDAS 3.28.6 [S. Scott trans. & ed. 1932]) (“Every man has a right to use the rivers for commerce and fisheries, to tie up the banks, and to land cargo and fish on them.”).

Wilkinson finds the roots of the public’s rights in water resources to be essentially worldwide. See Wilkinson, *Headwaters*, *supra* note 2, at 428.

43. See Stevens, *supra* note 42, at 197.

The public trust doctrine may have found its way into the English common law heritage through the writings of Bracton in the mid-Thirteenth Century, who wrote that:

By natural law, these are common to all: running water, the air, the sea, and the shores of the sea. No one is forbidden access to the seashore . . . [A]ll rivers and ports are public. Hence the right of fishing in a port or in rivers is common. By the laws of the nations, the use of the banks also is as public as the rivers; therefore all persons are at equal liberty to land their vessels, unload them, and fasten their cable to the trees upon the banks, as to navigate the river itself.

Lazarus, *supra* note 11, at 365 (CITING 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-

common law disliked “ownerless” things. Therefore, the “ownership” of public resources was placed in the king.⁴⁴ It was written that “all things which relate peculiarly to the public good cannot be given over or transferred . . . to another person, or separated from the Crown.”⁴⁵

As to wildlife, the development of the law was connected to the traditions of the commons:

The wild places abundant in early settlements were commonly resorted to by members of nearby communities to cut wood and catch fish, to hunt and graze animals, to obtain peat and rushes from marshes, and brush and broom from the heaths. It was only natural that these places should be commonly available, since their common use was necessary for the maintenance of the feudal economy.⁴⁶

Common rights in water continued to be essential to commerce and navigation, as had been true in the Roman law. However, new questions arose with respect to the need for grazing and hunting. In order to support the feudal economy, the king had to grant to the people a legal right of access to use his land for grazing, hunting, fishing, and foraging. This interest “was designed not to protect natural resources from overuse, but rather to ensure that the king did not hoard all the natural resources.”⁴⁷

Feudal law was customary law, and as Professor Sax writes, it was natural that these uses came to be seen as legally compelled and required by justice.⁴⁸ As the economy and populations grew, resources became scarce, and privatization began to rear its head becoming a perfect symbol for emphasizing class distinctions.⁴⁹ The effect was an enormous destabilization of this aspect of society which was brought about by the sharp disappointment of the public’s expectations as based on customary law.⁵⁰

What seems unlikely is that the English people of medieval times gave much thought to the “ownership” of species other than those needed for food.⁵¹ The trust concept itself was not known in the law until roughly the

40 (S. Thorne trans. 1968)).

44. See Stevens, *supra* note 42, at 197-98.

45. See *id.* at 198. Following the Norman Conquest in 1066, the law of wildlife predominately saw the expansion of the king’s exclusive right to hunt or to convey hunting privileges. MICHAEL J. BEAN AND MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW*, 8-10 (3rd ed. 1997).

46. See Sax, *Liberating*, *supra* note 38, at 189.

47. See Casperson, *supra* note 2, at 364.

48. See Sax *Liberating*, *supra* note 38, at 189.

49. See *id.* at 191 (citing E. THOMPSON, *WHIGS & HUNTERS* 109, 239-40 (1975)) (“[T]he gentry had decided . . . that enclosure was the best resource for class control.”).

50. See *id.* at 191-92.

51. In medieval times European society developed what now appear to us as extremely bizarre rituals of “trials” for animals and pests of all sorts who had harmed human beings. See Wise, *supra* note

16th century.⁵² Accordingly, “neither Roman Law nor the English experience with lands underlying tidal waters is the place to search for the core of the trust idea” and “only the most manipulative of historical readers could extract much binding precedent” from these times.⁵³

Pre-Colonial Foundations

The public trust doctrine could be characterized today as the rebellion against the idea that the sovereign may act as it pleases with respect to the natural world, at the expense of the people. This characterization probably came to fruition during the Tudor and Stuart monarchies in England.

As history moved toward the colonization and ultimate independence of the United States, the issues of sovereign privilege and obligation took on the distinct political flavor of the times. This period saw unprecedented political and religious unrest, which, as we know, was a huge motivating factor in the settlement of the New World by dissident factions.⁵⁴

During the Fifteenth and early Sixteenth Centuries the English monarch gained a much greater concentration of power and wealth than had ever been seen before.⁵⁵ In the Sixteenth Century this feature began to clash with ideologies of the Protestant Reformation. Henry VIII’s (1509 - 1547) systematic efforts to crush the Catholic Church in England stoked the Protestant Reformation going on elsewhere in Europe.⁵⁶ His daughter, Queen Mary (1553 - 1558), in her equally ferocious attempts to restore Catholicism, drove hordes of Protestants out of England to the Continent, many of whom were to return to England during the reign of Elizabeth I (1558 - 1603).⁵⁷ Elizabeth was able to work a compromise with the returning religious factions,⁵⁸ but Britain nonetheless became strongly influenced by the Calvinism of the Continent.⁵⁹

33, at 507. During this fearful time, when disease and pestilence would periodically wipe out whole generations of families and destroy the food supply, the traditional thought was to see many creatures whose principal value was not food, as pests and vermin that had been visited upon them by God as punishment for their sins. *See id.*

52. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 2-7 (2nd ed. Revised; Supp. 1999).

53. Sax, *supra* note 38, at 186.

54. *See generally* CHRISTOPHER HIBBERT, *CAVALIERS & ROUNDHEADS: THE ENGLISH CIVIL WAR* (1993); CLARENCE VER STEEG, *THE FORMATIVE YEARS – 1607-1763* (1964); WALLACE NOTESTEIN, *THE ENGLISH PEOPLE ON THE EVE OF COLONIZATION – 1603-1630* (1954).

55. VER STEEG, *supra* note 54, at 10-11, 15.

56. Henry VIII gave away much of the confiscated church lands to his friends and supporters, curiously not unlike what often happens today in politically motivated resource “management.” Interestingly, he thought he could best accomplish the destruction of monasteries and confiscation of their property by abolishing the “use,” an ancestor to the modern trust, through which many religious orders held their land. The Statute of Uses in 1535 was intended to do away with this practice. BOGERT, *supra* note 54, § 4.

57. NOTESTEIN, *supra* note 54, at 147.

58. *See id.*

59. *Id.*

The Calvinists and other fundamentalist Protestants, including the "Puritans," rejected royal authority over religious doctrine, a rebellion which necessarily spilled over into a broad-based rejection of royal prerogatives and wealth.⁶⁰ At this time the Protestants also were increasing their control over the House of Commons, which was gaining power.⁶¹ Distrust of the monarchy and its devotees, the royalists, by the protestant leaders of parliament, festered.⁶²

These tensions steadily increased after the Stuarts acquired the throne in 1603. Perhaps fearful of the increasingly powerful Commons, both James I (James VI of Scotland, 1603 - 1625) and his son Charles I (1625 - 1649) sought not compromise but an increase of the rights, privilege and influence of the monarchy. An aspect of this power shift was the adoption of a theory of divine right of kings, drawn from Biblical history of the patriarchs, an extraordinarily unpopular doctrine for the times.⁶³

During this time the monarchy perceived itself as in serious need of money. Afraid to call a parliament to raise funds, the monarchy resorted to ancient claims of privilege to natural resources as one method of increasing its cash flow.⁶⁴ The Puritan leaders of the Parliament forcefully objected to the king's prerogatives.⁶⁵

It is against this backdrop that the Puritans and similar religious sects initially began the intensive settlement of North America.⁶⁶ With the exception of Virginia, the first English colonies were products of the divisive forces created by the Reformation within England. As the colonies devel-

60. "The separatists represented a potent political threat, for in defying the centralization of religious authority, they stood, by implication, opposed to the centralization of secular authority." VER STEEG, *supra* note 54, at 18-19.

61. See HIBBERT, *supra* note 54, at 1-36.

62. See VER STEEG, *supra* note 54, HIBBERT, *supra* note 55, at 1-36

63. VER STEEG, *supra* note 54, at 106-07; NOTESTEIN, *supra* note 54, at 176. They also became infamous for their grants of land and peerages to friends and supporters. See *id.* at 174.

64. One such tactic was to revive ancient theories of trespass in the royal forests. See HIBBERT, *supra* note 54, at 14, 24; MAURICE ASHLEY, *THE ENGLISH CIVIL WAR* 18 (1974).

65. All of this, of course, eventually led to civil war, the unprecedented execution of the king (Charles I was beheaded in 1649), and ultimately the development of a constitutional monarchy in England. See generally HIBBERT, *supra* note 54.

Lazarus also discusses the importance of the public unrest relating to exercises of royal privilege under both Elizabeth I and her successors James I and Charles I. He notes the "substantial resistance" from the propertied class to Elizabeth's claim that the Crown was the *prima facie* owner of the shore to the high water mark, which the wealthier classes perceived to be a "blatant confiscation of private property." Lazarus, *supra* note 11, at n.19. Three quarters of a century later when Charles I was executed, Lazarus states that "[a]mong the causes specifically cited to support his beheading was the 'taking away of men's rights under the colour of the King's title to land between the high and low water marks.'" *Id.* at 635, n.19 (citing S. MOORE, *HISTORY OF THE FORESHORE* 310 (3d Ed. 1888)).

66. See VER STEEG, *supra* note 54, at 18.

oped over the next one hundred and fifty years, it cannot be doubted that they left behind any claims of sovereign right and centralized authority.⁶⁷

The American Doctrine

So what did the early colonists bring to America regarding the public ownership of wildlife and other natural resources? In his Commentaries of the Law of England, William Blackstone's analysis of the property interest which a person may have in animals was virtually unchanged from Roman law. He wrote that humans have no absolute interest in wild animals, only a qualified, limited, often transient interest:

A man may, lastly, have a qualified property in animals *ferae naturae*, propter *privilegium*; that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.⁶⁸

Here the focus again was on whether or not one had an enforceable property right in a given animal. This seems to have remained the principal inquiry in early Nineteenth Century America, as seen in *Pierson v. Post*⁶⁹ which solidified the common ownership in wildlife. The thrust of *Pierson* was simply that one did not have a property interest in a fox that was being chased, until one had actually gained possession of it.⁷⁰ *Pierson* represented the belief among Americans at that time that there was an endless frontier, and that the wilderness was not a precious resource to be protected, but rather an enemy to be conquered and tamed.⁷¹

It was not until the late Nineteenth Century, when the full impacts of the Industrial Revolution on our natural resources were beginning to be felt, that the question of property rights in animals began to have a substantially different form in our jurisprudence.

A great deal has been written about the general development of the public trust doctrine as it applied to water resources and the beds and banks

67. See *id.* at 19, 250-78. "The result was a new syntheses that was distinctly American." *Id.* at 277.

68. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Book 2, at 394-95 (Chitty ed. 1888, vol. 1 at 317). It appears that Blackstone referenced game animals simply because it was to such animals that the privileges pertained. Elsewhere Blackstone noted that man can have no absolute property right in any animal *ferae naturae*. *Id.* at 390 (Chitty ed. at 314).

69. 3 Cai. R. 174 (N.Y. Sup. Ct 1805).

70. *Id.* at 174.

71. See Casperson, *supra* note 2, at 365. "There appeared to be a never-ending supply of raw materials and, as Professor Sax comments, to the extent 'land [was] doing something - for example, harboring wild animals . . . getting rid of the natural, or at least domesticating it, was the primary task of the European settlers of North America.'" *Id.*

of navigable waterways, usually beginning with the case of *Martin v. Waddell*.⁷² Without digressing too much into the development of the public trust doctrine in navigable waters and tidelands, for our purposes the critical point is that from the beginning of this line of cases the public nature of wildlife, in particular fish and other water-dwelling creatures, was part and parcel of the public trust doctrine as it began to develop with earnest in this country.

At issue in *Martin* was the right of a riparian landowner to exclude others from taking oysters from the mudflats of the Raritan River in New Jersey.⁷³ The landowner had claimed to own both the riparian and submerged lands under a grant from (Stuart) King Charles II.⁷⁴ Speaking as the Puritan Commons might have done two centuries before, the Court was unequivocal in its rejection of any sovereign "giveaway" of these resources, and began to impose upon the sovereign the explicit trust obligation. It stated that "dominion and property in navigable waters, and in the lands under them [were] held by the King as a public trust" and further, it "must be regarded as settled in England, against the right of the King, since Magna Carta, to make a private grant in such lands and waters."⁷⁵

While technically *Martin v. Waddell* applied only to the original thirteen states, it was later held to apply to all subsequently admitted states under the Equal Footing Doctrine.⁷⁶ *Martin v. Waddell* was followed by a series of cases that steadily established that the wildlife within the water or soil resources held in trust, were also subject to the trust doctrine.

