THE PUBLIC TRUST IN WILDLIFE: CLOSING THE IMPLEMENTATION GAP IN 13 WESTERN STATES

by Martin Nie, Nyssa Landres, and Michelle Bryan

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SUMMARY

State wildlife agencies commonly claim they are entitled to manage wildlife under the public trust doctrine (PTD). This assertion is frequently made in judicial proceedings, with state requests that their managerial authority be given due force throughout state, private, federal, and even tribal lands. One might conclude that a rich body of PTD practices and policies exists for wildlife; in reality, the PTD in state wildlife management proves to be ephemeral. This Article empirically investigates application of the PTD to wildlife by 13 state fish and wildlife agencies in the American West over nearly two decades. It exposes a significant gap between the legal assertions western states make about the PTD and the actual decisions of state agencies. To fulfill the legal mandate of the PTD, and avoid the specter of arbitrary and capricious decisionmaking, state wildlife agencies must do more. The Article suggests how states can begin to close this implementation gap.

Under the banner of state sovereignty, state wildlife agencies commonly claim they are entitled to manage wildlife as a public trust resource under the public trust doctrine (PTD). This assertion is frequently made in judicial proceedings, with state requests that their managerial authority over wildlife be given due force throughout state, private, federal, and even tribal lands.[1] Based on these broad state assertions, one might be forgiven for concluding that a rich body of PTD practices and policies exists for wildlife. In reality, the PTD in state wildlife management proves to be little more than legal ephemera, leaving few concrete traces on the landscape.

This Article empirically investigates implementation of the PTD as applied to wildlife by 13 state fish and wildlife agencies in the American West over nearly two decades.[2] For these states, we reviewed state agency management and/or decisionmaking documents referencing the public trust (and related principles) using an evaluative rubric (Table 2, below). In only two out of 86 documents is there a discernible application of the PTD or public trust principles that goes beyond merely mentioning those legal concepts. This research exposes a significant gap between the legal assertions western states make about the PTD and the actual decisions of state agencies.

Agencies in any decisionmaking context must make findings under applicable law and support their choices with evidence.[3] This administrative expectation should be all the more exacting when a public trust resource is implicated. To truly fulfill the legal mandate of the PTD, and to avoid the specter of arbitrary and capricious decisionmaking, state wildlife agencies must do more. By drawing comparisons to the application of PTD in state water resources decisions—an area with more developed public trust application—the Article suggests how states can begin to close this implementation gap for wildlife.

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1. The applicability of state authority to manage wildlife on these various lands is a complex question outside the scope of this Article. *But see* Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 Envtl. L. 797 (2017).
2. Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Our review focused on states with searchable databases of agency decisions, and covered the years 2000-2018.
3. *See*, *e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 420, 1 ELR 20110 (1971) (holding that an agency decision must "provide an adequate explanation" and be "based on a consideration of the relevant factors" under the applicable law); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

I. Background

A. State Claims Under the Public Trust

State wildlife agencies commonly assert that they manage wildlife as a "public trust" resource and according to the fiduciary principles of the PTD. The doctrine stems from a state's "sovereign ownership" of natural resources such as wildlife, requiring that such resources be managed for the greater good and the benefit of the public.[4] Of most relevance to our research and subsequent analysis is how state governments, state wildlife agencies, and the Association of Fish and Wildlife Agencies (AFWA) (serving as the "collective voice" of North America's fish and wildlife agencies) invoke the PTD and related case law in judicial proceedings, most often as a way to claim state primacy over fish and wildlife management.

A recent multistate amicus curiae brief in a case before the U.S. Court of Appeals for the Tenth Circuit is indicative of the public trust claims made by western states, speaking to the amici's "sovereign interests in managing a public trust resource for their citizens' benefit."[5] In this case, which focuses on the state of Utah's introduction of non-native mountain goats in a research natural area on National Forest System lands, AFWA bases its argument on the PTD as applied to wildlife, referencing related PTD case law and literature.[6]

When the PTD is referenced as the legal foundation of wildlife management at the state level, it is often couched in the context of the North American Model of Wildlife Conservation, which is a set of broad principles said to guide state wildlife management and widely ascribed to by state wildlife agencies. The PTD serves as the "keystone component" of the model.[7] AFWA claims that "the Public Trust Doctrine and North American Model are the basis for state wildlife law."[8] A primary threat to the model, according to AFWA, is "[p]ublic misunderstanding of or lack of appreciation for the Public Trust Doctrine [and] its application to fish and wildlife management." In another Tenth Circuit case, focused on Mexican wolf recovery, AFWA tells the court that the North American Model "rests on a foundation of state management of wildlife as a resource in the public trust," and that "[r]eservations of state authority and the public trust doctrine must be given due force."[9]

Wildlife management, like nearly every other area of natural resource management, is at bottom an agency-executed endeavor. Thus, whenever a natural resources public trust exists, its "principles must imbue the state agency process."[10] This Article is an exploratory first cut at empirically investigating the implementation of the PTD as applied to wildlife by state fish and wildlife agencies in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. We ask: Is there a discernible relationship between the PTD and the decisions made by state wildlife agencies? If so, how is the public trust in wildlife being considered and implemented at the state level? We are, in essence, trying to determine if states are giving the PTD the "due force" they ask the courts to provide when zealously defending their spheres of authority.

There is an increasing body of scholarship that is constructively applying "public trust thinking" and related principles to wildlife governance in the United States.[11] We return to this literature below because we also believe that a more substantive application of the PTD to wildlife could lead to more ecologically and socially responsible wildlife governance at the state level.[12] Much of this literature focuses on "public trust thinking," conceptualized as a "philosophical orientation," which is certainly accurate.[13] Our more modest contribution to this literature is to bring to the forefront the legal implications of states asserting the PTD as applied to wildlife. These claims are more than philosophical, political, and public relations-oriented; they are also particular legal assertions with managerial implications.

