CALIFORNIA FISH AND WILDLIFE
STRATEGIC VISION PROJECT

PUBLIC COMMENTS FOR REVIEW

Comments Through December 11, 2011

From: Johnson, Doug
Sent: Sunday, December 11, 2011 11:33 AM
To: Strategic Vision
Cc: mbiddlecomb@ducks.org; jay_ziegler@tnc.org; kwoodmclaughlin@gmail.com; dtaylor@audubon.org; kdelfino@defenders.org; ereynolds@tejonranch.com; nvail@rangelandtrust.org; jcarlson@calwaterfowl.org; bill@outdoorheritage.org; karen-buhr@carcd.org; darla@calandtrusts.org
Subject: Cal-IPC comments on Strategic Vision

Please see attached comments on the draft interim Fish & Wildlife Strategic Vision. These comments address program elements on invasive plant management that we believe should be incorporated into the more concrete actions recommended in Appendix B. Thanks for all your hard work on this!

Doug

Doug Johnson, Executive Director
California Invasive Plant Council | www.cal-ipc.org
1442-A Walnut St., #462, Berkeley, CA 94709
dwjohnson@cal-ipc.org

Protecting California's lands and waters from ecologically-damaging invasive plants through science, education and policy.

Cal-IPC
California Invasive Plant Council

1442-A Walnut St., #462
Berkeley, CA 94709
(510) 843-3902
fax (510) 217-3500
www.cal-ipc.org

December 11, 2011

Ms. Melissa Miller-Henson , Director
California Fish and Wildlife Strategic Vision Project
The California Natural Resources Agency
1416 Ninth Street
Sacramento, CA 95814

Re: Stakeholder comments regarding invasive plant management

The California Invasive Plant Council (Cal-IPC) is a 20-year-old nonprofit organization working to protect the lands and waters of California from ecologically-damaging invasive plants. Our programs span science, education and policy. We partner with numerous stakeholders and agencies at the local, state and federal level, and our membership consists of natural resource managers, university researchers, and volunteer restoration workers across California.

California's biodiversity is world renowned. The conditions that allow for such diversity also provide opportunities for a wide variety of invasive species to establish and spread in the state. A major aspect of stewarding biodiversity in California is preventing and controlling invasive species.

Invasive plants are particularly damaging. They degrade native vegetation communities that anchor the food webs on which wildlife depends. Some alter underlying ecological process like fire regimes, hydrology, soil chemistry, and erosion. Without healthy plant communities, wildlife and natural resources are at risk.

The California Department of Fish and Game (DFG) is charged with "manag[ing] California's diverse fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public." Invasive plants damage these ecological values and also impact public use and enjoyment of the state's natural resources. Preventing and controlling invasive plants in California wildlands is critical to DFG's mission.

The visioning process being undertaken by the Natural Resources Agency offers an excellent opportunity to strengthen the state's response to invasive plants. Cal-IPC encourages the Executive Committee, the Blue Ribbon Citizen Commission, and the Stakeholder Advisory Group to integrate programs addressing invasive plants into DFG. Three items are of particular interest: first, formal state listing of invasive plants of wildlands; second, coordination of the state's network of local Weed Management Area groups; and third, integrating statewide risk mapping into landscape-level conservation goal-setting.

Listing invasive plants of wildlands in California

The Cal-IPC Inventory lists 200 plant species as invasive in the state, using a transparent science-based criteria system. Most of these species are not formally listed by any state agency, and the Cal-IPC Inventory serves as the *de facto* state list (www.cal-ipc.org/ip/inventory/weedlist.php).

The California Department of Food & Agriculture (CDFA) lists noxious weeds and provides pest ratings which determine eradication mandates. Noxious weeds are primarily species with an agricultural impact. Though the agricultural code was modified to include plants with an impact on natural resources, there is no proactive effort to evaluate species with wildland impact. The code specifically restricts listing plants that are themselves a commodity, with the result that plant species used in the horticultural trade cannot be listed, even if they are known to escape into wildlands.

Formally listing California wildland invasive plants is critical. Formal listing would not only elevate the recognition that they are a significant threat to our natural resources. If federal funds are made available to states for controlling invasive plants in wildlands, formal listing may be required to access these funds.

Many states have "weed boards" made up of experts from academia, conservation organizations, agencies, and industry. These boards meet regularly to review information and to make formal decisions regarding state listing. Such an approach should be explored for California, and Cal-IPC could facilitate establishing such a board.

Coordinating California's network of county-based Weed Management Areas

For the last decade, CDFA has overseen the development of the state's network of county-based Weed Management Areas. WMAs are cooperative entities bringing together local agency representatives and stakeholders to plan and implement management projects.[1]

In California, 40 WMAs have formed over the last decade, covering every county and involving hundreds of stakeholder groups. Local coordination is typically provided by a County Agricultural Commissioner's office or a Resource Conservation District. WMAs have leveraged state funding at a rate of 2:1, bringing in extensive in-kind participation and additional grants. They have controlled over 2,000 populations of high-priority invasive plant species across the state based on local planning and execution. Program funding has been used on both noxious weeds and on wildland invasive plants listed by Cal-IPC.

In California's 2011 budget, funding for the state's network of WMAs was eliminated. This removes the state's key funding source for holding the line against invasive plants on-the-ground. It also destroys infrastructure for coordinating work at the statewide level. This coordination is essential for long-term effectiveness at the landscape scale.

Cal-IPC is dedicated to keeping this program alive, and restructuring it as necessary to be as effective and sustainable as possible. The program has wide support in the conservation community. (In

[1] The WMA concept was pioneered in the greater Yellowstone area and has spread across the country. Some groups have evolved to work on more than plants. Florida's CISMAs (Cooperative Invasive Species Management Areas) also address animals, including pythons and other invasive snakes. New York has a network of PRISMs (Partnerships for Regional Invasive Species Management) that are integrated into their state's Department of Environmental Conservation.

2006, over 100 organizations submitted letters to the legislature in support of continued WMA funding—see attachment).

CDFA has done great work in pioneering and developing this program, and their relationship with the state's network of County Agricultural Commissioners is a tremendous asset. We will continue to work creatively with CDFA to find ways to bring the program back. (Funding was also cut for CDFA's regional biologists, who provided important expertise to local efforts, and we hope to renew support for them.) However, CDFA's focus is agriculture, and invasive plants in wildlands are a natural resource conservation issue. We believe it is critical for the Natural Resource Agency to take a leadership role on this important natural resource issue.

The WMA program is essentially a grant-giving operation, similar to the Wildlife Conservation Board. Identifying new funding sources, including federal and private, is a big hurdle. It is also important that existing program infrastructure be maintained so that gains made in building collaborations at the local, regional and state level are not lost. CDFA has committed to a low level of oversight for the next year, basically serving as a "pass-through" for US Forest Service invasive plant control funds. This provides a short window of time for restructuring the program.

The existing network of county-based WMAs is important to maintain. Each WMA provides a local nexus for coordination. In addition, regional collaborations involving multiple WMAs and other regional partners are needed to develop effective landscape-level conservation goals. Such partnerships are underway in the San Francisco Bay Area and the Southern Sierra, and should be fostered across the state. These partnerships can use the risk mapping tool discussed below to help set effective regional strategy.

Integrating statewide risk-mapping into strategic planning

Recent work in mapping invasive plant distribution statewide provides an important tool for setting regional and statewide priorities for control efforts. With ARRA funding from the US Forest Service through CDFA, Cal-IPC has developed a statewide atlas of invasive plant distribution based on over 100 expert meetings conducted around the state. This data forms the backbone for a dynamic online "risk mapping" tool that identifies opportunities for eradication, containment, and surveillance for invasive plant species in any given region of the state (http://calweedmapper.calflora.org).

The National Park Service has committed time from its park restoration ecologists to review how to best integrate the tool into their management planning. Cal-IPC has received a Landscape Conservation Cooperative grant from the US Fish & Wildlife Service to integrate range modeling for each species, including the effects of future climate change. We will be partnering with DFG's Biogeographic Data Branch to add key conservation data layers to the analytic framework.

This tool provides a foundation for setting regional and statewide invasive plant management goals. When coordinating with regional partnerships, the tool can provide a baseline understanding of the options regarding where to focus resources. This is essential if we are to maximize the conservation benefit from limited funding, and to monitor progress toward long-term conservation goals.

Conclusion

Effective work on preventing and managing invasive species requires well-coordinated programs and consistent, substantial funding. Cal-IPC recommends looking at how Departments of Conservation

in other states such as Florida and New York have set up their invasive species programs to guide how California proceeds.

Obviously there are major funding shortfalls for conservation in California at this time. There is common cause between wildland invasive species management and State Parks, which also protect natural resources for their ecological values as well as public enjoyment. The Natural Resources Agency should capitalize on program synergies between its departments, while stakeholders like Cal-IPC work to restore funding.

