

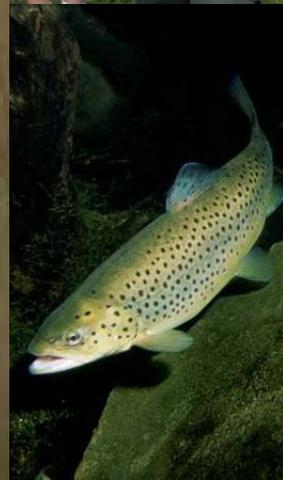


ASSOCIATION of
FISH & WILDLIFE
AGENCIES

WILDLIFE AS A PUBLIC TRUST RESOURCE



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Association of Fish & Wildlife Agencies**



The Public Trust Doctrine



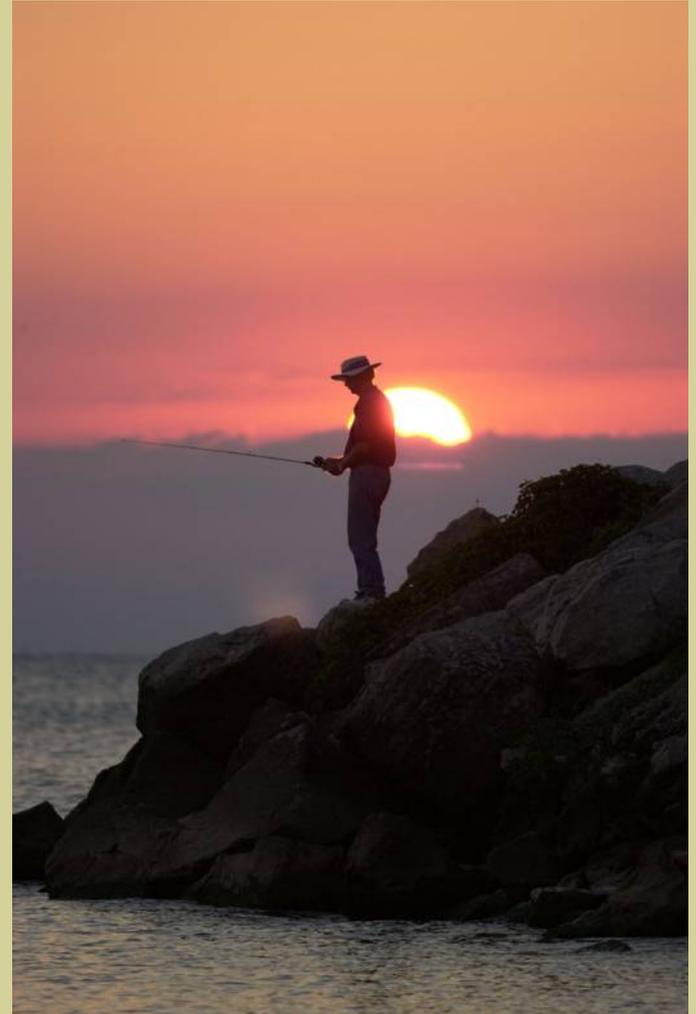


Purpose of Presentation

1. Trace the historical origins and geographic migration of the Public Trust Doctrine (PTD) from Roman Law to England to the United States.
2. Discuss the evolution of PTD from protecting commerce, fishing and navigation to encompassing ecological values, wetlands, and wildlife by examining what the U. S. Courts have said.
3. Discuss the North American Model of Wildlife Conservation and its importance to states fish and wildlife agencies' management of wildlife.
4. Threats to the PTD and Recommendations

What is the Nature of the Public Trust?

The basic tenet of the public trust doctrine is that certain natural resources, especially the waters and beds of the sea coast and large navigable lakes and rivers, are of such importance to the public that they are incapable of purely private ownership and control.



PTD Historical Origins

**First codified in Roman Law in sixth century
A.D. in Institutes of Justinian 2.1.1**

“By the law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided he respects habitation, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”



PTD Historical Origins

**PTD
incorporated
into
English
Common Law**



“In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark is in the king . . . [and] is held subject to the public right of navigation and fishing.”

Shively v Bowlby, 152 U.S. 1, 13 (1894)

PTD Historical Origins

“And I am of the opinion further, that, upon the Revolution, all those royal rights [of King Charles II] vested in the people of New Jersey, as the sovereign of the country and are now in their hands; and that...They may build dams, locks, and bridges for the improvement of navigation... and improve fishing places... [and] they may create, improve and enlarge oyster beds...”

