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# The Public Trust and *Parens Patriae* Doctrines: Protecting Wildlife in Uncertain Political Times

by

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# THE PUBLIC TRUST AND *PARENS PATRIAE* DOCTRINES: PROTECTING WILDLIFE IN UNCERTAIN POLITICAL TIMES

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## I. INTRODUCTION

Wildlife occupies a unique place on the American landscape and in the American mind. It is both protected as a cherished treasure and exploited like many other resources. From almost any perspective, personal feeling and public debate over wildlife policy are grounded in a fundamental belief: Wildlife is a public resource. Even our literature and our art embody this belief.[1] Nonetheless, wildlife populations have steadily declined for decades. Some species have gone quietly to extinction, while others remain only in fragile populations.[2] The steady erosion and elimination of wildlife populations have occurred without public recompense, financial or otherwise, despite widespread acknowledgement of wildlife as a public resource.

Air, water, and wildlife are all resources of the commons, yet each presents distinct challenges in both legal construct and practical management. Unlike air and water, wildlife is bound to the land, and each species has special habitat needs. This attachment to the land has caused wildlife law to develop its own unique character.[3] As we look towards an ever

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1. *See, e.g.*, RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (1982) (tracing how wilderness and wildlife in America have been perceived since the colonial period, and the role they have played in the development of American arts and culture).

2. *See generally* ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS (Tim W. Clark et al. eds., 1994).

3. Starting as early as the Roman Empire and extending through western history, landowners enjoyed the exclusive authority to reduce wildlife on their lands to possession and thus to acquire ownership of the wildlife. This authority presumably was associated with the bundle of rights inherent in land ownership. *See* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 10 (1983). Under modern state laws, property owners' right to hunt wildlife on their lands is subject to state regulation, although special privileges may be afforded them. *See, e.g.*, Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988); Clajon Prod. Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994).

larger and more demanding human population, towards continued urbanization and destruction of habitat, it is well worth examining this legal relationship with wildlife.[4] Understanding this relationship is even more critical in an era of increased efforts to weaken the nation's major environmental laws, including the Endangered Species Act of 1973.[5] Environmental laws are threatened, in part, by growing assertions that private property rights take precedence over public resource concerns.[6] To listen to some politicians and some property owners, any infringement by the public's wildlife on private property rights is an uncompensated taking that violates the Fifth Amendment of the Constitution.[7] Completely lost in this rhetoric is any recognition that wildlife also has value, or that any private gain realized through its destruction is offset by a public loss.

State authority to regulate and conserve wildlife is well established.[8] This article argues that states have not only the authority to regulate and conserve wildlife, but also an affirmative duty to do so. Under the public trust doctrine, the state serves as trustee of its wildlife resource. As trustee, the state must protect the corpus of its wildlife trust by preventing its unreasonable exploitation and by seeking compensation for unavoidable losses. This duty stems from the special relationship created by the state's ownership of its wildlife in its sovereign capacity, and the public's expectation that the state holds this common resource for the benefit of the people.

The public trust doctrine extends beyond the state's ordinary police

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4. Wildlife regulation is an interplay between state and federal authority. *See generally* BEAN, *supra* note 3, at 17-36. In general, states have exclusive authority to regulate and conserve wildlife within their borders, so long as no issues of federal regulatory preemption or federal questions are presented. Hughes v. Oklahoma, 441 U.S. 322 (1979). Federal preemption may occur under certain statutes enacted by the federal government for wildlife protection and conservation. For instance, federal statutes have been enacted to protect threatened and endangered species, Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993), to regulate the trade of animal parts in interstate and international commerce, Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378 (1988 & Supp. V 1993), and to protect certain species of animals under the federal treaty power, Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (1988 & Supp. V 1993). Further, federal questions may be presented when state wildlife regulations interfere with federal powers under certain constitutional provisions. *Hughes*, 441 U.S. 322 (Commerce Clause); Kleppe v. New Mexico, 426 U.S. 529 (1975) (Property Clause); Missouri v. Holland, 252 U.S. 416 (1920) (the treaty power). *See generally* BEAN, *supra* note 3, at 20-34.

5. 16 U.S.C. §§ 1531-1544.

6. *See, e.g.*, "Contract with America," H.R. 9, 104th Cong., 1st Sess. (1995).

7. *Takings: Compensation to Landowners Can Make Sense*, DALLAS MORNING NEWS, March 22, 1995, at 24a. For an explanation of why courts historically have denied compensation for direct property injury caused by wildlife, see Stephen Tan, Comment, *The Watchtower Casts no Shadow: Nonliability of Federal and State Governments for Property Damage Inflicted by Wildlife*, 61 U. COLO. L. REV. 427 (1990). Additionally, private property owners are restricted from modifying land that provides habitat for endangered species. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995) (holding that habitat modification constitutes a violation of the Endangered Species Act's "take" provision).

8. *Hughes*, 441 U.S. at 334-36; *see generally* BEAN, *supra* note 3, at 12-47.

power and requires the state to take affirmative action to protect its wildlife base. By affording judicial review of state actions affecting the wildlife resource, the public trust doctrine offers a means by which a court can place a "check" on legislative grants of public lands and other government conduct affecting wildlife.[9] Moreover, under the public trust doctrine and the associated doctrine of *parens patriae*, the state may bring suit to recover for injury to wildlife. Legislation need not be in place for states to take action to protect their wildlife.[10]

Section II of this article reviews the public trust doctrine and explains how the state's sovereign ownership of its wildlife resource imposes public trust duties. It then examines the nature and extent of these duties, and illustrates their application in the context of state authorization of domestic sheep grazing in bighorn sheep habitat. Section III considers the related doctrine of *parens patriae*, which enables states to fulfill their public trust duties by providing them legal standing to bring suit to protect their wildlife resource. Lastly, Section IV argues for the continuing need for the judicial mechanisms provided by these doctrines, despite similar state duties stemming from sources outside of the common law.

## II. THE PUBLIC TRUST DOCTRINE

Under the public trust doctrine, the state holds natural resources in trust for the benefit of the people.[11] The state may not destroy or relinquish its control over public resources except under certain, very narrow circumstances.[12] The state's ownership of the resource as sovereign is the source of the state's public trust rights and obligations, and affords the state special authorities while imposing on it certain duties.[13]

This article focuses on the application of the public trust doctrine to wildlife. Although most public trust cases involve water and water-related resources, public trust principles apply equally well to wildlife. The few cases that do address the application of these principles to wildlife support this argument.[14] Because this article focuses on the modern application of the public trust doctrine, it does not provide an exhaustive review of the doctrine's historical origins.[15] The core of the doctrine has remained un-

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9. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 495 (1970) [hereinafter Sax, *Public Trust Doctrine*].

10. *See infra* notes 216-17 and accompanying text.

11. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 637-41 (1986); *see also* Sax, *Public Trust Doctrine*, *supra* note 9, at 484-89.

12. *See* Sax, *Public Trust Doctrine*, *supra* note 9, at 489-91.

13. Lazarus, *supra* note 11, at 637-38.

14. *See* Geer v. Connecticut, 161 U.S. 519, 529 (1896); *infra* notes 55, 63 and accompanying text.

15. The notion of sovereign ownership of natural resources began under Roman law, which

changed since its inception: Natural resources such as wildlife are common to all citizens, and the state, in its sovereign capacity, is expected to govern these common resources for the public benefit.[16]

### A. *The Application of the Public Trust Doctrine to Water Resources*

The modern public trust doctrine was first introduced into the United States courts in the context of water-related resources.[17] Specifically, courts considered state authority with respect to the lands under the navigable waterways that traditionally belonged to the states in their sovereign capacity. The United States Supreme Court's seminal decision in *Illinois Central Railroad v. Illinois*[18] set forth the central tenet of the public trust doctrine: Under principles of sovereign ownership, the state holds natural resources in trust for the people and must protect that trust.[19]

The *Illinois Central* Court considered the competency of the Illinois Legislature to enact a statute conveying huge portions of the bed of Lake Michigan to the Illinois Central Railroad.[20] The Court held that because the state holds submerged lands in trust for the people, it cannot alienate those lands without some clear benefit to the trust.[21] The Court concluded, accordingly, that the state could revoke the conveyance.[22]

In reaching this decision; the *Illinois Central* Court considered extensively the nature of sovereign ownership of waterways. It traced the history of their ownership from English common law through colonization to statehood.[23] The Court noted that title to lands under tidal waters had been vested in the king as a public trust under the common law of England.[24] After the Revolution, the states became sovereign, and "in that character hold the absolute right to all their navigable waters . . . for their own common use, subject only to the rights since surrendered by the constitution to the general government."[25] Based on this sovereign owner-

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provided that natural resources, including running water, air, wildlife, and the ocean and its shores, had no owner and therefore "are naturally everybody's." J. INST. 2.1(1)-2.1(5). For a comprehensive review of the historical origins of the doctrine, see Sax, *Public Trust Doctrine*, *supra* note 9, at 475-91.

16. *See* Gary G. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 728 (1989).

17. Lazarus, *supra* note 11, at 636-40.

18. 146 U.S. 387 (1892).

19. *Illinois Cent.*, 146 U.S. at 452-53. While the decision concerned the bed of a navigable waterway, sovereign ownership survives as the basis for applying the public trust doctrine to other resources. *See* Lazarus, *supra* note 11, at 637-40.

20. 146 U.S. at 452.

21. *Id.* at 452-53.

22. *Id.* at 463-64.

23. *Id.* at 455-58.