The Invasive Species Council of California (ISCC), vice-chaired by Natural Resources Secretary John Laird, and the Strategic Framework it has assembled, provides a strong foundation for moving forward on these directions. Cal-IPC urges the agency to maintain an active lead role in the ISCC.

We appreciate your consideration of these proposals. Taken together, these proposals bring significant capacity for planning and executing effective stewardship activities. Cal-IPC and the community of natural resource managers stand ready to work with DFG on strengthening its role in addressing invasive plants in California's wildlands.

Sincerely,

Doug Johnson
Executive Director

Organizations endorsing AB 2479 (Cogdill 2006) for WMA funding

Statewide Organizations:

- California Agricultural Commissioners and Sealers Association
- California Association of Pest Control Advisers
- California Association of Resource Conservation Districts
- California Cattlemen's Association
- California Council of Land Trusts
- California Farm Bureau Federation
- California Forest Pest Council
- California Invasive Plant Council
- California Native Grasslands Association
- California Native Plant Society (CNPS)
- California Society for Ecological Restoration
- Regional Council of Rural Counties
- Sierra Club California
- Trust for Public Land

Local & Regional Organizations:

- Acterra (Palo Alto)
- Alameda County Resource Conservation District
- Alameda-Contra Costa Weed Management Area
- Alpine County Board of Supervisors
- Audubon Canyon Ranch (Stinson Beach)
- Bay Area Open Space Council
- Big Sur Land Trust
- Butte County Resource Conservation District
- Cache Creek Conservancy (Woodland)
- Catalina Island Conservancy
- Center for Natural Lands Management (Fallbrook)
- CNPS Alta Peak Chapter (Tulare County)
- CNPS Dorothy King Young Chapter (Mendocino)
- CNPS El Dorado Chapter
- CNPS Los Angeles/Santa Monica Mountains Chapter
- CNPS Milo Baker Chapter (Sonoma County)
- CNPS Monterey Bay Chapter
- CNPS Mt. Lassen Chapter
- CNPS Orange County Chapter
- CNPS San Luis Obispo Chapter
- CNPS Santa Clara Valley Chapter
- CNPS Sierra Foothills Chapter
- CNPS Yerba Buena Chapter (San Francisco)
- Center for Land-Based Learning (Winters)
- Channel Islands Restoration
- Colusa County Department of Agriculture
- Concerned Resource & Environmental Workers (Ojai)
- Conservation Biology Institute (Encinitas)
- Contra Costa Resource Conservation District
- Cummings Valley Protective Association (Tehachapi)
- East Bay Municipal Utility District
- El Dorado Invasive Weed Management Group
- Elsinore-Murrieta-Anza Resource Conservation District (Riverside County)
- Farm Bureau of San Diego County
- Fresno County Board of Supervisors
- Friends of Bidwell Park (Chico)
- Friends of Edgewood Natural Preserve (Redwood City)
- Friends of Five Creeks (Alameda and Contra Costa Counties)
- Friends of Switzer Canyon (San Diego)
- Garrapata Creek Watershed Council (Monterey)
- Glenn County Board of Supervisors
- Glenn County Department of Agriculture
- Glenn County Resource Conservation District
- Golden Gate Audubon Society
- Honey Lake Valley Resource Conservation District

- Humboldt/Del Norte Weed Management Area
- Inyo and Mono Counties Agricultural Department
- Kern County Board of Supervisors
- Kern County Department of Agriculture
- Kern Weed Management Area
- Lake County Weed Management Area Partnership
- Lake Tahoe Basin Weed Coordinating Group
- Land Trust for Santa Barbara County
- Lassen County Special Weed Action Team
- Los Angeles & San Gabriel Rivers Watershed Council
- Marin Conservation Corps
- Mariposa County Board of Supervisors
- Mariposa County Department of Agriculture
- Mendocino Weed Management Area
- Mendocino Coast Cooperative Weed Management Area
- Merced County Board of Supervisors
- Mission Resource Conservation District (Fallbrook)
- Mojave Desert Resource Conservation District
- Mojave Desert Weed Management Area
- Mojave Water Agency
- Mountains Recreation & Conservation Authority (Malibu)
- Mountains Restoration Trust (Santa Monica Mountains)
- Napa County Board of Supervisors
- Napa County Resource Conservation District
- Nature in the City (San Francisco)
- Ojai Valley Land Conservancy
- Palos Verdes Peninsula Land Conservancy
- Quail Ridge Wilderness Conservancy (Davis)
- Regional Assn. of Northern Counties Agricultural Commissioners and Sealers (Del Norte, Humboldt, Lake, Lassen, Mendocino, Modoc, Plumas/Sierra, Shasta, Sisiyou, Tehama and Trinity Counties)
- San Benito County Agricultural Department
- San Bruno Mountain Watch
- San Mateo County Board of Supervisors
- SPAWNERS - San Pablo Watershed Neighbors Education & Restoration Society (Contra Costa County)
- Santa Barbara Audubon Society
- Santa Barbara Botanic Garden
- Santa Barbara County Department of Agriculture
- Santa Clara County Parks and Recreation Department
- San Diego County Department of Agriculture
- San Joaquin County Board of Supervisors
- San Luis Obispo County Department of Agriculture
- Santa Lucia Conservancy (Carmel)
- Santa Margarita/San Luis Rey Weed Management Area
- Shasta County Department of Agriculture
- Sierra-Cascade Land Trust Council
- Sierra Club - Santa Lucia Chapter
- Solano County Weed Management Area
- Solano Land Trust
- Solano Resource Conservation District
- Sonoma Land Trust
- Southern Low Desert Resource Conservation & Development Council
- Surfrider Foundation, Ventura County Chapter
- Sutter County Board of Supervisors
- Tehachapi Resource Conservation District
- Tehama County Resource Conservation District
- Thirty-Second Street Canyon Task Force (San Diego)
- Trinity Resource Conservation and Development Council
- Tulare County Board of Supervisors
- Upper Salinas-Las Tablas Resource Conservation District
- Ventura County Resource Conservation District
- Yolo County Resource Conservation District

From: David Riddle
Sent: Saturday, December 10, 2011 6:41 AM
To: Strategic Vision
Subject: RESTRUCTURING

Hunting and Fishing has always been my favorite hobbies . It saddens me to even hear that HSUS is allowed to contribute in any way whatsoever to any thing the DFG dose . What are you guy's thinking ?

david i riddle
sac. ca .

From: Judy Brinkerhoff
Sent: Friday, December 09, 2011 6:59 AM
To: Strategic Vision
Cc: dtaylor
Subject: invasive plant management

I support state funding for invasive plant programs.

I am affiliated with CA Native Plant Society in Sonoma County and I write garden columns for newspapers in Sonoma County.
The thrust of my writings is gardening for wildlife with native CA plants.
Sonoma County is overrun with invasive non-native plants such as Scotch broom and Pampas Grass. See Highway One in Bodega Bay where Pampas Grass and ice plant rule to the exclusion of native coastal plants.
Native plants support our wildlife, starting with insects and on to the birds and mammals that depend on them.

Actions such as weeding out Scotch broom by the populace helps, but a larger vision is necessary if we are to make progress.
Thank you for your consideration.

Judy Brinkerhoff
Forestville, CA

From: Larry & Gretchen Koch
Sent: Friday, December 09, 2011 9:00 AM
To: Strategic Vision
Subject: Wildlife Strategies Comment

Dear DFG,

Thank you for the opportunity to comment on your recent work regarding changes to the DFG & Calif. Fish and Game Commission.

We chose not to attend the meeting held at Turtle Bay last night because of an earlier experience with T.Partiers. Several months ago we attended a meeting held in Red Bluff sponsored by the Fed. Dept. of Fish and Game regarding an opportunity for local ranchers in northern Tehama County be given a chance to participate in land conservation. A study had been done and this area was the only area in Northern Ca. that was significant to include in this opportunity.

When we arrived the room was packed and there was a line to get in. I guess because we are retirees others in that line thought we were also part of the T.Party movement. We were informed that they had met the previous week so they could "control" the meeting and many had been chosen as speakers and were told what to say.

As the meeting went on it became clear that only T.Partiers were going to speak. They stood and spoke immediately one after another. While I had not intended to speak that evening I finally realized that it seemed as if the T.Partiers were very uninformed and that they were achieving their goal of controlling the meeting. Finally I stood and interrupted the speaker who had just finished. I asked to speak with a different opinion then those before me. I then offered an opinion that this would at least allow local ranchers to have an opportunity to continue their ranching while still providing a place for continued survival of local wildlife as well as migratory waterfowl and that the rancher would no longer be pressured by developers to sell. The county had recently rezoned most of the ranchland in northern Tehama County to high density housing with the ultimate goal of providing housing for over 300,000 people.

After speaking (and being told to "get off my high-horse") by the man sitting behind me, we decided to leave. We were very concerned that our car would get "keyed" by T.Partiers. As we started leaving a man asked us to stay and hear what he too had to say. So we remained to hear him, applauded his speech and then we left. There were others there who also shared our concerns although certainly not as many nor as vocal as the t-partiers.

