Ecology Law Quarterly

Volume 44 | Issue 2 Article 5

9-15-2017

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In 2016, the United States Supreme Court decided Sturgeon v. Frost*, which posed the question of whether the federal government may regulate activities on nonfederal lands within the hundred million acres of land designated for preservation under a 1980 federal statute, the Alaska National Interest Lands Conservation Act (ANILCA). The Court did not answer the question, instead vacating the Ninth Circuit's interpretation of the relevant statutory language. Although inconsequential in itself,* Sturgeon *occupies a place in the history of litigation that originates in a rift between state and federal law governing subsistence hunting in Alaska.*

The source of the rift was an Alaska Supreme Court decision holding that the state constitution created a public trust guaranteeing a broad right of access to natural resources, including for hunting and fishing. Therefore, it found that a state statute granting rural Alaskans preference to engage in subsistence hunting, required for Alaska to manage hunting on federal lands under ANILCA, was unconstitutional. The state supreme court thus established Alaska as one of the few states that recognizes the public trust doctrine in wildlife enforceable against the state. Remarkably, the court did so at the cost to Alaska of controlling hunting on federal lands. Alaska zealously guards the use of its natural resources against federal control, as illustrated by the subsequent litigation over subsistence hunting that led to Sturgeon*. That the court would relinquish state control of hunting on federal lands shows its commitment to a public trust in wildlife unparalleled by other states.*

DOI: https://dx.doi.org/10.15779/Z38KH0DZ31

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Alaska may therefore appear to support extending the traditional public trust doctrine, based in navigable waters, to wildlife. However, this Note argues that public trust principles, which emphasize access, make the doctrine ill-suited to wildlife, which depends on conservation. The policy argument that the trust should extend to other natural resources, because it allows the public to enforce obligations against unaccountable agencies through recourse to the courts, is also ill-suited to wildlife management, which depends on agency expertise. Alaska's experience with the public trust in wildlife, which guarantees broad access as an enforceable trust obligation, illustrates these contradictions. This Note begins by recounting the history of legislation dealing with subsistence hunting in Alaska and the litigation that led to Sturgeon*. It then describes the traditional public trust doctrine, arguments for extending the public trust to wildlife, and why the traditional doctrine is incompatible with the purposes of wildlife law. Finally, it offers Alaska as an example of why the traditional public trust is incompatible with wildlife conservation.*

INTRODUCTION

Alaska is one of the few states that recognizes the public trust in natural resources outside of navigable waters[1] and one of fewer still whose courts recognize substantive trust obligations in these resources that are enforceable against the state.[2] Alaska's public trust in natural resources may outmatch that of any other state in its scope and rigor. It seems safe to say that no other state's courts have enforced trust obligations in the face of such great legal and political consequences.

Alaska's public trust in all natural resources developed in the course of litigation over the state's subsistence hunting statute.[3] Many Alaskans depend on hunting and fishing as an essential source of food,[4] a practice called subsistence hunting.[5] Alaska Natives in particular depend on subsistence hunting as part of their traditional rural way of life.[6] Congress abolished their aboriginal hunting and fishing rights as part of the 1971 Alaska Native Claims Settlement Act (ANCSA), in exchange for cash and the selection of unreserved federal lands.[7] ANCSA envisioned providing for Native subsistence hunting on

1. *See* 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*, 37 ECOLOGY L.Q. 53, 80 (2010) (observing that while some states have broadened the scope of public rights in navigable waters, most continue to limit the trust to navigable waters). A few states, notably California, Hawaii, and Alaska, have made environmental protection a trust obligation. *See id.* at 71, 83–89. California's environmental trust obligations have been held to extend to terrestrial wildlife by at least one court. *See* Ctr. For Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 595–600 (Cal. Ct. App. 2008). Hawaii's environmental trust obligations have not unequivocally been held to apply outside of navigable waters. *See* Craig, *supra* 1, at 124–25. For a survey of public trust doctrines among states in the eastern United States, see generally Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PA. ST. ENVTL. L. REV. 1 (2007).

2. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1471 (2013) ("[R]elatively few state court cases have expressly recognized the state conservation duties inherent in the public trust in wildlife."); Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 27 (2000) ("Courts have rarely addressed what obligations might co-exist with [public trust] authority" over wildlife); Patrick Redmond, Student Article, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RES. J. 249, 255–56 (2009) ("In . . . Alaska, judicial recognition of a public trust in the state's wildlife has been relatively unproblematic. . . . In other states . . . [t]he occasionally encouraging court statement often masks a much more complex trajectory of doctrinal development away from the public trust's expansion.") (emphasis omitted).

3. *See infra* Part IV.B.

4. *See generally* James A. Fall, *Subsistence in Alaska: A Year 2014 Update*, ALASKA DEP'T OF FISH & GAME (2016), http://www.adfg.alaska.gov/static/home/subsistence/pdfs/subsistence_update_2014.pdf.

5. Both state and federal law define subsistence as "customary and traditional uses . . . of wild, renewable resources for direct personal or family consumption as food . . . ." *See* 16 U.S.C. § 3113 (2012); ALASKA STAT. § 16.05.940(34) (2016). Subsistence includes both hunting and fishing; for simplicity, this Note refers to both activities using the term "subsistence hunting," unless referring specifically to subsistence fishing.

6. *See* Sophie Thériault et al., *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35, 37, 50, 54 (2005).

7. *See infra* Part I.A.1.

federal lands to be reserved for preservation under the Act, but Congress failed to approve the reservations.[8] Congress finally resolved the impasse with the 1980 Alaska National Interest Lands Conservation Act (ANILCA).[9] In addition to setting aside millions of acres of federal land in Alaska for preservation, ANILCA created a preference for rural Alaskans to engage in subsistence hunting on federal lands.[10] ANILCA let the state assume management of hunting on federal lands by adopting a statute with a rural subsistence preference.[11]

In 1978, anticipating the passage of ANILCA, the state enacted a statute with a preference that did not clearly favor rural hunters.[12] The statute was later amended to include an express rural preference.[13] Alaskans denied hunting permits under the state statute challenged the validity of the rural preference on the grounds that it violated sections of the state constitution protecting public access to the state's natural resources.[14] In the 1989 case *McDowell v. State*, the Alaska Supreme Court agreed. It found that the state constitution had codified the traditional public trust doctrine, guaranteeing a broad right of public access to natural resources, including wildlife.[15] It further found that public access constituted an important right that triggered heightened scrutiny of state restrictions under the state's version of equal protection analysis.[16] The rural preference did not correlate closely enough with subsistence use to pass scrutiny.[17] Consequently, the state lost the ability to manage hunting on federal lands.[18]

Ever since, Alaska has fought to establish state control of lands and resources that ANILCA placed in preservation under the protection of the federal government.[19] At first, the fight focused on regulation of fishing on rivers running through federal lands.[20] Recently, the case *Sturgeon v. Frost* expanded the fight to include control over nonfederal lands within the boundaries of federal preservation lands.[21] The plaintiff challenged federal authority to regulate these nonfederal lands under the language of ANILCA.[22]

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8. *See id.*
9. *See id.*
10. *Id.*
11. 16 U.S.C. § 3115(d) (2012).
12. Mary Kancewick & Eric Smith, *Subsistence in Alaska: Towards a Native Priority*, 59 UMKC L. REV. 645, 658, 663 (1991).
13. McDowell v. State, 785 P.2d 1, 2–3 (Alaska 1989).
14. *See infra* Part I.A.3.
15. *See* 785 P.2d 1, 8, 11 (Alaska 1989).
16. *Id*. at 9–11.
17. *Id*. at 10–11.
18. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 304 (3d ed. 2012).
19. *See infra* Part I.A.3.
20. *See id.*
21. *See* Sturgeon v. Masica, No. 3:11–cv–0183–HRH, 2013 WL 5888230, at *1, *7 (D. Alaska Oct. 30, 2013).
22. *Id.*

In 2016, the U.S. Supreme Court vacated the Ninth Circuit's interpretation of the relevant language.[23] The *Sturgeon* decision did not resolve any of the issues following from the Alaska Supreme Court's holding that the state's subsistence hunting law violated the public trust doctrine, but it does illustrate the consequences that the Alaska Supreme Court was willing to abide in enforcing a public trust in all natural resources.

Alaska's strong public trust in all natural resources, developed in the context of wildlife, has drawn the attention of environmental law scholars who advocate for extending the public trust doctrine, rooted in navigable waters, to wildlife.[24] These scholars argue that a public trust would impose an obligation on the state to protect wildlife and allow citizens to call on courts to enforce this obligation.[25] This argument fits within a broader argument for extending the public trust doctrine to all natural resources, originating from a 1970 article by Professor Joseph Sax.[26] Professor Sax argued that recognizing state trust obligations in natural resources would establish (1) a public interest in natural resources enforceable by citizens against the state and (2) require the state to justify its decisions affecting natural resources.[27] Together, citizen enforcement and procedural safeguards stood for "judicial skepticism" of agency decisions, which tended to favor narrow, organized interests over the public's broad but "diffuse" interest.[28]

This Note argues that the traditional public trust doctrine should not be extended to create enforceable obligations in wildlife. Such an extension lacks sound legal and policy grounds. First, the doctrine's emphasis on access is incompatible with wildlife conservation.[29] Second, wildlife conservation depends on complex ecological decisions that require agency expertise and discretion and that courts are not qualified to question.[30] Trust obligations enforceable by the court against wildlife management agencies interfere with agencies' abilities to effectively manage conservation.

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23. Sturgeon v. Frost, 136 S. Ct. 1061, 1070–72 (2016).

24. *See* Blumm & Paulsen, *supra* note 2, at 1482 (summarizing Alaska case law affirming the public trust in wildlife); Horner, *supra* note 2, at 58, 66–70 (analyzing Alaska's public trust in wildlife as a model for other states to follow); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 730 (1989) (noting that no state "has gone as [far as] Alaska" in applying the public trust doctrine to wildlife).

25. *See* Blumm & Paulsen, *supra* note 2, at 1486 ("Perhaps the most important effect of marrying states' sovereign ownership of wildlife with the public trust doctrine is that citizens gain the right to enforce states' responsibilities to preserve this resource."); Horner, *supra* note 2, at 54 (arguing that a public trust in wildlife might be read to allow the public, as beneficiaries, to sue for breach of trust duties, eliminating the problem of standing in environmental challenges to agency action); Meyers, supra note 24, at 733-34 (suggesting that applying the public trust to wildlife would create judicially recognizable rights in wildlife preservation).

26. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

27. *See id.* at 490–91, 556.

28. *Id.* at 489–91, 556–57.

29. *See infra* Part II.A.

30. *See infra* Part II.B.

Alaska's experience applying a strong version of the public trust to subsistence hunting illustrates why the doctrine should not create enforceable obligations in wildlife. Since announcing a broad right of access to wildlife and heightened scrutiny of restrictions to access under the public trust doctrine in *McDowell*, the Alaska Supreme Court has struggled to reconcile broad public access with the need to limit hunting for conservation.[31] As the Alaska Supreme Court has struggled to reconcile access and heightened scrutiny with conservation, it has shown less "judicial skepticism" and greater deference to wildlife agencies.[32] In a few cases, it has acknowledged the need for the Boards of Fisheries and Game, the state agencies charged with managing hunting and fishing, to exercise judgment in limiting access for conservation.[33]

This Note proceeds in five parts. Part I locates the *McDowell* court's announcement of a public trust in natural resources within the history giving rise to Alaska's subsistence preference, the history of the dispute between the state and federal governments over the rural preference, and the related legal battles that led to the *Sturgeon* case. It concludes that the *Sturgeon* case shows the far-reaching consequences of the *McDowell* decision, and that the *McDowell* decision therefore represents a strong endorsement of the public trust in wildlife.