24. *Id.* at 458.

25. *Illinois Cent.*, 146 U.S. at 456 (citations omitted).

ship, the Court concluded that the state served as trustee of the property, and held the property for the benefit of the people.[26]

The *Illinois Central* Court held that in light of this trust relationship, the state cannot unilaterally divest its citizens of their common right to the public trust through the conveyance of trust property to private hands.[27] Further, the Court reasoned that the state cannot grant individuals private rights that would prejudice this public trust.[28] The *Illinois Central* Court predicted that, absent judicial overview under the public trust doctrine, "every harbor in the country [would be placed] at the mercy of a majority of the legislature of the State in which the harbor is situated."[29] Fearful that without judicial intervention, such private advantages might result because of insufficiencies in the democratic process, the Court determined that judicial protection of the trust corpus was necessary.[30]

Whereas the *Illinois Central* Court confronted the public trust issue in the context of lands underlying waterways, the core of the public trust doctrine applies more generally to wildlife[31] and other natural resources. Courts apply the public trust doctrine to protect water-related and wildlife-related recreation activities such as boating, rafting, and hunting, as well as wildlife habitat.[32] Further, courts have recognized that the doctrine applies broadly, and that its applications reflect changes in the general public interest as they occur over time.[33] Nevertheless, the applicability of the public trust doctrine to protect wildlife derives directly from the state's sovereign ownership of this resource. Like their ownership of the beds beneath navigable waterways, states own wildlife in their sovereign capacity and thereby have a public trust duty to prevent impairment of this

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26. *Id.* at 455-56.

27. *Id.* at 456.

28. *Id.* at 458.

29. *Id.* at 455.

30. *Id.* This fear of insufficiencies in the democratic process remains the underlying rationale for invoking the public trust doctrine. *See* Sax, *Public Trust Doctrine*, *supra* note 9, at 495 ("[I]t will often be the case that the whole of the public interest has not been adequately considered by the legislative or administrative officials . . . ."); *id.* at 561 (asserting that the role of the courts in applying the public trust doctrine is one of democratization).

31. *See* Meyers, *supra* note 16, at 724-25; *infra* notes 34-61 and accompanying text.

32. *See, e.g.*, *In re* Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) [hereinafter *Mono Lake*]; Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); State *ex rel.* Brown v. Newport Concrete Co., 336 N.E.2d 453, 457 (Ohio Ct. App. 1975).

33. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (acknowledging that the public trust doctrine is not fixed but can be molded and extended to meet changing conditions and public needs), *cert. denied*, 469 U.S. 821 (1984); Sharon M. Kelly, Comment, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 911 n.108 (1989); *see also Mono Lake*, 658 P.2d at 719-20 (expanding the public trust doctrine to reflect changing public perception of the values of the waterways).

common resource.

B. *The Application of the Public Trust Doctrine to Wildlife*

When courts consider whether a state has the authority or the duty to regulate hunting or protect wildlife, they consistently trace the source of the state's authority to its sovereign ownership of the wildlife resource.[34] While alternative sources, such as the police power, may provide the necessary authority,[35] courts primarily invoke sovereign ownership theory.[36] By relying upon the state's sovereign ownership interest as the basis for the state's authority to manage wildlife, these courts essentially have adopted the public trust doctrine.

In *Geer v. Connecticut*,[37] the United States Supreme Court expressly adopted the theory of state sovereign ownership of wildlife and implicitly adopted the public trust doctrine. The Court considered whether the state, in light of the Commerce Clause, had the authority to regulate the killing of game within its borders by forbidding its transportation outside of the state.[38] It held that the state did have the requisite authority, and that the Commerce Clause did not limit such state regulation of game.[39] In reaching its holding, the *Geer* Court considered the nature of the state's interest in wildlife. Much like the *Illinois Central* Court, the *Geer* Court relied on the history of the state's sovereign responsibilities over its natural resources for the benefit of the people.[40]

The *Geer* Court considered principles of English common law and Roman law.[41] Under Roman law, wild animals had no owner and therefore belonged "in common to all citizens of the state."[42] Under English common law, wild animals similarly were under common ownership,[43]

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34. State v. Fertterer, 841 P.2d 467, 470-71 (Mont. 1992); State v. Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974); Hanley v. State, 126 N.E.2d 879, 882 (Ohio 1955); Schakel v. State, 513 P.2d 412, 414 (Wyo. 1973).

35. As Professor Lazarus argues and courts have noted in passing, the rubric of the state's police power encompasses regulation of wildlife. Lazarus, *supra* note 11, at 665-68; *infra* notes 186-91 and accompanying text.

36. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 334 (1979) (indirectly referencing the police power).

37. 161 U.S. 519 (1896).

38. *Geer*, 161 U.S. at 522.

39. *Id.* at 534.

40. *Compare Geer*, 161 U.S. at 522-30, and *Illinois Cent.*, 146 U.S. at 455-58 (each tracing sovereign ownership of the resource from its origins in English common law through the Revolution, and ultimately to each state by way of the equal footing doctrine).

41. 161 U.S. at 522-28.

42. *Id.* at 522.

43. *Id.* at 526.

with the king, as sovereign owner, maintaining ultimate authority.[44] This principle of governmental control of wildlife was carried over into American society upon colonization and ultimately through the Revolution.[45] The *Geer* Court reasoned that the state must exercise this power over wildlife "as a trust for the benefit for 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,"[46] in much the same way it must exercise its power over the beds underlying navigable waterways, which the state likewise owns in its sovereign capacity.[47] Essentially mirroring the *Illinois Central* ruling,[48] the *Geer* Court thus enunciated the central tenet of the public trust doctrine and applied it to the state's duties associated with sovereign ownership of wildlife.[49]

The *Geer* holding remained law for nearly a century, until the U.S. Supreme Court reconsidered *Geer*'s constitutional interpretation in *Hughes v. Oklahoma*.[50] The *Hughes* Court concluded that an Oklahoma statute prohibiting the interstate shipment of wild fish captured in the state violated the Commerce Clause.[51] While overruling *Geer* as to the constitutionality of state prohibitions against interstate wildlife shipping,[52] *Hughes* preserved the sovereign ownership analysis set forth in *Geer*.[53] With respect to the continuing applicability of the sovereign ownership theory, the *Hughes* Court explained, "The whole ownership theory, in fact, is . . . but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an impor-

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44. *Id.* at 527.

45. *Id.* at 528-30.

46. *Id.* at 529.

47. *Illinois Cent.*, 146 U.S. at 452-53.

48. *See id.* at 455, 457-458. The *Illinois Central* Court concluded that the lands were "held by the state, by virtue of its sovereignty, in trust for the public," *id.* at 455, "for the use of the people at large," *id.* at 457, and that the state may not prejudice the public interest. *Id.* at 458.

49. Neither the *Geer* Court nor the *Illinois Central* Court used the term "public trust." Rather, each outlined the role of the state as trustee of the public resources by virtue of its sovereignty, and acknowledged a public trust responsibility.

50. 441 U.S. 322 (1979).

51. *Hughes*, 441 U.S. at 338.

52. The *Hughes* Court stated, "We now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore expressly overrule *Geer*." *Id.* at 335.

53. *Id.* at 335-36, 338-39. "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership." *Id.* at 335-36. The *Hughes* Court's primary concern with the ownership theory was the *Geer* Court's conclusion that since the state represented the citizens, who owned in common all the wild animals in the state, the state could "control not only the *taking* of game but also the *ownership* of game that had been lawfully reduced to possession." *Id.* at 327.

tant resource."[54] After the *Hughes* decision, state authority to regulate wildlife under the "fiction" of sovereign ownership remains intact.[55] The *Hughes* holding applies only when state regulation of wildlife conflicts with powers delegated by the Constitution to the federal government.[56]

Since *Hughes*, several courts have applied sovereign ownership theory, and the public trust duties it implies, to wildlife issues.[57] Some courts have applied the public trust concept directly.[58] Others have not described the state's interest in wildlife by using the term "public trust," but have essentially adopted the concept by ruling that the state holds its wildlife in its sovereign capacity for the use and benefit of the people.[59] Implicitly, these courts recognize that because of the state's role as trustee and the potential for abuse of the legislative process, there may be a need for a judicial oversight of government actions which affect these resouces.[60] The state must act on behalf of all citizens to protect these resources under the public trust doctrine.[61]

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54. *Id.* at 334 (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1948)).

55. *See, e.g.*, Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 851 (D. Wyo. 1994) (concluding that, after *Hughes*, the state's role in governing and conserving wildlife remains unchanged); *Fertterer*, 841 P.2d at 470 ("There is no federal constitutional issue or other federal question presented in the present case. As a result, the holding in *Hughes* is not controlling here."). In *In re Steuart Transp. Co.*, the Court stated:

> The authority in support of th[e] position . . . [that the State of Virginia does not "own" the migratory waterfowl in question] . . . is clear and voluminous. . . . However, many of the cases refuting a state's claim to ownership of resources turned upon principles of federalism and pre-emption by federal legislation of state control measures. Neither of these principles is applicable to the current issue before this court.

495 F. Supp. 39-40 (E.D. Va. 1980) (citations ommited).

56. *See Hughes*, 441 U.S. at 335-36.

57. *See, e.g.*, *Fertterer*, 841 P.2d at 470; O'Brien v. Wyoming, 711 P.2d 1144, 1148 (Wyo. 1986); *see also* Washington *ex rel.* Lopas v. Shagren, 157 P. 31 (Wash. 1916).

