The Public Trust in Wildlife

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The public trust doctrine, derived from ancient property principles, is thought to mostly apply to navigable waters and related land resources. The doctrine supplies a mediating force to claims of both private ownership and unfettered government discretion over these resources, vesting the state with trust responsibility to ensure that the use of these resources promotes long-term sustainability. A related doctrine—sovereign ownership of wildlife—is also an ancient public property doctrine inherited from England. State ownership of wildlife has long defeated private ownership claims and enabled states to enact and implement wildlife conservation regulations. This paper claims that these two doctrines should be merged, and that state sovereign ownership of wildlife means that wildlife—like navigable waters—is held in trust for the public and must be managed for long-term sustainable use by future generations. Merging the doctrines would mean that state ownership would not only give states with the authority to manage their wildlife populations but also the duty to do so and would equip members of the public with standing to enforce the states’ trust duties in court. This paper shows that the public trust in wildlife has already been employed in California and in several other states, and suggests that it deserves more widespread judicial recognition, particularly—as we demonstrate—that no fewer than forty-seven states use trust or trust-like language in describing state authority to manage wildlife. We include an appendix citing the sources of the wildlife trust in all forty-seven states for reference.

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I. INTRODUCTION

The public trust in natural resources law imposes sovereign duties to prevent impairment of trust resources. The public trust doctrine’s origins date to Roman law and have roots in American jurisprudence as early as 1810, when the Supreme Court of Pennsylvania decided that a riparian landowner along the navigable Susquehanna River could not prevent members of the public from fishing for shad. A decade later, in 1821, the Supreme Court of New Jersey ruled that an adjacent upland owner did not have the right to exclude oystermen from harvesting oysters from the bed of the Raritan River. Nearly twenty years later, in 1842, the U.S. Supreme Court endorsed the public nature of navigable riverbeds in another dispute involving the Raritan River. Near the end of the nineteenth century, the U.S. Supreme Court recognized that the public trust doctrine applied to the bed of Lake Michigan, thereby preventing the privatization of Chicago Harbor. States subsequently enshrined the public trust doctrine in constitutions.

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Footnotes:
2. See THE INSTITUTE OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed. 1841); infra Part II.A (discussing the Roman origins of the public trust doctrine).
3. Carson v. Blazer, 2 Binn. 475, 1810 WL 1292, *5 (Pa.) (concluding that “the owner of land on the banks of the Susquehanna [River], has no exclusive right to fish in the river immediately in front of his lands, but that the right to fisheries in that river is vested in the state, and open to all”).
4. 6 N.J.L. 1 (N.J. Sup. Ct. 1821) (declining to honor an alleged private property interest in the bed of a tidal water and oyster upon it on the basis that the riverbed, and thus the oysters, belonged to the people in common).
5. Martin v. Waddell, 41 U.S. 367 (1842) (concluding that a private proprietor could not exclude the public from use of a tidal water and the oysters upon it); Pollard v. Hagan, 44 U.S. 212 (1845) (extending the state trust in the beds of navigable waters to all newly admitted states).
statutes, and common law, although state public trust doctrines vary in terms of their robustness and breadth.

A related doctrine—that of state sovereign ownership of wildlife—has nearly as old a pedigree as the public trust doctrine and perhaps even more widespread recognition. Also inherited from Roman law, state sovereign ownership of wildlife gained widespread recognition in American states in the early nineteenth century. The U.S. Supreme Court embraced the doctrine just four years after the Chicago Harbor case, and, despite judicial recognition of the limits of state ownership in the context of federal prerogatives, the concept is alive and well in the twenty-first century. At least forty-eight states now claim sovereign ownership of wild animals.

Some courts have interpreted sovereign ownership of wildlife to confer on states the right to control the use of wild animals, but not duties of conservation. Such an interpretation fails to

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7 See, e.g., ALASKA CONST. art. VII, § 3 (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”).
8 See, e.g., MASS. GENERAL LAWS ANN. CONST. AMEND. art. XLIIX (“The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.”).
9 See, e.g., Farris v. Ark. State Game & Fish Comm’n, 310 S.W.2d 231, 235–36 (Ark. 1958) (“The [State Game and Fish] Commission is a trustee for the people of this State, charged with the duty of conserving the wildlife resources. . . . The Commission, as trustee for the people of this state, has the responsibility and is charged with the duty to take whatever steps it deems necessary to promote the interest of the Game and Fish Conservation Program of this state; subject only to constitutional provisions against discrimination, and to any valid exercise of authority under the provisions of the Federal Constitution.”)
10 Under Roman law, wild creatures were res nullius—things owned by no one. See Michael C Blumm & Lucas A. Ritchie, The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife, 35 ENVTL. L. 673, 677 (2005). Having no owner, wild animals were thought to belong to the public in common. Geer v. State of Connecticut, 161 U.S. 519, 522 (1896). Thus governments, as representative of the public, held the right to oversee access to this resource.
14 See infra note 186 (listing the forty-eight states).
15 See, e.g., Susan Morath Horner, Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife, 35 LAND & WATER L. REV. 23, 27–28 (2000) (stating that courts have typically focused on states’ powers to regulate resources, rarely addressing whether states also have obligations to regulate resources).
acknowledge the responsibilities inherent in ownership in a sovereign capacity—that is, states’ sovereign ownership of wildlife creates a trust, with corresponding obligations as well as authorities to preserve wildlife.\textsuperscript{16} If the sovereign ownership of wildlife were understood as part of the public trust doctrine, the resulting wildlife trust doctrine would include both the state’s right to regulate the taking of wild animals and the state duty to preserve the wildlife resource for present and future generations.\textsuperscript{17}

This paper maintains that because states regulate wildlife in their sovereign capacity, sovereign ownership imposes a public trust in wildlife, requiring states to regulate for the common good over the long term. Part II traces the development of the public trust doctrine; Part III provides background on states’ sovereign ownership of wildlife. Part IV then asserts that states’ sovereign ownership of wildlife imposes public trust responsibilities and discusses the development of the wildlife trust doctrine in other states. Part V reviews examples of existing state wildlife trusts, spotlighting a California case in which the California Court of Appeals expressly recognized that state’s public trust in wildlife. Part VI identifies the benefits to states and citizens of employing the public trust doctrine to protect wildlife. The paper concludes that states’ longstanding claims of sovereign ownership of wildlife amount to recognition of a public wildlife trust imposing conservation duties as well as state authority over wildlife, and that other jurisdictions should embrace the California court’s decision.


\textsuperscript{17} See Patrick Redmond, \textit{The Public Trust in Wildlife: Two Steps Forward, Two Steps Back}, 49 NATURAL RES. J. 249, 259 (2009) (“The precise affirmative duties or obligations of the state as trustee . . . have unfortunately been rarely discussed by the courts, but since future generations are among the trust’s intended beneficiaries, these obligations must include the duty to preserve.”).
II. OVERVIEW OF THE PUBLIC TRUST DOCTRINE

Early public trust cases involved navigable waters and the lands submerged beneath them. Two centuries ago, in 1810, the Pennsylvania Supreme Court became the first American court to apply the public trust doctrine, deciding in *Carson v. Blazer* that the state owned, for the benefit of its citizens, the right to fisheries in navigable waters.\(^{18}\) Eleven years later, in *Arnold v. Mundy*, the New Jersey Supreme Court held that a landowner could not prohibit fishermen from harvesting oysters on the bed of the navigable Raritan Bay.\(^{19}\) The U.S. Supreme Court upheld these public rights in 1842 when it considered a very similar fact pattern in *Martin v. Waddell*.\(^{20}\) The Court reiterated the conclusion that a private party could not exclude others from an oyster hatchery the bay,\(^{21}\) confirming the New Jersey Supreme Court’s conclusion that states were the sovereign successors of the English Crown, and thus the public owned the beds of tidal waters in common.\(^{22}\) In 1845, just three years later, the U.S. Supreme Court clarified that states’ sovereign ownership of navigable waters extended to all newly admitted states based on what it characterized as the equal footing doctrine.\(^{23}\)

In what was arguably an extension of these cases, a half-century later in 1892, the Court expressly adopted the public trust doctrine, in *Illinois Central Railroad v. Illinois*, articulately the states’ duties to maintain trust resources for the benefit of the people. In *Illinois Central*, Justice Stephen Field, writing for a 4 to 3 majority, located the public trust doctrine in states’ sovereign

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\(^{18}\) See 2 Binn. 475, 1810 WL 1292, *5 (Pa.)* (concluding that “the owner of land on the banks of the Susquehanna [River], has no exclusive right to fish in the river immediately in front of his lands, but that the right to fisheries in that river is vested in the state, and open to all” and observing that the right to the fishery was “common to all”).

\(^{19}\) 6 N.J.L. 1 (N.J. Sup. Ct. 1821).

\(^{20}\) 41 U.S. 367 (1842).

\(^{21}\) *Id.* at 413–14.

\(^{22}\) *Id.*

ownership of natural resources,\textsuperscript{24} observing that such ownership must be exercised for common good. In response to changing social and legal circumstances, public trust cases have since expanded the scope of the doctrine’s protections beyond navigable waters to include waters not traditionally navigable and to protect public uses other than navigation and fishing.

A. \textit{Origins of the American Public Trust Doctrine}

Under the public trust doctrine, states hold certain natural resources in trust for the benefit of the people.\textsuperscript{25} A trustee owns and manages property for the benefit of designated beneficiaries, who have “equitable” ownership of the property.\textsuperscript{26} Trustees retain legal ownership and have fiduciary obligations to the beneficiaries. According to the public trust doctrine, states serve as trustees, and present and future generations are the beneficiaries.\textsuperscript{27}

Like much American common law, the origins of the American public trust doctrine are British.\textsuperscript{28} British common law distinguished between property that was \textit{jus privatum}—which the Crown could grant to private individuals, and property that was \textit{jus publicum}—which the Crown held in trust for members of the public.\textsuperscript{29} The latter category consisted principally of coastal 

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\item \textsuperscript{24} 146 U.S. 387, 456 (1892) (deciding that Illinois could revoke a conveyance of a substantial part of the bed of Lake Michigan to Illinois Central Railroad on the ground that the state owned submerged lands in trust for the people, and thus could not alienate those lands without clear benefit to the public).
\item \textsuperscript{25} See Richard J. Lazarus, \textit{Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine}, 71 IOWA L. REV. 631, 637–41 (1986) (stating that “[a]t the state level, the public trust doctrine took on a different character, suggesting not only that the state possessed special powers over [] water resources, but also that it owed certain enforceable duties to the public as well,” and outlining early public trust cases).
\item \textsuperscript{26} See Eric T. Freyfogle & Dale D. Goble, \textit{Wildlife Law: A Primer} 33 (2009) (asserting that “[t]rusts are given property not to manage for themselves, but for the benefit of designated beneficiaries,” so “the ‘equitable’ ownership of the property resides directly with the beneficiaries”).
\item \textsuperscript{27} See Redmond, \textit{supra} note 17, at 259 (“The precise affirmative duties or obligations of the state as trustee . . . have unfortunately been rarely discussed by the courts, but since future generations are among the trust’s intended beneficiaries, these obligations must include the duty to preserve.”).
\item \textsuperscript{29} Id.
\end{itemize}
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waters and the rivers affected by the ebb and flow of the tide.\textsuperscript{30} These waterways were uniquely important to the public, providing both a means of navigation and commerce, as well as a food source.\textsuperscript{31} Thus, the American public trust doctrine first arose in the context of navigable waters, the lands submerged beneath them,\textsuperscript{32} and the fishery resources in those waters.\textsuperscript{33} Notably, two of the earliest American public trust cases, \textit{Arnold v. Mundy} and \textit{Martin v. Waddell}, concerned access to oysters growing on the beds of the navigable Raritan Bay.\textsuperscript{34}

\textbf{B. Early Public Trust Cases}

In 1810, in \textit{Carson v. Blazer}, the earliest American public trust case, the issue was whether owners of lands on the banks of the Susquehanna River in Pennsylvania had an exclusive right of fishery opposite their land.\textsuperscript{35} A riparian landowner, Carson, owned 228 acres adjacent to the Susquehanna, and in 1773 his brother had cleared a pool for a shad fishery between the shore and a sandbank 200 yards into the river, and then fished there.\textsuperscript{36} Some two decades later, in 1796, a fishermen, Blazer, further cleared the pool and fished it with his sons afterwards, initially without opposition from Carson.\textsuperscript{37} However, in 1803, Carson sued to exclude Blazer from the pool, claiming the right to excluded the public due to his riparian land ownership.\textsuperscript{38}

In deciding the case, the Supreme Court of Pennsylvania reviewed the history of land and water grants in America. According to the court, in England, private individuals could not

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  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} See Shively v. Bowlby, 152 U.S. 1, 11 (1894) (stating that water is a public resource “for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King’s subjects”).
  \item \textsuperscript{32} See Lazarus, supra note 25, at 647 (“The public trust doctrine historically concerned public rights (traditionally, commerce, navigation, and fishing) in navigable waters and their submerged beds.”).
  \item \textsuperscript{33} See infra pt. III for a discussion of government ownership of wildlife.
  \item \textsuperscript{34} Martin v. Waddell, 41 U.S. 367 (1842); Arnold v. Mundy, 6 N.J.L. 1 (N.J. Sup. Ct. 1821).
  \item \textsuperscript{35} 2 Binn. 475, 1810 WL 1292, *1–2 (Pa.).
  \item \textsuperscript{36} Id. at *1.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} Id. at *2.
\end{itemize}
maintain an exclusive fishery in waters subject to the effects of the tide, but could do so in fresh water rivers unconnected to the tides. 39 Blazer sought to extend that rule to the Susquehanna, which was inland, and thus not affected by the tide. 40 However, the court rejected this assertion, instead distinguishing between navigable and non-navigable waters. 41 It concluded that “the right to fisheries . . . is vested in the state,” and therefore “common to all,” thus holding for Blazer and ruling against Carson’s claimed monopoly. 42

Eleven years after Carson, in Arnold v. Mundy, the New Jersey Supreme Court considered another dispute between a riparian landowner and member of the public, this time involving oyster harvesting in tidal Raritan River. 43 Robert Arnold planted oysters in the river next to his farm, managing to ward off would-be harvesters until Benajah Mundy arrived with a small fleet, 44 forcing a test case. Arnold proceeded to file suit against Mundy, arguing that he owned the submerged lands adjacent to his farm, and thus could exclude Mundy and his colleagues from harvesting the oysters. 45

The New Jersey Supreme Court rejected Arnold’s argument that he possessed exclusive harvesting right, holding that after the American Revolution what formerly were royal rights were now vested in the people, represented by the state as a sovereign. Thus, the riverbed—and

39 Id. at *4. The Court explained:

The whole argument upon the common law thus turns upon a definition, which however correct in England, cannot be defended for a moment in the United States. Those rivers alone are navigable, says the common law [in England], in which the ride ebbs and flows; and all rivers that are not navigable, are private rivers, belonging to the proprietors on each side; therefore rivers in which the ride does not ebb and flow are private rivers . . . .

