THE PUBLIC TRUST DOCTRINE AND WILDLIFE MANAGEMENT IN MONTANA: A PRIMER

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The public trust doctrine (PTD) is the legal bedrock of wildlife management in the State of Montana. The earliest PTD cases in the U.S. involve wildlife and place restrictions on the privatization and monopolization of trust resources. The PTD, based on a state's sovereign ownership of wildlife, was in part a response to commercial exploitation and private capture of wildlife, and part a direct repudiation of an English system that privileged landowners over the public-at-large. In contrast to other resources and issues in the State, such as water management and stream access, there is a relative lack of PTD case law specifically applied to wildlife in Montana. Though at times dormant, the Doctrine is alive and well in the State. As carefully applied by the Montana and U.S. Supreme Courts, the PTD is not a magic bullet or panacea that can resolve all of the trade-offs that are inherent in wildlife law and management, a field renowned for its complexity and "nearly unique status" in the law.[1] *Neither is the PTD an invitation to run roughshod over private property interests. Rather, it assures that the public interest in wildlife is not surrendered or relinquished to private monopolization or undue private control of the wildlife trust. Viewed through a political lens, the PTD opens a door and serves as an impetus for finding a range of pragmatic and feasible solutions to the problems presented by public wildlife on private lands. Without the PTD, private interests—and the political influence they wield in the state legislative and executive branches of state government—could undermine the public's sovereign ownership of wildlife and the special trust duties that go along with it. Though the PTD pre-dates the 1972 Montana Constitution, it is also rooted within it, and the Constitution's "clean and healthful environment" protection—provided as an inalienable right—further bolsters the application and enforcement of the PTD to wildlife management in the State.*

I. PREFACE

There is renewed interest in the public trust doctrine (PTD) due to several recent developments pertaining to the management of Montana's wildlife.

The catalyst for this Article was a lawsuit by the United Property Owners of Montana (UPOM) challenging the management of elk in the

1. MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW, at 8 (3d ed. 1997).

State by the Montana Fish and Wildlife Commission (Commission) and Department of Fish, Wildlife and Parks (FWP). This case is discussed in the following pages, along with the backlash that quickly ensued. However resolved, I thought the case raised a particular set of facts, questions, and issues that go back to the foundational PTD cases in the U.S., ranging from those pertaining to public access to oysters in *1821*[2] to restrictions on privatizing public resources in *1892*.[3] Several more recent decisions, at the federal and state level, involving the PTD and wildlife provide further insight into this case and others like it so I thought a Primer and Citizen's Guide on the topic could serve as a useful reference and perhaps make clear the real-world policy and managerial implications resulting from an ancient Doctrine. Though the UPOM case is about hunting and public wildlife on private lands, the PTD applies to both game and non-game species, and I believe it can serve as a unifying and coalescing force during a tumultuous time in State wildlife management.

A significant turn of events happened during the preparation of the Article. Two environmental organizations challenged the management of gray wolves by FWP and the Commission following recently enacted statutes designed to reduce the State's wolf population.[4] The controversial "2021 Wolf Laws" included extension of the wolf trapping season, the use of snares for trapping wolves, and allowed private parties to reimburse costs incurred by wolf hunters and trappers.[5] Included in the complaint by WildEarth Guardians and Project Coyote was the assertion that the actions taken by FWP and the Commission were in violation of Montana's PTD and the obligation to protect public trust resources from substantial impairment.[6]

As discussed in the Introduction, FWP has long viewed the PTD as its core historical and legal foundation. In the wolf case, FWP and the Commission could have simply acknowledged the importance of the Doctrine while countering that management of wolves by the State did not violate any public trust principle. FWP and the Commission could have argued, for example, that the State's wolf population is secure and thus not impaired and that there is nothing in the Doctrine that precludes particular types of management actions that plaintiffs find abhorrent or risky—actions that may trigger the Endangered Species Act but not the PTD.

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2. Arnold v. Mundy, 6 N.J.L. 1, 76–77 (1821).
3. Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).
4. Complaint, WildEarth Guardians v. Montana, No. DDV 2022-896, (Mont. 1st Dist. Ct. Oct. 27, 2022).
5. *Id.* at 10.
6. *Id.* at 6.

Instead, in a striking reversal, the State of Montana claimed that terrestrial wildlife has never been and is not now covered by the PTD.[7] "This is because the specific evolution of the PTD, from Justinian law to the 1972 Montana Constitution, pertains only to the use of State waters."[8] But what about all that talk about the PTD and wildlife in the past? The State parsed its previous position by redefining what is meant by trust management: "Montana manages its wildlife in trust for all Montanans, but that trust is not the same as, or subject to, the PTD."[9] Instead of a real legal doctrine, "the public trust in wildlife" is now conceived as something more rhetorical; simply giving to FWP and the Commission the unrestricted authority to manage wildlife as it deems fit and to limit the PTD whenever it so chooses.[10]

This Primer on the PTD, written by a public beneficiary of Montana's rich wildlife heritage, provides a more thorough accounting of the PTD and how it applies to wildlife in Montana. The complexities inherent in wildlife law and management can make the application of the Doctrine more challenging than when applied to traditional trust resources, such as access to public waterways. The Doctrine also offers no magic bullet that can resolve all of the difficult trade-offs and decisions that are inherent in wildlife management. But such complexity in no way negates the importance of the Doctrine, and its central tenets are just as relevant today as they were when State *citizens*—not serfs—rejected an English system of wildlife law that privileged landowners over the public-at-large and responded to the problems of private commercial exploitation of wildlife with *sovereign* ownership of a shared resource.

II. INTRODUCTION

The public trust doctrine (PTD) is commonly referenced as being the legal foundation of wildlife management at the state level in the U.S. It is the basis of state wildlife law according to the Association of Fish and Wildlife Agencies (AFWA), an organization serving as the collective

7. Defendant's Motion to Dismiss at 8–9, WildEarth Guardians v. Montana, No. DDV 2022-896, (Mont. 1st Dist. Ct. Jan. 27, 2023).

8. *Id.*

9. *Id*. at 9.

10. *Id*. at 10.

voice of North America's fish and wildlife agencies.[11] Montana is no exception, and Montana Fish, Wildlife & Parks (FWP) "explains almost everything [it] does" in terms of FWP's "responsibility to steward the public trust:"[12]

> The public trust concept, also called the public trust doctrine, derives from the long-held societal belief that certain natural resources are so important to everyone that they should be off limits to individual ownership, or privatization. The concept also maintains that it's the government's responsibility to steward these public resources for the fair and equitable enjoyment and use by current and future generations.[13]

FWP specifically references the public trust *doctrine* as a legal doctrine and references the associated principles and case law of trust management.[14] Like a private financial trust arrangement, "Trusts are legal tools" states FWP, and "[i]t works the same way for Montana's rivers, water, fish, wildlife, cultural resources, and state parks."[15] "Those public trust 'assets,' or resources, are held 'in trust' by the state, acting as the trustee, and are stewarded by [FWP], the trust manager, for the people of Montana, the trust beneficiaries."[16] FWP's "embrace [of] the public trust" and core principles of the Doctrine, including public ownership and equitable allocation of wildlife resources, are also incorporated into FWP's *2016-2026 Vision and Guide,* which "is the foundation on which

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11. ASS'N OF FISH & WILDLIFE AGENCIES, WILDLIFE MANAGEMENT AUTHORITY: THE STATE AGENCIES' PERSPECTIVE (Feb. 2014) (The Montana Department of Fish, Wildlife and Parks is a member of AWFA, and the organization frequently invokes the public trust doctrine as the foundation of the North American Model of Wildlife Management, as Amicus Curiae. *See* Martin Nie et al., *Response to Kisonak's "Fish and Wildlife Management on Federal Lands: The Authorities and Responsibilities of State Fish and Wildlife Agencies,"* 50 ENV'T. L. 973, 976–82 (2020)).

12. MONTANA'S PUBLIC TRUST RESPONSIBILITY: A GUIDE FOR FWP AND MONTANA'S CONSERVATION COMMUNITY, MONT. FISH, WILDLIFE AND PARKS, at 1 (2020).

13. *Id.* at 7 (FWP explains the expansion of the Doctrine from first applying to U.S. waterways and shorelines and then to fish and wildlife more broadly, citing Martin v. Waddell's Lessee, 41 U.S. 367 (1842); Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Geer v. Connecticut, 161 U.S. 519 (1896)).

14. *Id*. at 11.

15. *Id*. at 8–9.

16. *Id*. at 9.

[FWP] will turn vision into action and develop strategies and specific implementation plans for the next [ten] years."[17]

The PTD has deep, ancient roots, extending to Roman law, [18] and its principles have been described as "an essential attribute of sovereignty across cultures and across millennia."[19] The Doctrine's framework draws some parallels to private trusts whereby one party manages property for the benefit of another, with a fiduciary "duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person."[20]

At its core, the Doctrine requires governmental *trustees* (state legislatures and various forms of executive branch wildlife agencies and commissions that act as the *agents* implementing the law) to manage the *corpus, res* or assets of the trust—in this case wildlife—for the benefit of present and future generations, who are the *beneficiaries* of the trust.[21]

Professors Michael Blumm and Mary Christina Wood provide additional context for those unfamiliar with the Doctrine and its origins and evolution:

> The [PTD], an ancient doctrine governing the management of natural resources, first surfaced in Roman law, reemerged in medieval England, and then was transported across the Atlantic to the United States in the early nineteenth century. Functioning as a public property doctrine, the PTD imposes limits on governmental action and provides public access rights to trust resources. In the United States, the doctrine's reach expanded from coastal areas affected by tides to large inland waterways in the nineteenth century; it also evolved from a mechanism

17. VISION AND GUIDE 2016-2026, MONT. FISH, WILDLIFE & PARKS at 2, 4, 7 (2016) (The *2016-2016 Vision and Guide* states: "We recognize that Montana's fish and wildlife are the public's resources and are held in trust by the state to be managed for the benefit of present and future generations. The opportunity to enjoy and harvest these resources is allocated equitably.").

18. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

19. MICHAEL C. BLUMM & MARY C. WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW, at 5 (2013) [hereinafter THE PTD IN ENVIRONMENTAL AND NATURAL RESOURCES LAW] (quoting Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENV'T L. 287, 311 (2010)).

20. *Fiduciary Duty*, BLACK'S LAW DICTIONARY (7th ed. 1999).

21. THE PTD IN ENVIRONMENTAL AND NATURAL RESOURCES LAW, *supra* note 19, at 6–9.

> promoting navigation and commercial fishing to one protecting recreation and ecological integrity. . . [T]he enduring PTD long predates all modern statutes, having roots in United States law in court opinions from over a century ago. Although the legislature's police power underlies statutes, the PTD emanates from property law. The doctrine posits the government as a trustee of selected natural resources that must be managed for the long term benefit of the public. A trust is a type of ownership in which one party manages property for the benefit of another party. The trust bifurcates ownership between the *trustee*, who holds legal title, and the *beneficiary* who hold beneficial ownership. The assets in the trust make up the *res* or *corpus* of the trust. The trustee is under a fiduciary obligation to manage the assets for the sole benefit of the beneficiaries.[22]

The PTD is perhaps best known in Montana because of its role in securing the public's right to stream access.[23] Though commonly referenced in the context of wildlife management, I am aware of no scholarly work that traces application of the PTD specifically to wildlife management in Montana. This Primer serves as a basic introduction, and I hope to offer more comprehensive accounts and applications of the PTD to wildlife in Montana in the future.

This preliminary overview is offered in an expedited fashion due to recent political developments regarding wildlife management in the State and related questions about the PTD. One such development is a lawsuit by the United Property Owners of Montana (UPOM) challenging the management of elk in the State by the Montana Fish and Wildlife Commission (Commission) and FWP.[24] UPOM alleges that the Commission and FWP have failed their statutory duty to actively manage over-objective elk populations in part of the State and that this failure has resulted in damage to property owners.[25] UPOM challenges the management approach of the Commission and FWP that is based on making "equitable allocations" of hunting licenses and by using public access provisions to hunt on privately owned lands.[26] Instead, UPOM

22. *Id*. at 3.
23. *See* Part III.
24. Complaint, United Prop. Owners of Mont., Inc. v. Mont. Fish and Wildlife Comm'n, No. DV-22-36 (Mont. 10th Dist. Ct. Apr. 6, 2022).
25. *Id*. at 2.
26. *Id.*

seeks to drastically reduce elk populations, by roughly 50,000 elk, by giving private landowners licenses to hunt on private lands and by liberalizing hunting regulations of male ("bull") elk.[27] Doing so would increase opportunities for private landowners to sell more private guided hunts of bull elk. Equally sweeping is UPOM's claim that the Commission represents an unconstitutional delegation of legislative power and that wildlife policies may only be set by the State legislature.[28]

Several constituencies view UPOM's lawsuit as one of several recent developments that collectively pose a fundamental threat to the public trust in wildlife.[29] To the conservation and hunting-based groups intervening in the lawsuit, UPOM's proposal to redesign the State's wildlife licensing system, and to sell to the highest bidder more liberalized opportunities to hunt elk on private property, "harkens back to the old English concept of the 'King's deer,' with UPOM viewing its membership as the King."[30] To these groups, it is akin to eliminating "the 'public' from the concept of 'public resources,' instead moving to a managerial system where 'he who owns the land owns the wildlife thereon.'"[31]

As a result of this case, and others, there is renewed interest in how the PTD applies to wildlife in the State.[32] The newly formed *Keep Elk Public Coalition* frames the UPOM lawsuit in the context of several recent efforts that are viewed as steps to privatize elk hunting in Montana, a state renowned for its egalitarian approach to public hunting and fishing.[33] The *Montana Public Trust Coalition* was similarly launched in 2022.[34] The campaign simply seeks a promise from legislative candidates in the State:

> The public trust, including public lands, waters, fish and wildlife belong to all of us and must not become private property to be bought and sold. If elected, I promise, as required by my Oath of Office, to protect and defend Montana's Constitution, particularly our right to hunt and

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27. *Id.*

28. *Id*. at 20.

29. *See Why Do We Want to Defeat this Lawsuit and Keep Elk Public? FAQs*, KEEP ELK PUBLIC (June 13, 2022), https://perma.cc/5XJK-CKTS.

30. Reply Brief in Support of Motion to Intervene at 5, United Prop. Owners of Mont., Inc. v. Mont. Fish and Wildlife Comm'n, No. DV-22-36 (Mont. 10th Dist. Ct. July 5, 2022).

31. *Id*.

32. *See* Conclusion.

33. *Why Do We Want to Defeat this Lawsuit and Keep Elk Public? FAQs*, KEEP ELK PUBLIC (June 13, 2022), https://perma.cc/W4FT-JG3Y.

34. Montana Public Trust Coalition, *2022 Montana Public Trust Promise*, https://perma.cc/F9WQ-7KK7 (last visited Jan. 24, 2024).

> fish and our right to a clean and healthful environment. And I promise to reject any effort to reduce (in terms of value) public lands or turn our public waters, fish and wildlife into private property.[35]

The PTD is also referenced in a motion to intervene in the UPOM lawsuit by a group of hunting and conservation organizations: "Although the specific origins of the doctrine are sometimes difficult to discern, the idea that Montana holds certain natural resources in trust for the benefit of all people cannot be, with candor to the tribunal, the subject of legitimate controversy."[36]

This Primer on the PTD, as applied to wildlife in Montana, fills in some of these blanks. A fully comprehensive account is a difficult task because the PTD is a "fractured doctrine," with case law developing differently per state and per resource use and trust value in question.[37] An apt metaphor is to think of a source headwater and different tributaries constituting the doctrine. There are, however, inclusive themes and cross-cutting lessons found in PTD case law and briefly reviewed here are four that are most relevant to the UPOM lawsuit and other recent actions threatening the PTD applied to wildlife in Montana.

Part A explains the origins of the trust, which is rooted in Montana's sovereign ownership of wildlife, a lineage recognized by the U.S. and the Montana Supreme Court. There is no question as to whether the PTD applies to wildlife management in the State. As discussed in Part B, the earliest public trust cases in the U.S. focused on wildlife and prevented the privatization and monopolization of common property that must be managed in the public interest. Part C reviews the PTD in the context of the Montana State Constitution. Public trust principles are embedded in the State's Constitution and the environmental rights it

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35. *Id.*

36. Reply Brief in Support of Motion to Intervene at 5, United Prop. Owners of Mont., Inc., No. DV-22-36 (citing Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371 (1977)).

37. Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENV'T AFFS. L. REV 1, 6 (2017); *See also* MICHAEL BLUMM ET AL., THE PUBLIC TRUST DOCTRINE IN 45 STATES (Michael C. Blumm, ed., rev. ed. 2015); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 PENN. ST. ENV'T L. REV. 1 (2007) (reviewing state-by-state applications of PTD and the expansion of traditional public trust concepts into more ecological contexts).

secures further bolsters the application of the PTD to wildlife in the State. Reviewed in this section is the Montana Supreme Court's application of the PTD to stream access, as both the State's waters and wildlife are rooted in sovereign ownership. The Montana Supreme Court similarly approached several wildlife cases, emphasizing the special considerations required by wildlife trust management. Part D explains how the PTD—rooted in common law *and* the State Constitution—can serve as an enforceable check on state government and its management of wildlife. The Doctrine serves as a time-tested counterweight to the political pressures and private influences that can threaten the public's sovereign ownership and interest in wildlife. The Article closes by connecting these common PTD themes to recent developments in Montana wildlife law and management.

A. State Sovereign Ownership of Wildlife as the Foundation of Public Trust Doctrine

The PTD, as applied to wildlife, is best understood as a response to the private capture and commercialization of wildlife.[38] Unrestricted markets and commerce in wildlife, from the wanton slaughter of bison to the commercial exploitation of beaver, gradually gave way to state governments asserting their authority to regulate and restrict this abuse. [39]

But what was the source of the state's power to do so? Some courts in the 1800s based decisions on state sovereignty, meaning that states had the power to regulate capture.[40] Others did so on the basis of property, meaning that the state owned wildlife.[41] Others "freely mingled the concepts" and "many of the decisions reflect a web comprised of common law property concepts (such as the common fishery), the public interest, and state ownership."[42] In the wildlife context, this joining of property and sovereignty meant that the state held legal title to wildlife, but that wildlife is to be managed in trust for the people. This, in short, is the historical and legal foundation of states claiming to "own" wildlife.[43]

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38. Dale D. Goble, *Three Cases/Four Tales: Commons, Capture, The Public Trust, and Property in Land*, 35 ENVTL. L. 807, 816 (2005).

39. *Id*. at 817–19.

40. *Id*. at 835.

41. *Id*.

42. *Id*. at 836.

43. Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1440 (2013) (stating forty-eight states—with the exceptions of Utah and Nevada—claim sovereign ownership of wildlife and use it as a basis to assert their public trust authority).

