



FOR YOUR CONSIDERATION

BY TERRY ANDERSON

Can landowners restrict access in order to improve habitat and prevent overuse?

Landowners Are Our Friends



Landowners paid to improve the Mitchell Slough and create a beautiful place – due to protection as private property. But the Mitchell Slough has become a legal battleground in the debate between public access and privacy rights.

Anti-hunters and even non-hunters have difficulty understanding how hunting could possibly contribute to wildlife conservation. They see the animal dead from the hunter's bullet and conclude that one less animal means the demise of the rest. To the anti- and non-hunter, the hunter's trophy room with its "stuffed animals" is nothing more than "a victor's hall of imperial conquest, plunder and braggadocio," as columnist Lydia Millet described Tucson's International Wildlife Museum recently in the *New York Times*.

If they knew their history, of course, the anti- and non-hunters would discover that it was the rise of middle-class sport hunting in the late 19th century which stopped the plunder of wildlife for commercial purposes. From Teddy Roosevelt to the father and daughter going into the field with their trusted bird dog, hunters helped hammer out what has become known as the North American Model of Wildlife Conservation (NAMWC) and saved America's wildlife from the "tragedy of the commons" (see box) as seen with the near extermination of the buffalo. Like a pasture open to grazing by anyone with a cow or a pond open to fishing by anyone with a net or rod, open access to wildlife encouraged the race to shoot before someone else did. Understanding the potential for this tragedy, hunters led the charge to close the commons through the NAMWC. Seasons and bag limits set by professional managers and backed by hunters themselves became the tools of conservation.

TRAGEDY OF THE COMMONS

The idea that people might overuse resources they don't own was explained by economist William Foster Lloyd in 1833 and made popular by ecologist Garret Hardin in 1968. Lloyd was concerned about English villages where all local shepherds could graze their sheep. He noted that each additional sheep grazed would benefit the sheep's owner, but the grazing of each additional sheep would come at a cost of overgrazing for all grazers. Hardin expanded the concept as a metaphor for the global population commons, arguing that each newborn consumes resources at a cost to all others on Earth. What Hardin failed to emphasize and what increasing productivity has demonstrated is that human ingenuity can overcome the tragedy of the commons.

This applies especially to populations of fish and wildlife. As long as they are subject to taking by anyone, overharvesting will occur. Overfishing of ocean fisheries is a quintessential example. As with any commons, the key to preventing the tragedy of overharvesting is closing access whether through regulations as with the NAMWC or with private ownership as with fenced wildlife in South Africa.

Put simply, the tragedy of the commons and the importance of private ownership can be understood by the phrase, "no one washes a rental car except Hertz."

As hunters, we must continue to hammer home the point that we are the conservationists who closed the wildlife commons and helped build the NAMWC. No one can question the efficacy of this model. Elk numbers are at an all-time high in most western states, white-tailed deer in many places are a nuisance, wild turkeys have been reintroduced where they had once been and fish populations generally thrive.

The NAMWC was created from a grassroots movement based on the long-standing tradition in the United States that wildlife belongs to the people – not the king, as it did in England – held in trust by the state. This is in contrast to many European democracies where landowners have retained ownership of wildlife, but the state is still engaged in management. It is even more in contrast with South Africa where the owners of game-fenced properties have full ownership including management authority and where this model is responsible for saving many



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species from extinction, not the least of which is the rhino.

As a result of the NAMWC, the notion of wildlife being a public trust has become ensconced in American wildlife law. The Wildlife Society, one of the most prestigious professional wildlife management organizations, asserts that the public trust doctrine is “the keystone of the North American Model of Wildlife Conservation.”

Although we hunters should be proud of our conservation accomplishments, we must be careful not to push the public trust doctrine so far as to create enemies where we should be creating allies. It is true, as John Organ and Shane Mahoney state in the Summer 2007 issue of *The Wildlife Professional* that “For the Public Trust Doctrine to be an effective wildlife conservation tool, the public must understand that wild animals... belong to everyone.” But when the idea that this holds “regardless of whose property they are on” is carried beyond Organ and Mahoney’s intent, the potential for conflict may be possible between hunters and the landowners who provide wildlife habitat.

To be clear, Organ and Mahoney were not advocating expansion of the public trust doctrine to include unlimited hunting access to wildlife on private land, but vigilance requires that we consider how such advocacy using the public trust doctrine has been applied to stream access in Montana. Historically, diverting water from rivers and streams for beneficial uses creates a property right in the water. This was the case in the



The Mitchell prior to improvements, when it was used for little more than irrigation.



The Mitchell Slough, after landowners invested to create a habitat to support fish, game and vegetation more natural to the area.





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1860s when farmers and ranchers along the Bitterroot River in western Montana diverted water into their irrigation ditch. Since the late 19th century, the Mitchell Slough – the term used to describe this ditch – has been used continuously for irrigation.

Fortunately, thanks to several riparian landowners who were more focused on fish and wildlife habitat rather than agriculture, the Mitchell Slough became more than an irrigation ditch when they invested millions of dollars making the ditch meander, adding boulders and logs to aerate the water, bringing in gravel to create spawning beds and planting streamside vegetation for shade and cover.

Unfortunately, their success attracted the attention of floaters on the navigable Bitterroot River who wanted access to fish the now productive trout stream. Using earlier court cases which established that water, like wildlife, is held in trust by the state and that the people cannot be denied access to the water for recreational purposes even if it flowed across private property, the access advocates convinced the Montana Supreme Court to rule in their favor over the objection of the ditch's water and land owners.

But the story does not end there. Following the court ruling, the ditch owners turned off the headgates controlling water flows to the ditch except during the irrigation season, leaving the ditch dry outside of that season. As one of the owners put it, "I value my privacy more than I value the fishing." Yes, the public has access, but the access is to a ditch that is no longer a pristine trout stream.

Take the logic, if one can call it that, from Montana's application of the public trust doctrine to water and apply it to wildlife. If wildlife belongs to the people "regardless of whose property they are on," does this grant people the right to access their wildlife? When wildlife "flows" across private land, can the landowner deny the public access to their wildlife?

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Without maintenance, the Mitchell will return to a series of unconnected wetlands, choking out the trout habitat needed for spawning.

was a crucial first step in wildlife conservation, but all hunters and professional managers know that preserving habitat is crucial to survival of our fish and wildlife resources. Extending the public trust doctrine to include unlimited access to wildlife would surely reduce the willingness of landowners to preserve precious habitat. Suppose this happened in Texas or other southeastern states where land is owned or leased for hunting. Would sound wildlife conservation continue? At the second International Wildlife Management Symposium, Adri Kitshoff, chief executive officer of the Professional Hunters Association of South Africa, emphasized that trophy hunting gave wildlife value and created a sustainable contribution to the economics of the local community. If access to the game were open to all on the grounds that it belongs to all the people, as it essentially was in Kenya, we know what would happen to habitat and wildlife populations.

As hunters, we can be proud of the gains under the NAMWC, but we must be careful not to push the public trust doctrine so far as to claim it grants us access to wildlife “regardless of whose property they are on.” If we do as stream access advocates have done, we will lose one of our most important allies – landowners – in the battle to preserve the hunting tradition in America. **GT**

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