In *Smith v. Maryland*,⁷⁷ the Court found that the state ownership of the soil underneath the waters conferred upon it the authority to regulate the taking of oysters, with no distinction being noted between the tidelands and the fauna within the tidelands. In *McCready v. Virginia*,⁷⁸ the Court upheld a Virginia statute prohibiting citizens of other states from planting oysters in Virginia tidewaters. It expanded the holding of *Martin v. Waddell*, finding the state held in trust not only the tidewaters, but also the fish in them.⁷⁹ Then, in *Manchester v. Massachusetts*,⁸⁰ the Court upheld, again under the trust theory, a Massachusetts statute prohibiting the use of purse seines for the taking of menhaden.

72. 41 U.S. (16 Pet.) 367 (1842). See generally BEAN, *supra* note 45, at 10-15.

73. 41 U.S. at 407.

74. *Id.* (Charles II was the son of the ill-fated Charles I).

75. 41 U.S. at 263.

76. See BEAN, *supra* note 45, at 12 n.16, (citing *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845)).

77. 59 U.S. (18 How.) 71 (1855).

78. 94 U.S. 391 (1876).

79. *Id.* at 395.

80. 139 U.S. 240 (1891).

These cases set the stage for conceivably the most important case in the development of the public trust in wildlife, *Geer v. Connecticut*.⁸¹ In *Geer* the defendant had been charged with the possession of game birds, which had been lawfully killed, for the purpose of transporting the birds beyond state borders, in violation of state law. The question presented was whether the state had the power to criminalize such conduct, or whether the statute violated the Commerce Clause of the U.S. Constitution. The Court stated that “[t]he solution of the question involves a consideration of the nature of the property in game and the authority which the State had a right lawfully to exercise in relation thereto.”⁸²

Thus, the first part of the Court’s analysis was to address the principal question with which the Roman and the English common law had been occupied—what kind of property right (if any) attaches to wild animals in their natural state. In the second part the Court embarked upon a more novel analysis—an overt merging of the ancient ideas regarding the public “property” interests in wildlife with the developing body of public trust law. We also see the Court borrowing freely from the water/shoreland line of cases that had been developing over the prior fifty years for its understanding of the public trust in wildlife.

In its analysis the Court first accepted the Roman, civil, and feudal law concept that wild animals belong to those who take them, but that “[t]he sovereigns had reserved to themselves and to those whom they judge proper to transmit it, the right to hunt all game, and have forbidden hunting to other persons.”⁸³

The Court then delved deeply into the authority of the state to regulate such activity. Drawing on the discussion of sovereign rights in game in Merlin’s *Repertoire de Jurisprudence*, Pothier’s *Traite du Droit de Propriete*, Blackstone’s *Commentaries*, and the Napoleonic Code, it concluded that the government held the inherent attribute to control the taking of animals *ferae naturae*, and that this right had been “vested in the colonial governments . . . and passed to the States with the separation from the mother country.”⁸⁴ Following this, the Court discussed those cases that had recognized valid state regulation in game through the same line of cases generally recognized as establishing the public trust doctrine in shores and tidelands, *Martin, Smith, McCready and Manchester*.⁸⁵

Through these references the Supreme Court emphasized the state police power and the states’ ability to regulate the taking of game, but the

81. 161 U.S. 519 (1896).

82. *Geer*, 161 U.S. at 522.

83. *Id.* at 524 (citations omitted).

84. *Id.* at 528.

85. *Id.*

court did not stop there. It went on to make a sweeping assessment of the transformation of the principle into modern American law, marking a monumental divergence from traditional discussions of royal prerogative. It stated:

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from the common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of all people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public.⁸⁶

Herein lies the heart and soul of the modern day public trust in wildlife. Although without a doubt this trust relationship has its seeds in the ancient and feudal laws, it is distinctly American in its focus. It embodies the checks and balances of the American system of government and reflects the attitudes of the early settlers who fled England in a time when the English Parliament was painfully, yet effectively, putting the brakes on royal prerogative and divine right.

The doctrine also places meaningful restraint on the ability of the government to privatize this resource. For the first time not only is there a recognition of a right in the government to control the taking of game and to prevent the privatization thereof, we see the unequivocal imposition of the fiduciary duties of the state as trustee, as necessitated by the foundations of our free society.

In the century that has passed since *Geer*, the courts have not backed off from the recognition of this trust relationship. In *Hughes v. Oklahoma*⁸⁷ the Court overruled *Geer* to the extent *Geer* held that state "ownership" in wildlife allowed it the right to interfere with interstate commerce. However, in so doing, *Hughes* did not disturb the public trust in wildlife.⁸⁸

Therefore, we have within the common law ample authority that the states, and the federal government where applicable, hold wildlife in trust for the benefit of all persons. Yet because the public trust doctrine is pri-

86. *Id.* at 529 (emphasis added).

87. See *supra* note 11, 441 U.S. 322 (1979).

88. While it is possible to infer from *Geer* a holding that the state holds such actual title, the court's emphasis on the trust relationship makes it clear that the beneficial ownership of wildlife lies in the people.

The thrust of *Hughes* was simply that the State may not exercise its "ownership" of wildlife in a manner that conflicts with the Commerce Clause in the United States Constitution. "Nothing in [Hughes] indicated any retreat from the States' public trust duty discussed in *Geer*." *Owsicheck v. State of Alaska Guide Licensing and Control Board*, 763 P.2d 488, 495 (Alaska 1988).

marily derived from common law precedent, rarely have the states been held to any ascertainable standards for fulfilling their trust duties.⁸⁹ Likewise, the public is left without any guidance as to when its beneficial rights in the trust “property” have been violated. Therefore, the time has come for the public trust in wildlife be brought into full light, in the state constitutions, statutes, or both.

III. A MODEL FOR LEGISLATIVE OR CONSTITUTIONAL ENACTMENT

Though men now possess the power to dominate and exploit every corner of the natural world, nothing in that fact implies that they have the right or the need to do so.

Edward Abbey (1927 - 1989) A Voice Crying in the Wilderness (Vox Clamatis in Deserto)

As Professor Sax pointed out, “[t]he ‘public trust’ concept has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.”⁹⁰

One must agree with Sax that the democratic processes have had a tendency toward failure with respect to the management of natural resources. But all cannot be solved by reliance on the judiciary.⁹¹ Indeed, it would seem that it is precisely because the public trust doctrine arises from the common law that resource managers have insufficient statutory guidance or authority for making decisions that meet trust standards.⁹² It also is not enough to rely on the host of resource-specific statutes that fill the United States Code and many state codes.⁹³ Although these are remarkable achievements in many respects, they also do not give the government the global guidance it needs with regard to its trust responsibilities.

How can this dilemma be resolved? There may be more than one answer. The most obvious seems to lie in a statutory or constitutional refashioning of our system of wildlife management, and resource decision-making in general, so that when agency officials take action they are more apt to consider and fulfill their public trust obligations. By taking the common law roots of the public ownership in wildlife and superimposing upon them

89. As will be discussed *infra*, Part IV, a number of states have already attempted to codify the public trust doctrine, with varying degrees of success.

90. Sax, *supra* note 1, at 521.

91. Sax’s central theme was a call upon the judiciary to rectify the shortcomings of the democratic processes with respect to the shaping and enforcement of trust principles. *See id.* at 474.

92. In *R.D. Merrill Co. v. Pollution Control Board*, 969 P.2d 458, 467 (Wash. 1999) the court observed that “the public trust doctrine does not serve as an independent source of authority for the Department to use in its decision making apart from the provisions in the water codes.”

93. *See supra* note 5.

the specific requirements of the law of trust relationships, a workable model for the explicit adoption of the public trust principles with respect to the management of wildlife resources may be revealed.

The remainder of this article will be dedicated to ascertaining what features such a model might have in order for the trust doctrine to become a reality.

Statutory or Constitutional Authority

The public trust doctrine has been criticized as being an ineffective and therefore unworthy tool for protection of resources. One criticism among many is that the governmental agencies, in whose hands the trust responsibilities are placed, lack adequate information and are inherently unable to make better decisions than would individuals acting in their own interests.⁹⁴

This “throw the baby out with the bath water” attitude is unfair to both the doctrine and the officials in question. The unfortunate fact is that most agency employees, or their governing boards or commissions, have never even heard of the public trust doctrine, much less understand it as any part of their mandate. To criticize these workers for their failure properly to administer the trust thus is akin to chastising Nineteenth Century physicians for not using antibiotics to treat disease. Administrative officials cannot be expected to utilize and apply responsibly a legal principle that they do not know exists, and which appears nowhere in their agency mandate.

Whatever limitations the public trust doctrine might have today are neither necessary nor predetermined. The trust is an enormously flexible vehicle. It can be tailored to respond to virtually any given set of circumstances, yet always remains subject to prevailing themes of conduct that are at the heart of the trust relationship. The ineffectiveness of the public trust doctrine today is not inherent in the doctrine itself, but arises from the lack of awareness by both the public and the state or federal authorities who, theoretically, are charged with the trust responsibilities. Accordingly, it would seem self-evident that the first step to making the implementation of trust principles a reality in the every day management of wildlife is the adoption of a recognizable statutory or constitutional directive.⁹⁵

94. See, e.g., Delgado, *supra* note 30, at 1212-14.

Steven Jawetz also has criticized the public trust doctrine because it has no substantive content, and becomes “a mask for the unauthorized substitution of judicial for administrative discretion.” Steven M. Jawetz, *The Public Trust Totem in Public Land Law: Ineffective – And Undesirable – Judicial Intervention*, 10 *ECOLOGY L. Q.* 455 (1982). This article would disagree. As shown *infra*, the public has the ability to give the doctrine, and the relevant administrative agencies, the required substance and direction. It is not necessary to kill off the public trust doctrine simply because administrative officials do not currently understand it.

95. A handful of states have affirmatively adopted the trust doctrine either in their state constitutions,

What, then, might be the features of such a mandate? How do we demonstrate to our public officials the very special obligations they have to this enormously important, publicly held resource? How do we enforce those obligations? How do we correct the gross inadequacies of our traditional decision-making processes?

We do so first by recognizing the trust for what it is. This means embracing the full panorama of trust attributes and requirements, already well established in the law. It is proposed that a workable model for effectuating the public trust in wildlife must, at a minimum, include the fundamental elements of any trust relationship, as currently recognized in Anglo-American law. For wildlife and other resource managers, these translate into the following:

- 1) The designation of identifiable trustees;
- 2) The de-politicization of the process and assured independence of trustee action;
- 3) High-visibility decision-making;
- 4) A clearly articulated right by the beneficiaries of the trust to challenge those actions that fail to meet trust standards;
- 5) An elevation of the standard of care by which the trustees' actions are judged;
- 6) Ascertainable and, where possible, objective standards for decision-making; and
- 7) New ways of thinking about the funding of wildlife management agencies.

Designation of Identifiable Trustees

The obvious starting point, familiar to readers experienced in the law of trusts, is the identification of one or more identifiable trustees who are aware of their trustee obligations. Public officials cannot be expected to fulfill their trust responsibilities without having a sound understanding and acceptance of their obligations. Therefore, all employees in the wildlife management agencies must be educated about their trust responsibilities. However, just as there is always a final voice in the decision-making under other kinds of commonly used trusts of a financial nature, so too must there be one or more individuals who are ultimately responsible for fulfillment of the fiduciary obligations inherent in the trust model. In fact, it is recommended that, to avoid confusion about the mantle placed upon these individuals, they be called "trustees."⁹⁶

or by statute. *See infra*, Part IV.

96. At least one state has already adopted this usage. Florida's state constitution and statutes places control over its "sovereignty" lands jointly in the hands of its Trustees of the Internal Improvement Fund and its Division of State Lands, under the Department of Natural Resources. The Board of Trustees is

What sorts of persons should sit as trustees for the public interest in wildlife, and how should they be chosen? These are enormously important questions. Again, one can draw upon the features of traditional trusts. They must be high caliber individuals of impeccable integrity, well schooled in weight of their obligations, and free of conflicts of interest and competing concerns that could cloud their judgment as trustees.