Part II evaluates the arguments for extending the traditional public trust doctrine to wildlife. It begins by examining the legal arguments for a public trust in wildlife, tracing the development of the traditional public trust doctrine in navigable waters and its occasional application to aquatic wildlife. Advocates for extending the public trust to all wildlife base their legal argument on (1) the similarities between navigable waters and wildlife as a state-owned public resource under the state ownership doctrine, and (2) the application of the traditional doctrine to aquatic wildlife. Part II finds this argument unpersuasive. First, the traditional doctrine emphasized access to waters, which courts struggled to reconcile with the need to conserve aquatic wildlife. Second, the state ownership doctrine, overruled by the U.S. Supreme Court, has rarely been invoked by states or courts as creating trust obligations in wildlife. Part II then advances a policy argument against a public trust in wildlife. A history of unfettered access to wildlife and over-hunting necessitated the creation of state agencies to manage wildlife for conservation. Conservation relies on the expertise and discretion of these agencies to make decisions based on complex ecological factors.

Part III examines whether the public interest in wildlife is adequately protected in the absence of enforceable trust obligations. It first examines procedural safeguards, which Professor Sax found wanting in the area of natural resources. Looking at states that have recognized an important public

31. *See infra* Part V.
32. *See infra* Part V.C.
33. *See id*.

interest in natural resources through the public trust doctrines, Part III finds that these states do not require procedures beyond those contained in state environmental protection statutes modeled on the National Environmental Policy Act (NEPA). Given the Alaska Supreme Court's holding in *McDowell* that access to natural resources under the public trust doctrine entailed heightened equal protection scrutiny, Part III then examines constitutional safeguards of the public interest in wildlife. It finds that decisions affecting access to wildlife have been subjected to rational relations scrutiny under federal equal protection analysis. Part III concludes that, in light of necessary agency discretion in managing wildlife, NEPA-based procedural safeguards and rational relations scrutiny are proper.

Part IV examines the development of Alaska's constitutional public trust in natural resources, culminating in the *McDowell* decision. Part V discusses the Alaska Supreme Court's subsequent qualifications to the public trust announced in *McDowell*. The court has largely cabined *McDowell* to restrictions based broadly on a user's residence, but otherwise deferred to agency wildlife decisions. The court has even recognized the need for agency discretion in managing wildlife for sustained yield based on ecological factors. Part V ends by comparing Alaska's experience with other states that have recognized a public trust in wildlife. It finds that the normal procedural and constitution safeguards followed by these states are preferable to the enforceable obligations created by Alaska's public trust, and rejects the argument that the additional safeguards created by enforceable obligations are needed to protect the public interest in wildlife. The Note concludes by observing that the public trust is best considered as a policy statement that does not create safeguards beyond those that normally protect the public interest in natural resources.

I. BACKGROUND

This Part summarizes the history of subsistence law in Alaska, beginning with its origins in disputes over Alaska Native claims and the resulting subsistence statute. It then explains the structure of the statute and discusses the Alaska Supreme Court's decisions regarding its rural preference, culminating in the *McDowell* court's rejection of the preference under the state constitution's public trust doctrine. This Part then fits *Sturgeon* within the state-federal dispute over public lands and resources following the state's loss of subsistence management authority on federal lands. It presents the case's facts and procedural history, as well as the U.S. Supreme Court decision, before concluding that *Sturgeon* illustrates the Alaska Supreme Court's commitment to the public trust doctrine in wildlife.

A. History of Alaska's Subsistence Law

Alaska's state subsistence statute resulted from the elimination of Alaska Natives' aboriginal hunting and fishing rights by the federal government. The federal government eliminated these rights to make way for the state's economic development. ANILCA sought to remedy the loss by granting rural Alaskans engaged in subsistence a priority to hunt and fish on federal lands. The rural preference was intended to capture Native subsistence users without creating an explicit Native preference.

1. Native Claims and Creation of the Federal Subsistence Preference

Alaska's subsistence program developed from disputes over land that followed Alaska statehood. The Alaska Statehood Act allowed Alaska to select 103 million acres of unreserved federal land.[34] The harvest of mineral riches below the selected lands were to create an economic base to support state government.[35] However, two complications arose. First, Alaska Natives, fearing degradation of the lands that supported their traditional way of life, contested the state's land selections, forcing the Interior Secretary to impose a moratorium on conveyances.[36] Second, discovery of oil in Prudhoe Bay promised an economic bonanza, but one that depended on settling title to land along the construction route of a trans-Alaska pipeline.[37]

The ANCSA extinguished aboriginal land claims in exchange for $963 million and forty-five million acres of federal land not already claimed by the state.[38] However, while the federal government intended for the cash and land settlements to partially serve as compensation for the loss of aboriginal lands, they also intended for them to provide Alaska Natives with the means for economic self-sufficiency.[39] ANCSA departed from the reservation and federal trusteeship system that defined Native status elsewhere.[40] Instead, for-profit corporations were formed to receive the cash and land settlements.[41] Each Alaska Native became a shareholder in corporations for the village and region where they resided.[42] Village corporations were entitled to select relatively small tracts of surrounding land, while regional corporations were entitled to

34. CASE & VOLUCK, *supra* note 34, at 166–67.

35. *See* Trustees for Alaska v. State, 736 P.2d 324, 336 (Alaska 1987) (citing statement of Representative Dawson on the purpose of the grant).

36. *See* CASE & VOLUCK, *supra* note 34, at 167.

37. *See id.*

38. *See id.* at 171–75; 43 U.S.C. § 1603 (2012) ("extinguishment" is the term used by ANCSA).

39. *See* § 1601(b) (declaring that the settlement recognized "real economic and social needs of Natives . . . without creating a reservation system or lengthy wardship or trusteeship"); *see also* City of Angoon v. Marsh, 749 F.2d 1413, 1414 (9th Cir. 1984).

40. *See* § 1601(b).

41. *See* §§ 1606(d), 1607(a).

42. CASE & VOLUCK, *supra* note 34, at 170.

select remaining lands equal to about half of the total grant.[43] Regional corporations also received title to the subsurface estates of village corporation land.[44] Village and regional corporations evenly split the cash settlement.[45]

ANCSA also tried to resolve the question of which federal lands should remain in their natural state.[46] It authorized the Interior Secretary to select up to eighty million acres of unreserved federal land for addition to the National Park, Forest, Wildlife Refuge, and Wild and Scenic River systems.[47] Congress then had until 1978 to approve the Secretary's selections.[48] Pending congressional approval, the state and regional corporations could not select any of these lands.[49]

However, ANCSA failed to resolve the question of subsistence. It extinguished all aboriginal hunting and fishing rights along with claims to title.[50] Congress considered giving Alaska Natives the right to use public lands for subsistence, but its final bill contained no such guarantees.[51] Instead, the conference committee reported that it expected the Interior Secretary to ensure subsistence through the withdrawal of federal lands for preservation.[52] The state was also expected to "take any action necessary" to ensure Native subsistence.[53] But the domination of the state's fish and game boards by non-Native and urban interests precluded subsistence protection.[54] Meanwhile, the population boom that accompanied construction of the trans-Alaska pipeline led to greater competition for fish and game.[55]

Whether withdrawal of federal lands for preservation would provide for Alaska Native subsistence went unanswered during the 1970s. Pressured by interests characterizing the provision as an attempt to "lock up" Alaska, Congress refused to approve any of the Interior Secretary's selections for preservation.[56] As the deadline for approval approached with no congressional action forthcoming, President Carter unilaterally designated over one hundred million acres as National Monuments under the Antiquities Act.[57] The fierce

43. *Id.* at 171–72.
44. *Id.* at 174.
45. *Id.* at 175–76.
46. *See* § 1616(d).
47. § 1616(d)(2)(A).
48. § 1616(d)(2)(C).
49. § 1616(d)(2)(B)-(C).
50. § 1603.
51. A report commissioned to guide drafting of the bill recommended allowing use of public lands for subsistence. CLAUS-M. NASKE & HERMAN E. SLOTNICK, ALASKA: A HISTORY 289–93 (3d ed. 2011). The final Senate version included provisions allowing selection of federal land for hunting and fishing camps. CASE & VOLUCK, *supra* note 34, at 292.
52. CASE & VOLUCK, *supra* note 34, at 292.
53. *Id.*
54. *Id.* at 294–95.
55. *See id.*; Kancewick & Smith, *supra* note 12, at 656.
56. CASE & VOLUCK, *supra* note 34, at 168–69.
57. *Id.*

backlash in Alaska forced Congress to select federal lands for preservation and decide how they would support subsistence.[58] This resulted in ANILCA.[59]

ANILCA rescinded President Carter's designations, set aside 104 million acres of federal land, and created a preference for rural Alaskans to use federal lands for subsistence.[60] ANILCA's drafters recognized an obligation to fulfill ANCSA's promise to use federal lands for Native subsistence, and the original bill would have granted a preference to Alaska Natives.[61] But the bill envisioned state enforcement of subsistence and the state argued that a Native preference would violate the equal protection clause of its constitution; the final bill instead contained a rural preference.[62] Legislators believed that, since most rural Alaskans were Natives, the bill would achieve the same effect as one with a Native preference.[63] ANILCA affirmed a policy of protecting Native subsistence rights—the findings section declared that the law's subsistence provisions were meant to "fulfill the policies and purposes" of ANCSA and invoked the federal government's "constitutional authority over Native affairs."[64] The next subpart summarizes the structure of the federal rural preference and the corresponding structure under the state subsistence statute.

2. Framework of Federal and State Preferences

ANILCA's subsistence scheme, like ANCSA's claims settlement and the substitution of a rural preference for a Native preference, sought an accommodation of state interests, letting the state assume management of hunting and fishing on federal lands by adopting a statute that complied with ANILCA's rural preference. However, the state's initial statute did not contain an express rural preference. The inconsistency foreshadowed the state-federal schism over subsistence and public lands discussed in the following sections.

ANILCA's rural preference consisted of two tiers.[65] Tier I applied when fish and wildlife populations were sufficient to satisfy the needs of subsistence and non-subsistence users without threatening sustainability of the population.[66] Sport and commercial users could take only after satisfaction of all subsistence needs.[67] Tier II applied if fish and wildlife populations fell

58. *See id.* at 296.
59. *Id.*; *see* 16 U.S.C. § 3101 (2012).
60. *See* §§ 3101, 3113, 3114; Sturgeon v. Frost, 136 S. Ct. 1061, 1066 (2016).
61. Kancewick & Smith, *supra* note 55, at 657–58.
62. *See id.* at 658.
63. *Id.* at 645–46.
64. § 3111(4).
65. The terms "Tier I" and "Tier II" are drawn from regulations implementing Alaska's subsistence statute. *See* ALASKA STAT. § 16.05.258 (2016). The Alaska Supreme Court uses this terminology. *See, e.g.*, Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168, 174 (Alaska 1985). Since the federal and state subsistence statutes share a similar framework, the Alaska terms are used here to describe the federal framework.
66. § 3114.
67. Kancewick & Smith, *supra* note 55, at 659.

below levels that could sustainably provide for all subsistence users, and only some subsistence users could be allowed to take.[68] The Interior Secretary[69] would make allowances based on customary reliance, local residency, and availability of alternative resources.[70]

ANILCA's subsistence preference applied only to federal lands.[71] ANILCA allowed Alaska to assume management for subsistence on federal lands by adopting a consistent state subsistence law.[72] Alaska, in anticipation of ANILCA, enacted a complying statute in 1978 that essentially adopted ANILCA's two-tier system.[73] Tier I provided for satisfaction of subsistence uses before allowing non-subsistence users.[74] Tier II granted preference, when fish and game populations could not meet all subsistence uses, to uses based on the same factors set forth under Tier II of ANILCA.[75] But the Alaska law departed from its federal counterpart in one key respect. ANILCA defined subsistence as "customary and traditional uses by *rural* Alaska residents . . . for direct personal or family consumption."[76] The Alaska law likewise defined subsistence to include "customary and traditional uses," but it omitted the rural criterion included in the ANILCA definition.[77] The difference set the stage for a tug-of-war between the Alaska legislature and the state supreme court over whether a rural preference could exist under the state subsistence statute, leading the court to ultimately declare a rural preference as a violation of the state constitution.