The U.S. Supreme Court's decision in *Geer v. Connecticut*[44] is the first to fully elaborate and explain the legal underpinnings of state wildlife management.[45] The 1896 decision used both property and sovereignty language to explain the nature of trust management as applied to wildlife at the state level:

> While the fundamental principles upon which the common property in game rest 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 the 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 the benefit of private individuals as distinguished from the public good.[46]
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> Aside from the authority of the state, derived from the common ownership of game, and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end….[47]

Geer gets complicated and is sometimes mistakenly disregarded because aspects of it were overruled by the Supreme Court in *Hughes v. Oklahoma*,[48] a decision that treated claims of state ownership as a "legal fiction."[49] Both cases focus on the U.S. Constitution's Interstate Commerce Clause as it relates to commerce in wildlife and *Hughes* makes clear that state claims of ownership over wildlife are subordinate to federal constitutional powers and supremacy.[50] Other enumerated federal powers important to wildlife management—such as the Property Clause, Treaty

44. 161 U.S. 519 (1896).
45. *Id.*
46. *Id*. at 529.
47. *Id*. at 534.
48. 441 U.S. 322 (1979).
49. *Id.* at 335.
50. *Id.* at 339.

Clause, and Privileges and Immunities Clause—can similarly preempt actions taken by states in the name of sovereign ownership.[51]

The general rule adopted in *Hughes* nevertheless "makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals…."[52] The states, said the Court, are not "powerless to protect and conserve wild animal life within their borders."[53] Thus, authority to regulate wildlife can be seen as a shared space wherein the federal government can assert authority in certain instances of express constitutional power, with states holding authority in the remaining space under theories of sovereignty and property. As stated by the U.S. Supreme Court in *Baldwin v. Fish and Game Commission of Montana*,[54] "[t]he fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence."[55]

Concerning state authority, then, the take-home point from *Geer* and other early cases in the development of the field is that "property and sovereignty were metaphorically and legally joined in wildlife."[56] Professor Goble explains in his authoritative review:

> Thus, the government's proprietary rights could be exercised only for the use and benefit of the people of the states and not for the benefit of an individual or special group. The government's absolute regulatory power was similarly limited by the 'common right of the people.' 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.
>
> This perspective solved at least two jurisprudential problems. Not only did it convert monarchy to republic, it also offered a vantage point that helped to resolve questions surrounding the new and novel relationship

51. *See generally* Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV'T L. 797 (2017).

52. *Id.* (quoting Hughes v. Oklahoma, 441 U.S. 322, 335–36 (1979)).

53. *Id*. at 339 (quoting Hughes v. Oklahoma, 441 U.S. 322, 336, 338 (1979)).

54. 436 U.S. 371 (1978).

55. *Id.* at 386.

56. Goble, *supra* note 38, at 837.

> between national and state governments: as state property, wildlife was neither commerce nor a privilege and immunity to be shared with the citizens of other states.[57]

The next section explains how this joining of property and sovereignty applies to the Privileges and Immunities Clause of the U.S. Constitution and the definition of public beneficiaries. Subsequent sections explain how Goble's "trust metaphor" is applied even more specifically in the context of the PTD.

1. The Beneficiaries of State Ownership of Wildlife

The decision in *Baldwin* provides valuable context for how to define the beneficiaries of wildlife trust management and whether residents of a particular state have ownership rights and privileges that are not available to non-residents.[58] The Supreme Court in *Geer* locates wildlife ownership in "the people of that State."[59] Again, this comes with the caveat that state ownership of wildlife is subordinate to the supremacy of the U.S. Constitution.

Baldwin[60] deals with another constitutional provision intersecting with state ownership: The Privileges and Immunities Clause found in Article IV, §2 of the United States Constitution providing that "the [c]itizens of each [s]tate shall be entitled to all [p]rivileges and [i]mmunities of [c]itizens in the several [s]tates."[61] This clause was designed to unify the nation and to prevent political fragmentation amongst the states.[62] Challenged in *Baldwin* was the discrepancy in elk hunting license fees charged to residents and non-residents of Montana.[63] Though the Court made clear that a "State's control over its resources" does not "preclude the proper exercise of federal power," it supported a line of earlier cases that viewed state residents as the beneficiaries of a

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57. *Id.* at 838 (quoting Arnold v. Mundy, 6 N.J.L. 1, 35 (1821)).

58. 436 U.S. at 385–86.

59. Geer v. Connecticut, 161 U.S. 519, 529–30 (1896) ("The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own.").

60. Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371 (1978).

61. U.S. CONST. art. IV, §2, cl. 1.

62. *Baldwin*, 436 U.S. at 383–384.

63. *Id.*

state's sovereign ownership of wildlife.[64] This includes *Geer* and two preceding cases, one concluding that access to oyster beds owned by New Jersey could be limited to New Jersey residents,[65] and the other ruling that the State of Virginia can prohibit the citizens of other states from planting oysters in the Ware River.[66] It appears, said the Court, "[T]o have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people."[67]

The key distinction in these and other cases involving fish and wildlife and the U.S. Constitution's Privileges and Immunities Clause is that laws and regulations pertaining to *recreational* hunting and fishing are different from those governing *commercial* use of fish and wildlife. In the non-commercial realm, the Court has held that states may afford more favorable hunting rules for its own residents. The State of Montana's disparate treatment of residents and non-residents was upheld by the Court because hunting was not viewed as a type of fundamental right that would normally trigger the clause, such as an activity "bearing upon the vitality of the Nation as a single entity."[68] The Court in *Baldwin* distinguished between a regulatory scheme for elk management that serves a legitimate state interest and a statute governing commercial shrimp fishing off the coast of South Carolina.[69] The latter statute, considered by the Court in the earlier case of *Toomer v. Witsell*,[70] required non-residents of South Carolina to pay license fees one hundred times greater than those which residents must pay, with the effect of excluding non-residents and creating a commercial monopoly for South Carolina residents.[71] The commercial nature of the shrimp industry, along with the migrating nature of shrimp crossing multiple state jurisdictions, placed the South Carolina law within the purview of the clause, according to the Court, and was thus unlawful.[72] However relevant state ownership of wildlife justifications are in different contexts, said the Court, it was "but a weak prop for the South Carolina statute."[73]

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64. *Baldwin*, 436 U.S. at 386 ("Appellants contend that the doctrine on which *Corfield, McCready*, and *Geer* all relied has no remaining vitality. We do not agree.").
65. Corfield v. Coryell, 6 F. Cas. 546 (Cir. Ct. E.D. Pa. 1825).
66. McCready v. Virginia, 94 U.S. 391 (1876).
67. *Baldwin*, 436 U.S. at 384.
68. *Id*. at 383.
69. *Id.* at 386–88.
70. 334 U.S. 385 (1948).
71. *Id*. at 395.
72. *Id.* at 403.
73. *Id*. at 401.

A concurring opinion in *Baldwin* elaborates on how state ownership of wildlife fits into this recreational and commercial distinction:

> We recognized in *Toomer v. Witsell*, that the [state ownership] doctrine does not apply to migratory shrimp located in the three-mile belt of the marginal sea. But the elk involved in this case are found within Montana and remain primarily within the State. As such they are natural resources of the State, and Montana citizens have a legitimate interest in preserving their access to them. The Court acknowledges this interest when it points out that the Montana elk supply 'has been entrusted to the care of the State by the people of Montana,' and asserts the continued vitality of the doctrine upon which the court relied in *Corfield v. Coryell*, *McCready v. Virginia*, and *Geer v. Connecticut*.[74]

The recreational versus commercial distinction distilled from *Toomer* and *Baldwin* is far from perfect. Wildlife management is full of nuance and gray in this regard. The Court leaves unaddressed questions about things such as the transboundary nature of wildlife, wildlife on federal public lands, and subsistence use. Nonetheless, the recreational versus commercial distinction makes some sense when we consider the historical context in which unchecked commercial exploitation of wildlife gives way to state sovereign ownership.

2. Tension Between State Sovereign Ownership of Wildlife and Private Property

Both the U.S. and Montana Supreme Court trace the authorities and obligations of trust management to a state's sovereign ownership of wildlife. The Montana Supreme Court, in *Rosenfeld v. Jakways*,[75] relied on *Geer* and similarly traced the State's authority to restrict and regulate the killing of beaver to State powers of ownership and sovereignty.[76] Said the Court:

> That the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the

74. *Baldwin*, 436 U.S. at 392 (Burger, J., concurring) (internal citations omitted).

75. 216 P. 776 (Mont. 1923).

76. *Id.*

> 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…. Aside from any question of common ownership, the state may exercise these rights in virtue of its police power.[77]

The Court's statement in *Jakways* that wild animals are not subject "to private ownership *except in so far as the state may choose to make them so*"[78] may sound antithetical to trust principles, which limit the privatizing of trust resources. I return to both issues below. But, important to note now is that this statement is made in the particular context of the State *restricting* commerce in wildlife for conservation purposes. The quote actually comes from a California Supreme Court decision that is relied upon by the U.S. Supreme Court in *Geer* and the Montana Supreme Court in *Jakways*.[79] In that case, the Court upheld a California law banning the sale of wild game in the State.[80] As is typical in wildlife trust cases, the Court worked through the tensions between private property rights and the public interest in wildlife and finished by making clear the sovereign powers of California to restrict private property and commerce in wildlife

77. *Id*. at 777 (The State's sovereign ownership of wildlife was affirmed in Heiser v. Severy, 58 P.2d 50, 505 (Mont. 1945) ("The ownership of the wild animals of the state is in the state. The state holds such ownership in its sovereign capacity for the use and benefit of the people generally. The wild life of the state is one of its most prized and valuable assets."); Montana ex rel. Visser v. State Fish & Game Comm'n, 437 P.2d 373, 376 (Mont. 1968) ("The ownership of wild animals is in the state…"); Montana v. Fertterer, 841 P.2d 467, 470 (Mont. 1992) ("Montana has long recognized that Montana has the power to regulate game animals under both a title ownership and police power theory.")).

