Sovereign Ownership and the Public Trust in Wildlife

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Origins of the Public Trust in Wildlife

- Sovereign ownership of wildlife has deep roots in Anglo-American law
  - *Case of the Swans* (K.B. 1592)--King owns unmarked swans (as well as whales and sturgeons ("royal wildlife")--same with minerals
  - *Royal Fishery of Banne* (K.B. 1611)--King owns royal rivers (tidal) & fish (salmon) and submerged lands
    - First distinguished between tidal and non-tidal re navigability
- American courts would expand the scope navigable waters beyond tidal waters to include waters that were commercially navigable, *e.g., Carson v. Blazer* (Pa. 1810) (public rights in navigable waters to access shad fisheries include waters that are non-tidal but navigable)
- *Most of the early American public trust doctrine cases involved access to wildlife: e.g., Arnold v. Mundy* (N.J. 1821)--oysters in navigable waters subject to public harvests; adjacent landowners cannot monopolize the resource by excluding the public
- *Martin v. Waddell* (1842)--more oysters; U.S. S.Ct. adopts *Arnold*'s approach

The Public Trust Doctrine in Washington

- Washington Supreme Court traced the origins of the PTD in the state to the Justinian Code and Magna Carta. *Caminiti v. Boyle,* 732 P.2d 989, 994 (Wash. 1987)
- Washington recognizes that trust property can involve both public (*jus publicum*) and private rights (*jus privatum*). *Id.*
  - Public rights are to navigate and fish in navigable waters
  - Navigation rights include incidental rights to fish, boat, swim, water ski “and other related recreational purposes” and extend to waters expanded by a dam. *Wilbour v. Gallagher*, 462 P.2d 232, 239 (Wash. 1969)

More Washington case law

- *Orion Corp. v. State* (1987), Wash. S.Ct., sustaining the state's Shoreland Management Act regulations, referred to the public trust doctrine as imposing something like "a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent's wildlife"
  - Public trust doctrine "has always existed in Washington" (even prior to statutes)
  - *I.e.*, public trust limits a private landowner's development rights (*i.e.,* the *jus privatum* estate is subject to restraints imposed by the *jus publicum* estate)
  - Private landowners cannot "substantially impair" public rights to navigate and fish, boat, swim, and other recreational activities
- *Esplanade Properties v. Seattle* (9th Cir. 2002)--upheld a denial of a development permit in Elliot Bay on tidelands and rejected a takings claim because the public trust is a "background principle" inhering in land titles under the Supreme Court's *Lucas* decision
  - Public trust doctrine has not been superseded by statutes; exists independent of statutes, but it doesn't extend to groundwater. *Rettowski v. Dept of Ecology,* 858 P.2d 232, 235 (Wash. 1993) (administrative orders prohibiting groundwater pumping amounted to an "extrajudicial adjudication of water rights without statutory authority to determine water rights priorities").

The Public Trust in Wildlife: *Geer v. Connecticut* (U.S. S.Ct. 1896)

- Confirmed the state ownership of wildlife doctrine
  - States invoked sovereign ownership of wildlife as a response to the capture rule, giving ownership to the first harvester, recognized in the landmark case of *Pierson v. Post* (N.Y. 1805) (wildlife, *ferae naturae*, are owned by those who "mortally wound")
  - In the post-Civil War era, increased gun technology enabled the overharvesting by "market hunters" who wiped out wildlife populations (passenger pigeon exterminated)
  - Market hunters travelled across state lines to sell harvests (innovation of cold storage)
    - *e.g.*, 90% of game sold in Boston markets in the 1890s was from out-of-state
  - States, as successors of the English king, may regulate harvests; the so-called "republicanization of the royal prerogative"
- Connecticut law prohibited possessing harvested game with intent to transport out-of-state as a means of curbing wildlife overharvesting
  - Edward Geer charged with unlawful possession of birds for transport

Geer (cont'd)

- S.Ct. upheld the state law against a federal Commerce Clause attack
- States are sovereign owners of wildlife with trust responsibilities
- But 80-some years later the S.Ct., in *Hughes v. Oklahoma* (1979), ruled that states may not use their sovereign ownership to interfere with interstate commerce by discriminating against out-of-staters
    - the Court did acknowledge the need for state measures protecting and conserving wildlife
- Today, 48 states, including Washington, today claim state sovereign ownership of wildlife; Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife,* 2013 Utah L. Rev. 1437, 1488-1504

What does sovereign ownership of wildlife mean?