Arnold v Mundy, 6 N.J.L.1, 10 (1821)

First incorporated in American jurisprudence in 1821 involving oyster beds on Raritan Bay, New Jersey





PTD Historical Origins

In other words...

The states stepped into the shoes of the King of England and became the trustees of the beds of navigable waters and tidelands.

This principle is adopted in 1842 by the U. S. Supreme Court:

“For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the Constitution to the general government.”

Martin v Waddell's Lessee, 41 U.S.367, 410 (1842)

PTD Historical Origins

The PTD migrates inland up the Mississippi River in 1876



“It appears to be the settled law of that State [Iowa] that the title of [those dwelling] on the banks of the Mississippi extends only to the ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the State. This is also the common law with regard to navigable waters;... And it is especially true with regard to the Mississippi and its principal branches.”

Barney v Keokuk, 94 U.S. 324,336
(1876)

Finally, the PTD sails into the Great Lakes in 1892.

The Court had previously held in the case of the *Genesee Chief*, 12 U.S. (How.) 443 (1891) that the Great Lakes were commercially navigable and subject to federal admiralty law.

The Court then extended the PTD into the Great Lakes in what Professor Joe Sax describes as the “lodestar” public trust case, *Illinois Central R. Co. v Illinois*, 146 U. S. 387 (1892):

“We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, subject to the same trusts and limitations.”

Id. At 436-37

The Nature of PTD

The PTD is a different type of title.



“It is a title different in character from that which the state holds in lands intended for sale. It is a title *held in trust for the people* of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, *freed from the obstruction or interference of private parties.*”

*Illinois Central, 146 U.S. at 452
(emphasis added)*

The Nature of PTD

States have a duty to enforce the trust

“The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties,... than it can abdicate its police powers in the administration of government and the preservation of peace.”



Illinois Central, 146 U.S. at 453



The Nature of PTD

The trust is a high, solemn and perpetual duty.

In extending the public trust doctrine into Michigan's navigable waters, the Michigan Supreme Court described the trust in 1926 as follows:

“So long as waters flow and fish swim in Pine River, the people may fish at their pleasure in any part of the stream subject only to the restraints and regulations imposed by the State. In this right they are protected by a *high, solemn and perpetual* trust, which it is the duty of the State to forever maintain.”

Collins v Gerhardt, 237 Mich 38,49 (1926) emphasis in original

The Nature of PTD

The PTD evolves to embrace ecological values and concerns.

The traditional uses protected by the PTD were:

- Navigation
- Fishing
- Commerce

Following the 1920's the PTD went into hibernation in many parts of the country.





Professor Joe Sax and the PTD

In 1970, Professor Joe Sax published his article entitled, “*The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*”, 68 Mich. L. Rev. 473, which is considered to be one of the 10 most influential law review articles ever written.



Professor Joe Sax and the PTD

**Professor Sax breathed life into the PTD by
stating:**

“Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”

Id. at 474.



PTD Recognition

California recognizes that the PTD embraces ecological values – the relationship between animals and their environment - in 1971.

“There is a growing public recognition that one of the most important public uses of tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life...”

Marks v Whitney, 6 Cal.3d 251, 259-260 (1971)



PTD Recognition

Wisconsin recognizes that the PTD protects freshwater wetlands in 1972:

“The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters... Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams.”

Just v Marinette County, 201 B./w,2d 761, 768 (1972)

PTD Recognition

National Audubon Society v Superior Court, (1983)

This case represents a doctrinal shift from permitting certain uses on public trust lands to affirmatively protecting natural resources – a significant change in the public trust doctrine’s traditional focus.



PTD Recognition

***National Audubon*, once again a case out of California, recognized that the PTD protects non-navigable tributaries from diversions**



“We conclude that the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of non-navigable tributaries.”

*National Audubon Soc’y v
Superior Court of Alpine County,
658 P.2d 709,721 (1983)*



PTD Recognition

“Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”

Id. At 724.

Thus, even indirect effects on waters and wildlife have been upheld by the courts under the public trust doctrine.



PTD and Wildlife

As seen by the previous slides, the traditional public interests protected by the PTD were navigation, commerce, and fishing.

But, the U.S. Supreme Court in *Geer v. Connecticut* (1896) added “wild fowling” (note the concept of wild fowling (wildlife) is connected with water) within a state’s trustee relationship. Although partially reversed by *Hughes v. Oklahoma* (1979), state statutes and state courts continue to assert state ownership of wildlife.