78. *Id*. at 777.

79. Ex parte Maier, 103 Cal. 476, 483 (1894) ("The 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 any traffic or commerce in it, if deemed necessary for its protection or preservation or the public good." The California Supreme Court strongly reaffirmed the people's ownership of wildlife in People v. Truckee Lumber Co., 116 Cal. 397, 399 (1897): "The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state, Ex parte Maier, 103 Cal. 476, 483; 42 Am. St. Rep. 129,as in England it was in the King; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union.").

80. *Id*.

"if deemed necessary for its protection or preservation, or the public good."[81]

This tension between private property and the public's ownership of wildlife color and characterize much of wildlife law and PTD jurisprudence. As one prominent scholar of wildlife and property law puts it, there is often no "pro-property position" that can be taken in such conflicts because landowner property rights clash with the public's property rights in wildlife.[82] Significant cases in the early development of the field relied on state ownership and the wildlife trust to deal with a variety of issues pertaining to wildlife on privately-owned lands. Established, for example, is the now "near universal view"[83] expressed in *Cawsey v. Brickey*[84] that states have the power, acting as trustees, to restrict or prohibit the hunting of wildlife on private lands.[85]

Another influential ruling by the New York Supreme Court in 1917 relied on the State's sovereign ownership of wildlife in a case involving a law that protected and restored beaver and its habitat in the State.[86] The case, *Barrett v. State*,[87] involved a landowner complaint about the damage done by beavers to private property as a result of actions taken by New York to protect beavers.[88] "In liberating the beaver the state was acting as a government and a trustee for the people, and as their representative it was doing what it thought best for the interests of the public at large."[89] As done in other states, the Court used sovereign ownership and trustee language to justify the protective actions taken by the State in response to private capture and commercial exploitation of beaver and other species.[90] The State acted to protect beaver, as it did with migratory birds and other species, and doing so does not make the State liable for the damage done to private property by recovered wildlife.[91] Said the Court:

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81. *Id.*

82. ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD at 236 (2003).

83. ERIC T. FREYFOGLE, DALE D. GOBLE, & TODD A. WILDERMUTH, WILDLIFE LAW: A PRIMER at 60 (2d ed 2019) (reviewing the predominant view that "[l]andowners have no right to hunt that is legally enforceable against the state.").

84. 144 P. 938 (Wash. 1914).

85. *Id.*

86. Barrett v. State, 116 N.E. 99 (N.Y. 1917).

87. *Id.*

88. *Id.*

89. *Id.* at 431.

90. *Id.* at 427–31.

91. *Id.* at 430–31.

> [T]he general right of the government to protect wild animals is too well established to be now called into question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. The preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. . . Wherever protection is accorded harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large and no one can complain of the incidental injuries that may result.[92]

More recent variations of this theme involve claims by private landowners that damages done to private property by the public's wildlife, or regulations protecting wildlife on private property, amount to an unconstitutional taking of private property.[93] A review of these cases, however, show that "takings claimants have met remarkably consistent failure" when challenging wildlife laws and regulations based on the public's sovereign ownership of wildlife.[94] Some takings cases involve application of a "categorical" rule that requires compensation when a regulation bans *all* economically viable uses of private property.[95] Such compensation is not required, however, in such cases where some "background principle" of property law already restricts what landowners can do.[96] A background principle in property or nuisance law would therefore serve as an "antecedent inquiry" in takings cases because it defines the nature of the private property allegedly taken by a law or

92. *Id.* at 427.

93. John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENV'T L. J. 331, 332 (Summer 2003).

94. *Id*. at 332. (Such cases also often fail when brought against federal wildlife laws and regulations); *See* Christy v. Hodel, 857 F.2d 1324, 1334 (9th Cir. 1988) (reviewing numerous cases—based on federal wildlife laws and state sovereign ownership of wildlife—that "have considered, and rejected, the argument that destruction of private property by protected wildlife constitutes a governmental taking.").

95. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) (establishing the categorical rule).

96. *Id*. at 1029.

regulation.[97] A categorical takings claim would fail, for example, if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[98]

The PTD, rooted in state sovereign ownership of wildlife, can serve as one such background principle; thus operating as a defense to claims for compensation under federal or state-based takings clauses.[99] The Supreme Court of Montana upheld the District Court's application of this principle in *Kafka v. Montana Department of Fish, Wildlife and Parks*.[100] As discussed below, this case involved owners and operators of alternative game (elk) farms, a practice banned by Montanans through a citizen initiative process in 2000.[101] Game farm owners unsuccessfully challenged the enactment and enforcement of the initiative as a taking of private property.[102] Both the District Court and Supreme Court of Montana used the State's sovereign ownership of wildlife, as explained in both *Geer* and *Jakways*, as a limitation on takings claims.[103] "At common law," said the District Court, "[O]wnership of land did not carry with it the right to own wildlife game species. To the contrary, such species were *ferae naturae*, and their ownership was in the sovereign or in the people in common and was always considered subject to 'the authority of the law-giving power.'"[104]

More than a century after the Supreme Court's decision in *Geer*, state sovereign ownership of wildlife remains firmly rooted in American jurisprudence, and it continues to serve as the foundation of the PTD as

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97. *Id.* at 1027 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which as traditionally been guided by the understanding of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.").

98. *Id.* at 1027.

99. *See* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165 (2020); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 UC DAVIS L. REV. 931 (2012).

100. 201 P.3d 8, 22 (2008).

101. *Id.* at 13.

102. *Id.* at 75.

103. *Id.* at 22.

104. Kafka v. Mont. Dep't of Fish, Wildlife and Parks, 2005 ML 241, 94 (Mont. 12th Dist. Ct. 2005).

applied to wildlife management.[105] The following Parts of this Article explore in further detail the powers, restrictions, and obligations that come along with such a significant responsibility.

III. THE PUBLIC TRUST DOCTRINE AS PROTECTION AGAINST PRIVATE MONOPOLIZATION OF NATURAL RESOURCES

Fish and wildlife—and intersecting issues related to public access, submerged lands, and navigable waterways—have long been considered within the purview of the public trust. The earliest American public trust cases, extending back to *Arnold v. Mundy*[106] in 1821, protected the public's ability to harvest shellfish in tidal waters and prevented its monopolization by private interests.[107] In this case, the New Jersey Supreme Court ruled in favor of public access to public resources and rejected a landowner's attempted monopolization of oysters in the Raritan River.[108] One scholarly authority summarized the foundational PTD case law as such:

> For nearly two hundred years, the [PTD] has ensured that Americans have access to select natural resources, protecting those resources from privatization. At its core, the PTD prohibits sovereigns from alienating these natural resources and requires sovereign protection of trust resources for future public use and enjoyment…[A]ntimonopoly is the essence of the PTD, preventing privatization of certain resources used by the public, such as tidal waters and wildlife. Without this limit on alienation many valuable natural resources would, by now, be privately owned and thus inaccessible to the public.[109]

The antimonopoly thread running through these early cases is again best understood in the historical context in which U.S. wildlife law developed. As discussed above, sovereign ownership of wildlife was in

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105. *See* Horne v. Dep't of Agric., 576 U.S. 351 (2015) (For purposes of this Article, the details of this curious takings case are less important than the Court's contrast between raisins and oysters: "Raisins are not like oysters: they are private property—the fruit of the growers' labor—not 'public things subject to the absolute control of the state.'").

106. 6 N.J.L. 1 (1821).

107. *Id*. at 76–77.

108. *Id.*

109. Michael Blumm & Aurora P. Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENV'T. AFF. L. REV. 1, 2 (2017).

response to private capture and commercial exploitation of a largely unregulated resource. That the people of a state-owned wildlife was also a direct repudiation of an English system of wildlife law that privileged landowners over the public-at-large, rooting the ability to take game in land ownership. Historical accounts reveal that "the detested English system" and the type of monopolization of resources it produced "was an ever-present specter that dominated early American thought about proper game law."[110]

This antimonopoly theme is most forcefully and clearly articulated in the "lodestar"[111] PTD case of *Illinois Central Railroad v. Illinois*,[112] wherein the U.S. Supreme Court upheld a state legislative act nullifying the transfer of Chicago Harbor into the private ownership of Illinois Central Railroad based on the PTD.[113] As applied to navigable waters and the beds beneath them, the PTD in its classic formulation must protect public access for navigation, swimming, and fishing—thus encompassing aquatic wildlife within its purview.[114] In *Illinois Central Railroad*, the Court thus concluded that a previous attempt by the Illinois legislature to privatize most of Chicago Harbor was unlawful:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace…So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.[115]

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110. Thomas A. Lund, *Nineteenth Century Wildlife Law: A Case Study of Elite Influence*, 33 ARIZ. ST. L. J. 935, 940 (2001) (reviewing widespread contempt for the English system of wildlife law that favored the rich land-owning class. This view also helps explain early American laws pertaining to trespass and the widespread right to hunt and fish on unenclosed private lands.); *See* Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976).

111. Sax, *supra* note 18, at 489.

112. 146 U.S. 387 (1892).

113. *Id.*

114. *Id*. at 452.

115. *Id*. at 453–54.