Although it is reasonable that the trustee have some background in wildlife biology or related fields, it is suggested that extensive experience with any particular resource or interest group should not be the benchmark.⁹⁷ Indeed, unless all such interests can be effectively balanced, it might be well to avoid such relationships.⁹⁸ The most important qualifications are integrity, a broad exposure to competing concerns, and a full understanding of the public trust doctrine and the fiduciary duties imposed by that trust.⁹⁹

De-politicization of the process.

1. A radical paradigm shift

The next means of effectuating the public trust in wildlife should be shouted from the rooftops. We must do whatever we can to *de-politicize the process*. This, perhaps above all else, should be the guiding theory behind the adoption of any model legislation or constitutional amendment.

Politics are anathema to any trustee relationship. The trustee's fundamental obligation is to preserve the trust assets for the long-term well being of the trust beneficiaries.¹⁰⁰ The trustee therefore must remain pure of heart and without susceptibility to conflicting concerns that could cloud his or her judgment in reaching these long-term goals. A leading commentator puts it the following way:

made up of persons holding other state offices. See *infra*, Part IV.E.

97. One commentator has suggested the following:

Decisionmaking authority must be vested in an entity with a frame of reference broader, both spatially and temporally, than may be common among private actors. Ecosystems require a decisionmaker who can reduce the risks inherent in uncertainty by attempting to keep the impacts below some designated level of disturbance. Because these optimal thresholds are unknown, a manager must make informed guesses about where they may lie. The characteristics of the ideal manager would include systematic knowledge, long-term and repeated involvement in a single ecosystem, and flexibility. Because environmental changes caused by human activity provide both information on the costs of the activity and future predictive ability, it would be helpful to confine decisionmaking to a single entity.

Alison Reiser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 421 (1991).

98. Such ties often lead to a close relationship between the regulated and those doing the regulating, which is a serious impediment to the fulfillment of trust principles. See *infra*, Part III, C.

99. See *infra*, Part III, C and D.

100. See *Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559 (1985).

[O]ne of the most fundamental duties of a trustee and all other fiduciaries is to be loyal to the beneficiaries, to perform every act of trust administration with the sole objective of bringing advantages to the beneficiaries, to refrain from placing himself in any position where his personal interest does or may conflict with the interest of the beneficiaries, and to exclude completely from consideration the welfare and financial gain of third persons.¹⁰¹

Accordingly, the trustee must be not only selfless, he must studiously avoid favoritism or the dividing of loyalties among beneficiaries, and any personal conflict of interest.¹⁰² This does not mean that the beneficiaries are necessarily masters to the trustee. On the contrary, the frequent purpose of the trust is to save the beneficiary from himself, and to protect him and act in his behalf when he is helpless or misdirected. This is why we establish trusts for minor children who are too young to know what is good for them, and for ourselves in the event of old age or infirmity. We *trust* our trustees to act *in our best interests at all times* when we are unable to do so.

Should the public demand anything less than this from government officials responsible for the public trust in wildlife? The answer is, of course not. Unfortunately we have become so used to the politicization of virtually every aspect of governmental machinery that we can see no other way. There *are* other ways, but they may require radical paradigm shifts in the public consciousness. Certainly the trustees should be chosen on a wholly non-partisan basis. If they are to be appointed, another possibility is to subject them to periodic votes on retention (as is the practice in some states with respect to the appointment and retention of judges).¹⁰³

Is such a radical shift really called for? In a recent report, the Wildlife Management Institute discovered that over the past decade the directors of wildlife management agencies have become increasingly subject to removal for political reasons.¹⁰⁴ Moreover, since 1985 the number of states where the

101. GEORGE GLOASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 484, at 343 (2nd ed. 1987).

102. Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary the rule against dividing his loyalties must be enforced with 'uncompromising rigidity.' *Concrete Pipe and Products of California, Inc. v. Constr. Laborers, Pension Trust for Southern California*, 508 U.S. 602, 616 (1992) (citing *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-32 (1981)).

103. In many ways the trustee's role was conceptually similar to that of the judiciary, which at all times must remain free of undue influence as it goes about the business of protecting the broader public interest.

104. See WILDLIFE MANAGEMENT INSTITUTE, ORGANIZATION, AUTHORITY AND PROGRAMS OF STATE FISH AND WILDLIFE AGENCIES 4 (1997).

In 1997 the Arizona Wildlife Federation reported that:

[m]any states have virtually abandoned their trustee responsibilities through a series of politically generated organizational changes. These have resulted in the state wildlife agencies becoming tools of the political agenda of the moment rather than

director's term of office is based on merit has declined from over half the states (twenty-six) to only fifteen.¹⁰⁵ This is a disturbing trend that must be reversed. In fact, those persons given the responsibility of management of the public trust, like judges, should be subject for removal when they *do* act with purely political motivations.

2. Insuring the Independence of Trustees

It follows that the trustee role should not be filled by persons who cannot possibly be expected to act with the requisite degree of independence. But unfortunately our current models of resource decision-making virtually guarantee a lack of independence by the "trustees."

Except with respect to federal lands, and those resources subject to specific federal statutes, most decisions that directly affect wildlife are made at the state level. Officially, most states delegate responsibility for decision-making on wildlife issues to an independent fish, wildlife or parks agency, or some arm of a larger department of natural resources.¹⁰⁶

The decisions of all resource agencies impact wildlife populations and habitat. These include those responsible for approval of various types of resource development (such as oil and gas and other minerals), as well as agriculture. Many states also have broadly-based environmental protection departments, often patterned on the federal Environmental Protection Agency, the decisions of which may directly or indirectly affect wildlife.¹⁰⁷

It is not uncommon, indeed it is standard practice, for the governing board or commissions of the resource agency to be made up of individuals deemed to have a particular "expertise" on the issue. For example, the members of oil and gas oversight boards typically have substantial connection with the oil and gas industry. Similarly, it is routine for "insiders" in

being responsible for the trust's health.

Speaking directly of problems in California the commentator continued:

The progressive politicization of the California agency led to its abdication of its trustee role. . . . Major resource decisions are now made, without public input, in the inner sanctum of the Governor's office . . . The neglect of its trustee responsibility has caused public distrust and disrespect of the California Fish and Game Department.

Jack C. Fraser, ARIZONA WILDLIFE NEWS, Spring, 1997, at 5.

105. *See id.* at 4.

106. *See generally* WILDLIFE MANAGEMENT INSTITUTE, *supra* note 104. The commission or board members are approved by the governor in forty-eight states. In thirty-four of those states the appointments must be approved by the state legislature. *See id.* at 3. In twenty states the fish and wildlife department is an independent agency, directly responsible to the governor. In another twenty the agency is structurally part of a second tier of a larger natural resources administrative agency. The remaining states have either an independent fish, wildlife and parks agency, or the fish and wildlife division is a third tier of a larger natural resources agency. *See id.* at iv.

107. *See id.*, Tables 1a.

state agricultural agencies to be culled from the agricultural community, and to maintain close affiliations with that community.

While these kinds of appointments raise no eyebrows, they have an enormous impact on the ability of agency officials to act impartially to protect the resource. In some instances the conflict can be quite blatant. For example, in Colorado, the Commissioner of Agriculture has seized from the Division of Wildlife decision-making authority over "management" of predatory animals.¹⁰⁸ Accordingly, the department is mandated to favor "control" (i.e., destruction) of wildlife for the benefit of the one part of the community, without heed to other trust beneficiaries, and without any focus on the health of animal populations or broad eco-system management.

A similar situation has developed with respect to the Yellowstone bison, which have been slaughtered as they unwittingly leave the park boundaries. This government action is presumptively done in the name of protecting cattle from brucellosis.¹⁰⁹ Absent from such decision-making is any glimmer of the enforcement of the public trust.

These examples are by no means in the extreme. It is the accepted system of resource "management" for persons who have no direct accountability to the people and are themselves often representative of powerful private interests to be decision-makers with respect to the public's wildlife. This practice has caused decades of inappropriate, politically driven, and in many cases exceedingly poor, resource management.

The hallmark of the trustee is independence. If the public allows the continuance of a system in which decisions affecting public trust resources are made by persons who cannot be expected to act without partisanship and favoritism, then perhaps it deserves what it gets.

Let us put an end to this confusion of roles to which we routinely subject our wildlife (and other resource) administrators. Let us move toward the specific designation of trustees for the public trust in wildlife, and remove the conflicts that prevent our wildlife managers from acting with the care and loyalty required by their trust obligation.¹¹⁰

108. COLO. REV. STAT. §§ 35-40, 100.2 through 115 (1999). Section 101 provides that "[i]t is the duty of the Commissioner [of Agriculture] to control depreeding animals within the state of Colorado to reduce economic losses to agricultural products or resources." *Id.*

109. See *Draft Environmental Impact Statement for the Interagency Bison Management Plan for the State of Montana and Yellowstone National Park*, June 1, 1998. Most experts agree that there is no legitimate health threat to cattle from these roaming bison. See NATIONAL RESEARCH COUNCIL, BRUCELLOSIS IN THE GREATER YELLOWSTONE AREA (1998).

110. See *Concrete Pipe and Products of California, Inc. v. Constr. Laborers, Pension Trust for Southern California*, 508 U.S. 602, 602 (1992); *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991) (stating that fiduciaries owe their beneficiaries a duty of both care and loyalty).

Equal or Limited Access to Trustees

A corollary feature of the usual system of wildlife decision-making is the absence of free access to the resource managers and agency employees by the general public, coupled with an exceptional degree of access by those persons whom the agency must regulate.

Sax noted the shortcomings of this aspect of the administrative processes thirty years ago. In citing the excessive influence that special interests have on the administrative decision-making processes, he states:

[P]ublic officials are frequently subjected to intensive representation on behalf of interests seeking official concessions to support proposed enterprises. The concessions desired by those interests are often of limited visibility to the general public so that the public sentiment is not aroused; but the importance of the grants to those who seek them may lead to extraordinarily vigorous and persistent efforts. It is in these situations that public trust lands are likely to be put in jeopardy and that legislative watchfulness is likely to be at their lowest levels.¹¹¹

One who is acting as a true trustee must not be subjected to improper influences that he or she is powerless to repel. This is the nuts and bolts of the law of trusts: "If permitted to represent antagonistic interests the trustee is placed under temptation and is apt to yield to the natural prompting to give himself the benefit of all doubts, or to make decisions which favor a third person who is competing with the beneficiary."¹¹² Quite simply, it is not humanly possible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction.¹¹³

The actual trustees therefore must be insulated from the undue influence of the private interests who may benefit from the trustees' decision-making. We should not expect those charged with trust responsibilities to be able to act independently when more often than not the vast majority of their daily contact is with the persons and industries they regulate.¹¹⁴

111. Sax, *supra* note 1, at 495.

112. Bogert, *supra* note 101 § 543, at 227.

113. *See id.*

114. Again the judiciary, and its prohibition on *ex parte* contacts, provides an analogue. Just as a court and the litigants appearing before it are prohibited from private communications with the decision-maker, so too must there be a limitation on the extent to which those who have a personal interest in the outcome of a decision by the trustee may approach the trustee privately with regard to the matter. Parties may contact the clerk *ex parte*, but they may not contact the judge. Accordingly, while it may not be inappropriate for private interests to have routine communications with lower level agency employees, they should not attempt to privately influence the trustee.

Further, traditional wildlife management agencies are experiencing radical shifts in their constituencies and the philosophies which historically have guided their decision-making. In short, many persons other than hunters have a keen interest in the actions of these agencies and support the conservation of many species other than game.¹¹⁵

These trends forecast a steady move away from "traditional" wildlife management, where the focus has tended to be on the management of revenue producing game species, and predator control for the benefit of private landowners. The concepts which will increasingly dominate resource management, and rightly so, include ecosystem management, landscape ecology, non-game wildlife, biological diversity, and new technology.¹¹⁶ Accordingly, the management agencies must continue to move away from their traditional spheres of influence and to be more responsive to the public as a whole.¹¹⁷

High Visibility Decision-Making.

The actions of a trustee cannot be monitored unless they are brought into broad daylight. For this reason, the law of trusts has always required the trustee to maintain clear and accurate records of its activities.¹¹⁸ In addition, the trustee is required to make available to the beneficiary accurate and complete information regarding the trust property, and must permit inspection of all documents relating to the trust.¹¹⁹ Likewise, the beneficiaries of the public trust in wildlife must have adequate access to the trustee's records and proceedings, and must be given advance notice of those proceedings, at a time when their participation will be meaningful.

