

MEMORANDUM

TO: Stephen S. Joiner, Esquire

FROM: National Legal Research Group, Inc.
Steven Shareff, Senior Attorney

RE: Virginia/Environmental Law/Wildlife/Public Trust
Doctrine—Ballot Initiatives

FILE: 25-22684-223

February 4, 1998

QUESTIONS PRESENTED

1. Whether the state has an affirmative duty to protect, manage, and conserve fish and wildlife resources under the public trust doctrine.
2. Whether the state can relinquish that obligation to a popular vote to establish management and protection practices for renewable wildlife and marine resources.

DISCUSSION OF AUTHORITY

The public trust doctrine refers to the duty of sovereign states to hold and preserve certain resources, including wildlife, for the benefit of the citizens. *See, e.g., D. Cottriel, The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?* 27 Pac. L. J. 1235, 1261 (1996). The doctrine traces its roots to Roman law. *See J. Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 UCLA L. Rev. 195, 196-98 (1980). Under the doctrine, the state "may not destroy or relinquish its control over public resources except under certain, very narrow circumstances." D. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 Pub. Land L. Rev. 87, 89 (1995); *accord J. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 489-91 (1970). Although states have broad discretion to implement the fiduciary obligations imposed by the public trust, states are not free to alienate or extinguish the trust. *See M. Blumm et al., Renouncing the Public Trust Doctrine: The Validity of Idaho House Bill 794*, 24 Ecology L.Q. 461, 493 (1997).

The modern public trust doctrine was first introduced into United States courts in the context of state sovereignty over navigable waters. See R. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 636-40 (1986). The United States Supreme Court's seminal decision in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), sets forth the central tenet of the public trust doctrine: The state holds natural resources in trust for the people and cannot alienate the trust *res*.

The *Illinois Central* Court considered the authority of the Illinois legislature to convey portions of the bed of Lake Michigan to a railroad. *Id.* at 452. The Court held that since the state holds submerged lands in trust for the people, it cannot convey those lands without some clear benefit to the trust:

The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. *The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . .*

. . . .

A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, then it can abdicate its police powers in*

the administration of government and the preservation of peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the State.

Id. at 452-54 (emphasis added).

Overall, the effect of *Illinois Central* has been "profound." The case has been relied upon hundreds of times in state cases applying the public trust doctrine to public resources, including wildlife. E. Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 Va. Env'tl. L. 713, 714 (1996); *see, e.g., California Trout, Inc. v. State Water Resources Control Board*, 255 Cal. Rptr. 184, 211-12 (Ct. App. 1989) (applying public trust doctrine to fish); *Wade v. Kramer*, 459 N.E.2d 1025 (Ill. Ct. App. 1984) (applying public trust doctrine to wildlife). Some states also have adopted the doctrine legislatively or constitutionally. *See* G. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Wildlife*, 19 Env'tl. L. 723, 730-31 (1989); *see, e.g.,* Alaska Const. art. VIII, § 3; La. Const. art. IX, §§ 1, 7; N.C. Gen. Stat. § 113-133.1.

Even without relying on the subsequent judicial expansion of the doctrine to include fish and wildlife, *see* Pearson, *supra*, 15 Va. Env'tl. L. at 714; Lazarus, *supra*, 71 Iowa L. Rev. at 649, there is sufficient precedent and logical justification for including wildlife within the coverage of resources protected by the trust doctrine. In *Geer v. Connecticut*, 161 U.S. 519 (1896), the United States Supreme Court applied the public trust doctrine to the

taking of wildlife. The issue in *Geer* was whether the state, consistent with the Commerce Clause, could forbid interstate transportation of game within its borders. *Id.* at 522. In affirming that power, the *Geer* Court observed that, at common law, wildlife, having no owner, were considered as belonging in common to all citizens of a state. *Id.* This principle of governmental control of wildlife was carried over into American society upon colonization. *Id.* 528-30. The *Geer* Court further reasoned:

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Id. at 529.

The *Geer* holding remained law for nearly a century, until the Supreme Court reconsidered *Geer's* constitutional interpretation in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). While overruling *Geer* as to the constitutionality of state prohibitions against interstate shipping, *Hughes* preserved the trust responsibility set forth in *Geer*. *Id.* at 338. With respect to the continued viability of the state ownership theory, the *Hughes* court stated that "[t]he whole ownership theory, in fact, is . . . but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* at 334. After *Hughes*, the trust responsibility that accompanied state ownership remains. *See, e.g., Clajon Produce Corp. v. Petera*, 854 F. Supp. 843, 851 (D. Wyo. 1994) (concluding that, after *Hughes*, the state's role in

governing and conserving wildlife remains unchanged); *State v. Fertterer*, 841 P.2d 467, 470 (Mont. 1992) (holding that state holds wildlife "in its sovereign capacity for the use and benefit of the people generally"); *O'Brien v. Wyoming*, 711 P.2d 1144, 1148 (Wyo. 1986); *see also In re Steuart Transportation Co.*, 495 F. Supp. 38, 39-40 (E.D. Va. 1980) (holding that state and federal governments can recover damages for harm to waterfowl under public trust analysis); *State v. New Jersey Central Power & Light Co.*, 308 A.2d 671, 674 (N.J. Super. Ct. Law Div. 1973), *aff'd*, 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975); *rev'd*, 351 A.2d 337 (N.J. 1976) (same).