3. Alaska's Rejection of the Federal Preference and Aftermath

After the Alaska Supreme Court barred any rural preference, Alaskans and the state began to fight the federal government over the ownership of public lands and resources within the federal preservation system. However, at first it seemed that state-federal cooperation might be possible under a program of state subsistence management. Although the statute lacked an explicit rural preference, it was not immediately clear that a rural preference could not be established under it. However, in 1985 the Alaska Supreme Court clarified that a rural preference conflicted with the statute's purpose of broadly protecting historical subsistence use.[78] The state enacted a new statute including a

68. § 3114.
69. § 3124.
70. § 3114.
71. *Id.*; CASE & VOLUCK, *supra* note 34, at 299.
72. § 3115(d).
73. Kancewick & Smith, *supra* note 55, at 663.
74. Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168, 171 (Alaska 1985).
75. *Id*.
76. 16 U.S.C. § 3113 (2012) (emphasis added).
77. Kancewick & Smith, *supra* note 55, at 663.
78. *See Madison*, 696 P.2d at 176.

qualified rural preference to retain subsistence management on federal lands.[79] But in the 1989 *McDowell* case, the Alaska Supreme Court struck down the statute's rural preference as a violation of the state constitution's guarantee of "equal access" to natural resources, including a broad right of public access to resources such as wildlife and heightened scrutiny under equal protection.[80] The decision put the state out of compliance with ANILCA, and the federal government reclaimed management for subsistence on federal lands.[81]

Since the federal government reclaimed subsistence management on federal lands, the state and federal government have fought over whether the state's subsistence program applies to fishing in navigable waters running through federal land, an issue invoking questions of sovereignty. The question first arose in *Native Village of Quinhagak v. United States*.[82] Native villages sued the federal government for failing to protect their subsistence use of trout on rivers within a national wildlife refuge, in violation of ANILCA.[83] ANILCA defined public lands as "lands, waters, and interests therein" to which the United States held title.[84] At issue was whether the federal government's supreme navigational servitude or reserved water rights qualified as an interest in navigable waters.[85] The federal government countered that it did not have jurisdiction over navigable waters under ANILCA, because the state held title to the submerged lands beneath them.[86]

The issue arose again in the *Katie John* line of cases, initiated by Native Alaskans to force the federal government to enforce ANILCA's subsistence preference on navigable waters within a national park.[87] The federal government changed its position, conceding that it held reserved water rights in navigable rivers, and therefore had jurisdiction under ANILCA.[88] The Ninth Circuit held that the federal government did have jurisdiction over certain navigable waters appurtenant to federally reserved lands under the reserved water rights doctrine, but only to the extent that reserving water rights was necessary to achieve the land's statutory purposes.[89] The question of which navigable waters qualify as federal land under the subsistence provisions of

79. Kancewick & Smith, *supra* note 55, at 664–65. Whether an area qualified as rural under the law depended on whether subsistence constituted its primary economic activity. *Id*. at 665 n.103.

80. McDowell v. State, 785 P.2d 1, 6–9 (Alaska 1989).

81. CASE & VOLUCK, *supra* note 34, at 304.

82. 35 F.3d 388 (9th Cir. 1994).

83. *Id*. at 389, 390–91.

84. 16 U.S.C. § 3102(1) (2012).

85. *Quinhagak*, 35 F.3d at 392.

86. CASE & VOLUCK, *supra* note 34, at 305.

87. *Id.*; Alaska v. Babbitt, 72 F.3d 698, 699–701 (9th Cir. 1995).

88. *See Alaska*, 72 F.3d at 701. On petition by the state, the Ninth Circuit, sitting en banc, affirmed its earlier decision. The state petitioned for en banc review by the Ninth Circuit, which affirmed. John v. United States, 247 F.3d 1032, 1033 (9th Cir. 2001).

89. *Alaska*, 72 F.3d at 703–04.

ANILCA faces ongoing litigation,[90] with Alaska fiercely opposing federal jurisdiction at every turn.[91]

The history giving rise to Alaska's state subsistence statute illustrates a series of compromises between the state and federal government over the state's all-important interest in land and natural resources,[92] at the sacrifice of Alaska Native interests. The underlying disputes were fraught with anger and distrust at the federal government, as exhibited in the state's reaction to President Carter's attempt to "lock up" Alaska, and the resulting compromises were therefore delicate. The Alaska Supreme Court surely thought about the effect of its *McDowell* decision on the state-federal relationship and rights of Alaska Natives. That it still decided to strike down the rural preference as unconstitutional under the public trust doctrine demonstrates its commitment to enforceable trust obligations against the state. *McDowell* therefore stands as perhaps the strongest endorsement of the public trust in wildlife. The next subpart examines how the legal consequences of that decision continue to reverberate.

B. Sturgeon v. Frost

The *Sturgeon* case arose from fairly mundane circumstances, if only by Alaska standards: A moose hunter traveling by hovercraft to his preferred hunting grounds was stopped by park rangers for violating a federal ban on hovercrafts in rivers running through national park lands.[93] But in suing the National Park Service, the moose hunter, John Sturgeon, challenged the federal government's authority under ANILCA to manage nonfederal lands within the preservation system created by ANILCA. Sturgeon's challenge thus expanded on other post-*McDowell* challenges to federal control of public lands. Although the U.S. Supreme Court did not resolve the issue, the *Sturgeon* case highlights the continued legal consequences of *McDowell*, and the importance of the Alaska Supreme Court's endorsement in *McDowell* of the public trust in wildlife.

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90. *See* John v. United States, 720 F.3d 1214 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

91. *See, e.g.*, Alaska Legislative Council v. Babbitt, 181 F.3d 1333, 1335 (D.C. Cir. 1999) (affirming dismissal of suit brought on behalf of state legislature claiming that ANILCA violated principles of federalism and equal protection); Totemoff v. State, 905 P.2d 954, 958, 963–64 (Alaska 1995) (holding that the state could apply state hunting law on federal lands because ANILCA did not explicitly preempt state law and refusing to recognize reserved water rights under ANILCA because the U.S. Supreme Court had not ruled on the issue).

92. For a discussion of the critical importance of land and natural resources in the history of Alaska, see *infra* Part IV.A.

93. *See* Robin Bravender, *Moose Hunter's Unlikely Path to the Supreme Court*, E&E NEWS (Nov. 23, 2015), http://www.eenews.net/stories/1060028460.

1. Factual and Procedural Background

Park Service rangers found John Sturgeon traveling by hovercraft on the Nation, a small navigable river within Alaska's Yukon-Charley Rivers National Preserve, headed for the site of his annual moose hunt.[94] The rangers turned him back for violating a regulation banning hovercrafts within lands and waters administered by the Park Service.[95] Sturgeon sued the Park Service in the District Court for the District of Alaska, claiming that the federal government lacked authority to regulate Alaska's navigable waters, because the state owns navigable waters within its borders.[96] Moreover, he argued, section 103(c) of ANILCA barred the federal government from regulating lands within Alaska's federal conservation system that it does not own.[97]

The regulation in question was not issued under ANILCA, but the Park Service's general authority to regulate boating on waters within national park system lands.[98] Nonetheless, the legal issues raised bore a striking resemblance to those in *Katie John*. In *Katie John*, the Ninth Circuit held that section 102 of ANILCA, defining "public lands" under the Act, established reserved water rights to navigable waters appurtenant to federally protected lands.[99] The Ninth Circuit relied on the definition's inclusion of "lands, waters, and interests therein" to which the United States holds title.[100] Although the Ninth Circuit limited its ruling to reserved water rights for purposes of subsistence, it noted that the federal government may hold reserved water rights to navigable waters in Alaska under a variety of statutes.[101]

The district court in *Sturgeon* acknowledged that the federal government might regulate boating under reserved water rights, but declined to reach the question.[102] It ruled instead on Sturgeon's section 103(c) claim.[103] Section 103(c) of ANILCA states that non-federally owned lands within the federal preservation system in Alaska "shall [not] be subject to the regulations applicable solely to public lands within such units [within the system]."[104] The court held that since the hovercraft regulations did not apply "solely to public lands" within the system, they applied to navigable waters within the system, whether owned by the federal government or not.[105]

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94. *See id*.; Sturgeon v. Frost, 136 S. Ct. 1061, 1066–67 (2016).
95. *Sturgeon*, 136 S. Ct. at 1067.
96. *Id*.
97. *See* Sturgeon v. Masica, No. 3:11–cv–0183–HRH, 2013 WL 5888230, at *1, *7 (D. Alaska Oct. 30, 2013).
98. Sturgeon v. Masica, 768 F.3d 1066, 1079–80 (9th Cir. 2014).
99. Alaska v. Babbitt, 72 F.3d 698, 702 (9th Cir. 1995).
100. *Id*. at 701–02.
101. *See id.* at 702–03.
102. *Sturgeon*, 2013 WL 5888230, at *7.
103. *Id.*
104. *See* 16 U.S.C. § 3103(c).
105. *Sturgeon*, 2013 WL 5888230, at *8–9.

The Ninth Circuit upheld the district court's decision and reasoning, but seemed to interpret section 103(c) in a way that allowed for perverse results.[106] It stated that "only public land lying within [a unit of the preservation system's] boundaries may be subjected to [preservation system]-specific regulations—nonfederal land is expressly made exempt from such regulations."[107] This suggested that the Park Service could not regulate nonfederal lands within Alaska's preservation system according to rules specific to the Alaska system, but that it could regulate nonfederal lands according to nationally applicable regulations like the hovercraft ban.

The lower court decisions created ramifications far beyond navigable waters. ANILCA drew the boundaries of preserved lands to encompass entire ecosystems. Consequently, the preservation lands encompass over eighteen million acres of land owned by private individuals, the state, and Native corporations.[108] After the Ninth Circuit's decision, the Park Service proposed a rule that would impose stricter regulation of oil and gas drilling on inholdings within the National Park system. This rule alarmed both the state and regional Native corporations, which largely depend on oil revenues.[109]

2. The Supreme Court Decision

The Supreme Court ruled narrowly, vacating the Ninth Circuit's interpretation of section 103(c) as implausible, but declining to decide whether the federal government could regulate nonfederal lands within Alaska's preservation system under section 103(c) or reserved water rights.[110] The Court cited numerous exceptions to the Park Service's general regulatory authority contained in ANILCA[111] showing that "Alaska is often the exception, not the rule."[112] The Ninth Circuit's interpretation of section 103(c) would prevent the Park Service from managing nonfederal lands within Alaska's preservation system under Alaska-specific regulations and would allow the Park Service to regulate those nonfederal lands under national regulations. The Court concluded that this holding was contrary to ANILCA's recognition that Alaska's park lands may be treated differently.[113] The Court declined to rule on

106. *See* Sturgeon v. Masica, 768 F.3d 1066, 1075–79 (9th Cir. 2014).

107. *Id.* at 1076–77 (emphasis omitted).

108. *See* Sturgeon v. Frost, 136 S. Ct. 1061, 1062 (2016).

109. *See* NESHAP for Brick and Structural Clay Products Manufacturing and NESHAP for Clay Ceramics Manufacturing, 80 Fed. Reg. 65,470, 65,571, 65,573 (Oct. 26, 2015) (to be codified at 40 C.F.R. pt. 63); *see also* Brief of Amicus Curiae State of Alaska in Support of Petitioner at 20–21, Sturgeon v. Frost, 136 S. Ct. 1061 (2016) (No. 14-1209); Brief of Arctic Slope Reg'l Corp. as Amicus Curiae in Support of Petitioner at 13–15, Sturgeon v. Frost, 136 S. Ct. 1061 (2016) (No. 14-1209).

110. *See Sturgeon*, 136 S. Ct. at 1070, 1072.

111. *See id.* at 1070–71 (citing limited exceptions to restrictions on motorized transportation, improvements, and takings for purposes of subsistence, access to inholdings, and commercial and sport hunting).

112. *Id*. at 1071.