58. *See In re Steuart*, 495 F. Supp. at 38 (ruling that Virginia holds wildlife in trust for the public); State v. Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) (noting that Ohio has consistently recognized the trust doctrine with respect to wildlife); Schakel v. State, 513 P.2d 412 (Mont. 1992) (holding that the state holds wildlife as well as water as trustee).

59. *See, e.g.*, *Fertterer*, 841 P.2d at 470-71 (holding that the state holds wildlife "in its sovereign capacity for the use and benefit of the people generally") (quoting Rosenfeld v. Jakways, 216 P. 776, 777 (Mont. 1923)).

60. *See id.* at 495. The Montana Supreme Court stated:

> While it will seldom be true that a particular governmental act can be termed corrupt, . . . there is a strong, if not demonstrable, implication that [certain] acts in question represent a response to limited and self-interested proponents of public action. . . . The concessions desired by those interests are often of limited visibility to the general public so that public sentiment is not aroused; but the importance of the grants to those who seek them may lead to extraordinarily vigorous and persistent efforts.

*Id. See also supra* notes 28-30 and accompanying text.

61. Resources protected under the public trust doctrine are (1) so important to each citizen that their free availability is essential to free society, (2) "so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace," or (3) so "peculiarly public [in] nature that . . . their adaptation to private use [is] inappropriate." Sax, *Public Trust Doctrine*, *supra* note 9, at

### C. *The Scope and Application of Public Trust Duties*

Enforcement of the public trust concept requires an understanding of the scope of the state's duties regarding the public resource. As sovereign owner of wildlife, the state has a duty to protect the corpus of its wildlife trust from substantial impairment. Yet if the state fails to fulfill this duty, individuals may seek relief in the courts.[62] While courts have not yet postulated a precise definition of the state's duty under the public trust doctrine,[63] certain guiding themes have emerged. This section develops specific guidelines for the state's duty to protect wildlife by reviewing public trust case law.

#### 1. *Duties Imposed by the Public Trust Doctrine*

The common law public trust doctrine guides judicial review of state conduct. When courts apply the public trust doctrine, they generally view state conduct towards the trust resource with skepticism.[64]

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.[65]

This skepticism, stemming from the U.S. Supreme Court decision in *Illinois Central*,[66] suggests that the role of the public trust doctrine is to protect the public interest from "insufficiencies of the democratic process."[67] Under the public trust doctrine, the courts place checks on the other branches of government.[68] When the legislature or an administrative agency fails to fully consider the public interest in making a decision that

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484-85.

62. *See generally* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 158-174 (1970) [hereinafter SAX, CITIZEN ACTION] (the public trust doctrine creates a public right to enforce resource protection); Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 155 (1980) [hereinafter Sax, *Historical Shackles*] (the idea of the public trust is to protect the public's expectations).

63. In fact, few courts have considered the scope of the state's duty to protect wildlife under the public trust doctrine. *See* Owsichek v. State, 763 P.2d 488, 496 (Alaska 1988) (finding that the public trust duty prohibits the state from awarding any monopolistic grants or special privileges); Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 225 A.2d 130, 137 (N.J. 1966) (indicating that preservation of wildlife is a public purpose that merits consideration).

64. *See* Sax, *Public Trust Doctrine*, *supra* note 9, at 490.

65. *Id.*

66. 146 U.S. at 455. *See also supra* notes 28-30 and accompanying text.

67. Sax, *Public Trust Doctrine*, *supra* note 9, at 521.

68. *Id.* at 495-96.

affects a trust resource, or engages in "dubious governmental conduct,"[69] the public trust doctrine provides a mechanism by which the courts may intervene to protect the resource.[70]

The state, as trustee, must prevent substantial impairment of the wildlife resource so as to preserve it for the beneficiaries—current and future generations.[71] Under the public trust doctrine, the state must: (1) consider the potential adverse impacts of any proposed activity over which it has administrative authority;[72] (2) allow only activities that do not substantially impair the state's wildlife resources;[73] (3) continually monitor the impacts of an approved activity on the wildlife to ensure preservation of the corpus of the trust;[74] and (4) bring suit under the *parens patriae* doctrine to enjoin harmful activities and/or to recover for damages to wildlife.[75]

The *Illinois Central* decision provides some guidance regarding the nature of the state's public trust duty. The *Illinois Central* Court held that the state has a duty to prevent substantial impairment of the resource.[76] States may not permit private activities that will prejudice the public's sovereign interest without a compelling government public purpose.[77] To fulfill this obligation, the government necessarily must consider the adverse impacts of a proposed action on trust resources to determine whether these activities would cause "substantial impairment" of the trust resource.[78]

After *Illinois Central*, few courts considered the nature of the state's duty as trustee until the early 1980s. In 1983, the California Supreme Court considered the public trust doctrine in the context of water appropriation rights in *National Audubon Society v. Superior Court of Alpine County*[79] (*Mono Lake*). In *Mono Lake*, conservation groups sought an injunction to prevent the diversion of water from nonnavigable streams in the Mono Lake watershed based on the theory that the waters were pro-

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69. *Id.* at 491. General applications of the public trust doctrine include instances in which the government favors narrow, private uses over broad, public ones. *Id.*

70. *Id.*

71. *See Illinois Cent.*, 146 U.S. at 455-56.

72. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983).

73. *See* Harry R. Bader, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 756-57 (1992).

74. *Id.*

75. Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc., 271 Cal. Rptr. 596, 606 (Cal. Ct. App. 1990); State v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975). For a discussion of the doctrine of *parens patriae* and its relation to the public trust doctrine, see *infra* notes 113-73 and accompanying text.

76. *See* 146 U.S. at 455-46 (state has a duty not to take action that will harm the public interest).

77. *Id.*

78. *See id.*

79. 658 P.2d 709 (Cal. 1983).

tected by the public trust.[80] The court required the state agency to consider public trust values in approving the water project[81] and further required the agency to act to preserve the public trust interests.[82]

The *Mono Lake* court considered the purpose of the trust, the scope of the trust, and the powers and duties of the state as trustee of the public trust.[83] Values at issue in *Mono Lake* included the aesthetic enjoyment of rivers and lakes and the preservation of the indigenous flora and fauna and their habitat.[84] With respect to the purposes and scope of the public trust, the court determined that these values fell under the protection afforded by the public trust doctrine.[85]

In defining the powers and duties of the state as trustee, the *Mono Lake* court considered the relationship between the public trust doctrine and California water law. Predictably, the parties took opposing positions regarding which competing legal system should prevail.[86] The court refused to apply one system over the other. It noted that both legal frameworks have developed independently and "embody important precepts."[87] In an effort to accommodate both systems, the court concluded, "The state 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 feasible."[88]

The court observed that a state's failure to consider public trust values before making planning decisions may result in the "needless destruction of those values."[89] It therefore required state agencies not only to consider public trust values, but also to take measures to preserve these interests.[90] Further, the court noted that once the state approves an appropriation of water rights, it has a duty to continue supervising the use of

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80. *Mono Lake*, 658 P.2d at 712.

81. *Id.* at 728. This obligation to consider the impacts of proposed activities stands independent of the state's obligations under the various state environmental policy acts (SEPAs). The public trust obligation goes further than the obligations under the SEPAs because it not only requires the state to undertake certain procedural steps, but also to make the substantive decision to prohibit activities that will substantially impair the trust resource. *See infra* notes 210-15 and accompanying text.

82. *Mono Lake*, 658 P.2d at 728.

83. *Id.* at 718-24.

84. *Id.* at 715.

85. *Id.* at 719. The court also considered whether the public trust doctrine governs nonnavigable tributaries of navigable waterways, and concluded that the public trust doctrine necessarily "protects navigable waters from harm caused by diversion of nonnavigable tributaries." *Id.* at 721 (citations omitted).

86. *Id.* at 727.

87. *Id.*

88. *Mono Lake*, 658 P.2d at 728.

89. *Id.* at 712.

90. *Id.*

this water.[91] In sum, the *Mono Lake* decision stands for the proposition that state agencies should undertake advance consideration of public trust values, act to preserve those values, and continually supervise conduct that affects those values. Although few wildlife cases have fleshed out the public trust duty, courts should set forth similar duties in the wildlife context.[92]

As typified by *Mono Lake*, courts have applied the public trust doctrine to restrict state actions that may harm the trust resource.[93] Courts have restricted these actions to varying degrees. Some courts have followed the *Mono Lake* approach of requiring the sovereign to consider any potentially adverse impacts associated with a proposed action and to allow the action to proceed only if the impacts are minimal or necessary.[94] Other courts have advocated more of a balancing approach.[95] In the context of lawsuits challenging administrative agency actions, some courts have held that the agency may take action that impairs the public trust resource only if the legislature has authorized such action expressly.[96]

Moreover, in state-initiated lawsuits for damages, courts have found that the state has not only the ability, but also the obligation to bring suit when its resources are imperiled.[97] This duty stems from the expectation that the state will act to protect the rights of the public in the corpus of the natural resource trust.[98] Several courts have reiterated this duty, emphasizing that "[t]he State has not only the right but also the affirmative fiduciary obligation to . . . seek compensation for any diminution in that trust corpus."[99] As early as 1977, Michael Bean noted this common law trend toward recognizing an affirmative duty on the part of the states to

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91. *Id.* at 728.

92. *See e.g.*, *Texas E. Transmission Corp.*, 225 A.2d at 137-38 (indicating that preservation of wildlife is a public purpose that merits consideration).

93. Lazarus, *supra* note 11, at 650-56.

94. *See id.* at 650-52.