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4. Michael C. Blumm & Mary C. Wood, The Public Trust Doctrine in Environmental and Natural Resources Law 3-9 (2013) ("As a foundational property law principle, this doctrine aims to ensure that government safeguards and makes publicly accessible natural resources which are necessary for public welfare and survival."); Wildlife Society, The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada 10 (2010):
   > [T]he PTD holds that publicly owned wildlife resources are entrusted to the government (as trustee of these resources) to be managed on behalf of the public, the beneficiaries. Consequently, governmental institutions do not own trust resources; rather, they are owned by the public and are entrusted in the care of government to be safeguarded for the public's long-term benefit.
5. Brief of the Association of Fish and Wildlife Agencies as Amicus Curiae in Support of the Plaintiff-Appellee and Affirmation at 11, Utah Native Plant Soc'y v. U.S. Forest Serv., 923 F.3d 860, 49 ELR 20081 (10th Cir. 2019) (No. 17-4074).
6. Proposed Brief of the Association of Fish and Wildlife Agencies as Amicus Curiae in Support of Defendants-Appellees and Affirmation at 7, Utah Native Plant Soc'y v. U.S. Forest Serv., 923 F.3d 860, 49 ELR 20081 (10th Cir. 2019) (No. 17-4074).
7. John F. Organ et al., Wildlife Society & Boone and Crockett Club, The North American Model of Wildlife Conservation: Technical Review 12-04, at 11 (Theodore A. Bookhout ed., 2012).
8. AFWA, Wildlife Management Authority: The State Agencies' Perspective 13 (2014), *available at* https://wyoleg.gov/InterimCommittee/2015/SFR-0929APPENDIXB.pdf.
9. Brief of the Association of Fish and Wildlife Agencies as Amicus Curiae in Support of the Plaintiff-Appellee and Affirmation at 6, 10, Utah Native Plant Soc'y v. U.S. Forest Serv., 923 F.3d 860, 49 ELR 20081 (10th Cir. 2019) (No. 17-4074).
10. Michelle Bryan, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and "Public Interest" Review Cannot Protect the Public Trust in Western Water Law*, 32 Stan. Env't L.J. 283, 284 (2013) (arguing the same in the context of water rights permitting).
11. *See, e.g.*, Jeremy T. Bruskotter et al., *Rescuing Wolves From Politics: Wildlife as a Public Trust Resource*, 333 Science 1828 (2011); Daniel J. Decker et al., *Moving the Paradigm From Stakeholders to Beneficiaries in Wildlife Management*, 83 J. Wildlife Mgmt. 513 (2019); Daniel J. Decker et al., *Stakeholder Engagement in Wildlife Management: Does the Public Trust Doctrine Imply Limits?*, 79 J. Wildlife Mgmt. 174 (2015); Darragh Hare et al., *Applying Public Trust Thinking to Wildlife Governance in the United States: Challenges and Potential Solutions*, 22 Hum. Dimensions Wildlife 506 (2017); Daniel Decker et al., *Governance Principles for Wildlife Conservation in the 21st Century*, 9 Conservation Letters 290 (2016); Darragh Hare & Bernd Blossey, *Principles of Public Trust Thinking*, 19 Hum. Dimensions Wildlife 397 (2014); Adrian Treves et al., *Predators and the Public Trust*, 92 Biological Rev. 248 (2015).
12. Hare et al., *supra* note 11.
13. *Id.*

B. State Duties Under the Public Trust

The PTD has deep, ancient roots, extending to at least sixth-century Rome,[14] and its principles have been described as "an essential attribute of sovereignty across cultures and across millennia."[15] The doctrine's framework draws some parallels to private trusts, whereby one party manages property for the benefit of another with a fiduciary "duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person."[16] At its core, the doctrine requires governmental *trustees* (state legislatures and various forms of wildlife agencies and commissions that act as the *agents* of the legislature) to manage the *corpus*, *res*, or assets of the trust—in this case wildlife—for the benefit of present and future generations, who are the *beneficiaries* of the trust.[17]

Fish and wildlife—and intersecting issues related to public access, submerged lands, and navigable waterways—have long been considered public trust resources. In fact, the earliest American public trust cases, extending back to 1821, protected the public's ability to harvest shellfish in tidal waters and prevented its monopolization by private interests.[18]

These early cases, including *Geer v. Connecticut,* emphasize the common ownership of wildlife and how it shall be managed "as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or the benefit of private individuals as distinguished from the public good."[19] Similarly, 48 states (with the exceptions of Nevada and Utah) claim sovereign ownership of wildlife and use it as a basis to assert their public trust authority.[20]

The PTD goes beyond common ownership to include a number of substantive and procedural duties and obligations (Table 1). Douglas Quirke, distilling the work of Prof. Mary Wood and PTD case law, summarizes several core substantive and procedural duties of trustees, which we return to in the discussion of our findings.[21]

Table 1. Substantive and Procedural Duties of the Public Trust Doctrine

Substantive Duties	Procedural Duties
• To protect trust resources from substantial impairment • To give public purposes priority over private purposes • To prevent waste and restore damaged resources • To guard against privatizing trust resources at the expense of the public	• The utmost loyalty owed to the beneficiaries by the trustee • A legislative responsibility to adequately supervise administrative agencies • Acting in good faith and with reasonable skill • Managing trust resources with reasonable caution • Providing information to beneficiaries and an accurate accounting of trust resources

Though the PTD is rooted in common law, most western states also have specific or implied trust language in their constitutions and/or wildlife statutes, such as the California Code providing that "[t]he fish and wildlife resources are held in trust for the people of the state," and Alaska's constitutional provision related to the common use of wildlife: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[22] The latter was interpreted by the Alaska Supreme Court in *Owsichek v. State Guide Licensing & Control Board* to "impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people."[23] In perhaps the broadest articulation of the PTD, Hawaii's Constitution requires "the State and its political subdivisions [to] conserve and protect Hawaii's natural beauty and all natural resources" for "the benefit of present and future generations," explicitly stating that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[24]

Though *Owsichek* involved the court ruling on the constitutionality of two statutes, rather than actions taken by an administrative agency, it serves as an example of the connection between the PTD and an actual management decision. There, the court ruled that the creation of "exclusive guide areas"—"geographic areas in which only the designated guide may lead hunts and from which all other guides are excluded"—runs afoul of Alaska's constitutional "common use" clause, which was intended to "engraft in [the Alaska] Constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."[25]

Owsichek is but one case illustrating the connection between the public trust and a concrete management decision. Some of the most significant PTD cases, including those cited by western states in judicial proceedings, are significant exactly because of their management implica-

14. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475 (1970); Blumm & Wood, *supra* note 4, at 4-5, 12.
15. Blumm & Wood, *supra* note 4, at 5 (quoting Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 Colum. J. Env't. L. 287, 311 (2010)).
16. *Fiduciary Duty*, Black's Law Dictionary 523 (7th ed. 1999).
17. Blumm & Wood, *supra* note 4, at 6-9.
18. Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. Env't. Aff. L. Rev. 1 (2017); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842); Arnold v. Mundy, 6 N.J.L. 1, 76-77 (N.J. 1821).
19. 161 U.S. 519, 529 (1896), *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322, 9 ELR 20360 (1979).
20. Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437 (2013).
21. Douglas Quirke, The Public Trust Doctrine: A Primer 17 (2016); Mary Christina Wood, Nature's Trust: Environmental Law for a New Ecological Age 189 (2014).
22. Cal. Fish & Game Code Ann. §711.7 (2015); Alaska Const. art. VIII, §4.
23. 763 P.2d 488, 495 (Alaska 1988).
24. Haw. Const. art. XI, §§1, 7 (adopted in 1978).
25. *Owsichek*, 763 P.2d at 496.

