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THE PUBLIC TRUST FOUNDATION OF THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION

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Abstract: Seven components have been identified that form the foundation of the North American Model of Wildlife Conservation. *Wildlife as Public Trust Resources* is the keystone component of this model, as it is the source from which state, provincial, and federal governments derive authority for legal oversight of wildlife. The remaining six model components would crumble if not for this core construct. The concept of wildlife as public trust resources means that they can be owned by no one, and must be held in trust for all people. The origins of this concept predate the formal Public Trust Doctrine and its application in North America by centuries, and in its fundamental form it reflects the utilitarian benefits to be derived from wildlife. North America's conservation architects recognized cultural and spiritual values as well, values dating back to the Pleistocene, and deemed it necessary to maintain these for the benefit of future, as well as present generations. Today, the public trust in wildlife is under siege on many fronts. Privatization, game ranching, unsustainable land use practices, and animal rights are examples of assaults on the public trust. We discuss these and other impending threats to wildlife as a public trust. We emphasize the need to identify the fundamental societal values that motivate people to conserve wildlife, and the need to explore the underlying parameters governing society's approval of the uses of wildlife. The political system most likely to successfully maintain wildlife is one in which the benefits as well as the costs of wildlife are distributed broadly, so that a large portion of the public can become positively involved with wildlife. We suggest that a continental wildlife treaty be implemented to fundamentally safeguard the wildlife resource.

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THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION

The North American Model of Wildlife Conservation has been described as having a foundation built upon seven components (Geist et al. 2001). These components are: 1) Wildlife as public trust resources; 2) Elimination of markets for wildlife; 3) Allocation of wildlife by law; 4) Wildlife can only be killed for a legitimate purpose; 5) Wildlife are considered an international resource; 6) Science is the proper tool for discharge of wildlife policy; and 7) Democracy of hunting.

The keystone component of this model is the concept of wildlife as public trust resources. This key concept has become the source of state, provincial, and federal oversight of wildlife. Without this component, the remaining six model components would have no grounding in law. We describe the origins of the public trust concept, its application in the North American Model of Wildlife Conservation, current and emerging threats to the public trust, and a need for action. We see this not merely as a national concern, but as a continental one, and suggest that a continental treaty on wildlife, safeguarding wildlife as a public trust, should be a goal for the future.

THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine stems from a U.S. Supreme Court ruling in 1842 that denied a landowner's claim to exclude all others from taking oysters from certain mudflats in New Jersey (Martin v. Waddell; Bean 1983). Chief Justice Roger Taney, in determining that the lands under navigable waters were held as a public trust, based his decision on his interpretation of the Magna Carta. The Magna Carta, in turn, had drawn upon Roman law that was first written as the Institutes of Justinian (A.D. 529; Adams 1993). The written codes of Justinian were based upon the 2nd century Institutes and Journal of Gaius, who codified the natural law of Greek philosophers (Slade et al. 1977). The application of this fundamental concept of the public trust to natural resources, first written for posterity by the Romans, is as old as civilization itself. What the Romans recorded was, in part:

> "By the law of nature these things are common to all mankind - the air, running water, the sea, and consequently the shore of the sea. No one, therefore is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations" (Slade et al. 1997:4).

The roots of the Public Trust Doctrine in Roman law are, of course, more complex than this simple, eloquent statement. Joseph Sax, the pre-eminent scholar of the Public Trust Doctrine, traces these roots so that we may better understand the modern context (Sax 1999). The Romans had an elaborate property system that recognized different kinds of property serving different functions. Certain property belonged to the gods, certain property belonged to the state, and certain property belonged to individuals. Each of these kinds of property had a special status and had to be treated in a certain way. For example, the property might not be capable of being bought and sold. There were other kinds of property as well, such as common property (*res communis*). Common property could not be privately owned and was for common use by everyone. Roman law included wildlife (*ferae naturae)* within the law of things owned by no one - *res nullius*. Ownership of a wild animal only occurred when it was

physically possessed, most typically when killed for food.

Roman civil law was adopted in substance by the English after the Magna Carta (A.D. 1215; Slade et al.1977). English common law also recognized that there are special kinds of property, but provided its own interpretation: certain properties are held by the king for the benefit of the king's subjects. These properties are owned by the king, but not owned by the king for his private use. The king is a trustee, owning certain properties for someone else, which becomes a special responsibility (Sax 1999).

English law applied in the American colonies, yet after independence and the formation of the United States, there was no king to be the trustee. It wasn't until 1842 and the Supreme Court decision in *Martin v. Waddell* that trustee status was ascribed to the states. To understand how the ancient concept of public trust and the modern Public Trust Doctrine, neither one specific to wildlife, have become a pillar of wildlife conservation, we must look at their legal essence.