Some natural resources, such as wildlife, are so important to society that they cannot be surrendered to private interests and monopolization. As stated by the Court, "[t]he control of the State for the purposes of the trust can never be lost."[116]

Of course, the PTD does not exist in a vacuum and most natural resource issues, and PTD jurisprudence, involve some tension between private and public use. The Court in *Illinois Central Railroad* dealt with this tension and did not categorically prohibit the privatization of all trust resources.[117] Instead, the Court provided a two-pronged test where the grant to private parties: (1) promotes the public interest and serves trust purposes, and (2) does not substantially impair the public use of remaining public trust resources.[118]

Such exceptions can be applied to those state wildlife laws that permit some form and degree of private use of fish and wildlife. In contrast to more all-encompassing definitions of wildlife, state codes are typically segregated by types of species and how they are to be managed. In Montana, for example, there are different legal categories for "game animals" and "nongame wildlife."[119] The latter includes "any wild mammal, bird, amphibian, reptile, fish, mollusk, crustacean, or other animals not otherwise legally classified by statute or regulation."[120] Courts have applied sovereign ownership and trustee obligations to game and non-game wildlife.[121] But private use and markets exist for some of these categories, just as they do for "fur-bearing animals" such as beaver.[122] I am not aware of any cases that test the limits of such markets and private use of wildlife in the specific context of the PTD in Montana.[123] If brought,

116. *Id.* at 453.
117. *Id.* at 452–53.
118. *Id.*
119. MONT. CODE ANN. § 87-2-101(4), (8) (2021).
120. MONT. CODE ANN. § 87-2-101(8).
121. *See, e.g.*, Arnold v. Mundy, 6 N.J.L. 1 (1821) (applied to shellfish); Center for Biological Diversity v. FPL, 166 Cal. App. 4th 1349 (2008) (applied to raptors).
122. MONT. CODE ANN. § 87-2-101(3).
123. *See* J.M. Kelley, *Implications of a Montana Voter Initiative That Reduces Chronic Wasting Disease Risk, Bans Canned Shooting, and Protects a Public Trust*, 6 GREAT PLAINS NAT. RES. J. 89 (2001); *See also* Hagener v. Wallace, 47 P. 3d 847 (2002) (Perhaps closest in Montana was the highly controversial operation of alternative game (elk) farms, a practice banned by Montanans through a citizen initiative process in 2000.).

I would anticipate the possible application of the two-pronged test used in *Illinois Central Railroad*.[124]

That there are limits to privatizing public resources like wildlife in no way means that the PTD is anti-private property. PTD cases reveal a much more nuanced interplay between public and private interests, and an "accommodation principle" serves to mediate between the two values.[125] Consider western water law in this context, which is at once subject to the laws of prior appropriation and the PTD. The famous "Mono Lake decision" by the California Supreme Court is most instructive in this regard.[126] The Court had to reconcile two different systems of legal thought—the PTD and the prior appropriation doctrine of western water law—that were on a "collision course."[127] Though the Court did not dictate any "particular allocation" of water in the dispute, leaving that decision to the water management agencies, it did make clear that the agency has "*an affirmative duty to take the public trust into account* in the planning and allocation of water resources, and to protect public trust uses whenever

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124. *See* Reed Watson, *Public Wildlife on Private Land: Unifying the Split Estate to Enhance Trust Resources*, XXIII DUKE ENV'T. L & POL'Y F. 291 (2013) (Reed Watson of the Property and Environment Research Center (PERC) applies this test from *Illinois Central* to two controversial cases of public wildlife on private lands, which he calls the "split wildlife estate." One case involves the controversial "Ranching for Wildlife" program in Colorado. This program includes providing large landowners transferable big-game hunting permits that can be sold on the open market. Certain conditions must be met to obtain such permits, such as habitat improvements and the provision of some public hunting opportunities. Watson argues that the Program meets the *Illinois Central* test and is in the public interest. For a more comprehensive review of landowner transferable hunting permits, an approach endorsed by PERC); *See* Catherine Semcer and Jack Smith, *Conserving Wildlife Habitat With Landowner Hunting Permits*, THE PROPERTY AND ENVIRONMENT RESEARCH CENTER (2021) (I respectfully disagree with this analysis and hope to take the issue on more thoroughly in future work.).

125. Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENV'T. L. REV. 649 (2010).

126. Nat'l. Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

127. *Id*. at 712 (The prior appropriation doctrine essentially authorizes private diversion and use of waters to the exclusion of others who do not hold a water right, potentially placing it at odds with uses enjoyed by the public); *See generally* Dave Owen, *The Mono Lake Case, The Public Trust Doctrine, and the Administrative State*, 45 UC DAVIS L. REV. 1099, 1111 (2012) ("[W]ater users perceived pumping a stream dry not merely as an allowed outcome, but a desired one."); Michelle Bryan, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and "Public Interest" Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENV'T. L. J. 283, 305 (2013) ("[P]rior appropriation principles can stand in direct tension with public trust principles that depend upon stream flows for navigation, commerce, fishing, and other state-recognized trust uses.").

feasible."[128] Those uses, said the Court, include protection of wildlife and habitat.[129] Further, it held that the public trust "imposes *a duty of continuing supervision* over the taking and use of the appropriated water."[130] The Court asked state agencies to integrate the two different doctrines of law and corrected the State of California when it "mistakenly thought itself powerless to protect" trust resources.[131]

In a subsequent case known as *Waiāhole Ditch*,[132] the Hawaii Supreme Court added a further dimension to *Mono Lake*, holding that state agencies should exercise precaution before granting private uses of trust resources, requiring further research and data when there is inadequate information to make an informed decision regarding trust impacts.[133] Echoing *Mono Lake*, the Court instructed agencies to modify their water use permitting decisions over time when unforeseen trust impacts arise.[134]

The interplay between public and private uses of wildlife is carefully addressed by the Alaska Supreme Court in *Owsichek v. State Guide Licensing and Control Board*.[135] This decision helps us understand what types of private uses of wildlife are acceptable and when those uses cross a line in violation of anti-monopoly trust principles. The case involved the State's creation of "exclusive [hunting] guide areas"—"geographic areas in which only the designated guide may lead hunts and from which all other guides are excluded."[136] These "areas allow one guide to exclude all other guides from leading hunts professionally in 'his' area [and] are based primarily on use, occupancy and investment, favoring established guides at the expense of new entrants in the market."[137]

Not in question here was the commercial and private use of guides in hunting public wildlife, a practice used throughout the U.S. and one fully compatible with the PTD and the two-pronged test provided in *Illinois Central Railroad*. But the exclusive nature of this management approach ran afoul of common law trust principles and the "Common Use Clause" found in the Alaska Constitution, which provides: "Wherever

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128. *Nat'l Audubon Soc'y*, 658 P.2d at 732, 728 (emphasis added).

129. *Id*. at 718–19.

130. *Id*. *at* 728 (emphasis added).

131. *Id*. at 732.

132. In re Water Use Permit Applications, 9 P.3d 409 (Haw. 2000*), aff'd in part, vacated in part*, 93 P.3d 643 (Haw. 2004).

133. *Id.* at 445, 497.

134. *Id.* at 453 ("This authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust.").

135. 763 P.2d 488, 495 (Alaska 1988).

136. *Id*. at 489.

137. *Id*. at 496.

occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[138] This detailed opinion worked through *Geer, Illinois Central Railroad* and other public trust cases to explain how common law principles and public trust duties were engrafted into the State's Constitution.[139] These cases, like the State's Common Use Clause, reveal "an anti-monopoly intent to prohibit 'exclusive grants' and 'special privilege[s]' wholly apart from the limits imposed by other constitutional principles."[140] This public trust duty, said the Court, provides "independent protection of the public's access to natural resources."[141]

IV. THE PUBLIC TRUST DOCTRINE AND THE MONTANA STATE CONSTITUTION

Though the PTD is rooted in common law, several states also have specific or implied trust language in their wildlife statutes and/or constitutions. These provisions have been significant to the courts in prominent cases where the PTD was applied to wildlife management decisions. The California Code, for example, provides that "[t]he fish and wildlife resources are held in trust for the people of the state."[142] Alaska's constitutional provision related to the common use of wildlife provides another example: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[143] In perhaps the broadest articulation of the PTD, Hawaii's Constitution requires "the State and its political subdivisions [to] conserve and protect Hawaii's natural beauty and all natural resources," for "the benefit of present and future generations," explicitly stating that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[144]

Whether to "constitutionalize" the public trust doctrine was deliberated at the Montana Constitutional Convention in 1972. C. Louise Cross, Chair of the Committee on Natural Resources and Agriculture proposed a public trust provision that included wildlife and coupled it with a citizen's right to enforce the trust. Proposal 162 provided:

> The Public Trust: The state of Montana shall maintain and enhance a high quality environment as the public trust.

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138. ALASKA CONST. art. VIII, § 3.
139. *Owsichek*, 763 P.2d at 496.
140. *Id*.
141. *Id*. at 495.
142. CAL. FISH & GAME CODE § 711.7(a) (2023).
143. ALASKA CONST. art. VIII, § 3.
144. HAW. CONST. art. XI, §§ 1, 7 (adopted in 1978).

> Such obligation shall apply to all aspects of environmental quality including, but not limited to, air, water, land, wildlife, minerals, forests, and open space. The sole beneficiary of the trust shall be citizens of Montana, who shall have the duty to maintain and enhance the trust, and the right to enforce it by appropriate legal proceedings against the trustee.[145]

This specific public trust proposal was one of several environmental protection and rights provisions that were vigorously debated at the Constitutional Convention. This particular proposal did not pass. Instead, it became enmeshed in a larger debate about how best to protect the environment in a substantive and enforceable way.[146] Far from a defeat, and as shown below, public trust principles were embedded into parts of the 1972 Constitution and the environmental rights it provides further bolsters the application of the common law-based PTD in the State.

Two separate provisions in the Montana Constitution provide rights to a "clean and healthful environment." Article IX, §1 mandates:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[147]

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145. Montana Constitutional Convention Proceedings, Delegate Proposal No. 162, at 308 (1971–1972) https://perma.cc/ATE3-YTFR.