We had a friend who attended a meeting earlier this year regarding dredging of rivers for gold. When he arrived he told DFG officials that he planned to speak against the continued dredging. He was then asked if "he was alone". When he said he was they escorted him to his car at the end of the meeting so he would have some protection from angry dredging enthusiasts.

It is clear that there are a large group of very angry, very vocal, very anti-environment folks up here and they are "hell bent" on intimidating those who want to see some measure of protection for remaining wildlife, fish, waterfowl.

We are not anti farming (our grandparents were farmers), anti hunting (though we are not hunters) and we are pro protecting fishing and wildlife. Not only for the local economy, not only for the Indian, but for future generations.

We rent a wonderful old place located on the Klamath River for vacations twice a year. We buy all our groceries at local stores, shop at local stores for "stuff" and do lots of bird watching. The water where we stay is generally very placid and we have not seen much in terms of fish but the osprey seems to find some success. We watch kayaks and canoes drift by with people enjoying this wonderful area without despoiling it and spending money which boosts the local economy. It certainly needs to be considered that many of those who come to enjoy this wonderful recreational area are from out of area and/or out of state. They may have no idea about what "locals" are proposing.

While it is clear that "locals' fear dam removal it is also clear that if they do not share the water the fish will not survive. This is not 1928 and as more and more people tap into this precious resource something has to be done before it is too late. Please count this as a vote to "do what is right" and stand fast on protecting this natural resource for all, not just a few.

I thought the way the meeting was handled last night was brilliant! We would have attended had we known it was going to be handled in a manner so we did not feel threatened. I hope you will consider that there were probably many who did not attend this meeting because of concern for safety and hateful rhetoric or who live out of the area but spend money there when enjoying it.

Thank you again,

Gretchen Koch
Cottonwood

From: Cindy Schlageter
Sent: Friday, December 09, 2011 5:59 PM
To: Strategic Vision
Subject: Funding to irradicate invasive plants in California

Thank you for taking the time to review my comment. Most likely I represent the "common California homeowner new to the beauty of California native plants" I am sometimes hard pressed to find ways to incorporate California natives in my landscaping but desire to for two reasons:

1.) Our water resources should not be taken for granted and with my latest rate increase effective January 1st from my water utility company, a wise choice in my hillside home area is California native plants. My immediate area was subject to brush fire last June and California natives are the current plant species "coming back" after the burn in the hills above me that will o prevent land/mud slides this winter.

2.) Due to lack of public "leadership" and education, we homeowners are mainly provided costly plant & landscape choices at the big box so called home improvement stores, that:
a.) drain water resources
b.) encourage chemical pesticides and
c.) teach us to put anything in the ground that grows no matter what down the road implications arise that may cause choking out of plants that were meant to be there in the first place.

I travel, enjoying California only locally (within 200 mile radius) and note the irrational choices made by cities and counties to plant trees, shrubs etc. in small choked out 4x4 foot squares or landslide areas, that will later become hindrances, promote fire spread and mud slide. Point of Interest: the huge trees that fell on Pasadena area homes in the last windstorm causing thousands of dollars in lost business and inconvenience to homes etc.This highlights where & what type of plant is important to preserve the lives and property of Californians.

But most of all I urge you to consider the impact of allowing invasive plants to cause down current (ocean) flooding, soil erosion, bird/animal/insect endangerment, etc. which could relate to our fishing and farming industries. The longer allowed, the more costly it will be to eradicate. Do you live next to someone who decides to plant bamboo next to the property line of "your house". If you consider California "your house" please consider the benefit of eradicating invasive plants as a smart one.

The effort of a young man working on his Eagle Scout badge has prompted out local church to plant "only California indigenous plants" on a large embankment on church property. This effort has educated many more, like me, to get on board the **right planting strategy** as we care for all land in our beautiful state.

Thank you,

Cynthia Schlageter
Camarillo, CA.

From: philip c. hoffman
Sent: Thursday, December 08, 2011 2:35 PM
To: Strategic Vision
Subject: Habit Restoration Team (HRT)

Dear Sirs,
I've contracted with and volunteered for HRT for the NPS in Marin County, California. Our target species for removal is mainly Helichrysum, Jubata grass, Ehrharta, Cape ivy, Harding grass and various Broom species. After removal we go back in and replant with natives. Our group leader is Ranger Maria Alvarez (415) 331-0732 who does a great job coordinating the volunteers and the limited resources to reestablish native plant communities in the park. If you can help in any way it would greatly appreciated.
Sincerely,
Philip Hoffman

From: Dolan, Michael P
Sent: Thursday, December 08, 2011 3:04 PM
To: Strategic Vision
Subject: support funding for CA invasives

This is in reference to the following web link;
http://campaign.r20.constantcontact.com/render?llr=dxw8ysbab&v=001TZa7AKGpnMH-DPQFOCYP97qAaueJOdZeBV2fwyvHN76_jCnS_sCTId0q9cE2vQj_F-rnjc5LWAmCDL-_Ar_jI_vhZLc9OzDecTBQ12HXQcVvXTP5rm7I-qb8ykzCMvkrUIjgf_rMWu3iQEWebaA-eG74OZxDiphINT1nJA52cZFe4AE9jrdoJA%3D%3D

My concern is that the DFG will NOT have funding to fully support invasive plant management. The entire toolbox of IPM includes cultural, biological, chemical, mechanical control and education. I fear that certain parties in DFG will not to use ANY chemicals or they will only want to fund control measures or programs that fit into the political atmosphere that would be in Sacramento at the time of funding. The CDFA has done an excellent job so far. Maybe they are strapped for funding which is why the proposal is have DGF take some of the financial burden. It all comes out of one pot—our state budget. Unless DFG presents its proposal prior to implementation so the taxpayers can see the whole picture, I say leave the invasive weed program where it is.

Thanks,
Mike

****

Botanist
Alturas Field Office, BLM
Alturas, CA 96101

From: Cynthia Powell
Sent: Thursday, December 08, 2011 4:31 PM
To: Strategic Vision
Subject: please continue to fund stopping the spread of invasives

Hi,

Please support funding to stop the spread of invasive plants; invasive plants are a top threat to the state's ecological communities. DFG and the Natural Resources Agency need to address invasive plants as an essential part of managing these resources.

Funding for CDFA's invasive plant management programs (such as county-based Weed Management Areas) has been eliminated. CDFA focuses on agriculture. For invasive plants damaging the state's wildlands, the Natural Resources Agency must take the leadership role.

DFG and the Natural Resources Agency should:

- take the lead role in addressing invasive plants in California's wildlands
- dedicate significant funding to invasive plant management.
- partner with WMAs, Cal-IPC and others on invasive plant management programs.
- take an active role in leading the interagency Invasive Species Council of California and implementing the actions recommended in its Strategic Framework.
- educate the public on the wildlife impacts of invasive species, and how citizens can help reduce the problem.

Thank you.
Cynthia

From: Marvin Clark
Sent: Thursday, December 08, 2011 12:16 PM
To: dwjohnson@cal-ipc.org
Cc: Strategic Vision
Subject: Re: Support funding for CA invasive plant programs

Please forward if needed.

Cal-IPC and interested parties:
As PCA for Caltrans District 6 and 9, and previously long-time (20 years) Tulare County Agri. Commissioner's weed abatement team surveyor and applicator, I sincerely hope someone will have the foresight or insight to maintain funding for these programs. After watching funding drop through the years, surveying various weeds like Yellowstar, Scotch Thistle, Alligatorweed, to name a few, AND watching what can happen in a year, let alone 5 or 20 years, to funding or personnel issues, to the various weed abatement programs when not implemented regularly. I saw small weed 'plots' of Scotch, Alligatorweed, Milk, Italian thistles etc. (forgotten or not visited annually) 'explode' and become major problems for access, livestock, range management, water delivery, farming, just to name a few. Just minor cuts or retirement, illnesses and loss of 'veteran applicators', lost maps, and landowner/ access issues, result in years of issues, continuing eradication (hardly possible), seed reserves, and logistics in these areas. I have seen the result of lowered Q, A, B, C ratings, and moving on to more 'problematic programs' like YST in northern California, let alone Milk and Italian thistles devastating results of discontinued 'rating' or programs. Those involved in eradication efforts, actually effectively only control, know all too well what can happen in short periods of time of non-treatment, or loss of labels/registration of very effective products like Tordon, or Garlon (within Caltrans). Even those new, very specific and effective products like Milestone VM, can only be efficacious when timely, regular applications are made, without skips in time.
We had a long-time QAC illness (and death) and lack of applications made to Halogeton in District 9 for some time (Eastern Sierra WMA) and now have years of 'cleanup' ahead to even come close to control. There is no effective answer to thousands of square miles of untreated YST and Italian Thistle stands in the foothills now.
The resultant costs of loss of tax revenues from 'feedable' rangeland, supplemental feed costs, animal illnesses, public's recreational access to 'their' lands alone, and potentially years of future application efforts, ...IF the funds were re-implemented, is truly staggering.
The subsequent 'environmental costs' to reverse these problem areas alone should be enough to 'raise the hairs' on the legislators, to reinstate those programs. It's like a ton of prevention to be worth an ocean of cure, to backtrack now, at only a short time of loss of control efforts, in those remaining programs.
Thank you for considering these long term problems, the 'fall-out' of discontinued efforts, that have been 'battled' by' weed warriors' for many, many, long years of hot, miserable, backbreaking, bur in the saddle/shorts, allergy inducing work. As a third generation Tulare County Agri. Inspector, (upon transfer) I have truly lived these programs, my entire life.
Sincerely, Marvin Clark, Pest Control Advisor, Qualified Applicator Licensee, and 'veteran applicator'.
Marvin L. Clark
Caltrans - Landscape Specialist- D-6