An alternative evolution of wildlife law, in which wildlife became defacto private property of landowners, is discussed by Threlfall (1995), detailing the conditions in Great Britain. Canada, then a colony of Great Britain, opted for the same basic policies governing wildlife as did the United States. An account of this effort to protect Canada's wildlife in close cooperation with the United States is discussed by Hewitt (1921), including the establishment of wildlife treaties between our countries. Historically, wildlife became a public resource in part by default because the Crown was the ward of huge tracts of land not claimed for settlement and was thus the defacto owner of the wildlife it contained. be repealed by a legislature. The traditional Moreover, as wildlife fed native populations, Canada's government had little choice but to safeguard that food supply. It is axiomatic that international wildlife treaties can only be negotiated where wildlife is in the public trust, while at the same time such treaties are the only mechanism for establishing certain wildlife species as a ward of national governments.

PUBLIC TRUST AS LAW

Sax (1999) identifies four fundamental concepts of public trust:
1) Public trust is common law. There is no book where you can find the Public Trust Doctrine because it has never been officially enacted. It is "judge-made law" that is interpreted and evolves through court decisions. For the last century or so, most of our laws have been statutory coded laws, but for most of the development of the Anglo-American legal system, the law was common law; 2) Public trust is state law. As such, there is no single law but many; yet each embodies a unifying principle of the fundamental rights of all citizens; 3) Public trust is property law. One of the great strengths of the Public Trust Doctrine is that in asserting it, the state is asserting its own property rights - property rights that belong to the public - so the issue of "taking" becomes moot as one cannot be taking a property right from another while asserting such right; and 4) Public trust is a public right. Trust property is owned by the public and held in trust for the benefit of the public. You do not have to have special status to make a claim; you just have to be a member of the public.

Since the Public Trust Doctrine is common law, and judge-made, it can never

applications of public rights under the

Public Trust Doctrine were for navigation, fishing, and commerce. The New England states of Massachusetts, Maine, and New Hampshire added fowling as a right. It was not until 1896 that wildlife were firmly established in law as a public trust resource of the states. *Geer v. Connecticut* became judge-made law that is the "heart and soul of the modern day public trust in wildlife" (Horner 2000:21). While transforming this principle into modern American law, and making the concept of wildlife as public trust resources distinctly American, the court stated:

> "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has lead to the recognition of the fact that the power or control lodged in the State, resulting from the common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of all people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public" (Geer v. Connecticut, 161 U.S. 519, 1896).

The trustee status of states in regard to wildlife is transferred to the federal government in the United States when wildlife falls within parameters of the United States Constitution: federal treaty-making power, the Commerce Clause, and the Property Clause. Chief Justice Taney, in articulating the Public Trust Doctrine in Martin v. Waddell in 1842 acknowledged this when he wrote that the powers assumed by the states were "subject...to the rights since surrendered by the Constitution to the general government" (Bean 1983:14).

Smith (1980) identified three criteria that need to be met in order for the Public Trust Doctrine to be an effective tool: 1) it must contain some concept of a legal right in the general public; 2) it must be enforceable against the government; and 3) it must be capable of an interpretation consistent with contemporary concerns. Simply stated from a wildlife conservation perspective, people must understand that wildlife, regardless of whose property they are on, belong to them. The government as trustee must be able to be held accountable so as to prevent the squandering of the trust. Finally, the Doctrine must be in broad enough terms to allow inclusion of resources currently considered important, even though they might not have been considered by the architects of the public trust.

WILDLIFE AS PUBLIC TRUST RESOURCES UNDER SIEGE

The need for wildlife to be held in public trust originated as "a fundamental nineteenth-century conception of the purpose of wildlife law, the preservation of a food supply" (Bean 1983:16). The architects of North American wildlife conservation believed that wildlife were no longer essential as a food supply, and believed that they had greater value for cultural and spiritual purposes (Trefethen 1972, Reiger 1975, Organ and Fritzell 2000). Hunting as a cultural pursuit (coined "sport hunting" to distinguish it from "market" and "pot" hunting) became the driving force in development of the North American Model of Wildlife Conservation. The Roosevelt Doctrine, which in part calls for scientific management to sustain wildlife for the benefit of present and future generations so as to achieve the greatest good for the greatest number of people (Reiger 1975), is firmly rooted in the Public Trust Doctrine. If wildlife did not have legal status as public trust resources, the

remaining components of the model referenced earlier would not have been set in place. The reason governments have agencies to manage wildlife and state and provincial universities have programs to train scientists to manage wildlife is because of trustee status. The private ownership of wildlife, or common ownership lacking a trustee, would have spelled the demise of these resources. Today, the public trust in wildlife is under siege on many fronts.