tions. Consider, for example, *Arnold v. Mundy,* which is considered to have laid the foundation for the American PTD.[26] There, the New Jersey Supreme Court ruled in favor of public access to public resources and rejected a landowner's attempted monopolization of oysters in the Raritan River. This anti-monopoly theme carried over into the "lodestar" PTD case of *Illinois Central R.R. v. Illinois,* wherein the U.S. Supreme Court upheld a state legislative act to nullify the transfer of Chicago Harbor into the private ownership of Illinois Central Railroad on the basis of the public trust.[27]

Also important to emphasize is the state's duty to formally consider public trust principles when making management decisions. The famous "*Mono Lake* decision" by the California Supreme Court provides an informative way to think about this obligation and what it means in practice.[28] The court had to reconcile two different systems of legal thought—the PTD and the prior appropriation doctrine of western water law—that were on a "collision course."[29]

Though the court did not dictate any "particular allocation" of water in the dispute, leaving that decision to the water management agencies, it did make clear that the agency 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."[30] Those uses, said the court, include protection of wildlife and habitat.[31] Further, it held that the public trust "imposes a duty of continuing supervision over the taking and use of the appropriated water."[32] In the case, the court asked state agencies to integrate the two different doctrines of law and corrected the state of California when it "mistakenly thought itself powerless to protect" trust resources.[33]

In a subsequent case known as *Waiāhole Ditch*, the Hawaii Supreme Court added further dimension to *Mono Lake*, holding that state agencies should exercise precaution before granting private uses of trust resources, requiring further research and data when there is inadequate information to make an informed decision regarding trust impacts.[34] Echoing *Mono Lake,* the court instructed agencies to modify their decisions over time when unforeseen trust impacts arise.[35]

The *Mono Lake* case is also important to our study because the influence of the PTD on judicial and agency decisionmaking, in the context of water management in California, has been subjected to empirical review by Prof. Dave Owen.[36] While having little influence on subsequent court decisions, Professor Owen finds that the PTD is more impactful at the administrative level, with the state's water agency sometimes referencing it as a basis for environmentally protective restrictions on water use.[37] Professor Owen also finds that in the administrative context, the PTD is hardly ever invoked in isolation, but rather "thoroughly integrated into the state's statutory and administrative law system"—an integration he cites as both positive and one that could nonetheless be further strengthened.[38] We return to the *Mono Lake* decision and Professor Owen's recommendations in Part III.

II. Examining the Agency Record

A. Research Methodology

Our research used publicly available online databases and documents to gauge how the public trust in wildlife is considered and implemented in state wildlife management and decisionmaking. First, the websites of state wildlife management agencies were searched for decision and managerial documents referencing the "public trust doctrine," the "public trust" in wildlife, and related principles of trust management (e.g., keyword searches for "beneficiary," "trustee," etc.). Documents released between 2000 and 2018 were searched, and those documents making no reference to the public trust or related principles were eliminated from the analysis.

A total of 86 documents were identified as referencing the public trust (and/or doctrine and related principles). An evaluative rubric (Table 2) was used to guide the document review and analysis and consisted of key principles of the PTD as articulated in case law and academic literature. Fifteen questions were asked in order to discern how state wildlife agencies conceptualize and apply the PTD in written documents. For each question asked, we marked and tabulated a (a) yes, (b) no, or (c) unclear response.

Following the document review, we contacted legal counsel for each state's wildlife management agency via e-mail. We asked if any relevant documents had been missed in the online search and whether there was any additional documentation on the agency's position and use of the public trust in wildlife that should be included in the analysis. Eleven responses were received and are discussed below. None of the responding legal counsel provided

26. Arnold v. Mundy, 6 N.J.L. 1 (N.J. 1821); *see also* Blumm & Moses, *supra* note 18, at 9.
27. 146 U.S. 387 (1892).
28. National Audubon Soc'y v. Superior Ct., 658 P.2d 709, 13 ELR 20272 (Cal. 1983).
29. *Id.* at 712. The prior appropriation doctrine essentially authorizes private diversion and use of waters to the exclusion of others that do not hold a water right, which potentially places it at odds with uses enjoyed by the public. Dave Owen, *The Mono Lake Case, The Public Trust Doctrine, and the Administrative State*, 45 U.C. Davis L. Rev. 1099, 1111 (2012) ("[W]ater users perceived pumping a stream dry not merely as an allowed outcome, but a desired one."); Bryan, *supra* note 10, at 304-05 (2013) ("[P]rior appropriation principles can stand in direct[sic] tension with public trust principles that depend upon stream flows for navigation, commerce, fishing, and other state-recognized trust uses.").
30. *National Audubon Soc'y*, 658 P.2d at 728, 732.
31. *Id.* at 718-19.
32. *Id.* at 728.
33. *Id.* at 732.
34. In re Water Use Permit Applications (*Waiāhole Ditch*), 9 P.3d 409, 445, 497 (Haw. 2000).
35. *Id.* at 453 ("This authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust.").
36. Owen, *supra* note 29, at 1099.
37. *Id.* at 1105.
38. *Id.* at 1106.

Table 2. Evaluative Rubric Used to Guide Document Review

1. Is the public trust explicitly referenced in the document?
2. Is the public trust implied in the document by making clear references to essential principles of trust management?
3. Is state ownership (or sovereign ownership) of wildlife referenced?
4. Is the public trust referenced to assert state management authority over wildlife?
5. Are there references to the conservation obligations/duties of trust management?
6. Are there references to what management limitations/constraints are imposed by trust management?
7. Are the beneficiaries of trust management identified and/or explained (e.g., present and future generations, state residents, the American public, the public interest versus private interests)?
8. Is the trust asset clearly defined (e.g., are there references to fish and game, predators, application to habitat)?
9. Is the trustee identified/explained in the document (e.g., is it the state wildlife management agency, state legislature, board of game, state wildlife commission)?
10. Are there references to accountability for trust management and/or trust enforcement?
11. Is the public trust linked to human access to/use of fish and wildlife?
12. Is the public trust referenced/discussed in the context of the North American Model of Wildlife Conservation?
13. Are potential adverse impacts of any proposed activity considered?
14. Was public input solicited or social science conducted on the decision/outcome (if applicable)?
15. Application: Does the document explain the connection/relationship between the public trust and the decision made or the position taken by the agency (if applicable)? In other words, is it apparent how the public trust was applied to the subject of focus in the document?

additional references, documents, or related information that they considered significant to our analysis.