40 Id. at *5.

41 Id. The Court asserted: “One thing is very clear by this law, that no man has an exclusive fishery in the waters of a navigable river. Every man may fish in a navigable river of common right.” Id. at *5.

42 Id. at *4, 13.


44 Id. at 2.

45 Id. at 7. Arnold maintained that he acquired title to the riverbed from colonial “Proprietors,” who were successors in interest to the Duke of York, of Charles II, King of England, the first grantee. Id.
attached oysters—belonged to the people in common. Chief Justice Andrew Kirkpatrick observed that some natural resources belong to all citizens in common

and are called *common property*. Of this latter kind . . . are the air, the running water, the sea, the fish, and the wild beasts. But inasmuch as the things which constitute this *common property* are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of the title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit.

Writing for the court, Kirkpatrick concluded that Arnold could not exclude Mundy from use of the submerged tidal lands, which included the harvesting of oysters.

Two decades years later, in *Martin v. Waddell* in 1842, the U.S. Supreme Court entered the fray over access to oysters in New Jersey’s Raritan Bay. In *Martin*, in what seemed to be a case attempting to encourage the U.S. Supreme Court to overturn the state court decision in *Arnold*, William Waddell’s lessee filed suit in federal court, seeking to prohibit Merritt Martin and others from continuing an exclusive oyster fishery on one hundred acres of submerged lands in the bay. As the New Jersey Supreme Court had done in *Arnold*, Chief Justice Roger Taney, writing for the U.S. Supreme Court, traced ownership of the lands beneath navigable waters, as well as “the rights of fishery for shell-fish or floating fish,” to the English Crown, concluding

46 *Id.* at 6 (“The right of free fishery passed as an incident to sovereignty in the seas adjacent, which were not granted to the proprietors by the grant of soil, but as annexed to the government. . . . This right passed on the surrender to the crown, and by the Declaration of Independence vested in the people of New Jersey, as sovereign, together with the rights of free fishery, which now can only be granted by the sovereign power.”). The court observed that “this oyster-bed is located in a navigable river, where the tide ebbs and flows, the defendant had a common right to fish there, and, therefore, his entry and taking away the oysters was lawful.” *Id.* at 33.

47 *Id.* at 1 (emphases in original).

48 *Id.* at 33.

49 41 U.S. 367 (1842).

50 *Id.* at 407.

51 *Id.* at 414.

52 *Id.* at 411–14.
that a private proprietor could not exclude the public from use of a public trust resource.\textsuperscript{53} In other words, the \textit{Martin} Court essentially ratified \textit{Arnold},\textsuperscript{54} creating a national rule that the public owned the beds of tidal waters, at least in states that were the sovereign successors of the English Crown.\textsuperscript{55}

Three years after \textit{Martin}, in \textit{Pollard v. Hagan} in 1845, the Court extended the state trust in the beds of tidal waters to all newly admitted states, explaining:

Because the rivers do not pass by grant, but as an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the state or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land, which may be sold, and the right to them passes with a transfer of sovereignty.\textsuperscript{56}

That decision established what is now known as the equal footing doctrine.\textsuperscript{57}

In 1851, the Court once again considered state holdings of the beds of waters. In \textit{The Genesee Chief v. Fitzhugh}, it upheld a congressional extension of admiralty jurisdiction to non-tidal waters used for commerce.\textsuperscript{58} In that case, the Court justified expanding the scope of the public trust doctrine because of the development of steam-powered travel, which opened inland waters to commerce, explaining that in the U.S. there were “thousands of miles of public navigable water, including lakes and rivers in which there is no tide.”\textsuperscript{59} The tidal limitation on the public trust in waterways inherited from England was a poor fit for U.S. geography.\textsuperscript{60}

\textsuperscript{53} \textit{Id.} at 413–14.
\textsuperscript{54} See \textit{id.} at 418 (stating that \textit{Arnold} was decided “with great deliberation and research”).
\textsuperscript{55} See \textit{id.} at 416 (“[W]hen the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.”).
\textsuperscript{56} 44 U.S. 212, 216 (1845) (citing \textit{Martin}, 41 U.S. at 410, 413, 416).
\textsuperscript{57} \textit{Id.} (“The Constitution says, [new states] must be admitted into the union on an \textit{equal footing} with the rest.”) (emphasis added).
\textsuperscript{58} 53 U.S. 443 (1851).
\textsuperscript{59} \textit{Id.} at 457.
\textsuperscript{60} See Michael C. Blumm, \textit{The Public Trust Doctrine—A Twenty-First Century Concept}, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 105, 105–06 (2010) (“[T]he English standard of navigability did not fit the American continent,
Following Pollard and The Genesee Chief, the U.S. Supreme Court considered various limitations on public access to shellfish in Maryland, Virginia, and Massachusetts. In Smith v. Maryland in 1855, the Court reviewed a Maryland law prohibiting the gathering of oysters within state waters by means of scoop or drag. The case arose when a defendant ship owner licensed to fish by the U.S. interfered with the federal power to regulate interstate commerce. The Court rejected the ship owner’s argument, instead concluding that Maryland’s ownership of the seabed, which it referred to as a trust, gave the state the right to limit the oyster fishery.

In 1876, in McCready v. Virginia, the Court considered a Virginia law forbidding citizens of other states from planting oysters in Virginia waters. A oysterman indicted under the law challenged its constitutionality. In that case, Observing that oysters were state citizens’ “common property,” the Court explained:

> The principle has long been settled in this Court that each state owns the beds of all tidewaters within its jurisdiction unless they have been granted away. In like manner, the states own the tidewaters themselves and the fish in them so far as they are capable of ownership while running. For this purpose, the state represents its people, and the ownership is that of the people in their united sovereignty.

The Court proceeded to uphold Virginia’s law and the conviction.

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with its great rivers and lakes. Thus, over a century-and-a-half ago, navigability—central to the historic public trust doctrine, evolved from a coastal to an inland, upriver concept.”); Jan S. Stevens, The Public Trust: A Sovereign’s Ancient Prerogative Becomes the People’s Environmental Right, 14 U.C. DAVIS L. REV. 195, 196 (1980) (“The opening of the Northwest Territory and the purchase of Louisiana presented us with vastly different waters than the seas and rivers of England. Unrestricted use of the inland waterways was a necessity for the development of the country.”).

61 59 U.S. 71 (1855).
62 Id. at 75.
63 Id. The Court limited its holding by explaining: “[W]hat, in general, are the limits of the trust upon which the State holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case, and upon which we give no opinion.” Id.
64 94 U.S. 391 (1876).
65 Id. 394.
66 Id. at 395.
67 Id. at 394 (internal citations omitted).
68 Id. at 397.
Similarly, fifteen years later, in *Manchester v. Commonwealth of Massachusetts* in 1891, a Massachusetts statute prohibited the fishing for menhaden with purse seines, and a Massachusetts resident convicted of violating the law appealed.69 The Court affirmed the state court and upheld Massachusetts’ statute on the ground that the state could regulate navigable waters within its territorial jurisdiction, stating that preserving the fish was for the “common benefit.”70 The next year, in the seminal American public trust case *Illinois Central Railroad v. Illinois*, the U.S. Supreme Court elaborated on the trust language it employed in those early cases.71

### C. *Illinois Central Railroad v. Illinois*

In 1892, in *Illinois Central Railroad v. Illinois*, the U.S. Supreme Court articulated the earlier public ownership cases as establishing the American public trust doctrine, announcing that natural resources are “held by the state, by virtue of its sovereignty, in trust for the public.”72 The *Illinois Central* case concerned the question of whether Illinois could repeal an earlier statute that conveyed significant portions of the bed of Chicago Harbor to Illinois Central Railroad.73 Regretting an 1869 conveyance, the Illinois legislature revoked its grant of ownership in 1873, and the Circuit Court of the Northern District of Illinois upheld Illinois’ revocation of conveyance of the lakebed, concluding that the grant was in trust and was revocable for

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69 139 U.S. 240 (1891).
70 *Id.* at 265.
72 *Id.* at 455 (1892) (affirming the circuit court of the northern district of Illinois, which upheld Illinios’ revocation of a grant to private title in a significant part of Lake Michigan, and recognizing the public trust doctrine). Two members of the Court did not participate in this decision, *see id.* at 476 (Fuller, C.J. & Blatchford, J.), and three justices dissented on the ground that the state retained regulatory authority over Chicago Harbor. *See id.* at 464 (Shiras, Gray, and Brown, JJ., dissenting).
73 *Id.* at 449, 452.
unimproved land. The railroad appealed, and U.S. Supreme Court affirmed the circuit court’s ruling, deciding that Illinois could revoke the conveyance on the ground that the state owned submerged lands in trust for the people, so it could not alienate those lands to a private company without clear benefit to the public.

Justice Field’s majority opinion traced the nature and history of sovereign ownership of waterways. Observing that after the Revolution the original states acquired the sovereign powers of the English king, the Court ruled that in their sovereign capacity states “hold the absolute right to all their navigable waters . . . for their own common use, subject only to the rights since surrendered by the constitution to the general government.” The Court stated that, “by virtue of its sovereignty,” Illinois served as trustee of the submerged lands, holding them in trust for the people. Consequently, Illinois’ grant of the Chicago Harbor lakebed to Illinois Central Railroad was impermissible because it “‘divest[ed] all the citizens of their common right’” to enjoy Lake Michigan. The state could not properly convey property to a private corporation if doing so would significantly compromise the public trust and was not in the best interest of the people.

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74 Illinois v. Ill. Cent. R.R. Co., 33 F.1d 730, 775 (N.D. Ill. 1888) (“The railroad company was not a purchaser of the submerged lands. It paid nothing for them. It only assumed to pay a certain per centum of any income that might be derived from the use of the lands, but it did not come under any enforceable obligation to use them. In short, it accepted the grant of the submerged lands with the knowledge that the only purpose of the state was to improve the harbor of Chicago by the construction and maintenance of wharves, docks, and piers in aid of commerce on the lake, but without assuming any obligation to make the improvements contemplated. The repeal of the act making the grant was therefore nothing more than a change of policy upon the part of the state, which took from the company on franchise or privilege, secured by its charter. The state, in effect, only revoked the license which had been granted to the company to improve the harbor of Chicago, and discharged it from every obligation it might have incurred by entering upon and completing that work.”).  
75 Id. at 463–64. Although there has been some question whether the result of the case ruled that the state grant to the railroad was void or merely voidable by the state, in later opinions the Court seemed to clarify that the conveyance was void as beyond the power of the state. See infra text accompanying notes 75-76.  
76 Id. at 453–54. According to the Court:
Illinois Central remains “the most celebrated public trust case in American law.”

Although the Illinois Central Court examined the public trust doctrine only in the context of waterways, over the years the public trust it recognized has been applied to many other resources, including wildlife. Illinois Central established two essential characteristics of states’ oversight of natural resources: 1) states must regulate use of some resources, such as the beds of navigable waterways, in a sovereign capacity; 2) states’ powers to manage natural resources may be exercised only to further the public interest.

The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which, when occupied, do not substantially impair the public interest in the lands and waters remaining and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.


Although it concluded that Illinois’ conveyance was impermissible, “the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited. What a state may not do, the Court said, is divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power; to grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation.” See Sax, supra note 1, at 489. However, a state may still “use or dispose of any portion [of the state], when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.” Ill. Cent., 146 U.S. at 435.

See Sax, supra note 1, at 489. Although celebrated by many as a judicial check on politically-influenced legislative decisions not ultimately in the public interest, Professors Joseph Kearney and Thomas Merrill argue that a real solution to resource management may “require[] legal rules that presuppose a degree of trust in government to control the use of resources, not radical skepticism in the form of judicially enforced inalienability rules.” Kearney & Merrill, supra note 80, at 930.

See Musiker, France & Hallenbeck, supra note 16, at 91 (noting that the public trust doctrine applies to natural resources more generally, and that application of the doctrine reflects changing public perceptions).

See, e.g., Farris v. Ark. State Game & Fish Comm’n, 310 S.W.2d 231, 235, 236 (Ark. 1958) (“The [State Game and Fish] Commission is a trustee for the people of this State, charged with the duty of conserving the wildlife resources. . . .”).

See Ill. Cent., 146 U.S. at 456 (determining that Illinois held the lakebed in its sovereign capacity).

See id. at 458 (claiming that the state could not convey property if doing so was contrary to the public interest).
Cases following *Illinois Central* found public trust protections for an increasing number of natural resources, evolving to meet public needs. For example, state courts have extended protection to the following: the dry sand area of beaches used for public recreational purposes, wildlife habitat connected to navigable waters, sand and gravel in water beds, state parks, drinking water, groundwater, artificial waters, inland wetlands, marine life, wildlife, and even a historic battlefield. Such extensions indicate that courts are increasingly likely to view the doctrine as inclusive of important natural resources other than navigable waterways.


88 See *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (holding that the public trust encompasses purposes broader than the traditional uses of navigation, commerce, and fishing, including use as open space, for wildlife study, for scientific study, and for swimming).


91 Mayor v. Passaic Valley Water Comm’n, 224 N.J. Super. 53, 64 (1987) (stating that the public trust doctrine includes drinking water resources).

92 *In re Water Use Permit Applications for the Waiahole Ditch*, 9 P.3d 409 (Haw. 2000).

93 Parks v. Cooper, 676 N. W. 2d 823 (S.D. 2004) (relying on public ownership of all state water to establish public access to three lakes created on private land by several unseasonably wet years); *McQueen v. South Carolina Coastal Council*, 124 S.Ct. 466 (2003).

94 See *Just v. Marinette County*, 201 N.W.2d 761, 769 (Wis. 1972).


III. STATES’ SOVEREIGN OWNERSHIP OF WILDLIFE

Like the public trust doctrine, sovereign ownership of wildlife first surfaced in Roman legal theory and then threaded its way through the common law of England, then following early colonists to the United States. States then inherited sovereign ownership of wildlife from English royalty at statehood. The U.S. Supreme Court issued a strong confirmation of states’ sovereign ownership of wildlife in 1896 in \textit{Geer v. State of Connecticut}. Now, despite some confusion about the viability of the \textit{Geer} decision, state ownership of wildlife in a sovereign capacity is the overwhelming majority view.