146. *See* C. Louise Cross, *The Battle for the Environmental Provisions in Montana's 1972 Constitution*, 51 MONT. L. REV. 449 (1990) (detailing the "vigorous" debate over the public trust proposal and the subsequent decision to make the "clean and healthful environment" provision an enforceable right); *See also* Peter M. Meloy, *A Retrospective: The Golden Years*, 43 PUB. LAND & RES. L. REV. 193, 202 (2020) (reviewing debate over the public trust provision and how it evolved into a making a right to a clean and healthful environment an inalienable right that "would serve as a basis for challenging any governmental action harming the environment.").

147. MONT. CONST. art. IX, §1.

Of profound importance is Article II, §3, which makes "a clean and healthful environment" an inalienable right.[148] In *Montana Environmental Information Center v. Department of Environmental Quality* ("MEIC"),[149] the Montana Supreme Court clarified that these two provisions "must be read together"[150] and "cannot be interpreted separately."[151]

MEIC involved a private application for a massive open-pit gold mine in the upper Blackfoot River, a river providing important habitat for several species of fish, including the Endangered Species Act-listed Bull Trout.[152] Here, the Court utilized the extensive record of discussion and debate among the delegates to the 1972 Constitutional Convention.[153] In adding the right to a "clean and healthful environment" to the Constitution's Declaration of Rights, the delegates to the Constitutional Convention "made it unambiguous that it was a self-executing fundamental right deserving of the highest level of protections."[154] Because this right is fundamental, and framed in terms of liberty, it is the special duty of the courts, and not the state legislature "to decide what 'clean and healthful" means and to play an essential role in protecting such

148. MONT. CONST. art. II, §3 (Montana's Constitution stands out among others in this regard); *See* Barton H. Thompson Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 Mont. L. Rev. 1, 9 (2003) (reviewing provisions in the Montana Constitution that are still at the "cutting edge," including being the only state to make a clean and healthful environment an alienable right.).

149. 988 P.2d 1236 (1999).

150. *Id*. at 1249.

151. *Id*. at 1246.

152. *Id*. at 1238.

153. *Id*. at 1246.

154. Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanans' Inalienable Right to a Clean and Healthful Environment*, 45 PUB. LAND & RES. L. REV. 1, 18 (2022); *See also* Jack Tuholske, *The Legislature Shall Make No Law…Abridging Montanans' Constitutional Rights to a Clean and Healthful Environment*, 15 SE. ENV'T. L. J. 311, 322 (2007) (reviewing the history of the Constitutional Convention demonstrating "that the new Constitution's environmental provisions were designed to provide powerful, enforceable rights.").

rights.[155] These rights, moreover, are "both anticipatory and preventative."[156] As stated by the Court in *MEIC*:

> We conclude, based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution they must be read together and consideration given to all of the provisions of Article IX, Section 1 as well as the preamble to the Montana Constitution. In doing so, we conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.[157]

Well-known in the State is how the PTD and the Montana Constitution were used to secure public rights to stream access.[158] In a series of cases, the Montana Supreme Court dissected the origins and interplay between the PTD and the Montana Constitution. The story begins on the Dearborn River. A landowner, Dennis Michael Curran, owned or controlled roughly seven miles along the river and blocked public access to state-owned waters along his property.[159] In *Montana Coalition for*

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155. Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanans' Inalienable Right to a Clean and Healthful Environment*, 45 PUB. LAND & RES. L. REV. 1, 18 (2022) (as stated by the Court in Ramsbacher v. Jim Palmer Trucking, 417 P. 3d 313, 317 (Mont. 2018): "The rights found in Article II, the Montana Constitution's Declaration of Rights, are 'fundamental,' meaning these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and thus the highest level of protection by the courts.").

156. Mont. Env't Info. Ctr. V. Dep't. of Env't Quality, 988 P. 2d 1236, 1249 (Mont. 1999).

157. *Id*.

158. *See generally* Amanda Eggert, *How the Montana Constitution Shapes the State's Environmental Landscape*, MONT. FREE PRESS (Mar. 24, 2022), https://perma.cc/DP7T-MZ36; PUBLIC POLICY RESEARCH INSTITUTE, *STREAM ACCESS IN MONTANA* (Univ. of Mont. 2006); Robert N. Lane, *The Remarkable Odyssey of Stream Access in Montana*, 45 PUB. LAND & RES. L. REV. 69 (2015).

159. Mont. Coal. For Stream Access, Inc. v. Curran, 682 P.2d 163, 165 (Mont. 1984).

Stream Access, Inc. v. Curran,[160] the Court used the PTD, as rooted in common law, as one basis for its decision to recognize the public's right to use the waters and the streambed of a river up to its high water mark as it flowed through a private landowner's property.[161] As in the case of wildlife, the State's sovereign ownership of water imposed an obligation on the State:

> If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. *The Constitution and the public trust doctrine* do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.[162]
>
> In sum, we hold that, *under the public trust doctrine and the 1972 Montana Constitution*, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.[163]

The *Curran* Court thus identified the PTD as a freestanding concept apart from the Montana Constitution.[164] Simultaneously, the Montana Supreme Court decided another stream access case focused on the Beaverhead River. In *Montana Coalition for Stream Access, Inc. v. Hildreth*,[165] the Court again made clear that its decision in *Curran* was based on the PTD and the Montana Constitution.[166] And once again, in 2002, the Montana Supreme Court used its *Curran* decision in a case focused on instream water flows for fish, wildlife, and recreational purposes.[167] *In re Adjudication of the Existing Rights to the Use of All Water*, so-called *Missouri Drainage Case*, the Court recognized that fish, wildlife and recreation are beneficial uses for water appropriation purposes.[168] In doing so, the Court revisited *Curran*, which "interpreted

160. *Id.*
161. *Id.*
162. *Id*. at 170 (emphasis added).
163. *Id*. at 171 (emphasis added).
164. *Id*. at 167–68 (reviewing and quoting the seminal PTD case of *Illinois Central*).
165. 684 P.2d 1088 (Mont. 1984).
166. *Id*. at 1093.
167. In re Adjudication of the Existing Rights to the Use of all Water, 55 P.3d 396 (Mont. 2002).
168. *Id*. at 407 (overruling the "Bean Lake Case*," In re Dearborn Drainage Area*, 766 P.2d 228 (Mont. 1988)).

not only the 1972 Constitution, but also the public trust doctrine which dates back to Montana's statehood."[169]

In *Montana Trout Unlimited v. Beaverhead Water Co*mpany,[170] the Supreme Court characterized the public trust as a type of water right entitled to protection: "Under the Montana Constitution and the public trust doctrine, the public owns an instream, non-diversionary right to the recreational use of the State's navigable surface waters."[171] Based on State ownership of waters of Montana, and the PTD, the Court also found that a public interest group working on instream flows for fish had particularized standing to object to claims before the Water Court because it was advancing public rights under the public trust doctrine.[172]

The Montana Supreme Court took a different approach to applying the PTD to stream access in *Galt v. State Department of Fish, Wildlife and Parks*.[173] In this case, the Court mistakenly stated that *Curran* located the public trust doctrine within the Montana Constitution.[174] Applied in the context of water, the Court stated that the "public trust doctrine is found at Article XI, Section 3(3) of the Montana Constitution" which provides: "All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law."[175] *Curran*, which cites *Illinois Central Railroad,* indicated that while Article XI, Section 3(3) corroborates the PTD for water, the PTD's origins go back to statehood, well before the 1972 Constitution.[176]

No similar express public trust provision related to fish and wildlife is found in the Montana Constitution. In a state so defined by and

169. *Id.* at 404.

170. 255 P.3d 179 (Mont. 2011).

171. *Id.* at 184–85 (citing In re Adjudication of Existing Right to the Use of all Water, 55 P 3d. 396, 404 (Mont. 2022)).

172. *Id*. at 187 (For a discussion of this and related cases see MICHELLE BRYAN, STEPHEN R. BROWN, & RUSS MCELYEA, MONTANA WATER LAW, Ch. VIII (2021).)

173. 731 P.2d 912 (Mont. 1987).

174. *Id*. (In *Curran*, said the Court, "[W]e held that under the public trust doctrine as derived from the Montana Constitution the public has a right to use any surface waters capable of use for recreational purposes up to the high water marks and may portage around barriers in the water in the least intrusive manner possible.").

175. *Id*. at 914–15.

176. 682 P.2d 163, 170 (Mont. 1984).

celebrated because of its wildlife heritage, such an absence is striking.[177] But in no way does this preclude the application of the PTD to wildlife in the State. As in the case of water, it is rooted in the State's sovereign ownership of wildlife, as recognized by the U.S. and Montana Supreme Courts.[178] It is further bolstered by the inclusive nature of Article IX, §1 and the mandate to protect "the environmental life support system," language intentionally used to by the drafters of the Constitution to be all-encompassing and least restrictive.[179]

This is the approach taken by the Montana Legislature, "mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana Constitution," in enacting the Montana Environmental Policy Act (MEPA).[180] The Act explicitly recognizes the State's continuing responsibility to "fulfill the responsibilities of each generation

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177. The only explicit reference to fish and wildlife in the State Constitution is found in Article IX, 7: "Preservation of Harvest Heritage: The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right to trespass on private property or diminution of other private rights." This is an Amendment to the Constitution ratified by voters in 2004. The Amendment recognizes an important heritage but does not create an enforceable right like those found in Article II. Debate over the Amendment focused on ensuring that the Department of Fish, Wildlife and Parks—the trustee of fish and wildlife in the State—retained management control and authority. More about the Amendment available at https://perma.cc/84D5-9F3H; *See also* Stacey Gordon, *A Solution in Search of a Problem: The Difficulty with State Constitutional "Right to Hunt" Amendments*, 35 PUB. LAND & RES. L. REV. 3, 14–15 (2014).