Wildlife as a Public Trust Resource



Modern courts are beginning to acknowledge wildlife as a public trust resource and to apply the public trust doctrine to wildlife.

How did this come about?



Wildlife as a Public Trust Resource

The courts had to first address the question -Who owns wildlife?

In *Martin v Waddell*, 41 U.S. 367 (1842), the Supreme Court ruled that the Magna Carta had settled the question of who owns fish and wildlife and that King Charles II did not have the authority to give away the “dominion and property” of lands in colonial America. The court further ruled that since the American Revolution the **people** held public trust responsibilities for fish and wildlife except for rights specified in the U.S. Constitution.

Since that time, legislation drafted around issues of wildlife ownership has reflected the “public trust doctrine” whether it is administered by federal or state governments.

Wildlife as a Public Trust Resource



New case in California, *Center for Biological Diversity v FPL Group, Inc.*; Case no. A116362 (2008) held that wildlife does fall under the umbrella of the public trust doctrine. The case involves bird deaths at a wind farm near San Francisco.

Wildlife as a Public Trust Resource

California case held:

- Wildlife, including birds, is considered to be a public trust resource of all the people of the state.
- Members of the public may enforce the trust.
- The proper defendant in such an action is the state or its subdivisions, not the companies themselves.





Wildlife as a Public Trust Resource

Federal government recognizes states' broad trustee and police powers over resident fish and wildlife:

43 CFR Subtitle A, section 24.3:

“(a) In general, the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a state.”



Wildlife as a Public Trust Resource

State constitutions have declared wildlife as public trust resources

Virginia & Wisconsin: The people have the right to fish, hunt, trap, and take game subject only to the reasonable restrictions as prescribed by law.



State Wildlife Statutes and the PTD

State Statutes Specifically Mentioning “Trust”:

- **Ohio:** “The ownership and the title to all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in **trust** for the benefit of all the people.
- **Michigan:** “The Great Lakes are a bi-national public treasure and are held in **trust** by the Great Lakes states and provinces.”



PTD Language

Strong, **implicit language** articulating wildlife is held in trust for the public:

- **Indiana:** All wild animals...are the *property of the people* of Indiana.
- **Kentucky:** ...is to *protect and conserve the wildlife* of the Commonwealth so as to insure a permanent and continued supply of the wildlife resources of this state for the purpose of furnishing sport and recreation *for the present and for the future residents of this state.*
- **Minnesota:** the *ownership of wild animals* of the state is in the state, in its sovereign capacity for the *benefit of all the people* of the state.



Wildlife Violator Compacts

Wildlife Violator Compacts are agreements whereby participating states share information about fish and game violators and honor each other's decision to deny licenses and permits.

Section 11: “The participating states find that wildlife resources are managed in **trust** by the respective states for the benefit of all of their residents and visitors.”



Wildlife Violator Compacts

Participating States

New Mexico

South Dakota

Oregon

Arizona

Florida

Kansas

Minnesota

New York

Wyoming

Indiana

Wisconsin

Nevada

Georgia

California

Idaho

Maryland

Missouri

Tennessee

North Dakota

Washington

Illinois

Colorado

Iowa

Michigan

Montana

Utah

Ohio

Alaska

Kentucky

Louisiana

Mississippi

Hunting and the PTD

Doctrine can be used as focal point of arguments both for and against hunting



Under the expanded Public Trust Doctrine, there is basis for hunters to assert an implied right to hunt and to enforce that right in the courts as a beneficial and essential tool for the government to manage properly the public resource of hunting.



Hunting and the PTD

- Under the PTD, hunting is recognized as a traditionally protected public use or right, but is treated in law as a **privilege**, an activity subject to governmental restriction and prohibition. Exceptions are states such as Virginia, South Carolina, or Oklahoma that have passed constitutional amendments protecting the right to hunt.
- If hunting is no more than a privilege, it is a privilege that is passionately held by hunters across the country. Its traditionalism may ultimately protect it from extinction.
- Under the PTD, hunting is recognized as a traditionally protected public use or right. This right, when combined with the fact that more and more states recognize wildlife as a public trust resource, could also give rise to an implied right to hunt, enforceable against government.

Hunting and the PTD

Accordingly, the PTD can provide hunters with a means by which they may legally challenge certain restrictions and prohibitions on hunting that are inconsistent with the conservation of wildlife.



