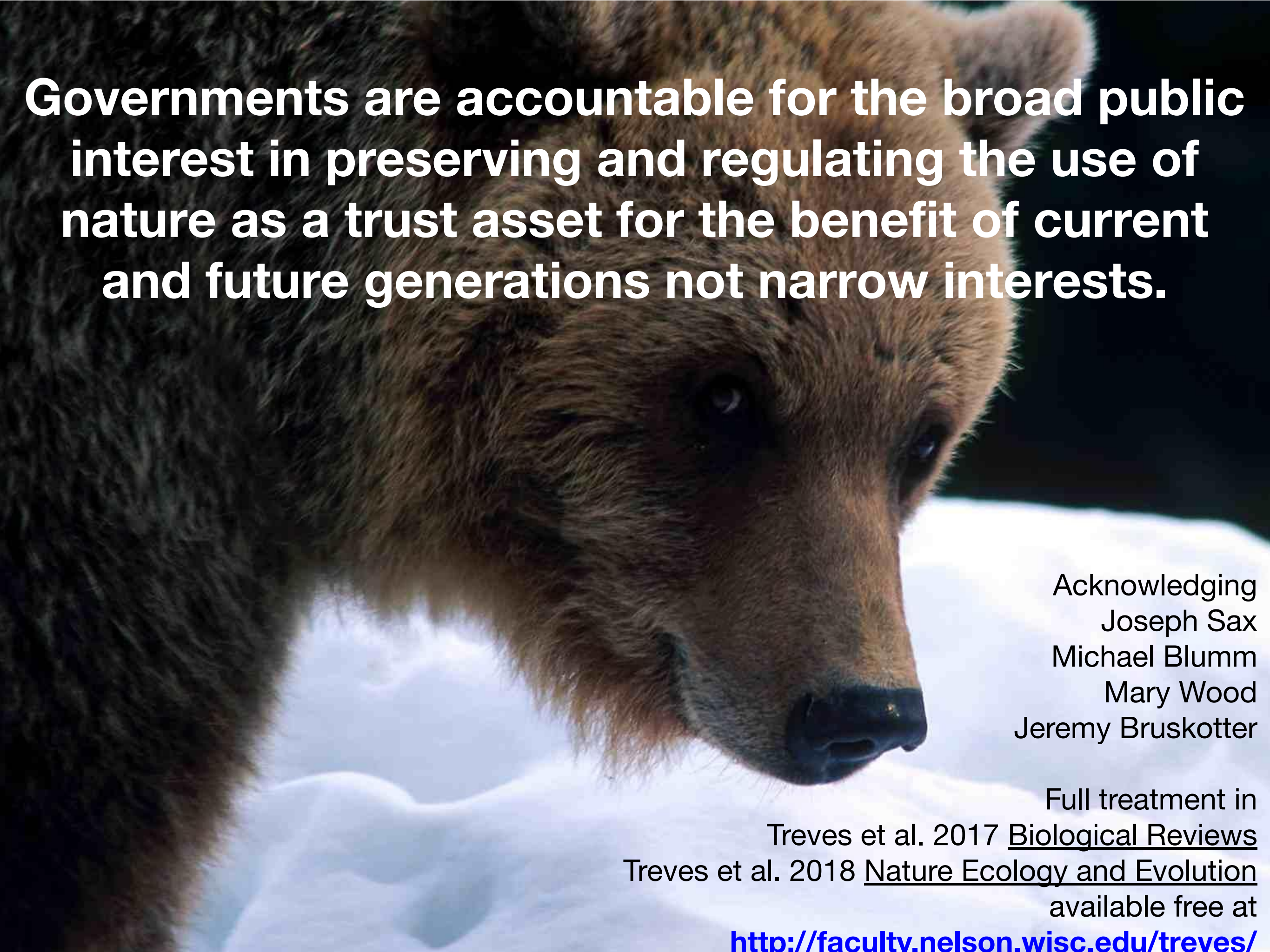


U.S. public trust and implicit constitutional protections, lessons from atmospheric trust litigation

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Governments are accountable for the broad public interest in preserving and regulating the use of nature as a trust asset for the benefit of current and future generations not narrow interests.

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Full treatment in
Treves et al. 2017 Biological Reviews
Treves et al. 2018 Nature Ecology and Evolution
available free at

<http://faculty.nelson.wisc.edu/treves/>

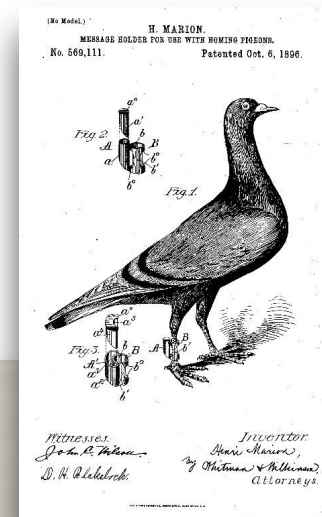
Misconceptions I have encountered about the U.S. Public Trust Doctrine (PTD)

1. It applies only to navigable waters.
2. Wildlife are not in the trust, and anyway, only states have wildlife trust duties.
3. It is only common law.
4. SCOTUS ruled out a federal public trust in 2012.

