

PUBLIC WILDLIFE ON PRIVATE LAND: UNIFYING THE SPLIT ESTATE TO ENHANCE TRUST RESOURCES

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ABSTRACT

In the United States, wildlife is a publicly owned resource, yet the majority of wildlife habitat is privately owned. This division of ownership has perpetuated conflicts over such topics as endangered species, public hunting access, and crop depredation. Tensions arise not only between private property rights and the public interest, which are both regrettably dynamic legal concepts, but more fundamentally over the division of economic rents generated from the combination of public wildlife and private habitat.

This Article examines the nature of the split wildlife estate and the potential to unify it with public-private partnerships. A review of the public trust doctrine and its historical evolution reveals that state governments can and, in many instances, should share with private landowners the financial benefits of wildlife stewardship—not only the costs. Two case studies demonstrate how unifying the split wildlife estate can lead to improvements in wildlife habitat and an increase in the health and value of wildlife resources.

INTRODUCTION

On a crisp morning in August of 2002, Jay Newell shot the biggest elk of his life.¹ Newell estimated that the mature bull weighed more than 1,000 pounds, a trophy by almost anyone's standard, yet the harvest was not cause for celebration.² As he walked towards the

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1. Tom Dickson, *The Elk Next Door: Why One Person's Prized (or Profitable) Elk Has Become Another Person's Elk Depredation Problem*, MONT. OUTDOORS, Nov.-Dec., 2003, available at fwp.mt.gov/mtoutdoors/HTML/articles/2003/elkdepredation.htm.

2. *Id.*

downed animal, there were no high-fives or pats on the back from hunting companions. This was no typical elk hunt. It was a culling operation intended to limit property damage.³

Newell, a wildlife biologist for Montana Fish, Wildlife, and Parks, had spent the night attempting to haze elk out of irrigated agricultural fields twenty-five miles east of Billings, Montana.⁴ On the ranch where he shot the bull, a herd of elk had been gorging for weeks on rows of corn, beets, and alfalfa.⁵ When noise makers and professional herders failed to drive the animals back onto the forested public land to the south, the state agency decided that shooting some of the animals was the only remaining option.⁶

Culling herds with sharpshooters is not how state wildlife agencies prefer to manage game populations, but such measures have become more common as wildlife exact an increasing financial toll on farmers and ranchers.⁷ In the years leading up to the above incident, Steve Sian, the ranch owner, had lost as much as fifteen percent of his annual crop to elk depredation, a non-trivial amount in an industry that fluctuates with the weather.⁸ Sian had given dozens of locals permission to hunt on the property, but they were unsuccessful at reducing the herd's numbers or its impact.⁹ Elk adapt quickly to hunting pressure and often wait until after dark to enter agricultural fields.¹⁰ Additionally, neighboring ranches that allowed very little or no hunting became safe havens where the elk could retreat during the day. Like many landowners, Sian had previously enjoyed seeing elk and other wildlife on his property, but that enjoyment faded when

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Montana still uses game damage hunts as a means to reduce property damage caused by high wildlife concentrations, and Montana Fish, Wildlife and Parks enlists private citizens from a Game Damage Hunt Roster to participate in the culling operations. *See Game Damage Hunts and Management Seasons*, MONT. FISH, WILDLIFE & PARKS, <http://fwp.mt.gov/hunting/seasons/damage.html> (last visited Mar. 20, 2013) (enabling private citizens to enlist in a Game Damage Hunt Roster for culling operations organized by Montana Fish, Wildlife and Parks to reduce property damage caused by wildlife).

8. *Dickson, supra* note 1.

9. *Id.*

10. For safety reasons, most states limit legal hunting hours to thirty minutes before sunrise until thirty minutes after sunset. These limits would not necessarily apply to culling operations carried out by state wildlife agencies. *See, e.g.*, MONT. FISH, WILDLIFE & PARKS, DEER, ELK & ANTELOPE HUNTING REGULATIONS 15 (2013).

their presence began to threaten the ranch's financial future.¹¹ Much of the tension surrounding wildlife management and, in particular, the management of game species, stems from the fact that wildlife is publicly owned,¹² while most wildlife habitat is privately owned.¹³ Per the North American model of wildlife conservation, wild animals are public property managed by each state for the benefit of its citizens.¹⁴ These public resources are not stationary, however, nor do they confine themselves to publicly owned and funded lands. Wild animals such as elk and deer routinely cross onto privately owned property, where they consume valuable crops, destroy fences, and inflict costly property damage.¹⁵ The result is a kind of split estate—an overlap of valuable resources, the rights to which are held by separate and distinct entities. Much like the separation of surface and sub-surface mineral rights can generate conflicts and inefficiencies in the extraction of minerals and fossil fuels,¹⁶ the division of rights to wildlife and wildlife habitat has occasioned an increasing number of conflicts over public access, private property damage, and the appropriate division of the costs and benefits that wildlife generate.

One approach to minimizing wildlife-landowner conflicts is to share the benefits and burdens of wildlife stewardship between the state and private landowners—in essence to unify the split estate so that private habitat owners have an incentive to act as stewards of the public's wildlife resources. The question is whether unification is legal. The public trust doctrine is an ancient legal concept that arguably vested public property rights in certain natural resources and precluded the government from transferring those resources to private parties.¹⁷ If applied broadly to wildlife resources, it could be

11. *Dickson*, *supra* note 1.

12. See Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 713–19 (2005) (listing twenty-five state statutes declaring wildlife to be state property).

13. DONALD R. LEAL & J. BISHOP GREWELL, *HUNTING FOR HABITAT: A PRACTICAL GUIDE TO STATE-LANDOWNER PARTNERSHIPS* 3 (1999).

14. MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 10–15 (1997); ERIC G. BOLEN & WILLIAM L. ROBINSON, *WILDLIFE ECOLOGY AND MANAGEMENT* 3–5 (2003); THOMAS A. LUND, *AMERICAN WILDLIFE LAW* (1980).

15. Of course, domestic livestock eat crops and destroy fences on private property too. The critical difference is that livestock are privately owned and generate financial benefits that the private landowner can legally capture in the marketplace.

16. Timothy Fitzgerald, *Evaluating Split Estates in Oil and Gas Leasing*, 86 LAND ECON. 294, 294 (2010).

17. Compare Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970), with James L. Huffman, *Speaking of*

used to prohibit private landowners from acquiring an ownership interest in wildlife or influencing how wildlife is managed.¹⁸

Consistent with the doctrine's historical foundation, courts have struck down sovereign transfers of certain lands and natural resources when those transfers served no obvious public interest.¹⁹ For decades, however, legal scholars have argued for expanding the public trust doctrine beyond its historical scope to prohibit not only states from alienating or abrogating control over trust resources, but also to erode private contracts and property rights.²⁰ Courts have adopted this expansive formulation of the doctrine to undo surface water transfers²¹ and to recognize public access rights over private land where none had previously existed.²² The application of the public trust doctrine to wildlife has the potential to alter the allocation of rights and responsibilities significantly between state wildlife agencies

Inconvenient Truths—A History of the Public Trust Doctrine, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007) (presenting contrasting views of the public trust doctrine and its application).

18. See, e.g., RICK APPLGATE, PUBLIC TRUSTS: A NEW APPROACH TO ENVIRONMENTAL PROTECTION 56–57 (1976) (concluding that wildlife should be placed in the public trust, with the national public as beneficiary for all wildlife); Patrick Redmond, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RESOURCES J. 249, 249 (2009) (describing the inconsistent and “bumpy” application of the doctrine to wildlife resources); Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 74 (2000) (arguing that the public trust doctrine generally precludes all dispositions of wildlife resources to private interests and abdications of wildlife management responsibilities). See generally Deborah G. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87 (1995); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989) (proposing that the scope of the public trust doctrine be expanded to encompass all wildlife and the habitat upon which it depends and arguing that the approach is jurisprudentially sound given the similarity between water and wildlife).

19. See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452–53 (1892) (holding that the public trust doctrine would not sanction “the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake”).

20. Sax, *supra* note 17, at 490; see also David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 711–13 (2008) (proposing a synthesis of the public trust doctrine and human rights in response to climate change and other modern environmental issues).

21. *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709 (Cal. 1983) (holding that the state of California has an affirmative duty to consider the public trust in the planning and allocation of water resources and to protect public trust uses such as recreational and aesthetic values whenever feasible).

22. *Mont. Coalition of Stream Access v. Curran*, 682 P.2d 163, 171 (Mont. 1984) (holding that the public trust doctrine created a public right of access to privately owned stream beds underlying all waterways capable of recreational use in the state).

and private landowners²³ and to exacerbate the controversies and rent dissipation caused by the split wildlife estate.