There are limitations to the research design. Most important, it is limited to 13 western states and it only reviews online agency documents. A more robust study of all 50 states would have been preferable, but was beyond the capacity of the authors. The 13 states selected, however, represent a significant portion of the western states and geographical areas where wildlife management plays an important role in state governance. We are less concerned about the online document selectivity because of the comprehensiveness of most agency databases and because of our subsequent inquiry to legal counsel.

The methods may also fail to adequately capture the more nuanced and unmeasurable way that the PTD may influence agency decisionmaking. This is a fair point, but as we discuss below, it is also reasonable to expect that public trust principles would be explicitly acknowledged and applied, given ordinary agency fact-finding obligations, the importance of the trustee's legal duties, and how strongly the PTD is asserted by AFWA and the states in the courts.

B. Research Findings

Our primary finding is that nearly every agency decisionmaking document reviewed did not go beyond a vague reference to the public trust in wildlife or the PTD. In just two of the documents reviewed is there a discernable application of public trust principles or the PTD to a management position or decision made by a state wildlife agency. Though the words "public trust" or "trustee" occurred in 56% of the 86 documents, they were used as passing references with no serious explanation about how public trust principles or the PTD informed the decision made. Fifty-three percent of the documents defined the beneficiary of the trust, most often as citizens of the state, but sometimes as "present and future generations" or "citizens" more broadly. The 2010 Idaho Bighorn Sheep Plan illustrates what we categorized as a common passing reference: "[T]he Department [of Fish and Game] serves as a trustee to protect and manage wildlife resources for all Idaho citizens."[39]

None of the documents analyzed explicitly articulated the substantive and procedural duties and affirmative obligations that are inherent in trust management, as described above. Neither were any references to the enforcement of public trust found in the review. Six documents (7%) analyzed potential adverse impacts of the decision, but these were generally done in the context of state environmental statutory requirements and not explicitly in the context of the PTD. Likewise with public involvement, 45% of the documents discussed or provided opportunities for public participation, but none were linked directly to the management of trust resources. Instead, they were part of other state administrative and environmental legal requirements—an issue we return to below.

Twenty percent of the documents reviewed invoked public trust principles in a more detailed fashion, but here too there was no discernable relationship between the PTD or its basic principles and the decision made. These documents peripherally draw on public trust principles by broadly discussing the public benefits of fish and wildlife conservation, but go no further in providing detail and do not explain how the agency is conceptualizing or operationalizing the public trust in wildlife.

As noted, only two of the 86 documents reviewed use public trust principles to more specifically support a decision. Here we are not evaluating the merits of the decision, but rather determining whether there is a traceable connection to public trust principles and the decision made by a state wildlife agency.

39. Idaho Department of Fish and Game, Bighorn Sheep Management Plan 14 (2010).

The Montana Bighorn Sheep Conservation Strategy is the strongest example of public trust principles being applied to a management decision in a logical and detailed fashion.[40] The strategy makes a strong connection between public trust principles, governing statutes, and the objective of the plan. It identifies the trustee and beneficiary and explains how the agency will serve as "an advocate for responsible management and for equitable allocation of public use of the limited resources that [it is] entrusted to manage."[41] The document also identifies what research is being conducted on bighorn sheep and how it informs management.

The strategy also connects proposed management actions to public trust principles by establishing criteria that must be met prior to transplanting sheep to a new area. One of the criteria is to "[a]pprove transplants only where there are significant public benefits outweighing any public concerns or issues."[42] And it describes what types of public feedback will accompany that decision.[43] The document further provides:

> Except as otherwise provided, the importation for introduction or the transplantation of any wildlife is prohibited unless the [Fish and Game] commission determines, based on scientific investigation and after public hearing, that a species of wildlife poses no threat of harm to native wildlife and plants or to agricultural production and that the transplantation or introduction of a species has significant public benefits.[44]

Of course, these are vague and discretionary provisions, but unlike the other documents reviewed, there is at least some identifiable and plausible connection between trust principles and a management decision.

The second example is less specific and more controversial because it uses public trust principles to justify predator control to enhance ungulate populations. The Alaska Department of Fish and Game's "Intensive Management Protocol" begins its review of the "regulatory and decision process" by discussing the public trust in wildlife as applied to the "outcomes and outputs" of game management policy.[45] This is followed by a discussion of law in the state requiring a "positive determination" of whether hunting harvest objectives are being met or not as a precursor to predator control. Though not explicitly tied back to public trust principles, the review is framed as a sort of trust-based affirmative duty to control predators.

Alaska's protocol for intensive management uses tiered "principles," "guidelines," and "actions" to decide the appropriateness of predator control. One principle is that "[i]ntensive management programs should be socially sustainable."[46] Social sustainability, as explained in the document, refers to having widespread support for the state's management actions by the people of the state of Alaska, and education is one mechanism by which to achieve such support. The protocol document also links the "Department's role as trust manager" and the responsibility "to provide scientific information on biological sustainability."[47] Referencing an article about the PTD's application to wildlife, it states that "[o]nce the biological and management factors are presented by the Department, implementation is a policy decision by elected and appointed officials with public trust authority for wildlife that incorporates biological, social, and economic factors."[48] As demonstrated from these excerpts, the protocol draws broadly on public trust principles, and the state's constitutional and statutory context, to base and frame Alaska's decision regarding predator control.

Our e-mail inquiry to state legal counsel was meant to ensure that there were no significant documents missed in our online review, which we considered quite possible given the nature of most online agency databases. All but the states of Alaska and Oregon responded to the initial inquiry and follow-up inquiry.[49] None of the states responding recommended additional documents that make clear the application of public trust principles to a management decision.