\textbf{A. Origins}

The origin of states’ sovereign ownership of wildlife lies in the Roman civil law tradition. Under Roman law, wild creatures were \textit{res nullius}—things owned by no one.

\begin{itemize}
\item \textsuperscript{99} See \textit{Sax}, supra note 1, at 475–76.
\item \textsuperscript{100} \textit{Geer v. State of Connecticut}, 161 U.S. 519, 529 (1896) (stating that wildlife belongs to the state in its sovereign capacity, and then affirming the Supreme Court of Errors of the State of Connecticut’s holding that the defendant was guilty of possessing game out of season with intent to transport it across state lines, and recognizing states’ sovereign ownership of wildlife). \textit{Hughes v. Oklahoma} overruled \textit{Geer v. Connecticut} in 1979, ruling that a state could not use its sovereign ownership to interfere with interstate commerce by discriminating against other states’ citizens’ use of wildlife within its borders, but \textit{Hughes} left states’ sovereign ownership of wildlife intact. 441 U.S. 322, 335–36 (1979) (asserting that “the general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership”).
\item \textsuperscript{101} See \textit{supra} pt. III.B.2 for a discussion of \textit{Geer}.
\item \textsuperscript{102} See infra at Appendix.
\item The roots of the concept of states’ sovereign ownership of wildlife may extend even farther back in history, to the natural law philosophies of Greek Stoicism. See Horner, \textit{supra} note 15, at 31.
\item \textsuperscript{104} See Blumm & Ritchie, \textit{supra} note 10, at 677. \textit{Res nullius} constituted one subcategory of the larger category of \textit{res extra patrimonium}, meaning things owned by no particular individual, which were contrasted with \textit{res in patrimonium}, the things owned by someone. \textit{Id.} As Professor Joseph Sax explained, such categories “were a response to what the Romans conceived to be the physical nature of certain properties—things that were abundant
Having no owner, wild animals “were considered as belonging in common to all citizens of the state.” Animals *ferae naturae*, or “of a wild nature,” became individual property only when under the control of a captor, now known as the rule of capture. Believing that private ownership of wildlife was natural, the Romans implemented few restrictions on the capture of wild animals. Nevertheless, the Roman state retained sovereign power to regulate the harvest of wildlife.

English common law initially reflected the Romans’ relatively unfettered rule of capture. However, over time the English version of the rule of capture became a more restrained iteration, because eventually only the English Crown exercised significant authority over wild animals and their habitat. In medieval England, the crown, not landowners or private citizens, owned game animals, which were essentially all wild animals with economic value.

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105 See *Geer*, 161 U.S. at 522.

106 See Favre, *supra* note 103, at 243 (“Under Roman law, title to wild animals could be obtained only by exhibiting physical control of the animal.”); Hudson, *supra* note 98, at 105 (asserting that under Roman law wild animals “were reducible to ownership by any person who could capture them”).

107 See Blumm & Ritchie, *supra* note 10, at 677 (“Roman jurists accepted without argument that animals *ferae naturae* were capable of qualified private ownership. Indeed, Romans believed that private ownership was natural.”).

108 See Hudson, *supra* note 98, at 106 (“[T]he [U.S.] Supreme Court has reasoned that Roman conceptions of natural law placed little restriction on the power of an individual to take and control wildlife.”).

109 See *Geer*, 161 U.S. at 522 (asserting that “[f]rom the earliest traditions, the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power” and discussing the origins of the trust in wildlife as emanating from Roman civil law). See Blumm & Ritchie, *supra* note 10, at 678–79 (“Roman citizens’ right to take wildlife was not absolute. While rarely employed, the Roman state maintained the sovereign power (imperium) to control the harvest of animals *ferae naturae*. . . . The Roman rule of capture, while granting freedom to take animals in most circumstances, never permitted an unrestricted harvest.”).

110 See Favre, *supra* note 103, at 245 (stating that “English law first reflected the Roman’s concept of free access to all animals, without state interference but was later modified on behalf of the Crown to permit the taking of a game animal only with royal permission”).

111 See Blumm & Ritchie, *supra* note 10, at 679 (“The rule of capture prevailed throughout common law England. However, the authority employed by the English Crown over wild animals and their habitat produced a different and much more restrictive permutation of the rule than in Roman law. . . . Under the laws of England, limitations on wildlife appropriation by private individuals were pervasive.”).

112 See FREYFOGLE & GOBLE, *supra* note 26, at 22 (“The legal rule in medieval England was that game species were owned by the Crown, not by landowners or other private citizens. Game animals could be hunted or harvested only with the Crown’s permission.”).
As a result, citizens could harvest wildlife only if they had permission from the king.\textsuperscript{113}

Beginning in 1066, the king had the power to designate certain landscapes as royal forests, which he oversaw for the benefit of himself and his favored subjects.\textsuperscript{114} Royal forest laws protected both game animals and the plants on which those animals relied, and violations of forest laws could result in severe punishment.\textsuperscript{115} The king also had authority to issue hunting franchises, granting exclusive hunting privileges to wealthy individuals in order to gain influence, endear himself to nobility, and raise money.\textsuperscript{116} In addition to game animals, as the owner of English lands beneath tidal waters, the king owned both fish and shellfish.\textsuperscript{117}

Early English common law did not distinguish between proprietary and sovereign powers, since both were lodged in the crown,\textsuperscript{118} referred to as the king’s “prerogative.”\textsuperscript{119} As head of the government, the king held the sovereign power to regulate wildlife harvests. The

\begin{itemize}
  \item \textsuperscript{113}See id. Some species—whales, sturgeons, and swans—were expressly characterized as “royal” species, because of their unique cultural value. \textit{Id.}
  \item \textsuperscript{114}See Blumm & Ritchie, \textit{supra} note 10, at 680; Echeverria & Lurman, \textit{supra} note 103, at 339 (asserting that “[u]nder English common law, private landowners were under an obligation to support wildlife by retaining adequate forage and cover and by allowing forest officials to enter their land to remove vegetation needed for wildlife”); \textit{Freyfogle & Goble, supra} note 26, at 22 (observing of the designated royal forest lands that “many . . . [were] occupied by people and some [were] not even forested”).
  \item \textsuperscript{115}See Blumm & Ritchie, \textit{supra} note 10, at 680 (reporting that violators of forest laws “were punished, sometimes severely. Impermissibly entering or damaging the forest, or illegally planting crops on designated lands, resulted in monetary fines for the wrongdoer. Poaching food in the forest, meanwhile, was punishable by castration, banishment, and even death.”).
  \item \textsuperscript{116}See Dale D. Goble & Eric T. Freyfogle, \textit{Wildlife Law: Cases and Materials} 197 (2d ed. 2010) (stating that a “critical aspect of this period was the King’s constant need for revenue and his concomitant inclination to raise money by selling a wide variety of ‘franchises’ . . . . To solidify influence, gain favor, and raise money, the Crown often granted such exclusive franchises to private parties.”).
  \item \textsuperscript{117}See \textit{id.} at 24 (“As owner of all lands beneath tidal waters, the king owned the fish and shellfish in the waters.”).
  \item \textsuperscript{118}See Goble & Freyfogle, \textit{supra} note 116, at 197; Blumm & Ritchie, \textit{supra} note 10, at 679 (“English law did not recognize modern distinctions between proprietary and sovereign powers. The king not only exercised the lawmaking powers of a sovereign; as the head of the feudal landholding system, he also maintained extensive proprietary rights.”).
  \item \textsuperscript{119}See Dale D. Goble, \textit{Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land}, 35 \textit{Envtl. L.} 807, 837 (2005) (“Thus, property and sovereignty were metaphorically and legally joined in wildlife [in the U.S.] In England, the court would have spoken of the Crown’s ‘prerogative[,]’ which was a conjunction of property and sovereignty. Royal prerogative, however, was unacceptable in America. Hence the need for different terminology.”).
\end{itemize}
kind was also a major property owner and in control of the feudal land-holding system. Eventually, English courts concluded that the king’s ownership interest in wildlife was sovereign rather than proprietary, which meant that the king was then obligated to manage wildlife for the benefit of all the people of his kingdom rather than his own individual interest. As sovereign, the king had a duty to manage both game animals and fish and shellfish for the general benefit of his realm.

As the king’s ownership interest in wildlife evolved, sovereign and proprietary powers came to be thought of as distinct, with sovereign power involving governance for the benefit of the public and the proprietary power belonging to individuals, including the king. The king’s powers subsequently declined, due to transfers to landholders and the rise of parliamentary authority. By the time of the American Revolution, sovereignty and proprietorship were understood to be separate forms of power.

B. Sovereign Ownership of Wildlife in America

Colonial governments inherited the crown’s governance powers, including the power to regulate wildlife harvests. At statehood, the original states acquired the powers vested in the

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120 See Goble & Freyfogle, supra note 116, at 197 (“The king not only headed what we now call the government (and thus exercised law-making powers), he also stood at the apex of a feudal land-holding system (and in that capacity exercised what we would not term property rights).”).
121 See Freyfogle & Goble, supra note 26, at 23 (“All valuable wild species, English courts eventually decided, were owned by the king, but they were owned in a sovereign rather than proprietary capacity. This meant, importantly, that the king was obligated to manage wildlife in the interests of the entire realm, rather than for his personal benefit.”).
122 See id. at 24 (“As owner of all lands beneath tidal waters, the king owned the fish and shellfish in the waters.”).
123 See Goble & Freyfogle, supra note 116, at 340 (“Over time, sovereignty and property came to be perceived as different things—and in both, the King’s powers slowly declined.”).
124 See id. (clarifying that the powers formerly reserved for the Crown were split between landholders and Parliament).
125 See id. (“By the time of the American Revolution, the line between sovereignty and property—although still contested—had been sufficiently clarified that people understood them to be different forms of power.”).
126 See Freyfogle & Goble, supra note 26, at 22.
American colonies, and new states acquired powers equal to the original states. But unlike in feudal England, harvesting wildlife in America was not an elite right conditioned on wealth or noble birth. In fact, according to Professor Lund, “hunting was arduous and dangerous, and the returns probably so small, that only those without other prospects were willing to devote their energies exclusively to hunting.” Nevertheless, colonists relied on captured wild animals for food and clothing.

In early America, as in Rome, the rule of capture governed harvest, basically permitting anyone who captured or killed wild animals to obtain title to them. The rule of capture often extended even to those hunting or fishing on another’s unfenced land, despite the law of trespass. From the seventeenth century to the nineteenth century, wild animals provided a source of food and, for market hunters, a source of income, assuming an important role in the

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127 Geer v. State of Connecticut, 161 U.S. 519, 527–28 (1896) (stating that “this attribute of government to control the taking of animals ferae naturae, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.”).

128 See Freyfogle & Goble, supra note 26, at 25 (“Sovereign power passed to the several states for their separate exercise.”).

129 See Pollard v. Hagan, 44 U.S. 212, 224 (1845) (explaining that newly admitted states enjoy the same propriety authority over the beds of navigable waters, due to the “equal footing” doctrine).

130 See Blumm & Ritchie, supra note 10, at 685 (“America’s early settlers promptly rejected their mother country’s legacy of conditioning the right to take game on wealth and birthright.”).


132 See id. at 704. Early colonial policies sought to provide a sustained yield of game and to serve agricultural needs by eliminating animals seen as pests, thus encouraging the harvest of wildlife. See Favre, supra note 103, at 248 (asserting that bounty laws “were enthusiastically enacted to eliminate predators which the colonists perceived as a threat to either their domestic livestock or to the species of wildlife preferred by hunters”).

133 See Favre, supra note 103, at 247 (In America, “[t]he complexities of the English law governing the taking of wild animals were stripped back to the bare Roman bones, which permitted anyone who captured or killed wild animals to obtain title to them.”).

134 See, e.g., McConico v. Singleton, 1818 WL 787 (S.C. 1818) (“The forest was regarded as a common, in which they entered at pleasure, and exercised the privilege; and it will not be denied that animals, ferae naturae, are common property, and belong to the first taker.”) (emphasis in original); see also Favre, supra note 103, at 247 (“[T]he right of all people to fish and hunt, even on another’s land, often was recognized despite the law of trespass.”).

135 Market hunters were hunters who killed game to sell in local or interstate markets, rather than for personal use. See Goble, supra note 119, at 818–19. Professor Dale Goble refers to the extinction resulting from an incentive to exploit wildlife before the next person arrived to do so as the “‘Tragedy of the Market,’ since the problem arises
However, harvest practices without limits encouraged overexploitation, as hunters competed to capture the economic benefits from trade in wild animals, and this practice soon devastated wildlife populations. Consequently, at the dawn of the twentieth century, nearly every species of large mammal in the continental U.S. was absent from most of its original range.

In the early nineteenth century, many states passed legislation regulating harvest of wildlife in order to preserve wild animals as a food source, and some states proclaimed ownership of wildlife in statutes and constitutions. Initially, states were primarily concerned with preserving resources that had been easily accessible to colonists, and thus prone to overharvesting. For example, in 1710, in the colonial era, the Massachusetts Bay colony had...
passed a law restricting access to fowl near towns.\textsuperscript{141} Other early examples of wildlife regulation included legislation preserving a near-shore oyster fishery,\textsuperscript{142} deer hunting near settlements,\textsuperscript{143} and fish harvesting in nearby river systems.\textsuperscript{144} During the nineteenth century, as the effects of harvesting intensified and expanded, state and territorial regulation of wildlife grew.\textsuperscript{145} Inevitably, some of those convicted under statutory restrictions on taking wild animals challenged states’ right to oversee harvest.

1. \textit{Early Sovereign Ownership Cases}

Although a number of the early cases discussing public access to wildlife resources are commonly thought of as public trust cases, they should also be thought of as state sovereign ownership cases, at least of finfish and shellfish. Of the three earliest American public trust cases, one, \textit{Carson v. Blazer},\textsuperscript{146} concerned access to a shad fishery, and the other two, \textit{Arnold v. Mundy},\textsuperscript{147} and \textit{Martin v. Waddell},\textsuperscript{148} centered on disputes over access to oysters. Subsequently, as discussed above,\textsuperscript{149} the U.S. Supreme Court considered state governance of use of wild animals in \textit{Smith v. Maryland},\textsuperscript{150} \textit{McCready v. Virginia},\textsuperscript{151} and \textit{Manchester v. Commonwealth of Massachusetts}.\textsuperscript{152}

\textsuperscript{142} See \textit{Martin v. Waddell}, 41 U.S. 367, 417 (1842).
\textsuperscript{143} [1741] New York Laws ch. 723, 22d Assembly, 5th Sess., in 3 \textit{THE COLONIAL LAWS OF NEW YORK} 1 (1894).
\textsuperscript{145} See Michael J. Bean & Melanie J. Rowland, \textit{THE EVOLUTION OF WILDLIFE LAW} 12 (1997) (“[P]rior to 1900 the only federal wildlife legislation was limited in scope and relatively insignificant in impact. There was, however, a steady growth in the regulation of wildlife at the state and territorial levels. The few Supreme Court cases that considered the validity of this regulation uniformly upheld it.”). For a discussion of early American wildlife law, consult Lund, supra note 130.
\textsuperscript{146} 2 Binn. 475, 1810 WL 1292 (Pa.).
\textsuperscript{147} 6 N.J.L. 1 (N.J. Sup. Ct. 1821).
\textsuperscript{148} 41 U.S. 367 (1842).
\textsuperscript{149} See supra pt. II.B.
\textsuperscript{150} 59 U.S. 71 (1855).
\textsuperscript{151} 94 U.S. 391 (1876).
\textsuperscript{152} 139 U.S. 240 (1891).
In *Arnold*, Chief Justice Kirkpatrick clarified that states’ public trust duties arose from sovereign ownership of natural resources. According to the Chief Justice, “common property” resources, which include “the sea, the fish, and the wild beasts,” were “placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit.” He elaborated on this statement by explaining that “the right of the soil in navigable rivers . . . with the exclusive right to what are called royal fish, are vested in the state, the sovereign power, as a part of the prerogative of the sovereign power.” Thus, from the outset, the American public trust doctrine was founded on the principle of sovereign ownership.