113. *Id.*

whether section 103(c) or the reserved water rights doctrine might provide authority to regulate nonfederal lands or waters, noting that the lower courts had not ruled on the question.[114]

This Part placed the *McDowell* court's announcement of a public trust in wildlife within the history leading to the creation of Alaska's subsistence statute and the post-*McDowell* disputes between Alaska and the federal government leading to the *Sturgeon* case. The subsistence statute, under which the federal government allowed the state to manage hunting and fishing on federal lands, was one of several compromises that sought to accommodate the state's interest in lands and resources. However, these compromises preserved a delicate relationship between the state and the federal government, as illustrated by the legal battles that followed the Alaska Supreme Court's striking down of a rural subsistence preference in *McDowell*. The *Sturgeon* case shows that the battle continues to rage. This Part therefore concludes that the *McDowell* court's endorsement of a public trust in wildlife enforceable against the state represents a remarkably strong commitment to the public trust in wildlife.

The next Part places *McDowell*'s version of the public trust in wildlife within the context of arguments for extending the traditional public trust doctrine in navigable waters to wildlife.

II. THE PUBLIC TRUST DOCTRINE AND ITS EXPANSION TO COVER WILDLIFE

This Part begins by examining the legal arguments for applying the traditional public trust doctrine to wildlife. It traces the historical development of the traditional public trust doctrine in navigable waters and the parallel development of the doctrine of sovereign ownership of wildlife. It finds that, despite the two doctrines' overlap, cases have split on whether the traditional public trust serves to guarantee access to, or to conserve, aquatic wildlife. Further, the doctrine of state ownership of nonaquatic wildlife has not been invested with the same public trust obligations. This Part then advances a policy argument against applying the traditional public trust doctrine. It examines the development of wildlife law, finding that a system based on access gave way by necessity to a system of state management that balances access with conservation.

A. Development of the Public Trust and State Ownership Doctrines

The public trust doctrine and wildlife law share origins. Roman law recognized wild animals as *res nullius*, or property owned by no one.[115] It

114. *Id.* at 1072.
115. Blumm & Paulsen, *supra* note 2, at 1452.

recognized waters as *res communes*, or property belonging to everyone.[116] The effect was the same; private individuals could not own either resource.[117] Medieval English law, by contrast, initially vested ownership of all property in the Crown, including waters and wildlife.[118] Wildlife became the exclusive property of the Crown, which exercised its authority to hunt in royal forests on private lands.[119] Over time, the Crown's proprietary ownership of waters and wildlife gave way to sovereign, or governmental, ownership, which imposed an obligation to manage them in trust for the public benefit.[120]

The Supreme Court first applied the public trust to state ownership of navigable waters in the 1842 case of *Martin v. Waddell's Lessee*.[121] The case concerned whether a riparian landowner, tracing ownership to a proprietary grant from the Crown, could exclude the public from harvesting oysters on submerged lands beneath the waters included in the grant.[122] The Court held that since the Crown held submerged lands in trust for the public, it could not grant their exclusive use to a private individual.[123] After the American Revolution, ownership of submerged lands passed to the states, which held them and the resources they contained under the same public trust.[124] Trust uses included a public right to fish in navigable waters.[125]

The Supreme Court expanded *Martin*'s holding in *Illinois Central Railroad Co. v. Illinois*,[126] which established the public trust doctrine in its traditional form.[127] The case concerned Illinois' sale of submerged lands below Chicago Harbor to a railroad company, including the right to develop those lands as seen fit.[128] The Court held that the public trust created by state ownership of submerged lands prevented the state from alienating those lands unless doing so promoted trust purposes.[129] It also clarified that trust uses

116. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633–35 (1986).

117. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 7–8 (3d ed. 1997).

118. Meyers, *supra* note 24, at 728.

119. *See* ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 22 (2009); BEAN & ROWLAND, *supra* note 117, at 8–9.

120. FREYFOGLE & GOBLE, *supra* note 119, at 23.

121. 41 U.S. 367 (1842); *see* BEAN & ROWLAND, *supra* note 117, at 10–11. *Martin* was the first case to use trust language in connection to state ownership of navigable waters. *See* Charles F. Wilkerson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 450 (1989). Public trust principles had earlier been applied by the New Jersey Supreme Court in *Arnold v. Mundy*, 6 N.J.L. 1, 38 (N.J. 1821), which *Martin* endorsed, but that decision did not use trust language. *See* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 42, 44–50 (2007).

122. BEAN & ROWLAND, *supra* note 117, at 10–11.

123. *Id.* at 11.

124. *Id.*

125. *See Martin*, 41 U.S. at 411–14.

126. 146 U.S. 387 (1892).

127. Sax, *supra* note 26, at 556–57.

128. *Ill. Cent. R.R. Co.*, 146 U.S. at 438–39, 450–51.

129. *Id*. at 452–53.

included navigation and commerce, as well as fishing.[130] That the grant might inhibit commercial development of the harbor struck the Court as an especially unforgivable dereliction of trust responsibilities.[131] Thus, while the *Martin* court held that a private individual could not exclude public trust uses of submerged lands, the *Illinois Central* court held that public trust obligations could be enforced against the state.

Courts traditionally applied the public trust doctrine, in the spirit of *Illinois Central*, to commerce and economic development; access to routes of commerce seemed to take precedence over other forms of public benefit.[132] However, in 1970, Professor Joseph Sax published a landmark article advocating for application of the public trust doctrine to other natural resources.[133] Sax asserted that the doctrine's essence lies in a recognition of a special public interest in resources with a public nature.[134] Moreover, the precedent set by *Illinois Central*, that public trust obligations could be enforced against the state, might give private parties a means for judicial enforcement of the public interest against agency management decisions influenced by narrow interests.[135] Sax reasoned that *Illinois Central* also stood for "judicial skepticism" of governmental decisions affecting public resources.[136]

Wildlife seems especially suited to public trust protection under Sax's analysis because of its peculiarly public nature and because the traditional public trust doctrine had been applied to aquatic wildlife, as in *Martin*.[137] These characteristics suggest that the doctrine may apply to non-aquatic wildlife as well.[138] However, several problems stand in the way of extending the traditional public trust to wildlife.

First, the traditional public trust doctrine's emphasis on access to resources and their economic development conflicted with the conservation purposes advocated for extending the doctrine to wildlife. The *Martin* court held that the public enjoyed a right of free access to fish in navigable waters.[139] Some seminal cases likewise held that the public trust entailed free access to

130. *Id.* at 452.

131. *See id.* at 454 ("The harbor of Chicago is of immense value . . . in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose . . . is a proposition that cannot be defended.").

132. *See* Lazarus, *supra* note 116, at 711; Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351 (1998).

133. Sax, *supra* note 127, at 556–57.

134. *Id.* at 478–85.

135. *Id.* at 490–91, 556.

136. *Id*. at 491.

137. *See* Blumm & Paulsen, *supra* note 115, at 1466; Meyers, *supra* note 118, at 728–30.

138. *See* Blumm & Paulsen, *supra* note 115, at 1466; Meyers, *supra* note 118, at 728–30.

139. *See* Martin v. Waddell's Lessee, 41 U.S. 367, 411–14 (1842).

fisheries,[140] while others held that trust justified limitations on fishing for conservation.[141] It is not clear what trust obligations attached to aquatic wildlife under the traditional doctrine.

Second, the evolution of sovereign ownership of wildlife in the United States followed a different course from that of navigable waters. Courts applied the traditional public trust doctrine to aquatic wildlife by reference to sovereign ownership of submerged lands and navigable waters.[142] Thus, it is not clear that whatever trust obligations attached to aquatic wildlife would also apply to non-aquatic wildlife. In fact, American courts have applied a separate doctrine derived from Crown ownership to non-aquatic wildlife: the state ownership doctrine. This doctrine has not been held to apply the traditional public trust obligation of access to wildlife.

The Supreme Court recognized the state ownership doctrine in the 1896 case *Geer v. Connecticut*.[143] The case concerned a Connecticut law prohibiting transportation out of state of game birds killed in Connecticut.[144] The court first reviewed the history of wildlife law from ancient times through *Martin* and contemporary cases,[145] concluding that the state owned wildlife as "common property" and therefore held it "as a trust for the benefit of the people."[146] The Court then held that Connecticut could prohibit transportation of game birds out of state "to confine the use of such game to those who own it—the people of that state."[147] It further held that state ownership precluded application of the Commerce Clause.[148]

The Supreme Court subsequently overruled *Geer*, holding that state ownership cannot preclude invalidation of state game laws under the Commerce[149] and Privileges and Immunities Clauses.[150] Almost all states

140. *See* Carson v. Blazer, 2 Binn. 475, 478 (Pa. 1810) (holding that under common law, ownership of fisheries "is vested in the state, and open to all"); Arnold v. Mundy, 6 N.J.L. 1, 38, 47 (N.J. 1821) (holding that oyster beds on submerged lands were common property and open to public harvest).

141. *See* Blumm & Paulsen, *supra* note 115, at 1443–47; Smith v. Maryland, 59 U.S. 71, 75 (1855) (holding that Maryland could regulate methods of oyster harvesting); McCready v. Virginia, 94 U.S. 391, 391–92, 395, 397 (1876) (holding that Virginia could prohibit nonresidents from planting oysters on the state's submerged lands); Manchester v. Massachusetts, 139 U.S. 240, 265 (1891) (holding that Massachusetts could regulate methods for catching fish).

142. *See, e.g.*, *Martin*, 41 U.S. at 411 ("The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted (sic) to his care for the common benefit."); *Smith*, 59 U.S. at 75 ("Th[e] power [to regulate fishing] results from the ownership of the [submerged] soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held.").

143. 161 U.S. 519, 521–22 (1896).

144. *Id.*

145. *Id.* at 522–28.

146. *Id.* at 529.

147. *Id.*

148. *Id.* at 530–31.

149. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

150. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 385–86 (1978).

continue to claim sovereign ownership of wildlife.[151] However, many states do not express a concomitant public trust based on sovereign ownership.[152] Moreover, state obligations under such a public trust are not clear. Many state legislatures and courts claim that state ownership entails management for the "benefit of all people" or for "the common good."[153] Yet states whose constitutions proclaim an environmental public trust have often failed to execute the trust through legislation,[154] and courts have refrained from finding particular obligations, often giving deference to agency decisions.[155]

There are good policy reasons for why legislatures and courts have generally not extended the traditional public trust doctrine to wildlife, or created enforceable obligations stemming from state ownership of wildlife. These policy reasons are discussed in the next subpart.

B. Development of American Wildlife Law

Hunting in early America served strictly utilitarian purposes, primarily subsistence.[156] Those who hunted tended to do so for lack of better means for earning a living.[157] A system of "free taking" took hold: Whereas English law limited hunting rights first to the Crown and then to wealthy landowners, early American law allowed hunting regardless of class or land ownership, including hunting on the unimproved private property of others.[158] Free taking represented a basic right under early American wildlife law.[159]

Preventing depletion of wildlife had always been a problem under the free taking system.[160] Lawmakers responded by imposing restrictions to manage wildlife populations using the sustained yield principle.[161] Restrictions included closed seasons and prohibitions on hunting near populated areas.[162] However, the absence of an infrastructure for enforcement prevented restrictions from having much effect.[163] During the nineteenth century, subsistence hunting gave way to agriculture, and hunting became the pursuit of

151. Blumm & Paulsen, *supra* note 115, at 1462.
152. *See id.* at 1471–72.
153. *See id*. at 1473; FREYFOGLE & GOBLE, *supra* note 119, at 21–22.
154. Matthew Thor Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1170–71 (1997).
155. Blumm & Paulsen, *supra* note 115, at 1471; Patrick Redmond, Student Article, *The Public Trusts in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RES. J. 249, 257 (2009); Horner, *supra* note 2, at 27.
156. THOMAS A. LUND, AMERICAN WILDLIFE LAW 19 (1980); Blumm & Paulsen, *supra* note 115, at 1457 n.152.
157. LUND, *supra* note 156, at 20.
158. *Id.* at 24–25; BEAN & ROWLAND, *supra* note 117, at 9–10.
159. *See* LUND, *supra* note 156, at 57, 61.
160. *Id.* at 28–29.
161. *Id.*
162. *Id.*; Blumm & Paulsen, *supra* note 115, at 1457.
163. LUND, *supra* note 156, at 30–31.

commercial and sporting interests.[164] Maximum exploitation overtook the sustained yield principle due to its lack of enforcement capability.[165] Unchecked, commercial and sports hunters engaged in the wanton slaughter of wildlife.[166]

Eventually, sporting interests stepped in to prevent the total destruction of wildlife.[167] Sportsmen introduced two major reforms. First, they banned commerce in wildlife.[168] Hunting became a recreational pursuit, not a basic right.[169] Second, they introduced licensing, which provided the funding for state game agencies to enforce hunting restrictions and manage populations on the sustained yield principle, using scientific management practices applied by professional staff.[170] Since management decisions must respond to fluctuations in game populations and environmental conditions, state game and fishing agencies are afforded wide discretion by legislatures to manage takings.[171] These fluctuating restrictions led to successful recovery of game species threatened with extinction during the period of maximum exploitation in the nineteenth century.[172]

The development of American wildlife law on the ground illustrates why neither the traditional public trust nor a trust based on state ownership fits well within the context of wildlife management. The traditional public trust doctrine, with its emphasis on access and economic development, fits especially poorly. Unfettered access and commercial exploitation led to the decimation of wildlife. Meanwhile, the twin imperatives of sustained yield—deriving a source of management funding from licensing and maintaining wildlife numbers—do not indicate a simple obligation to guarantee access on one hand or conserve wildlife on the other.