Seven responses (California, Hawaii, Montana, New Mexico, Utah, Wyoming) affirmed the public trust in wildlife, and four (Hawaii, Idaho, Utah, Wyoming) referenced related state constitutional and statutory provisions related to public trust principles and the PTD. For example, the state of Hawaii responded to our inquiry with a relatively substantive discussion of the PTD, as embedded in the Hawaii Constitution, and as applied to a range of resources, such as water rights, shoreline management, submerged lands, Native Hawaiian traditional and customary rights, and wildlife.[50] Montana provides another example of a relatively strong response: "[W]e use the public trust principles on a daily basis in our management as an agency, and in my advice as counsel."[51]

Colorado and Washington responded to our inquiry by stating that the PTD as applied to wildlife is not applicable

40. Montana Fish, Wildlife & Parks, Montana Bighorn Sheep Conservation Strategy (2010).
41. *Id.* at 4.
42. *Id.* at 65.
43. *Id.* at 5-7.
44. *Id.* at 64.
45. Division of Wildlife Conservation, Alaska Department of Fish and Game, Intensive Management Protocol (2011).
46. *Id.* at 5.
47. *Id.* at 3.
48. *Id.* at 7 (citing Christian A. Smith, *The Role of State Wildlife Professionals Under the Public Trust Doctrine*, 75 J. Wildlife Mgmt. 1539 (2011)).
49. E-mail from Communications Office, Hawaii Department of Land and Natural Resources, to Martin Nie, Inquiry on Use of the Public Trust in Wildlife Management (Nov. 14, 2018, 6:48 p.m.) (on file with Prof. Martin Nie); E-mail from Rebecca Dockter, Chief Legal Counsel, Montana Fish, Wildlife & Parks, to Martin Nie, Inquiry on Use of the Public Trust in Wildlife Management (Nov. 13, 2018, 5:03 p.m.) (on file with Professor Nie); E-mail from Laura Chartrand, Deputy Attorney General, Natural Resources and Environment Section, Colorado Attorney General's Office, to Martin Nie, Inquiry on Use of the Public Trust in Wildlife Management (Dec. 10, 2018, 7:56 p.m.) (on file with Professor Nie); Letter from Joseph V. Panesko, Senior Counsel, Attorney General of Washington, to Martin Nie, Inquiry on Use of the Public Trust in Wildlife Management (Sept. 19, 2018) (on file with Professor Nie).
50. E-mail from Communications Office, Hawaii Department of Land and Natural Resources, *supra* note 49.
51. E-mail from Rebecca Dockter, *supra* note 49.

to their states.[52] We somewhat anticipated the response from Colorado, as the PTD in this state has a long and complicated history, one beyond the purview of this Article. But to summarize, Colorado has not applied the PTD to a range of water and natural resource property interests, and, as a result, a series of ballot initiatives beginning in 1994 have proposed to apply the PTD to environmental and resource management in the state.[53]

Less anticipated was the response from the state of Washington. The Fish, Wildlife, and Parks Division of the Office of Attorney General of Washington cites *Citizens for Responsible Wildlife Management v. State*[54] for its assertion that "the public trust doctrine in Washington State applies narrowly to the public's use of navigable waters, not to wildlife resources on the uplands."[55] In that case, *Citizens for Responsible Wildlife Management* challenged two wildlife ballot initiatives[56] as violating the PTD. Though we cannot fully cover the complexities of the case here, we were struck by the senior counsel's unequivocal response because it strays afield of the court's holding.

The court in its decision makes clear that it "need not decide whether the public trust doctrine applies," and dismissed the plaintiff's challenge on other grounds.[57] The court further held that in passing these initiatives "Washington voters did not give up control over the state's natural resources in violation of the public trust doctrine."[58] Thus, *Citizens for Responsible Wildlife Management* is cited as the basis for not applying the public trust to wildlife even though the case did not reach such a question. In contrast, Prof. Michael Blumm and others' exhaustive PTD study, which postdates this decision, states that "common law and state statutes establish the basis for the Washington PTD in wildlife."[59]

Equally noteworthy is the counsel's parsing of the term "public trust," suggesting that there are some as yet unspecified categories of trust applicable to wildlife in Washington:

> There are numerous other Washington State court decisions, some of which are cited in Citizens, which describe the status of wildlife as being managed in "trust" by the State, but I think it is a mistake to presume that those references to "trust" intended the specific "public trust doctrine." There are many different kinds of trusts, with differing obligations on the trustees. So merely describing something as a trust relationship does not connect that trust to the unique public trust doctrine.[60]

The counsel's response does not indicate what types of obligations these "other" trust relationships require of wildlife agencies, and their application in agency decisions of that state were noticeably absent. We return to this issue below because we see the counsel's parsing of trust management as a significant impediment to the implementation path ahead.

III. Analysis and Recommendations

Based on the documents reviewed, there is a significant gap between the legal assertions made by western states about the PTD as applied to wildlife and the actual management decisions of state agencies. If states are going to demand primacy in wildlife management under the PTD, their claims should mean something in practice.

To begin, the PTD entails something far bigger than managing "resource x" in the public interest. After all, most government agencies are lawfully mandated to serve the public interest in some form but are not encumbered by the legal obligations at the core of the PTD. In the context of water resources, one present co-author, Prof. Michelle Bryan, details several reasons why agency "public interest" inquiries are distinct from, and often fall short of, public trust review—most notably due to the impropriety of placing public trust uses on equal footing with other types of public interests like short-term economic gains associated with exploiting a natural resource.[61] "As the legislative machinations of *Illinois Central* illustrate, political priorities [raised under the auspices of 'public interest'] and trust purposes can occupy entirely different spheres."[62]

Waiāhole Ditch is also illustrative, as the economic boon that might come from the proposed commercial resort in that case arguably advanced a "public interest," but the court held such commercial uses fell outside the scope of the public trust.[63] Thus, to the extent agency wildlife decisions make passing references or even more rigorous findings based on public interest outcomes, those decisions risk falling short of the mark. Instead, agencies should develop cogent administrative procedures and guidelines solidly anchored in public trust jurisprudence; and they should apply such approaches

52. E-mail from Laura Chartrand, *supra* note 49; Letter from Joseph V. Panesko, *supra* note 49.
53. Michael Blumm et al., The Public Trust Doctrine in 45 States (Michael C. Blumm ed., Lewis and Clark Law School rev. ed. 2015); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 46 Env't L.Q. 53 (2010); Stephen J. Leonhardt et al., *The Public Trust Doctrine and Environmental Rights Initiatives: A Tectonic Shift in Colorado Property Rights in Natural Resources?*, 53 Rocky Mountain Min. L. Found. J. 1 (2016).
54. 103 P.3d 203 (Wash. Ct. App. 2004).
55. Letter from Joseph V. Panesko, *supra* note 49.
56. One initiative proposed making it unlawful to hunt black bear with the aid of bait or to hunt black bear, cougar, bobcat, or lynx with the aid of dogs; the other proposed prohibiting the use of body-gripping traps and other devices to capture animals and banning the use of two poisons. *Citizens for Responsible Wildlife Mgmt.*, 103 P.3d. at 204.
57. *Id.* at 205.
58. *Id.* at 205, 208.
59. Blumm et al., *supra* note 53, at 865.
60. Letter from Joseph V. Panesko, *supra* note 49.
61. Bryan, *supra* note 10, at 307-26 ("[T]he public interest is a discretionary concept rooted in state police powers, and the government may prioritize among a myriad of interests, receiving broad judicial deference toward its choices . . . This deferential language stands in stark contrast to the more constrained authority states exercise in public trust decisions.").
62. *Id.* at 310-11.
63. In re Water Use Permit Applications (*Waiāhole Ditch*), 9 P.3d 409, 450 (Haw. 2000).

transparently, inclusively, and consistently. Otherwise, states' assertions of the PTD are a mere stalking horse.