178. *See* Rosenfeld v. Jakways, 216 P. 776, 777 (Mont. 1923); State v. Jack, 539 P.2d 726, 728 (Mont. 1975).

179. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide*, 168 (Greenwood Press, 2001) (Delegate C.B. McNeil stated that: Subsection 3 mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life-support system" is all-encompassing, including but not limited to air, water and land; and whatever interpretation is afforded this phrase by the legislature and courts, there is no question that it cannot be degraded); *See also* Gregory S. Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 MONT. L. REV. 123, 146 (2012).

180. MONT. CODE ANN. § 75-1-102(1) (This was a legislative amendment to MEPA's purpose statement in 2003. The Legislature enacted MEPA in 1971, just prior to the Constitutional Convention and its ratification by Montanans in 1972. The purposes of Article II, 3 (Inalienable rights), Article II, 8 (Right of participation), Article II, 9 (Right to know), and Article IX, 1 (Protection and improvement) "mirrors, and is intertwined with, the underlying purposes of MEPA."); *See* Hope Stockwell, *A Guide to the Montana Environmental Policy Act*, at 4 (Helena, MT: Legislative Environmental Policy Office, 2017).

as trustee of the environment for succeeding generations."[181] Subsequent actions by the State reflect the core understanding that this responsibility extends to wildlife.

For example, the constitutional obligations imposed by Article IX, and Article II, §3 were acknowledged by the Montana Legislature in enacting the State's Nongame and Endangered Species Conservation Act, a statute covering more than 85 percent of Montana's birds, mammals, reptiles, and amphibians: "It is the legislature's intent that [its] requirements provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."[182]

The Montana Supreme Court also invoked the State's constitutional trust provisions in *State v. Boyer*,[183] linking Article IX's mandate to the enforcement powers granted to the Department of Fish, Wildlife and Parks.[184] The Court held that these special trust obligations mean that there is "no objectively reasonable expectation of privacy…when a wildlife enforcement officer checks for hunting and fishing licenses in open season near game habitat, inquires about game taken, and requests to inspect game in the field."[185] In summary, said the Court, "[O]ur Constitution, laws, and regulations mandate special considerations to assure that our wild places and the creatures that inhabit them are preserved for future generations."[186] In this context, "[G]ame wardens are acting not only as law enforcement officers, but as public trustees protecting and conserving Montana's wildlife and habitat for all of its citizens."[187]

The "special considerations" required by trust management were also raised by the Montana Supreme Court in *Hagener v. Wallace*.[188] This was one of several cases brought by owners and operators of alternative game (elk) farms, a practice banned by Montanans through a citizen initiative process in 2000. These cases epitomize the tension often evident in balancing rights in private property and public ownership of wildlife. In

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181. MONT. CODE ANN. § 75-1-103(2)(a).

182. MONT. CODE ANN. § 87-5-103; *See What is "Nongame" Wildlife?*, MONT. FISH, WILDLIFE & PARKS, https://perma.cc/AH5E-EF9Q (last visited Jan. 26, 2024).

183. 42 P.3d 771 (Mont. 2002).

184. *Id*.

185. *Id*. at 776.

186. *Id*.

187. *Id*.

188. 47 P.3d 847 (Mont. 2002).

this case, the Court relies on *MEIC v. Deptartment of Environmental Quality*, for "the theory underlying environmental protection that being proactive rather than reactive is necessary to ensure that future generations enjoy both a healthy environment and the wildlife it supports."[189] In a special concurrence, Justice Nelson elaborates on the State's constitutional obligations under Articles IX, §1 and II, §3 and their connection to wildlife conservation.[190] Such obligations are both substantive and procedural, such as in this case the need for state agencies (the Department of Fish, Wildlife and Parks and the Department of Livestock) to provide a coordinated response in preventing game farmed elk to breed with Montana's wild elk population—a threat "with the potential for an environmental disaster of truly monumental proportions."[191]

V. THE PUBLIC TRUST DOCTRINE IMPOSES LIMITS ON STATE GOVERNMENT AND ITS MANAGEMENT OF WILDLIFE

The PTD—as rooted in common law and engrafted into the Montana Constitution—imposes limitations on legislative power.[192] The State is not a monarchy, citizens are not serfs, and legislators are mistaken if they believe that they have absolute unchecked powers to either privatize or impair trust resources like fish and wildlife. Legislative attempts to eliminate the public trust doctrine are routinely invalidated by state courts due in part to the judiciary's obligation to uphold a constitutional system

189. *Id*. at 854.

190. *Id.* at 857–58 (Nelson, J., concurring).

191. *Id*. at 857 (Nelson, J., concurring).

192. Not reviewed here is the applicability of the PTD to both state *and* federal governments. The Supreme Court's decision in PPL Montana v. Montana, 565 S. Ct. 1215 (2012) caused some confusion and debate because of its statement that "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine." Regardless, the *PPL Montana* decision does not affect access to streams in Montana because of State laws enacted after *Curran* and related decisions. Neither is the case focused on wildlife and terrestrial wildlife does not intersect with the legal complexities associated with navigability and rules of riverbed ownership. In any case, the PTD is widely considered to impose inherent limits on both federal and state sovereigns. For a review, see Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and* Illinois Central Railroad, 45 ENVT'L. L. 398 (2015).

of divided government and checks and balances.[193] Montana's history of stream access law is instructive in this regard. Because the Montana Supreme Court's decision in *Curran* was based on the PTD and the Montana Constitution, the state legislature, in a bi-partisan effort involving recreational users and impacted private landowners, drafted stream access laws understanding that its response was limited and that the legislature could not substantially modify the basis of those decisions.[194]

As discussed above, the idea that the PTD can serve as a check on state legislative efforts to privatize public resources is core to the holding of the U.S. Supreme Court in *Illinois Central Railroad* and applies to wildlife. Recall, for example, the logic used by the Court to explain sovereign ownership of wildlife in *Geer*: That the state must exercise its power over wildlife "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."[195]

Courts continue to view the public trust as imposing limitations and obligations on state legislatures and the executive, including a recent high profile case in Pennsylvania, a state with a similar constitutional environmental rights provision as found in the Montana Constitution.[196] In *Pennsylvania Environmental Rights Foundation v. Commonwealth*,[197] the Pennsylvania Supreme Court invalidated several state laws that authorized the expenditure of funds from oil and gas drilling on state lands for purposes other than the conservation and maintenance of public natural

193. *See, e.g.*, Ariz. Ctr. for Law in the Pub. Int. v. Hassell, 837 P.2d 158 (Ariz. Ct. App. 1991); San Carlos Apache Tribe v. Superior Court, 972 P. 2d 179 (Ariz. 1999); Defenders of Wildlife v. Hull, 18 P. 3d 722 (Ariz. Ct. App. 2001) (For a review of these and other cases *see* THE PTD IN ENVIRONMENTAL AND NATURAL RESOURCES LAW, *supra* note 19, at 77; Michael C. Blumm, Harrison C. 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)).

194. *See* Lane, *supra* note 158, at 95 (reviewing legal advice provided to a legislative committee responsible for writing stream access laws following the decisions in *Curran* and *Hildreth*).

195. 161 U.S. 519, 529 (1896) (emphasis added).

196. PA. CONST. art I, §27 (provides: The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of everyone, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.).

197. 161 A.3d 911, 916 (Pa. 2017) [hereinafter *PEDF II*].

resources.[198] Similar to the Montana situation, the Court emphasized the importance of environmental trust duties that are provided as *rights* in the State's Constitution.[199] This constitutional trust duty, said the Court, limits the State's power to act contrary to these rights, thus serving as a limit on State government authority.[200] Though focused on the State's constitutional rights provision, the Court applied Pennsylvania trust law to its interpretation, including core trust principles of loyalty, impartiality, and prudence.[201]

Concomitant with the limits imposed on state legislatures is the right of citizens to enforce the PTD. To argue otherwise would be to suggest that the state, and only the state, could enforce the PTD but never, in fact, violate it. That is not the way the courts interpret the duties and obligations imposed by trust management. Both state legislatures and state wildlife agencies are subject to political pressures and private influences that may counter the public's sovereign ownership and interest in wildlife. The PTD applies an important check to such legislative and executive control swings.

There is a relative lack of case law focused on the enforceability of the common law-based PTD, especially in the context of wildlife. [202] The tendency, instead, is for plaintiffs to first use state constitutional and

198. *See* John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 WIDENER COMMONWEALTH L. REV. 147, 158 (2021) (analyzing Pennsylvania Environmental Rights Foundation v. Commonwealth and related cases).

199. *PEDF II*, 161 A.3d at 931–32.

200. *Id.*

201. *Id*. at 932–33 (The Commonwealth is bound by the general trust duties of prudence, exercising "such care and skill as a man of ordinary prudence would exercise in dealing with his own property"; loyalty, managing the trust corpus "so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries"; and impartiality, managing "the trust so as to give all of the beneficiaries due regard for the respective interests in light of the purposes of the trust."); *See also* Dernbach, *supra* note 198, at 159–60.