As in *Arnold*, sovereign ownership of wildlife was central in some of the U.S. Supreme Court’s earliest public trust cases. For example, in *Smith*, the Court explained that submerged soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. . . . This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held.

Two decades later, in *McCready*, the Court was express in stating that states owned the beds of navigable waters, and the fish in those waters, as a result of its sovereignty:

> [E]ach state owns the beds of all tidewaters within its jurisdiction unless they have been granted away. In like manner, the states own the tidewaters themselves and the fish in them so far as they are capable of ownership while running. For this purpose, the state represents its people, and the ownership is that of the people in their united sovereignty.

The Court cited this language again in *Manchester*.

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153 Id. at 1.
155 59 U.S. 71, 74–75 (1855) (internal citations omitted).
156 94 U.S. 391, 394 (1876) (internal citations omitted).
157 139 U.S. 240, 260 (1891).
As these decisions indicate, court recognition of states’ sovereign ownership of wildlife can be traced to early public trust cases, in addition to seventeenth century legislation. Subsequently, just before the turn of the twentieth century, the U.S. Supreme Court dealt at length with the nature of state control of wild animals in *Geer v. State of Connecticut*.

2. *Geer v. Connecticut*

In 1889, the state of Connecticut charged Edward Geer with possessing woodcock, ruffled grouse, and quail with the intent to transport them across state lines. Geer had killed the birds during hunting season and was therefore permitted to possess them, but a state statute forbade transporting them outside the state. A Connecticut police court convicted Geer for unlawful possession of the fowl and imposed a fine, which Geer appealed. The criminal court of common pleas judged Geer guilty and ordered him to pay costs as well as the fine. Geer again appealed, but the state Supreme Court of Errors upheld his conviction.

Geer subsequently obtained review from the U.S. Supreme Court. The only question before the Court was whether Connecticut could regulate game in a manner that made possession of the game within the state lawful but subsequent transport of the same game to another state impermissible. In affirming the state courts, the Court outlined the history of sovereign control

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158 161 U.S. 519, 529 (1896) (asserting that “[t]he wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.”) (internal citation omitted).
159 See id. at 521.
160 Id. at 520.
161 See id.
162 See id.
163 See id.
164 Id. at 521–22.
165 Id. at 522. In the words of the Court, “the sole issue which the case presents is, was it lawful, under the constitution of the United States, for the state of Connecticut to allow the killing of birds within the state during a designated open season, to allow such birds, when so killed, to be used, to be sold, and to be bought for use, within
of wildlife, deciding that examples of judicial recognition of the states’ right to regulate wild animals were “numerous.”  

The Court discussed the purpose and extent of states’ regulatory power over wildlife. According to Justice Edward White, this “power or control lodged in the state, resulting from [] 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 good.” The Court observed that the state represents the public, and that ownership of wildlife is that of the people “in their united sovereignty,” identifying the state as having a duty to protect the public interest. Thus, in Geer v. Connecticut, the 1896 Court confirmed that states own wildlife in a sovereign sense and indicated that the authority to ensure conservation of wildlife is inherent in state ownership.

C. Modern Sovereign Ownership of Wildlife

Although the state sovereign ownership of wildlife articulated in Geer is still alive and well, excluding other states’ citizens from access to resources has not withstood the test of time, beginning with Missouri v. Holland and extending through Hughes v. Oklahoma. In 1920, in Missouri v. Holland, the U.S. Supreme Court considered whether the Migratory Bird Treaty

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166 *Id.* at 528 (citing U.S. Supreme Court cases, as well as cases in New York, Illinois, Minnesota, California, Arkansas, New Jersey, Ohio, Indiana, and Missouri).

167 *Id.* at 530–35.

168 *Id.* at 529.

169 *Id.*

170 252 U.S. 416 (1920).

Act (MBTA) was a valid exercise of federal power. Missouri argued that the MBTA impermissibly infringed on powers reserved to the states by the Tenth Amendment of the U.S. Constitution, to which Justice Oliver Wendell Holmes replied: “No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers.” Missouri v. Holland thus established the federal government’s right to carry out wildlife protection, despite the state ownership doctrine.

Subsequent state challenges to federal oversight of wildlife were similarly unsuccessful. Eight years after Missouri v. Holland, in Hunt v. United States, the Court again affirmed federal power over wildlife by dismissing state objections to the U.S. Forest Service’s choice to kill what it deemed excess deer, in violation of state law. Next, in Toomer v. Witsell in 1948, the Court rejected a state’s out-of-state shrimp boat licensing fee that greatly exceeded in-state licensing fees. Then, in the 1976 case Kleppe v. New Mexico, the Court upheld the federal Wild Free-Roaming Horses and Burros Act, which sought to protect wild burros and horses on federal land. The state objected on the basis that the animals were state property, but the Court held that federal power over wildlife on federal land was plenary, limited only by the U.S. Constitution. One year later, in Douglas v. Seacoast Products, Inc., the Supreme Court held unlawful a state law prohibiting vessels owned by nonresidents from fishing in state waters.

172 252 U.S. 416.
173 Id. at 434.
177 Id. at 536–41.
Three years after Kleppe, the Court again reviewed state sovereign ownership of wildlife. In Hughes v. Oklahoma, the Court overruled Geer’s conclusion that forbidding the entry of game into interstate commerce was constitutional. In that 1979 decision, the Court considered the constitutionality of an Oklahoma law forbidding the transport of natural minnows out of the state, concluding that the law impermissibly infringed on interstate commerce, in violation of the Commerce Clause of the U.S. Constitution. However, the Hughes Court stated that “the general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership.” Nonetheless, states continue to rely on Geer in support of state regulation of wildlife.

Despite these cases limiting states power over wild animals vis-à-vis the federal government, state sovereign ownership of wildlife has not diminished in importance, and preserving this resource still serves a variety of important concerns. For example, trappers, guides, wildlife biologists, wildlife agency employees, and commercial fishermen still rely on wildlife for their livelihood. Others committed to conservation include consumptive users like sports hunters and fishermen, as well as non-consumptive users, such as bird- and whale-watchers, photographers, vacationers visiting state and national parks. Given the strong interest in maintaining wildlife populations, it is hardly a surprise that at present, at least forty-

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180 Id. at 336–37.
181 Id. at 337–38.
182 Id. at 335–36.
183 E.g., Pullen v. Ulmer, 923 P.2d 54, 60 (Alaska 1996) (finding that “nothing in [Hughes] . . . indicated any retreat from the state’s public trust duty discussed in Geer”); State v. Fertterer, 841 P.2d 467, 470–71 (Mont. 1992) (noting that Hughes abandoned title ownership, but that the state continues to have sovereign ownership over wildlife).
184 See, e.g., Coggins, supra note 138, at 296 (noting that “[m]any significant private interests are directly or indirectly affected by wildlife regulations,” and listing examples).
eight states claim ownership of wildlife. But states’ resounding confirmation of their sovereign ownership of wild animals has not always conferred conservation benefits on the public.

185 Alabama: ALA. CODE § 9-11-81 (2011) (“The title ownership to all fish in the public fresh waters of the State of Alabama is vested in the state for the purpose of regulating the use and disposition of the same in accordance with the provisions of the laws of this state and regulations based thereon.”); ALA. CODE § 9-11-230 (2011) (“The title and ownership to all wild birds and wild animals in the State of Alabama or within the territorial jurisdiction of the state are vested in the state for the purpose of regulating the use and disposition of the same in accordance with the laws of the state.”); Rogers v. State, 491 So. 2d 987, 990 (Ala. Crim. App. 1985) (“The authority of the state to regulate the hunting of its game animals derives from the long established and well recognized principle of law that ownership of wild animals is vested in the state.”); Alaska: Shepard v. State, Dep’t of Fish & Game, 897 P.2d 33, 40 (Alaska 1995) (interpreting the Alaska Constitution to establish that “the natural resources of the state belong to the state . . . .”); Arizona: A RIZ. REV. STAT. ANN. § 17-102 (2011) (“Wildlife, both resident and migratory, native or introduced, found in this state, except fish and bullfrogs impounded in private ponds or tanks or wildlife and birds reared or held in captivity under permit or license from the commission, are property of the state.”); Arkansas: A R.K.S.A. § 15-43-104 (2011) (“All game and fish except fish in private ponds found in the limits of this state are declared to be the property of this state. The hunting, killing, and catching of the game and fish are declared to be privileges.”); California: People v. Brady, 286 Cal. Rptr. 19, 22 (Cal. Dist. Ct. App. 1991) (“We conclude that like other wild game, the abalone caught in the state’s coastal waters belong to the people of the State of California in their collective, sovereign capacity . . . .”); Colorado: Collopy v. Wildlife Comm’n, Dep’t of Natural Res., 625 P.2d 994, 999 (Colo. 1981) (“[T]he ownership of wild game is in the state for the benefit of all people.”) (internal citation omitted); Connecticut: State v. Gilletto, 98 Connecticut 702, 706 (Super. Ct. of Errors of Conn. 1923) (“As bearing upon the peculiar right of the General Assembly to Legisl ate as to animals ferae naturae on account of the ownership of property in them being in the state for the benefit of the people at large, as well as in exercise of the police power.”); Florida: Harper v. Galloway, 51 So. 226, 228 (Fla. 1910) (“Under the common law of England the title to animals ferae naturae or game is in the sovereign, for the use and benefit of the people.”); Georgia: G A. CODE ANN. § 27-1-3(b) (2011) (“The ownership of, jurisdiction over, and control of all wildlife, as defined in this title, are declared to be in the State of Georgia, in its sovereign capacity, to be controlled, regulated, and disposed of in accordance with this title.”); Hawaii: Murphy v. Hitchcock, 22 Haw. 665, 668 (Super. Ct. of the Territory of Haw. 1915) (“Fish in public waters, like animals ferae naturae, belong to the public, in which individuals, as such, have no property interests so long as such fish are in public waters.”); Idaho: I D AHO CODE ANN. § 36-103(a) (2011) (“All wildlife, including all wild animals, wild birds, and fish, within the state of Idaho, is hereby declared to be the property of the state of Idaho.”); Illinois: 515 ILL. COMP. STAT. ANN. 5/5-5 (2011) (“The ownership of and title to all aquatic life within the boundaries of the State, are hereby declared to be in the State.”); 520 ILL. COMP. STAT. ANN. 5/2.1 (2011) (“The ownership of and title to all wild birds and wild mammals within the jurisdiction of the State are hereby declared to be in the State.”); Indiana: I ND. CODE § 14-22-1-1 (West 2011) (“All wild animals except those that are: (1) legally owned or being held in captivity under a license or permit as required by this article; or (2) otherwise excepted in this article are the property of the people of Indiana.”); Iowa: IOWA CODE § 481A.2 (2011) (“The title and ownership of all fish, mussels, clams, and frogs in any of the public waters of the state, and in all ponds, sloughs, bayous, or other land and waters adjacent to any public waters stocked with fish by overflow of public waters, and of all wild game, animals, and birds, including their nests and eggs, and all other wildlife, found in the state, whether game or nongame, native or migratory, except deer in parks and in public and private preserves, the ownership of which was acquired prior to April 19, 1911, are hereby declared to be in the state.”); Kansas: K AN. STAT. ANN. § 32-703 (West 2011) (“The ownership of and title to all wildlife, both resident and migratory, in the state, not held by private ownerships, legally acquired, shall be, and are hereby declared to be in the state.”); Kentucky: Nicoulin v. O’Brien, 172 Ky. 473, 481 (1916) (“stating that there is a “well-established principle that, by reason of the state's control over fish and game within its limits, it is within the police power of its Legislature, subject to constitutional restrictions, to enact such general or special laws as may be reasonably necessary for the protection and regulation of the public's right in its fish and game”); Louisiana: Leger v. Louisiana Dep’t of Wildlife & Fisheries, 306 So. 2d 391, 394 (La. Ct. App. 1975) (“We have concluded that the wild birds and wild quadrupeds found in the state are owned by the State of Louisiana in its sovereign capacity, as distinguished from its proprietary capacity, and that it owns them solely as trustee for the use and common benefit of the people of the state. Because of its ownership in a sovereign capacity, and in the exercise of its police power, the state may regulate and control...
the taking and subsequent use of wild birds and wild quadrupeds, and the property rights which may be acquired in them."); Maine: State of Maine v. M/V Tamano, 357 F.Supp. 1097, 1101 (D.C. Me. 1973) (“It is a well settled principle of the common law that the fish in the waters of the state, including the sea within its limits as well as the game in its forests belong to the people of the State in their collective sovereign capacity.
”) (internal citation omitted); Maryland: State of Maryland, Dep’t of Natural Res. v. Amerada Hess Corp., 350 F.Supp. 1060, 1066 (D.C. Md. 1972) (stating that “the ownership of all game animals and birds is in the people in their sovereign capacity, that is, in the State”)
) (internal citation omitted); Massachusetts: Commonwealth v. Worth, 23 N.E.2d 891, 3894 (Mass. 1939) (“The title or ownership of the deer being in the Commonwealth in trust for the public and no individual having any property rights to be affected, the result of the legislation is to grant to the individual upon careful[ly] guarded conditions, a privilege, to hunt and possess the game.”); Michigan: Glave v. Michigan Terminix Co., 407 N.W.2d 36, 37 (Mich. Ct. App. 1987) (“[W]ild game’ belongs to the state and is subject to the state’s power of regulation and control.”); Minnesota: MINN. STAT. ANN. § 97A.025 (2011) (“The ownership of wild animals of the state is in the state, in its sovereign capacity for the benefit of all the people.”); Mississippi: Smith v. State, 646 So. 2d 538, 545 (Miss. 1994) (“[Those who headlight deer] have no respect whatsoever for the State of Mississippi’s sovereign ownership of such magnificent God given creatures of the wild, entrusted to mankind for his consumption and/or enjoyment. They fail to recognize that such animals are for the benefit of all mankind, nor do they heed the State’s laws regulating the taking, possession, or prohibition against certain acts regarding wildlife. To say that headlighters fail to understand the principles of good conservation management and stewardship of our abundant wildlife resources in order to secure the survival of the species for future citizens, is an understatement.”); Missouri: MO. REV. STAT. § 252.030 (Vernon 2011) (“The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri.”); Montana: Rosenfeld v. Jakways, 216 P. 776, 777 (Mont. 1923) (“That the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally, and that neither such animals nor parts thereof are subject to private ownership except in so far as the state may choose to make them so, are principles now too firmly established to be open to controversy.”); Nevada: NEV. REV. STAT. ANN. § 501.100(1) (West 2011) (“Wildlife in this state not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada.”); New Hampshire: St. Regis Paper Co. v. New Hampshire Water Res. Bd., 92 N.H. 164, 169 (N.H. 1942) (“The reference is to water, rivers and streams which are public. Until disposed of, by grant from the legislature of ownership or easement therein, they belong to the State in full and unrestricted title. As sometimes expressed, the State holds them in trust for the public. But the public right is a State right which the legislature may control, take away or cede at its will.”); New Jersey: ZRB, LLC v. New Jersey Dept. of Envtl. Prot., Land Use Regulation, 959 A.2d 866, 879 (N.J. Super. Ct. App. Div. 2008) (“Wildlife is the common property of all and held in trust by the State for the benefit of all its people.”) (quoting the state legislature’s discussion of New Jersey’s Endangered Species Act); New Mexico: State of New Mexico v. Morton, 406 F.Supp. 1237, 1238 (D.N.M. 1975) (“The doctrine of the common law, dating back to the Roman law, has been that wild animals are owned by the state in its sovereign capacity, in trust for the benefit of the people. This sovereign ownership vested in the colonial government and was passed to the states. Even though the state ownership doctrine has been described as a legal fiction, it has never been abrogated.”); New York: N.Y. ENVTL. CONSERV. LAW § 11-0105 (McKinney 2011) (“The State of New York owns all fish, game, wildlife, shellfish, crustacea, and protected insects in the state.”); North Carolina: N.C. GEN. STAT. ANN. § 113-131(a) (West 2011) (“The marina and estuarine and wildlife resources of the State belong to the people of the State as a whole.”); North Dakota: N.D. CENT. CODE ANN. § 20.1-01-03 (West 2011) (“The ownership of and title to all wildlife within this state is in the state for the purpose of regulating the enjoyment, use, possession, disposition, and conservation thereof, and for maintaining action for damages as herein provided.”); Ohio: OHIO REV. CODE ANN. § 1531.02 (Baldwin 2011) (“The ownership of and title to all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in trust for the benefit of all the people.”); Oklahoma: OKLA. STAT. tit. 29, § 7-204 (2011) (“All wildlife found in this state is the property of the state.”); Oregon: OR. REV. STAT § 498.002 (2011) (“Wildlife is the property of the state.”); Pennsylvania: 34 PA. STAT. ANN. § 2161(a) (West 2011) (“The proprietary ownership, jurisdiction and control of game or wildlife . . . is vested in the Commonwealth.”); Rhode Island: State v. Kofines, 33 R.I. 211, 219 (R.I. 1911) (“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 this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the 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 good.”); South
Although conservation responsibilities are inherent in the concept of state sovereign ownership of wildlife, states often seem to assume they have the powers of a trustee, but not the accompanying duties.  Consequently, the primary practical effect of states’ sovereign ownership has been that states have the right to protect wildlife. Recognition of the obligations that derive from that authority has been far less common.