95. *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (indicating that a balancing test is an appropriate method to determine issues such as appropriateness of hazardous waste disposal facility); Morse v. Oregon Div. of State Lands, 590 P.2d 709, 713 (Or. 1979) (concluding that the extent of public need for filling estuarine land must be balanced against interference with water-related uses); Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1974) (balancing development with resource management under public trust concept).

96. Lazarus, *supra* note 11, at 654-55.

97. *See In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980); State v. S.S. Bournemouth, 307 F. Supp. 922, 929 (C.D. Cal. 1969); State v. Jersey Cent. Power, 308 A.2d 671, 674 (N.J. Super. Ct. Law Div. 1973); State v. Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974).

98. *See, e.g.*, Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc., 271 Cal. Rptr. 596, 606 (Cal. Ct. App. 1990).

99. *Id.* at 606 (quoting State v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337, 344 (N.J. 1976)).

bring suit to protect the public trust.[100]

Hence, while the public trust doctrine does not necessarily require "pure" preservation, it does insist on maintaining the diversity and stability of the resident biotic community.[101] It places restrictions on conduct that may adversely affect the stability of the resource by providing a mechanism by which the judiciary can safeguard public expectations regarding the protection of common resources.

2. *Illustration of the Duty to Protect Wildlife*

The public trust doctrine imposes certain duties on the state in its role as trustee of wildlife. Regardless of whether an activity occurs on public or private land, the state must not permit the activity to significantly diminish the wildlife resource. While these duties are well-founded in case law, their applicability in the wildlife context has yet to be thoroughly defined by the courts. This section considers the state's duty to protect wildlife in the context of allowing grazing on public lands.

Recently, several Montana-based conservation groups challenged the state's decision to allow domestic sheep grazing in bighorn sheep habitat because domestic sheep transmit disease to bighorn sheep.[102] These groups challenged the legality of the state's decision, in part, on the grounds that the public trust doctrine required the state to protect wildlife when making permitting decisions. This case (the Montana Sheep case) is now on appeal to the Montana Supreme Court.[103]

The facts of the Montana Sheep case are straightforward. Under state permit, cattle have grazed the Sula State Forest for years. In 1972, with the assent of local landowners, the Montana Department of Fish, Wildlife and Parks transplanted bighorns from the Sun River Game Preserve to the Sula Forest. Since then, a bighorn population has established itself across the forest and on adjacent national forest lands. Today, the Sula herd is one of the most visible bighorn sheep populations in the northern Rockies and provides both recreational viewing and hunting opportunities.[104]

In 1991, the Department of State Lands (DSL) approved the transfer of the Sula grazing permits to George R. Madden, who had purchased adjacent private lands. After securing the permit, Mr. Madden began graz-

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100. BEAN, *supra* note 3, at 34-45.

101. *See* Bader, *supra* note 73, at 756-57.

102. Ravalli County Fish and Game Ass'n, Inc. v. Montana Dep't of State Lands, No. CV-93-148 (Mont. 21st Dist. August 10, 1994) (opinion and order), *appeal filed* January 6, 1995.

103. *See id.* The district court did not consider the application of the public trust doctrine but granted defendants' summary judgment case on all other grounds.

104. Brief for Plaintiffs/Appellants at 5, Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands, No. 94-564 (Mont. 1995).

ing domestic sheep instead of cattle. The shift from cattle to sheep is significant in light of the high incidence of disease transmission from domestic and wild sheep;[105] in fact, such disease transmission contributed substantially to the original extirpation of bighorns across much of the West.[106]

After several conservation groups threatened litigation, DSL prepared an environmental assessment (EA) to evaluate the impacts of domestic sheep grazing. DSL adopted the EA on December 30, 1992. The EA allowed Mr. Madden to continue grazing his domestic sheep in proximity to the bighorns. Accordingly, several groups filed suit in May 1993. On August 10, 1994, the district court granted the defendants summary judgment on all counts.[107] Plaintiffs appealed the district court's ruling on several grounds. Amicus National Wildlife Federation and the plaintiffs argued that the court erred by failing to consider and apply the public trust doctrine.

As explained above, the public trust doctrine imposes a duty on the state to protect its wildlife from substantial impairment or degradation. In the Montana Sheep case, amicus argued that DSL, acting as an agent of the state, failed to assess the impacts of domestic grazing on wildlife values and failed to ensure preservation of these values.[108] DSL approved domestic grazing without making a determination of the impacts. In addition to violating the statutory provisions of the Montana Environmental Policy Act (MEPA),[109] the state's failure to make an impact determination contravenes its public trust responsibilities.[110] Like MEPA, the public trust doctrine requires the state to evaluate the impacts of a proposed action; the public trust doctrine additionally imposes the substantive requirement that the state not approve an action that will impair trust resource values.[111] Thus, the full scope of the state's duty to wildlife encompasses not only procedural compliance with MEPA, but also substantive adherence to the trust obligations.

If DSL had adequately evaluated the impacts of domestic sheep graz-

105. Montana Dep't of State Lands, Sula State Forest Grazing Licenses Revised EA (Dec. 1992) [hereinafter Revised EA]; *see also* Deposition of John Firebaugh, Regional Director for Montana Dep't of Fish, Wildlife, and Parks, March 1994 (filed with Mont. 21st Dist. Court) [hereinafter Firebaugh Deposition] (on file with author).

106. Revised EA, *supra* note 105, at 5; Deposition of Firebaugh, *supra* note 105, at 8-9.

107. *Ravalli County Fish and Game Ass'n*, No. CV-93-148, slip op. at 18.

108. *Id.* at 15.

109. Montana Environmental Policy Act (MEPA), MONT. CODE ANN. §§ 75-1-101 to 324 (1971). MEPA, like its federal counterpart, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1988 & Supp. V 1993), requires state agencies to evaluate the impacts of major actions prior to approving these actions. MONT. CODE ANN. § 75-1-201.

110. *See Mono Lake*, 658 P.2d at 712.

111. *See Illinois Cent.*, 146 U.S. at 455; *supra* notes 71-75 and accompanying text.

ing in Sula bighorn habitat, it may not have allowed sheep grazing considering the overwhelming evidence that contact between domestic sheep and bighorns seriously endangers the health and welfare of the wild bighorns. Domestic sheep grazing in bighorn habitat jeopardizes the bighorn population's stability.[112] Accordingly, amicus urged the court to conclude that the state inappropriately approved activities that would have significant impacts on the wildlife resource. Such serious endangerment of a wildlife resource is exactly the type of harm the state must prevent under the public trust doctrine.

The Montana Sheep case is an example of how private groups can seek to enforce the state's public trust duties when the state has failed to do so. Often, however, these roles are reversed; that is, private individuals have damaged public trust resources, and the state wishes to protect the trust. In such situations, the judicial system often places states in a curious dilemma: Although a state may be compelled to bring a suit to fulfill its obligation to preserve the trust, it may be unable to do so because courts may find that mere sovereign ownership of wildlife—as opposed to a claim of outright title—is not a sufficient property interest to give the state legal standing to sue. The common law doctrine of *parens patriae* offers a way out of this dilemma.

## III. THE DOCTRINE OF *PARENS PATRIAE*

Like the public trust doctrine, the *parens patriae* doctrine rests on the notion that the state should act to protect common resources because it is the sovereign owner of those resources.[113] Whereas the public trust doctrine recognizes that the democratic process may fail to protect a state's trust resources, the doctrine of *parens patriae* recognizes that the judiciary may fail to provide for entities incapable of representing themselves, or for the general welfare of the people.[114] This judicial failure stems from the likelihood that these entities lack the capacity to bring suit themselves; without this common law doctrine, the state may be denied standing pursuant to Article III of the Constitution.[115] As *parens patriae*, the state has standing to seek injunctive relief or resource damages[116] based on either

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112. Revised EA, *supra* note 105, at 7-11.

113. *See, e.g.*, Maine v. M/V Tamano, 357 F. Supp. 1097, 1099-1100 (S.D. Me. 1973).

114. *See* Susan Diane Larsen, Note, *The Right of a State to Sue as* Parens Patriae, 19 WAKE FOREST L. REV. 471, 477 (1983).

115. U.S. CONST. art. III. *See also* Comment, *State Protection of its Economy and Environment:* Parens Patriae *Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411, 412 (1970).

116. *See id.*; *M/V Tamano*, 357 F. Supp. at 1101; Sax, *Public Trust Doctrine*, *supra* note 9, at 507-514. Note, however, that at least two courts have held that a state lacks standing to recover damages. State v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972); Commonwealth v. Agway, Inc., 232 A.2d 69 (Pa. Super. Ct. 1967); *see also infra* note 152 and accompanying text.

the state's role as guardian of the entity,[117] or the state's quasi-sovereign interest in the general welfare of its residents.[118]

### A. *Establishing Standing to Bring Suit*

The doctrine of standing places a limitation on cases that may come before courts.[119] Generally, standing requires that (1) a plaintiff have a sufficient direct interest in the outcome of the action to render the controversy justiciable, (2) the defendant caused the alleged injury, and (3) the alleged injury is redressable by the court.[120] When a state's direct, proprietary interest in its property has been injured, and the state's injury may be relieved by monetary or declaratory relief, that state generally will have standing.[121] A state's outright ownership of a resource would thereby constitute a sufficiently direct interest to provide standing to recover from injury to the resource.[122]

But states do not hold title to their wildlife; rather, they own wildlife as sovereign.[123] Courts have generally found sovereign ownership to be an insufficient proprietary interest for purposes of standing.[124] Nonethe-

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117. *See* George B. Curtis, *The Checkered Career of* Parens Patriae: *The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 895-97 (1976).