U.S. Supreme Court Cases



Geer 1896, Hughes 1979



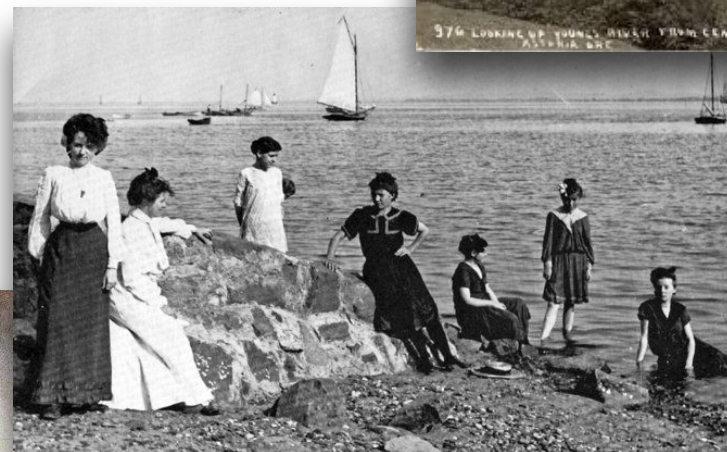
Illinois Central 1892



Multiple cases
1890-18944



Federal courts 1986-2018



Martin 1842



1776: American Revolution replaces English sovereign with current & future peoples of the USA

**All of nature
is in trust for
all of the
people
(Martin 1842)**



Photo: Henry Wantuch,
http://photos.nj.com/star-ledger/2010/10/post_589.html

“together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowlings, and all other royalties, profits, commodities and hereditaments to the said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances, and all the estate, right, title, interest, benefit and advantage, claim and demand of the King, in the said land and premises... And in the judgment of the court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government... For when the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government... “ **Martin 1842 (41 U.S. 367)**

**applies to the
federal
government
and all federal
public lands
(U.S. v Trinidad
Coal 1890,
Shively 1894,
etc.)**



<https://www.pinterest.com/coastweekend/histor>
y/

When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it to the same extent, in all respects, that it was held by the states ceding the territories. . . . Nothing remained to the United States, according to the terms of the agreement, but the public lands." p.27

"Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory." p.57 in **Shively 1894 (152 U.S. 1)**

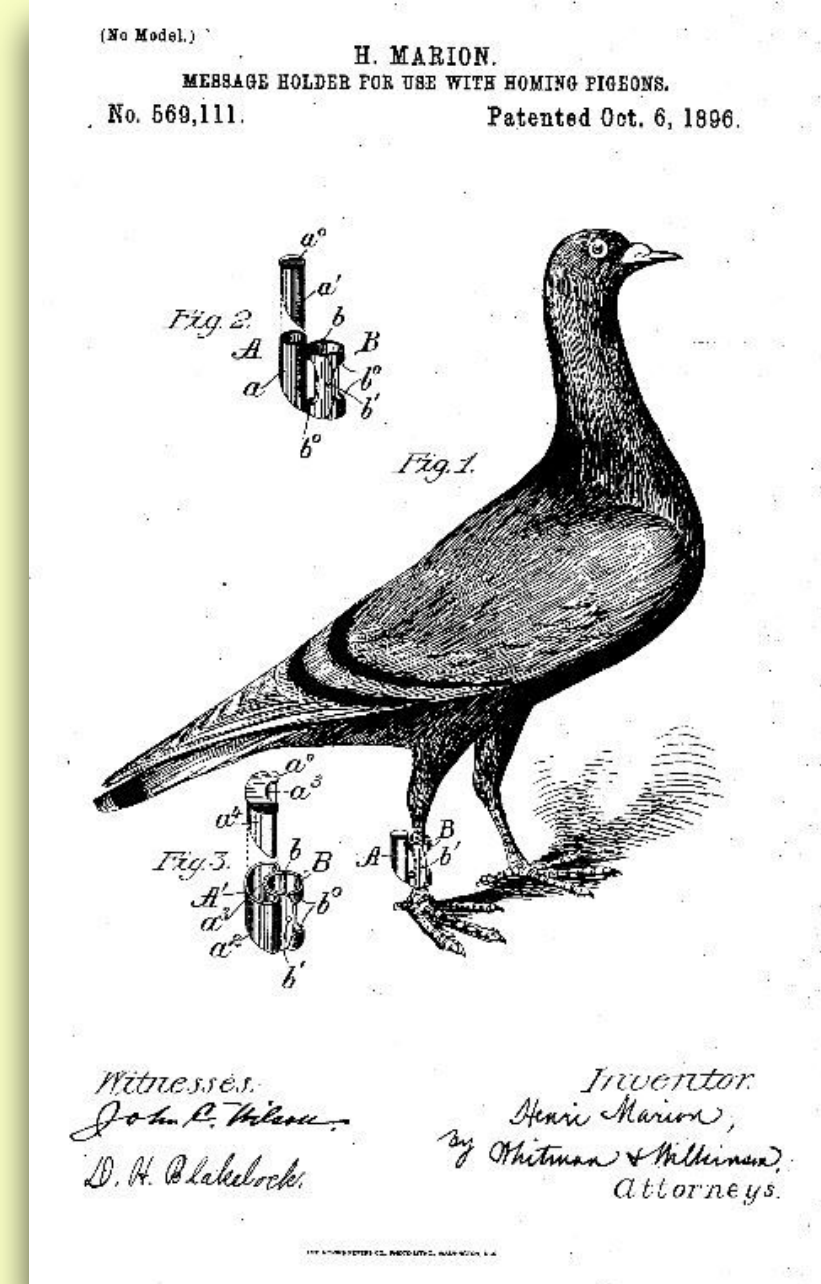
**The trust obligates U.S. governments with a permanent duty to preserve from substantial impairment; that duty cannot be granted, sold, or delegated away, current and future legislatures enjoy perfect equality
(Illinois Central 1892)**