From: Brett Matzke
Sent: Thursday, December 08, 2011 9:00 AM
To: Strategic Vision
Subject: A few comments on the Strategic Vision Draft from 11/22/2011

I have worked with the Department of Fish and Game and the Fish and Game Commission for years as a member of California Trout I worked with Dave Cogdill to write legislation and also worked with the Wild Trout Program and the California Fish and Game Commission to start the Heritage Trout Program. Finally, I was the Chairman of the fish committee for the Al Taucher committee for many years until I left California Trout. Right now I am also interested in the rights of a sovereign Indian Nation over collection of plant materials and hunting and fishing on our ancestral lands. Last night I attended the public meeting in Fresno and thought I had better list in bullet form some of the things I believe needs to be done before they are lost in the shuffle.

- The Director of Fish and Game should be hired and fired by the California Fish and Game Commission not the Governor.
- Under a State amendment of the Constitution the Fish and Game Commission needs to be changed.
    - Add two more members
    - Requirements for being members, like one conservation group, one fish group, one hunting group, one cattle rancher, one timber person etc.
    - The Al Taucher committee needs to be equal in its representation of both hunting and fishing groups. Right now it is about 3/4th hunting and 1/4th fishing or do away with this group.
- Under partnerships, we need to include both NGO's and the Indian Nations in California.
    - Not only for education of treaty rights, but also cultural concerns that a warden or fish and game biologist might not understand.
        - Perhaps sensitivity classes with local Indian groups would be called for.
    - A method needs to be developed to allow gathering for tribal citizens comparable to the one we use with both Yosemite NP and Sierra NF.
    - This could be a simple collection document that they carry so if approached by a member of the DFG they can prove they have the right to do what they are doing.
- No more robbing Peter to Pay Paul! The Preservation fund is the collection of license fees and fines for game related issues. The Fish and Game Code states that all other activities are to be funded from the General Fund. At this time they are not, the Preservation fund is a catch all for funds needed to do anything they Department wants to do with them. AB 7 was an attempt to at least control part of the 70 million dollars provided in this fund by fishermen/women to improve their chance of having fish available when they wanted to go fishing. Instead, only 33% of these funds were asked for to provide better hatchery management and funds for a much improved Wild/Heritage Trout Program including 9 new biologists for the program. Now the DFG is using these funds to write EIR's on take for Coho salmon or gold dredging regulations that in a small way are related to fish but are now what we felt the intent of the law was regarding the Fund.
- The Department has been criticized for years for not talking with its constituents. We need a new position at each Region where people can go to start searching for the answers to questions they might have. This officer could also post volunteer opportunities available in the Region for NGO's and Tribes to help participate in.
- Last night we discussed increased Cattle grazing on DFG lands. We have to be careful here that this does not become another un-funded mandate. Some areas are acceptable to allowing

grazing and others are not. What species will be effected, who will administer the permits, how long will the permits be good for, and what is the opportunity for the public to comment on these permits?

- Finally, the Fishing and Hunting Regulations need to be summarized down to about 10 pages and simplified so that everyone understands them. Right now you can have different regulations on one river and step across a line in that river and be out of compliance. You can fish for two days longer in one place then in another. It is a big mess and should be easy to fix. Throw out the duplication, confusion and staggered years of change used by the Commission. I do want to also say that one thing that needs to be implemented in the simplified regulations in an inclusion of Fish and Game Commission Policy.
    - As an example Golden Trout Waters should not be planted with other species either rainbow trout or brown trout. The use of Triploid sterile fish is not an except able answer either. That are not 100% sterile and can still breed with the Golden Trout and dwindle the limited populations we still have of our state fish.

I plan on writing more about this vision change document later when I get some more time but thought I had better get this information in now while it was fresh in my memory.

Respectfully submitted,
R. Brett Matzke
North Fork

From: Matthew Danielczyk
Sent: Thursday, December 08, 2011 8:25 PM
To: Strategic Vision

Subject: strategic vision for Dept. of Fish & Game

Dear Decision Maker,

I am writing to you to encourage DFG and Natural Resources Agency to take up the crucial task of managing invasive plant species in California's wildlands. This task has, until recently, been undertaken by CDFA. Unfortunately, due to unending budget crises, CDFA has informed stakeholders that its ability to support this important work has been severely curtailed. Perhaps this is for the best in the long-run, because wildlands are outside CDFA's mandate. The reason why wildland invasive weed work was housed in CDFA, I am told, is because CDFA already had capacity for dealing with agricultural weeds. So, in essence, they were doing more than their fair share. Good on them! I wish the good times had lasted, however. Addressing wildland weed issues is what I do for a living. I work for a small, nonprofit conservation organization. Controlling invasive plants is one of our biggest challenges. The role DFG can play is hiring regional biologists to keep an eye on the larger picture than I can managing 5,000 acres. The grunt work on the ground is something I can do, but larger-scale coordination is very important and DFG, in my opinion, is the best-positioned agency to do that. I think it's far more appropriate for DFG to coordinate assessment of and response to wildland plant invasions than for CDFA to try to shoe-horn that task in to their mission.

Specifically, I am asking DFG and the Natural Resources Agency to:

- take the lead role in addressing invasive plants in California's wildlands
- dedicate significant funding to invasive plant management.
- partner with WMAs, Cal-IPC and others on invasive plant management programs.
- take an active role in leading the interagency Invasive Species Council of California and implementing the actions recommended in its Strategic Framework.
- educate the public on the wildlife impacts of invasive species, and how citizens can help reduce the problem.

DFG has the expertise to take this on, and I suspect many of its staff would love to sink their teeth into this challenge. Please demonstrate the political courage to recommend this course of action to the Legislature.

Sincerely,
Matthew Danielczyk

From: William Spangler
Sent: Thursday, December 08, 2011 1:39 PM
To: Strategic Vision
Cc: darla@calandtrusts.org; jay_ziegler@tnc.org; kdelfino@defenders.org
Subject: Support funding for CA invasive species programs

Dear Department of Natural Resources,

I am writing as an individual who is fortunate to volunteer and also work in the field of weed management and California native habitat restoration. I am aware of the integral role the Department of Fish & Game plays in protecting habitat that is vital to the state's many native species and how this ultimately contributes greatly to the state's economy through ecosystem services, not to mention by maintaining the "greatness" of our state through invaluable and world class biological resources.

I write today to speak of the need for the state to address invasive species issues, which DFG and the California Department of Food and Agriculture contribute to. Standing idly by while invasive weeds spread across our state, damage important ecosystems, and cause economic harm is not an option. The longer we wait to fund initiative to stop these weeds and restore native habitat, particularly on urban/rural boundaries and along agricultural corridors, the harder and more expensive it will be to fight them in future.

I agree the the core principles put forth by the California Invasive Plant Council that the state Natural Resources Agency and the Department of Fish and Game should:

- take the lead role in addressing invasive plants in California's wildlands
- dedicate funding to invasive plant management.
- partner with WMAs, Cal-IPC and others on invasive plant management programs.
- educate the public on the wildlife impacts of invasive species, and how citizens can get engaged to help reduce the problem.
- Provide incentives for landowners to tackle invasive species.

Please deeply consider managing invasive species in your review. Thank you,
Will Spangler

--
William Spangler
Field Crew Leader
Younger Lagoon Reserve

Jim Clark
Walnut Creek

December 6, 2011

California Fish and Wildlife Strategic Vision Project
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: California Fish and Wildlife Strategic Vision Project. *Draft Interim Strategic Vision: Potential Recommendations for the California Department of Fish and Game (*"DFG"*) and the California Fish and Game Commission (*"F&GC"*).* November, 2011 ("the November Draft Vision")

Ladies and Gentlemen:

I write to provide comments on the November Draft Vision to further the discussion of the future of DFG and the F&GC as well as their capacity to deal with the challenges of the 21st century and the strategic issues of today. These comments are submitted in the spirit of respectful appreciation for the effort to-date of all members of the Project and are intended to help advance those efforts.