IV. THE PUBLIC TRUST IN WILDLIFE

There are four interrelated reasons why the public trust in wildlife has a solid historical foundation and therefore is likely to be employed by an increasing number of courts in the coming years. First, state preservation of wildlife is grounded in the states’ nearly unanimous

California: S.C. CODE ANN. § 50-1-10 (Law. Co-op. 2010) (“All wild birds, wild game, and fish . . . are the property of the state.”); South Dakota: S.D. CODIFIED LAWS ANN. § 41-1-2 (2011) (“Game birds, game animals, and game fish are the property of the state.”); Tennessee: TENN. CODE ANN. § 70-4-101(a) (West 2011) (“The ownership of and title to all forms of wildlife within the jurisdiction of the state that are not individual property under the laws of the land are hereby declared to be in the state.”); Texas: TEX. CODE ANN., PARKS & WILDLIFE CODE § 1.011(a), (b) (Vernon 2011) (“All wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state.”); And “[a]ll fish and other aquatic animal life contained in the freshwater rivers, creeks, and streams and in lakes or sloughs subject to overflow from rivers or other streams within the borders of this state are the property of the people of this state.”); Utah: UTAH CODE ANN. § 23-13-3 (West 2011) (“All wildlife existing within this state, not held by private ownership and legally acquired, is the property of the state.”); Vermont: Vt. H.91 (May 31, 2011) (“The State of Vermont, in its sovereign capacity as a trustee for the citizens of the state, shall have ownership, jurisdiction and control of all the fish and wildlife of Vermont.”); Virginia: VA. CODE ANN. § 29.1-557 (West 2011) (“Wild birds, wild animals and fish are the property of the Commonwealth.”); Washington: WASH. REV. CODE § 77.04.012 (West 2011) (“Wildlife, fish, and shellfish are the property of the state.”); West Virginia: W. VA. CODE § 20-2-3 (West 2011) (“The ownership of and title to all wild animals, wild birds, both migratory and resident, and all fish, amphibians, and all forms of aquatic life in the State of West Virginia is hereby declared to be in the State, as trustee for the people.”); Wisconsin: WIS. STAT. § 29.11 (West 2011) (“The legal title to, and custody and protection of, all wild animals within this state is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation thereof.”); Wyoming: WYO. STAT. ANN. § 23-1-103 (West 2011) (“For the purposes of this act, all wildlife in Wyoming is the property of the state.”). Not included in this list are Delaware and Nebraska.

186 Id. at 851 (“States as trustees can, for example, obtain compensation for damage to wildlife, but courts have been far less willing to impose trust obligations on the state, generally holding that it is for the legislature (or its delegatee) to determines the applicable duties.”).

187 See FREYFOGLE & GOBLE, supra note 26, at 29 (“The main effect of the states’ sovereign ownership of wildlife is that states have extensive powers to protect wild animals. That power has been exercised regularly since the early days of American settlement, when colonies banned the taking of game species that were already becoming scarce.”).

188 See Horner, supra note 15, at 27 (“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. Courts have rarely addressed what obligations might co-exist with such authority.”).
assertion of sovereign ownership of wild animals and is inherent in that responsibility. Thus, wildlife is often the subject of public trust reasoning. Second, preservation of access to wildlife lies at the heart of the American public doctrine, because early public trust cases centered on access to fishery resources. Third, the public trust in navigable waters, the essence of the doctrine, originated in part to ensure citizens could fish, and thus access to this resource is fundamental. Finally, since the public trust doctrine evolves to serve public needs, it is quite appropriate to include wildlife within its ambit, due to shrinking habitats and other changes that threaten populations of wild animals, which continue to be an important natural resource.

A. The Foundation of the Public Trust in Wildlife

First, sovereign ownership of wildlife, recognized in fully forty-eight states, is the basis of the public trust in wildlife. As sovereign owners, state governments have expansive roles in regulating conduct affecting wildlife. Yet as Professor Goble has observed, “[u]nlike a private owner who might use wildlife solely for personal gain, when the government [is] the owner, its powers [are] constrained by the public interest.” If a state’s powers over wildlife were proprietary, state managers could theoretically use wildlife regulation to benefit themselves.

189 See infra pt. IV.B for a list of states asserting that wildlife is a public trust resource or using public trust-like language to describe management of wild animals.
190 See supra pt. II for a discussion of early public trust cases.
191 See supra note 186 (listing forty-eight states that assert sovereign ownership of wildlife).
192 See Musiker, France & Hallenbeck, supra note 16, at 92 (“By relying upon the state’s sovereign ownership interest as the basis for the state’s authority to manage wildlife, these courts essentially have adopted the public trust doctrine.”); see also Goble, supra note 119, at 853 (“[T]he public’s interest in wildlife—whether characterized as a trust, state ownership, state custodianship, or a ‘substantial interest in preserving’ such animals—gives the state a special authority and responsibility to ensure the preservation of wildlife.”).
193 See id. at 345 (noting that a Minnesota case introduced the phrase “police power” in 1894 to discuss states’ regulation of wildlife, “blend[ing] language about sovereignty and property”) (discussing State v. Rodman, 59 N.W. 1098 (Minn. 1894); Goble, supra note 119, at 838–39 (“The metaphor employed to describe this mixture of sovereign and proprietary powers was the trust: the state was a trustee for the people and state sovereign ownership was a public trust. . . . The blending of property and sovereignty in the ownership—because-sovereign formula of the state ownership doctrine defines the special relationship that the state has to animals ferae naturae—a relationship that reflects the unique quality of wildlife as common property.”)).
194 See Goble, supra note 119, at 838. Professor Goble noted that this constraint “convert[s] monarchy to republic.” Id.

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or favored constituents, because things owned in a proprietary sense may be manipulated for the benefit of whomever controls them. However, sovereign ownership is quite different: A state wildlife manager may regulate resources but must manage wildlife for the benefit of all members of the public. As a result, wildlife is often the subject of public trust reasoning.

The U.S. Supreme Court applied public trust reasoning to the preservation of wildlife when it observed in *Smith v. Maryland* that a state’s right to regulate navigable waters results from the ownership of the soil, from the legislative jurisdiction of the state over the soil, and from its duty to preserve unimpaired those public uses for which the soil is held,” including fishing. Similarly, the Court stated in *Geer v. Connecticut* 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 the people.” Thus, like other resources subject to states’ sovereign ownership, state management of wild animals is often considered in terms suggestive of the public trust doctrine.

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195 See also Blumm & Ritchie, *supra* note 10, at 679 (listing ownership of feudal land as an example of a proprietary right).
196 See Lazarus, *supra* note 25, at 637 (“The origins of the modern public trust doctrine thesis lie in the notion of ‘sovereign capacity’ ownership. In particular, lurking in the background of those early judicial rulings was the suggestion that state power to alienate the resource or otherwise deny general public access is sharply restricted.”); Musiker, France & Hallenbeck, *supra* note 16, at 91 (asserting that ownership in a sovereign capacity results in “a public trust duty to prevent impairment of this common resource”); *see also* Arnold v. Mundy, 6 N.J.L. 1, 60–61 (N.J. Sup. Ct. 1821) (“We contend, that the right of the soil in navigable rivers . . . with the exclusive right to what are called royal fish, are vested in the state, the sovereign power, as a part of the prerogative of the sovereign power; and that the citizens have a common vested right of fishery therein.”).
197 59 U.S. 71, 74–75 (1855) (internal citations omitted).
199 See Blumm & Ritchie, *supra* note 10, at 713 (“[T]he state ownership—or wildlife trust—theory not only provides authority to states to regulate wildlife separate and distinct from the police power, it also imposes a duty on the state to safeguard its wild animals for coming generations.”); Lazarus, *supra* note 25, at 637 (“The origins of the modern public trust doctrine thesis lie in the notion of ‘sovereign capacity’ ownership.”); Musiker, France & Hallenbeck, *supra* note 16, at 89 (“The state’s ownership of the resource as sovereign is the source of the state’s public trust rights and obligations, and affords the state special authorities while imposing on it certain duties.”). *But see* Redmond, *supra* note 17, at 259 (“The doctrinal shift from permitting certain uses on public trust lands to affirmatively protecting natural resources is ‘a significant change in the public trust doctrine’s traditional focus.’”) (internal citation omitted).
Second, access to wildlife was fundamental to the nineteenth century cases first establishing the American public trust doctrine. As discussed above, not only *Arnold* but also *Martin*, *Smith*, *McCready*, and *Manchester* arose out of questions concerning public access to shellfish (i.e., oysters) and finfish (i.e., menhaden). In *Arnold*, much of the New Jersey Supreme Court’s analysis was intertwined with references to the public right to fishery resources. For example, that court asserted:

[T]he sovereign has allodium of the soil of the sea and its arms; a right of fishery, quasi in trust for all the citizens and subjects; that he has the exclusive right to royal fish; that fishery and navigation are co-extensive; the subject in a limited government, and the citizen in a free republic have, in my mind, the undoubted *communem piscariam* and the right of navigation.

On a similar note, the U.S. Supreme Court upheld public access to oysters in *Martin*, noting that all colonies owned “the soil under [their] navigable waters, and the rights of fishery for shell-fish or floating fish.” As reflected in these early cases, preservation of public access to wildlife was an essential part of the origins of the public trust doctrine, indicating that wildlife are deserving of public trust protections.

Third, the public trust doctrine arose in part to protect fishery access. That is, the doctrine initially revolved around navigable waters, important as a means of navigation, commerce, and

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199 See Ann R.C. Casperson, *The Public Trust Doctrine and the Impossibility of “Takings” by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, (377 (1996) (“Wildlife was always included in the package of property rights that no one can own—rights like water and air—that have been traditionally the domain of the public trust doctrine.”)).

200 See, e.g., Horner, supra note 15, at 38 (“[F]rom the beginning of [public trust] cases the public nature of wildlife, in particular fish and other water-dwelling creatures, was part and parcel of the public trust doctrine.”).

201 *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. Sup. Ct. 1821); see supra notes 43–48 and accompanying text.

202 *Martin v. Waddell*, 41 U.S. 367 (1842); see supra notes 49–55 and accompanying text.

203 *Smith v. Maryland*, 59 U.S. 71 (1855); see supra notes 57–59 and accompanying text.

204 *McCreary v. Virginia*, 94 U.S. 391 (1876); see supra notes 61–63 and accompanying text.

205 *Manchester v. Commonwealth of Massachusetts*, 139 U.S. 240 (1891); see supra notes 69–70 and accompanying text.


207 *Martin*, 41 U.S. 367 at 414.
fishing. Indeed, the earliest public trust cases explained that the public trust in navigable waters was necessary to support fishing. In Arnold, the right to fish was inherent in states’ trusteeship over tidal waters because “[a] right of several fishery is in concomitance with, and founded on, the right of soil, and is co-extensive with it; and whoever has the right of soil in a navigable water has, also, the right of several fishery.” In Smith, the U.S. Supreme Court recognized the same relationship between the right to submerged land and fishing, observing that “the soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish.” Consequently, public access to wild animals, or at least to fish, is inherent in the public trust in navigable waters.

Finally, since its establishment on American soil, the public trust doctrine has evolved to meet public needs, including the conservation of wildlife. The Arnold court was quite clear about the malleability of the doctrine:

Our ancestors, on emigrating, did not bring with them the whole body of the [English] common law . . . . They brought the common law purified from its local dross. Every thing of a mere local origin was left on the other side of the ocean, and we have gradually substituted in its place a local common law of our own.”

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208 See Shively v. Bowlby, 152 U.S. 1, 11 (1894) (stating that water is a public resource “for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King’s subjects”).

209 See, e.g., Pollard v. Hagan, 44 U.S. 212, 215 (1845) (The shores “may be left bare at low tide, but are still a part of the river, either for the purposes of navigation or fishing.”).

210 Arnold, 6 N.J.L. at 45. The New Jersey Supreme Court also explained:

I say I am of opinion, that, by all these, the navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the people, and . . . that the property indeed vests in the sovereign, but it vests in him for the sake of order and protection, and not for his own use, but for the use of the citizen . . . .

211 59 U.S. 71, 74–75 (1855) (internal citations omitted).

212 6 N.J.L. at 43–44 (citations omitted).
For example, although not necessary in England—where the public relied primarily on the sea—in America, the public trust doctrine quickly extended to inland navigable waterways, such as rivers. As noted above, in recent years, courts have expanded the doctrine to include the dry sand area of beaches used for public recreational purposes, wildlife habitat connected to navigable waters, groundwater, artificial waters, inland wetlands, and state parks, among other resources. Some courts have expressly recognized wildlife as an important natural resource deserving of public trust protections, and others are likely to do so in the future.