This Article examines how the public trust doctrine influences the management of public wildlife on private land and whether, consistent with the doctrine, states can transfer ownership and management of wildlife to private landowners. Part I explains the split estate dilemma of managing public wildlife on private land. Part II outlines the history of the public trust doctrine as it applies to wildlife resources, finding little historical evidence to suggest state governments are as constrained by the doctrine as some commentators have suggested. Parts III and IV reflect on the success of public-private partnerships and explain how contracting with private landowners for wildlife stewardship services is consistent with states' wildlife trusteeship and, in some instances, might be necessary to maximize public wildlife values in the face of the split wildlife estate. Part V concludes.

I. THE SPLIT WILDLIFE ESTATE

For many, the image of a deer or an elk meandering through a wilderness area epitomizes the North American conservation model—abundant wildlife inhabiting public land “where the earth and its community of life are untrammled by man.”²⁴ Though the United States has sizeable endowments of both wildlife and publicly owned lands,²⁵ the distribution of these resources does not perfectly align. In the West, where the ratio of public to private land is highest, the asymmetry is somewhat seasonal. Large ungulates summer in higher elevation terrain, which is typically federally owned, until scarce food and cold temperatures force them out of the mountains

23. See Blumm & Ritchie, *supra* note 12, at 713–19 (2005) (describing the additional regulatory authority and legal rights conferred to states by the public trust doctrine over and above those available under states' police powers); John D. Echeverria & Julie Lurman, “Perfectly Astounding” *Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 355 (2003) (“In keeping with the leading public trust decisions involving water resources or tidelands, [state ownership] language could be interpreted to mean that the doctrine of public ownership of wildlife supports imposing affirmative obligations on government officials to protect wildlife.”).

24. See The Wilderness Act of 1964, 16 U.S.C. § 1131 (1964).

25. See ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2012), available at <http://www.fas.org/sgp/crs/misc/R42346.pdf> (noting the federal government owns and manages approximately 640 million acres of land, or roughly twenty-eight percent of the nation's total land area).

and onto private land.²⁶ In Eastern and Midwestern states, where the percentage of private land ownership is much higher, publicly owned wildlife is more likely to occupy private land year-round.

Whether seasonal or year-round, the presence of public wildlife on private land creates a situation similar to a split estate of surface and mineral rights; specifically, the ownership of overlying resources is held by separate and distinct entities. The economic incentives and resulting legal principles surrounding split mineral and surface estates have been studied in significant detail²⁷ and are worth considering in the context of public wildlife and private wildlife habitat. With a unified surface and sub-surface estate, the single owner bears the full costs and benefits of her actions and unilaterally determines where, when, how, and at what rate to extract the sub-surface resources. By contrast, when the surface and sub-surface rights are held by two different parties, conflicts routinely emerge over issues of access, waste disposal, allocation of liability, and, in general, the hierarchy of the divided property rights.²⁸ As Chouinard and Steinhoff explain in the context of coal-bed methane extraction:

Subsurface rights give energy companies surface access, but exactly what that means for overlying landowners remains highly uncertain and requires negotiation on a case-by-case basis between the parties. In general, negotiations to date have not quieted landowner resentment over the intrusion of energy companies on their land. From the perspective of energy companies, failed negotiations result in costly delays (even foregone development) in gas extraction and possible legal action.²⁹

In the context of public wildlife on private land, the split estate conflict usually centers on three issues: public access, private property damage, and the claimed privatization of public wildlife.³⁰ The issue of public access concerns whether the presence of a publicly owned

26. See, e.g., Laura Lundquist, *Judge: Bison Can Winter in More of Park County*, BOZEMAN DAILY CHRON. (Jan. 7, 2013), http://www.bozemandailychronicle.com/news/wildlife/article_b38e4c48-590f-11e2-8a01-001a4bcf887a.html.

27. See, e.g., Andrew C. Mergen, *The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419 (1998); Andrew M. Miller, *A Journey through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas Is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461 (2003); Drake D. Hill & P. Jaye Rippley, *The Split Estate: Communication and Education versus Legislation*, 4 WYO. L. REV. 585 (2004).

28. See Hayley H. Chouinard & Christina Steinhoff, *Split-Estate Negotiations: The Case of Coal-Bed Methane*, 4 REV. L. & ECON. 233, 236–38 (2008) (explaining some of the conflicts that split mineral and surface estates can create).

29. *Id.* at 234.

30. The latter, which is the primary focus of this article, typically concerns a division of economic rents between the state as owner of the wildlife and private landowners or outfitters.

resource on private land creates a public access right or easement over that private land. Several courts have recognized such rights with respect to water flowing across private property. For instance, Montana has recognized a public access right to all streams capable of recreational use regardless of streambed ownership.³¹ Therefore, anglers in Montana are legally entitled to walk through private property so long as they remain below a stream's mean high water mark. By contrast, Colorado law forbids boaters, anglers, and other recreationists from touching privately owned streambeds underlying non-navigable waters.³² No Western state has yet recognized a public access right across private land based solely on the presence of terrestrial wildlife,³³ perhaps because the stream access disputes have been so contentious.³⁴ Nonetheless, given the similarities between water and wildlife—both are publicly owned, fugitive resources managed by state governments for the benefit of the public—and the expanding conception of the public trust doctrine described below, a lawsuit seeking to apply the stream access rationale to terrestrial wildlife is likely.

The property damage issue concerns whether private landowners should be compensated for financial injury caused by publicly owned wildlife. Whereas the access issue raises a question of public rights, the property damage issue raises a question of public responsibility—namely, whether the state should bear the cost of wildlife forage and property damage on private lands. The answer to this question has significant financial implications. Jim Knight estimates the annual cost of wildlife forage on private property in Montana alone is \$31.5

31. *Mont. Coalition of Stream Access v. Curran*, 682 P.2d 163, 171 (Mont. 1984); MONT. CODE ANN. § 23-2-302(1) (2012); *see also* *Bitterroot River Protective Assn. v. Bitterroot Conservation Dist.*, 198 P.3d 219, 242 (Mont. 2008) (holding the public has a right to access privately owned and operated irrigation ditches containing fugitive waters capable of appropriation).

32. *See, e.g., People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (“It is the general rule of property law recognized in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands.”). Despite this precedent, recent legislative efforts in Colorado have attempted to exempt stream recreationists from the state's civil trespass laws. H.B. 10-1188, 67th Leg., 2d Reg. Sess. (Colo. 2010).

33. *Curran*, 682 P.2d at 171, had the practical effect of allowing the public to wade and fish on privately owned property, but the decision was based on the presence of state owned water.

34. Deborah B. Schmidt, *Public Trust Doctrine in Montana: Conflict at the Headwaters*, 19 ENVTL. L. 675, 678 (1988) (discussing how “[following *Curran*,] direct conflict between landowner and recreationist rights in water is likely to occur unless water users, administrators, and public policy makers work to develop a consensus on reasonable and equitable ways to share the resource and deal with its shortages”).

million.³⁵ Private landowners bear these costs, plus the costs of repairing countless miles of wildlife-damaged fences, usually without any compensation from the state as legal owner of the wildlife. Though some Western states have big game compensation programs,³⁶ most do not, and private landowners have a very low probability of recovering damages in court.³⁷

The opposite of the cost allocation issue is the question of revenue allocation: namely, whether and under what circumstances states should share the economic rents generated by publicly owned wildlife with private landowners.³⁸ Some commentators have argued that states must use financial incentives to motivate landowners to engage in wildlife habitat improvements.³⁹ Several others have concluded that rent sharing amounts to the privatization of public wildlife, which contradicts the North American conservation model

35. JIM KNIGHT & CAROLYN NISTLER, MONT. ST. UNIV. EXTENSION, THE CONTRIBUTIONS OF LANDOWNERS TO BIG GAME IN MONTANA 2 (2007), available at <http://msuextension.org/publications/OutdoorsEnvironmentandWildlife/MT200604AG.pdf>.

36. See IDAHO CODE ANN. § 36-1108 (2012) (outlining an elaborate compensation program for wildlife forage on private land). The Canadian provinces have similar programs. See Kimberly K. Wagner et al., *Compensation Programs for Wildlife Damage in North America*, 25 WILDLIFE SOC'Y BULL. 315, 324 (1997) (finding that seven provinces have compensation programs).

37. See *Montana v. Rathbone*, 100 P.2d 86, 95 (Mont. 1940) (“We again call attention to the fact that wild animals are the property of the State, and the State cannot be sued without its consent; whereas the owner of property, damaged by trespassing cattle or other livestock, may sue for damages, and, if the trespasses are repeated, he may also apply for injunctive relief against the owner of the livestock.”).