However, the strongest argument for not applying trust obligations to wildlife may be the necessity of agency discretion in management. Professor Sax argued for extending the traditional public trust to other natural resources because doing so might give private parties a means for judicial enforcement of trust obligations against agency decisions.[173] Professor Richard Lazarus, in contrast, has criticized the use of the public trust to create a public interest in resources that courts could enforce against agency decision making. Lazarus highlights the danger in inviting courts to scrutinize legislative and

164. *Id.* at 57–61.
165. *Id.*
166. *Id.*
167. *Id.* at 61.
168. *Id.* at 63–64.
169. *See id.*
170. *Id.* at 61–63.
171. *See* Eric Biber & Josh Eagle, *When Does Legal Flexibility Work in Environmental Law?*, 42 ECOLOGY L.Q. 787, 808 (2016).
172. *See id.*
173. Sax, *supra* note 26, at 490–91, 556.

administrative decisions.[174] In the case of wildlife management, where decisions reflect careful balancing of ecological factors, the dangers of judicial second-guessing become pronounced. Courts are simply not qualified to address such questions.[175]

This Part examined the arguments for extending the traditional public trust doctrine to wildlife. Despite overlap between the traditional public trust and state ownership doctrines, the traditional public trust's emphasis on access is incompatible with wildlife management. On legal grounds, no clear public trust obligations pertain to wildlife. On policy grounds, agency expertise and discretion are necessary to manage wildlife for sustained yield. Consequently, judicial skepticism of wildlife management decisions, advocated as the reason that a public trust in wildlife is needed, should not apply. Moreover, judicial skepticism may not be needed. The next Part examines whether normal procedural and constitutional safeguards are sufficient to protect the public's interest in wildlife.

III. PROTECTING THE PUBLIC INTEREST IN WILDLIFE ABSENT THE PUBLIC TRUST

Advocates for creating a public trust in wildlife assume that trust obligations enforceable by courts exercising judicial skepticism against the state are necessary to protect the public interest in wildlife. If true, then deference to agency expertise, though crucial to effective wildlife management, might be insufficient. This Part looks at whether procedural safeguards protect the public interest in the absence of enforceable trust obligations. Given *McDowell*'s application of heightened scrutiny under the Alaska Constitution's version of equal protection to wildlife management decisions, this Part also looks at how equal protection is normally applied to such decisions.

A. Procedural Safeguards

Absent a constitutional public trust in wildlife, the public interest is only protected by general procedural and constitutional safeguards. Professor Sax believed that existing administrative procedural safeguards did not adequately protect the public's interest in natural resources.[176] He therefore framed expansion of the public trust doctrine not only in terms of substantive public interests in natural resources, but also in terms of procedural safeguards.[177] Particularly, Sax argued that courts should require agencies to bear the burden of justifying decisions regarding "diffuse public uses," like interests in natural

174. Lazarus, *supra* note 116, at 712.

175. *See id.* ("[C]ourts may lack sufficient competence in the environmental arena [because] [q]uestions arising in the environmental and natural resources law field can be so inordinately complex . . . .").

176. *See* Sax, *supra* note 26, at 556–57, 558.

177. *See id*. at 558.

resources, where decisions might be influenced by narrower, but more organized interests.[178] Essentially, Sax believed that administrative agencies were undemocratic, and the courts should assume the role of requiring greater process where natural resources were at stake.[179]

Apart from his criticism of judicial expertise in the realm of natural resources, Professor Lazarus has criticized Sax's characterization of agency decision making as anachronistic.[180] Sax's 1970 article predated developments in administrative law that, according to Lazarus, obviated the need for the public trust doctrine as a prod to "judicial skepticism."[181] These developments included liberalized standing requirements for environmental plaintiffs[182] and a more aggressive interpretation of the judicial role under the Administrative Procedure Act, including "hard look" review and a requirement that agencies fully explain the basis for their decisions.[183] Furthermore, environmental statutes enacted since Sax's article limit agency actions and, in the case of NEPA, require consideration of environmental impacts in the decision-making process.[184]

State courts have generally not recognized any special public interest or rights enforceable against states, even in states that recognize a constitutional public trust in natural resources.[185] In the few states with constitutional public trusts in wildlife, their courts have held that trust provisions are essentially procedural in nature.[186] Louisiana and Pennsylvania are two of the few states where courts have held that a constitutional public trust in natural resources carries procedural requirements.[187] The Louisiana Supreme Court has read the state's constitutional trust to require agencies to balance environmental impacts

178. *Id.* at 491, 561.

179. *Id.* at 558.

180. Lazarus, *supra* note 116, at 679–80.

181. *See id.* at 680–83; *see also* Sax, *supra* note 26, at 489–91, 556–57 (arguing that citizen enforcement and procedural safeguards stood for "judicial skepticism" of agency decisions).

182. Lazarus, *supra* note 116, at 659–60.

183. *Id.* at 684–87. According to Lazarus, environmental litigation pushed courts to apply stricter review, in part based on a realization that environmental interests lacked powerful representatives. *Id.* at 685–86.

184. *Id.* at 685–86.

185. *See* Blumm & Paulsen, *supra* note 115, at 1471 ("[R]elatively few state courts have expressly recognized the state conservation duties inherent in the public trust in wildlife.").

186. See Kirsch, *supra* note 154, at 1196 (noting that state courts have interpreted trust provisions to require "a cost-benefit test").

187. There are few detailed studies of how courts in states that have announced public trusts in natural resources have interpreted those trusts. *See generally* Blumm & Paulsen, *supra* note 2; Horner, *supra* note 2; Redmond, *supra* note 2; Kirsch, *supra* note 154. The studies that do exist tend to focus on individual decisions that have been overruled or not extended. *See id.* Louisiana and Pennsylvania are two of the only states where courts seem to have consistently upheld the doctrine, the other being Alaska. In 2008, a California appeals court held that members of the public may sue to enforce public trust obligations in wildlife. Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008). However, a search of the scholarly literature did not yield any studies of public trust developments since that case.

with social and economic benefits.[188] The court also held that a state environmental statute, modeled on NEPA, satisfied the constitutional mandate.[189] Although the statute required consideration of whether environmental impacts had been minimized, whether alternatives existed, and whether mitigation was possible, the requirements "le[ft] room for a responsible exercise of discretion and may not require particular substantive results."[190] Pennsylvania courts have required agencies to conduct similar balancing tests, but only to the extent required by state environmental statutes.[191] The refusal of Louisiana and Pennsylvania courts to require procedures beyond those mandated by state environmental statutes that are similar to federal statutes, suggests that courts in states with constitutional public trusts either do not believe that agency discretion poses a threat to natural resources, or believe that the benefits of agency expertise and discretion outweigh any threat of mismanagement.

B. Constitutional Safeguards

It does not appear that any states—except Alaska—have interpreted their constitutional public trusts to confer individual rights in natural resources.[192] However, in the context of wildlife, courts have been called on to apply equal protection to agency decisions regarding hunting laws restricting access to wildlife. Under equal protection analysis, unless a restriction implicates a fundamental right[193] or involves a suspect classification such as race or gender, courts apply rational relations scrutiny.[194] Rational relations scrutiny requires a reasonable connection between the differential treatment and a plausible, legitimate purpose for the treatment.[195] Courts have found that hunting laws do not violate equal protection where they serve a conservation purpose because conservation is a legitimate state interest.

Several cases concern differential treatment based on geography.[196] Where a section of land was closed to hunting for wildlife conservation, the Washington Supreme Court found that the closure did not violate equal

188. Save Ourselves, Inc. v. La. Envt'l Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

189. *Id*. at 1157.

190. *Id.* (citing Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (holding that courts may require strict adherence to NEPA procedures, but cannot review substantive decisions unless arbitrary and capricious)).

191. Horner, *supra* note 155, at 62–63.

192. Kirsch, *supra* note 154, 1171 ("[C]ourts have been unwilling to read constitutions' environmental protection provisions as having any effect on standing").

193. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 32–34 (1973).

194. *See* Hoffman v. United States, 767 F.2d 1431, 1434–35 (9th Cir. 1985).

195. *See* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

196. *See* FREYFOGLE & GOBLE, *supra* note 119, at 141–42. Hunting restrictions based on geography date to colonial America, where laws banned hunting near populated areas. *See* LUND, *supra* note 156, at 28; Blumm & Paulsen, *supra* note 115, at 1457.

protection.[197] It reasoned that by excluding all residents, the law treated them equally, and that conservation served a legitimate purpose.[198] By contrast, where one county charged hunting fees to nonresidents, but not to residents, the Florida Supreme Court found a violation of equal protection.[199]

There seems to be less case law addressing differentiation based on the identity of the hunter. However, in 2006 Alaska's federal district court held that the federal rural subsistence program did not violate equal protection, in a case brought by urban and out-of-state hunters claiming in part that the preference violated their fundamental right to travel.[200] The court, while recognizing that the rural classification was not suspect, held that it could withstand the most demanding scrutiny.[201] The Ninth Circuit upheld the decision in an unpublished opinion, ruling that the rural preference was subject to rational relations scrutiny.[202]

Access to the necessities of life does not constitute a per se fundamental right under equal protection analysis.[203] The Supreme Court has explained that unless a clear, constitutional right is violated, courts may not substitute their judgment for that of the legislature.[204] The challenge to the subsistence preference in federal court was based on the fundamental right to travel. However, it seems likely that subsistence hunting as a source of food would not qualify as a fundamental right under equal protection analysis, even though many Alaskans depend on it for food.

Consequently, even where states have constitutionalized the public trust in natural resources, courts have not read it to require procedures beyond those generally required by environmental statutes, and have not read it to require any substantive results. Nor have they read the doctrine as creating individual rights enforceable against the state. The general constitutional safeguard of equal protection allows that wildlife conservation is a legitimate state purpose. Even where hunting rises above a recreational interest, a conservation purpose would likely prevail in an equal protection analysis. Therefore, additional administrative or constitutional safeguards derived from the public trust

197. Cawsey v. Brickey, 144 P. 938, 939–40 (Wash. 1914).

198. *Id*. at 940.

199. Harper v. Galloway, 51 So. 226, 229 (Fla. 1910).

200. Alaska Constitutional Legal Def. Conservation Fund, Inc. v. Norton, No. A00-0167-CV-HRH, 2005 WL 2340702, at *5 (D. Alaska 2006). "Protecting the physical, economic, traditional, and cultural existence of people in Alaska is a compelling governmental issue as is 'the national interest in the proper regulation, protection, and conservation of fish and wildlife on public lands in Alaska.'" *Id.* at *6 (quoting 16 U.S.C. § 3111(5)).