B. State Recognition of the Wildlife Trust

Over two decades ago, Professor Meyers argued for recognition of wildlife as a public trust resource, and numerous other commentators have since proclaimed the states’ trusteeship over wildlife. As discussed previously, this trust is based on sovereign ownership of the

213 See, e.g., Matthews v. Bay Head Improvement Ass’n, 95 N.J. 306 (1984) (explaining that the public trust doctrine mandates public access to the dry sand area of beaches between the high water mark and the vegetation line); see also Keith, supra note 87.

214 See Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (holding that the public trust encompasses purposes broader than the traditional uses of navigation, commerce, and fishing, including use as open space, for wildlife study, for scientific study, and for swimming).

215 In re Water Use Permit Applications for the Waiahole Ditch, 9 P.3d 409 (Haw. 2000).

216 Parks v. Cooper, 676 N.W. 2d 823 (S.D. 2004) (relying on public ownership of all state water to establish public access to three lakes created on private land by several unseasonably wet years); McQueen v. South Carolina Coastal Council, 124 S.Ct. 466 (2003) (rejecting a taking claim to artificially created wetlands on trust grounds).

217 See Just v. Marinette County, 201 N.W.2d 761, 769 (Wis. 1972).


219 See infra pt. IV.B for a discussion of state wildlife trust cases.

220 See Gary D. Meyers, Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife, 19 Env’t L. 723, 734 (1989) ("In this essay I propose reinvigorating and expanding the public trust doctrine so that its protection is extended to wildlife, and by necessity, to the habitat it depends upon.").

221 See, e.g., Blumm & Ritchie, supra note 10, at 693 (“American courts transformed the English concept of prerogative ownership and fashioned a uniquely American justification for regulation: the state ‘ownership’ doctrine, also known as the wildlife trust.”); Musiker, France & Hallenbeck, supra note 16, at 91 (“Like their ownership of the beds beneath navigable waterways, states own wildlife in their sovereign capacity and thereby have a public trust duty to prevent impairment of this common resources.”); Wood, supra note 139, at 58 (“[T]he sovereign’s ownership of wild animals is in the nature of a trust, exercised for the benefit of its citizens. From this trust ownership flows both the duty and power to take action to protect the trust for present and future beneficiaries.”).
wildlife resource, a firm foundation for judicial recognition of the public trust in wildlife.\textsuperscript{223}

Nevertheless, relatively few state court cases have expressly recognized the state conservation duties inherent in the public trust in wildlife.\textsuperscript{224}

As a result of the paucity of case law, there is relatively little judicial analysis of the extent of states’ duties to preserve wildlife.\textsuperscript{225} However, courts and legislatures in at least twenty-two states have expressly employed the words “trust” or “trustee” when discussing state management of wildlife. Those states include Alabama,\textsuperscript{226} Alaska,\textsuperscript{227} Arkansas,\textsuperscript{228} California,\textsuperscript{229} Georgia,\textsuperscript{230} Indiana,\textsuperscript{231} Louisiana,\textsuperscript{232} Massachusetts,\textsuperscript{233} Michigan,\textsuperscript{234} Missouri,\textsuperscript{235} New Jersey.\textsuperscript{236}

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  \item \textsuperscript{222} See supra pt. IV.A.
  \item \textsuperscript{223} See supra note 186 (listing forty-eight states that assert sovereign ownership of wildlife).
  \item \textsuperscript{224} See Horner, supra note 15, at 27 (observing 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”). For a discussion of cases that have recognized a public trust in wildlife, see pt. VII.
  \item \textsuperscript{225} See, e.g., FREYFOGLE & GOBLE, supra note 26, at 34 (“The duties states have and the limits they face in managing wildlife remain largely undecided.”).
  \item \textsuperscript{226} Sanders v. State, 53 Ala. App. 534 (Ala. Crim. App. 1974) (“The title to, and property in, the fish within the waters of the State are vested in the State of Alabama and held in trust for the people of the State. The State owns the fish, not in a private or proprietary capacity, but in its sovereign capacity and as a trustee for the people of the State.”).
  \item \textsuperscript{227} Shepard v. Alaska Dep’t of Fish & Game, 897 P.2d 33, 40 (Alaska 1995) (“[T]he state acts as a ‘trustee’ of the naturally occurring fish and wildlife in the state for the benefit of its citizens.”).
  \item \textsuperscript{228} Farris v. Arkansas State Game & Fish Comm’n, 310 S.W.2d 231, 235, 236 (Ark. 1958) (“The [State Game and Fish] Commission is a trustee for the people of this State, charged with the duty of conserving the wild life resources,” and “[t]he Commission, as trustee for the people of this state, has the responsibility and is charged with the duty to take whatever steps it deems necessary to promote the interest of the Game and Fish Conservation Program of this state; subject only to constitutional provisions against discrimination, and to any valid exercise of authority under the provisions of the Federal Constitution.”).
  \item \textsuperscript{229} Ctr. for Biological Diversity v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 590 (Cal. Ct. App. 2008) (recognizing that “the public trust doctrine encompasses the protection of undomesticated birds and wildlife”); see also supra pt. IV (discussing CBD v. FPL Group, Inc.).
  \item \textsuperscript{230} GA. CODE ANN. § 27-1-3(b) (2011) (“The ownership of, jurisdiction over, and control of all wildlife, as defined in this title, are declared to be in the State of Georgia, in its sovereign capacity, to be controlled, regulated, and disposed of in accordance with this title. Wildlife is held in trust by the state for the benefit of its citizens and shall not be reduced to private ownership except as specifically provided for in this title. All wildlife of the State of Georgia is declared to be within the custody of the department for purposes of management and regulation in accordance with this title.”).
  \item \textsuperscript{231} Smith v. State, 155 Ind. 611 (Ind. 1900) (“It is important to note that American quails are game birds, and as such belong to the state in its sovereign capacity as the trustee of the citizens in common. Such game is a valuable and wholesome article of food, diffused and accessible to all, and its preservation a matter of general interest to the people. The primary object of government is mutual safety and benefit; and to promote these ends it has long been held that the state possesses such police power as enables it to employ drastic measures to protect the public health, morals, safety, and such other concerns as affect the happiness and general welfare of the citizens.”).
\end{itemize}
New Mexico, Ohio, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming. Moreover, the courts and

232 State v. McHugh, 630 So. 2d 1259, 1265 (La. 1994) (The Louisiana 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.”).
233 Commonwealth v. Worth, 304 Mass. 313, 317 (Mass. 1939) (“The title or ownership of the deer being in the
Commonwealth in trust for the public and no individual having any property rights to be affected, the result of the legislation is to grant to the individual upon careful[l]y guarded conditions, a privilege, to hunt and possess the game.”).
animals Feræ naturæ are not objects of private ownership, but rather belong to the State, which in effect holds the
fish in a trust for all of the people of the State in their collective capacity.”).
235 Haggerty v. St. Louis Ice Mfg. & Storage Co. 143 Mo. 238, 239 (Mo. 1898) (“[T]he common ownership of
game, which otherwise would remain in the body of the people, is lodged in the state, to be exercised, like all other
governmental powers in the state in its sovereign capacity, in trust for the benefit of the people, and subject, of
course, to such regulations and restrictions as the sovereign power may see fit to impose.”).
is the common property of all and held in trust by the State for the benefit of all its people.’” (quoting the state
legislature’s discussion of New Jersey’s Endangered Species Act)).
dating back to the Roman law, has been that wild animals are owned by the state in its sovereign capacity, in trust
for the benefit of the people. This sovereign ownership vested in the colonial government and was passed to the
states. Even though the state ownership doctrine has been described as a legal f[lication], it has never been
abrogated.”).
238 Ohio v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) (“The common law in Ohio has consistently
recognized the trust doctrine and that it is predicated upon the property interest which the state holds in such wildlife
as a trustee for all citizens.”).
239 State v. Couch, 103 P.3d 671, 676 (Or. Ct. App. 2004) (“‘It is a generally recognized principle that migratory fish
in the navigable waters of a state, like game within its borders, are classed as animals Feræ naturæ, the title to
which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its
sovereign capacity in trust for all its citizens.’” (emphasis in original) (internal citation omitted).
240 State v. Kofines, 33 R.I. 654 (Tenn. 1911) (“The common law vests the title of game and fish, not reduced to
possession or under restraint, in the sovereign power-in Great Britain, in the King; in the United States, the several
states, in trust for their inhabitants.”).
241 State v. Bartee, 894 S.W.2d 34, 43 (Tex. App. 1995) (“The power of the state agency is to be exercised like all
other powers of government as a trust for the benefit of the people and not as a prerogative for the advantage of
the government or for the benefit of private individuals. The very purpose of the wildlife conservation act ‘is to provide
a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure
reasonable and equitable enjoyment of the privileges of ownership and pursuit of wildlife resources.”).
242 H.91 (May 31, 2011) (“The State of Vermont, in its sovereign capacity as a trustee for the citizens of the state,
shall have ownership, jurisdiction and control of all the fish and wildlife of Vermont.”).
Virginia and the United States have the right and duty to protect and preserve the public’s interest in natural wildlife
resources.”).
animals Feræ naturæ belongs to the state in its sovereign capacity and the state holds this title in trust for the

37
legislatures of at least twenty-two other states use trust-like language—such as sovereign ownership of wildlife for “the benefit of all people” or for “the common good,” or discussion of the “sovereign capacity” for regulating wildlife in a manner consistent with the public interest—in proclaiming state ownership of wildlife. States using trust-like language to reference management of wild animals include Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Minnesota, peoples' use and benefit. . . . No Washington case has applied the public trust doctrine to terrestrial wildlife or resources. . . . But we need not decide whether the public trust doctrine applies here . . . .”) (emphasis in original).

246 W. VA. CODE § 20-2-3 (West 2011) (“The ownership of and title to all wild animals, wild birds, both migratory and resident, and all fish, amphibians, and all forms of aquatic life in the State of West Virginia is hereby declared to be in the State, as trustee for the people.”).

247 O'Brien v. State, 711 P.2d 1144, 1148–49 (Wyo. 1986) (“[W]ildlife within the borders of a state are owned by the state in its sovereign capacity got the common benefits of all its people. . . . [T]he enlightened concept of this ownership is one of a trustee with the power and duty to protect, preserve and nurture the wild game.”).

248 Begay v. Sawtelle, 53 Ariz. 304, 306 (Ariz. 1939) (“Under the common law, the title to game animals and fish was held to be in the state for the use and benefit of its citizens, and the killing or taking and use of such game was subject to governmental control and regulation in the interest of the common good. These principles passed to America with the rest of the common law of England and, except as changed by statute or contrary to our customs or conditions, are the law of Arizona.”).

249 Collopy v. Wildlife Comm’n, Dep’t of Natural Res., 625 P.2d 994, 999 (Colo. 1981) (“[T]he ownership of wild game is in the state for the benefit of all people.”) (internal citation omitted).

250 State v. Gilletto, 98 Conn. 702, 706 (Sup. Ct. of Errors of Conn. 1923) (“As bearing upon the peculiar right of the General Assembly to Legislate as to animals ferae naturae on account of the ownership of property in them being in the state for the benefit of the people at large, as well as in exercise of the power of the police.”). (internal citation omitted).

251 Harper v. Galloway, 51 So. 226, 228 (Fla. 1910) (“Under the common law of England the title to animals ferae naturae or game is in the sovereign, for the use and benefit of the people.”) (emphasis in original).

252 HAW. CONST. art. XI, § 1 (“For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii'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.”).

253 IDAHO CODE ANN. § 36-103(a) (2011) (“All wildlife, including all wild animals, wild birds, and fish, within the state of Idaho, is hereby declared to be the property of the state of Idaho. It shall be preserved, protected, perpetuated, and managed.”). However, Idaho’s legislature may recently have limited the state’s public trust doctrine to protection of navigable waterways. See Michael C. Blumm, Harris Dunning & Scott W. Reed, Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794, 24 ECOLOGY L.Q. 461 (1997) (discussing the validity of a bill severely limiting Idaho’s public trust).

254 Meul v. People, 198 Ill. 258, 262–63 (Ill. 1902) (“Section 11 of the act declares the ownership and title to the animals designed to be protected to be in the state of Illinois. Prior to the enactment the state had general ownership of animals ferae naturae—not, however, as a proprietor, but in its sovereign capacity, as the representative of the people, and for the benefit of all of the people in common. Section 11 places the title and ownership in the state as a proprietor.”) (internal citation omitted); Tyrrell Gravel Co. Caarradus, 250 Ill. App. 3d 817, 820 (Ill. App. Ct. 1993) (“The State owns the fish: ‘not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common, and the ownership thereof cannot be claimed by any particular individual.’”) (internal citation omitted).

255 United States v. McCullagh, 221 F. 288, 292 (D. Kan. 1915) (“As has been seen, the basic principle on which the decision of Geer v. Connecticut, supra, rests is that the exclusive title and power to control the taking and ultimate
disposition of the wild game of this country resides in the state, to be parted with and exercised by the state for the
common good of all the people of the state, as in its wisdom may seem best.”).

Commonwealth v. Masden, 295 Ky. 861, 863 (Ky. 1943) (“In protecting game the state is discharging a
governmental function and acting in its sovereign capacity for the common benefit of all of its people.”). See Ky.
REV. STAT. § 150.015 (“The declared purpose [and] policy of the Commonwealth of Kentucky, is to protect and
conserve the wildlife of this Commonwealth so as to insure a permanent and continued supply of the wildlife
resources of this state for the purpose of furnishing sport and recreation for the present and for the future residents of
this state; to promote the general welfare of the Commonwealth; to provide for the prudent taking and disposition of
wildlife within reasonable limits, based upon the adequacy of the supply thereof; to protect the food supply of this
state, and to insure the continuation of an important part of the commerce of this state which depends upon the
existence of its wildlife resources.”).

State of Maine v. M/V Tamano, 357 F.Supp. 1097, 1101 (D. Me. 1973) (“It is a well settled principle of the
common law that the fish in the waters of the state, including the sea within its limits as well as the game in its
forests belong to the people of the State in their collective sovereign capacity.”) (internal citation omitted).

(stating that ‘the ownership of all game animals and birds is in the people in their sovereign capacity, that is, in the
State.”) (internal citation omitted).

State v. Rodman, 59 N.W. 1098, 1099 (Minn. 1894) (“[O]wnership of wild animals, so far as they are capable of
ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit,
of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other
useful purpose, is a matter of public interest . . . .”).

Smith v. State, 646 So.2d 538, 545 (Miss. 1994) (“[T]hose who headlight deer have no respect whatsoever for the
State of Mississippi’s sovereign ownership of such magnificent God given creatures of the wild, entrusted to
mankind for his consumption and/or enjoyment. They fail to recognize that such animals are for the benefit of all
mankind, nor do they heed the State’s laws regulating the taking, possession, or prohibition against certain acts
regarding wildlife. To say that headlighters fail to understand the principles of good conservation management and
stewardship of our abundant wildlife resources in order to secure the survival of the species for future citizens, is an
understatement.”).