38. It is necessary to distinguish between revenues derived from the permission to hunt a particular parcel of private land, which permission is given or withheld by the private landowner, and revenues derived from hunting permits, which are issued by state wildlife agencies. Private landowners throughout the West lease hunting access, primarily to big game, waterfowl, and upland bird hunters, but these leases concern only access to the property. Without the required licenses and permits, access is of little value to a hunter. States that convey transferable hunting permits to private landowners are granting those landowners influence over the allocation of hunting opportunities, such as the right to take game animals, and it is this delegation of management authority that fuels the claims of wildlife privatization. See generally Pallab Mozumder et al., *Lease and Fee Hunting on Private Lands in the U.S.: A Review of the Economic and Legal Issues*, 12 HUMAN DIMENSIONS OF WILDLIFE 1 (2007) (describing the various types of wildlife related income earned by private landowners).

39. See Patrick F. Noonan & Michael D. Zagata, *Wildlife in the Market Place: Using the Profit Motive to Maintain Wildlife Habitat*, 10 WILDLIFE SOC'Y BULL. 46 (1982) (explaining that, unless the wildlife professional capitalizes on the American “profit-motive,” the passive expectation of private landowners to produce wildlife habitat is not likely to ensure long-term wildlife health); LEAL & GREWELL, *supra* note 13, at 2, 4 (1999) (describing how the market, rather than strained state agencies, provides an incentive for landowners to improve wildlife habitat and how these habitat improvements benefit game and non-game species).

and jeopardizes wildlife health.⁴⁰ Of the issues arising from the split wildlife estate, revenue allocation is particularly divisive because it pits legal and equity-based claims for limiting wildlife commercialization against utilitarian arguments for it.

Strategies for resolving the access, property damage, and revenue sharing issues that arise from the split wildlife estate are shaped by the incentives of private landowners and the ability of states, as trustees of public wildlife, to harness those incentives in the public's interest. Specifically, whether private landowners manage their property for the benefit or detriment of the public's wildlife depends on private landowners' view of wildlife as either an asset or a liability.⁴¹ This largely depends on whether the wildlife imposes a net cost or generates a net revenue for the landowner. And the ability of private landowners to generate revenues from public wildlife ultimately depends on the application of the public trust doctrine to wildlife. If the doctrine is read to prohibit delegations of management authority and the division of wildlife revenues entirely, then wildlife could only *indirectly* generate revenues for private landowners via hunting leases and other access-oriented contracts. Because of this, the problems of split ownership are likely to persist. Conversely, if courts interpret the public trust doctrine as allowing wildlife transfers that advance the public interest, state wildlife agencies and private landowners will enjoy greater latitude to write contracts that resolve the problems of split ownership.

In short, the primary mechanism by which states can motivate private landowners to enhance wildlife habitat or increase public access is by unifying the split estate and then transferring the wildlife ownership interest to those landowners. Whether such a transfer would survive judicial scrutiny depends on two factors: the court's willingness to apply the public trust doctrine to wildlife⁴² and the court's interpretation of the public trust doctrine's history.

40. See Paul Robbins & April Luginbuhl, *The Last Enclosure: Resisting Privatization of Wildlife in the Western United States*, 16 CAPITALISM NATURE SOCIALISM 45 (2006) (extolling the grass roots, bureaucratic, and political opposition to public-private sharing of wildlife revenues); Valerius Geist, *How Markets in Wildlife Meat and Parts, and the Sale of Hunting Privileges, Jeopardize Wildlife Conservation*, 2 CONSERVATION BIOLOGY 15, 23 (1988) (describing paid hunting as a deterrent that excludes low income hunters, reduces hunting participation rates, and threatens the health of wildlife populations).

41. See Noonan & Zagata, *supra* note 39, at 46 (1982) (describing how "many landowners are willing, in fact eager, to maintain wildlife habitat if it results in economic gain").

42. See Redmond, *supra* note 18, at 304 ("[T]he path to judicial recognition of the public trust in wildlife has not been smooth. Indeed, this path has been so crisscrossed and rutted with

II. WILDLIFE IN THE PUBLIC TRUST

The principles of legal trusts arise in wildlife management via the public trust doctrine. Specifically, states hold wildlife in trust for the benefit of their citizens.⁴³ This legal construct did not arise via a trust document or grant by the federal government, but first as a practical necessity under Roman law and later as a default rule under English common law. Like all common law principles, the public trust doctrine is not a static legal concept; it has evolved and will continue to evolve as courts apply the doctrine to new facts and circumstances. But because precedent binds these courts, the history of the public trust doctrine provides some limitation to the doctrine's application. Therefore, it is important to understand this history to contextualize the current controversies over wildlife management on private land. Before examining the history in detail, the following primer on trust law describes the basic operation of public trusts with particular attention to the rights and responsibilities they create.

A. Trust Law Fundamentals

Though the public trust doctrine has been expanded to natural resources not contemplated by its Roman and common law origins, the operation of the trust vehicle—particularly the rights and responsibilities arising under the trust relationship—remains unchanged. Legal trusts can take many forms and serve a number of purposes, but the basic structure of all legal trusts is the same. A trust is a relationship whereby one person or entity manages property for the benefit of another.⁴⁴ Typically, a “grantor” or “donor” entrusts

competing doctrines of constitutional limitations, property rights, and statutory and agency mandates that drawing generalizations across state lines invites oversimplification.”). For example, after the Idaho Supreme Court declared the doctrine applicable to wildlife in *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085 (Idaho 1983), the Idaho legislature enacted a provision which expressly declared that Idaho's public trust doctrine was “solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters.” IDAHO CODE ANN. § 58-1203 (2002) (emphasis added).

43. BEAN & ROWLAND, *supra* note 14 at 10–15; Redmond, *supra* note 18; Darren K. Cottriel, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1266–69 (1996); *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585, 630 (Cal. Ct. App. 1989) (holding that title to wild fish is vested in the state and held by it as trustee for the common ownership and use of the people); *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (holding that, under the public trust doctrine, the Commonwealth of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources). *But see* IDAHO CODE ANN. § 58-1203 (2002).

44. RESTATEMENT (THIRD) OF TRUSTS § 2 (2007).

property to the “trustee” who must manage the trust property for the benefit of a specified “beneficiary” or charitable purpose. The trustee holds legal title to the trust property and owes a fiduciary duty to the beneficiary.⁴⁵ The beneficiary, in turn, holds equitable title to the property but cannot consume the trust property in any manner inconsistent with the trust provisions.⁴⁶

Trusts can be either public or private.⁴⁷ The critical distinction is whether the beneficiary is an identified individual or group of individuals or a charitable purpose that benefits society as a whole. For instance, public trusts may be created with the charitable purpose of alleviating hunger or increasing adult literacy. On the other hand, private trusts are created for the benefit of identifiable persons, often the grantor’s descendants. Regardless of whether a trust is public or private, the trustee holds a fiduciary obligation to manage the trust property exclusively for the benefit of the beneficiary.⁴⁸

A trustee’s fiduciary obligation subjects the trustee to a strict legal standard—a higher standard of care than ordinary care. Not only must a trustee use ordinary, reasonable skill and prudence in the management of trust property, a trustee must also ensure the trust property is profitable and secure against unreasonable loss.⁴⁹ This fiduciary obligation does not require that the trustee personally perform all of the tasks required to maintain the trust property, but it does require that the trustee make the necessary arrangements if third-party assistance is needed.⁵⁰ For instance, if the trust property is real estate, the trustee is not personally obligated to sweep the floors or clean the windows. However, the trustee is obligated to ensure the property does not fall into a state of disrepair and, consequently, may be required to hire professional janitorial services. Similarly, a trustee of financial funds may be required to hire a professional financial planner or investment strategist if the management of the trust property requires a competency beyond that which the trustee possesses.

Though the trustee owes a strict fiduciary duty to the trust beneficiary, the trustee enjoys significant discretion in the way she

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See generally Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991).

50. RESTATEMENT (THIRD) OF TRUSTS § 80 (2007).

administers the trust. So long as the trustee manages the trust property in accordance with the terms of the trust and with an undivided loyalty to the trust beneficiary, courts are usually hesitant to find a trustee in violation of her fiduciary duty.⁵¹

Opposite the trustee is the trust beneficiary. Though the beneficiary holds equitable title to the trust property—the actual enjoyment and use of the property—the beneficiary does not possess a right to consume the trust property in any manner inconsistent with the terms of the trust.⁵² As such, the trustee's fiduciary duty to preserve the trust property from unreasonable loss includes the obligation to ensure the beneficiary does not consume the trust property in a manner that frustrates the trust's purpose. With this basic understanding of the rights and responsibilities created by legal trusts, we turn to the history of trust principles as applied to wildlife.