My comments are focused on the following areas:

(1) Capacity of DFG and F&GC to advocate for their mission in the modern era.
(2) Funding DF&G in the modern era
(3) Focusing the Project on the Strategic vs the Tactical

Advocating for the mission:

In the modern era, communication, education and outreach will not empower DFG and F&GC to succeed in the delivery of their mission. The Department and the Commission must be chartered to, and required to, *advocate* for their mission. This fundamental change is necessitated by several issues that have either arisen or become more significant in the modern era:

(a) Organizations incompatible with the mission of DFG and F&GC due to their ideology or other priorities seek to invoke their projects or agendas on the state through legislation, litigation and or special interest advocacy. Certain of these groups operate in an "ends justify means" mode, manipulating politics, science and/or public opinion in a fashion which, at best, can be described as bordering on the unethical.

(b) Since 1900, California population has increased from approximately 1.5 million (nearly 50% rural) to over 37 million (7% rural). This human onslaught obviously has implications for stewardship as well as for notions such as basing decisions in part on a clear understanding of the desires of the public. More significantly, this dramatic change has bearing on the methods DFG and F&GC must employ to achieve their mission. Voters relatively uniformed (often misinformed) about fish, wildlife and plant resources, the habitats upon which they depend and the science and methods used to maintain their health, balance and sustainability, must hear from an unencumbered advocate.

(c) Legislation incompatible with the mission of DFG and F&GC is in effect now and will be proposed in the future. This includes directly incompatible legislation (such as removing one alpha-predator from DFG management while directing the department to manage on a science-based, balanced, eco-system basis) and indirect mutation of well intended legislation such that, over-time, it is mis-used (such as abuse of the ESA to delay delisting of recovered species).

In the face of these and other material changes, I request that the Project recommend to the Governor and the Legislature that DFG and F&GC engage in compelling advocacy for their mission, internally and externally. Currently the DFG maintains a position of "no comment" on legislation and other political matters and, in the modern era, this is a travesty. (Emphasis: I know this "no comment" policy to be true – if any question or alternative view is raised, I encourage the Project to conduct an anonymous survey of DFG employees asking whether they have been directed to make no comment in political arenas.) To empower the DFG and F&GC to advocate for their mission I request the following recommendations to the Governor and Legislature to achieve this goal:

(a) To the greatest extent possible, remove the appointment of all members of the F&GC from the political arena. Study the processes of other states and improve upon their insulation of the stewards of precious resources from political pressure and manipulation. In Arizona, for example, openings on the equivalent of F&GC are filled by inviting applications from all interested citizens. Within guidelines, the commission then narrows the applicants to no less than 2 or more than 5 options and the Governor is required to make the appointment from that list. I do not set this system forth as the Holy Grail, but it is better than the current CA system which has recently seen blatant politics in the appointment of commissioners who are promptly removed when they do not vote in-line with the governor's political (non-scientific) expectations. This system should be improved with, on the one hand, set terms for commissioners regardless of changes in administration, and explicit guidelines for selection to ensure that selected candidates are aligned with the mission and values of DFG and F&GC. On the other hand, the system should allow for the ability for commissioners to be removed by the public.

(b) Similarly, appointment of the Director of DFG should be removed from the political arena. Guideline qualifications for this position (which, among several other specifications should, I believe, favor promotion from within and secondarily favor those with appropriate relevant experience in other agencies or organizations) should be suggested by the project. Rigidly within those guidelines, I recommend that the F&GC commission appoint the Director without input from the Governor or Legislature.

(c) Having insulated the leadership from political whim, I would encourage the Project to assign each of DFG and F&GC the task of reviewing, revising and coordinating as appropriate their own mission statements and core values considering the output of the Project and their new empowerment. In this context, I emphasize that the mission and values of an advocate are far more visible and/or far more of a fundamental guiding value than they are for organizations subject to political whim. I further encourage the project continue its good work to define "best available science" and, in that context, recognize the such science must be compatible with the missions of DFG and F&GC. In the modern era, all science should be vetted for unsound, false or manipulated intent. I believe the DFG and F&GC should be directed to incorporate such science, active management including consumptive use (the only proven success in the face of human population growth) and advocacy in their mission. I also encourage the F&GC to consider dropping the notion that resource decisions should be made based (in part) upon desires of the public, leaving the process instead to sound biological information.

(d) Unfettered by politics and grounded in a sound, current mission and values, I recommend that the Project encourage the Governor and Legislature to require the DF&G and Commission to advocate for their missions. The DFG and F&GC should be required to speak out objectively, but aggressively for or against current or proposed legislation which assists or impedes its mission, citing objective, scientific information wherever possible and overtly rebutting claims with which they disagree. The DFG and F&GC should be chartered to advocate for reversal of laws which it believes are incompatible with its mission, reversal of laws which the passage of time and/or accumulation of new data has proven ineffective and for or against new proposed legislation as it sees fit. Frankly, I believe that those "Problem statements" in the current appendix B which cite lack of sufficient understanding on the part of the public will be remedied by an engaged, active and vocal DFG and F&GC advocating for their mission.

(e) Finally, among other actions, to enable DFG and F&GC performance in these areas in this era, I encourage the Project to recommend to the Governor and the legislature that DFG staff be expanded (including adequate funding) to include specialist legal staff to BOTH defend DFG and F&GC actions from litigation and to proactively press litigation against incompatible entities impeding the mission. Also add legislative liaison staff to DFG to work with the legislature advising which proposals the DFG and F&GC will support, is seeking to initiate and will oppose. Finally, I would add a "new issues" responsibility within F&GC and/or DFG tasked with annually projecting strategic shifts on the 10 and 20 year horizons which will need to be addressed. The DF&G and F&GC will need to respond to these issues with initial plans and concepts to address them. These may include matters such as climate change, energy ecology, fire ecology, predator ecology, California water ecology (and population growth), funding and state vs Federal management conflicts (particularly in light of Federal inability to control programs in the face of ESA abuse).

Funding DFG in the modern era:

As is noted in the November Draft Vision and above, the stakeholders in and users of our State's natural resources have changed as dramatically as the population of the state over the last century. This, along with several other factors, has broadened the responsibilities and constituency of DFG and F&GC. Despite this broadening of responsibility and complexity, the budgets of these entities have not kept pace. Further, an inherent current enmity has sometimes been apparent between those who know they have provided the vast majority of funding for nearly a century of success in improving habitats and wildlife population numbers and those who now offer input on matters such as non-consumptive use, predator ecology and other new directions. Opportunities exist to increase funding and reduce enmity.

(a) The Federal Wildlife Restoration Act (1937) and Sportfish Restoration Act (1950) are well known examples of conservation groups working with government to tax themselves in the interest of funding active management of wild resources. These acts place 10-11% taxes on a relatively short list of outdoor gear, primarily firearms, ammunition, archery equipment, arrow components and sportfishing equipment. I encourage the Project to recommend to the Governor and the Legislature that California lead the nation in embracing the modern diversity of those who enjoy outdoor resources to include a much more comprehensive list of outdoor gear at the same 10-11% tax. The incremental list subject to the tax could include among others photographic gear, optics, tents, backpacks, boots, climbing gear, kyaks (and other individual craft), scuba gear, wet suits, camp stoves, sleeping bags, technical clothing and professional fees paid to develop and run messages influencing natural resource policy. The list will be much longer, but this provides the idea. (I recognize that not all photographic equipment, optics or organic foods have a direct connection to wildlife resources, but neither do all firearms or archery equipment users – one would hope users of items on the CA list will welcome the opportunity to help.) If success in this arena leads to national adoption of similar increases in items subject to the tax, the California tax should be reduced to offset. In addition, I encourage the Project to recommend to the Governor and the Legislature that the concept of licensing the use of outdoor resources be expanded such that possession of and hunting license, a fishing license or a new "conservation license" results in usage fees at state parks, refuges, back country areas and other lands in-line with history, but higher "day use" fees apply to those without annual licenses.

(b) DFG, armed with its new mission, unfettered from the political and advocating for its mission and foundational science, should review all situations on all State Lands (including state parks) where animals are being removed at a cost to taxpayers. These opportunities should be made available as fee generating hunts to interested outdoors people. If necessary, given human population and multiple use issues, certain of these hunts should require the engagement of specially licensed guides who earn no more than $40 per hour after a minimum 8 hour first day and who are specifically trained in safety issues and in explaining the precautions, science and history of success in the activity to passer-by.