201. *Id.* at *5–6.

202. Alaska Constitutional Legal Def. Conservation Fund, Inc. v. Kempthorne, 198 Fed. Appx. 601, 602–03 (9th Cir. 2006).

203. *See, e.g*., Dandridge v. Williams, 397 U.S. 471, 487 (1970) (holding that government-provided welfare payments do not constitute a fundamental right under equal protection analysis); Lindsey v. Normet, 405 U.S. 56, 72–74 (1972) (holding that eviction statutes did not violate a constitutional right to dwellings meeting certain standards).

204. *Lindsey*, 405 U.S. at 74.

doctrine would not only invite courts to interfere with agency discretion and expertise in wildlife management, but would also be unnecessary to protect the public interest in them.

Parts II and III argue that a public trust in wildlife is legally questionable, inadvisable, and unnecessary. Parts IV and V test this argument against Alaska's experience with a public trust in wildlife.

IV. ESTABLISHMENT OF ALASKA'S PUBLIC TRUST

As Justice Roberts observed in *Sturgeon*, "Alaska is often the exception, not the rule" when it comes to the relationship of its people to its resources.[205] Alaska's dependence on its natural resources for its economy and the sustenance of its people, coupled with a past where Alaskans were denied the benefits of these resources, led the state to adopt a constitution that sought to ensure development of its natural resources for the benefit of Alaskans. The Alaska Supreme Court has interpreted this constitutional context to guarantee a broad right of access to wildlife under the public trust doctrine and equal protection principles. But that interpretation has made it difficult for the state to manage wildlife for sustained yield.

This Part begins by discussing the history of natural resources management in Alaska prior to statehood, and its influence on the natural resources section of the state constitution. Early cases show a court unsure what obligations the trust imposes on the state in its resource management. Analysis of the *McDowell* decision shows the court strongly endorsed an obligation on the state to guarantee a right of "equal access," but split on the grounds and meaning of access. After *McDowell*, the court qualifying this right, deferring to agency decisions, and suggesting that the public trust is better framed in terms of sovereign ownership that grants the state discretion in resource management. This Part concludes by noting that subsistence represents an interest of greater importance than recreational hunting. However, the *McDowell* court's declaration of an enforceable right to access based on the public trust doctrine has not resulted in a system of subsistence management appreciably different from that which would have resulted from agency management free from the scrutiny of the courts.

A. Alaska's Natural Resources and Its Constitution

The natural resources provisions of Alaska's constitution grew out of the state's experience with exploitation during its territorial days. Natural resources have always represented Alaska's main economic asset,[206] but outside companies monopolized the territory's resources for their own immediate

205. Sturgeon v. Frost, 136 S. Ct. 1061, 1071 (2016).
206. *See* NASKE & SLOTNICK, *supra* note 51, at 235–36.

gain.[207] They avoided using local labor, resisted local taxation and self-government, and stifled local competition.[208] Similar to commercial exploitation of wildlife elsewhere in America,[209] outside enterprise decimated fur-seal, salmon, and whale populations to the point where the federal government intervened to limit harvests.[210] The depletion of these species threatened the survival of Alaska Natives who depended on them for food.[211]

Gaining control of natural resources drove the Alaska statehood movement.[212] As its main economic asset, their development was seen as key to establishing the economic and political power of the state against outside interests.[213] The natural resources article of the Alaska Constitution, Article VIII, therefore announces a policy favoring resource development. Article VIII, section 1 declares it "the policy of the [s]tate to encourage . . . the development of its resources . . . for maximum use consistent with the public interest."[214] Section 2 directs the legislature to "provide for the utilization, development, and conservation of all natural resources . . . for the maximum benefit of [Alaska's] people."[215]

Given the state's history of monopolization by outside economic interests, Article VIII also sought to ensure that economic gains from statehood benefitted Alaska residents broadly.[216] Section 3 states, "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[217] Section 15 prohibits the creation of an "exclusive right or special privilege of fishery."[218] Section 17 requires that laws governing the use of natural resources "apply equally to all persons similarly situated."[219] Still, the framers of Alaska's constitution were mindful of the wasteful exploitation that marked territorial days. Section 4 dictates the maintenance of renewable natural resources for sustained yield, "subject to preferences among beneficial uses."[220]

The sections promoting maximum common use and prohibiting special privileges to fisheries evoke the traditional public trust doctrine's policy of

207. *See id.* at 112, 157. These included the Alaska Commercial Company, which held a government monopoly on fur seals, and canning companies that dominated salmon fisheries. *Id.*

208. *Id.* at 112, 159, 168.

209. *See supra* Part II.B.

210. NASKE & SLOTNICK, *supra* note 51, at 107, 120, 160.

211. *Id.* at 119. Effects of overharvest fell heavily on Alaska Natives. Whalers decimated whale populations, and then turned to killing walruses for ivory and oil, pushing some villages to the edge of starvation. *Id.*

212. *Id.* at 235.

213. *See* GORDON HARRISON, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 129 (5th ed. 2012), http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.

214. ALASKA CONST. art. VIII, § 1.

215. *Id.* art. VIII, § 2.

216. *See* HARRISON, *supra* note 213, at 129.

217. ALASKA CONST. art. VIII, § 3.

218. *Id.* art. VIII, § 15.

219. *Id.* art. VIII, § 17.

220. *Id.* art. VIII, § 4.

access to navigable waters for economic development, although common use applies to all natural resources. Meanwhile, section 4's endorsement of the sustained yield principle, based on Alaska's history of wildlife depletion, evokes the modern approach of agency wildlife management, free from enforceable trust obligations. In a departure from other states' interpretations of the public trust doctrine, section 17 seems to apply a qualified equal protection framework to agency management, acknowledging the necessity to restrict use, but limiting discretion to ensure common use principles.

The public trust doctrine appears nowhere on the face of Alaska's constitution, and section 2's qualification that natural resources be developed and conserved for the "maximum *benefit*" of the people echoes the language of other states' declarations of state ownership, which do not include trust obligations.[221] Nonetheless, in applying the constitution to the state's subsistence law, the Alaska Supreme Court has interpreted sections 3, 15, and 17 together as forming a public trust obligating the state to ensure "equal access" to natural resources.[222]

B. Judicial Construction of Alaska's Constitutional Public Trust

The Alaska Supreme Court developed its constitutional public trust doctrine primarily in the course of litigation over subsistence preferences. Early cases recognized that Article VIII endorsed anti-monopoly principles in the use of natural resources, but also the state's authority to limit use for conservation. However, one case found that Article VIII's endorsement of the public trust doctrine in all resources might entail greater access than a prohibition on monopolies. This discrepancy led the *McDowell* court to read a broad right of access into the doctrine, based on a fishing case that reflected the traditional doctrine's emphasis on access. Concluding that the public enjoyed a broad right of access to natural resources, the court also concluded that the right was protected by heightened scrutiny under equal protection. The court allowed some outer limits to access, but in contrast to earlier courts, sidestepped conservation. Further, by applying heightened scrutiny, it implied that the state's authority to limit access for conservation might be significantly curtailed.

The 1978 subsistence law came before the Alaska Supreme Court in the 1981 case *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*, which found that anti-monopoly principles were tempered by state authority for conservation.[223] The Board of Fisheries had responded to increased demand for subsistence fishing permits on Cook Inlet[224] by closing the commercial salmon

221. *See id.* art. VIII, § 2 (emphasis added); *supra* note 155 and accompanying text.
222. *See* McDowell v. State, 785 P.2d 1, 8, 11 (Alaska 1989).
223. 628 P.2d 897 (Alaska 1981).
224. Madison v. Alaska Dept. of Fish & Game, 696 P.2d 168, 170–71 (Alaska 1985).

season early.[225] Salmon fishermen sued, arguing that the Board's decision created a special privilege of fishing in violation of section 15.[226] The court upheld the Board's decision, recognizing that while section 15 prohibited monopolies in fisheries, it did not prevent the Board from preferring some groups of users when it found limitations necessary for resource conservation and development.[227] User groups based on subsistence, sports, and commercial fishing were sufficiently broad to avoid preferences functioning as special privileges.[228] The decision echoed the tension in cases applying the traditional public trust doctrine to aquatic wildlife, but seemed to side with those cases recognizing that access must sometimes yield to conservation.[229] The decision was consistent with section 4's endorsement of preferential uses based on sustained yield, and thus agency discretion in wildlife management, but did not address sustained yield or the broad access policies set forth in sections 3 and 17.

Section 3 came before the court for the first time seven years later, in *Owsichek v. State*.[230] The court read the common use clause in light of its section 15 jurisprudence, but found that it might guarantee a broader right of access than the ban on monopolies or special privileges articulated in *Kenai Peninsula*. *Owsichek* concerned the constitutionality of a state regulation granting one guide an exclusive license to lead hunts in a designated area.[231] The court, noting an issue of first impression, first reviewed previous cases involving Article VIII.[232] While the cases cited dealt with grants of special privileges to fisheries, references to section 3 showed that the common use clause was meant to protect a similar right of broad public access in all natural resources.[233] The court then examined the common use clause's legislative history, finding that the framers of Alaska's constitution, probably relying on *Illinois Central* and *Geer*, included section 3 to codify a common law public trust in natural resources, including wildlife.[234]

The *Owsichek* court did not define the scope of the public trust imposed by common use, but acknowledged that section 3 might require a broader right of access than a ban on monopolies, and that under section 15 a "*minimum* requirement . . . is a prohibition against any monopolistic grants or special privileges."[235] It further observed in a footnote that section 17's uniform application clause might entail greater scrutiny of restrictions to access of

225. *Kenai Peninsula Fisherman's Cooperative Ass'n.*, 628 P.2d at 900–01.
226. *Id.* at 903–04.
227. *Id.* at 904.
228. *Id.*
229. *See supra* notes 139–141 and accompanying text.
230. 763 P.2d 488 (Alaska 1988).
231. *Id.* at 489.
232. *Id.* at 492.
233. *Id.* at 492–93.
234. *Id.* at 493–95.
235. *Id.* at 496 (emphasis added).

natural resources than required under the constitution's equal protection clause.[236]

Although the case did not concern conservation, the court implied the possibility that section 3 and 17's access policies might limit Board of Game or Fisheries management decisions in a way not considered by the court in *Kenai Peninsula*.[237] However, the court's open-ended decision observed that such limits were not "clearly defined."[238] It did note that the common use clause must allow traditional methods of wildlife conservation, such as licensing, bag limits, and closed seasons.[239]

McDowell followed the legislature's amendment of the subsistence statute after *Madison* put it out of compliance with ANILCA's requirement of a rural preference at Tier I.[240] The amendment added a Tier I rural preference, based on whether subsistence constituted an area's primary economic activity.[241] Subsistence fishermen denied permits because they did not meet rural residency requirements challenged the Tier I rural preference.[242] The court faced the question posed by *Owsichek*—whether public trust principles embodied in the common use clause entailed a right of access broader than a ban on monopolies.

A majority of the court held that such a broad right of access did exist, but divided on the scope of that right.[243] In a two-part plurality opinion, Justice Matthews first wrote that residency-based restrictions on access to natural resources facially violated a constitutional guarantee of "equal access" to natural resources under sections 3, 15, and 17.[244] He found the kernel of equal access in *Hynes v. Grimes Packing Co.*, a U.S. Supreme Court decision interpreting the White Act (the Act), a federal law prohibiting exclusive or several rights to fisheries during Alaska's territorial period.[245] The Supreme Court had applied the Act to invalidate a regulation granting special rights. The regulation in question prohibited commercial salmon fishing on a river running through an Alaska Native reservation, but allowed residents to fish the stretch of river within the reservation.[246] The Supreme Court held that the Act's prohibition of exclusive rights included rights particular to "any special group or number of people."[247] Since section 15 was based on the Act, Justice

236. *Id.* at 498 n.17.

237. *See id.* at 495 ("The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined.").

238. *Id.*

239. *Id.* at 492.

240. Kanewick & Smith, *supra* note 55, at 663.

241. *Id.* at 664.