“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 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... 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... 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... [for the grant of land to a corporation to construct a railway]... All such lands, waters, materials, and privileges belonging to the state were granted to the corporation...” **Illinois Central 1892 (146 U.S. 387)**

Government duty to the sovereign is to preserve the wildlife trust and regulate exploitation, using police powers not infringing the Commerce Clause (Geer 1896, Hughes 1979)

"...the general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership.... We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." (p. 335-337, **Hughes 1979 (441 U.S. 322)**)



"...the power or control lodged in the State, resulting from the common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of all 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" **Geer 1896 (161 U.S. 519)**

My conclusions about the misconceptions about the U.S. PTD

- ~~1. It applies only to navigable waters.~~ The scope of assets in Nature's trust may change over time but it never excluded wildlife.
- ~~2. Wildlife are not part of the U.S. public trust, and anyway, only states have wildlife trust duties.~~ Federal and state governments are co-trustees, neither can abdicate their duty to the sovereign.
3. It is only common law?
4. SCOTUS ruled out a federal public trust in 2012?

The federal govt can claim financial damage to the wildlife trust (U.S. v Burlington Northern 1989)

“In view of this trust position, and its accompanying obligations, it appears that the United States,, ... can maintain an action to recover for damages to its public lands and the natural resources on them, which in this action would encompass the destroyed wildlife.” **U.S. v Burlington Northern Railroad 1989 (710 F. Supp. 1286 U.S. District Court Nebraska).**



Juliana v U.S. 2016

Atmospheric Trust Litigation (ATL) filed by 21 youth plaintiffs and a representative of future generations , enters oral arguments October 29, 2018 ([ourchildrenstrust.org](https://www.ourchildrenstrust.org)).



~~SCOTUS ruled out a federal public trust in 2012.~~ PPL Montana 2012 was not about the public trust doctrine.

Juliana 2016 findings and decisions recognized a federal public trust.

Juliana v U.S. 2016



Blumm and Wood (2017), p.44

“As Judge Aiken recognized, the PPL Montana case was not about the PTD at all. Instead, it concerned the application of the equal footing doctrine to waterways in Montana. But in describing the equal footing doctrine, Justice Kennedy distinguished it in passing from the public trust, referring to the latter as a state-law doctrine.²³⁴ Kennedy’s dictum was not inaccurate, since the PTD has been largely interpreted by state courts. But the D.C. Circuit in *Alec L.* invoked the dictum in a context not remotely similar to the bedlands ownership question at issue in PPL Montana, stretching it beyond bounds to address the federal government’s obligations under the PTD. As Judge Aiken explained, the *Alec L.* court’s approach “was not a plausible interpretation” because “PPL Montana said nothing at all about the viability of federal public trust claims with respect to federally-owned trust assets. ²³⁵”

234 PPL Montana, 132 S.Ct. at 1235.

235 *Juliana*, at *22. In a later decision by Magistrate Judge Coffin recognizing the federal public trust, the court aptly noted: [T]his public trust over the navigable waters In other words, this public trust over the navigable waters and riverbeds passed to the States to hold as the new sovereigns from the previous sovereign, the United States. The United States could not pass what it did not have. The public trust doctrine is rooted in our common law heritage and can be traced back millennia to ancient Roman times.” **Juliana v. USA 21016** Findings and Recommendations 12 (May 1, 2017).

“I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society...” Judge Aiken in Juliana v U.S. 2016



Why Constitutional claims?

Youths allege breach of PTD by substantially impaired atmosphere the atmosphere and violated rights to due process, equal protection, and reserved rights (5th, 9th, 14th amendments respectively).

Juliana v. United States 2016 (Case No. 6:15-cv-01517-TC, 2016 WL 6661146, U.S. District Court Oregon)

Juliana v U.S. 2016

Why youths?

“For the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity...” (preamble, U.S. Constitution) and the political question doctrine often prevents adult from winning legal standing.



Why sue the federal govt?

The U.S. government is the primary trustee and the U.S. emits >14% of GHG emissions. Policies have substantially impaired the public trust.