202. The common law doctrine of *parens patriae is not examined here*, which provides a possible way for States to recover damages to trust resources. *See* Deborah G. Musiker, Tom France, & Lisa Hallenbeck, *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND & RES. L. REV. 87 (1995); *See also* In Re Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980) (finding the doctrine of *parens patriae* and the PTD as providing to both the federal government and State of Virginia rights to seek the recovery of damages to migratory waterfowl).

statutory provisions to protect the public trust.[203] The clearest expression of the enforceable check served by the PTD applied to wildlife is found in *Center for Biological Diversity, Inc. v. FPL Group, Incorporated*,[204] wherein the California Court of Appeals found "the public [retaining] the right to bring actions to enforce the trust when the public agencies fail to discharge their duties."[205] To get here, the Court drew from the PTD as applied to water in the State, noting that "the protection of water resources is intertwined with the protection of wildlife,"[206] and that the California Supreme Court already established the public having "standing to raise a claim of harm to the public trust" in the Mono Lake decision,[207] which follows precedent established by the U.S. Supreme Court in *Illinois Central Railroad*:

> The facts involved in *National Audubon Society* illustrate that public agencies do not always strike an appropriate balance between protecting trust resources and accommodating other legitimate public interests; indeed, as in that case, the protection of the trust resources may be entirely ignored. The suggestion that members of the public have no right to object if the agencies entrusted with preservation of wildlife fail to discharge their responsibilities is contrary to the holding in *National Audubon Society* and to the entire tenor of the cases recognized the public trust doctrine.[208]

This instructive case involved the operation of older, first-generation wind turbines that were killing and injuring hundreds of raptors and tens of thousands of other birds in violation of the PTD.[209] Though the Court recognized the right of citizens to enforce the public trust, it nevertheless ruled against the environmental plaintiff because it challenged the private operator of the turbines and not the California

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203. *See, e.g.*, Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T. L. 431 (2015) (recommending plaintiffs to use a more robust common law PTD to support existing environmental protection statutes in Minnesota).

204. 83 Cal. Rptr. 3d 588 (Cal. 1st Dist. Ct. App. 2008).

205. *Id.* at 601.

206. *Id*. at 599 (quoting Env't Prot. & Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot., 187 P.3d 888, 926 (Cal. 2008)).

207. Nat'l Audubon Society v. Superior Court, 658 P.2d 709, fn. 11 (Cal. 1983).

208. *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 601.

209. *Id.* at 592.

Department of Fish and Game, which is the trustee of wildlife in the State.[210] It is, said the Court, the responsibility of state agencies to ensure that the PTD is taken into account and the agencies are best positioned to deal with all the tensions between public and private and the "delicate balancing of the conflicting demands for energy and for the protection of other environmental values [that] must be made."[211]

Though clarifying the rights of citizens and the judiciary to enforce the PTD, the Court's decision in *Center for Biological Diversity* is also respectful of the expertise possessed by state agencies and the complicated context in which they work and balance tensions between public and private, and sometimes between multiple public goods. The Court does not view the PTD as some caricature or open-ended charter for judicial intervention. Nor is it viewed as a magic bullet or hidden thumb on the scale of environmental protection. Instead, the court traces the lineage of the PTD and why citizen enforcement of it is both permissible and necessary. If state agencies fail to enforce the trust, then "members of the public may seek to compel the agency to perform its duties, but neither members of the public nor the court may assume the task of administering the trust."[212]

VI. CONCLUSION

At the time of this writing, the lawsuit brought by the United Property Owners of Montana (UPOM) remains unresolved. However decided, the case represents something far bigger than how elk are managed in Fergus County, Montana. Context is everything, and the UPOM case strikes a nerve that is reverberating throughout the entire system of wildlife governance in Montana.

Profound changes in the State—including an influx of out-of-state wealth and changes in land ownership (and accompanying views of it)—have engendered equally profound questions about what it means to own and manage the public's land and wildlife. The often arcane and technical nature of allocating hunting opportunities on public and private lands can obscure deeper trends feared by beneficiaries who place each story in a larger context. This was the case, for example, when Texas billionaire Dan Wilks used his influence and a permitting arrangement with the Department of Fish, Wildlife and Parks to secure bull elk tags for members

210. *Id.* at 606–07.
211. *Id*. at 603–04.
212. *Id*. at 603.

of his family from Texas and those he selected from the public-at-large.[213] "Bulls for Billionaires" became the catchphrase and critics view it as yet one more example of a creeping monopolization and privatization of wildlife in the State; as one more backward step towards a feudal system that ties the ownership of wildlife to the ownership of land.[214] The most immediate fear is that a Montana model of wildlife allocation—one emphasizing public ownership of wildlife—is giving way to a New Mexico-like model that privileges private land owners over the public-at-large.[215]

The trends and transformation of wildlife management in Montana go well beyond hunting opportunities and elk management. The state legislature is aggressively inserting itself into matters that were traditionally deferred to the Department of Fish, Wildlife and Parks. Some push-and-pull between the State legislature and FWP is to be expected, as both are trustees of wildlife in the State. But some recently enacted legislation, and a spate of controversial bills, pertaining to the management of high-profile species like wolves, grizzly bears and bison, raise significant questions about the substantive and procedural obligations of trust management and how they apply to these and other cases.[216] These obligations, distilled through PTD case law, are summarized in Table 1 below.[217]

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213. *See* Andrew McKean, *"Bulls for Billionaires." Are Montana's 454 Permits a Step Toward Privatizing the State's Elk Herd?*, OUTDOOR LIFE (May 20, 2022), https://perma.cc/2G2M-HBEE.

214. *Id.*

215. *See, e.g.*, TAKE BACK YOUR ELK (New Mexico Wildlife Federation and New Mexico Chapter of Backcountry Hunters and Anglers, 2022) (reviewing New Mexico's "EPLUS system" that leads to a large share of elk licenses going to private landowners and outfitters instead of New Mexico residents).

216. *See, e.g.*, Christopher Servheen, *Anti-Predator and Anti-Science*, THE WILDLIFE PROFESSIONAL (May/June, 2022) (reviewing recently enacted legislation in Montana and Idaho focused on wolves and grizzly bears).

217. *See* DOUGLAS QUIRKE, *THE PUBLIC TRUST DOCTRINE: A PRIMER* (2016); MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* (2014) (For an application of these obligations to wildlife management and governance *see* Susan Morath Horner, *Embryo, Not Fossil: Breathing Life Into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23 (2000)).

Table 1. Substantive and Procedural Duties of Trust Management	
Substantive Duties	Procedural Duties
• to protect trust resources from substantial impairment • to give public purposes priority over private purposes • to prevent waste and restore damaged resources • to guard against privatizing trust resources at the expense of the public	• the utmost loyalty owed to the beneficiaries by the trustee • a legislative responsibility to adequately supervise administrative agencies • acting in good faith and with reasonable skill • managing trust resources with reasonable caution • providing information to beneficiaries and an accurate accounting of trust resources

Answering how the PTD specifically applies to these cases and others is necessary future work. For example, what does the duty not to impair trust resources mean for the use of science in wolf and grizzly bear management? Or what about the duty to restore trust resources—how might this pertain to managing bison as a trust species in Montana? Or what about the procedural duties of trust management—are they breached when decisions get made without full disclosure and transparency or resolved through negotiated settlements without participation of public beneficiaries? The composition and politics surrounding the State's Fish and Wildlife Commission must also be part of future inquiries, as there must be a clear duty of undivided loyalty to public beneficiaries and not for the trustee's own benefit or for the sake of third-party interests.[218]

However addressed, this Primer suggests careful application of the PTD as it does not provide a magic bullet for all of the difficult choices that must be made in wildlife management. There will be legitimate disagreements about how best to manage trust resources amongst trustees and beneficiaries. But at its core, the PTD provides a most important counterweight and assurance that the public interest in wildlife is not surrendered to private monopolization or undue private control of the wildlife trust. Notwithstanding the differences amongst beneficiaries, the

218. *See* Martin Nie, Nyssa Landres, & Michelle Bryan, *The Public Trust in Wildlife, Closing the Implementation Gap in 13 Western States*, 50 ENV'T L. REP. 10909 (2020) (discussing this and other actions that should be taken to effectuate the wildlife trust duty).

PTD can serve as a coalescing and unifying force in wildlife management for the benefit of all species.

All this political turmoil and controversy has Montanans going back to first principles and the foundation of state wildlife management—the public trust doctrine. A similar type of political turbulence preceded the passage of the 1972 Montana Constitution[219] and the public trust cases that secured stream access in the State.[220] The Constitution freed Montana from its corporate colony status, and embedded within it are public trust principles that are just as relevant today as they were in 1972. The stream access decisions, relying on the Constitution and the PTD, also happened in response to controversial actions taken by private landowners to bar public access to public-owned resources.

This history is most instructive now, roughly 40 years after the Montana Supreme Court's decisions in *Curran* and *Hildreth*. These monumental victories, grounded in both the PTD and trust principles in the Montana Constitution, opened a door for public beneficiaries and provided leverage in finding workable solutions to stream access in the State. The PTD can play the same role now in the context of wildlife management, especially with issues pertaining to public wildlife on private lands. And like the case of stream access and how legal victories became codified into Montana statute, the analog makes clear how caution and compromise will be necessary in order to find pragmatic and durable solutions that respect both public and private ownership rights.[221]

The Preamble to the Montana Constitution evokes a sense of place and set of values like no other:

> We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

None of these scenes can be conjured without the wild bringing life to them, from the mountains to rolling plains. But this quiet beauty and

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219. *See, e.g.*, *To Make a Better Place: For This and Future Generations*, 43 PUB. LAND & RES. L. REV. (2020) (providing a special collection of articles focused on the political and legal developments preceding the passage of the Montana Constitution).

220. *See e.g.*, Lane, *supra* note 158.

221. *Id.* (reviewing the compromise and collaboration it took to translate codify stream access law following the Supreme Court's decisions in 1984).

grandeur were once not so alive with the wildlife that now makes the State the envy of others. Like elsewhere, Montana's wildlife was once decimated as a result of private capture, market forces, and commercial exploitation. State ownership and the public trust doctrine provide the legal foundation to reverse course and to ensure that the State's wildlife is managed for present and future generations of *all Montanans*.