118. *Id.* at 907-08.

119. *See* Larsen, *supra* note 114, at 471; Martha Colhoun & Timothy S. Hamill, Comment, *Environmental Standing in the Ninth Circuit: Wading through the Quagmire*, 15 PUB. LAND. L. REV. 249, 251-52 (1994).

120. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

121. *See* Colhoun & Hamill, *supra* note 119, at 253 ("Traditionally, a plaintiff had to allege injury to an economic interest or a property right to establish standing.").

122. *See, e.g.*, Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 447-49 (1945); *M/V Tamano*, 357 F. Supp. at 1101.

123. An owner claiming title to wild animals must have possession of them, and can claim them as property; in contrast, the state, as sovereign owner, does not have possession, and arguably claims only the "power to preserve and regulate the exploitation of an important resource." Douglas v. Seacoast Prod., Inc., 431 U.S. 265, 284 (1977); *see also* Hughes v. Oklahoma, 441 U.S. 322, 334 (1979); Geer v. Connecticut, 161 U.S. 519, 539-540 (1896) (Field, J., dissenting); *but see* 30 PA. CONS. STAT. ANN. § 2506 (1980) (specifically vesting the state with a proprietary interest in fish "sufficient to give it standing . . . to recover damages in a civil action against any person who kills any fish or who injures any streams . . . by pollution or littering").

124. In *Commonwealth v. Agway, Inc.*, for example, the Pennsylvania court considered whether the state's property interest in *ferae naturae* supported a suit in trespass for damages. 232 A.2d 69 (Pa. 1967). Wild fish in the creek waters of the state had been killed by pollution resulting from the defendant's operations. Pennsylvania brought suit to recover damages based on its "property interest either as sovereign or proprietor in all wild game and fish in the Commonwealth." *Id.* at 70. It supported this interest with cases upholding the state's authority to regulate wild game for its preservation and protection. *Id.* The Pennsylvania court held that the state's power to regulate wild fish and game resulted from its

> sovereignty over the land and the people[, b]ut it is not the owner of the fish as it is of its lands and buildings so as to support a civil action for damages resulting from the destruction of those fish which have not been reduced to possession.

*Id.* at 71. The state's property interest did not give it sufficient standing to sue.

less, courts have consistently held that sovereign ownership does represent another type of interest—a quasi-sovereign interest—that is sufficient to give states standing under the doctrine of *parens patriae.*[125]

The *parens patriae* doctrine, like the public trust doctrine, developed at English common law.[126] The notion of *parens patriae*, or "parent of the country,"[127] originated as the king's ability to exercise power in certain instances.[128] Under the king's prerogative, the king was "the guardian of his people," and could exercise authority to take care of people who were legally unable to take care of themselves or their property.[129] Under this theory, people protected by the king basically fell into three classes: infants, "idiots," and "lunatics."[130] With respect to children, the Crown's *parens patriae* role was as the "supreme guardian and superintendent,"[131] and derived from a "trust" relationship.[132]

At American common law, the doctrine of *parens patriae* applies more broadly, allowing the state to bring suit whenever it can show a

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Similarly, in *Stuart v. Dickinson Cheese Co., Inc.*, the court concluded that the state's power to protect fish and game is an attribute inherent in sovereign power, but that as sovereign the state does not have "such property interest in the fish while they are in a wild state" to support a civil action for damages. 200 N.W.2d 59, 61 (N.D. 1972). As in *Agway*, the *Dickinson Cheese* court merely considered the sufficiency of the state's property interest in its wildlife deriving from its sovereignty, not whether the quasi-sovereign interest in the general welfare was sufficient. *Id.*

However, in *Selma Pressure Treating v. Osmose Wood Preserving, Inc.*, the California Court of Appeals concluded that a state's usufructuary interest in water was a sufficient property interest for standing under a statute to seek damages associated with hazardous waste disposal. 271 Cal. Rptr. 596, 605-06 (Cal. Ct. App. 1990). The court distinguished between a state acting in its representative capacity to protect the public interest, and a state having a property interest that has been injured. *Id.* at 603. The court based its conclusion that the state's property interest in its waters was sufficient to support the state's standing to sue on the state's usufructuary ownership interest in water. *Id.* at 605-06. The state was not acting in its representative capacity. *See id.*

125. *See, e.g.*, *M/V Tamano*, 357 F. Supp. at 1100-01; *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980); *In re* The Exxon Valdez, No. A89-095, (D. Alaska Jan. 19, 1993).

126. Curtis, *supra* note 117, at 896-97.

127. *Id.* at 896 (quoting BLACK'S LAW DICTIONARY 1003 (5th ed. 1979)).

128. *Id.* Blackstone defines the king's prerogative as:

> that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. . . . [The prerogative] can only be applied to those rights and capacities which the king enjoys alone . . . and not to those which he enjoys in common with any of his subjects.

1 WILLIAM BLACKSTONE, COMMENTARIES *239.

129. Curtis, *supra* note 117, at 896 (quoting J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN 155 (1820)). This entitlement to exercise authority was also considered a duty of the Crown in return for the allegiance paid to his Majesty by his subjects. *Id.*

130. *Id.*

131. *Id.* at 897 (quoting Eyre v. The Countess of Shaftsbury, 2 P. Wms. 102, 24 Eng. Rep. 659 (Ch. 1722)). *Parens patriae* suits have been exercised by states to prevent injury to those who could not protect themselves, such as juveniles. Larsen, *supra* note 114, at 473 n.30. While this approach has not been recognized by courts in considering states' standing to sue for damages to wildlife, it may be a valid approach in that wildlife, like juveniles, cannot protect itself.

132. *See* Curtis, *supra* note 117, at 897.

direct interest in the damaged resource independent of the individual interests of its citizens.[133] In other words, the state must act on its own behalf, rather than merely seek recovery for the benefit of particular individuals who are the real parties in interest.[134] Importantly, a state's direct interests include not only proprietary interests, but also the general quasi-sovereign interests it exercises on behalf of its citizens as a whole.[135] Quasi-sovereign interests include a state's general economic well-being,[136] its environment,[137] and the health, comfort, and welfare of its populace.[138] When any of these interests is imperiled, the state may bring suit to recover damages or enjoin the threatening activity.[139] Although protection of wildlife arguably falls under the state's quasi-sovereign interest in protecting the enivronment,[140] several courts applying the *parens patriae* doctrine in the wildlife context have looked instead to sovereign ownership theory, and ultimately the public trust doctrine, to find a sufficient quasi-sovereign interest to protect public trust resources.[141]

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133. *Id.* at 907.

134. *M/V Tamano*, 357 F. Supp. at 1100 (citations omitted); *In re Steuart*, 495 F. Supp. at 40. When public interest groups seek to sue on behalf of their members and the public interest, it may become difficult to determine whether the state's interest is distinct from that of the public interest group. If both represent the same interest, they may not bring separate suits because of the doctrine of *res judicata*. *See* Larsen, *supra* note 114, at 479. For an interesting discussion of this potential issue, see Miles Tolbert, Comment, *The Public as Plaintiff: Public Nuisance and Federal Citizen Suits in the Exxon Valdez Litigation*, 14 HARV. ENTL. L. REV. 511 (1990).

135. *See M/V Tamano*, 357 F. Supp. at 1099-1100 (citing Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1979)); *id.* at 1102. The U.S. Supreme Court enunciated the general rule for states bringing suit under the doctrine of *parens patriae* based on their quasi-sovereign interests in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945). While that case involved a state's claim for damages to its economic welfare from defendants' acts in restraint of trade, the distinctions the court makes between a state's proprietary interests and its quasi-sovereign interests lay the framework for *parens patriae* suits to protect a state's natural resources. *See, e.g.*, Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Haw. 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972). In *Pennsylvania R.R.*, the Court noted that:

> [T]he interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests which . . . are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'

324 U.S. at 447-48 (citations omitted). Georgia asserted standing based on its proprietary interest as owner of the railroad and on its quasi-sovereign interest as representative of the state's general economic welfare. *Id.* at 443.

136. *Pennsylvania R.R.*, 324 U.S. at 450-51.

137. *Standard Oil*, 301 F. Supp. at 982.

138. Comment, *supra* note 115, at 412.

139. *See id.* at 412-13 (citations omitted).

140. *See* Larsen, *supra* note 114, at 477 (asserting that an independent sovereign interest is not hard to identify in disputes over the environment); *In re The Exxon Valdez*, No. A89-095, slip op. at 13-14.

141. *See, e.g.*, *Selma Pressure Treating*, 271 Cal. Rptr. 596. In *Selma Pressure Treating*, the court bolstered its conclusion that a state's usufructuary interest in water was a sufficient proprietary interest to impart standing by noting authority under the public trust doctrine. *Id.* at 605-06. The court concluded that "[t]he state's public trust interest in the navigable portions of the American River is

For instance, in *Maine v. M/V Tamano*,[142] the court reasoned that a state's sovereign ownership of its waters and marine life constitutes a sufficiently direct interest to maintain a damages claim.[143] The court did not uphold standing based on the state's quasi-sovereign interest in the environment, but rather based on the state's sovereign ownership of its marine life.[144] Similarly, in *Maryland v. Amerada Hess Co.*,[145] the court relied on sovereign ownership and public trust theories to find that the state had standing to bring suit as *parens patriae*.[146] In *Amerada Hess*, the state sought to recover damages caused by an oil spill in the Baltimore Harbor. The power to bring suit, the court reasoned, is associated with the state's "fictional" ownership of those waters.[147] The "fictional" or "technical" ownership creates the state's role as trustee of its waters.[148] In this trustee role, the state has the power to bring suit to protect the corpus of this trust for its beneficiaries.[149] Thus, state ownership of its waters, even though merely fictional, sufficiently supports standing to sue.