Rosenfeld v. Jakways, 216 P. 776, 777 (Mont. 1923) (“That the ownership of wild animals is in the state, held by
it in its sovereign capacity for the use and benefit of the people generally, and that neither such animals nor parts
thereof are subject to private ownership except in so far as the state may choose to make them so, are principles now
too firmly established to be open to controversy.”).

State v. Dow, 70 N.H. 286, 286 (N.H. 1900) (“The duty of preserving the fisheries of a state from extinction, by
prohibiting exhaustive methods of fishing, is as clear as its power to secure to its citizens, as far as possible, a supply
of any other wholesome food.”) (internal citation omitted).

In re Del. River at Stilesville, 115 N.Y.S. 745, 753 (N.Y. App. Div. 1909) (approvingly quoting another case as
asserting that “[t]he state, the representative of the people, the common owner of all things fæ naturæ, not only has the
right, but is under a duty, to preserve and increase such common property.”) (internal citation omitted).

N.C. GEN. STAT. ANN. § 113-131(a) (West 2011) (“The marina and estuarine and wildlife resources of the State
belong to the people of the State as a whole.”).

State v. Dickinson Cheese Co., 200 N.W.2d 59, 61 (N.D. 1972) (“Ownership of and title to fish while in such
state of freedom is in the State of North Dakota only for the purpose of regulating the enjoyment, use, possession,
disposition, and conservation thereof for the benefit of the people of the State.”).

Hughes v. State, 572 P.2d 573, 574 (Okla. Crim. App. 1977) (“The United States Supreme Court has held on
numerous occasions that the wild animals and fish within a state’s border are, so far as capable of ownership, owned
by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the
exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that
may be acquired therein. . . . [P]rotection of the wildlife of a state is peculiarly within the police power of the state,
and the state has great latitude in determining what means are appropriate for its protection.”). Although this case
was overruled by the U.S. Supreme Court in Hughes v. Oklahoma on the grounds that the statute impermissibly

In addition to these forty-four states’ explicit acknowledgment of the wildlife trust, three other states, Iowa, Delaware, and Nebraska, have less articulated, but perhaps incipient, versions of the public trust in wildlife. For example, although Iowa has yet to apply the public trust doctrine to wildlife, the Iowa Supreme Court observed in 1989 that “[t]he public trust doctrine is said to have evolved to the point that it now has ‘emerged from the watery depths [of navigable waterways] to embrace the dry sand area of a beach, rural parklands, a historic battlefield, wildlife, archaeological remains, and even a downtown area.” Also in 1989, a federal district court in Nebraska took note of that state’s public trust in wildlife when it determined that the federal government could recover for damages for lost wildlife caused by a fire allegedly caused by a railroad company, because the federal government holds the nation’s natural resources in trust.
Unlike Iowa and Nebraska, Delaware has a statute announcing a public trust in wild animals, albeit one limited to rare and endangered species.⁴¹ But Delaware’s code appears to assume only a hortatory position with respect to other wildlife, opining that

[i]t is in the best interest of the State to preserve and enhance the diversity and abundance of nongame fish and wildlife, and to protect the habitat and natural areas harboring rare and vanishing species of fish, wildlife, plants[,] and areas of unusual scientific significance or having unusual importance to the survival of Delaware’s native fish, wildlife[,] and plants in their natural environments.⁴³

Of the fifty states, only Nevada, South Carolina, and Utah have yet to make some acknowledgement of the public trust in wildlife. These few outliers aside, the widespread consensus on states’ roles as acting for the benefit of the public makes implausible the notion that grants of authority to manage wildlife are merely proprietary, permitting states to manage public use of wildlife but entailing no corresponding responsibilities.

V. EXAMPLES OF STATE WILDLIFE TRUSTS

The public trust doctrine and state sovereign ownership doctrine are closely related, but the link is not yet widely recognized. Yet the numerous constitutional⁴⁴ and statutory provisions,⁴⁵ as well as cases interpreting those provisions or locating the public trust in specific [statutory] powers, a general trust duty imposed upon the National Park Service, Department of the Interior, by the National Park System Act to conserve scenery and natural and historic objects and wildlife [in the National Parks, Monuments and reservations] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.’ In view of this trust position, and its accompanying obligations, it appears that the United States, much like the States in their parens patriae capacities can maintain an action to recover for damages to its public lands and the natural resources on them, which in this action would encompass the destroyed wildlife.”) (internal citations omitted).

⁴¹ DEL. CODE ANN. tit. 7, § 201(2) (2011) (“Rare and endangered species are a public trust.”).
⁴³ Id. § 201(1) (“It is in the best interest of the State to preserve and enhance the diversity and abundance of nongame fish and wildlife, and to protect the habitat and natural areas harboring rare and vanishing species of fish, wildlife, plants and areas of unusual scientific significance or having unusual importance to the survival of Delaware’s native fish, wildlife and plants in their natural environments.”).
⁴⁴ See, e.g., ALASKA CONST. art. VIII, § 3 (2011) (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”).
⁴⁵ See supra note 186—states with statutory provisions pertaining to states’ sovereign ownership of wildlife include Alabama; Arizona; Arkansas; Georgia; Idaho; Illinois; Indiana; Iowa; Kansas; Minnesota; Missouri; Nevada; New
common law, may serve as a foundation for judicial recognition of the public trust in wildlife. For example, a recent California case expressly marries the two doctrines, providing a model for other state courts. In 2008, in *Center for Biological Diversity v. FPL Group, Inc.*, the California Court of Appeals recognized the public trust in wildlife and expressly reaffirmed that members of the public have standing to challenge the state’s management under the public trust doctrine. In addition to California, courts in Alaska, Louisiana, and Virginia also recognize the public trust in wildlife.

**A. California: CBD v. FPL, Inc.**

In 2008, the Center for Biological Diversity (CBD) sued nine wind energy owners and operators in California, alleging that since the 1980s more than 5,000 wind turbines in Altamont Pass killed tens of thousands of birds, including between 17,000 and 26,000 raptors. CBD claimed that destruction of the birds was due in large part to turbine operators’ choices to employ inefficient and obsolete generators, despite the availability of better technology, as well as the government’s decision to reissue permits for the outdated turbines.

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276 See supra note 186—states with cases discussing states’ sovereign ownership of wildlife include Alabama; Alaska; California; Colorado; Connecticut; Florida; Hawaii; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Mississippi; Montana; New Hampshire; New Jersey; New Mexico; and Rhode Island.

277 *Ctr. for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 590 (Cal. Ct. App. 2008) (affirming the trial court’s dismissal of the case, but on the grounds that CBD sued the wrong party, on the basis that CBD lacked standing to bring the suit, and finding that “[w]ildlife, including birds, is considered not to be a public trust resource of all the people of the state, and private parties have the right to bring an action to enforce the public trust”).

278 *Id.* at 600.

279 *E.g.*, Rogers v. State, 491 So. 2d 987, 990 (Ala. Crim. App. 1985) (“The authority of the state to regulate the hunting of its game animals derives from the long established and well recognized principle of law that ownership of wild animals is vested in the state.”); State v. McHugh, 630 So. 2d 1259, 1265 (La. 1994) (The Louisiana 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.”); In re Stueart 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 duty to protect and preserve the public’s interest in natural wildlife resources.”).

280 *CBD v. FPL Group, Inc.*, 83 Cal. Rptr. 3d at 592.

281 *Id.* at 591–92. CBD filed nine claims under California’s Unfair Competition Law (UCL) and one claim under the public trust doctrine. In addition to rejecting CBD’s claim under the public trust doctrine, the trial court dismissed...
In 1980, California’s State Energy Resources Conservation and Development Commission created the Altamont Pass Wind Resource Area to encourage development of alternative sources of energy.\(^{282}\) Between 1981 and 2005, Alameda County issued forty-six permits to operate private wind energy generation facilities in the Alameda County portion of this area.\(^{283}\) Between 2003 and 2005, Alameda County considered applications to extend the existing twenty-year permits to operate the wind turbines in the Alameda County portion of Altamont Pass.\(^{284}\) To determine whether to reissue the permits, the county held at least eight public hearings and created a “Wind Power Working Group.”\(^{285}\) In 2005, the county granted the permits, subject to nine conditions, including increased monitoring, a phase-out of the turbines most dangerous to birds, and studying mitigation and reduction in avian mortality.\(^{286}\)

CBD filed suit against nine wind operators, arguing that their “destruction of California wildlife is a violation of the public trust,” as well as violation of numerous statutes.\(^{287}\) Although CBD objected to the renewed permits, it challenged the permittees’ actions in killing the birds, not the government approvals, which proved to be a mistake. The trial court ruled for the wind operators, explaining that CBD lacked standing to enforce the public trust doctrine because “[n]o statutory or common law authority supports a cause of action by a private party for violation of the public trust doctrine arising from the destruction of wild animals.”\(^{288}\) CBD appealed.\(^{289}\)

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CBD’s nine UPL claims because it concluded that “loss of the power or right to control wildlife is, at most, loss of an abstract interest owned commonly by all members of the public, and not loss of property owned by plaintiffs individually that would potentially allow this court to order restitution.” \(\text{id.}\) at 592.

\(^{282}\) \(\text{id.}\) at 591.

\(^{283}\) \(\text{id.}\) at 592.

\(^{284}\) \(\text{id.}\) at 592–93.

\(^{285}\) \(\text{id.}\) at 593.

\(^{286}\) \(\text{id.}\) at 593–94.

\(^{287}\) \(\text{id.}\) at 592.

\(^{288}\) \(\text{id.}\).

\(^{289}\) \(\text{id.}\) at 590.
In *CBD v. FPL Group, Inc.*, the California Court of Appeals affirmed the trial court’s ruling on the basis that CBD did not have standing to sue the wind operators, but it concluded that members of the public have a right to enforce the government’s obligation to protect and conserve wildlife as a public trust resource. The court cited Professor Sax for the proposition that “‘certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace.’” Moreover, the court noted that the California Supreme Court had expanded the scope of the state’s public trust doctrine well beyond public use of tidal and navigable water bodies for navigation, commerce, and fishing to include the right to swim and bathe and the preservation of lands in a natural state for study or wildlife habitat. Concluding that the public trust in wildlife “has long been recognized” by scholars and California courts, the court declared that state has a duty to preserve wildlife.

According to the court, by recognizing the public trust in wildlife it was following longstanding California case law. The court traced the states’ sovereign ownership of wildlife, including the 1894 decision of the California Supreme Court in *Ex Parte Maier*, in which it

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290 This aspect of the court’s decision is problematic. The court concluded that “[a] challenge to the permissibility of defendants’ conduct must be directed to the agencies that have authorized the conduct,” *id.* at 604–05, drawing an analogy to the law of financial trusts, where the beneficiary must sue the trustee, and emphasizing the importance of agency expertise in wind turbine permitting. *Id.* at 602-03. However, the court made no attempt to reconcile this result with *Marks v. Whitney*, 491 P.2d 371 (Cal. 1971), where the California Supreme Court concluded that a neighboring landowner had standing to sue to challenge the filling of tidelands as a member of the public. *Id.* at 377. Since the court of appeal was bound by the supreme court’s decision in *Marks*, the CBD court should have made some effort to distinguish the cases. It is possible that the distinction could lie in the fact that there are two distinction public trust doctrines in California: the common law doctrine applicable to water rights, as articulated in the *Mono Lake* decision, 658 P.2d 709 (Cal. 1983); and a statutory doctrine, as explained in *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*, 44 Cal.4th 459 (Cal. 2008) (interpreting s. 711.7 of the California Fish and Game Code). It may be that the public has standing only to challenge administrative agencies when enforcing the statutory public trust doctrine.

291 *CBD v. FPL Group, Inc.*, 83 Cal. Rptr. 3d at 599–601. According to the court, “The interests encompassed by the public trust undoubtedly are protected by public agencies acting pursuant to their police power and explicit authorization. Nonetheless, the public retains the right to bring actions to enforce the trust when the public agencies fail to discharge their duties.” *Id.* at 601.

292 *Id.* at 596 n.12.

293 *Id.* at 596.

294 *Id.* at 597.

295 *Id.*
upheld a prosecution for violation of a law prohibiting the sale of deer meat in the California, even though the deer was lawfully killed in another state, on the ground that wild animals belong to the people in their collective, sovereign capacity.\footnote{Id. (citing Ex Parte Maier, 37 P. 402 (Cal. 1894)).} The court observed that because wild animals belong to the public in a sovereign capacity, the state can prohibit actions adversely affecting wildlife if deemed necessary for the public good.\footnote{Ex Parte Maier, 37 P. 402.}

The CBD court noted that the U.S. Supreme Court in Geer cited Ex Parte Maier for the proposition that common ownership of wild animals created a state responsibility to preserve wildlife, referring to Maier as a “‘well-considered opinion.’”\footnote{Id. (citing Geer v. State of Connecticut, 161 U.S. 519 (1896)); see supra pt. II.C for a discussion of Geer.} The CBD court concluded that although state ownership of wildlife may be a legal fiction, the state’s duty to preserve wildlife to further the public good was an imperative.\footnote{CBD v. FPL Group, Inc., 83 Cal. Rptr. 3d at 599.} The court explained that

whatever its historical derivation, it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife. They are natural resources of inestimable value to the community as a whole. Their protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions.\footnote{Id.}

The court therefore recognized citizens’ rights to sue to enforce the public trust in wildlife, at least against the state trustee.

\textbf{B. Other Decisions Recognizing the State Wildlife Trust}

In addition to California, a number of state courts have expressly recognized that the public trust doctrine encompasses wildlife. For example, Alaska’s Supreme Court first recognized that state’s constitutionally-based public trust in wildlife shortly after statehood\footnote{Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), aff’d, 369 U.S. 45 (1962).}
and reaffirmed that conclusion in *Owsichek v. State Guide Licensing and Control Board*.\(^{302}\) Alaska’s public trust in wildlife therefore rests on a firm constitutional foundation. Similarly, the Louisiana Supreme Court interpreted the state’s constitution as establishing a wildlife trust in 1994 in *State v. McHugh*.\(^{303}\) In Virginia, a federal district court expressly recognized that wildlife were included in that state’s public trust doctrine in 1980 in *In re Steuart Transportation Company*.\(^{304}\)

I. Alaska

The basis of Alaska’s public trust in wildlife lies in the state constitution’s common use clause.\(^{305}\) The Supreme Court of Alaska recognized Alaska’s public trust in wildlife just two years after statehood, observing in 1961 that the state of Alaska owned migrating schools of fish in trust for the benefit of the people.\(^{306}\) A quarter-century later, in 1988, the court reaffirmed Alaska’s wildlife trust in *Owsichek v. State Guide Licensing and Control Board*.\(^{307}\)

In *Owsichek*, a hunting guide claimed that the state Guide Licensing and Control Board’s assignment of exclusive guide areas was unconstitutional.\(^{308}\) The court concluded that the common use clause sought guaranteed access to fish, wildlife, and water resources.\(^{309}\) Thus, “common law principles incorporated in the [constitution’s] common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all

\(^{302}\) 763 P.2d 488, 495 (Alaska 1988).
\(^{303}\) State v. McHugh, 630 So. 2d 1259, 1265 (La. 1994).
\(^{305}\) ALASKA CONST. art. VIII, § 3 (2011) (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”).
\(^{306}\) Metlakatla Indian Community, Annette Island Reserve, 362 P.2d at 915 (“These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state.”).
\(^{307}\) 763 P.2d 488, 495 (Alaska 1988).
\(^{308}\) Id. at 488–89.
\(^{309}\) Id. at 496.
the people.’’[^310] The court concluded that the clause denied the board the right to create exclusive guide areas and joint use areas, allowing one guide to exclude all other guides from a particular area.[^311] Since the *Owsichek* decision, the Supreme Court of Alaska has repeatedly acknowledged Alaska’s wildlife trust, observing its presence in that state at least a half-dozen times.[^312]

2. **Louisiana**

Louisiana’s constitution of 1921 established a public trust in natural resources, which its 1974 constitution reaffirmed.[^313] The state also has a number of statutes that burden the

[^310]: *Id.* at 495.