Hunting and the PTD

Also potential for anti-hunters to use the Public Trust Doctrine as a basis for enjoining state-permitted sport hunting because anti-hunters could argue the state is permitting hunters to take wildlife resources belonging to all the people and using the resources contrary to public policy.



Hunting and the PTD

Aldo Leopold said,

“Hunting should be protected so long as it tends to preserve wildlife, and when it no longer does so, it should be restricted or prohibited.”





Hunting and the PTD

States strive to achieve this balance of taking and preserving wildlife by regulating peoples' actions using sound science of land and water management as the basis for decisions.



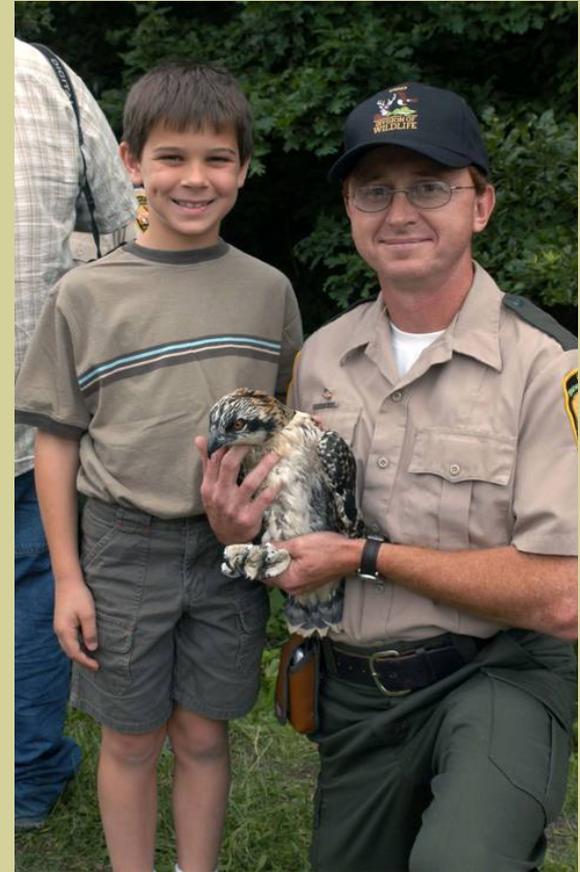
The North American Model of Wildlife Conservation

The PTD is recognized as a doctrine of what has come to be known the **North American Model of Wildlife Conservation** (Geist 1995). This model is viewed by many as an important conservation construct of law, policy, program framework and scientific investigation that has led to the protection, conservation and restoration of wildlife populations in the United States and Canada.

The North American Model of Wildlife Conservation

Two basic principles:

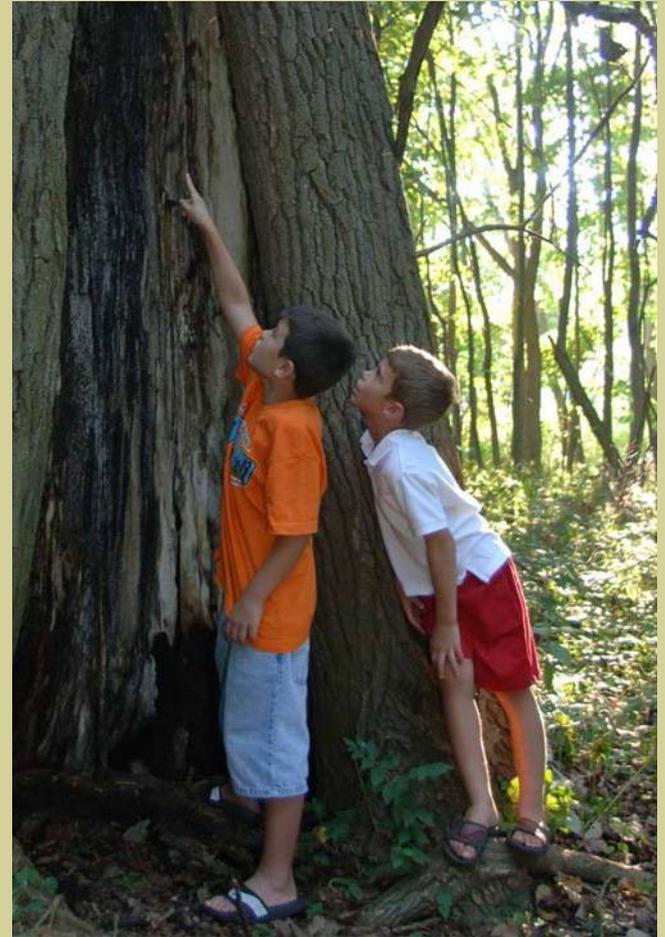
1. Fish and wildlife belong to all citizens and are to be managed to sustain populations forever.
2. Advocate for the primacy of state management authority for resident wildlife.