As demonstrated, courts have consistently concluded that states have standing to sue under the doctrine of *parens patriae* on the basis of their sovereign ownership of their resources, for sovereign ownership satisfies the quasi-sovereign interest requirement. Historically, there was a distinction in rights based on whether standing was derived from a direct proprietary interest or from the state's quasi-sovereign interest.[150] *Parens patri-*

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similarly sufficient for standing to claim damages caused by environmental pollution," *id.* at 605, and that by that line of reasoning the state's *parens patriae* interest is clear (noting a line of cases granting the state the right to seek money damages based on its *parens patriae* interest in its air, land, and waters). *Id.* at 605-06.

142. 357 F. Supp. 1097 (S.D. Me. 1973).

143. *M/V Tamano*, 357 F. Supp. at 1099-1100.

144. *See id.*

145. 350 F. Supp. 1060 (D. Md. 1972).

146. *Amerada Hess*, 350 F. Supp. at 1066-67.

147. *Id.* at 1067. The court uses the term "technical ownership," and quotes *Toomer v. Witsell*, 334 U.S. 385, 408 (1948), to support the proposition that this type of ownership grants states the authority to exercise "for the common good . . . all the authority that technical ownership ordinarily confers." *Id.* The *Toomer* reasoning with regard to ownership was also used to support the Supreme Court ruling that such ownership is "fictional." Hughes v. Oklahoma, 441 U.S. 322, 334 (1979); *see also supra* notes 54-56 and accompanying text.

148. "It is just this 'technical' ownership that the State of Maryland has in its waters that gives it the legal right to bring suit on behalf of the public in order to serve the 'common good' of its citizens." *Amerada Hess*, 350 F. Supp. at 1067.

149. *Id.* Interestingly, in assessing ownership of waters of the Baltimore Harbor for purposes of bringing suit to protect the corpus of the state's trust, the court reasoned that the waters were owned by the state as sovereign in a similar capacity to the state ownership of wildlife outlined in *Geer*, and that the state therefore had the authority to bring suit as trustee of the waters of the harbor. *Id.* at 1066.

150. *See* Larsen, *supra* note 114, at 473-74.

*ae* suits on behalf of the state's quasi-sovereign interests invoked only equitable relief, such as declaratory judgments and injunctions.[151] Thus, where states lacked a direct proprietary interest, they could not collect damages.[152] As explained above, the state's sovereign ownership of its wildlife is not a proprietary form of ownership.[153] Thus, suits seeking damages on the basis of this ownership failed.

The courts in *Commonwealth v. Agway*[154] and *State v. Dickinson Cheese*,[155] for example, held that the state did not have standing to obtain damages for harm caused to fish.[156] In the *Agway* and *Dickinson Cheese* cases, the courts based their decisions on the nature of the state's relationship to the fish resource. Both courts reasoned that although the state has the authority to regulate the taking of fish, it does not have an ownership interest in wild fish sufficient to support a claim for damages.[157] Importantly, neither court addressed the claims in terms of the *parens patriae* doctrine.[158] Rather, they looked solely to the state's proprietary interest. Moreover, these cases have not been followed by a significant number of courts and have been distinguished in at least one instance.[159]

These isolated cases, which disallow a state's claims for natural resources damages, nevertheless have led some commentators to urge states to enact statutes codifying the state's right to recover natural resource damages.[160] Although codification of this right may prove useful, the common law doctrine of *parens patriae* continues to apply in a substantial number of states.[161] Even in states that have codified natural resource

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151. *Id.* at 480.

152. *Id.*; *see, e.g.*, *Standard Oil*, 405 U.S. at 262-65. *But see* Larsen, *supra* note 114, at 481 (describing a prior, contrary holding in *Pennsylvania R.R.*, and concluding, "The Court's failure to reconcile these conflicting decisions leaves unanswered the question of whether a state can actually recover damages for economic injury in its *parens patriae* capacity.").

153. *See supra* notes 123-25, 135-41 and accompanying text.

154. 232 A.2d 69 (Pa. 1967).

155. 200 N.W.2d 59 (N.D. 1972).

156. These cases did not address the question of the availability of injunctive relief.

157. *See Agway*, 232 A.2d at 70-71 (reasoning that the state as sovereign has the power to regulate fish and game, but because the state is not their owner it cannot bring an action for damages); *accord Dickinson Cheese*, 200 N.W.2d at 61.

158. In *Agway*, the state brought its claim under trespass theory. 232 A.2d at 69. Although the *Dickinson Cheese* court did not expressly indicate the legal basis upon which the state brought its claim, it did consider whether an antipollution statute provides a right to maintain a damages suit. 200 N.W.2d at 61.

159. State v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) (rejecting *Agway* and noting that the *Dickinson Cheese* court had based its decision, at least in part, on the interpretation of a statute), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976).

160. Faith Halter & Joel T. Thomas, *Recovery of Damages by States for Fish and Wildlife Losses Caused by Pollution*, 10 ECOLOGY L.Q. 5, 13 (1982); *see also supra* note 123.

161. *Id.*

damages, the *parens patriae* doctrine may complement the state legislation unless the statute preempts common law.[162]

### B. *Fulfilling Public Trust Obligations as* Parens Patriae

The *parens patriae* doctrine essentially provides a mechanism for the state to fulfill its public trust obligations. Indeed, the two doctrines are inextricably linked.[163] In *State v. Jersey Central Power & Light Co.*,[164] the court recognized this link when it combined the doctrines and ruled that the state had the right and the fiduciary duty to collect damages for destruction of wildlife, a part of the corpus of the public trust.[165]

In *Jersey Central*, an unscheduled shutdown at Jersey Central Power's atomic power plant resulted in a sudden drop in water temperature, which led to the death of 500,000 fish.[166] The New Jersey Department of Environmental Protection brought an enforcement action under state statutory and common law theories.[167] Jersey Central moved to dismiss the state's common law count that sought damages for injury to wildlife as *parens patriae*. Jersey Central argued that *parens patriae* provides standing for injunctive relief only.[168]

The court rejected Jersey Central's attempt to limit *parens patriae* to injunctive relief. It reasoned that the state, as trustee, must have the ability to seek reimbursement for the corpus of the trust when it suffers a diminution of value.[169] On appeal, the appellate division upheld the trial court's reasoning that:

> The State has not only the right but also the affirmative *fiduciary obligation* to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.[170]

Other courts have similarly concluded that a state has a fiduciary obligation to seek damages. For example, the courts in *In re Steuart Transporta-*

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162. *See infra* notes 216-18 and accompanying text.

163. *In re* Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980); State v. Jersey Cent. Power & Light Co., 308 A.2d 671, 674 (N.J.L. Div. 1973), *aff'd*, 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975), *rev'd*, 351 A.2d 337 (N.J. 1976); State v. Bowling Green, 313 N.E.2d 409 (Ohio 1974).

164. 308 A.2d 671.

165. *Jersey Cent.*, 308 A.2d at 674.

166. *Id.* at 672.

167. *Id.*

168. *Id.* at 673.

169. *Id.* at 673-74.

170. 336 A.2d 750, 759 (N.J. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337, 344 (N.J. 1976) (emphasis added).

*tion Co.*[171] and *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.*[172] explain the state's fiduciary obligation in virtually the same terms as the *Jersey Central* court.[173]

The *Jersey Central* court's conclusion that the state may recover damages raises the difficult issue of determining an appropriate measure of damages. Many scholars have noted the difficulty in placing a value on our natural resources.[174] Nonetheless, such valuation is critical for ensuring environmental protection. Both courts and legislatures have made efforts to develop mechanisms for valuing environmental harm.[175] The court, in *Jersey Central*, refused to "speculate" as to the monetary value of the environmental damage and awarded the state the market value of the dead fish.[176] Other courts have used the restoration value rather than market value as the appropriate measure of damages.[177]

Legislatures have also addressed the issue of how to assess natural resource damages. For instance, Congress included natural resource damage provisions in the Comprehensive Environmental Response Compensation, and Liability Act[178] ("CERCLA") and the Oil Pollution Act of 1990[179] ("OPA"). CERCLA and OPA regulations further provide a mechanism for developing natural resource damage assessments.[180] OPA provides that damages include the cost of restoration, rehabilitation, or replacement, together with the diminution in value of the resources.[181] CERCLA provides a similar scheme.[182] In assessing the appropriate amount of natural resource damages in cases brought under the *parens patriae* doctrine, courts can look to this existing statutory and regulatory framework for guidance.

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171. 495 F. Supp. at 40.

172. 271 Cal. Rptr. at 606.

173. *See also* State v. Gillette, 621 P.2d 764 (Wash. Ct. App. 1980).

174. *See, e.g.*, Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269 (1989).

175. *Id.* at 272.

176. *Jersey Cent.*, 308 A.2d at 674.

177. *See, e.g.*, Puerto Rico v. The SS Zoe Colocotroni, 456 F. Supp. 1327, 1344-45 (D.P.R. 1978) (awarding Puerto Rico the costs of restoring the affected areas to the condition before the casualty), *aff'd in part and vacated in part*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

178. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

179. 33 U.S.C. §§ 2701-2761 (1988 & Supp. V 1993).