[^311]: *Id.*

[^312]: McDowell v. State, 785 P.2d 1, 6 (Alaska 1989) (noting that wildlife is a public trust resource); Pullen v. Ulmer, 923 P.2d 54, 60–61 (Alaska 1996) (“[W]e think . . . the public trust responsibilities imposed on the state . . . compel the conclusion that fish occurring in their natural state are property of the state for purposes of carrying out its trust responsibilities. We hold that the state's interest in salmon migrating in state and inland waters is sufficiently strong to warrant characterizing such salmon as assets of the state which may not be appropriated by initiative. Thus we conclude that . . . salmon are public assets of the state which may not be appropriated by initiative.”); Baxley v. State, 958 P.2d 422, 434 (Alaska 1998) (“The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, ‘and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.’” (internal citation omitted); Brooks v. Wright, 971 P.2d 1025, 1029 (Alaska 1999) (noting that the Alaska Constitution made the state the trustee of wildlife); Anchorage Citizens for Taxi Reform v. Municipality of Anchorage, 151 P.3d 418, (Alaska 2006) (observing that “the public trust responsibility, imposed by article VIII of the Alaska Constitution, to take care of fish, wildlife, and water resources of the state, gives the state ‘property-like interests’ in salmon. We concluded that ‘naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all its people.’” (internal citations omitted); Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell, 215 P.3d 1064, 1074 (Alaska 2009) (noting that “‘common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people.’” (internal citation omitted)).

[^313]: L.A. CONST. art. IX, § 1 (“The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic 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.”); Save Ourselves, Inc. v. La. Envtl. Control Comm’n, 452 So.2d 1152, 1154 (La.1984) (“A public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by [Article] VI [section] 1 of the 1921 Louisiana Constitution. The public trust doctrine was continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy.”) (internal citations omitted); see also Mouton v. Dep’t of Wildlife & Fisheries for State of La., 657 So.2d 622, 627 (La.App. 1st Cir. 1995) (“Generally, the state's natural resources are held in common trust for all of the citizens of the state. Numerous public agencies are ‘public trustees’ of the public trust natural resources, and their primary responsibility is to manage the natural resources within their respective jurisdictions in order to preserve the public's right to use and enjoy these public resources.”) (internal citation omitted).
government’s management of wildlife with trust responsibilities. Moreover, the Louisiana Supreme Court recognized the state’s public trust in land submerged by navigable waters in 1984, relying on *Illinois Central*, and in 1994, in *State v. McHugh*, interpreted the state’s constitution to establish a wildlife trust.

In *McHugh*, the state charged hunters with possession of untagged deer meat after wildlife law enforcement officers stopped their car. The court considered whether the officers could make a “suspicionless” stop of the hunters’ boat as the hunters were heading towards a boat landing during hunting season, detaining them briefly to determine whether they had valid hunting licenses, inquiring whether they were in possession of game, and asking to inspect the game. The court decided that wildlife law enforcement officers could lawfully stop hunters entering or leaving a wildlife habitat during hunting season to check for licenses and request game information and inspection. In upholding the search, the court observed that the state had an interest in safeguarding wildlife, in part because the Louisiana Constitution “establishes a public trust doctrine requiring the state to protect, conserve and replenish all natural resources,

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314 For example, one statutes states that “[t]he policy of the state of Louisiana is hereby declared to be the following: Stewardship of the state’s saltwater finfish resources shall have as its utmost concern the continued health and abundance of the resource and its environs, shall provide for optimum sustained benefits to the state, shall be responsive to the needs of interested and affected citizens, shall ensure the proper and fair utilization of these resources for the citizens of the state in present and future generations, shall preserve the state's exclusive right to manage the fisheries within or beyond its jurisdiction, and shall be based on the best scientific information available. In addition, such stewardship of the state's saltwater finfish resources shall draw upon federal, state, and academic capabilities and promote efficiency in carrying out research, administration, management, and enforcement.” LA. REV. STAT. ANN. tit. 56, § 638.4 (West 2011).

According to the Louisiana Court of Appeals, such statutes are directed at the Louisiana Wildlife and Fisheries Commission, and do not burden the legislature. La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm’n, 719 So.2d 119, 125–26 (La.App. 1st Cir. 1998).

315 *Save Ourselves, Inc.*, 452 So.2d at 1154 (“It is the well settled law of this country that a state holds title to land under navigable waters within its limits and that the title is held in trust for the people of the state that they may enjoy and use the waters free from obstruction or interference.”) (citing Ill. Cent. R.R. v. Ill., 146 U.S. 387 (1892)).

316 *State v. McHugh*, 630 So. 2d 1259, 1265 (La. 1994).

317 *Id.* at 1261.

318 *Id.*

319 *Id.* at 1270.
including the wildlife and fish of the state, for the benefit of its people.\textsuperscript{320} The court concluded that Louisiana’s public trust in wildlife established a compelling state interest in safeguarding wildlife.\textsuperscript{321}

Since \textit{State v. McHugh}, Louisiana courts have confirmed the state’s public trust in wildlife, although a 1995 case limited citizens’ standing to enforce it. For example, in 1995, in \textit{Mouton v. Department of Wildlife and Fisheries for State of Louisiana}, fishermen and an environmental group claimed that the state had a duty to enforce a regulatory prohibition against weekend commercial spotted trout fishing.\textsuperscript{322} The court acknowledged that “the public trust of the state’s various natural resources” includes “wildlife and fisheries,”\textsuperscript{323} but dismissed the claim for lack of standing.\textsuperscript{324} According to the court, the standing doctrine generally requires a plaintiff to have a special interest in the case, but “no one citizen or citizen group has a ‘special interest’ [in public trust resources] beyond that enjoyed by the general public.”\textsuperscript{325} That holding severely limited, or even eliminated, citizen enforcement of the public trust.

\textsuperscript{320} \textit{Id.} at 1265.
\textsuperscript{321} \textit{Id.} at 1264–65 (“There can be no doubt that the state's interest in safeguarding the wildlife and fisheries for the benefit of the people is compelling. The paramount importance of these invaluable natural resources is recognized by our state constitution, property laws and regulatory statutes. The state 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. These 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.”).

\textsuperscript{322} \textit{Mouton v. Dep’t of Wildlife & Fisheries for State of La.}, 657 So.2d 622, 623–24 (La.App. 1st Cir. 1995).

\textsuperscript{323} \textit{Id.} at 627.

\textsuperscript{324} \textit{Id.} at 626–27.

\textsuperscript{325} \textit{Id.} at 627. The court further elaborated:

Protection and preservation of the speckled trout population would inure to the benefit of the citizens of this state generally, but not specifically to the benefit of [plaintiffs]. There is no allegation or proof that the livelihood, health, welfare, or personal interests of [plaintiffs], or their members, will be directly affected by the failure to enforce the weekend ban on commercial speckled trout fishing. . . . [S]imply because a group of citizens . . . organize to assist with the protection of the state's coastal and fishing resources or to assist with the preservation and protection of the state’s environment for the health, safety, and enjoyment of its members does not confer upon such organization a “special” interest in those resources . . . \textit{sufficient to authorize the use of a mandamus action}. 

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Three years later, a Louisiana appellate court reaffirmed the state’s public trust in wildlife but once again rejected a public trust claim, although it did not address standing. In 1998 in *Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Commission*, commercial saltwater fishermen and associations, seafood wholesalers and retailers, and others claimed that a gill net ban imposed by the Louisiana Marine Resources Conservation Act was unconstitutional and contrary to the public trust doctrine.\(^{326}\) The plaintiffs asserted, among other things, that Louisiana’s public trust doctrine required equitable distribution of saltwater finfish resources among fishermen, but that under the statute recreational fishermen collectively caught more fish than commercial fishermen.\(^{327}\)

The trial court rejected plaintiffs’ public trust doctrine claim on the basis that they had not shown inequitable allocation of saltwater finfish resources between commercial and recreational fishermen.\(^{328}\) The Louisiana Court of Appeals affirmed the trial court’s dismissal of the plaintiffs’ public trust claim, but acknowledged the state’s public trust doctrine by observing that the state’s constitution “mandates that the natural resources of this state be protected, conserved, and replenished.”\(^{329}\) As these decisions indicate, the Louisiana courts have upheld the public trust in wildlife, although litigation on the issue has been relatively sparse.

3. **Virginia**

A federal district court in Virginia in 1980 recognized the public trust in wildlife in *In re Steuart Transportation Company*,\(^{330}\) in which the federal government and Virginia sued the owner of an oil tanker for the deaths of approximately 30,000 migratory waterfowl, statutory

\(^{327}\) *Id.* at 126, 126 n.9.
\(^{328}\) *Id.* at 126, n.9.
\(^{329}\) *Id.* at 25.
penalties, and cleanup costs arising from an oil spill in Chesapeake Bay.\textsuperscript{331} Quoting \textit{Missouri v. Holland}, Steuart Transportation Company claimed that neither the federal government nor the state of Virginia owned wildlife, so they could not sue for the loss of migratory waterfowl.\textsuperscript{332} However, the Eastern District Virginia disagreed.

According to the court, although neither government owned the animals,

\begin{quote}
[u]nder 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.\textsuperscript{333}
\end{quote}

Consequently, the court denied the company’s motion and allowed the suit to proceed.\textsuperscript{334} Despite the court’s affirmation of Virginia’s public trust in wildlife, there have been no cases interpreting the state’s wildlife trust since \textit{Steuart}.

\textbf{VI. EMPLOYING THE WILDLIFE TRUST}

Perhaps the most important effect of marrying states’ sovereign ownership of wildlife with the public trust doctrine is that citizens would gain the right to enforce states’ responsibilities to preserve this resource. If a state owns wildlife in trust, and the public is the beneficiary, citizens may enforce the state’s fiduciary obligations.\textsuperscript{335} Courts have generally held that private parties can assert the public trust doctrine against the states. For example, the Alaska Supreme Court permitted a private individual to sue a state agency in \textit{Owsichek v. State Guide}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 39.
\item \textit{Id.}
\item \textit{Id.} at 40.
\item \textit{Id.}
\item See Horner, \textit{supra} note 15, at 25–26 (“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 clarity the rights of the public to challenge government action that does not comport with trust obligations.”).
\end{enumerate}
\end{footnotesize}
Similarly, in *CBD v. FPL, Inc.*, the California Court of Appeals indicated that a nonprofit organization had standing to sue the state.\(^337\)

Beyond authorizing public enforcement against states, the marriage of the doctrines of sovereign ownership of wildlife and the public trust would allow state governments to enforce the doctrine against private parties who harm wildlife or wildlife habitat.\(^338\) Examples of cases supporting states’ enforcement of a public trust in wildlife include *In re Steuart Transportation Company*\(^339\) and *State v. McHugh*,\(^340\) which are discussed above.\(^341\) In fact, a number of courts have recognized that states have not only a right to enforce the public trust doctrine, but also a fiduciary obligation to seek compensation for damage to the wildlife trust.\(^342\) In addition to empowering states, the wildlife trust enables public entities or individual citizens to vindicate public trust duties by maintaining actions against private parties who damage wildlife or wildlife habitat.

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\(^336\) 763 P.2d 488, 495 (Alaska 1988).

\(^337\) 83 Cal. Rptr. 3d at 604–605 (“A challenge to the permissibility of defendants’ conduct must be directed to the agencies that have authorized the conduct.”).

\(^338\) See, e.g., Lazarus, *supra* note 25, at 645–46 (“The [public trust] cases since 1970 fall into three basic categories: (1) private citizens suing the government for allegedly violating the doctrine; (2) private citizens suing other private parties for allegedly violating the doctrine; and (3) the government suing private parties for allegedly violating the doctrine.”). Examples of cases supporting states’ enforcement of a public trust in wildlife include *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980), and *State v. McHugh*, 630 So. 2d 1259, 1265 (La. 1994). For a discussion of those cases, see *supra* pt. V.B.2, 3.


\(^340\) 630 So. 2d 1259, 1265 (La. 1994).

\(^341\) See *supra* pt. V.B.2, 3.

\(^342\) See *In re Steuart Transp. Co.*, 495 F. Supp. at 40 (finding a “duty to protect and preserve the public’s interest” in the context of federal and state claimed recompense for damages to migratory waterfowl caused by an oil spill); State Dep’t of Fisheries v. Gillette, 621 P.2d 764, 767 (Wash. Ct. App. 1980) (“Representing the people of the state—the owners of the [spawning grounds that were] destroyed . . . the Department of Fisheries thus has a right of action for damages. In addition, the state, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust.”); State Dep’t of Envtl. Prot. v. Jersey Cent. Power & Light Co. 336 A.2d 750, 759 (N.J. Super. App. Div. 1975) (“The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.”), rev’d on other grounds, 351 A.2d 337, 344 (N.J. 1976); State v. City of Bowling Green, 313 N.E. 2d 409, 411 (Ohio 1974) (“We conclude that where the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit . . . to protect the corpus of the trust property . . . . An action against those whose conduct damages or destroys such property, which is a natural resource of the state, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs. . . . The state’s right to recover exists simply by virtue of the public trust property interest which is protected by traditional common law.”).
VII. CONCLUSION

The overwhelming majority of states claim sovereign ownership of wildlife, confirming that states own wild animals in a sovereign, rather than a proprietary sense. However, the applicability of the public trust doctrine to wildlife is not widely recognized. The CBD v. FPL decision is a milestone, recognizing the linkage between the two doctrines and confirming that the state not only had the authority to regulate wildlife and protect wildlife habitat, but also a duty to do so enforceable by the public. Given the states’ widespread statutory and constitutional recognition of the wildlife trust, it seems likely that soon more courts will recognize that state ownership of wildlife is part of the public trust doctrine, imposing duties as well as empowering states to ensure wise stewardship of wild animals and their habitat.

343 See supra note 186 (listing forty-eight states that assert sovereign ownership over wildlife).
344 See Horner, supra note 15, at 27 (noting that courts have rarely addressed states’ obligations to conserve wildlife).
345 See Musiker, France & Hallenbeck, supra note 16, at 91 (“Like their ownership of the beds beneath navigable waterways, states own wildlife in their sovereign capacity and thereby have a public trust duty to prevent impairment of this common resources.”).
346 See supra pt. IV.B.