- Cases first centered on public access to fisheries, mostly oyster fisheries vs. landowner claims of exclusion; public harvesters prevailed
  - *Arnold v. Mundy* (oysters); *Martin v. Waddell* (oysters, due to state-owned submerged lands)
- Early state regulation upheld by S.Ct.
  - *Smith v. Maryland* (1855); state's limiting of harvesting methods for oysters upheld
  - *McCready v. Virginia* (1876); state can forbid out-of-staters from planting oysters
  - *Manchester v. Massachusetts* (1891); state can regulate fin-fish harvests (menhaden)
  - *Geer v. Connecticut* (1896)--state, as representative of the public, must regulate common property "for the benefit of the people," not "for the benefit of private individuals"
    - state can prohibit taking wildlife across state lines, later reversed by *Hughes v. Oklahoma* (1979), but *Hughes* didn't overturn state sovereign ownership of wildlife
- Federal conservation regulations can preempt contrary state law
  - *Missouri v. Holland* (1920)--upheld federal regulation of migratory birds under the federal Treaty Clause power over a state claim of exclusive sovereign powers
    - Justice Holmes: wildlife conservation is "a national interest of very nearly the first magnitude"
  - *Hunt v. U.S* (1928)--upholding federal wildlife regulation on federal public lands
  - *Kleppe v. New Mexico* (1976)--federal gov't may protect wild horses despite state sovereign ownership

Mt. States Legal Foundation v. Hodel (10th Cir. 1986)

- “It is well settled that wild animals are not part of private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised ‘as a trust for the benefit of the people” (citing *Geer*)
- Sovereign ownership is in trust for the public and is inalienable (inabrogable)

Washington's Sovereign Ownership of Wildlife

- State recognizes sovereign ownership of wildlife: "title to game belongs to the state in its sovereign capacity, and the state holds this title in trust for the use and benefit of the people of the state." *Graves v. Dunlap,* 152 P. 532, 533 (Wash. 1915).
- "Wildlife, fish, and shellfish are the property of the state. The commission director and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters. The department shall conserve the wildlife and and food fish, game fish, and shellfish resources in a manner that does not impair the resources." Wash. Rev. Code s. 77.04.012.
- In plain language, the statute recognizes wildlife as public property requiring the state to 1) protect and manage for the long-term benefit of the people and 2) avoid substantial impairment of trust resources
    - These clear directives impose non-discretionary duties on the state
    - If the state fails to carry out its duties; can the public enforce?
    - Does statutory language is codifying public trust principles?
    - State AGs uniformly oppose (loss of prosecutorial discretion)

Linking sovereign title to trust obligations

- *Citizens for Responsible Wildlife Mgmt. v. State,* 103 P.3d 203, 205 (Wash. Ct. App. 2004) ("Title to animals *ferae naturae* belongs to the state in its sovereign capacity and the state holds this title in trust for the people's use and benefit . . .")
  - Case does not establish that the public trust doctrine doesn't apply to wildlife
  - Court expressly avoided deciding the issue, holding that there was no trust violation because the initiatives prohibiting various hunting and trapping practice did not violate the state's public trust duties to manage wildlife because the state didn't relinquish control over the public's interest in the state's natural resources
- Under *Caminiti v. Boyle,* 732 P.2d 789, 994 (Wash. 1987), state must retain control over the *jus publicum* of trust resources unless promoting trust purposes or avoid substantial impairment of them
- What happens if the state relinquishes control through inaction substantially impairing trust resources?