This is a huge stumbling block in the arena of traditional administrative law, both at the federal and state level. A full analysis of the issue is far beyond the scope of this article. However, the very essence of administrative law, and in fact the principle justification for allowing administrative agencies to have such considerable "legislative" power,¹²⁰ is the requirement

115. These include a decline in the number of traditional hunting and fishing constituents, with a concomitant increase in the influence of diverse, largely non-consumptive groups (such as camping, wildlife viewing, and photography). They also have fewer employees with "traditional" wildlife backgrounds (i.e. hunting), and an increase in public expectation and demand for fish and wildlife habitat conservation. See WILDLIFE MANAGEMENT INSTITUTE, *supra* note 104, at 1.

116. See *id.* at 2. Unfortunately, the agencies also have experienced an absence of significant new funding for conservation programs, increased legal responsibility and vulnerability under both state and federal law, staff reductions, and budget cuts, due in part to increased anti-government sentiment. *Id.* at 1.

117. The Wildlife Management Institute found that the last decade has seen increased levels of research on non-game species, which may be "indicative of the changing agency priorities and demonstrates agency responsiveness to changing constituencies." *Id.* at 6.

118. See RESTATEMENT (SECOND) OF TRUSTS § 172 (1959).

119. See *id.* § 173.

120. The influence of decision-making by unelected public administrators on our daily lives is staggering. In 1992 there were almost eighteen million people working in government agencies, out of a

of notice to affected individuals and opportunity for those individuals to be heard.¹²¹

Unfortunately, our administrative agencies have been allowed to utilize many practices that barely meet minimal notice requirements. Too often the notice that is given is of a constructive nature only, and is not reasonably calculated, nor is it truly intended, to allow meaningful participation by persons who will be affected by the decision-making. In some cases there may be a conscious effort, either on the part of the proponent of the action or by the agency, and sometimes both, to exclude the public.¹²² Indeed, at the federal level, the APA itself allows the agency to decide whether it must comply with the notice requirements.¹²³

The agencies' failure to give full disclosure has been an ongoing problem under the National Environmental Policy Act (NEPA).¹²⁴ Although NEPA governs federal actions affecting the environment, many state actions involve some participation or approval by a federal agency, particularly in the west where a number of states have millions of acres of federal public

total work force of 118 million. See KENNETH WARREN, *ADMINISTRATIVE LAW AND THE POLITICAL SYSTEM* 26 (3rd ed. 1996). Certainly not all of these workers possess policy-making powers. But these numbers underscore the important role of administrative agencies, leading some to believe they pose a serious threat to traditional democratic processes in this country. See *id.* Speaking at least to the federal bureaucracy, Warren laments that "[i]t may be that bureaucratic power has become so strong that it is now beyond the realistic control of all existing external systematic checks." *Id.* at 196. He also estimates that roughly 90% of the laws which govern our lives are made at the administrative level. See *id.* at 295.

121. The federal Administrative Procedures Act, 5 U.S.C. §§ 500-576 (1994) is the benchmark for agency conduct in fulfilling its delegated duties. Although the APA itself applies only to federal agencies, every state has enacted a similar administrative procedures act to guide state agency action.

Section 553 of the federal APA, regarding formal rulemaking, requires that any proposed rules be announced to the public through publication in the Federal Register. Under most circumstances, the agency then is directed to "give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 5539 (1994). The agency is then to "consider the relevant matter presented" and must "give an interested person the right to petition for the issuance, amendment or repeal of a rule." 5 U.S.C. § 5539(e) (1994).

122. See Sax, *supra* note 1, at n.76. The private memos from the Department of the Interior regarding oil leakages off the Santa Barbara coast in the late 1960s, referenced by Sax, would be amusing if the sentiment expressed were not so serious, and pervasive. The memos indicated that a decision had been made "not to stir the natives up any more than possible [sic]" and that pressures were being applied by the oil companies whose equipment "costing millions of dollars" was being held "in anticipation" of the lease sales. See *id.*

Sax notes a variety of other ways in which agencies minimize public participation in their deliberations. For example, the duty to hold a public hearing may technically be satisfied by holding a hearing which is "announced" to the public by posting a notice on an obscure bulletin board in a post office." *Id.* at 497 (citing *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179, 183 (6th Cir. 1967)).

123. The notice provision of the APA "is so plagued with exceptions and loopholes that it turns out to be a cynic's paradise." WARREN, *supra* note 120, at 262. Section 553(b)(3)(A), provides that the notice and comment requirements do not apply to "interpretive rules, general statements of policy, or rules of agency, organization, procedure, or practice." Through the use of this feature, administrators can effectively do away with the notice requirement for any decision-making, simply by designating their actions as mere "interpretive rules," "statements of policy" or the like. See *id.*

124. See 42 U.S.C. § 4321-4370(b) (1999).

lands within their borders. Also, the federal government is a partner with the states in certain comprehensive programs pertaining to wildlife. The most notorious of the programs is the United States Department of Agriculture's, "Animal Damage Control" program that sanctions destruction of wildlife for the benefit of agricultural interests.¹²⁵ There is no doubt that the NEPA environmental analysis requirements apply to federal/state programs such as this.¹²⁶

While NEPA and its implementing regulations¹²⁷ provide a fairly comprehensive system for public participation and comment, its methods for disseminating information to the public, to allow for meaningful participation at appropriate stages, is often seriously flawed.

Under the CEQ regulations, the responsible federal agency essentially uses its discretion in deciding whether a proposed action is of a sufficient magnitude so as to require the preparation of an environmental impact statement ("EIS").¹²⁸ Theoretically the decision is not made until an Environmental Assessment ("EA") is prepared to determine whether a full EIS is warranted.¹²⁹ In many cases, however, overworked, under-funded agency personnel, often under pressure from the proponent of the project, frequently will reach a conclusion that the proposal will cause minimal environmental impacts in advance of ever preparing the EA. The EA is then prepared in such a manner as to justify the previously-made decision of no significant impact ("FONSI").¹³⁰

Notice to the public regarding all stages of the process is at the heart of NEPA.¹³¹ But this requirement can be made illusory by the agency. If the agency decides of its own accord that the matter is not one of "national con-

125. Perhaps due to problems in public relations, Animal Damage Control has now adopted the peculiar euphemism, "Wildlife Services." The irony of this public relations strategy has not gone unnoticed. See *Comments, Great Plains Restoration Council, Rocky Mountain Animal Defense, Sinapu, Southern Plains Land Trust, and Wildlife Damage Review, to "Pre-Decision Environmental Assessment for Predator Damage Management in Eastern Colorado,"* April 26, 1999.

126. See *id.* These wildlife advocacy groups would find it equally obvious that this agency fails to act with regard to the public trust in wildlife. They write, "[t]he EA [for the predator control program] should disclose ADC's purpose: to promote and subsidize the livestock industry and to perpetuate itself. ADC activities are profoundly harmful to species--particularly species that are sensitive, threatened or endangered--and ecosystems. Rather than contemplating biodiversity and other important values, the EA admits it fails to consider biodiversity or conservation values. The EA fails to show how killing so many predators, particularly coyotes, benefits society." *Id.* at 3.

127. See 40 C.F.R. §§ 1500.1 - 1508.28 (1999).

128. See *id.* §§ 1501.4(b), 1508.9(1) (1999).

129. See *id.* § 1501.4 (1999).

130. In many instances, the EA is prepared by the proponent of the agency action--usually a private interest. This is allowed under the CEQ regulations, as long as the agency "make[s] its own evaluation of the environmental issues and take[s] responsibility for the scope and content of the environmental assessment." 40 C.F.R. § 1506.5(b) (1999). But it is hardly surprising that such documents have a tendency to minimize the project's impact on the environment, and limit its discussion of possible alternatives.

131. See 40 C.F.R. §§ 1506.6, 1501.4(b), 1501.7(a)(1) (1999).

cern” it may squeak by with extraordinarily limited notice to the public.¹³² The notice can but need not be published anywhere. It may be simply posted near the site where the action is to be located.¹³³ One can imagine the effectiveness of such a notice regarding, for example, the approval of a drilling permit in the high desert. Even the most diligent and financially secure public interest watch groups do not have the resources to give these “minor” decisions the attention they deserve. As a result, many perceived smaller decisions, which may, in fact, have a significant cumulative impact on the environment,¹³⁴ go unnoticed until it is too late to reverse the decision.

Another oddity of current NEPA practice is for the proponent of the action to contract and pay for preparation of the EIS. Not surprisingly such statements minimize environmental impacts and the range of available alternatives. It seems unlikely the drafters of NEPA ever intended the agencies to allow this practice routinely, and the CEQ regulations plainly disallow it.¹³⁵ Thus far the courts, although disapproving, do not appear inclined to make the agencies stop this practice.¹³⁶

Some industries have also learned to manipulate NEPA's public participation requirements, in order to minimize participation by the public.¹³⁷

132. See *id.* § 1506.6(b) (1999).

133. See *id.* § 1506.6(b)(3)(ix) (1999).

134. The agency is required to consider the cumulative impacts of a series of actions. See 40 C.F.R. § 1508.25 (1999). As one commentator has noted:

[a] key characteristic of natural systems is their vulnerability to cumulative effects. The magnitude of these impacts can vary depending upon the extent to which effects are dispersed or concentrated by either biological or physical processes, including animal migrations or feeding concentrations and wind or water currents. When new impacts occur before a system has recovered from a previous injury, or when impacts occur in adjacent areas, the combined effects can be worse than the results of the individual events.

Reiser, *supra* note 97, at 420-21.

135. See 40 C.F.R. § 1506.5 (1999) which requires the EIS to be prepared directly by the agency or by a contractor selected by the lead agency.

136. For example, in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991), the court found that the agency plainly had violated CEQ regulations by allowing the applicant to select the consultant for the EIS. However, notwithstanding this fundamental defect in the procedure, it not only did not strike down the EIS, it allowed the agency to give substantial weight to the preferences of the applicant. See *id.* “Although the majority [in *Citizens Against Burlington*] scolds the FAA, it does not recognize, as does the dissent, that objectivity under NEPA is not a trivial requirement.” Clay Hartmann, Comment, *NEPA: Business as Usual: The Weaknesses of the National Environmental Policy Act*, 59 J. AIR L. & COM. 709, 741 (1994).

137. An example of this can be seen with respect to the development of oil and gas leases on federal lands in the west. For several decades public interest groups who favoring the imposition of restrictions on leasing in sensitive areas, and strict requirements as to when, where and how a well may be drilled so as to minimally impact wildlife, have battled the land management agencies for better NEPA compliance. But the industry and agencies have argued for an application of NEPA that results in any challenge to agency action falling at the wrong point in the decision-making process. The argument has gone like this—if challenge is made to the leasing of the public lands for oil and gas exploration and development, it is said that the granting of a lease by itself causes no impact on the environment at all, and therefore is not subject to NEPA scrutiny. If, however, the challenge is made to an application to

In other instances, the agencies and the proponent of the action have broken the proposal into small pieces, thereby avoiding the appearance of a major federal action.¹³⁸

The end result is that all too often, even under a regulatory scheme so progressive and so procedurally intensive as that of NEPA, which in some ways was among the first public trust statutes,¹³⁹ we have been unable to insure the integrity of environmental decision-making.¹⁴⁰

In developing a model for management of the public trust in wildlife, how can these pitfalls be avoided? First, the agencies must not be given the task of deciding the adequacy of the notice and hearing requirements. Because of the agencies' inherent conflicts, which includes their close, daily

drill a particular well, protestors are answered that because the lease rights have already been granted, they are powerless to deny the permit and may only place limited restrictions on the actual, inevitable, drilling.

This was the essential posturing of a trilogy of cases in the 1980s: *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); *Park County Resource Council v. United States Dept. of Agric.*, 817 F.2d 609 (10th Cir. 1987); and *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988). It now appears to be more or less settled that, because of the property rights conveyed under an oil and gas lease, the issuance of such a lease does constitute an irretrievable commitment of resources, requiring assessment under NEPA. See *Peterson*, 717 F.2d at 1414-15. Only those leases which contain valid "No Surface Occupancy" stipulations (thereby precluding any disturbance without further agency authorization) can be issued without full NEPA compliance. See *Connor*, 848 F.2d at 1448. However, because the industry often has no definable plans for development at the leasing stage, NEPA review and approval becomes perfunctory.