B. Roman Law

The public trust doctrine is a historical concept that most scholars trace back to sixth century Roman law. Not surprisingly, given its age, the historical roots of the public trust doctrine are themselves topics of much scholarly and judicial debate.⁵³ However, most scholars agree that the story begins with the Justinian Code, completed in 529 A.D.⁵⁴

As to wildlife, Justinian summarized the law of the day as follows:

Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of course anyone who enters the ground of another for the sake of

51. See Cooter and Freedman, *supra* note 49, at 1054.

52. ALASTAIR HUDSON, EQUITY AND TRUSTS 54–55 (2009).

53. See generally Huffman, *supra* note 17 (documenting the doctrine's historical foundations and controversial application in current jurisprudence).

54. Matthew E. Pecoy, *Sitting on the Dock of the Bay: South Carolina's Need for a General Submerged Land Lease Program*, 15 SOUTHEASTERN ENVTL. L.J. 281, 282 (2006) (quoting JUSTINIAN, THE JUSTINIAN INST. 35 § 2.1.1 (J. B. Moyle trans., 5th ed. 1913)) (“By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations.”).

hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering.⁵⁵

Citing “special rules for bees, pigeons, peacocks, geese and other fowl that might leave their owners’ land but would return of their own accord,” Huffman notes that “wild creatures were owned by no one, not because they were thought to be owned by everyone, but because establishing private ownership required establishing special rules adapted to their wild nature.”⁵⁶ According to Huffman, “[i]f there was a right held in common [under Roman law] it was the right to acquire private ownership of wild animals by capturing them.”⁵⁷

The inability of Roman law to define ownership of wildlife by any other rule than capture thus necessitated that ownership be shared in common until such capture was made. However, communal ownership of wildlife resources is by no means synonymous with sovereign trusteeship for exclusive public benefit. According to Patrick Deveney:

Roman law was innocent of the idea of trusts, had no idea at all of a “public” (in the sense we use the term) as the beneficiary of such a trust, allowed no legal remedies whatever against state allotment of land, exploited by private monopolies everything (including the sea and the seashore) that was worth exploiting, and had a general idea of public rights that is quite alien to our own.⁵⁸

As such, there appears to be no support in Roman law for the claim that the public trust doctrine precluded the sovereign’s ability to transfer ownership of wildlife resources to private individuals or to share with private individuals the benefits of cooperatively managed wildlife populations.

Under Roman law, there was no trust relationship between the government and the citizenry with regard to wildlife or any other natural resources; instead, public rights of access appeared to exist “*unless and until* a private person or the state required exclusive control of the resource.”⁵⁹ Moreover, the ability of private landowners to exclude the public from hunting and fishing on private land suggests that private property rights outweighed any public right to hunt or fish. That wildlife populations were communally owned under

55. Huffman, *supra* note 17, at 80 (quoting JUSTINIAN, THE INSTITUTES OF JUSTINIAN § 2.1.12 (Thomas Cooper trans. & ed., 1841)).

56. *Id.*

57. *Id.*

58. Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 17 (1976) (internal citation omitted).

59. *See id.* at 21 (emphasis in original).

Roman law reflects only the difficulty of defining private rights in fugitive wildlife resources, not a trust-based restraint on the sovereign's ability to alienate or grant exclusive use rights to natural resources.

C. English Common Law

Because the practical difficulties of defining individual rights in fugitive wildlife resources had not been solved, the common law of England similarly treated wildlife as common property subject to the rule of capture. Lord Bracton wrote that “[t]hings are said to be *res nullius* [owned by no one] in several different ways: by nature or the *jus naturale*, as wild beasts, birds and fish.”⁶⁰ According to Blackstone, however, the common law did eventually evolve to allow a qualified private property right in wildlife.⁶¹ Such a right could be established according to one of three distinct principles: by capture and confinement so that wildlife “could not escape and use their natural liberty” (*per industrium*); by providing habitat to the offspring of wildlife species confined to nests or burrows (*propter impotentium*); or by “the privilege of hunting, taking, and killing them, in exclusion of other persons” on private land or on public land granted by the crown for the purpose of taking game (*propter privilegium*).⁶² Absent these circumstances, title to all wildlife was held by the crown as the practical shorthand for public ownership and pursuant to the “wise and orderly maxim, of assigning to everything capable of ownership a legal and determinant owner.”⁶³

According to Blackstone, another practical justification for vesting ownership of wildlife in the crown was to limit the conflict that would arise under the rule of capture applied to game animals. Title to those “species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game,” was held by the crown so as to limit the “disturbances and quarrels [that] would frequently arise among individuals, contending about the acquisition of this species of

60. ANDREW ZURCHER, SPENSER'S LEGAL LANGUAGE: LAW AND POETRY IN EARLY MODERN ENGLAND 145 n.56 (2007) (quoting BRACTON, 2 DE LEGIBUS ET CONSUECUDINIBUS ANGLIAE 41 (1256)).

61. Huffman, *supra* note 17, at 82.

62. *Id.* at 81 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 391 (1765)).

63. *Id.* at 82.

property by first occupancy.”⁶⁴ The concern appears to be that hunters and anglers would quarrel and potentially exhaust game populations in a race to establish ownership of wildlife via the rule of capture.

Thus in Europe, despite claims that the natural law prohibited governments from limiting public access to game, “[t]he sovereigns have reserved to themselves, and to those to whom they judge proper to transmit it, the right to hunt all game, and have forbidden hunting to other persons.”⁶⁵ By this account, sovereign ownership of game species did more to restrict public hunting access than enhance it.

Not until the Magna Carta is there evidence of limitations on the sovereign’s ability to alienate commonly owned natural resources.⁶⁶ Chapter Sixteen of the Magna Carta reads: “No riverbanks shall be placed in defense henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time.”⁶⁷ This chapter was eventually understood to be a prohibition on the crown’s granting of exclusive fisheries.⁶⁸ According to Blackstone, “making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John’s great charter, and the rivers that were fenced in his time were directed to be laid open.”⁶⁹

It should be noted, however, that previous grants of exclusive hunting and fishing rights were not undone by the Magna Carta and the King’s authority to make such grants apparently persisted for several centuries after its signing.⁷⁰ Indeed, there is evidence to suggest that the crown could alienate tidal lands and, by association, grant exclusive hunting and fishing privileges to private individuals long after the Magna Carta.⁷¹ Deveney explains that “there is no suggestion whatsoever of a public trust in Lord Hale’s writings, and he recognizes no limitations on the power of the Crown to convey

64. *Id.*

65. *Geer v. Connecticut*, 161 U.S. 519, 524 (1896) (quoting POTHIER, *TRAITÉ DU DROIT DE PROPRIÉTÉ*, NOS. 27-28 (1772)).

66. Jan S. Stevens, *The Public Trust: A Sovereign’s Ancient Prerogative Becomes the People’s Environmental Right*, 14 U.C. DAVIS L. REV. 195, 197-200 (1980).

67. MAGNA CARTA, CHAPT. 16, ART. 20 (Eng. 1225).

68. Huffman, *supra* note 17, at 20.

69. *Id.* at 23 n.121.

70. *Id.* at 20.

71. *Id.* at 20-23.

title to the coastal area.”⁷² Similarly, Hale acknowledged that title to submerged and tidal land could be and most often was privately owned and that it could be acquired by usage, custom, prescription, or conveyance from the Crown.⁷³ Hale also explained “there is no public right to fish in navigable waters, though the public may be granted the liberty to do so.”⁷⁴

Though the Magna Carta is often cited as the first explicit restraint on the sovereign’s ability to alienate certain natural resources, it did not create a sovereign trusteeship in wildlife resources and had little effect on restraining resource alienation by the sovereign. According to historical accounts, the crown often transferred to private individuals the title to commonly owned lands as well as the exclusive hunting and fishing rights on those lands.⁷⁵ Not until centuries later, in a sequence of American cases, was the public trust doctrine interpreted as providing any meaningful restraint on sovereign alienation of wildlife resources.

D. American Jurisprudence

Following the American Revolution, state governments succeeded the English Crown as sovereign trustees of public lands and other communally owned resources. The rights and responsibilities of the state governments vis-à-vis their citizenry were unknown and frequently disputed, as suggested by the extensive body of case law discussed below. Emerging from this case law is a theme relevant to wildlife management today: although the public trust doctrine limits the alienability of trust resources, it does not preclude alienation that benefits the public interest.⁷⁶

First in the lineage of early American cases is *Arnold v. Mundy*,⁷⁷ a case concerning the ownership of tidal lands and oyster beds along

72. Deveney, *supra* note 58, at 48.

73. MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM (1735), reprinted in STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370 (1888).