Another co-author, Prof. Martin Nie, and others find that states most often invoke their sovereign ownership of wildlife, and the PTD, to assert primary authority and jurisdictional control over wildlife, often in opposition to federal or tribal governments.[64] But as Gary Meyers and Susan Horner argued long ago: "It is only logical that, inasmuch as the states have so frequently invoked trust concepts to justify their actions, they not be permitted to ignore or dodge their corresponding obligations."[65]

We agree, and offer three related priorities and recommendations that stem from our findings and the work of others. These are: (1) leveraging existing environmental procedural processes to include more explicit PTD review; (2) articulating the scope and dimensions of the wildlife public trust more clearly through statutes, regulations, and agency guidance; and (3) deepening education of agency officials on the PTD and their duties in implementing the doctrine through their regulatory and decisionmaking processes.

A. *State Wildlife Governance and the Procedures Used to Make Trust Decisions*

The first recommendation is to focus more on state wildlife governance and the procedural frameworks used to make trust-based management decisions.[66] As Professor Owen concludes in his study of the PTD as applied to water management in California, "the public trust doctrine is environmental law with minimal procedures."[67] And because the PTD in California is so intertwined with complementary state environmental and administrative laws, "the public trust doctrine utilizes procedural requirements established by other statutes."[68] For example, the California Environmental Quality Act "establishes extensive procedural requirements for assessing the environmental impacts of proposed agency decisions, and compliance with those requirements can facilitate evaluation of public trust impacts."[69]

We similarly encourage state wildlife agencies to leverage existing procedural frameworks and decisionmaking processes to more systematically apply the PTD and its core principles to wildlife management. State-based environmental planning statutes, species management plans, state wildlife action plans, and a number of other common decisionmaking processes provide feasible platforms to interweave and implement trust management. At the same time, agencies need to be intentional and explicit about their application of the PTD as part of existing processes, since an agency trust duty may demand heightened obligations above and beyond a statutory baseline.[70]

The composition and decisionmaking powers of state wildlife commissions (or boards) should also be scrutinized in this context.[71] The powers granted to state wildlife commissions vary, from setting fish and game seasons and bag limits to charting broader management goals and objectives for the states. Members are typically appointed by a governor and are subject to state legislative approval. Most states also have requirements for commission membership, such as having a general knowledge of wildlife issues, maintaining political and geographic balance, having a sporting license, or having some representation of agricultural, outfitting, or other commercial interests.[72]

Effectuating the wildlife trust, one way or another, thus will involve state wildlife commissions and the processes they use to make wildlife management decisions. And it is here where the procedural obligations of trust management are again relevant. First and foremost is the trust duty of undivided loyalty.[73] In this case, the duty is lodged in state commissions with the obligation to manage wildlife solely in the interest of public beneficiaries, and not for the trustee's own benefit or for the sake of third-party interests. This duty would call into question a commission composed of exclusive economic interests—divided loyalties—that may have an incentive to make wildlife management decisions for their own advantage and not as a trust for the benefit of the public at large. And following the precedent of the *Mono Lake* decision, a state wildlife commission should embrace its "affirmative duty to take the public trust into account" when making wildlife management decisions, and "protect public trust uses whenever feasible."[74]

A state's implementation of the PTD as applied to wildlife should also be considered during state participation in federal decisionmaking processes, such as in the context of the Endangered Species Act (ESA).[75] For example, §6 of the ESA empowers the U.S. Fish and Wildlife Service (FWS) to enter into cooperative agree-

64. Nie et al., *supra* note 1.
65. Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 Env't L. 723 (1989); Susan Morath Horner, *Embryo, Not Fossil: Breathing Life Into the Public Trust in Wildlife*, 35 Land & Water L. Rev. 23, 27 (2000).
66. Hare et al., *supra* note 11; Horner, *supra* note 65; Cynthia A. Jacobson et al., *A Conservation Institution for the 21st Century: Implications for State Wildlife Agencies*, 74 J. Wildlife Mgmt. 203 (2010); Cynthia A. Jacobson & Daniel J. Decker, *Governance of State Wildlife Management: Reform and Revive or Resist and Retrench?*, 21 Soc'y & Nat. Resources 441 (2008); Martin Nie, *State Wildlife Policy and Management: The Scope and Bias of Political Conflict*, 64 Pub. Admin. Rev. 221 (2004); Smith, *supra* note 48; Treves et al., *supra* note 11.
67. Owen, *supra* note 29, at 1143.
68. *Id.* (citing this as positive and suggesting ways of strengthening further).
69. *Id.*
70. Bryan, *supra* note 10, at 330-32 ("As with other permit review criteria, states can continue to weigh a variety of considerations when deciding whether to issue a permit. With a separate public trust analysis, however, those competing considerations will not be allowed to prevail if the impacts are too substantial under public trust law.").
71. Jacobson et al., *supra* note 66; Nie, *supra* note 66; Smith, *supra* note 48.
72. *See, e.g.*, Ruth S. Musgrave & Mary Anne Stein, Center for Wildlife Law, State Wildlife Laws Handbook (1993) (providing a state-by-state overview).
73. Wood, *supra* note 21, at 189.
74. National Audubon Soc'y v. Superior Ct., 658 P.2d 709, 732, 13 ELR 20272 (Cal. 1983).
75. Bruskotter et al., *supra* note 11; 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

ments with states establishing and maintaining an "adequate and active program for the conservation of listed species."[76] This framework provides an opportunity for state wildlife agencies to specify how their public trust obligations ensure the conservation of species.