180. Cross, *supra* note 174, at 275.

181. 33 U.S.C. § 2706(d)(1).

182. 42 U.S.C. § 9607(f).

## IV. THE NEED TO INVOKE THE PUBLIC TRUST DOCTRINE TO PROTECT WILDLIFE

The common law doctrines of the public trust and *parens patriae* establish states' duty to protect their wildlife resources and provide a means by which states may assert lawsuits on behalf of these resources. The public trust doctrine is founded upon the notion of sovereign ownership of natural resources. *Parens patriae* is based upon the notion of the sovereign's duty to protect entities whose interests otherwise might not be satisfactorily represented in the courts. Although the case law that invokes these doctrines for the protection of wildlife and other natural resources establishes their precedential value, these doctrines work their way into law review articles with much greater frequency than into court decisions.

A primary reason that these doctrines do not enter the litigation arena more frequently may be the availability of alternative sources of law for natural resource protection, especially in the years following the *Mono Lake* decision. The state's police power, state constitutions, and state and federal legislation all help to enforce the state's obligation to protect wildlife. Some critics of the public trust doctrine contend that the doctrine should no longer be recognized by the courts because these other sources of state obligation somehow render it unnecessary.[183] These critics contend that the sovereign ownership theory should be abandoned, and the public trust duties should be enforced by way of these alternative sources.[184]

Although these alternative sources may represent efforts to acknowledge and implement the state's trust duties, they do not render the public trust doctrine obsolete. In fact, recent threats to state and federal legislative protections may trigger a greater need to harness this elusive doctrine to protect the wildlife resource. Public trust doctrine critics overlook the basis for the doctrine's judicial origins. The public trust doctrine protects natural resources, and therefore the public, from the failure of legislatures, state agencies, and administrative personnel to recognize the state's duty to protect the corpus of the wildlife trust for future generations.[185] Other common law doctrines and statutory enactments cannot replace the vital role of the public trust doctrine. Courts cannot ignore the substantial common law that has developed the public trust and *parens patriae* doctrines. Alternative sources of authority do not provide the necessary judicial check on the legislative and administrative branches provided by the pub-

183. *See, e.g.*, Lazarus, *supra* note 11, at 631-33, 658, 691-716.

184. *See id.* at 656-58.

185. *See Illinois Cent.*, 146 U.S. at 455; Lazarus, *supra* note 11, at 656-57; Sax, *Public Trust Doctrine*, *supra* note 9, at 489, 521.

lic trust doctrine, nor do these sources provide the requisite standing for states to fulfill their public trust duties.

For instance, the police power[186] indisputably provides states with the requisite authority to regulate wildlife. Courts consistently uphold wildlife regulatory authority under police power theory.[187] In fact, the state's police power was noted as a source for state wildlife regulatory authority in the landmark *Geer v. Connecticut*[188] decision, and was preserved by the Court in *Hughes v. Oklahoma*.[189] Since *Geer* and *Hughes*, numerous U.S. Supreme Court[190] and state court[191] decisions have ac-

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186. The police power, while elusive of exact definition, generally connotes the government's power to regulate for the health, safety, and welfare of its people. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 n.6 (1964); *see also* Berman v. Parker, 348 U.S. 26, 32 (1954). In an early Massachusetts case, Chief Justice Shaw defined the police power as:

> the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

George W. Wickersham, *The Police Power, A Product of the Rule of Reason*, 27 HARV. L. REV. 297, 304 (1914) (citing Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851)); *see also Berman*, 348 U.S. at 32-33; ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3 (1904). The police power embodies the state's sovereign power to govern, and is exercised by the states subject only to constitutional limitations. *Id.* The objective of the police power is to secure and promote the public welfare, and it is accomplished by way of restraint and compulsion. *Id.*

187. *See, e.g.*, State v. Jack, 539 P.2d 726 (Mont. 1975). "Montana recognizes both the doctrine of sovereign ownership and the police power theory." *Id.* at 728. Further, the court explained:

> [A] state has the power to preserve and regulate its wildlife. In the nineteenth century, it was commonly held that this power derived from the common law concept of "sovereign ownership.". . . Under more modern theory, the power has been held to lie within the purview of a state's police power.

*Id.*; *see also* O'Brien v. State, 711 P.2d 1144, 1148-49 (Wyo. 1986) ("[T]he wildlife within the borders of a state are owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership and in the exercise of its police power, the state may regulate the taking and use thereof.").

188. 161 U.S. 519 (1896). The *Geer* Court observed that "it is within the police power of the State . . . to make such laws as will best preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations." *Id.* at 533 (citations omitted). It should also be noted that the authority to enact game laws under the police power may be traced back to the English common law. *See* FREUND, *supra* note 186, at 2 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *162-75).

189. 441 U.S. 322 (1979). The *Hughes* Court considered "the States' interests in conservation and protection of wild animals [to be] legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Id.* at 337. The *Hughes* court thus implicitly upheld state authority to regulate wildlife under its police power.

190. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 386 (1978); Kleppe v. New Mexico, 426 U.S. 529, 545 (1975); Missouri v. Holland, 526 U.S. 416, 434 (1920); *see also* New York *ex rel.* Silz v. Hesterberg, 211 U.S. 31, 40, 43-44 (1908) (holding constitutional a state law prohibiting possession of game during the closed season).

191. The Montana Supreme Court has noted that "[a]side from any question of common ownership, the state may exercise these rights [of granting or withholding the right to hunt and imposing conditions on that right] in virtue of its police power." Rosenfeld v. Jakways, 216 P. 776, 777 (Mont.

knowledged police power authority to regulate wildlife.

Nevertheless, case law does not definitively use the police power as the basis for the state's affirmative duty to take action to protect this resource.[192] Despite clear police power authority, courts that have considered state authority to regulate wildlife have relied primarily upon sovereign ownership theory to endorse the states' actions.[193] Courts have promulgated sovereign ownership theory for a reason: The duties associated with sovereign ownership of wildlife extend beyond the authority to protect the health, safety and welfare of the people. They mandate that the state take action to protect its wildlife resource.

Another important distinction between the functions of the police power and the public trust doctrine lies in the role of the judiciary. Whereas the role of the judiciary in reviewing a state's exercise of its police power is very narrow,[194] the judiciary plays a greater role in evaluating state actions under the public trust doctrine.[195] Courts will uphold a state's exercise of its police power so long as it is reasonably related to a legitimate government purpose.[196] Under the public trust doctrine, courts scrutinize the state's action under a more discerning standard.[197] If a

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1923). Years later, the Montana court noted:

> There is no question that a state has the power to preserve and regulate its wildlife. In the nineteenth century, it was commonly held that this power derived from the common law concept of "sovereign ownership." . . . Under more modern theory, the power has been held to lie within the purview of a state's police powers.

*Jack*, 539 P.2d at 728 (holding unconstitutional a statute requiring nonresident hunters to be accompanied by resident guides for violation of equal protection).

The Wyoming Supreme Court similarly has assessed state regulatory authority over game and fish laws under the police power. Schakel v. State, 513 P.2d 412, 414 (Wyo. 1973). So has the Washington Supreme Court. State *ex rel.* Lopas v. Shagren, 157 P. 31, 33 (Wash. 1916) (holding that the state can protect game birds, animals and fish within state borders under the police power); State v. Towessnute, 154 P. 805, 808 (Wash. 1916) (police power extends to conservation of fish).

192. There is an implied (and sometimes express) duty of the state to protect the health, safety and welfare of its citizens. See Wickersham, *supra* note 186, at 305:

> [I]t is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends . . . .

*Id.* (quoting Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837)). Nevertheless, courts typically rely on sovereign ownership theory to support the notion of a state's duty to protect its wildlife, as separate from its authority to do so.

193. *See, e.g., Hughes*, 441 U.S. 322, 334; Toomer v. Witsell, 334 U.S. 385, 402 (1948); *supra* notes 33, 50-56 and accompanying text.

194. *Berman*, 348 U.S. at 32.

195. *See* Sax, *Public Trust Doctrine*, *supra* note 9, at 478.

196. *See Berman*, 348 U.S. at 32 ("The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.") The breadth of the scope of the police power has alarmed some commentators, *see generally* Wickersham, *supra* note 186, and has led others to contend that the public trust doctrine is not necessary to provide state authority to legislate to conserve wildlife and other natural resources. *See* Lazarus, *supra* note 11, at 665-68.

197. Sax, *Public Trust Doctrine*, *supra* note 9, at 478. The standard of review of government

court determines that the wildlife resource will be impaired, it may strike down an action even if it is reasonably related to a legitimate government interest.[198]

Because of these differing standards of review, if a state were to affirmatively enact legislation to protect its wildlife resource, the legislation most likely would be upheld as reasonably related to a legitimate interest.[199] However, if the state were to pass legislation that would further the public welfare at the expense of the wildlife resource, this exercise of the police power likewise might be upheld.[200] Under the police power alone, courts do not enforce a state's affirmative duty to protect its wildlife.[201] In contrast, under the public trust doctrine, states must protect the corpus of their wildlife trust. Thus, a state's police power does not supplant public trust considerations in regulating a state's wildlife and furthering the health, safety, and welfare of its citizens.