The North American Model of Wildlife Conservation

The Model's two basic tenets are elaborated by seven concise doctrines first articulated in the mid-to-late 1800's.

These pillars are called the Seven Sisters for conservation.



Seven Sisters for Conservation

1. Wildlife as Public Trust Resources
2. Prohibitions on Commerce
3. Hunting Opportunity for All
4. Non-Frivolous Use of Wildlife
5. Wildlife is Considered an International Resource
6. Scientific Management
7. Democratic Rule of Law



Seven Sisters for Conservation

1. Wildlife as a public trust resource –

Martin v Waddell (1842) established the legal precedent that it is the government's responsibility to hold wildlife nature in trust for all citizens.



Seven Sisters for Conservation

2. Prohibitions on Commerce –

Hunters and anglers led the effort to eliminate markets and commercial traffic in dead animal parts, which was a huge business in the latter half of the 1800s and the early 1900s. The market killing of birds and animals decimated many species and brought some to near extinction or extinction.



The Dodo bird

Seven Sisters for Conservation

3. Hunting Opportunity for All –

In Canada and the United States, every man and woman has a fair and equitable opportunity under the law to participate in hunting and fishing. No one group, hunters or non-hunters, can legally exclude others from access to game within the limitations of private property rights.





Seven Sisters for Conservation

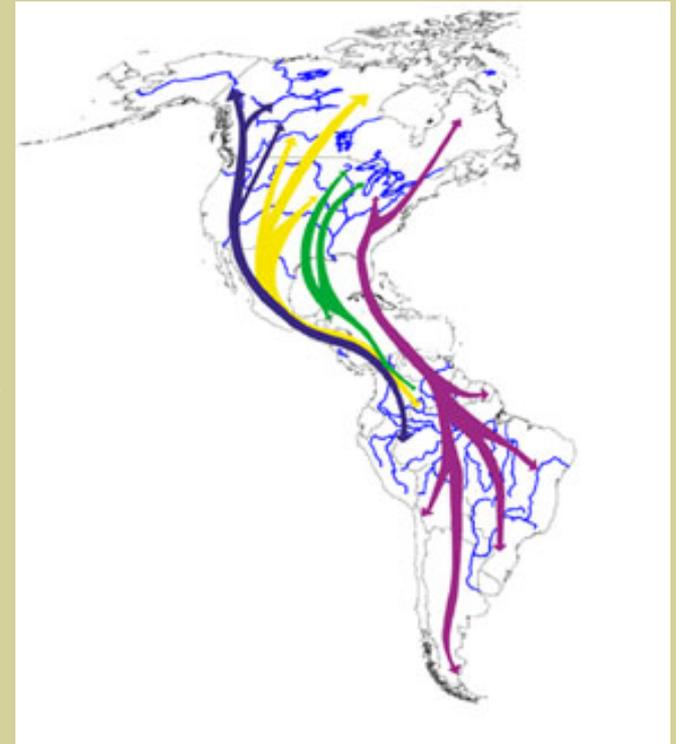
4. Non-Frivolous Use of Wildlife –

Although laws could govern access to wildlife and ensure that all citizens had a say in its protection, there has to be guidelines as to appropriate use. This is defined as killing for food and fur, self-defense, and property protection, categories that are broadly interpreted.

Seven Sisters for Conservation

5. Wildlife is Considered an International Resource –

The boundaries of states and nations are of little relevance to migratory wildlife and fish, and policies and laws for wildlife conservation have to address this reality. The Migratory Bird Treaty Act of 1918 is an excellent example of successful international cooperation.



Migratory bird paths



Seven Sisters for Conservation

6. Scientific Management –

Interest in science and natural history was deeply ingrained in North American society, a fact reflected in the emphasis placed on recording wildlife habits and diversity by almost every major expedition charged with mapping the continent, along with the enormous popularity of amateur natural history collections. Hunters and anglers are, by habit and inclination, naturalists. Science is identified as a crucial requirement of wildlife management. For this Aldo Leopold, in his **1930 American Game Policy**, credited Theodore Roosevelt, explicitly stating that science should be the underpinning of wildlife policies.



