

Public Trust Doctrine: For The Good of The People

Ed Owens, Chair, Citizens for Responsible Wildlife Management, PO Box 14245, Tumwater, WA 98511-4245, July 2001

Regardless of how we trace its ancestry the Public Trust Doctrine - the principle of common law directing who owns and manages natural resources - is deeply rooted in our culture and history. Some historians have argued that hunting of game, fishing and wildlife management responsibility components of the doctrine have their origins in English common law dating back to the Saxon invasion of England in about 450 AD and maintained after the Norman Conquest in 1066.¹ It is clearly evident that elements of the doctrine related to fish, shorelines and water have come to us from codified dictates enacted by the Roman Emperor Justinian in about 530 A.D.²

The English monarchy added strength and recognition to the public trust doctrine with the signing of the Magna Carta in 1215. Changes in English common law enacted in 1641, and additional modifications enacted by Colonial Ordinance in 1647,³ reinforced the public trust doctrine concept that government has an affirmative duty to administer, protect, manage and conserve fish and wildlife; hence, government cannot relinquish its obligations to a popular vote to establish administrative management, protection, and conservation practices for renewable wildlife and marine resources. In other words, ballot measures cannot supersede governmental (sovereign) rule.

With a history spanning upwards of fifteen centuries, or potentially more, it would be impossible to cite every publication, historical record or litigation associated with the public trust doctrine. Fortunately, such a bibliography is not necessary to illustrate the constantly evolving history of the doctrine as it applies to wildlife management responsibilities. As it seems to be the case with many important issues in America, litigation, and the occasional Act of Congress, have played roles in defining the responsibilities of government under the public trust doctrine. A profile of some of the Acts of Congress and Supreme Court rulings that have defined the public trust doctrine include:

- ❖ In 1842 the Supreme Court ruled that the Magna Carta had settled the question of who owns fish and wildlife and that King Charles II did not have the authority to give away the "dominion and property" of lands in colonial America. The court further ruled that since the American Revolution the people held public trust responsibilities for fish and wildlife except for rights specified in the U.S. Constitution.
- ❖ In 1892, the Supreme Court declared that the "Sovereign Lands" of a state are held in trust by the State for all present and future generations, and that such land may not be sold for development incompatible with uses covered by the Public Trust Doctrine.⁴
- ❖ In 1896, the Supreme Court declared that the states' property right in game was to be exercised as a trust or the benefit of the people of the state.⁵ Up until this ruling the 10th Amendment of the Constitution only appeared to give states jurisdiction over wildlife. This court case is considered by many to be the core ruling of states' public trust authority over wildlife but it is somewhat controversial because it does so in terms of ownership.
- ❖ The Lacey Act of 1900 utilized the power of Congress to regulate interstate commerce to initiate federal involvement in wildlife conservation by prohibiting transportation across state lines of wildlife killed in violation of state laws.⁶ Since 1900 the Lacey Act has been amended numerous times as federal and state government public trust authorities have been further refined.
- ❖ It took about seven years (1913-20), two Acts of Congress (the Migratory Bird Act of 1913 and the Migratory Bird Treaty Act of 1918) and two Supreme Court rulings (the first ruled the 1913 Act unconstitutional and the second upheld the 1918 Act) before the role of Congressional Treaty Powers were sorted out as related to migratory birds and the public trust doctrine concept applied to the management of migratory birds.⁷ The 1918 Act and subsequent Supreme Court ruling gave the federal government a strong basis for leading the conservation and management of migratory birds resulting in the application of the public trust doctrine in many treaties for the protection of migratory birds.
- ❖ In 1976 the Supreme Court decreed that federal authority *may* be superior to that of the states in some wildlife management situations but the extent of the authority remains unclear.⁸ This relatively undefined aspect of the ongoing public trust doctrine debate is an area likely to draw additional consideration by the courts over time because of the broader states rights versus federal powers (and related issues) debates.

For the first hundred, or so, years of America's history public trust doctrine litigation and legislation generally tended to focus on providing for the public use of waterways for commerce, navigation, and fisheries; a consequence of the mandates established by Emperor Justinian. Court rulings at both the federal and state levels - and legislation including the relatively recent federal Endangered Species, Marine

Mammal and Environmental Protection Acts - over the last 150 years, or so, added hunting. In recent years courts have added swimming, recreational boating, and preservation of lands in their natural state in order to protect scenic and wildlife habitat values as codified elements of the public trust doctrine.