In addition to the authority conferred by the police power, many state constitutions acknowledge the state's trustee capacity with respect to its natural resources.[202] While the language of these constitutions varies,[203]

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conduct under the public trust doctrine is "more rigorous than that applicable to governmental activity generally." *Id.*

198. *See* Jeffrey L. Amestoy & Mark J. Di Stefano, *Wildlife Habitat Protection through State-Wide Land Use Regulation*, 14 HARV. ENVTL. L. REV. 45, 46 (1990); *see also* Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc., 636 So. 2d 761 (1994).

199. *See* Walls v. Midland Carbon Co., 254 U.S. 300, 324 (1920) (it is within the police power of the state to legislate for the conservation of the state natural resources).

200. When regulating development, for example, states and localities typically do not consider any encroachment upon habitat or other impacts on wildlife. While development poses one of the greatest threats to wildlife, legislation that allows it has historically been upheld under the police power. *See* Amestoy & Di Stefano, *supra* note 198, at 47.

201. Under the police power, states are required to protect the wildlife resource only as necessary to advance the health, safety, and welfare of their citizens. *See* Wickersham, *supra* note 186, at 305.

202. For instance, the Hawaii Constitution mandates that, "For the benefit of present and future generations, the State . . . shall conserve and protect Hawaii's natural beauty and all natural resources," concluding that "[a]ll public natural resources are held in trust by the State for the benefit of the people." HAW. CONST. art. XI, § 1. It further provides that "[e]ach person has the right to a clean and healthful environment." HAW. CONST. art. XI, § 9.

Similarly, the Montana Constitution provides, "The state and each person *shall* maintain and improve a clean and healthful environment in Montana for present and future generations." MONT. CONST. art IX, § 1(1) (emphasis added). This provision mandates that the state maintain the environment for the future, recognizing that the state holds the environment in trust for the benefit of the people. *See id.*

203. State constitutions typically address the public trust duty by referencing citizens' right to a clean and healthful environment and naming the state as trustee for its resources. For instance, the Pennsylvania Constitution provides that:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the

state courts have interpreted the provisions as constitutionalizing the common law principle and imposing an enforceable public trust duty on the state to protect its natural resources.[204]

Although these constitutional provisions may appear to duplicate the common law public trust doctrine, they do not render it obsolete. First, a majority of states do not have constitutional provisions.[205] Second, courts rely heavily on the common law development of the public trust doctrine to interpret these constitutions.[206] Finally, these constitutional provisions must be self-executing in order to impose an enforceable duty on the state to protect its wildlife resource.[207] Otherwise, legislative enactment pursuant to the constitutional provision is necessary to enforce the trust.[208] Courts and scholars are mixed as to whether the trustee provisions are self-executing.[209]

Lastly, state and federal statutes recognize the government's role as trustee of its natural resources for future generations. For instance, most states[210] have enacted environmental protection acts modeled after the National Environmental Policy Act (NEPA).[211] Many states have statutes providing the state a right to sue to recover for natural resource damag-

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benefit of all the people.

PA. CONST. art. I, § 27. *See also* LA. CONST. art. IX, § 1 ("The natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible."). Another type of constitutional provision is the common use clause, which provides, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." ALASKA CONST. art. VIII, § 3.

204. *See* Owsichek v. State, 763 P.2d 488, 495-96 (Alaska 1988) (interpreting the common use clause to impose on the state "a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people"); American Waste and Pollution Control Co., 642 So. 2d 1258, 1262 (La. 1994) (noting that the constitutional provision "continues the Public Trust Doctrine in environmental matters"); Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1974) (concluding that the framers of the state constitution intended to "constitutionally affix[] a public trust concept to the management of public natural resources of Pennsylvania").

205. Susan D. Bauer, Comment, *The Public Trust Doctrine: A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385, 426-27 n.326 (1988).

206. *See, e.g.*, *Owsichek*, 763 P.2d at 94 (relying on the common law of wildlife to interpret the Alaska constitutional provision).

207. *See generally* Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219 (1994); Kelly, *supra* note 33, at 913-16.

208. *See* Wyatt-Shaw, *supra* note 207, at 222-27.

209. *See id.* at 230-235.

210. *See, e.g.*, MEPA, MONT. CODE ANN. §§ 75-1-101 to 324 (1993).

211. 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993). Under NEPA, Congress declared a national environmental policy requiring the federal government "to use all practicable means . . . to . . . (1) fulfill the responsibilities of each generation as trustee of the environment for future generations." § 4331(b)(1). Most states adopted language similar to the federal language, recognizing as state policy the trustee responsibilities of the state government and of each generation with respect to the environment. *See, e.g.*, MEPA, MONT. CODE ANN. § 75-1-103(2) (using identical trustee language).

es.[212] While legislative enactments of trust duties such as these do impose a duty on the states similar to that of the public trust, they fall short of the public trust duty both in the scope of the duty imparted, and to the extent that they are subject to modification or repeal by subsequent legislatures. As illustrated by the Montana Sheep case, NEPA and its state protegees create a less substantive duty than that mandated by the public trust doctrine.[213] Under the NEPA requirements, the government must consider a range of alternatives before taking any action that will significantly affect the environment.[214] Under the public trust doctrine, the government not only must consider a range of alternatives, but it must adopt the most feasible alternative that will least impair the corpus of the trust.[215]

Further, the duty and authority imparted by legislative action is limited to the parameters embodied in the language of the statutes. Under the public trust doctrine, a state's duty to protect the trust corpus extends beyond the scope of existing legislation.[216] States must bring suit to protect their natural resources under the public trust doctrine regardless of whether legislation provides them a cause of action, so long as any existing statute does not directly preclude common law actions.[217] The scope of the state's power to bring suit under the common law encompasses all matters for which the state has the power to legislate.[218]

The public trust doctrine imposes a duty on the state that extends

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212. Halter & Thomas, *supra* note 160, at 9.

213. *See supra* notes 108-11 and accompanying text (regarding the Montana Sheep case).

214. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978) (stating that the purpose of reviewing a range of alternatives is to insure a fully informed and well-considered decision); Natural Resources Defense Council v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972).

215. *See supra* notes 71-78, 93-96 and accompanying text.

216. *See, e.g.*, Maryland v. Amerada Hess, 350 F. Supp. 1060, 1066-67 (D. Md. 1972). The court appealed to public policy imperatives, noting that to require legislation to be in place would "unnecessarily tie the hands of the State in its war against pollution." *Id.* at 1067. This result would be unacceptable and highly costly to the public. *Id.*

217. The state's power to regulate pursuant to its police power does not preclude the state from seeking relief for injury to its natural resources in a court of law when no statute has been enacted for that purpose. *Amerada Hess*, 350 F. Supp. at 1066-67. The *Amerada Hess* court noted:

> The Court has not been directed to and indeed is unaware of any rule of law which holds that the power of a state to legislate concerning a given matter precludes the state from bringing a common law suit to accomplish the same purpose and to redress the same wrong which a statute might seek to correct.

*Id.* at 1066. *See also* Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc., 271 Cal. Rptr. 596, 606 (Cal. Ct. App. 1990).

218. In *Amerada Hess*, a suit brought by the state for recovery of damages to the waters of the state from an oil spill in the Baltimore Harbor, the court reasoned that if a state has the power to legislate with regard to a certain matter, it follows that the state has the power to bring common law suits in the absence of legislation to achieve the same result. 350 F. Supp. at 1066-67.

beyond any duty imposed under the police power, constitution, or statutes. Together with the doctrine of *parens patriae*, it protects the wildlife resource from exercises of the police power that may bear a reasonable relation to the health, safety, and welfare of the people but that significantly impair the wildlife base, when feasible alternatives are available. The public trust and *parens patriae* doctrines provide clear guidance for the courts to review state actions together with standing for states to sue, even when the extent to which constitutional provisions are self-executing is unclear. They protect the wildlife resource from the whims of any given legislature, mandate more substantive protection of the state's wildlife resources than the procedural dictates of most statutes, and provide the state a cause of action regardless of whether legislation is in place. Thus, these alternative sources of authority, while helpful in buttressing wildlife protection, do not render the public trust doctrine obsolete.

## V. CONCLUSION

In a period when the United States Congress and state legislatures threaten to weaken environmental laws in an effort to protect private property rights, the continued application of the public trust doctrine remains crucial. If wildlife protection set forth by statute or constitution is hampered, the public trust and *parens patriae* doctrines can play an important role to ensure protection. If existing statutory and constitutional protections remain intact, the public trust and *parens patriae* doctrines still provide wildlife protection that differs from and complements constitutional, statutory, and common law theories.

The strength of the public trust and *parens patriae* doctrines lies in the flexibility they afford the judiciary. When called upon to protect common resources under these doctrines, courts can flesh out the public trust duty on a case-by-case basis. In the wildlife context, courts can look to the public trust cases involving water issues for guidance. Based on existing public trust doctrine case law, the state must: (1) consider the potential adverse impacts of any proposed activity over which it has administrative authority; (2) allow only those activities that do not substantially impair the state's wildlife resources; (3) continually monitor the impacts of an approved activity on the wildlife to ensure preservation of the corpus of the trust; and (4) bring suit to enjoin harmful activities and/or to recover for damages to its wildlife under the *parens patriae* doctrine.[219] Courts may adapt this general framework to the cases before them.

The role the judiciary should play in applying the public trust doctrine springs from the core of the public trust doctrine. The state's rela-

219. *See supra* notes 71-75 and accompanying text.

tionships to water and to wildlife both stem from the notion of sovereign ownership of common resources. The citizenry has the expectation that the sovereign will protect the common resources. The judiciary should act to ensure that citizen expectations are met.