(c) Finally, the Project should recommend that the F&GC act now to modify the definition of Maximum Point Holder in the California draw system to mean those holding maximum points AND any holder of over 10 points. For premium hunt opportunities (CA sheep, elk, pronghorns), the current system is

dramatically flawed at attracting license purchases and loyalty from any out of state or new hunters. In sheep, as the worst example, current tag availability requires over 200 years before current max holders will cycle through. As a result: (a)the public trust has been violated as the max point tags (about 2/3 of all tags) have become the private venue of max point holders; (b) New hunters are disincented to participate in drawings; (c) New hunters are disincented to volunteer in conservation projects which benefit the opportunity of a limited few; (d) annual hunt application services recommend that out of state hunters do NOT buy licenses or apply in California: and (e) we are headed for an embarrassing era where groups of 90 year-old sheep hunters are at odds with the new generation of hunters. The dollars here are not small (nor are the public trust and ethical issues): As a result of California's inability to attract interest and loyalty from out of state, the state does not sell enough licenses to attract maximum Wildlife Restoration Act funds (despite our advantage in geographical size and total population), leaving seven-figure amounts to go to other states.

(d) Perhaps this goes without saying, but as a matter of prudence and in-particular in the current environment, any recommendations made by the Project to the Governor and Legislature to raise funding should include protections to ensure that those incremental funds are secured for the DFG and the F&GC AND that the availability of increased funds is not "backdoored" by reducing other, historical, sources of funds such that a net increase is diminished or completely offset.

Focusing on the Strategic

The matters which the Project has undertaken to address are numerous and their interaction is complex. To optimize the potential for success from the Project, I encourage the members to step-back at this time to review the list of draft problem statements in Appendix B. The purpose of this review is specifically to consider whether matters are "strategic", rising to the level of mission and challenges of the 21st century, or are "tactical". Those matters which are tactical are likely good thoughts and important work, but should be removed from the report to the Governor and the Legislature and provided by the project to DFG and F&GC for their handling.

For example, I would respectfully suggest that all matters discussed in Appendix B, Table 1 from its start on page 30 down to the last few items on page 31 ("adopt missions and visions that reflect the organizational mandates" ; establish a standing stakeholder advisory and "change the names of DFG and F&GC to reflect their mandates") are tactical. Inclusion of an abundance of tactical items obscures and dilutes the Strategic.

Further, the gist of more or better communication, partnering and/or collaboration is tactical. I would suggest that adopting a posture of aggressive advocacy to advance the mission in communications, partnerships and collaborations is strategic.

I will not presume to go through the entire list in this fashion as I am sure the Project can accomplish the task, but I would like to finish by suggesting that the discussions defining science, influencing the relationship with and control by the Governor and Legislature and considering funding are strategic.

With regard to the question of guiding science, I have attached (below) to my comment an August, 2011 position statement of the Wildlife Society, a professional organization for wildlife managers and biologists. I submit this position as an example of the type of clarity that will be necessary for DFG and F&GC to succeed.

Finally, I understand and appreciate the effort to "embrace diversity" in this, the "discussion" stage. I trust the Project recognizes that the ultimate goal of embracing diversity must be to enable unity. Further that, while all voices and views can and should be heard in the discussion stage, to succeed we must reach a "decision point" . Every view and every constituency will not be accommodated in the decision. Some views and ideals will be incompatible with the foundational science and mission. Ideally, understanding the process, thought and facts, all parties will decide to support the decision and advance the mission. Those that do not are being political and should be recognized as adversarial by an advocacy-driven organization. In the context of 21st century issues, the ability to advocate for the mission and address adversaries is perhaps the most important vision we can have for DFG and F&GC.

Thank you for the opportunity to comment and for your time and effort in considering these thoughts and those of all interested parties.

Yours sincerely,

Jim Clark

THE WILDLIFE SOCIETY

5410 Grosvenor Lane
Bethesda, MD 20814-2144
Tel: (301) 897-9770
Fax: (301) 530-2471
E-mail: tws@wildlife.org

Final Position Statement
Animal Rights Philosophy and Wildlife Conservation

The Wildlife Society (TWS) regards science as the framework necessary to understand the natural world and supports the use of science to develop rational and effective methods of wildlife and habitat management and conservation, as one of the pillars of the North American Model of Wildlife Conservation. The Wildlife Society recognizes the intrinsic value of wildlife, the importance of wildlife to humanity, and views wildlife and people as interrelated components of an ecological-cultural-economic complex. The

Wildlife Society supports regulated hunting, trapping, and fishing, and the right of people to pursue either consumptive or non-consumptive use of wildlife. The Wildlife Society is concerned that foundational elements of the animal rights philosophy contradict the principles that have led to the recognized successes of wildlife management in North America. Selective or broad application of elements of animal rights philosophy to contemporary issues of wildlife management promotes false choices regarding potential human-wildlife relationships and false expectations for wildlife population management, and erodes the confidence in decades of knowledge gained through scientific exploration of wildlife and their habitats.

Although a range of individual philosophies exists within the realm of “animal rights,” most adherents to such philosophies hold similar foundational beliefs, including that (1) each individual animal should be afforded the same basic rights as humans, (2) every animal should live free from human-induced pain and suffering, (3) animals should not be exploited for any human purposes, and (4) every individual animal has equal status regardless of commonality or rarity, or whether or not the species is native, exotic, invasive, or feral.

Animal welfare philosophy, such as that endorsed by TWS, focuses on quality of life for a population or species of animals. It does not preclude management of animal populations or use of animals for food or other cultural uses, as long as the loss of life is justified, sustainable, and achieved through humane methods. In contrast, the animal rights view holds that it is wrong to take a sentient animal’s life or cause it to suffer for virtually any reason, even to conserve species or ecosystems or to promote human welfare and safety. According to animal rights philosophy, animals should be given all of the same moral considerations and legal protection as humans. However, animal rights adherents have not come to consensus with regard to which species are sentient enough to qualify for these protections.

The animal rights focused emphasis on individual animals fails to recognize the inter-relatedness of wildlife communities within functioning ecosystems and holds that protecting individual animals is more important than conserving populations, species, or ecosystems. For example, conservationists may value the protection of an individual of an endangered species more than the existence of an individual of a common species, but for animal rights advocates these individuals are viewed as equally valuable and deserving of equal protection.

The animal rights viewpoint is silent on the massive land use alterations that would be necessary to feed the human population in the absence of consumptive use of animals and the dramatic and continued loss of wildlife that would entail as habitats are converted to and maintained in intensive agriculture. Further, the animal rights viewpoint has no room for the use of animals in scientific and medical research, whether designed to benefit humans or animals. Curtailment of these uses will inhibit wildlife science and conservation and a whole range of human endeavor and progress.

The conflict between many tenets of animal rights philosophy and wildlife management and conservation philosophy is profound. Established principles and techniques of wildlife population management, both lethal practices such as regulated hunting and trapping, and nonlethal techniques such as aversive conditioning or capture and marking for research purposes are dismissed in the animal rights viewpoint. The Public Trust Doctrine, the foundation of many laws protecting wildlife in the U.S., is based on the premise that wild animals are a public resource to be held in trust by the government for the benefit of all citizens. Animal rights advocates philosophically oppose this concept of wildlife as property held as a public trust resource, and further advocate affording legal rights to all animals. Taken literally, under the animal rights legal framework, there would be no existing legal basis for wildlife conservation and management. If the Public Trust Doctrine concept was voided, it would be difficult, if not impossible, for wildlife professionals to manage endangered species, overabundant, invasive, exotic, or ecologically detrimental animal populations, and to protect human health and safety. See TWS position statements on The North American Model of Wildlife Conservation and on Human Use of Wildlife for more details.

The policy of The Wildlife Society regarding animal rights philosophy is to:

1. Recognize that the philosophy of animal rights is incompatible with science-based conservation and management of wildlife.

2. Educate organizations and individuals about the need for scientific management of wildlife and habitats and about the practical problems relative to the conservation of wildlife and habitats, and to human society, with the animal rights philosophy.

3. Support an animal welfare philosophy, which holds that animals can be studied and managed through science-based methods and that human use of wildlife, including regulated hunting, trapping, and lethal control for the benefit of populations, species, and human society is acceptable, provided the practice is sustainable and individual animals are treated ethically and humanely.

Approved by Council August 2011. Expires August 2016.

-----Original Message-----
From: Marcia Armstrong
Sent: Saturday, December 10, 2011 10:31 PM
To: Strategic Vision
Subject: Comments submitted on DFG strategic vision

Attached are my comments on the proposed California Fish and Wildlife Strategic Vision (CFWSV) Project - Draft Interim Strategic Vision

Marcia H. Armstrong
Siskiyou County Supervisor District 5
P.O. Box 750
Yreka , CA 96097

Dec. 10. 2011

COMMENTS on the California Fish and Wildlife Strategic Vision (CFWSV) Project - Draft Interim Strategic Vision

The CA Department of Fish and Game has been charging down an aggressive regulatory path that people find increasingly oppressive, severe, intolerably burdensome and contrary to the rule of law and good government - causing an overwhelming backlash in Siskiyou County. If this is the vision of the CA DF&G, then it needs to go back to the drawing board, because we can't live with it.