138. Here also the oil and gas industry has made an appearance. Beginning in the late 1980s both the Bureau of Land Management, under the Department of Interior, and the Forest Service, under the Department of Agriculture, allowed thousands of natural gas wells to be drilled in southwestern Wyoming without the benefit of a programmatic EIS, even though it was well known that industry intended to seek full development of the area. In the instances where field-wide Environmental Impact Statements were prepared for larger proposals, they failed to recognize the cumulative impacts of all the neighboring fields. Such impacts included among other things, fragmentation of habitat and obstruction of migration routes on a massive scale, not to mention fouled air and polluted pit water, which was claiming the lives of migratory birds. See, e.g., *Appeal of National Wildlife Federation, Wyoming Outdoor Council and Wyoming Wildlife Federation (Stagecoach Draw)*, 150 IBLA 385 (October 8, 1999). Although the Office of Hearings and Appeals, Department of Interior, denied the Stagecoach Draw appeal on its facts, it stated that "Appellants' concern regarding the need to examine the cumulative impacts from all mineral and industrial activity over the coming decades is well-taken, and it is a concern shared by the State and by BLM." *Id.* at 402. Fortunately, following the Stage Coach Draw proposal the BLM had undertaken the preparation of the Southwest Wyoming Resource Evaluation to assess the regional impacts of the widespread gas development. *Id.*

139. Although it is the states that are charged generally with the public trust responsibility, there is no doubt that federal legislators have been far quicker to recognize the trust responsibilities of government agencies. The trust concept is both explicit and implicit in a number of the more recent environmental protection statutes, notably the Clean Water Act amendments, 33 U.S.C. 1321(f)(4) (1988), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9607(a)(4)(C)(f)(1) (1994) (stating that federal and state officials "shall act on behalf of the public as trustees . . . to recover" natural resource damages). See also BLM regulations, *supra* note 22. But see *Edmonds Institute v. Babbitt*, 42 F. Supp.2d 1 (D.D.C. 1999) (finding that Congress had supplanted any trust obligations through its detailed regulatory schemes).

140. NEPA was designed not necessarily for the purpose of making any substantive changes in resource management, but to enhance the integrity of the process by which those decisions are made, and to require due regard for the environmental impacts of any major federal action. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989) (noting that NEPA merely prohibits uninformed, rather than unwise, agency action).

contacts with the persons and entities whom they regulate, the system is destined for failure. Either the enabling legislation must itself mandate the standards for notice and hearing, or such standards must be promulgated by the designated trustees—who are independent agents well-schooled in the trust principles. We also must “keep the fox away from the henhouse.” Any proposal that has the potential to negatively impact wildlife populations must be subject to independent evaluation based upon sound biological data and criteria.

Cementing the Beneficiaries’ Right to Challenge the Trustee’s Actions that Fail to Meet Trust Standards

Currently, the right and ability of the average citizen to successfully challenge agency actions regarding wildlife, and environmental issues in general, is severely limited by two important features of any legal challenge to agency decision-making. The first is procedural, and is based on narrow definitions of which persons have standing to sue the agency in the first place. The second limitation is more substantive, and is based upon the high degree of deference generally given to agency decision-making—even decision-making that may lead to questionable results.

These limitations are inappropriate in the context of resources held in the public trust. When a person holds property in trust for another, for any purpose, he or she must demonstrate an extraordinarily high standard of conduct in dealing with the trust property. Likewise, all beneficiaries of that trust have an automatic right to challenge trustee action that fails to meet that standard. It is essential that these principles be applied to the states’ trustee relationship of natural resources, including wildlife.

1. Articulating the beneficiaries’ right to challenge breaches of trust/Adoption of a “citizen suit” standing provision for enforcement of trust obligations

Under current law, “public interest” plaintiffs in environmental litigation are restricted in their ability to bring suit. Only individuals or groups demonstrating a particular injury uncommon to the public at large are entitled to have their arguments heard in court.¹⁴¹ Although parties are not required to show that their argument will ultimately prevail in court, they must demonstrate a potential that they will suffer harm, or that they have a “justiciable interest” in the proceedings.¹⁴²

The right of the beneficiary to bring suit challenging a trustee’s actions

141. See Leslie McSpadden, *Environmental Policy in the Courts*, in ENVIRONMENTAL POLICY IN THE 1990S 168, 181-82 (Norman J. Vig & Michael E. Kraft eds., 1997).

142. See *Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Envtl Justice*, 962 S.W.2d 288, 295 (Tex. App.-Austin 1998).

has always been an integral part of the law of trusts. Indeed, it would be impossible to enforce the extraordinarily high standard of conduct owed the beneficiary by the trustee without such a right. According to the *Restatement of Trusts*, the beneficiary of a trust can maintain a suit:

- (a) to compel the trustee to perform his duties as trustee;
- (b) to enjoin the trustee from committing a breach of trust;
- (c) to compel the trustee to redress a breach of trust;
- (d) to appoint a receiver to take possession of the trust property and administer the trustee; or
- (e) to remove the trustee.¹⁴³

If there are several beneficiaries, any one beneficiary has the right to maintain such a suit.¹⁴⁴ If not all beneficiaries can agree upon a particular remedy, it is the duty of the court to enforce the remedy that, in its opinion, is most conducive to effectuating the purposes of the trust.¹⁴⁵

With respect to environmental and natural resource decision-making, history shows that statutory recognition of a right of action and the court's ability to oversee agency conduct is fundamental to encouraging responsible behavior. Certainly no feature of modern environmental law has caused more angst for would-be violators and their governing regulatory agencies than the modern day "citizen suit." Yet no single feature of the environmental movement of the past thirty years has done more to encourage responsible decision-making, and in some cases, to lead to great strides in the health of the resource. It is no accident that those resources that have shown the most improvement in ecological integrity and sustainability are those that are subject to federal laws carrying a strong citizen suit provision.¹⁴⁶

By contrast, those resources that have not yet been recognized as endangered, and for which there are few objective standards for their management and no free-standing "citizen suit" provision, have either not improved or have continued to decline.¹⁴⁷ Additionally, as to federal agency

143. RESTATEMENT (SECOND) OF TRUSTS § 199 (1959). See also *Cavendar v. Cavendar*, 114 U.S. 464 (1885) (stating that where the acts or omissions of a trustee are such as to show a want of reasonable fidelity a court of equity will remove him); *Taylor v. Beham*, 46 U.S. (5 How.) 233 (1847) (holding a trustee is liable for misconduct or breach of trust if he injures the *cestui qui trust*, whether or not he personally gains).

144. RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. a & § 214. (1959).

145. See *id.* § 214(2)(b).

146. These would include the Endangered Species Act, 16 U.S.C. § 1540(g) (1994); the Clean Water Act and its many amendments 33 U.S.C. § 1365 (1994); and the Clean Air Act, 42 U.S.C. § 1857 (1994). While these statutes are not without their flaws, and the judiciary has limited citizen access under their respective citizen suit provisions, the ability of public interest organizations and individuals to file suit to enforce specific requirements of these acts has been instrumental in bringing many species back from the brink of extinction, and in notable improvement in the quality of our air and of many water resources.

147. The management of non-threatened or endangered wildlife is an example. Other broader examples include the management of various public lands. These lands are subject to an array of land man-

decision-making with regard to these resources, there generally is no access to the courthouse other than via the Administrative Procedures Act.¹⁴⁸ In such cases, standing generally is limited to those persons deemed to be within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”¹⁴⁹ Although this concept means many things to many people, it plainly does not reflect anything remotely approaching the general rights of the common law trust beneficiary.

On the state level, would-be public interest litigants are usually left with similar standing limitations of the state’s administrative procedures act to determine whether or not a right of action will exist against the agency decision-makers.¹⁵⁰ In short, the public, for whose benefit the public trust exists, has at most a weak ability to challenge agency decision-making.

However, there probably is more work to be done besides the statutory or constitutional adoption at the state level of the federal model of the “citizen suit” with regard to the public trust in wildlife. Even where Congress has been emphatic in its granting of a specific right of action by the public to enforce resource-protective statutes, the courts have systematically limited that right based upon a very restrictive interpretation of standing requirements.¹⁵¹ Codification of the public trust in wildlife at the state level must be emphatic in its grant of a right of action to the public to enforce the trust.¹⁵²

agement legislation, dedicated to the “multiple use” concept. See, e.g., the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784; the Multiple Use Sustained Yield Act (MUSYA), 16 U.S.C. §§ 528-531; and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1614.

148. The APA provides a right to judicial review of all “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. This applies universally “except to the extent that— (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” See *id.* at § 701(a). See also *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

149. *Bennett*, 520 U.S. at 175 (citations omitted). See also *National Wildlife Federation v. Lujan*, 497 U.S. 871 (1990); *National Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998).

150. All fifty states have an administrative procedures act. See WILDLIFE MANAGEMENT INSTITUTE, *supra* note 104, at 3.

151. In the federal courts, standing has been restricted by the Article III “case or controversy” requirement of the Constitution. For a discussion of standing in the environmental context, see generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Fed’n*, 497 U.S. 871 (1990); Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 947 (1998). The courts have read this requirement as consisting of three components: (1) that the plaintiff have suffered an injury in fact; (2) that the challenged action be the cause of the injury; and (3) that the injury is redressable by the courts. See *Defenders of Wildlife*, 504 U.S. at 561. *But see Bennett*, 520 U.S. 154 (1997). It is ironic that the Supreme Court seems more inclined to find corporate interests to have standing to sue with respect to wildlife issues than the general public. It is plain that the current law of standing turns trust concepts on their head.

The federal courts also have limited standing by requiring that plaintiffs show that it is likely that their injury will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 555. This notion has been used to deny standing to plaintiffs whose complaint is found to be based upon wholly past violations. See *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83 (1998); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

152. Because the standing limitations found in these cases are based largely on Article III of the United States Constitution, e.g., *Defenders of Wildlife*, 504 U.S. at 574-78, they should not limit efforts

2. Elevating the standard of care by which the trustees' actions are judged.

The *type* of judicial review accorded to agency decision-making is as much a limiting factor for public trust advocates as is the ability to obtain review, or standing requirements. In formal rulemaking, review of agency action is generally limited to the "abuse of discretion" or "arbitrary and capricious" standard of the federal Administrative Procedures Act.¹⁵³ While sometimes an abuse of discretion is obvious, in the absence of objective standards of conduct—more often than not the courts will defer to the agency decision. Again, review of the actions of the trustees for the public trust in wildlife should rise to a higher level. It should be guided by traditional principles from the law of trusts and the important fiduciary responsibilities of the trustee. As Justice Cardozo eloquently stated:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.¹⁵⁴

The decisions or actions of a trustee are reversible whenever they fail to meet the high standards of care and loyalty imposed on the trustee, not just when the trustee is obviously negligent or failing to comply with statute. Unfortunately the latter is, essentially, the current standard for review of agency actions.¹⁵⁵

by the states to allow beneficiaries of the public trust to maintain suits based on the government's failure to protect the trust resources. However, they underscore the court's (and the litigants') failure to analyze the government's responsibility in terms of the trust relationship. See discussion *infra* at note 173 regarding the importance of a self-executing constitutional clause.

153. See 5 U.S.C. § 706(2)(A). Agency action also may be set aside if it is contrary to constitutional right (§ 706[2][B]), in excess of statutory authority or short of statutory right (§ 706[2][C]), without observance of procedure required by law (§ 706[2][D]), unsupported by substantial evidence (§ 706[2][E]), or, in certain circumstances, unwarranted by the facts. (§ 706[2][F]). As a practical matter, the court will not substitute its judgment for that of the agency and usually will defer to the agency, as long as there is a rational basis for its action. See *Sierra Pacific Indus. v. Lyng*, 866 F.2d 1099 (9th Cir. 1989).

154. *Meinhard v. Salman*, 249 N.Y. 458, 164 N.E. 545, 546 (1929).

155. In addition to having the general duties of loyalty and fairness to all beneficiaries, typically a trustee is said to be under a duty in administering a trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. See *United States v. Mason*, 412 U.S. 391, 398 (1973) (citing 2 A. SCOTT, TRUSTS 1408 (3d ed. 1967)).

IV. LEARNING FROM EXPERIENCE—THE PUBLIC TRUST DOCTRINE AS CODIFIED IN LOUISIANA, PENNSYLVANIA, HAWAI'I, ALASKA AND FLORIDA.