Wash. State Geoduck Harvest Assoc. v. Wash. DNR
101 P.3d 891 (Wash. Ct. App. 2004)

- Upheld state regulation of geoduck harvesting on public lands
  - State auctioned geoduck harvesting on tidelands
- Doesn’t interfere with public’s right to fish
  - Public trust doctrine applies to comm’l harvesting of geoducks on public tidelands
  - State has a continuing obligation under the doctrine to manage harvests for the public interest
  - State didn’t give up control over the *jus publicum*
    - conveyed no title via auction
    - may require terms and conditions to protect the public interest
    - has right to revoke or suspend harvest rights
  - Therefore, satisfied the *Caminiti* requirements (slide 10)

Some relevant case law

- *Causey v. Brickey*, 144 P. 938 (Wash. 1914); sovereign ownership enables state to establish game reserves prohibiting a gun club from hunting, even while allowing hunting elsewhere, so long as the law treats similarly situated equally
  - State ownership principle in Game Code = merely reflective of common law and inherent in the state's police powers
  - Seems to authorize the state to act even absent statutory authority
- *Dept of Fisheries v. Gillette*, 621 P.2d 764 (Wash. Ct. App. 1980); landowner repaired a riverbank on a navigable water by reconstructing the bank w/ a tractor in the stream without a permit; ct. said the state has not only the authority but a "fiduciary obligation of any trustee to seek damages for injury to the object of the trust," even w/o a statute
  - State has a proprietary duty to seek damages to its property, which it holds as "trustee for the common good"

States' Rights to Regulate vs. Obligations to Protect Wildlife

- State sovereign ownership justifies state regulation, absent a conflict with federal law or unjustified discrimination against out-of-staters
- State duty to seek damages for wildlife losses
  - *Gillette* case (slide 12) suggests the state of Washington has a duty to seek damages to wildlife and habitat regardless of an authorizing statute
  - *In re Steuart Transportation Co.* (E.D. Va. 1980)--state of Virginia and federal government have "the right and duty" to preserve wildlife by seeking damages for losses due to an oil spill
  - Other cases recognizing a state duty to seek damages include *State Dept of Envtl Prot. v. Jersey Central Power & Light* (N.J. App. Div. 1975) (recognizing "an affirmative fiduciary obligation" to seek damages for wildlife losses); *State v. City of Bowling Green* (Ohio 1974) (state "has the obligation to bring suit" to recover damages)

What about state action that is not protective?

- *Center For Biological Diversity v. FPL Group* (Cal. App. 2008)--county (under state authority) issued 46 permits for wind turbines at Altamont Pass killing tens of thousand of birds, due to inefficient and obsolete turbines; when 20-yr permits came up for renewable, CBD objected and filed suit vs. 9 operators
- Ct. of Appeal affirmed a lower court dismissal of the case because CBD sued the wrong parties--should have sued the county and the state--the wildlife trustees
- But court concluded that the state's duty to protect wildlife was an imperative, and citizens had a right to enforce the wildlife trust against the trustee
- Court recognized that state sovereign ownership created a trust enforceable by the public
- States' failure to take effective action is widespread according to Martin Nie, Nyssa Landres & Michelle Bryan, *The Public Trust in Wildlife: Closing the Implementation Gap in 13 Western States,* 50 Envtl. L. Rep. 10909 (2020) (empirical study of western states over 2 decades found "a significant gap" between the legal assertions western states make about the public trust in wild and the actual decisions of state agencies)

Some Lessons for State Wildlife Trustees

- State's public trust doctrine extends to wildlife because state sovereign ownership imposes a trust obligation on the state (and local) trustees
- State must control trust property; can't relinquish unless serving trust purposes or avoiding substantial impairment
- Trust obligation includes a duty to seek damages for wildlife losses in Washington
- Trust empowers the state to take action to protect trust property, even without express statutory authority
- State public trust duty for wildlife implies public enforcement
    - Will be opposed by all state AGs, who see only authorities--not obligations--in the wildlife trust
    - Scant evidence of judicial recognition of these one-sided interpretations of the widely claimed sovereign ownership of wildlife thus far