At one time, the people of Siskiyou County had one of the most effective voluntary programs for the conservation of fish and wildlife in the State. Farmers and ranchers in the Scott and Shasta Valleys were so proactive in addressing the needs of coho salmon that they were recognized for their voluntary partnership efforts by having a separate local recovery plan and pilot programmatic permit. But the CADF&G pushed too hard – becoming unreasonable in its demands under the 1602 and Incidental Take Permit. It demanded water needed for crops and livestock without paying for it, without making people whole for the loss of their livelihood. Along with other environmental regulations, it placed a burden on local small family farms that threaten their continued economic survival. The CADF&G replaced a partnership with force, intimidation and impossible demands. Many people are standing up and saying "no" to what they considered to be tyranny.

Here are some examples

1. **The Department is violating individual's due process rights by agreeing to joint stipulations and settlement agreements with special interests that affect the property rights of people excluded from the process. [Fifth Amendment to the U.S. Constitution: *"No person shall be… deprived of life, liberty, or property, without due process of law…"; Fourteenth Amendment to the U.S. Constitution: No State shall… deprive any person of life, liberty, or property, without due process of law…"*]**

   For example, in the 2005 case of *Karuk Tribe of California et al. v. California Department of Fish and Game et al.*, Alameda County Superior Court Case No. RG 05211597, the stipulated agreement affected the property rights of miners in the Klamath River system who were not a party to the suit. It bypassed the formal rulemaking process, violating miner's due process rights. The stipulated agreement with the tribe was to cease to issue permits to local miners to operate their claims until the CA DFG administratively issued new regulations addressing specific areas. The case was also heard in a distant venue (Alameda) where the affected private properties were not located.

The *New 49er's* group successfully intervened and in 2006, the court required that CA DFG initiate an EIR and a formal rulemaking to mitigate identified harms within 18 months. In the meanwhile, miners with a constitutionally-protected property right to prospect and extract locatable mineral upon public lands (as granted by Congress) were physically prevented from beneficial use of their property. [The current law now extends the moratorium until 2016. The EIR has never been completed and not one miner has been compensated for the physical taking of his property.]

Another example is the infamous Klamath Basin Settlement Agreement(s). It was flat out required that interested parties agree to support dam removal as a prerequisite to their application to join the Settlement group. This summarily precluded any individual or interest that would be harmed by dam removal from participation. This included people whose property values and rights, wells, livelihoods and recreational opportunities would be directly affected. Further, the agreements themselves attempt to waive any liability for damage done by dam removal to county and city infrastructure and the health, safety and property of individuals in the vicinity. They also give short shrift to local County ordinances and processes in place to protect public health and safety, requiring permits for large scale demolition. To make matters even worse, the EIS/EIR fails to address the scope of the entire Klamath Basin Restoration Agreement {KBRA) in its analysis, excluding significant portions and affecting the due process rights of anyone impacted by its provisions.

2. **The Department has imposed regulations and fees that have interfered with individual's rights to engage in a lawful business or trade. It is a well-known adage that the power to regulate is not the power to destroy. Regulation of a business activity does not contemplate its destruction or restraint (prohibition for a period of time,) but rather places operation within certain bounds. A state agency may impose reasonable restrictions upon the conduct of such activities so long as the regulations have a reasonable relation to a legitimate public purpose (general public peace, health, morals, welfare); are reasonably exercised, (within constitutional limitations, not arbitrarily, and not in such a manner as to restrain trade or to unfairly discriminate.) Under the guise of protecting the public, the regulation may not arbitrarily interfere with, or unnecessarily restrict or act in a confiscatory manner to a lawful business or occupation (e.g. arbitrary and capricious.)**

   Contrary to the rule of law, the moratorium on dredge mining until 2016 arbitrarily restrains that industry. CF&GC Section 5653.1 requires that *regulations* on suction dredge mining "fully mitigate all identified significant environmental impacts." First, this selectively holds suction dredge mining to a standard contrary to CF&GC 2052.1, which states: "The Legislature further finds and declares that if any provision of this chapter requires a person to provide mitigation measures or alternatives to address a particular impact on a candidate species, threatened species, or endangered species, the measures or alternatives required shall be roughly proportional in extent to any impact on those species that is caused by that person."

Second, although CF&GC 2081 also includes the “fully mitigate” verbiage it applies to “measures required” not “regulations” and holds such measures to a standard of “roughly proportional in extent to the impact of the authorized taking on the species.” In addition, this selectively holds S.D. mining to a standard not required of any other industry under CEQA (Pub. Res. Code 21000, et seq.,) which has no “fully mitigate” requirement or standard. In fact, CEQA allows for findings that “specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.”

CF&GC section 5653 allows a permit to be issued only if the Department can determine that the “operation will not be deleterious to fish.” Laws may not unfairly discriminate. In this case, S.D. mining is being held to a standard of “not deleterious to fish.” According to Mirriam Webster’s dictionary, “deleterious” means harmful. Fishermen can kill fish and that is ok. Any other group can even harm an endangered species, but not be in violation because the standard is “kill.” This standard applied to S.D. mining is glaringly arbitrary, capricious and discriminatory.

In the vein of the “precautionary principle,” note that the standard is in the negative. It assumes that that the activity is deleterious unless it can be proven that it is “not deleterious.” In America, it is a doctrine that people are presumed innocent until proven guilty. There is a standard that one has the liberty to use ones private property unless such use causes a substantial injury to general public health and safety. The standard in the current code flies in the face of justice.

AB 120 also requires that “a fee structure is in place that will fully recover all costs to the department related to the administration of the program.” Under the rule of law, "fees" cannot be punitive, but are to only cover costs of government services related to permitting - as the permitting act benefits a specific individual. Fees which exceed the estimated reasonable cost of providing permitting are considered "special taxes" which require a public vote. The level of many current fees is unreasonable and intolerable, forcing small businesses out of business.

Regulations lose their validity when they become confiscatory in nature. Under the aborted “programmatic incidental take” permit attempted for the Shasta and Scott river areas, the CA DFG imposed a variety of extortive mitigations that were confiscatory: (a) reallocation of Gold Rush era pre-1914 water rights to instream flows; (b) land conversion from crop and grazing land (a commercial crop) to riparian forest (non-income producing); and (c) waiver of the right to control access.

According to the AG Census, there were 846 farms in all of Siskiyou County in 2007. There were 80 farms under 10 acres; 229 farms from 10-49 acres; 228 farms from 50-179 acres; 130 farms from 180-449 acres; 79 farms from 450-999 acres; and 100 farms above 1,000 acres (mostly in the upper Klamath Basin.) Only 241 farms had sales values above $25,000. Only 137 of these farms had sales values in excess of $100,000. These are very small businesses. The spectre of a $10-20,000 fish screen or

a $40,000 EIR process for an ITP is simply prohibitive. Profit margins are so thin that taking land out of production or cutting water back from the living needs of crops and livestock can literally make or break a business. In 2008, 87% of farm income was used for production expenses and only 12% was net profit, with the average net cash profitability of local farms and ranches at $29,747.

According to the USDA Ag Census, in 1992, Siskiyou County had 647,446 acres in farms. By 2007, this had been reduced to 597,534. In 1992, there were 37 farms of 1-9 acres, this more than doubled to 80 in 2007. The number of farms 10-49 acres increased 59% from 144 in 1992 to 229 in 2007. There were 179 farms 50-179 acres in 1992. This had increased 27% to 228 farms by 2007. The farms 180-449 acres and 500-999 acres remained appreciably the same. There was a 19% reduction in farms 1,000 acres or more from 124 in 1992 to 100 in 2007. It is likely, from these figures, that many of these larger farms were subdivided.

From 1992 to 2007, farms selling less than $2,500 increased from 175 to 359 (+105%.) Farms selling $2,500-9,999 stayed about the same. Farms selling $10-$24,999 decreased from 105 to 95. Farms selling $25,000-$49,999 decreased from 73-60. Farms selling $50,000 to $99,999 decreased from 80 to 44 and farms selling more than $100,000 increased from 107 to 137 (+28%.)

According to Cal. D.O.T. Siskiyou County Economic Forecast, since 1995, Siskiyou County's agriculture industries have experienced substantial job loss at about 586 jobs, declining almost 45%. For instance, since 1996, county vegetable crops have declined in their contribution to the economy from $18.9 million to $11.8 million - or 38 percent. Much of this is due to regulatory pressures, such as the water crisis and conservation land conversion in the Upper Klamath Basin.

There were 81 fewer production ranches in 2007 than in 1992 (312 v. 393 – a 21% decrease.) There were 20,882 fewer cattle and calves in inventory over this period of time (77,417 to 56,535, or -27%) and sales dropped from 41,668 to 33,683.

Of non-farmers and ranchers, in 2007, 61% of the establishments in Siskiyou County had less than 4 employees; 82% had less than 10 employees and 93% had less than 20.

After government, and entitlement benefits, agriculture is our largest contributor to the economy of the county. We simply cannot survive if we lose these small businesses to regulation.