74. *Id.* at 377.

75. Deveney, *supra* note 58, at 33.

76. Many of the cases that mark this evolution involve disputes of ownership to tidal lands, not wildlife. Because most conceptions of the public trust doctrine group these together as trust resources, these tidal land cases are relevant to this wildlife management inquiry. As explained below, some state courts and legislatures have expressly narrowed the application of the public trust doctrine to submerged lands, while others have explicitly included wildlife as a trust resource. See Redmond, *supra* note 18, at 259–304.

77. 6 N.J.L. 1 (1821).

New Jersey's Rariton River. Though the riparian landowner had planted and maintained the oyster beds in question, and could trace title to the tidal land to the King of England, the New Jersey Supreme Court ruled the tidal lands and the overlying oyster beds were "common to all citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use."⁷⁸ To reach this conclusion, the court nullified the original land transfer from the King of England as an invalid transfer of common property.⁷⁹ In support of this conclusion, the court cited the Magna Carta, as well as English common law according to the expansive interpretations of Blackstone, Hale, and Bracton.⁸⁰ Relying on these commentators, the *Arnold* court concluded that the citizens of New Jersey held "the legal estate and the usufruct [and] may make such disposition of them, and such regulation concerning them as they may think fit . . . [through] the legislative body, who are the representatives of the people for this purpose."⁸¹

The court held that the New Jersey legislature may develop the commonly owned natural resources "at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive enjoyments."⁸² However, the court described the state legislature's powers as:

. . . nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.⁸³

This passage is susceptible to at least two interpretations: as prohibiting the transfer of any stated-owned water, or as prohibiting

78. *Id.* at 76–77.

79. The court delineates three types of property: private, public, and common. According to the court, public property is transferable property owned by the government, whereas common property is inalienable public property "to be held, protected, and regulated for the common use and benefit." *Id.* at 71.

80. Huffman, *supra* note 17, at 18. Judge Kirkpatrick, writing for the New Jersey Supreme Court, simply misunderstood the common law of England and the practical impotence of the Magna Carta with respect to wildlife alienation by the sovereign.

81. *Arnold*, 6 N.J.L. at 13 .

82. *Id.*

83. *Id.* at 78.

the transfer of *all* “the waters of the state.” The latter is more reasonable for two reasons. First, by New Jersey law, individuals owning lands adjacent to tidal waters “wherein oysters do or will grow” could plant and have the exclusive right of harvesting oysters.⁸⁴ Second, the New Jersey Supreme Court later reversed *Arnold* and in so doing confirmed the legislature’s authority to limit public access via alienation to private parties.⁸⁵

Despite being overturned, *Arnold* stands as the first articulation of the public trust doctrine as a significant, though not absolute, restraint on the ability of state governments to alienate state waters and the wildlife in those waters.

The United States Supreme Court repeated this expanded notion of the public trust doctrine and laid the foundation for state ownership of wildlife in the 1842 case *Martin v. Waddell*,⁸⁶ a tidal land case very similar to *Arnold*. Writing for the majority, Chief Justice Taney explained, “[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 to either the crown or the parliament, became immediately and rightly vested in the state.”⁸⁷ Thus, according to the Supreme Court, the citizens of New Jersey held in common the navigable waters, submerged lands, and the wildlife lying thereon.

The Court described how, under common law, the English crown could transfer trust lands but that such transfers were strictly construed so as to limit the alienation of commonly owned resources.⁸⁸ The Supreme Court then suggested that the powers of

84. Act of June 9, 1820, 1820 N.J. Laws 162 (providing for the preservation of clams and oysters).

85. *Gough v. Bell*, 22 N.J.L. 441, 459 (N.J. 1850) (“If, by this proposition, it is meant only to assert that a grant of all the waters of the state, to the utter destruction of the rights of navigation and fishery, would be an insufferable grievance, it is undoubtedly true But if it be intended to deny the power of the legislature, by grant, to limit common rights or to appropriate lands covered by water to individual enjoyment, to the exclusion of the public common rights of navigation or fishery, the position is too broadly stated.”).

86. 41 U.S. 367 (1842).

87. *Id.* at 416.

88. *Id.* at 411. (“The dominion and property in navigable waters and the lands under them being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund entrusted to his care for the common benefit. In such cases, whatever does not pass by the grant remains in the Crown for the benefit and advantage of the whole community. Grants of that description are therefore, construed strictly, and it will not be presumed that the King intended to part from any portion of the public domain unless clear and special words are used to denote it.”).

alienation held by state governments could exceed those held by the English crown at common law, presumably because the state legislature is a better representative of the public than was the English monarch.⁸⁹

Decades later, in the famous case of *Illinois Central Railroad Co. v. Illinois*,⁹⁰ the Court defined those “different principles” and the category of sovereign transfers that are consistent with the public trust doctrine. *Illinois Central* raised the issue of the validity of a legislative grant of a significant portion of the Chicago harbor waterfront to a privately owned railroad.⁹¹ In answering that question, the Court referenced the public trust doctrine and explained that title to the submerged lands is “a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference by private parties.”⁹²

The Supreme Court explained that, while the public trust doctrine prohibited Illinois from transferring control “over lands under the navigable waters of an entire harbor or bay, or of a sea or lake,” and thus the legislative grant in question, it did not preclude transfers of trust property to private parties that aided in the public interest.⁹³ According to the Court,

[t]he interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, *do not substantially impair the public interest* in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise

89. *Id.* at 410–11 (“For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by *different principles* from those which apply to grants of the British crown, when the title is held by a single individual, in trust for the whole nation.”) (emphasis added).

90. 146 U.S. 387 (1892).

91. *Id.* at 452.

92. *Id.*

93. *Id.* at 452–53.

of legislative power consistently with the trust to the public upon which such lands are held by the state.⁹⁴

The Supreme Court thus recognized the distinction between a state's wholesale abdication of its trust obligation and some lesser alienation of trust property that aids in the purpose of the public trust. According to the Court, "[t]he 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."⁹⁵

Four years later, the United States Supreme Court would repeat this distinction in a case specifically dealing with state wildlife regulation under the public trust doctrine.⁹⁶ Tracing the history of sovereign control of game species through Roman and common law, Justice White explained:

While the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from the common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of all people, and not as a prerogative for the advantage of government, as distinct from the people, *or for the benefit of private individuals as distinguished from the public good.*⁹⁷

This passage is important for two reasons: first, it confirms the states' trust obligations regarding wildlife management; second, it articulates the flexibility of the trust relationship terms. According to the Court's explanation, this trust relationship precludes state wildlife management policies that benefit the government or private individuals *instead* of the public, but it does not preclude the management of trust resources for the benefit of private individuals *and* the public. This distinction is important because it allows for wildlife management policies that share the rents of publicly owned wildlife with the private landowners and for states to transfer a full or partial ownership stake in wildlife to private landowners who steward the wildlife for the public benefit.

Several legal commentators have depicted the public trust doctrine as absolutely precluding state governments from transferring trust resources, including wildlife, or sharing with private landowners

94. *Id.* (emphasis added).

95. *Id.* at 453.

96. *Geer v. Connecticut*, 161 U.S. 519 (1896).

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

the rents derived from shared habitat production.⁹⁸ As explained above, this characterization has no historical basis. As far back as ancient Rome, private landowners could prevent members of the public from hunting or fishing communally owned wildlife on private land. Under English common law, private landowners could establish ownership of wildlife by providing habitat to certain wildlife species and, in some instances, by sovereign grant. And in the foundational American cases, the public trust doctrine only limited sovereign transfers of trust resources that were inconsistent with the public's benefit. Expanding the public trust doctrine beyond these historical foundations to preclude all transfers of trust property would likely perpetuate the split ownership conflicts that currently characterize wildlife management.

III. RANCHING FOR WILDLIFE

The history of the public trust doctrine supports the assertion that states can transfer an ownership interest in wildlife resources to private landowners. Even grants of exclusive access and control are permissible if they advance the public interest.⁹⁹ To be sure, states can expressly curtail the resources and uses protected by the public trust doctrine,¹⁰⁰ supplant the doctrine with comprehensive environmental regulatory schemes,¹⁰¹ expand public access rights,¹⁰² or restrict the alienability of trust resources more narrowly than is proscribed by the

98. See Sax *supra* note 17, at 490 (“When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any government conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.”).