Narrow minded provincialism: Sad to say but true—I am more interested in the mountain lions of Utah, the wild pigs of Arizona than I am in the fate of all the Arabs of Araby, all the Wogs of Hidustan, all the Ethiopes of Abyssinia.

Edward Abbey (1927 - 1989) A Voice Crying in the Wilderness (Vox Clamatis in Deserto)

The idea of codifying the public trust doctrine in a state constitution or statute is not entirely new. Several states have already done so, or attempted to do so, with varying degrees of success. A review of the experiences of some of these states will give some guidance to future drafters into what should be done in order to make such a law effective.

Louisiana—A Model of True Commitment to the Public Trust Doctrine.

Without a doubt the state of Louisiana is a leader in its commitment to the public trust doctrine, not just for wildlife or water, but for all of its resources. It has embraced the doctrine largely through amendment to the state constitution, appearing in 1974. Article IX, § 1 of the Louisiana Constitution, and its enacting legislation, is a simplistic and unfettered adoption of the public trust concept for all natural resources of the state, providing as follows:

Section 1. The natural resources of the state, including air and water, and the healthful, scenic, historic, and aesthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people. The legislature shall enact laws to implement this policy.

Although the term is not used, this section has consistently been interpreted as an affirmative adoption of the public trust doctrine, which not only allows the state to enact appropriate legislation to protect trust resources, but mandates that it do so.¹⁵⁶ Louisiana Revised Statute 56:640.3 provides:

A. The legislature recognizes that under the public trust doctrine the marine fishery resources, among other natural resources, are managed by the state in trust for the benefit of all its citizens.

B. [C]onservation and management decisions shall be fair and equitable to all the people of the state and implemented in such a

156. See *Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n.*, 452 So. 2d 1152, 1158 (La. 1984); *Matter of American Waste and Pollution Control*, 633 So. 2d 188 (La. Ct. App. 1993).

manner that no individual, corporation, or other entity acquires an excessive share of such rights and privileges. The right to fish does not convey any property right.

C. The legislature further recognizes that the state's marine fishery resources require proper management in order to be sustained biologically and to continually produce a maximum yield of social and economic benefits.

The trust applies to wildlife, and imposes an affirmative duty on the state to protect this resource. *State v. McHugh*¹⁵⁷ held that the constitution "establishes a public trust doctrine requiring the state to protect, conserve and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people."¹⁵⁸ The court further stated that "[t]hese constitutional provisions establish a standard of protection which the legislature and all public trustees are required to vigorously enforce. Upon judicial review, a public trustee is duty bound to demonstrate that he has properly exercised his responsibility under the constitution and laws."¹⁵⁹ The Louisiana high court was emphatic that wildlife "is not subject to private appropriation except when done under regulations that protect the general interest."¹⁶⁰

Most cases that have arisen in Louisiana under the constitutional public trust mandate have pertained to issues of hazardous waste management. The Louisiana Environmental Control Commission is recognized as the primary public trustee of natural resources with respect to protection from hazardous waste pollution.¹⁶¹ However, Louisiana plainly requires that all state officials who act with respect to public trust resources, not just designated administrators, wear the mantle of "trustee." Thus, in *State v. McHugh*, a criminal case involving the reasonableness of a stop of the defendants by wildlife enforcement officers, the court concluded that these officers were acting not only as law enforcement officials, but as public trustees who were required to act as front line gatherers of information "pertaining to the appearance, quality, quantity, health and habits of animals taken or regulated."¹⁶² This special role gave them greater authority to make routine stops of hunters, if not necessarily to conduct searches.

The leading case in Louisiana concerning the proper implementation of public trust doctrine is *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*.¹⁶³ There it was firmly established that the state con-

157. 630 So. 2d 1259 (La. 1994).

158. *Id.* at 1265.

159. *Id.*

160. *Id.*

161. See *Save Ourselves*, 452 So. 2d at 1156.

162. *McHugh*, 630 So. 2d. at 1265-66.

163. *Save Ourselves*, 452 So. 2d at 1156.

stitution does not allow the state to take a passive role with respect to its trust resources. It stated: “[The ECC’s] role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission.”¹⁶⁴ Accordingly, Louisiana recognizes that the public trust doctrine does more than merely grant the state the right to regulate; it imposes affirmative duties on administrative officials that should be enforceable by a writ of mandamus or injunctive relief against the trustee agency, by either the attorney general or the citizens, as beneficiaries of the trust.¹⁶⁵

It is significant that the public trust doctrine in Louisiana has been interpreted not as an absolute prohibition against any action that might adversely affect a natural resource, but as a requirement for an environmental cost-benefit analysis (although not necessarily an economic analysis), as well as explicit fact finding by administrative agencies. In other words, Louisiana has elevated the required standard of conduct for its administrative officials to be more in line with what is expected of a trustee in the law. The Louisiana courts view the constitutionally enacted public trust doctrine as the adoption of a rule of reasonableness, designed to ensure that before an agency or official approves a proposed action affecting the public trust resources, it must determine that “adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare” and in so doing “must act with diligence, fairness and faithfulness to protect this particular public interest in the resources.”¹⁶⁶ This is, in effect, a balancing process that “leaves room for a responsible exercise of discretion and may not require particular substantive results in a particular problematic instance.”

Procedural protections are at the heart of the Louisiana scheme. At least with regard to issues of hazardous waste, the public trust mandate contains “important procedural provisions designed to see that the discretion entrusted to the ECC is in fact exercised in each individual case. The agency is required to use a systematic, interdisciplinary approach to evaluate each hazardous waste project or facility.”¹⁶⁷ In short, this means that the agency must “consider whether alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits.”¹⁶⁸ In order to assure that the agency has fulfilled its trust duties,

164. *Id.*

165. See James J. Wilkins and Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 898 (1992); *Matter of Dravo Basic Materials Co., Inc.*, 604 So. 2d 630, 640 (La. Ct. App. 1992).

166. *Matter of American Waste and Pollution Control*, 633 So. 2d 188, 193 (La. Ct. App. 1993).

167. *Id.* (citing LA. REV. STAT. ANN. § 30:1141).

168. *Id.*

administrative officials are required to make specific findings of fact, not mere conclusions, and its failure to do so will result in a reversal of the agency's decision.¹⁶⁹

Yet, as noted, the Louisiana courts also have made clear that the balancing act, or the risk/benefit analysis, done by the agencies must not be one of pure economics. In *Matter of Dravo Basic Materials Co., Inc.*¹⁷⁰ the court noted that the environmental benefits at hand are not easily quantified, and that "[t]he economic benefits derived from the industry must be balanced against our need for protection of natural resources."¹⁷¹

The 1974 Louisiana Constitution which affirmatively adopted the public trust doctrine for all of its resources has not led to a flood of litigation, crippled private rights, or become an administrative nightmare. The body of case law over the past twenty years is surprisingly small, and has primarily concerned hazardous waste permitting. Thus far, the Louisiana courts have been ready and willing to give Article IX, § 1 the force it deserves. The effect appears to have been better decision-making and heightened awareness of the obligations of the public trustees.

Pennsylvania—Lacking Trust in the Public Trust

Although not specifically addressing wildlife, the Commonwealth of Pennsylvania also has adopted a constitutional codification of the public trust doctrine with respect to all publicly-held natural resources. But the contrast to Louisiana's experience is stark. At best, the doctrine in Pennsylvania is lack-luster, at worst, it is ignored.

In 1971 Pennsylvania adopted Article I, § 27 of its constitution, which provides as follows:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Shortly after its adoption this provision was determined to be a recognition of the public trust doctrine.¹⁷² However, the Pennsylvania courts have watered down the doctrine to such an extent that it is barely, if at all, distin-

169. See *Matter of American Waste*, 633 So. 2d at 188 (La. Ct. App. 1993), *on remand*, 642 So.2d 1258, 1266 (La. 1994); *Save Ourselves*, 452 So. 2d at 1157.

170. 604 So. 2d 630, 636 (1992).

171. *Id.* at 636.

172. See *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973) [hereinafter *Payne I*], *aff'd* 323 A.2d 407 (Pa. Commw. Ct. 1974), *aff'd* 361 A.2d 263 (Pa. 1976) [hereinafter *Payne II*].

guishable from traditional state police power, and “abuse of discretion” remains the standard of review.

Almost immediately litigants argued that Article I, § 27 was unenforceable because it was not self-executing.¹⁷³ Although a few early decisions agreed,¹⁷⁴ the Pennsylvania courts ultimately concluded in *Payne v. Kassab*¹⁷⁵ that the section is indeed self-executing “in accordance with doctrines of public trust.”¹⁷⁶

It appeared from *Payne* that the Pennsylvania courts were on their way toward a fairly meaningful recognition of the public trust doctrine. Although proceeding with caution,¹⁷⁷ the *Payne* court found within the doctrine an obligation on the part of state officials to act with extraordinary care with respect to trust resources. It recognized that although enforcement of the trust will often be a balancing act, any development that would have an impact on sensitive areas should be avoided altogether. It suggested that only where there are no feasible alternatives, could such resources be utilized in a way as to minimize the environmental or ecological impact of the use.¹⁷⁸ The *Payne* court also found that the plaintiffs, as members of the public and owners of property fronting the resource (in this instance, a public park), had standing to sue under § 27.¹⁷⁹

Accordingly, the impact of § 27 was to allow normal development “while at the same time constitutionally affixing the public trust concept to the management of public natural resources of Pennsylvania.”¹⁸⁰ The result would be controlled development rather than no development.¹⁸¹ The *Payne* court adopted a three-fold test for determining whether there had been compliance with § 27: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the commonwealth’s public natural resource? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm

173. A constitutional provision is considered self-executing when it needs no further legislation to put it in force. See *Davis v. Burke*, 179 U.S. 399, 403 (1900). “[E]ven though the legislature may pass legislation defining more explicitly the meaning of the constitutional language, no such action is necessary to create citizens’ rights to bring individual cases.” ARCHER, *supra* note 7, at 88. “More commonly, however, the state constitutional recognition of public rights with respect to the shore and other natural resources is not self-executing and must be carried into effect by legislation.” *Id.*

174. See *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973) (holding that although this declaration was more than just a statement of rights, and does impose affirmative duties, it was not self-executing but was a mere recognition of the state police power).

175. *Payne I*, 312 A.2d at 86.

176. *Id.* at 97. This might be interpreted as a recognition that the public trust by its very nature needs no authorizing legislation.

177. It recognized the difficulties in adopting an absolute interpretation of this provision, finding it difficult to conceive of any human activity that does not disturb the environment in some way. *Id.* at 94.

178. See *Payne II*, 361 A.2d at 273.

179. *Payne I*, 312 A.2d at 97.

180. *Id.* at 94.

181. *Id.*

which will result from the challenged decision or action so clearly outweigh the benefit to be derived therefrom that to proceed further would be an abuse of discretion?¹⁸²

Although not the strongest of all approaches to the public trust doctrine, the *Payne* case showed that Pennsylvania courts were imposing on agencies at least some obligation to choose alternatives that would minimize harm to the public trust resources. Unfortunately these early successes for the protection of trust resources soon met with solid resistance. In *Borough of Moosic v. Pennsylvania Public Utility Commission*¹⁸³ the court found that in a conveyance of trust resources the public trust mandate did not even require the commission to examine the intended uses of the property by the intended grantee.

More recently, the case of *National Solid Waste Management Association v. Casey*¹⁸⁴ resulted in a peculiar ruling that there could be no violation of the constitutional public trust mandate where the agency had fully complied with a related statute. The impression left by this ruling is that legislative enactments do not necessarily need to comply with constitutional requirements for the protection of trust resources.¹⁸⁵ Also, in *Snelling v. Department of Transportation*,¹⁸⁶ the court found that § 27 does not require consideration of factors beyond those which, by statute, must be considered in evaluating projects that are potentially harmful to the environment.

In *Concerned Residents of Yough, Inc. v. Department of Environmental Resources*¹⁸⁷ the Pennsylvania court reaffirmed the three-pronged test set forth in *Payne*. It found that the citizens' group, aptly dubbed "CRY," had not adequately proven the third part of the test: that the environmental harm of the solid waste proposal outweighed the benefits.¹⁸⁸

In addition to finding the constitutional public trust mandate to impose few if any ascertainable standards of conduct on agency officials, the Pennsylvania courts have burdened citizens, and even those persons presumed to be trustees, with serious impediments to their ability to enforce the trust. For example, in *Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources*,¹⁸⁹ the game commission challenged the issuance of a solid waste permit, asserting that the facil-

182. *Id.*

183. 429 A.2d 1237 (Pa. Commw. Ct. 1981).