242. McDowell v. State, 785 P.2d 1, 2–3, 6 (Alaska 1989).

243. *See id.* at 12.

244. *Id.* at 8, 11.

245. *Id.* at 6–7.

246. *Id.* at 7 (citing Hynes v. Grimes Packing Co., 337 U.S. 86, 122 (1949)).

247. Hynes, 337 U.S. at 122.

Matthews inferred that the framers of Alaska's constitution imported *Hynes*'s bar on closed user groups.[248] Drawing on *Owsichek*'s dictum that section 3 might go further than section 15's anti-monopoly policy, and analogizing section 3 to the section 17 uniform application clause, Justice Matthews concluded that section 3 prohibited closed groups for hunting and harvesting other natural resources.[249]

Justice Matthews reconciled his interpretation of section 15 with section 4's sanctioning of preferences among beneficial uses and *Kenai Peninsula*'s subsistence, sports, and commercial classifications by distinguishing uses from users. The state could grant preferences for different types of use, but it could not bar eligibility to join a user group.[250] The rural preference created such a bar by requiring urban subsistence users to move to a rural area to qualify for the preference.[251]

This holding left two questions. First, if section 15 prohibited creation of closed user groups, what purpose was served by section 17's prohibition of differential treatment of similarly situated users? Second, what discretion did "equal access" leave the Boards of Fisheries and Game in managing wildlife?

In the second part of his plurality opinion, Justice Matthews, acknowledging that some restrictions on access to resources are necessary for conservation, stated that the equal access clauses and, citing *Owsichek*, section 17 in particular,[252] entailed a "special type of equal protection guaranty," and that restrictions should be subject to "demanding scrutiny."[253] Under such a test, the state would have to demonstrate that a restriction served an "important" purpose and that the means for achieving that purpose caused "the least possible infringement on . . . open access values."[254] Justice Matthews found that the rural preference failed his demanding scrutiny test because it correlated weakly with subsistence use—many subsistence users resided in urban areas.[255]

Unlike equal protection analysis under the federal constitution, the Alaska Supreme Court does not reserve heightened scrutiny for fundamental rights or a few suspect classifications based on vulnerable minorities with a special claim to constitutional protection. Rather, in practice, the court decides the importance of a state interest in question, and the breadth of means available to carry it out, on an ad hoc basis.[256] Again, federal equal protection analysis

248. *McDowell*, 785 P.2d at 7–8.
249. *Id.* at 5–6.
250. *Id.* at 7–8.
251. *Id.* at 7.
252. *Id.* at 10.
253. *Id.* at 9, 11.
254. *Id.* at 10.
255. *Id.* at 10–11.
256. Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 253 (1998). For the court's interpretation of equal protection, see *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983).

subjects restrictions on recreational hunting to rational relations scrutiny.[257] Even where hunting might represent a necessity of life, federal equal protection would likely not subject it to a higher standard.[258] States that recognize a constitutional public trust in natural resources have seemingly not deviated from the federal approach.[259]

As one commentator has observed, Alaska's sliding scale approach allows the state supreme court to insert itself into the policy-making process, substituting its own judgment on issues that are properly decided by the legislature and agencies.[260] As Professor Lazarus notes in his critique of extending the public trust doctrine to all natural resources, creating an interest in resources enforceable against the state invites courts to scrutinize legislative and administrative decisions that they are not qualified to address.[261] Although Justice Matthews claimed that demanding scrutiny did not "imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons,"[262] his opinion left the Boards of Fisheries and Game's wildlife management decisions vulnerable to contravention by the courts. Demanding scrutiny implied neither deference to the agencies' expertise nor a clear standard of review.

For his part, Justice Rabinowitz, author of the *Owsichek* decision, strenuously dissented from the plurality opinion. First, he clarified that the public trust principles codified in section 3 empowered the state to manage resources for the benefit—not use—of all people.[263] This interpretation necessarily entails the authority to prefer some uses over others under section 4.[264] Second, he disagreed that subsistence represented a fundamental right entitled to the highest levels of scrutiny.[265] Rather, the importance of subsistence required only that a substantial relationship exist between restrictions and their purposes, which the rural preference satisfied.[266]

Two other justices joined Justice Matthews to create a majority holding that residency-based restrictions in subsistence were per se unconstitutional.[267] However, neither of the other justices agreed that demanding scrutiny was proper for restrictions on subsistence rights.[268]

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257. *See supra* notes 196–202 and accompanying text.
258. *See supra* notes 203–204 and accompanying text.
259. *See supra* notes 185–192 and accompanying text.
260. McGreal, *supra* note 256, at 252–53, 275–77.
261. Lazarus, *supra* note 116, at 712.
262. McDowell v. State, 785 P.2d 1, 9 (Alaska 1989).
263. *Id.* at 18 (Rabinowitz, J., dissenting).
264. *Id.* (Rabinowitz, J., dissenting).
265. *Id.* at 19 (Rabinowitz, J., dissenting) (citing, among others, Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371 (1978), for the proposition that recreational hunting does not constitute a fundamental right).
266. *Id.* (Rabinowitz, J., dissenting).
267. *Id.* at 12 (Compton & Moore, JJ., concurring).
268. *Id.* at 12–13 (Compton & Moore, JJ., concurring).

By beginning with section 15, the clause closest in content to the traditional public trust doctrine, interpreting it in a way that affirmed the traditional doctrine's open-access values, and applying that interpretation to all natural resources, the *McDowell* court arrived at a version of the constitutional public trust that might limit the state's ability to restrict access for conservation. The overlay of heightened scrutiny to restrictions on the right of access similarly conflicted with state discretion in imposing restrictions for conservation.

V. QUALIFYING ALASKA'S PUBLIC TRUST

While the *McDowell* decision recognized a right of access to natural resources, it did not specify limits on restrictions to access for conservation. It left three major questions unanswered. First, what constituted a user group, and what barriers closed membership to the group? Second, under *McDowell*'s equal protection analysis, what differential treatment within similarly situated user groups[269] for conservation would not infringe on equal access values? Third, would the legislature and agencies or the courts settle these questions?

This Part answers these questions in turn, tracing the court's evolving attitude toward restrictions on subsistence since *McDowell*. First, while the court has defined user groups broadly to encompass subsistence users,[270] it has narrowed access by upholding restrictions that reflect socio-economic and ecological judgments about how wildlife in an area should be used. It has continued to strike down purely residency-based restrictions as creating burdens that amount to closed membership. By contrast, it has found that restrictions based on wildlife use do not create burdens that close membership, in effect cabining *McDowell*'s prohibition on residency-based restrictions. Second, the court has followed a similar approach under equal protection analysis, voiding restrictions only where they are based on residence and do not bear a clear relation to use. Third, these decisions demonstrate a shift away from *McDowell* and toward greater deference to agency decisions, including a recognition of their expertise in making conservation decisions. This Part concludes by comparing Alaska's strong public trust in wildlife to other states that have endorsed a trust in wildlife. It argues that the normal procedural and constitutional safeguards followed by other states are preferable to the enforceable trust obligations created by Alaska's public trust, and rejects the

269. In its subsistence cases, the Alaska Supreme Court has not clearly distinguished user groups, the basis of the first part of the *McDowell* decision, from "persons similarly situated" under section 17, the basis of the equal protection analysis in the second part of the decision. Generally, the court appears to use the term corresponding to the part of *McDowell* it is applying. The terms do not appear to materially differ. For simplicity, this Part uses the terms interchangeably.

270. *See* Alaska Fish Spotters Ass'n v. State, 838 P.2d 798, 803 (Alaska 1992) ("[W]e have consistently defined 'user groups' in terms of the nature of the resource (*i.e.*, fish or wildlife) and the nature of the use (*i.e.*, commercial, sport or subsistence.")).

argument of advocates for applying the public trust to wildlife that additional safeguards created by enforceable obligations are needed.

A. Defining Similarly Situated User Groups

The *McDowell* court's prohibition on closed user groups did not specify the outer limits on the breadth of group parameters needed to avoid running afoul of equal access. The prohibition's basis in a case striking down fishing privileges limited to "any special group or number of people"[271] seemed to suggest that any subsistence preference might violate equal access. While the court has defined user groups broadly for subsistence purposes,[272] it has generally found that restrictions do not create burdens that close membership to subsistence users. It has only voided statutory provisions and regulations that create preferences based purely on a user's residence.

The court effectively limited *McDowell* to such residency-based restrictions by recognizing that, while subsistence may not be restricted through preferences based on the status of the user, it may be restricted through preferences based on the type of use under section 4. In *State v. Kenaitze Indian Tribe*, the court found that a post-*McDowell* amendment to the subsistence statute, which authorized the Boards of Fisheries and Game to eliminate the subsistence preference in areas where it did not constitute the primary economic activity, did not close access to subsistence users residing in those areas.[273] A group of Native subsistence users living in an area designated as exempt from the subsistence preference challenged the amendment as a violation of equal access under *McDowell*.[274] The court disagreed.[275] It observed that non-subsistence determinations represented a preference among beneficial uses allowed under section 4 and *Kenai Peninsula*.[276] Requiring a preference for subsistence hunting in areas where sport and recreational uses offered significant economic benefit would thwart the purposes of section 4.[277] The court distinguished the subsistence preference exemption from the invalidated rural preference by noting that residents of non-rural areas could still engage in subsistence use by traveling to areas where the subsistence preference remained in place.[278] Unlike the burden of moving to a rural area to engage in subsistence hunting, the inconvenience of traveling to engage in subsistence hunting did not create a group of subsistence users closed to

271. *McDowell*, 785 P.2d at 7 (1989) (quoting Hynes v. Grimes Packing Co., 337 U.S. 86, 122 (1949)).
272. *See Alaska Fish Spotters Ass'n*, 838 P.2d at 803.
273. 894 P.2d 632, 634 (Alaska 1995).
274. *Id.*
275. *Id.* at 642.
276. *Id.* at 640.
277. *See id.* at 640–41.
278. *Id.* at 641.

residents of non-preference areas.[279] However, the court did strike the use of proximity to domicile as a factor in deciding Tier II preferences, finding that it violated *McDowell*'s prohibition against residency-based restrictions.[280]

While in *Kenaitze* the court narrowed the scope of access based on preferential uses, in *State v. Manning* the court further narrowed access based on individual and community characteristics that reflected subsistence use.[281] Although the *Manning* court, like the *Kenaitze* court, held that purely residency-based restrictions could not be considered in preference decisions, it allowed that residence could be considered if it reflected dependence on subsistence hunting.[282] In *Manning*, a long-time subsistence hunter denied a Tier II permit challenged three regulatory criteria for determining Tier II preferences based on the statutory standard of "customary and direct dependence . . . as a mainstay of livelihood."[283] The three criteria were (1) the ratio of takings of the animal under Tier II restrictions to takings of other game in the community, (2) the cost of gas and groceries in the community, and (3) the availability of other local food sources.[284]

The court, applying the *McDowell* framework, found that the regulations were not per se impermissible under the first part of *McDowell* because they did not discriminate solely based on geography; rather, they accounted for individual and community economic factors.[285] The court acknowledged that the Tier II need-based preference inevitably reflected economic characteristics based on the location of a community.[286] The preferences struck down in *McDowell* and *Kenaitze*, it observed, "created an arbitrary preference based explicitly on where one lived."[287]

B. Restrictions within Similarly Situated User Groups

Although the *Kenaitze* and *Manning* courts upheld restrictions to access based on the burdens to membership in a subsistence user group, such burdens might still infringe on equal access values through differential treatment of similarly situated users under section 17. After all, *McDowell* indicated that section 17 might subject restrictions to access to a form of heightened scrutiny.[288] However, the court's post-*McDowell* equal protection analysis has reached similar results as its user-group analysis, striking down restrictions only where they reflect overly broad patterns of use based on residence.

279. *Id.*
280. *Id.* at 633, 638.
281. *See* 161 P.3d 1215, 1224 (Alaska 2007).
282. *See id.* at 1222–23.
283. *Id.* at 1217.
284. *Id.* at 1217–18.
285. *Id.* at 1222.
286. *Id.*
287. *Id.*
288. *See supra* Part IV.B.