Seven Sisters for Conservation

And, the **1937 Federal Aid in Wildlife Restoration Act** set a precedent for the role of science over politics as the proper tool to discharge wildlife policy. Comprehensive conservation principles and their scientific application led to increased professional management of hunting programs. As a result, hunting is accessible to citizens of all social classes in the United States and Canada, a feature not found in many other conservation models.

Seven Sisters for Conservation

7. Democratic Rule of Law –

Wildlife is allocated for use by citizens through laws. This protects against the rise of elites who would appropriate wildlife to themselves (as occurred in Europe). All citizens can participate, if necessary through the courts, in developing systems of wildlife conservation and use.



Threats to the PTD

The keystone of the North American Model is that wildlife is managed as a public trust resource. An uninformed public makes wildlife management difficult to effectively address.



Threats to the PTD

- Claiming ownership of wildlife as private property
- Unregulated sale of wildlife
- Prohibitions on access and use of wildlife
- A value system oriented toward animal rights (and/or welfare)
- Lack of Science oriented approach to land management





Undesirable Outcomes

A number of undesirable outcomes may result from a lack of a PTD-oriented model of management including:

- Wildlife resources are viewed as less important or relevant to the general public, and not warranting public support for conservation.
- Wildlife resources are viewed as an artifact of the past separated from modern life, to be viewed and appreciated, yet with a lack of understanding and acceptance of utilization concepts of sustainable use.
- Wildlife resources are viewed as a liability or threat to be minimized to the extent possible rather than an asset to be conserved and managed to sustain benefits for the current and future generations.

Recommendations

Recommendations to help trustees of the public's wildlife ensure wildlife continues to be a public trust resource and that the public has access to its wildlife in perpetuity:

- Statutory changes
- Policy changes
- Outreach and education





Recommendations

Statutory change:

Strengthen language in state laws to recognize PTD in wildlife.



Recommendations

Policy change:

Increase the focus within state and federal government to provide for holistic wildlife management based on the N. A. Model of Wildlife Conservation.



Recommendations

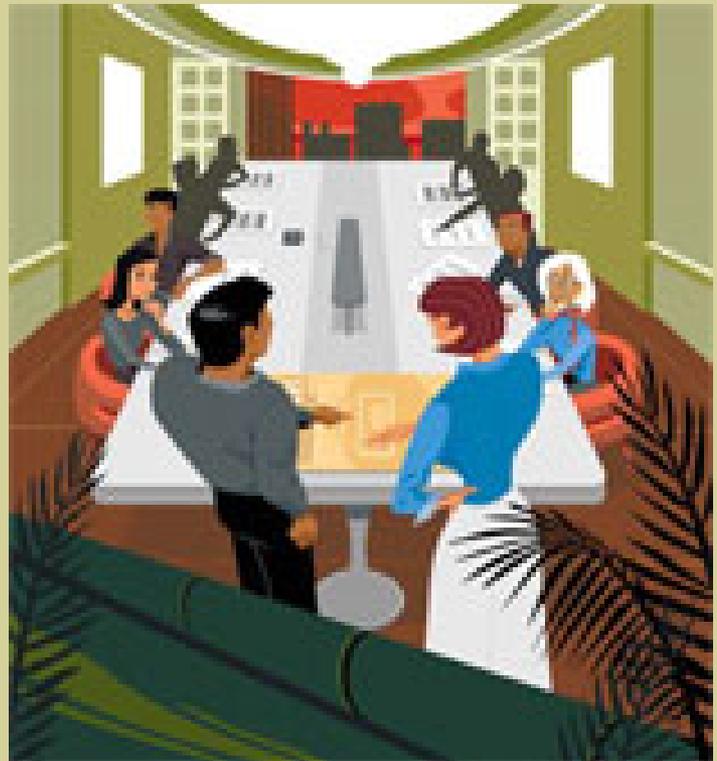
Outreach and Education:

- Teach N. A. Model in law schools and universities.
- Promote young children's understanding of the importance of wildlife conservation.



Thank you!

MAFWA, through conferences like this one, contributes to the advancement of the Public Trust Doctrine the North American Model of Wildlife Conservation.





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