99. See *Martin v. Waddell*, 41 U.S. 367, 411 (1842) (“The dominion and property in navigable waters and the lands under them being held by the King as a public trust, the grant to an individual of an *exclusive* fishery in any portion of it is so much taken from the common fund *entrusted to his care* for the common benefit.”) (emphasis added).

100. See, e.g., IDAHO CODE ANN. § 58-1203 (expressly limiting the doctrine to submerged lands under navigable waters); *Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987) (applying the doctrine to tidelands and shorelands and distinguishing between the alienable *jus privatum*, or private property interest, and the inalienable *jus publicum*, or public authority interest in the context of allowing a statute that permits private property owners to install private recreational docks on abutting state property without paying a fee). *But see* *Weden v. San Juan County*, 958 P.2d 273, 284 (Wash. 1998) (rejecting the notion that the doctrine would “sanction an activity that actually harms and damages the waters and wildlife of this state”).

101. See MASS. GEN. LAWS ANN. ch. 30, §§ 61–62 (West 2001); MICH. COMP. LAWS §§ 324.1701–06 (1999).

102. See *Mont. Coalition of Stream Access v. Curran*, 682 P.2d 163, 171 (Mont. 1984) (using the public trust doctrine to create a public right of access over privately owned stream beds underlying all water ways in the state capable of recreational use).

bedrock common law principles.¹⁰³ Nonetheless, the argument that the public trust doctrine, by vesting wildlife ownership in the states, precludes states from alienating wildlife resources or delegating wildlife management authority is unfounded. Free from these assumed limitations, states have significant flexibility to contract with private landowners to overcome the issues of public access, property damage, and rent allocation that arise from the split wildlife estate.

One model for unifying the split wildlife estate that has gained traction in recent years is called “ranching for wildlife.”¹⁰⁴ Though the name elicits images of high-fenced game ranching, ranching for wildlife (RFW) actually describes state managed programs that use cooperative agreements between landowners and wildlife agencies to improve the quality of free-roaming wildlife populations.¹⁰⁵ States with RFW programs¹⁰⁶ encourage eligible landowners to invest time, money, and resources in wildlife habitat improvements and expanded hunting opportunities on their properties.¹⁰⁷ In return for these investments, states modify their hunting regulations to allow enrolled landowners greater flexibility to manage and profit from the public’s wildlife.¹⁰⁸

The details of each state’s program are unique and vary according to the objectives of the wildlife department, private landowners, and the state’s legislature.¹⁰⁹ To get a sense of how RFW can address the issues arising from a split wildlife estate, consider the specifics of Colorado’s program, Colorado Ranching for Wildlife. The objectives of the program are to improve public access and recreational opportunities, preserve and protect wildlife habitat, improve and enhance wildlife habitat, more effectively implement species management plans, decrease or mitigate game damage, and improve relationships between Colorado Parks and Wildlife (CPW),

103. See *Nat’l Audubon Soc’y v. Super. Ct.*, 658 P.2d 709 (Cal. 1983).

104. This is an umbrella term used to describe various landowner incentive programs in the West.

105. LEAL & GREWELL, *supra* note 13, at 1.

106. *Id.* at 17. California, Colorado, New Mexico, and Utah, among others, have developed ranching for wildlife programs with several thousands of private acres enrolled. Several other Western states have fledging programs with fewer acres enrolled. *Id.*

107. *Id.* at 1.

108. *Id.* at 2.

109. See *id.* at 17–18 (providing an overview of each program’s structure and size).

private landowners, and hunters.¹¹⁰ To achieve those objectives at the lowest administrative cost, CPW targets large ranches and limits enrollment in the program to properties with at least 10,000 contiguous acres.¹¹¹ Twenty-nine ranches are currently enrolled.¹¹²

As a prerequisite to enrollment, petitioning landowners and staff from CPW must agree to a management plan that specifies objective performance criteria for habitat improvements for game and non-game species, species management, free public hunting access, and hunter satisfaction.¹¹³ Based on the landowner's performance under these management objectives, CPW will lengthen hunting seasons and increase harvest limits on the property.¹¹⁴ These regulatory modifications give enrolled landowners more tools for limiting property damage and crop depredation. However, the primary incentive for landowners to enroll in the program is to earn transferable big-game hunting permits.¹¹⁵ These permits entitle the purchasing hunter to harvest a particular big game animal on the enrolled ranch.¹¹⁶ Landowners can sell the permits on the open market, often for thousands of dollars depending on the species and the quality of the hunting opportunity. The landowners choose to whom they will sell the permits and are entitled to all of the sale proceeds. The number of tags issued to the landowner is based on a tiered system reflecting the amount of habitat enhancements and free public hunting access the landowner provides.¹¹⁷

110. COLO. PARKS & WILDLIFE, RANCHING FOR WILDLIFE OPERATING GUIDELINES 1 (2012), available at <https://wildlife.state.co.us/SiteCollectionDocuments/DOW/Hunting/BigGame/Ranching/RFWGuidelines.pdf>.

111. *Id.*

112. COLO. PARKS & WILDLIFE, RANCHING FOR WILDLIFE—RANCH SIZE, LOCATION, & SPECIES (2013), available at <https://wildlife.state.co.us/SiteCollectionDocuments/DOW/Hunting/BigGame/Ranching/PDF/RanchSizeLocationSpecies.pdf>.

113. COLO. PARKS & WILDLIFE, *supra* note 96, at 5.

114. *Id.*

115. *See id.* at 16 (noting allocation of public to private hunting licenses).

116. *Id.* Most states require a general hunting license for all hunting activity in the state, plus species and location specific permits for big game animals such as elk, deer, antelope, and turkey. Though landowners enrolled in Ranching for Wildlife can transfer the permits to whomever they like, most sell them to non-resident hunters because of the price differential between resident and non-resident permits. Colorado's program grants tags for deer, elk, pronghorn, moose, bighorn sheep, and black bear. *Ranching for Wildlife Hunter Information*, COLO. PARKS & WILDLIFE, <http://wildlife.state.co.us/Hunting/BigGame/RanchingforWildlife/Pages/RFWHunterInformation.aspx> (last updated Feb. 26, 2013).

117. 2 COLO. CODE REGS. § 210(E) (2012).

The public benefits generated by Colorado's Ranching for Wildlife program are significant. Participating landowners have opened up public access to more than one million acres, over 50,000 acres per year have active wildlife habitat improvements applied, and improved livestock grazing systems have been implemented on approximately eighty percent of the lands enrolled.¹¹⁸ Programs in other Western states have had similar success by aligning the incentives of private landowners with the public's interest in wildlife.¹¹⁹

Despite these successes, critics complain that ranching for wildlife programs constitute an unlawful privatization of wildlife,¹²⁰ and that allowing private landowners to profit from public wildlife is likely to "destroy the basic policies by which North America's system of wildlife conservation operates."¹²¹ Even under the assumption that enrolled landowners acquire an ownership interest in wildlife under

118. *Ranching for Wildlife*, COLO. PARKS & WILDLIFE, <https://wildlife.state.co.us/hunting/biggame/ranchingforwildlife/pages/rfw.aspx> (last updated Feb. 20, 2013).

119. For example, California's Private Land Management Program, encompassing over one million acres, has funded habitat enhancements for deer, elk, pronghorn antelope, wild turkeys, quail, waterfowl, as well as threatened and endangered species like the bald eagle and red-legged frog. *Private Lands Management*, CAL. DEP'T FISH & WILDLIFE, <http://www.dfg.ca.gov/wildlife/hunting/plm.html> (last visited Mar. 9, 2013). Utah's Cooperative Wildlife Management Units have opened more than two million acres of private land to the public. *Cooperative Wildlife Management Units*, UTAH DIV. WILDLIFE RES., <http://wildlife.utah.gov/dwr/about-the-program.html> (last updated Oct. 3, 2012). Oklahoma's Deer Management Assistance Program has significantly improved the white-tail deer management on private property, reduced property damage, and improved the data collection throughout the state. *Deer Management Assistance*, OKLA. DEP'T WILDLIFE CONSERVATION, <http://www.wildlifedepartment.com/wildlifemgmt/deermanagement.htm> (last visited Mar. 9, 2013).