184. 600 A.2d 260 (1991).

185. The case was procedurally unusual, which may have accounted for this result. In *Casey* the governor had issued an executive order that conflicted with a comprehensive statutory scheme for waste management. *Id.* The state tried to defend the governor's actions through reliance on § 27. *Id.*

186. 366 A.2d 1298 (Pa. Commw. Ct. 1976).

187. 639 A.2d 1265 (Pa. Commw. Ct. 1994).

188. *Id.* at 1275.

189. 509 A.2d 877 (Pa. Commw. Ct. 1986).

ity would be too close to a wildlife and plant refuge. The court gave no heed to any public trust duties that might be imposed on the commission, and allowed it no standing to challenge the permit (concluding that only the Department of Environmental Resources had a duty to protect wildlife).¹⁹⁰ It further found it unlikely that the Dam Safety and Encroachment Act, under which standing was asserted, was concerned with wildlife.¹⁹¹ The implication was that the state constitution does not impose any general public trust duty on state officials, which leaves one to wonder what in fact it does impose.

In another instance, in *Western Pennsylvania Conservancy v. Commonwealth, Department of Environmental Resources*,¹⁹² the court was disinclined to find that an environmental group that used the state park in question was a person "aggrieved" by an administrative adjudication so as to allow it standing to assert the public trust.

In short, notwithstanding the clear and concise language of § 27, the Pennsylvania courts have not found this public trust mandate to impose any special obligations on its public officials, and apparently gives the public no additional or enforceable rights. It is seen as not much more than the codification of traditional police powers, and establishes no higher standard of conduct other than the arbitrary and capricious/abuse of discretion standard imposed on agency action in general. The agencies and the courts seemingly have ignored entirely the last sentence of the section, imposing an affirmative duty of conservation on the state.

No Hindrance in Hawai'i

The state of Hawai'i has always recognized the enormous value of its natural resources and the importance of preserving those resources for future generations. It has specifically adopted the public trust concept for all publicly held natural resources. Article XI, § 1, which has been a part of its constitution since statehood, provides as follows:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

190. *Id.*

191. *Id.* at 881.

192. 367 A.2d 1147 (Pa. Commw. Ct. 1977).

There has never been any question that Hawai'i's public trust clause is "self-executing" and gives citizens standing to sue for enforcement. This intent is found through a companion clause, Article XI, § 9, which provides that:

[e]ach person has a right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any other party, public or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as provided by law.

However, given its manifest self-executing nature, it is surprising to find that that the public trust doctrine has been at the center of very few cases. This apparently has troubled Hawai'i legislature. In the legislative history for the enactment of HRS § 607-25 in 1986, it is stated that "[t]he legislature finds that article XI, section 9, of the Constitution of the State of [Hawai'i] has given the public standing to use the courts to enforce laws intended to protect the environment. However, the legislature finds that the public has rarely used this right. . . ." ¹⁹³ To insure that the public is not dissuaded from asserting their rights by the high costs of litigation, HRS § 607-25 allows citizens recovery of their attorneys' fees for bringing a successful civil action against a private party "who has been or is undertaking any development without obtaining all permits or approvals required by law from government agencies."¹⁹⁴

This statute was interpreted in *Kahana Sunset Owners Association v. Maui County Council*¹⁹⁵ in which the plaintiff failed to prevail in an action against a private defendant with regard to a permitting issue. After review of the legislative history of § 607-25, the court concluded "that the legislature intended that individuals and organizations would help the state's enforcement of laws and ordinances controlling development by acting as private attorneys general and suing developers who did not comply with the proper development laws."¹⁹⁶

Accordingly, while Hawai'i has firmly established the public trust doctrine as applicable to all publicly held resources, the full reach of the doctrine has not been tested. The reasons for this are not apparent.¹⁹⁷ But the doctrine should provide a sound tool for allowing the present generation

193. Sen. Stand. Comm. Rep. No. 450-86, 1986 Senate Journal, at 976.

194. HAW. REV. STAT. § 607-25(e)(1) (1993).

195. 948 P.2d 122 (Haw. 1997).

196. *Id.* at 125.

197. Although case law on the subject remains in its infancy, one commentator has found that the prevailing purpose of the Hawai'i doctrine and the predominant duty of the state is to conserve and protect, and that it has an affirmative duty to do so. Morihara, *supra* note 32, at 200.

the right to enjoy natural resources, yet requiring protection and conservation of these resources for future generations.¹⁹⁸ Arguably, this requires “a delicate balance between the two interests of conservation and use so that they can both coexist.”¹⁹⁹ However, all uses should be subject to reasonable restrictions to ensure that they do not pose a substantial harm to the conservation of natural resources.²⁰⁰

Alaska's Access

Perhaps because it also had a late entry into the union, and has large populations of native peoples having a deep and ancient relationship with their natural surroundings, the State of Alaska has also readily absorbed public trust concepts into its state constitutional authority. However, at least until recently, Alaska has focussed primarily on the element of access to the trust resources, in particular wildlife, by the public.

This emphasis on access may arise from Section 1 of Article VIII of the Alaska constitution, which provides that “[i]t is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”

Article VIII, § 2 then states that “[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.” Alaska Const. Art. VIII, § 3 further provides that “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”

Alaska also has a constitutional sustained yield requirement which lends considerable support to the conservation component of these clauses. Article VIII, § 4 provides that “[f]ish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”²⁰¹

198. *See id.* at 196-97.

199. *Id.*

200. *Id.* at 198.

201. In the water context, Article VIII, § 14 provides that:

[f]ree access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

ALASKA CONST. Art. VIII, § 14.

It was found in *Wernberg v. State*, 516 P.2d 1191, 1198 (Alaska 1974) that the provisions of Article VIII “were intended to permit the broadest possible access to and use of state waters by the general

There seems to be no doubt that these clauses are interpreted as a recognition of the common law public trust doctrine.²⁰² A leading case is *Owsichек v. State of Alaska, Guide Licensing and Control Board*.²⁰³ There a hunting guide brought an action for a declaration that the state's Guide Licensing and Control Board's assigning of exclusive guide areas in which only the designated guide could lead hunts was unconstitutional under the common use provisions of the Alaska Constitution.

The *Owsichек* court found that Alaska's common use provisions constitutionalize common law principles governing the sovereign's authority over the management of fish, wildlife and water resources.²⁰⁴ However the court found that the framers of the constitution had likely modeled Article VIII on *Geer v. Connecticut*,²⁰⁵ and its conclusion that ancient sovereign rights had been substantially modified by the American tradition.²⁰⁶ The purpose of the clause was anti-monopoly, which was achieved by constitutionalizing common law principles that imposed upon the state a public trust duty with regard to the management of fish, wildlife, and waters.²⁰⁷ These principles "hark[] back to the old tradition whereby wildlife in its natural state was in the presumed ownership of the sovereign until reduced to possession."²⁰⁸ Implicit in the expression "for common use" is the notion that "these resources are not to be subject to exclusive grants or special privilege as was so frequently the case in ancient royal tradition."²⁰⁹

In *Owsichек*, the court initially noted that the framers of the constitution clearly did not intend to prohibit all regulation of the use of these resources.²¹⁰ However, relying on four prior cases it concluded that Article VIII demonstrates an intent to apply the common use clause so as to permit

public." There a riparian landowner was found to have stated a valid cause of action for inverse condemnation where his access to waters had been obstructed. *Id.*

202. See, e.g., *CWC Fisheries v. Bunker*, 755 P.2d 1115 (Alaska 1988). The court declined to determine whether the clause might impose an even higher duty than that imposed by the public trust doctrine. *Id.*

203. 763 P.2d 488 (Alaska 1988).

204. *Id.* at 494.

205. See *Geer v. Connecticut*, 161 U.S. 519, 519 (1892).

206. The court stated: "The following statement from the constitutional papers, as quoted above, closely tracks the reasoning of *Geer*":

The title remained with the sovereign, and in the American system of government with its concept of popular sovereignty this title is reserved to the people or the state on behalf of the people. The expression "for common use" implies that these resources are not to be subject to exclusive grants or special privilege as was so frequently the case in ancient royal tradition.

Owsichек v. State of Alaska Guide Licensing and Control Board, 763 P.2d 488, 495 (Alaska 1988) (citing Alaska Constitutional Convention Papers, Folder 210, paper prepared by Committee on Resources entitled "Terms").

207. See *id.* at 493.

208. *Id.* (citing 4 Proceedings of the Alaska Const. Convention 2492 (Jan. 18, 1956)).

209. *Id.*

210. *Id.*

the broadest possible access to and use of natural resources by the general public,²¹¹ and that these guarantees to access plainly apply to wildlife.²¹²

In a somewhat similar case, *State v. Ostrosky*,²¹³ the court found limited entry fishing to be inconsistent with the Alaska constitution. It stated:

We have difficulty squaring the Section 3 reservation of fish to the people for common use with a system which grants an exclusive right to fish to a select few who may continue to exercise that right season after season. We accept, therefore, at least for the purposes of this case, the proposition that limited entry is inconsistent with the command of Article VIII, § 3.²¹⁴

These holdings, of course, are based on a reading of the Alaska Constitution. The same result regarding equality of access is reached by application of traditional trust principles to the public trust in wildlife.²¹⁵ While conservation of the wildlife resource (the trust corpus) may demand regulation limiting or even prohibiting access to the public at large,²¹⁶ the trustee is not permitted to give access to some while denying it to others. Such conduct plainly violates the trustee's duty to act fairly and impartially towards the beneficiaries of the trust.²¹⁷

This access element of the public trust doctrine, although suggested in most discussions on the subject, has not received significant attention in other jurisdictions. Thus, perhaps more than any other state, Alaska has recognized that the public trust in wildlife prohibits the granting of preferences in access to wildlife. It remains to be seen whether Alaska will continue its strong stance on the public trust doctrine when confronted with serious challenges to the sustainability of its wildlife populations.²¹⁸

211. *Id.* at 492-93 (citing *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1974); *CWC Fisheries v. Bunker*, 755 P.2d 1115 (Alaska 1988); *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983); *Jones v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256 (Alaska 1988)).

212. *Id.* at 492.

213. 667 P.2d 1184 (Alaska 1983).

214. *Id.* at 1189.

215. Interestingly, the *Owsichek* court suggested that the result in that case probably would have been the same under *Illinois Central*, even if there were no constitutional clause. Historically the public trust doctrine disallows the abdication of trust duties. See *Owsichek*, 763 P.2d at 496.

216. The state's power over natural resources is such that it could entirely eliminate the role of hunting guides. See *Hersher v. State*, 568 P.2d 996, 1003 (Alaska 1977).

217. See discussion *supra*, Part III.

218. "Access . . . is an illusion if such resources exist only as atrophied forms of their former quality and quantity. To preserve access is not enough—the public trust doctrine must be applied as an affirmative instrument for ecological protection." Bader, *Antaeus and The Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*. 19 B.C. ENVTL. AFF. L. REV. 749, 750 (1992).

Another important Alaska case is *Pullen v. Ulmer*.²¹⁹ In *Pullen* a group calling itself Fairness in Salmon Harvest, Inc. (F.I.S.H.) submitted an initiative application to the state providing that subsistence, personal use, and sport fisheries would receive a preference to take a portion of the salmon harvest before the remaining harvestable salmon are allocated to other harvest users. The plaintiffs filed suit to declare the proposed initiative unconstitutional and to obtain an injunction against placement of the initiative on the 1996 general election ballot.

The court found in favor of the plaintiffs, holding that the public trust responsibilities imposed on the state by the provisions of Article VIII compelled the conclusion that fish occurring in their natural state are property of the state for purposes of carrying out its trust responsibilities.²²⁰ To that end, "appropriation" of these resources by the initiative process is in violation of the state constitution, to the same extent as appropriation of other, more traditional "assets."²²¹

Finally, mention should be made of *Alaska Native Class v. Exxon Corp. (In re The Exxon Valdez)*.²²² Where the Ninth Circuit Court of Appeals failed to grasp the significance of Alaska's forty-year commitment to its common use clause and the public trust in wildlife. In *Exxon Valdez* the court concluded that the plaintiff Alaskan Natives, although they may have been affected by the Valdez oil spill more severely than other members of the public, shared only the same rights in the trust assets as all other members of the public.²²³ Therefore, they failed to prove any "special injury" sufficient to support a public nuisance action against the defendant.²²⁴

This ruling may be correct under pure principles of nuisance law, but it turns the public trust doctrine inside out. The decision ignores the fundamental rule of the law of trusts that beneficiaries are entitled to bring suit to enforce the right of all beneficiaries to protection of the trust corpus, and to be given the same advantages as all other beneficiaries.²²⁵ In this regard, it is

219. 923 P.2d 54 (Alaska 1996).