In his widely cited law review article of 1970, Professor Sax developed the modern theory of the public trust doctrine as a tool to protect the public interest from the "insufficiencies of the democratic process." Sax, *supra*, 68 Mich. L. Rev. at 521. Sax states that

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

Id. at 490. Based on this premise, it follows, *inter alia*:

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

Musiker, *supra*, 16 Pub. Land L. Rev. at 96; *see, e.g., National Audubon Society v. Superior Court of Alpine County*, 189 Cal. Rptr. 346 (Cal. 1983). Thus, "the classic doctrine seems analogous to a conventional real property trust: the state, as title holder, assumes the role of trustee and must honor the interest of the trust's beneficiaries, the public, in its management decisions." Pearson, *supra*, 15 Va. Env'tl. L. at 714.

In its capacity as trustee of wildlife resources under the public trust doctrine, the state arguably is endowed with duties and obligations akin to an ordinary trustee. *See Slocum v. Borough of Belmar*, 569 A.2d 312, 317 (N.J. Super. Ct. Law Div. 1989) (holding that state has duties applicable to any other trustee). In theory, a private trust protects a corpus intended for the benefit of an individual or group from the perhaps shortsighted and biased control of one or more beneficiaries. Under traditional trust principles, the heart of a trust is the discretionary duties imposed upon trustees; delegation of these discretionary duties to the beneficiaries would defeat the purposes of the trust and render it a nullity. *See* 76 Am. Jur. 2d *Trusts* § 376 (1992); *see also* Restatement (Second) of Trusts § 171 (1959). According to the Restatement § 175 cmt. f, the "duty of the trustee is not only to take and keep control of the trust assets, but to take and keep exclusive control." The trustee has exclusive control over the trust property, subject only to limitations imposed by law or the trust instrument. *E.g., Continental Bank & Trust Co v. County Club Mobile Estates*, 632 P.2d 896 (Utah 1981).

Similarly, under the public trust doctrine, the state's duty to preserve and protect the public's interests in wildlife resources cannot be abdicated. The obligation and authority to

manage and conserve these resources is vested exclusively in the state. The state must consider diffuse and competing common needs and values when making decisions relating to the regulation and protection of wildlife, with the decision to allow or prohibit hunting and trapping being one of those decisions.

By extension, it is possible to argue that the public trust doctrine precludes the implementation of the trust relationship by the beneficiaries, that is, the public, through a ballot initiative. Although state and federal appellate courts have not addressed the validity of such a ballot initiative, Alaska Supreme Court Justice Compton addressed the issue in his concurring opinion in *Pullen v. Ulmer*, 923 P.2d 54 (Alaska 1996) (Compton, C.J., concurring).

In *Pullen*, an organization of fishermen brought an action challenging the certification of a ballot initiative providing that subsistence, personal use, and sport fisheries would receive preference in the allocation of salmon harvests. The Alaska Supreme Court held that the initiative constituted an "appropriation" of salmon, which was prohibited by Article XI, Section 7 of the Alaska Constitution.

In his concurring opinion, Chief Justice Compton disagreed with the reasoning underlying the majority's holding and instead opined that the ballot initiative was invalid under the Alaska Constitution, based on public trust principles. 923 P.2d at 54-55 (Compton C.J., concurring). Article XII, Section 11 of the Alaska Constitution permits the legislative power to be exercised by ballot initiative, unless "clearly inapplicable." The public trust relationship in Alaska is incorporated in Article VIII, Section 3 of the Alaska Constitution,

which reserves public resources to common use. *See Owsichek v. Alaska Guide Licensing & Control Board*, 763 P.2d 488, 495 (Alaska 1988).

In opining that an initiated law is "clearly inapplicable" to salmon allocation, Chief Justice Compton reasoned as follows:

In my view an initiated law is "clearly inapplicable" to the allocation of a resource reserved to the people for their common use. This is particularly so when the State holds the resource in trust for all the people of the State. The people, as beneficiaries of this trust, cannot dictate to the trustee the manner in which the trust is to be administered.

The uniqueness of this trust relationship in our government distinguishes it from most other relationships created by the Alaska Constitution. . . .

The trust relationship, the structure of the Department of Fish and Game, the agency responsible for implementing the State's trust responsibilities for the benefit of all the people of the State, and the detailed professional requirements that must be possessed by the Commissioner of Fish and Game, the executive who directs that agency, persuasively demonstrate the clear inapplicability of initiated laws which dictate policies regarding the "protection, management, conservation, and restoration of the fish and game resources of the state."

Pullen, 923 P.2d at 66.

As trustee over the state's public resources, the state has a fiduciary relationship with its citizen beneficiaries and an equitable obligation to control or regulate wildlife resources for the benefit of its people. This equitable obligation imposes an unwavering duty of complete loyalty to the citizen beneficiaries of the trust. Voters, unlike the state, are not the trustees of a state's natural resources. They are beneficiaries. Their relationship to each other is not a fiduciary one. Therefore, voters' conduct toward the trust property and toward

one another is not of the high standard required of the trustee. As beneficiaries, voters do not have an equitable obligation to deal with the trust property for the benefit of other citizen beneficiaries, nor do they bear an unwavering duty of loyalty to the beneficiaries of the trust. Allowing the people, through the initiative, to control and regulate the trust assets provides no protection of loyalty, equity, and fairness in the regulation of these resources for public trust purposes. Only the state as trustee can act as a fiduciary with the duty and authority to regulate equitably and wisely the use of the state's wildlife resources for the benefit of its people.

In conclusion, the public trust doctrine imposes upon the state a duty to manage wildlife resources for the benefit of all the people. The people, as beneficiaries, arguably may not dictate to the state how game resources are to be managed. Therefore, the public trust doctrine may be employed as a tool to challenge ballot initiatives that control or regulate the trust assets.