120. See John Gibson, *Ranching for Wildlife: Commercializing Public Wildlife*, MONT. STANDARD (Nov. 6, 2008), <http://www.plwa.org/viewarticle.php?id=84> (describing ranching for wildlife programs as a violation of the public trust doctrine); Chris Marchion, *Ranching Model Doesn't Work: Wildlife Management Technique Has Failed in Western States*, MISSOULIAN (Nov. 13, 2008), http://missoulain.com/news/opinion/editorial/article_7043df6d-dcc8-5489-8d88-b758681dd779.html ("This approach returns wildlife to private commerce, animal husbandry and gives control of who gets a hunting license for use on specific private lands to participating landowners. While such a program has been tried in some Western states, it has failed to produce anticipated benefits for landowners, wildlife management and public opportunities."); *Public Ownership of Wildlife & the Threat of Privatization*, MONT. WILDLIFE FED., <http://www.montanawildlife.com/publications/huntingfishingfuture.htm> (predicting ranching for wildlife would undermine the state's cultural heritage and violate the public trust doctrine) (last visited Mar. 21, 2013); Tyler Baskfied, *Ranching for Wildlife Program Criticized*, CRAIG DAILY PRESS (July 6, 2000), http://www.craigdailypress.com/news/2000/jul/06/ranching_for_wildlife/?print.

121. Geist, *supra* note 40, at 16; see also Horner, *supra* note 18, at 29; Meyers, *supra* note 18.

ranching for wildlife contracts,¹²² RFW programs still comport with the historical guidelines of the public trust doctrine and the state's role as trustee. First, the interest transferred does not amount to a total abdication of the state's fiduciary obligations, as prohibited by *Illinois Central* and the basic principles of private trust law. Rather, it constitutes a sharing of wildlife management authority and the resulting revenues. The state wildlife agency retains control over the number of transferrable permits issued and the conditions by which those permits can issue. The state agency also holds discretionary authority over whether to approve or deny enrollment applications; no ranching for wildlife programs have automatic enrollment provisions. Thus, any management authority or ownership interest transferred under such a program is partial and revocable. In this way, it is more akin to the transfer of submerged land underlying a dock in Chicago's harbor than the entire harbor itself, and more similar to a private trustee hiring janitorial service than delegating all of her fiduciary obligations.

Secondly, any transfers of ownership or delegations of management authority accomplished by ranching for wildlife programs satisfy the public trust doctrine's requirement of advancing the public interest.¹²³ Recall that the enrolled landowner's receipt of the transferable permits is conditioned on his or her performance of specific habitat enhancements and provision of public hunting opportunities. Though landowners profit from participation, the program provides a net benefit to both the landowners and the state. The transferable permits motivate the private landowners to better steward the public's wildlife and to increase public hunting access on land that might otherwise be totally inaccessible. This quid pro quo contract grows the proverbial pie of wildlife benefits such that the

122. Ample authority suggests such an ownership interest is severely limited by the public trust, if it exists at all. See *Nat'l Audubon Soc'y v. Super. Ct. of Alpine County*, 658 P.2d 709, 723 (Cal. 1983) (explaining that "the grantee [of trust property] holds subject to the trust, and while he may assert a vested right to the servient estate (the right to use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purpose."). See also generally Anna R.C. Casperson, *Public Trust Doctrine and the Impossibility of Takings by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357 (1996).

123. The stated objectives of Colorado's RFW Program speak to the way in which it harnesses landowner incentives and enhances the public's interest in the wildlife trust property. These include (a) improving public access and recreational opportunities; (b) preserving and protecting wildlife habitat; (c) improving and enhancing wildlife habitat; (d) more effectively implementing species management plans; (e) decreasing or mitigating game damage; and (f) improving relationships between the Department of Wildlife, landowners, and sportsmen. COLO. PARKS & WILDLIFE, *supra* note 110, at 1.

public's transfer of an ownership interest in wildlife ultimately generates more wildlife benefits for the public.

In sum, landowner incentive programs such as ranching for wildlife overcome the split estate issues by aligning the incentives of private landowners with the public's interest in wildlife—they “harmonize the public's interest in sustaining wildlife populations with the landowner's desire to manage wildlife on his or her property.”¹²⁴ When private landowners view wildlife as an asset rather than a liability, they are more likely to be good wildlife stewards.

IV. BARTERING IN BISON

A non-game example of a more unified wildlife estate can be found on media mogul Ted Turner's Green Ranch near Bozeman, Montana. The property is home to a herd of bison from Yellowstone National Park that is considered genetically pure¹²⁵ and closely related to the historic Great Plains bison.¹²⁶ The story of how the herd came to Turner's ranch—not by migrating but by a memorandum of understanding—shows that public-private wildlife partnerships can enhance the health and value of wildlife resources. It also reveals how an expansive and historically unfounded interpretation of the public trust doctrine could discourage stewardship and destroy the value of wildlife resources.

The story starts with a disease called *Brucella abortus* (brucellosis). Brucellosis causes miscarriage, infertility, and reduced milk production in cattle and flu-like symptoms in humans.¹²⁷ Scientists debate whether bison can transmit brucellosis to livestock, but most agree that approximately fifty percent of the Yellowstone Park bison test positive for the disease.¹²⁸ If multiple brucellosis outbreaks occur in a single state within a twelve-month period, the

124. LEAL & GREWELL, *supra* note 13, at 12.

125. See R.O. Polzhihn et al., *Bovine mtDNA Discovered in North American Bison Populations*, 9 CONSERVATION BIOLOGY 1638 (1995); Jim Robbins, *Out West, With the Buffalo, Roam Some Strands of Undesirable DNA*, N.Y. TIMES, Jan. 9, 2007, at F2 (most American bison in the United States have some bovine genetics).

126. *Mont.-Turner Bison Agreement Challenged*, MONT. STANDARD (Aug. 25, 2012), http://mtstandard.com/news/local/state-and-regional/mont—turner-bison-agreement-challenged/article_bafe715a-ee6c-11e1-8e93-001a4bcf887a.html.

127. U.S. DEPT. OF AGRIC., BRUCELLOSIS AND YELLOWSTONE BISON 1 (2007), available at http://www.aphis.usda.gov/animal_health/animal_dis_spec/cattle/downloads/cattle-bison.pdf.

128. Jack C. Rhyan et al., *Pathogens and Epidemiology of Brucellosis in Yellowstone Bison: Serologic and Culture Results from Adult Females and Their Progeny*, 45 J. WILDLIFE DISEASES 729, 730 (2009).

U.S. Department of Agriculture can revoke the state's brucellosis-free certification triggering extensive testing and vaccination protocols¹²⁹ and reducing the marketability of the state's livestock.¹³⁰ In short, Yellowstone Park bison and cattle do not mix.¹³¹

In an attempt to fix the problem, a coalition of state and federal agencies began a quarantine feasibility study to develop procedures for certifying brucellosis-free bison.¹³² The objective was to transplant Yellowstone bison outside the Park to augment existing populations near extinction and to ensure that the bison population inside the Park does not exceed carrying capacity.¹³³ As part of the five-year program, an initial herd of 100 bison calves was quarantined and serially tested for brucellosis.¹³⁴ In March 2009, Montana Fish, Wildlife & Parks (FWP) completed an environmental assessment for the placement of the first group of quarantined bison on the Wind River Reservation of the Northern Arapaho Tribe in Wyoming.¹³⁵ Before the animals were moved, the Tribe rescinded their offer to accept the bison because it had been unable to secure the necessary facilities.¹³⁶ In November 2009, the bison quarantine facility reached its maximum capacity, requiring the immediate relocation of the eighty-eight bison remaining from the original herd.¹³⁷

Earlier, in June 2009, FWP had published a request for proposals announcing the availability of the brucellosis-free bison, the conservation objectives of the translocation effort, and the criteria for

129. See MONT. ADMIN. R. §§ 32.3.411–32.3.437 (defining the testing and vaccination procedures for livestock operations in the designated surveillance area bordering Yellowstone National Park).

130. M. Jeff Hagener, *Concerns about Brucellosis in Montana*, MAGAZINE MONT. FISH, WILDLIFE & PARKS, <http://fwp.mt.gov/mtoutdoors/HTML/director/2008/SO08.htm> (last visited Mar. 20, 2013) (Brucellosis outbreaks did occur in Montana in 2007 and 2008, causing the state to lose its brucellosis-free certification).

131. See U.S. DEPT. OF AGRIC., *supra* note 127, at 2. During the harsh winter of 1996 to 1997, thousands of bison began to migrate out of Yellowstone in search of food. Their migration pattern crossed over National Forest land and private ranches where cattle grazed. Given the potential for transmission, federal and state officials attempted to haze the bison back onto park land. *Id.* When those efforts failed, officials shot or sent to slaughter 1,079 bison. *Id.* An additional 1,300 starved to death inside the Park. *Id.*

132. MONTANA FISH, WILDLIFE, & PARKS, FINAL ENVIRONMENTAL ASSESSMENT, BISON TRANSLOCATION, BISON QUARANTINE PHASE IV (2010), *available at* fwp.mt.gov/fwpDoc.html?id=41816.