Meanwhile, it has upheld restrictions where they reflect more specific patterns of use that are not explicitly based on residence. Indeed, the court has largely avoided questioning the fit between means and ends. Instead, it has imported *Kenaitze*'s finding that inconvenience does not amount to exclusion into the context of equal protection, ruling that non-residency burdens do not trigger equal protection analysis.

The equal protection cases have dealt with the authority of Boards of Fisheries and Game to regulate preferences at Tier I and Tier II. At Tier I, the boards may designate fish and game populations "customarily and traditionally taken or used for subsistence" and provide for their use before other uses are allowed.[289] At Tier II, where fish and game populations cannot provide for subsistence and other uses, the boards may prefer subsistence users whose "customary and direct dependence . . . [represents] a mainstay of livelihood."[290] The court has upheld restrictions based on this authority under equal protection analysis where they reasonably related to customary and traditional use or dependence as a mainstay of livelihood.

The court endorsed differential regulation of subsistence under this authority in *State v. Morry*, the first subsistence case to come before the court after *McDowell*.[291] In *Morry*, the court explained that the Boards of Fisheries and Game could apply the "customary and traditional" language to create preferences among uses, but not users.[292] The Alaska Native plaintiffs had argued that, while *McDowell* had invalidated the rural residency requirement, the statute's "customary and traditional" definition of subsistence allowed the state to prefer users based on their traditional patterns of use.[293] The court rejected this argument, finding that after the invalidation of the rural residency requirement, all Alaskans could qualify as subsistence users.[294] However, the "customary and traditional" definition gave the Boards of Fisheries and Game discretion to develop regulations based on historical use.[295]

The court affirmed the boards' authority to restrictively prefer customary and traditional uses in two cases against claims that such preferences infringed on equal access by subjecting similarly situated users to disparate treatment. In *Alaska Fish & Wildlife Conservation Fund v. State I*, it held that the Board of Fisheries could designate different levels of access to fish populations in different areas based on customary and traditional subsistence use in those areas, even if the result tended to favor rural Alaska Natives.[296] The Boards of Fisheries and Game had adopted a regulation creating enumerated criteria for

289. *See* ALASKA STAT. § 16.05.258(a)–(b) (2016).
290. *See* § 16.05.258 (b)(4)(B)(i).
291. 836 P.2d 358, 368 (Alaska 1992).
292. *See id*. at 368, 370.
293. *Id.*
294. *Id.* at 368.
295. *Id.* at 370.
296. 289 P.3d 903, 907–08, 910 (Alaska 2012).

determining customary and traditional subsistence use.[297] The Board of Fisheries, applying the regulations, opened a fishery favored by urban subsistence users to "personal use" fishing by all Alaskans, while limiting a nearby fishery used by Native Alaskans to subsistence use.[298] The plaintiffs claimed that the regulation and designations unfairly benefited rural Alaska Natives at the expense of urban subsistence users, in violation of equal access.[299] "[C]ultural, social, and economic" factors under the regulation, the plaintiffs argued, focused on types of user, not use.[300] The court found that the regulations and designations did not "subject any user group . . . to disparate treatment"[301] because they focused on the resource and its use, not its users.[302] Echoing *Kenaitze*, it also found that the inconvenience to urban subsistence users of fishing in a disfavored location did not amount to an unconstitutional burden on access.[303]

Given that the facts of the case focused on types of use and geography, the court could analogize *Kenaitze* to reject the disparate treatment claim without engaging in an equal protection analysis. However, a follow-up case presented the court with a subsistence restriction that blurred the line between use and user. In *Alaska Fish and Wildlife Conservation Fund v. State II*, the court held that a subsistence hunt limiting the methods of taking and consuming an animal based on historical patterns of Alaska Native use did not violate section 17.[304] At issue were two subsistence hunts. For the first hunt, based on a history of community hunting among Ahtna Natives, the Board required permittees to hunt in groups of at least twenty-five, share meat, and use other parts of the animal.[305] The second hunt relied on more recent patterns of household hunting, without restrictions on methods or use.[306] The first hunt had a longer season, larger area, and no restrictions on size of animals taken.[307] Both hunts were open to all subsistence users who agreed to follow the prescribed methods of hunting and consumption.[308] The plaintiffs argued that the two hunts amounted to disparate treatment of similarly situated users by limiting the more favorable first hunt to Native subsistence users.[309] Although the methods required under the first hunt embodied the cultural practices of a specific group, the court nonetheless held that they did not result in disparate treatment because

297. *See* ALASKA ADMIN. CODE tit. 5, § 99.010 (2017).
298. *Alaska Fish & Wildlife Conservation Fund*, 289 P.3d at 908, 910.
299. *Id.* at 908.
300. *Id.* at 909.
301. *Id.* at 910.
302. *Id.*
303. *Id.*
304. 347 P.3d 97, 100–01, 103 (Alaska 2015).
305. *Id.* at 100–01.
306. *Id.* at 101.
307. *Id.* at 101, 106.
308. *Id.* at 102.
309. *See id.*

all subsistence users were eligible to participate in the hunt if they agreed to follow them.[310] Once again invoking *Kenaitze*'s inconvenience standard, the court found that following the methods did not violate equal access.[311]

Since *McDowell*, the court has only struck down a subsistence restriction under an equal protection analysis where a residency-based regulation did not correlate closely enough to community use in *Manning*.[312] Again, *Manning* dealt with the three criteria developed by the Boards of Fisheries and Game to implement Tier II preferences based on "customary and direct dependence . . . as a mainstay of livelihood."[313] After holding that the factors—based on local hunting patterns, gasoline and grocery costs, and the availability of alternative food sources[314]—did not violate the first part of *McDowell* because they were not based solely on residence,[315] the court turned to *McDowell*'s equal protection analysis.[316] The court struck down the criterion based on hunting patterns, since it captured non-subsistence uses within a community.[317] However, the court upheld the other two criteria, finding that they embodied need-based characteristics consistent throughout a community and therefore represented reasonable proxies for individual dependence.[318]

Together, the post-*McDowell* cases applying equal protection analysis to subsistence show a reluctance to scrutinize regulations restricting access. Mainly, the court has avoided the question by finding that restrictions based on use do not create disparate treatment under section 17, even where the distinction between use and user blurs. *Manning* is notable because Tier II restrictions are based on user characteristics.[319] However, the *Manning* decision, consistent with *Kenaitze* and the cases following its lead, only voided a restriction based broadly on residence.

C. Political or Judicial Control: The Court Chooses Deference

McDowell's pronouncement of a public trust in natural resources, based on broad access and scrutiny of limits to access, threatened the state's authority and discretion to restrict use of natural resources for conservation. As argued in Part II, wildlife management agencies must be given discretion to limit harvests to maintain populations on the basis of sustained yield, which requires expert

310. *Id.* at 103.
311. *Id.*
312. State v. Manning, 161 P.3d 1215, 1221, 1223 (Alaska 2007).
313. *See id.* at 1216–17; ALASKA STAT. § 16.05.258(b)(4)(B)(i) (2016).
314. *Manning*, 161 P.3d at 1217–18.
315. *Id.* at 1222.
316. *Id.* at 1223.
317. *Id.*
318. *See id.* at 1224. The court found that the criteria would survive Justice Matthews' demanding scrutiny test, though it noted that the proper level of scrutiny under *McDowell* had never been settled. *Id.* at 1221, 1225.
319. *See* ALASKA STAT. § 16.05.258(b)(4)(B) (2016).

decisions based on consideration of complex ecological factors that courts are not qualified to second guess.

The court's post-*McDowell* decisions, in cabining its reach to invalidate restrictions based purely on a user's residence, have arguably exhibited greater deference to the Boards of Fisheries and Game than that mandated by *McDowell*. In doing so, the court has explicitly recognized the importance of agency expertise. In *Kenaitze*, the court noted that the Boards of Fisheries and Game must have authority to allocate use resources based on geography under section 4 because "[a]llocation decisions entail a complex mixture of biological, historical, and socio-economic factors[,]" which are "often competing."[320] "Allocation decisions," it noted, "are so complex and multi-faceted that they are not amenable to analysis under" heightened scrutiny.[321]

The court similarly recognized the Boards' conservation authority in a non-subsistence case, *Gilbert v. State*.[322] In *Gilbert*, the court upheld a Board of Fisheries decision to allocate different commercial harvests to adjacent fisheries based on salmon spawning patterns against a challenge that the decision violated section 17 as interpreted by *McDowell*.[323] The court observed that the public trust in fish entailed "the obligation and authority to equitably and wisely regulate the harvest is that of the state,"[324] but cited *Owsichek* for the proposition that such regulation included conservation measures such as licensing, bag limits, and seasonal restrictions.[325] It further observed that "resource management" represented a legitimate purpose that could justify restrictions under *McDowell*'s equal protection analysis.[326]

D. The Case against Alaska's Public Trust in Wildlife

Subsistence hunting represents an important interest to the many Alaskans who depend on wildlife as a source of food and tradition. The Alaska Supreme Court's decisions striking down explicit residency requirements have sought to protect this interest against discrimination by the state in deciding who may use Alaska's wildlife, and for what purposes. In these decisions, the public trust doctrine operates as a constraint on state action that interferes with needed discretion in wildlife management. Even though the court has largely deferred to the decisions of the Boards of Fisheries and Games unless they restrict access to wildlife based purely on a user's residence, the subsistence litigation following *McDowell* created uncertainty for the boards. It may continue to create uncertainty at the margins. The court may still choose to scrutinize

320. State v. Kenaitze Indian Tribe, 894 P.2d 632, 641 (Alaska 1995).
321. *Id.* at 641–42.
322. 803 P.2d 391 (Alaska 1990).
323. *Id.* at 393, 399.
324. *Id.* at 399.
325. *Id.*
326. *See id.* at 398–99.

subsistence restrictions under *McDowell*'s unsettled equal protection standard. The doctrine has also involved the boards in extensive litigation.

As shown in Part III, states recognizing a public trust in wildlife have relied on the procedures found in NEPA-based environmental protection statutes to safeguard the public interest in wildlife. Federal equal protection analysis likewise safeguards fairness in hunting restrictions. Alaska's experience with enforceable trust obligations, subject to heightened equal protection scrutiny, demonstrates that these normal procedural and constitutional safeguards are preferable to the additional safeguards advocated as a reason for applying the public trust to wildlife. The court's recent deference to subsistence decisions by the Boards of Fisheries and Game suggests it realizes that normal safeguards tend to sufficiently protect access to wildlife.

CONCLUSION

This Note has examined the argument for extending the traditional public trust doctrine in navigable waters to wildlife. Although parallels exist between the traditional public trust and the doctrine of state ownership of wildlife, the traditional public trust's emphasis on access conflicts with the emphasis on conservation in wildlife law—a hard-learned lesson from a history of unrestricted access.[327] State wildlife law generally grants agencies discretion in managing wildlife on the sustained yield principle because of the need to respond to fluctuations in game populations and environmental conditions.[328]

Alaska presents a counterexample of what happens where a constitutional public trust in wildlife, based on traditional trust doctrines of access, is interpreted to create rights and obligations enforceable by courts against state discretion in managing wildlife. The experience of Alaska shows that the traditional public trust is ill-suited to wildlife, that attempts at court-enforced protection of the public interest in natural resources hamstring agency management, and that those attempts ultimately prove unworkable.[329]

This is not to say that statements of public trust values in natural resources found in other state constitutions do not serve a worthy purpose. They affirm the state's role in protecting and conserving resources that benefit the public and in a sense belong to the public. But they are best regarded as policy statements, not as a vesting of individual rights against the state. Management of resources for the maximum public benefit depends on agency management, expertise, and discretion—especially in the context of wildlife—and, as recognized by courts in other states with constitutional public trusts, the public interest must rely on normal procedural safeguards and environmental statutes.

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327. *See supra* Part II.B.
328. *See* Biber & Eagle, *supra* note 171, at 787, 808, 817.
329. *See supra* Part V.