

The Public Trust Doctrine: What Does This Mean to Users of Wildlife?

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There are some in our community who have been advocating a system of belief, bordering on religious fanaticism, relating to the public trust doctrine and how they desire to apply it to wildlife in general and raptors in particular. It is the intent of this small but vocal group to indoctrinate our community with the dogma (there is no objectivity here) that we cannot own legally harvested wildlife. Part of their problem lies with the misunderstanding of the term “wildlife.” The Supreme Court states “Wild birds are not in the possession of anyone, and possession is the beginning of ownership” (*Missouri v. Holland*). This informs us that animals that are free roaming, i.e. “wild”, belong to no one, but once they are reduced to possession by an individual (i.e. no longer wild; we can refer to them as *domestic, previously-wild, tame*, etc.), they are the property of that individual. The U.S. Supreme Court case **Hughes v. Oklahoma** stated, “A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture”. So those who say that no one can own a “wild” animal are correct, in a qualified sense. However, once it comes into possession of a human, it is no longer considered wild by the Court and therefore is subject to property rights. Those who attempt to maintain the application of the term “wildlife” upon a harvested animal are attempting to keep the animal in the public sphere so as to prevent ownership by an individual; the Court will not accept this position.

This article will address the true purpose of the public trust doctrine and the flaws in the argument by those who apply it to wildlife.

We should begin with a brief explanation of this doctrine as explained by the U.S. government through the National Oceanic & Atmospheric Administration (NOAA).

The Public Trust Doctrine is a common-law doctrine of property law, customized by each state, which establishes public rights in navigable waters and on their shores. The doctrine is premised on the fact that such waters and shores have been used as common areas for food, travel, and commerce since time immemorial....

The legal interest of the public is determined by balancing public and private rights and interests.

(Emphasis is mine.) NOAA uses a formula to demonstrate the doctrine:

“A Legal Interest + Held by States + Tidal & Navigable Waters + For the Benefit of the Public = Public Trust Doctrine”

NOAA continues:

The concepts presented in the Public Trust Doctrine date back at least to the Roman Empire. English common law recognized public rights in navigable waters and on their shores. American colonial courts followed English common law. Each state has since further refined the doctrine through its courts and legislatures to best fit the unique circumstances and societal needs of the state.

The Public Trust Doctrine exists because historically the use of navigable waters and their shores for navigation, commerce and fishing has been a mark of a free society. The public nature of navigable waters as highways for navigation and commerce is self-evident....

In an article by Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, Michigan Law Review, Jan. 1970, the author states:

It is clear that the historical scope of public trust law is quite narrow. Its coverage includes ... that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence.... Traditional public trust law also embraces parklands, especially if they have been donated to the public for specific purposes....

Public trust problems are found when ever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals.

Sax informs us:

Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public [*a harvested duck cannot be shared in this manner*]; second, the property may not be sold, even for a fair cash equivalent [*which automatically excludes wildlife; consider commercial fishing and the fur trade*]; and third, the property must be maintained for particular types of uses [*will the government dictate how to use the fish I caught or the pelt I tanned, excluding commercial considerations?*].

(My italicized comments are inserted in brackets.) This makes it quite clear that the public trust doctrine encompasses principles that are fundamentally land and water related; not wildlife in particular or renewable resources in general. Since wildlife belongs to no one until possession takes place, as the Court has ruled, public trust principles may be related, not unlike a cousin, but it is not a doctrine that can be directly applied to wildlife.

Sax provides:

The most common theory advanced in support of [government's] special trust obligation is a property notion; historically, it is said, certain resources were granted by government [*this would have been England*] to the general public in the same sense that a tract of public land may be granted to a specific individual. If that were the case, the government's subsequent effort to withdraw the right would confront the same barrier that the government faces when it [takes] private property. The test is no longer whether the government is acting for a public purpose within the legitimate scope of regulatory powers, but rather whether it is taking [private] property.

This explains the reason some fish & game officials attempt to deny that legally taken wildlife belongs to the individual who harvested it. They wish to have the power to confiscate wildlife without a challenge.

Sax referenced the public trust in Wisconsin since, as he explains, "The Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state." When considering a public trust question, the Wisconsin Court considers whether a use conflicts or is compatible with the public's interests. If it conflicts, they will restrain or prohibit the activity. Obviously, the personal use and subsequent ownership of harvested wildlife, including raptors, is not in conflict with the principles of the trust; therefore the attempt to draw wildlife under the public trust doctrine is deceitful. However, access to wildlife requires a sustainable-use management system in order to prevent over-harvest of species. This authority is grounded in the Commerce and Welfare clauses of the Constitution. The maintenance of wildlife populations is certainly in our economic and general welfare interests. There is no need to incorporate public trust authority into the mix; it would surely unsettle established common law, which would unquestionably be harmful to society.