Privatization of Wildlife

There is an increasing trend throughout North America by private interests to control wildlife for personal profit. Typically, access is controlled through land ownership and restriction of users through leasing of rights or pay-per-use. Ultimately, competition fosters efforts to control the number and quality of wild animals inhabiting the land. Consequences of such demands include the elimination of predators, less biological diversity, loss of "democracy of sport" (Leopold, quoted in Meine 1988:169), and a decline in the wildlife profession (Geist 1988, 1995). Science as a tool to discharge wildlife policy is a key component of the North American Model of Wildlife Conservation. A notable achievement of North Americans was in the development of the wildlife management profession in order to institute scientific stewardship. The use of science in wildlife management and policy is predicated upon the public buying the services of wildlife biologists to ensure the public trust is maintained. In private hands, science, when applied, is focused on profit. Some trust resources may become expendable in order to maximize others.

Game Ranching

wildlands to support the human economy. Unless a major change in social values and

The last two decades have seen the growth of game farming, an industry devoted to raising wildlife for the sale of its parts in an open market. This industry stands in opposition to every major policy of wildlife conservation in North America (Geist 1985, 1995). Game ranching systematically destroys the legislative framework that has been effective in conserving wildlife—elimination of markets, allocation by law, democracy of hunting. It is most dangerous in the disease implications it presents to wildlife and humans. Game ranching represents an enormous disease bridge between wildlife and livestock and people. Additionally, it has potential to destroy the genetic integrity of wildlife through escapes and the genetic manipulation of captive wildlife.

Unsustainable Land-Use Practices

The United States human population is projected to increase to nearly 400 million by the year 2050 from its 2000 census figure of 281,421,906 (Trauger et al. 2002). This exceeds an estimate reported a few years ago by about 50 million, suggesting an accelerated growth rate. Americans comprise less than 5% of the world's population, but consume 30% of its resources. The current political agenda favors economic growth, which exacerbates the effects of population and consumption on wildlife resources (Czech 2000). The land base available to and suitable for wildlife is disappearing at an alarming rate. Our current trends in human impacts on the land pose the greatest long-term threats to wildlife. We will see increased fragmentation and isolation of wildlife populations, and increased conversion of corresponding political ideology occurs, our conservation triumphs on behalf of our trust

resources will dwindle away.

Animal Rights

Animal rights is an ideology that opposes any human use of animals (Herscovici 1985). According to one of the leading animal rights scholars, true proponents of animal rights cannot support animal welfare initiatives because animal welfare is predicated on use of animals (Francione 1996). North American wildlife conservation programs have largely adhered to three fundamental principles regarding use of wildlife: 1) The use does not threaten or endanger the species; 2) the techniques used to kill animals are fair and acceptable to society; and 3) the use serves a legitimate purpose (Hamilton et al. 1998). However, this runs afoul of the animal rights doctrine that use be restricted only to non-sentient beings. This philosophy is based on splitting life into a higher sentient form and a lower non-sentient one. In so doing, it denies the unity of life, and that is a falsehood. Ever since Darwin we have viewed life as united, and that unity has been demonstrated at great length by modern science; molecular biology in particular. Science has shown that all organisms sense injury to their self and proceed to repair themselves. The urgency of these repairs suggest suffering, yet this cannot be proven scientifically. As animals, we are bound to eat life in order to live. As the great mythologist Joseph Campbell (1959) stated, flesh eats flesh to beget flesh. As such, we have no way to avoid inflicting suffering; that we must strive to limit suffering goes without saying.

CONCLUSION

A program that would eliminate human uses of wildlife would destroy their value as public trust resources. Essentially, wildlife thrives where humans get something precious from wildlife, which, for many people, must be something tangible. A synergistic effect results as people's interest in and demand for wildlife encompasses more species, leading to greater species richness and more complex ecosystems to support them. Wildlife invokes passion in many people, but historically, hunting has invoked the greatest passion that has assured wildlife its place on the landscape. These powerful urges to hunt appear to be deeply primordial. The North American Model of Wildlife Conservation resulted largely because that passion expressed itself as a deep, life-long interest in and devotion to wildlife by people who were committed to their preservation. A wonderful example of that passion is novelist William Faulkner's response to the invitation to go to Stockholm to receive the 1949 Nobel Prize in Literature: "I can't get away. I am going deer hunting!" (Wegner 2000).

We must take action to defend the assaults on wildlife as public trust resources, and this will require no less effort, leadership, and courage than exhibited by those who created the North American Model of Wildlife Conservation. First, people must be made aware of the North American model and their stake in it. They must learn that this is a uniquely American construct, and its principles reflect the very values America was founded on. They must learn that the threats are real and will take something that belongs to them and their children. Hopefully, awareness will foster interest, and interest will lead to recognition of value and participation in the traditions that have upheld the model. Ideally, the result will be action. An event that would be as monumental as the actions that set the North American Model of Wildlife Conservation

in place would be the formal adoption of the model through a continental treaty. This would secure the public trust in wildlife and people's access to it as an international obligation.

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