Another opportunity is in the listing and delisting process, where one of the five factors considered by FWS and National Oceanic and Atmospheric Administration Fisheries is the adequacy of "existing regulatory mechanisms" at the state level.[77] This framework provides a similar opportunity for the states to go beyond vague declarations of their police and public trust powers, and to specify how their enforceable obligations as a trustee of a species constitute an "adequate regulatory mechanism," as that provision is generally interpreted by most courts. These are, after all, *regulatory* mechanisms that must be more than vague, voluntary, and unenforceable promises to do something in the future. And part of the reason the U.S. Congress added the adequate regulatory provision to the ESA was "to prod states and localities into adopting more adequate laws to protect imperiled species and their habitat."[78]

We concur with Profs. Jeremy Bruskotter, Sherry Enzler, and Adian Treves that a "state-trustee's obligation is heightened where, as is the case with [gray wolves (*Canis lupus*)], the species at issue has recently been removed from the list of endangered species."[79] These authors explain the advantages of a more robust application of the PTD: that it would at the minimum require states to maintain a viable population of a species; and that "[f]or the wildlife trust to act as a check against narrow interests that promote exploitation over conservation, courts must use the doctrine to hold states accountable to their trust obligations."[80]

Similarly, the better a state agency can articulate its PTD policy on wildlife, the more weight its positions will carry during federal land use planning[81] and review of agency actions under the National Environmental Policy Act (NEPA).[82] NEPA regulations, for example, require that a federal environmental impact statement (EIS) "shall discuss any inconsistency of a proposed action with any approved state or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the [EIS] should describe the extent to which the agency would reconcile its proposed action with the plan or law."[83]

And federal land use planning statutes often contain wildlife-specific agency mandates. The National Park Service, for example, must plan and manage its lands "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[84] These planning statutes, in turn, generally ask agencies to coordinate with state and local planning. The Federal Lands Policy and Management Act (FLPMA)[85] is illustrative, requiring that the Bureau of Land Management land use plans "shall be consistent with State and local plans to the maximum extent . . . consistent with federal law and the purposes of this Act."[86]

State certification of federally permitted water projects under §401 of the Clean Water Act (CWA)[87] also presents possibilities in the realm of aquatic wildlife. Under the certification process, states have been allowed to impose instream-flow requirements on federal permits based on water quality needs of impacted fisheries.[88]

As these examples make clear, capitalizing upon existing state and federal procedural mechanisms provides a necessary first foothold for state wildlife agencies to begin bridging the PTD implementation gap.

B. *To Codify Trust Principles and Obligations in State Law and Regulation*

The second priority, and one more commonly highlighted in the literature, is to more precisely codify public trust principles as applied to wildlife in state laws and regulations.[89] Specifying the legal obligations at the core of trust management would be both legally and politically advantageous. Further, "state legislatures and permitting agencies must clearly delineate public trust interests from more generalized public interests. . . . [and t]his distinction should appear in [legislation], implementing regulations, and agency guidance documents."[90] Not only would this PTD codification support state wildlife agencies and commissions in making politically difficult decisions, but so too would the judiciary benefit from the ability to base decisions pertaining to the wildlife trust on both the common law

76. 16 U.S.C. §1535(c)(1).
77. *Id.* §1533(a)(1)(D).
78. Sandra B. Zellmer et al., *Species Conservation and Recovery Through Adequate Regulatory Mechanisms*, 44 Harv. Env't L. Rev. 367, 376 (2020).
79. Bruskotter et al., *supra* note 11, at 1829.
80. *Id.* Whether listed or delisted, such species fall under the "common concern of humankind," to which trustee duties adhere most poignantly. Convention on Biological Diversity, *opened for signature* June 5, 1992, pmbl., 1760 U.N.T.S. 79.
81. Federal lands play a significant role in wildlife protection. *See generally* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 271 (1980) ("Many species of wild animals depend on the prime wildlife habitats found on the federal lands.") (citing Gustav A. Swanson, *Wildlife on the Public Lands*, *in* Wildlife and America 428 (H. Brokaw ed., FWS 1978)).
82. *See* Michelle Bryan, *Cause for Rebellion? Examining How Federal Land Management Agencies & Local Governments Collaborate on Land Use Planning*, 6 J. Energy & Env't L. 1 (2015) (making a similar argument at the local government level); 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
83. 40 C.F.R. §1506.2(d) (2019).
84. 16 U.S.C. §1.
85. 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603.
86. 43 U.S.C. §1712(c)(9).
87. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
88. PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology, 511 U.S. 700, 24 ELR 20945 (1994).
89. Wildlife Society, *supra* note 4, at 25-26.
90. Bryan, *supra* note 10, at 329 ("Guided by a clear trust definition, there is less risk that an agency will consider other public interest matters that fall outside the scope of the trust.").

and state statutes and regulations carrying those principles into action.

Through statutory law and regulation, public trust principles and the legal obligations of trust management would also mitigate the parsing of "public trust" language evident in the response by Washington State's legal counsel. Recall that the counsel responded to our inquiry by stating that "it is a mistake to presume that those [court] references to 'trust' intended the specific 'public trust doctrine,'" and that "merely describing something as a trust relationship does not connect that trust to the unique public trust doctrine." Admittedly, the PTD, even when explicitly identified by name, is a "fractured doctrine," having different effects in different states, much of it depending on state common law and the resources to which it is applied.[91]

The problem, though, is that western states and AFWA make no similar distinction and forcefully assert the PTD and related case law when litigating sovereignty over wildlife. At some point, the question must be asked: Is wildlife managed according to the substantive and procedural obligations of the PTD or not? We believe that a much clearer answer will emerge through the process of legislating and administrative rulemaking.

The scope of the PTD also requires better articulation. In codifying wildlife trust principles and management, one possible path identified in the literature is to adopt a more inclusive "all taxa" definition of "wildlife."[92] Our review of documents and the responses from state legal counsel emphasize the importance and complexity of this task. There is a sort of "legal taxonomy" of wildlife in state codes having significant implications for trust management. What does it mean, for example, when a state broadly invokes the PTD as applied to "wildlife" in the courts? This is commonly assumed to apply to statutory definitions of "game," but does it similarly apply to the legal categories of "predators" and "non-game"?

Montana statutes, for example, require enforcement of all laws regarding "the protection, preservation, management, and propagation of fish, game, fur-bearing animals, and game and nongame birds within the state,"[93] with the legal category of "predatory animals" not included in this provision.[94] Coyotes are defined as predators in Montana, as they are in other states, so would the PTD apply to the debate over coyote-killing contests and commercial-based predator derbies that are sanctioned under some state laws?

Things get even more complicated for those species, like bison, having multiple legal classifications at the state level. Bison that are free-roaming and "held in the public trust" are classified as a game species in Montana.[95] But bison are also classified as "domestic livestock," a "species in need of management" because of the potential for the spread of contagious disease to persons or livestock, and the "publicly owned wild buffalo or bison originating from Yellowstone national park" are designated a "species requiring disease control."[96]

Absent a clear delineation of the trust resources falling within the concept of "wildlife," agencies will continue to falter in translating the PTD from legal doctrine to on-the-ground resource protection.