220. *Id.* at 59.

221. *Id.* at 60. In response to F.I.S.H.'s contention that a precipitous decline in the moose population does not require the state to notify Moody's to adjust its bond rating, the court stated:

In fact, a precipitous decline in the moose population may not, on its own, be enough to greatly affect the state's bond rating, but the effect on the state would be as significant as the loss of any other asset. . . . Furthermore, if other wildlife populations also plummeted, the state's finances would obviously be affected as one of the primary tourism attractors disappeared. Finally, if the state's salmon population precipitously declines, the fishing industry would be devastated, causing even more harm to Alaska's economy and revenue base.

Id. at 59.

222. 104 F.3d 1196 (9th Cir. 1996).

223. *Id.* at 1198.

224. *Id.*

225. See *supra*, Part III.

the very “non-specialness” of the trust beneficiary that defines him. The *Exxon* case also makes no attempt to understand or apply the decisions of the Alaska courts that repeatedly affirm the commitment to equality of enjoyment in the trust resources.

To be sure, the *Exxon* case presented a twist on the public trust doctrine in that it was a suit against a private party for damages. It should not establish precedent that a citizen cannot sue to protect his or her rights in trust resources unless “special injury” is shown. The *Exxon* case highlights the importance of including in any constitutional or statutory commitment the right of the trust beneficiary to bring suit.

Florida—Calling a Spade a Spade

Finally, the State of Florida provides an interesting study with respect to its efforts to write into law certain aspects of the public trust doctrine. It has not adopted a constitutional public trust mandate, but instead has by statute created a comprehensive system for the management of its public lands pursuant (more or less) to trust principles. Although this scheme has some drawbacks in terms of its ability to give full effect to trust concepts, Florida is to be commended for its efforts to identify its trustees with particularity.

Under Florida law, title in and control over most state lands, as well as funds generated from those lands, is vested in the Board of Trustees of the Internal Improvement Fund.²²⁶ The Internal Improvement Trust Fund originally was established to administer all lands that had been granted to it by Acts of Congress in the nineteenth century that had not been sold, and all proceeds from such sales as remained on hand at the passage of the statute.²²⁷ The Fund is to be augmented by revenues from state lands and all such revenues are to be used for the “acquisition, management, administration, protection, and conservation of state-owned lands.”²²⁸ The Board of Trustees also may acquire land.²²⁹

The members of the Board of Trustees are determined by statute. They include the governor, the secretary of state, the attorney general, the comptroller, the state treasurer, the commissioner of education and the commissioner of agriculture.²³⁰ They are empowered to sell and transfer the trust lands, but may not do so without the vote of at least five of the seven trustees.²³¹ With respect to submerged lands, before any transfer may occur, the

226. See FLA. STAT. ANN. §§ 253.002(1), 253.01 (West 1998).

227. See *id.* § 253.01.

228. *Id.*

229. See *id.* § 253.025.

230. See *id.* § 253.02(1).

231. See *id.* § 253.02(2)

Department of Environmental Protection is required to inspect the lands and file a written report with the Board of Trustees stating whether or not the development of the lands would be detrimental to established conservation practices.²³²

The obligations of the Board of Trustees are both extremely comprehensive and ambiguous. The statutory scheme clearly is intended to embrace the public trust doctrine with respect to all publicly held land, which includes any wildlife that may be present on those lands. However, in its efforts to cover all bases, it is possible that conflicts could arise with respect to the proper trustee management of the resources. The statute states that:

All lands acquired pursuant to chapter 259 shall be managed to serve the public interest by protecting and conserving land, air, water, and the state's natural resources, which contribute to the public health, welfare, and economy of the state. These lands shall be managed to provide for areas of natural-resource-based recreation, and to ensure the survival of plant and animal species and the conservation of finite and renewable natural resources. The state's lands and natural resources shall be managed using a stewardship ethic that assures these resources will be available *for the benefit and enjoyment of all people of the state, both present and future*. It is the intent of the Legislature that, where feasible and consistent with the goals of protection and conservation of natural resources associated with lands held *in the public trust* by the Board of Trustees of the Internal Improvement Trust Fund, public land not designated for single-use purposes . . . be managed for multiple-use purposes. All multiple-use land management strategies shall address public access and enjoyment, resource conservation and protection, ecosystem maintenance and protection, and protection of threatened and endangered species. . . .²³³

Within this provision are a number of rather mixed notions with respect to how the lands will be managed. For example, benefit to the economy does not necessarily square with protection of the trust corpus for future generations.²³⁴

The statute does not provide a specific definition of the public trust, but does address the meaning of "multiple-use," which can encompass both the enhancement and conservation of lands.²³⁵ It is clear, however, the Board of

232. See *id.* § 253.02(3).

233. See *id.* § 253.034(1) (emphasis added).

234. However, with respect to dredging permits the courts have reinforced the Trustees' duty to make substantive findings about long term ecological harm. See *Yonge v. Askew*, 293 So.2d 395 (Fla. App. 1974).

235. See Fla. Stat. Ann. § 253.034(2)(a) (West 1998).

Trustees is directed to consider the needs of future generations of beneficiaries, an important component of any trust obligation.²³⁶

The Board of Trustees is given broad power to delegate any statutory duties it may have, unless expressly prohibited by law.²³⁷ Generally speaking, the Department of Environmental Protection is delegated the duty of performing all staff duties related to the acquisition, administration, and disposition of those lands.²³⁸ With respect to submerged lands, the statute allows for the adoption of regulations for creation of a water management district to perform such duties and functions.²³⁹ The statute further obligates all state attorneys and wildlife officers to ensure that the lands are duly protected, and to report to the trustees any unlawful uses or activities.²⁴⁰

Enforcement of the public trust seems to be primarily in the hands of the trustees themselves. The Board has extensive enforcement powers, and may seek injunctive relief, damages and/or civil penalties against persons willfully damaging the trust lands.²⁴¹

The rights of the public are less clear. Overall, any commitment to public trust concepts appears to lose vitality within those sections pertaining to the public rights. The public is given fairly traditional rights to notice of the proposed action and opportunity to comment.²⁴² Although the board may hold a hearing, it is not required to do so.²⁴³ The Board of Trustees generally is allowed to approve the action if “not contrary to the public interest” or “is in the public interest when required by law”²⁴⁴ and “abuse of discretion” remains the standard of review.²⁴⁵ Moreover, the state’s failure to provide notice to the public apparently has no effect on the validity of the action.²⁴⁶ It therefore would seem that traditional procedural due process protections are weak.

V. CONCLUSION—THE BREATH OF LIFE

The public trust doctrine as it has developed and is continuing to develop in this country is uniquely American in its guarantee of management of wildlife for the benefit of all. Certainly the concept has developed over

236. *See id.* § 253.034(1).

237. *See id.* § 253.002(1).

238. *Id.*

239. *Id.*

240. *See id.* § 253.05.

241. *See id.* § 253.04.

242. *See id.* § 253.115(1).

243. *See id.* § 253.115(2).

244. *Id.* Actions that are arguably within broader notions of the “public interest” are not necessarily actions that would fulfill the trustee’s fiduciary duty to preserve the trust corpus for future generations.

Id.

245. *Hayes v. Bowman*, 91 So.2d 795, 802 (Fla. 1957).

246. FLA. STAT. ANN. § 253.115(4) (West 1998).

many centuries and through many cultures. But as the *Geer v. Connecticut* court so eloquently stated, the public trust in wildlife as we know it in this country is a product of the development of free institutions and democratic ideals, where no state and no government has the right to alienate or destroy the resource, or public rights in the resource.

Unfortunately however, the American political processes have failed us. The public's rights under the trust doctrine have been almost completely lost through the corrupted machinery of the administrative arm of the government, where our "trustees" are bestowed with no sense of duty with regard to either conserving the trust "assets," or preventing the alienation of those assets. They consistently react to political pressures and the pressures of special interest groups, which usually stress short-term economic gain rather than the long term conservation of the resource. Worse yet, when they violate the public trust, the public has no adequate voice to challenge the action. The tragedy is that as a society we have become so accustomed to this state of affairs that we have no vision for another way.

Chances are, the model of administrative law is here to stay, at least for the foreseeable future. Administrative agencies no doubt will continue to wield enormous power and influence over resource decision-making. But there is no legitimate reason for not requiring these administrative actors, as well as all other state officials who have the ability to make decisions impacting wildlife, to fulfill their trust responsibilities.

The other part of this equation, however, is that administrative agencies do not and cannot operate in a vacuum. They do not base their decisions on a study of the common law. Specific constitutional, statutory and regulatory authority is their lifeblood and they are prohibited from acting without it. Therefore, without specific directive to the states and their agencies as to the requirements of the public trust doctrine, the doctrine will remain poorly understood, inconsistently applied by the judiciary, and generally the ineffective dinosaur it is often considered to be.²⁴⁷

Codification of the public trust doctrine serves another purpose as well in providing the courts with a benchmark for determining whether there has been compliance with trust requirements, so that they may be consistent in their evaluations of the trustees' conduct. Specifically, they will benefit from statutory and/or constitutional guidance in instances where the application of traditional trust principles may fail to answer all questions as to administration of the public trust.

Enforcement of the public trust doctrine must not be an exercise in dogma. Like all trusts, the public trust is and must remain a flexible tool,

247. See Delgado, *supra* note 30, at 1216.

able to adapt to new circumstances and new information. Indeed, because of this flexibility and because it is the only guiding philosophy that we take from the common law regarding the relationship between human beings and the natural environment, it has the unique ability to provide an umbrella of protection and understanding over the many complex statutory schemes now in place.

It therefore is recommended that minimal objective standards of conduct for our trustees for wildlife, as well as for interpretation of the public trust obligations by the courts, be established. The basic parameters for such standards can be drawn from the many judicial decisions regarding either the public trust, or traditional private or charitable trusts. We can also learn from some of the experiences of other states as to how to avoid pitfalls that will weaken or obfuscate the commitment to the public trust. Some suggestions are as follows:

- There must be no disposition of wildlife resources to any private interest unless the State can ensure the continuation of the public's beneficial rights in those resources.²⁴⁸
- The State may not abdicate its public trust responsibilities. Any unlawful abdication is subject to reversal by the courts.²⁴⁹
- Decision-making with respect to the public trust assets cannot be delegated to any administrative body or official that does not meet the requirements of being sufficiently independent, knowledgeable as to the fiduciary obligations of the trust, shielded from political pressures, and liable for breach of trust.
- Where actions by private persons, whether on private or public lands, have the potential to interfere with the biological sustainability of healthy fish or wildlife populations, such actions should be disallowed, absent substantial proof of a compelling interest in the public health or safety, which clearly outweighs the interest in conservation. Such a finding should be supported by competent, admissible evidence as would be required in a court of law.
- Where public health and safety require an action that has the potential to impact wildlife resources, the trustees have a duty to evaluate alternatives and to choose the least harmful alternative.
- The guiding philosophy of the trust concept is long term conservation of wildlife. Inconvenience or the possibility of economic benefit alone

248. This is the most fundamental element of the public trust mandate as set forth in *Illinois Central v. Illinois*, 146 U.S. 387 (1892).

249. *Id.*

should be insufficient grounds for interference with conservation of trust resources for future generations.

- In order to assist the trustees in fulfilling their obligations, biological surveys and other in-depth ecological studies should be required before the trustees may act.
- The authorizing legislation or constitutional amendment should be interpreted narrowly and with a presumption that there is no intent to alienate the public trust.
- The trustees must be required to set forth in detail the factual findings that support any decision affecting wildlife. Failure to provide sufficient rationale for their decisions should result in the automatic setting aside of the decision.
- The public must have direct access to the courts for review of the trustees' actions. Constitutional recognition of the public trust in wildlife must be self-executing.
- The states should explore new ways to fund wildlife management agencies in a manner that ensures the agencies' ability to fulfill their trust responsibilities without compromise of their integrity and independence.

Through the specific adoption of these principles the public can assure that the rights of future generations of beneficiaries of the public trust will not be compromised.