Sax analyzes California's public trust cases and points out that these "cases stand for the more limited proposition that the state cannot give to private parties such title that those private interests will be empowered to delimit or modify public uses." Of course ownership of harvested wildlife does not fall within this test. Property rights in wild taken animals do not modify public uses, since it is a renewable resource and renewable resources fall under separate considerations from public lands. Renewable resources are more transient; they grow and then perish either by age or by consumption of some organism, including man. Whereas public lands have greater permanency and provide access to renewable resources which can be used for recreational or economic purposes, e.g. sport versus commercial fishing. If wildlife were to fall within the scope of the public trust doctrine, special interests would attempt to divert the public's and Court's attention from individual rights and liberties and steer it toward collectivism, or guide it through insidious manipulations in the direction of animal rights. At which point individual animals would not be accessible to citizens since they would become "public property" and therefore inalienable of the public trust; or, of even greater harm, they would acquire their own rights with the subsequent protection of a citizen. The term *slippery slope* takes on a whole new meaning under these circumstances.

Sax continues:

Any action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter; such actions should not be taken in some fragmentary and publicly invisible way. Only with such a safeguard can there be any assurance that the public interest will get adequate public attention.... Consistency with this principle would require that decisions likely to inhibit public uses be made in a public forum.

Conversely, any action which will adversely affect private property rights is a matter of general interest. If there is to be

any changes in property rights of harvested wildlife, the same principle would apply. Remove the words *public rights in trust lands* in the first line of the above quote and insert *private rights in harvested wildlife* and it becomes quite clear that the efforts of certain sectors of the wildlife management community have been attempting to circumvent the democratic process - a most dangerous road to travel.

Sax points out that governmental bodies “may interfere with the public trust in the same manner as private profit-oriented interests; many aspects of local self-interest are as inconsonant with the broad public interest as are the projects of private enterprises.” This indicates that all segments of society, including the government, can abuse some portion of our common interest. Therefore restraints need to be applied to all since none can be completely trusted. It's the difference between liberty and anarchy: liberty is tempered with socially responsible restraints embraced by the individual; whereas anarchy knows no restraint. Therefore, as Sax explains, “Indeed, if there is any lesson to be learned from the cases which have been examined in this Article, it is that a much more sophisticated examination into the manipulations of legislative and administrative processes is required if the public interest is to be promoted.... The very fact that ... courts perceive a need to reorient administrative conduct in this fashion suggests how insulated such agencies may be from the relevant constituencies.” Frequently legal counsel is required to navigate through the maze of bureaucracy in order to protect the interests of citizens. To place wildlife in the hands of bureaucrats under the public trust doctrine is to completely lose the **right** of access and use through the slow process of attrition. Access and use will be considered a “privilege,” in the disparaging sense, which can be withdrawn at the whim of an agency.

Sax points out how courts attempt to push public trust questions onto “a truly representative body” in order to minimize special interest influence. He states:

Certainly even the most representative legislature may act in highly unsatisfactory ways when dealing with minority rights, for then it confronts the problem of majority tyranny. But that problem is not the one which arises in public resource litigation. Indeed, it is the opposite problem that frequently arises in public trust cases that is, a diffuse majority is made subject to the will of a concerted minority [*such as animal rights activists*]. For self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests. Thus the function which the courts must perform, and have been performing, is to promote equality of political power for a disorganized and diffuse majority by remanding appropriate cases to the legislature after public opinion has been aroused.

In closing we can revisit NOAA's formula with a clearer understanding:

A Legal Interest (necessary for economic well being and general welfare of citizens)

+

Held (not owned) by States (in trust for citizens' use)

+

Tidal & Navigable Waters (plus parks)

+

For the Benefit of the Public (for continued access and use)

=

Public Trust Doctrine (no one sector may have a monopoly on the trust, including protectionists)

While the public trust has attributes or principles that bear a resemblance to sustainable-use principles as it relates to wildlife, they are not grounded in the same doctrine. They serve different purposes yet they can complement one another when they meet. Public trust principles guarantee us and our posterity continued access and use of trust property. Sustainable-use principles, empowered by Commerce and Welfare doctrines, guarantees us and posterity continued access and use of renewable resources located on or off trust property. Any attempt to tie the two doctrines together will certainly destroy our right, not privilege, to access and use of wildlife.