C. *Legal Education Through Judicial Enforcement and Shared Learning*

Our third priority is focused on legal education and shared learning. If the public trust in wildlife is to be more systematically applied to wildlife management decisions, there is a need to demonstrate to state wildlife agencies how that should be done in specific cases and contexts. Such learning could happen via an iterative process whereby outside interests carefully select test cases to challenge a state wildlife agency's breach of its trust obligations, thereby obtaining judicial clarification of the PTD.[97]

This hews to the vision of using the PTD as a way for the courts to compel state legislatures and administrative agencies to reconsider actions harmful to trust resources.[98] It is the path of the *Mono Lake* case wherein environmental plaintiffs successfully used the PTD to correct an agency's abdication of trust responsibilities and to make clear its "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."[99] It is also the path of *Waiāhole Ditch*, which has led the state to explicitly incorporate the PTD into its state water planning.[100]

Center for Biological Diversity, Inc. v. FPL, Inc. provides another example of how selected litigation might be used to inform a more robust application of the PTD.[101] In this case, plaintiffs used the PTD as a way to protect thousands of birds and raptors that were being killed by the operation of outdated wind turbines by private businesses in California. Though the full details of the case are beyond our purview, the decision made clear that citizens have the right to bring a cause of action to enforce the public trust in wildlife. The case also helped clarify the complicated relationship between the public trust as derived from common and/or statutory law, thus working through the principles of the PTD and California Wildlife Code. In doing so, both the trustee

91. Blumm & Moses, *supra* note 18, at 5-6; Craig, *supra* note 53.
92. Hare et al., *supra* note 11.
93. Mont. Code Ann. §87-2-101(6) (2019).
94. *Id.* §87-2-101.
95. *Id.* §87-2-101(6).
96. *Id.* §86-1-216(a).
97. Bryan, *supra* note 10, at 336 ("The judiciary, which serves as the gatekeeper of the public trust, can help create the appropriate context for protecting the public trust during [agency actions].").
98. Sax, *supra* note 14.
99. National Audubon Soc'y v. Superior Ct., 658 P.2d 709, 728, 13 ELR 20272 (Cal. 1983).
100. *See generally* State of Hawaii Commission on Water Resource Management, Water Resource Protection Plan 7-20 (2019 Update), *available at* https://files.hawaii.gov/dlnr/cwrm/planning/wrpp2019update/WRPP_201907.pdf.
101. 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008), *modified on denial of reh'g* (Oct. 9, 2008).

and beneficiary learned more about the contours and future applications of the PTD.

In terms of education and shared learning, a less adversarial approach is to demonstrate in proactive fashion what PTD-based decisionmaking looks like in practice. Here we are envisioning a more interactive and substantive exchange of ideas between trustees and beneficiaries. There are relatively few published sources, of which we are aware, focusing on how the PTD should be applied to wildlife management decisions. Prof. Edward Fitzgerald does so in the context of wolf management in Alaska and Professor Treves and others in the context of "predators and the public trust," with the latter providing a specific and much-needed application focused on the decision to permit the hunting of wolves in Wisconsin.[102]

We are in need of even more specific applications and examples of how to fulfill the substantive and procedural obligations of trust management, from the relatively simple to complex cases. Cases focused on core themes of public trust management, such as access and the privatization and monopolization of public wildlife, would be instructive.[103] But more complicated cases are also necessary, such as those where significant legal, political, and financial forces are brought to bear on a state wildlife population.

Here, the framework of candidate conservation agreements (CCAs) with assurances,[104] enabled under the ESA, provides an extraordinary opportunity to proactively engage in state advocacy of the PTD in wildlife before complex federal listings or litigation ensue. As FWS has articulated, because many species fall within the jurisdiction of states, "[s]tate involvement is highly desirable even if they do not take the lead for preparing the CCA. In some cases the State may already have an appropriate plan developed that can be used or updated to serve the purposes identified in this guidance."[105] To date, state wildlife agencies do not appear to be capitalizing on such opportunities.

IV. Conclusion

If the PTD serves as the "legal foundation" of state wildlife management then it ought to mean something in practice. It is time for state wildlife agencies to actually practice trust management or to stop invoking the PTD in courts of law. To the extent states suggest that the PTD is implied in their decisionmaking, that is not sufficient to meet their fact-finding obligations and leaves the PTD as mere guesswork.

Granted, there are variations of the PTD and its application will depend on a state's common law and the management issue in question. But the PTD is not just political rhetoric, nor should it be selectively used by states to assert jurisdictional primacy and unfettered control of wildlife vis-à-vis federal and tribal governments. Instead, the PTD comes with significant legal obligations, substantive and procedural. For states and their representatives to ask the judiciary to give the PTD "due force," and to then not apply trust-based decisionmaking on the ground, is to invite future legal challenge.

Like others, we believe that a more serious application of the PTD to wildlife could result in more ecologically and socially responsible wildlife governance at the state level. We do not, however, see the doctrine as a panacea or as a way to eliminate the need for state agencies to make difficult decisions and to face the trade offs inherent in wildlife management. Nor are these agencies free agents, operating outside of the political and budgetary forces emanating from state legislative and executive branches. Our preference is to illuminate and codify the core trust principles and obligations referenced above. Doing so would provide a historically rooted yet future-oriented way of thinking about the challenges and potential reform of state wildlife management.

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102. Edward A. Fitzgerald, *The Alaskan Wolf War: The Public Trust Doctrine Missing in Action*, 15 Animal L. 193 (2009); Treves et al., *supra* note 11.

103. *See, e.g.*, Kafka v. Montana Dep't of Fish, Wildlife & Parks, 201 P.3d 8 (Mont. 2008) (describing a takings claim and related ballot initiative in Montana that prohibited game farm operators from charging a fee to shoot alternative livestock). *See also* Organ et al., *supra* note 7, at 9 (reviewing game farms, the commercialization of wildlife, and limited access to harvest wildlife as threats and challenges to the PTD applied to wildlife).

104. 50 C.F.R. §§17.22(d), 17.32(d) (2019).

105. *See generally* FWS, Using Existing Tools to Expand Cooperative Conservation for Candidate Species Across Federal and Non-Federal Lands, *available at* https://www.fws.gov/endangered/esa-library/pdf/CCA-CCAA%20%20final%20guidance%20signed%208Sept08.PDF.