133. *Id.* at 6–7.

134. *Id.*

135. See generally *id.*

136. *Id.* at 6–7.

137. *Id.*

the facilities needed to house and continue testing the herd.¹³⁸ FWP received seven proposals¹³⁹ and chose Turner's proposal on the basis of available carrying capacity, fencing, the ability to keep the bison separate from livestock, and the ability to comply with the feasibility study's testing protocols.¹⁴⁰

Because Turner would bear the cost of relocating, feeding, caring for, and otherwise maintaining the herd until the end of the five-year research period, the memorandum of understanding specified that Turner would retain seventy-five percent of the offspring born during his stewardship.¹⁴¹ FWP explained how the quid-pro-quo would advance the objectives of the feasibility study and bison conservation, generally:

This portion of the proposed action will help serve the objectives of the research project, will serve to propagate a brucellosis-free herd of bison, and will encourage partners of this research project to carry out future conservation and restoration efforts of Yellowstone bison. In the case of TEI, the remaining QF progeny may be used to increase the genetic diversity of TEI's Castle Rock bison herd in northern New Mexico. That herd, which originated in Yellowstone Park in the 1930s, has been managed as a closed herd since then and has been identified by Texas A&M as genetically "pure" and unique.¹⁴²

Nonetheless, and perhaps not surprisingly, several groups immediately sued FWP, arguing that the transfer of a portion of the quarantined herd's progeny violated the public trust by privatizing public wildlife.¹⁴³ The cashless nature of the agreement is the plaintiffs' primary focus. Glenn Hockett with the Gallatin Wildlife

138. *Id.*

139. *See id.* at 7 (listing the applicants as the Fort Belknap Indian Community, Turner Enterprises, Inc., Chicago Zoological Society, Billings Zoo, Wildlife Conservation Society, and two other private entities).

140. Memorandum of Understanding between Montana Fish, Wildlife & Parks, Montana Department of Wildlife, and Turner Enterprises, Inc (Feb. 16, 2010), *available at* http://www.buffalofieldcampaign.org/legislative/quarantine/Turner_bison_agreement_signed_feb_2010.pdf.

141. *Id.* at 3.

142. MONTANA FISH, WILDLIFE, & PARKS, *supra* note 132, at 13.

143. Complaint at 3, Western Watersheds Project, Gallatin Wildlife Association, Buffalo Field Campaign, Yellowstone Buffalo Foundation v. State of Montana & Montana Dept. of Fish Wildlife and Parks (Mont. Dist. Ct. 2010). The plaintiffs have asked the court to "declare FWP's attempted privatization of publicly held wildlife a violation of its public trust responsibilities, enjoin the State/FWP from transferring title to these publicly held bison to a private party, and remand to FWP with instructions to prepare a full EIS to analyze a full range of alternatives that would ensure all surviving bison and their offspring are managed as wildlife for conservation purposes, and not privatized or commercialized." *Id.*

Association explained, “[t]hey need to remain in public hands. Paying [Ted Turner] by bartering the public’s wildlife is a violation of the public trust.”¹⁴⁴

As a threshold issue, the court must decide whether to apply the public trust doctrine to wildlife as separate from or subsumed in the agency’s constitutional, statutory, and regulatory obligations. Montana’s constitution requires that the state “maintain and improve a clean and healthful environment . . . for present and future generations.”¹⁴⁵ Additionally, FWP is charged with the statutory duty to supervise all the wildlife in the state¹⁴⁶ and the regulatory duty to “protect, enhance, and regulate the wise use of the state’s wildlife resources for public benefit now and in the future.”¹⁴⁷

Assuming the court does apply the doctrine separately,¹⁴⁸ the initial inquiry is whether the interest transferred amounts to a total abdication of the state’s fiduciary obligations. Because the state is attempting to transfer legal title to the animals, as opposed to a transferable permit which allows a hunter to establish ownership via the rule of capture, the issue is closer in this case than in the context of ranching for wildlife and other permit-based landowner incentive programs. However, if the court finds that the evidence supports FWP’s conclusion that no other facility could have taken the bison, leaving slaughter as the only alternative, it is unlikely to conclude the state abdicated its fiduciary duty as trustee.¹⁴⁹ In other words, if the decision FWP faced was whether to save all of the living animals from the original herd plus twenty-five percent of the offspring at the end

144. *Lawsuit Challenges Bison Transfer to Ted Turner*, BILLINGS GAZETTE (Mar. 23, 2010), http://billingsgazette.com/news/state-and-regional/montana/lawsuit-challenges-bison-transfer-to-ted-turner/article_1e0c53b0-36d3-11df-951d-001cc4c002e0.html.

145. MONT. CONST. art. IX, § 1.

146. MONT. CODE ANN. § 87-1-201(1). *But see* MONT. CODE ANN. § 87-1-201(5) (2012) (authorizing FWP to “dispose of all property owned by the state used for the protection, preservation, management, and propagation of fish, game, fur-bearing animals, and game and nongame birds that is of no further value or use to the state”).

147. MONT. ADMIN. R. § 12.1.101(8)(b) (2012).

148. *See Redmond, supra* note 18, at 252–57 (describing outcomes in different states and the unpredictability of courts on this issue).

149. *See* William Corbet, *Montana Administrative Law Practice: 41 Years after Enactment of the Montana Administrative Procedures Act*, 73 MONT. L. REV. 339, 384 (2012). In Montana, courts review an agency record “to determine whether (1) the agency findings of fact are properly supported by the record evidence, (2) the agency interpretations of law are correct, (3) the agency properly applied law to fact, and (4) the agency has not abused its discretion on matters where the court accords the agency discretion.” *Id.* (citing *Hughes v. Mont. Bd. of Medical Examiners*, 80 P.3d 415 (Mont. 2003)).

of the study period, or to save none, the agency could hardly be faulted for abdicating its trust duties.

The second requirement of the public trust doctrine is that any transfers of ownership or delegations of management authority must be done for the benefit of the public, not “for the benefit of private individuals as distinguished from the public.”¹⁵⁰ No doubt, Turner Enterprises is deriving a private benefit by acquiring animals from one of the most genetically pure herds of bison. The question is whether the public will derive any benefits from the transfer. This inquiry is not an examination of fairness but rather whether the private and public interests are conflicting or aligned. By preventing the slaughter of the quarantined animals and, perhaps more importantly, by allowing the feasibility study to continue so that more translocations might occur in the future, the proposed ownership transfer appears to generate both private and public benefits. As Russ Miller of Turner Enterprises explained, “We’re not a philanthropy. We’re trying to create a blend between conservation and commercialization.”¹⁵¹

It remains to be seen how the Montana courts will resolve the case.¹⁵² Because the transaction at issue contemplates transferring full legal title of wild animals to a private enterprise in exchange for the stewardship of other wild animals and the myriad public benefits that flow from that stewardship, the court might find it difficult to sidestep the public trust issues. A decision to strike down the agreement on public trust grounds would further polarize the public wildlife-private habitat issue and discourage wildlife agencies and private landowners from future collaboration. By contrast, a decision to uphold the agreement as consistent with the public trust doctrine would set a rare precedent for unifying the split wildlife estate.

VI. CONCLUSION

The split ownership of wildlife and wildlife habitat raises issues of public access, private property damage, and the division of

150. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

151. *Ted Turner's Bid to House Yellowstone Bison Draws Protest*, L.A. TIMES: L.A. UNLEASHED BLOG (Jan. 12, 2010, 5:04 PM), <http://latimesblogs.latimes.com/unleashed/2010/01/bison-ted-turner.html>.

152. The case came to trial on March 29, 2013. Laura Lundquist, *Turner Bison Case Comes to Trial*, BOZEMAN DAILY CHRON. (Mar. 30, 2013), http://www.bozemandailychronicle.com/news/wildlife/article_d4830a8c-98ee-11e2-8b8b-001a4bcf887a.html. As of this writing, no ruling has yet been issued.

economic rents. Policies that unify ownership can align the financial incentives of private landowners with the public's interest in wildlife stewardship. Revenue sharing programs like ranching for wildlife have increased public hunting access, improved habitat conditions on a landscape scale, and given landowners more flexibility to manage their property. However, as evidenced by the bison barter currently pending in Montana, even more can be done to unify the split wildlife estate. The public trust doctrine does not preclude states from transferring to private parties an ownership interest or management authority in wildlife; it only requires that such transfers and delegations are consistent with the state's fiduciary obligations as trustee and the public's interest as the beneficiary.