For example, A 1983 California Supreme Court ruling held that the State has an "affirmative duty to take the public trust into account" in making decisions affecting public trust resources, and also the duty of continuing supervision over these resources which allows and may require modification of such decisions.⁹ More recently, the definition of the doctrine has been further refined by the California courts as providing the public the right to use water resources for: navigation, fisheries, commerce, environmental preservation and recreation; as ecological units for scientific study; as open space; as environments which provide food and habitats for birds and marine life; and as environments which favorably affect the scenery and climate of the area."¹⁰

A Court in New York State declared that, "[T]he entire ecological system supporting the waterways is an integral part of them and must necessarily be included within the purview of the trust." The Court was calling for protective measures against actions which would degrade the trust resource, the waterway.¹¹ Another court in the State of Iowa noted that the Public Trust Doctrine has, "emerged from the watery depths [if navigable waters] to embrace the dry sand area of a beach, rural parklands, a historic battlefield, wildlife, archeological remains, and even a downtown area."¹²

The New York State Supreme Court, Suffolk County upheld the Long Island Pine Barrens Act ("Act") against a takings challenge by highlighting the public trust doctrine. The decision was handed down on April 22, 1998, Earth Day. Briefly stated, the Act is a comprehensive planning law that established in a 100,000 acre area of Long Island a 50,000 acre protected preserve surrounded by a 50,000 acre managed growth area. Justice William L. Underwood's decision includes an analysis of the common law and he concludes that, "Contrary to popular misconception, the Common Law did speak on the subject of environmental regulation."¹³

Each of these cases, and others just like them, point to the inescapable conclusion that management of our natural resources is the administrative responsibility of government (the sovereign) and that government cannot turn that responsibility over to someone else. In recent years, in the twenty-four states that permit ballot initiatives, the animal rights movement has ignored management of our natural resources on the premise of science and law and bought their way to the ballot with measures seeking to establish their political agenda by changing how natural resources are administered. As a consequence of this activity there are now a number of states where public trust doctrine lawsuits seek to overturn these politically motivated initiatives.¹⁴

Wildlife management has historically been, and continues to be, a difficult and often contentious arena. Contrary to the political hype of the animal rights movement there are no "magic bullets." To drive wildlife management on the premise of political agenda – on the premise of ballot box biology - when at least fifteen hundred years of history,

science, litigation and experience has demonstrated that government (the sovereign) must make such decisions so that they reflect the balanced needs of society and the resource is simply wrong.

Footnotes:

¹ Historical records for the Saxon and Norman periods in English history supporting the concept that hunting of game and wildlife management responsibilities are components of the public trust doctrine are limited. Significant documentation in support of the public trust doctrine does not make itself clearly evident in English law until 1215 with the signing of the Magna Carta. While interpretations vary, the premise that Saxon and Norman kings "owned" all that they ruled is the basis most commonly cited to justify the premise that hunting of game and wildlife management responsibilities are elements of the historical record associated with the public trust doctrine.

² Slade, David C. Esq. "The Public Trust Doctrine: A Gift From A Roman Emperor," 12211 Roundtree Lane, Bowie, Maryland, 20715, phone: (301) 464-3900. (Note: Some sources attribute the date to 533 A.D.)

³ *Ibid.*

⁴ *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

⁵ *Greer v. Connecticut*, 161 U.S. 519 (1896).

⁶ Lacey Act of 1900 -- 16 USC §§701, 3371-3378 and 18 USC §42.

⁷ *Migratory Bird Treaty Act of 1918*, 39 Stat. 1702, T.S. No. 628; 16 USC §703 and *Missouri v. Holland*, 252 U.S. 416 (1920).

⁸ *Kleppe v. New Mexico*, 426 U.S. 529 (1976) regarding the Wild Free-Roaming Horses and Burros Act. 16 USC §1331.

⁹ *National Audubon Society v. Superior Court*, 33 C3rd 419.

¹⁰ _____, California Public Trust (Excerpt from California's Rivers, A Public Trust Report - Executive Summary, prepared for the California State Lands Commission in 1993, page vi.).

¹¹ Bray, Paul M., "An Introduction to the Public Trust Doctrine," Government Law Center, Albany Law School, 80 New Scotland Ave., Albany, New York 12208.

¹² *Ibid.*

¹³ *W.J.F Realty Corporation and Reed Rubin v. the State of New York*

¹⁴ Boynton, Stephen S., Washington, DC Counsel, National Trappers Association, "Public Trust Doctrine Legal Cases Challenge Wildlife Ballot Initiatives That Ban Use of Leghold Traps," National Trappers Association, P.O. Box 550, New Martinsville, WV 26155.