3. **CA DFG regulations fail to meet the standards of "essential nexus" and "rough proportionality" set forth in <u>Nollan v. California Coastal Commission,</u> 483 U.S. 825 (1987) and <u>Dolan v. City of Tigard,</u> 512 U.S. 374 (1994). In these decisions, the Supreme Court of the United States indicated that the conditions/mitigations/exactions required of an individual must be specifically related to an identified injurious activity and roughly proportionate to that**

impact. CF&GC 2052.1 also provides that any required mitigation measures or alternatives to address a particular impact on a candidate, threatened or endangered species be "roughly proportional in extent to any impact on those species that is caused by that person."

In the case of threatened coho, in the Klamath River system, there are overwhelming limiting factors other than the normal functions of farming and ranching that negatively impact the species and contribute to its decline:
a) **Fish disease** - in sampling of coho done in 2008, greater than 90% of juveniles trapped were found to be suffering from fatal clinical ceratomyosis. (The Klamath River is infected with *Ceratomyxa shasta* and *Parvicapsula minibicornis.* There are also several years of samplings of heavy infection rates among Chinook juveniles. http://www.fws.gov/arcata/fisheries/projectUpdates.html)

b) **Predation** - Estimates of mortality of anadromous salmonids from natural predators runs as high as 98 percent (Fresh in Steward and Bjornn 1990). Great blue herons, belted kingfishers, mergansers, dippers, gulls, otters, garter snakes, various mammals, and other fish all eat juvenile salmonids. Predation in ocean nearshore areas is greatest by blue sharks, sea lions, and harbor seals, while sharks and lampreys may pose the greatest threat on the high seas (Ricker 1976). [Chaper 4, 37-38, Page 200-201 of the Long Range Plan For The Klamath River Basin Conservation Area Fishery Restoration Program]

c) **Ocean conditions** – "The Wells Ocean Productivity Index (WOPI), a composite index of 13 oceanographic variables and indices, weighted heavily by sea level height, sea surface temperature, upwelling index, and surface wind stress, has been used to accurately predict zooplankton, juvenile shortbelly rockfish, and common murre production along the California coast, and is thus a valid indicator of ocean productivity. Index values for the spring-summer of 2005 and 2006 were low, indicating poor conditions for growth and survival (Fig. 2). In fact, only the El Niño years (1982-83, 1992-93, 1999) had lower WOPI values. The WOPI assesses conditions on a local scale for California, but has tracked another index, the Northern Oscillation Index (NOI), which is based on the strength of the North Pacific high pressure cell and describes a broader region of the North Pacific Ocean. In 2005 and 2006, the WOPI decoupled from the NOI, suggesting local conditions on the California coast were worse than for the larger North Pacific region. These results indicate that ocean conditions in the spring and summer, when juvenile coho and Chinook salmon enter the ocean, were unfavorable to growth and survival. This may explain the poor returns of both coho in 2007/08 and Chinook salmon in 2007. And, if the WOPI has predictive power, adult Chinook returns in 2008 should be low, supporting independent findings by the PFMC's Salmon Technical Team, which reported a record low in the number of jacks returning to the Central Valley this past fall. Jack returns have been a useful predictor of run size in the next year, in this case, 2008. In 2007, only 2,000 jacks returned compared to th e previous low of 10,000 and the long-term average of 40,000." [Coho and Chinook Salmon Decline in California during the Spawning Seasons of 2007/08 - Prepared by R.B. MacFarlane, S. Hayes, B. Wells 2008 http://swfsc.noaa.gov/publications/CR/2008/2008Mac3.pdf]

In comparison with these other factors, the impact on the species from normal agricultural practices in the Scott and Shasta Rivers is minute. The regulations proposed are enormously out of proportion to impacts.

In the proposed programmatic incidental take permit for coho for the Scott and Shasta Valleys, the CA DFG even attempted to interpret the "fully mitigate" standard of the CA Endangered Species Act to mean that for every egg, fry or juvenile potentially killed that the farmer or rancher would have to create new habitat or habitat conditions to replace that lost individual. The measures required under CF&GC 2081 hold to a standard of "roughly proportional in extent to the impact of the authorized taking on the species," not the impact on an individual member of the species.

d) Bycatch

4. **Regulations are governed by rules of "proximate cause." There must be a substantial forseeability or predictability that specific actions would cause injury or harm within an uninterrupted period of time. There is also a quality of direct causation – no intervening causes between the original act and the resultant injury. In addition, the act itself must be voluntary. It must be the primary act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred. The action is not the cause of the injury if the injury would have occurred without the action.**

   The injury or harm caused by an activity being regulated is also held to a standard of "substantial," significant, serious or appreciable injury as well as being a substantial factor or contributor to the injury. (The action must have been a significant factor enough to have independently caused the injury by itself.) This would be contrasted with injuries/damage that are "de minimis" or of minimum importance – something that causes an impact that is so little, small or insignificant that the law will not consider it.

   If one can point to evidence of a direct cause and effect relationship between a specific activity and alleged prohibited consequence, then it is an activity which can be regulated. In the case of S.D. mining, there are no definitive studies that can prove proximate cause to death or even substantial harm to salmon. Every one of the studies available state that impacts to the resources are unsubstantial and very temporary. In the case of agriculture and death to threatened coho, there is very little exposure where a normal agricultural activity can be proven as a proximate cause. This is why the CA DFG tied the watershed-wide 1602 to the programmatic ITP. Although some folks needed a 1602, they determined that they did not need an ITP. The CA DFG, however, tied one to the other, requiring both.

   CA DFG cannot just arbitrarily establish a prohibition on use. People have a fundamental natural right to liberty and property subject to the qualifier that property use cannot harm general public health and safety. The law must have a legitimate

relationship to proximate cause. It certainly cannot presume harm unless proven otherwise as the "not deleterious" standard currently does.

5. **California law defines Environmental Justice as "the fair treatment of people of all races, cultures and income with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies" (Government Code Section 65040.12 and Public Resources Code Section 72000).**

   The California Resources Agency Environmental Justice Policy http://resources.ca.gov/environmental_justice_policy_20031030.pdf identifies low-income communities for protection from the "disparate implementation of environmental regulations, requirements, practices and activities in their communities." All Departments, Boards, Commissions, Conservancies and Special Programs of the Resources Agency must consider environmental justice in their planning, decision-making, development and implementation of all Resources Agency programs, policies and activities.

   Pub.Res.Code § 71110(a) and (b) outlines standards for environmental justice where the agency shall:
   (a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
   (b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.

   According to the new 2007 California County Data Book, Siskiyou County is dead last in all California Counties in family economic well-being, having the lowest median income. 65% of households with children ages 0-17 are low income, compared with a California average of 43%. The report notes that 27% of Siskiyou County's children live in official poverty, compared to 19% for the state.

   Poverty and other stressors contribute to local family problems. Siskiyou County has a very high child abuse referral rate compared to national statistics. For instance, in a total population of only 44,000, in December 2007 there were 36 referals and three children had to be removed from their home. In that month, 83 children were in permanent foster care or a group home, 20 were in non-relative guardianship, 23 were supported by a voluntary family maintenance plan, and 69 children were in a temporary foster or other care working toward family reunification. The 2004 report entitled "*Community Indicators of Alcohol and Drug Abuse Risk for Siskiyou County*" (CA Dept. of Alcohol and Drug) indicates that from 2000-2002 in Siskiyou County, there were 132.1 emergency responses per 1,000 population under the age 18 for child endangerment/abuse. This compares with a statewide average of 68.6 per

1,000. County Foster care placements were 18. 9 per 1,000, compared with a statewide average of 10.3.

According to an October 2008 study by Meredith Bailey CPA, Inc. entitled *"A Review of Intimate Partner Violence in Siskiyou County,"* the rate of Type I crimes (aggravated assault, robbery and forcible rape,) is much greater in Siskiyou County than in Los Angeles. In fact aggravated assault is about five times greater. Siskiyou County also dominates the surrounding counties of Humboldt, Shasta, Lassen and Del Norte County in the rate of these crimes. The report points to "social strain" fueled by alcohol and drug use as the cause.

The report entitled *"Community Indicators of Alcohol and Drug Abuse Risk for Siskiyou County"* states that from 1999-2001 the annual rate of DUI arrests for Siskiyou County was 13.3 per 1000 people aged 18-69, while the average for the State of California is only 8.4. The total arrests for alcohol-related offenses (excluding DUI) was per 13.2 per 1000 people aged 18-69 in Siskiyou County, while the rate for California is only 5.9. In 1998-2000, the rate of alcohol related fatalities was 149.4 per 100,000 drivers in Siskiyou County and an average of in the entire State was 98.1.

It is clear that aggressive environmental regulation that put species welfare ahead of the welfare of human communities has taken a definite toll on the economy and social fabric of Siskiyou County.

6. **According to Public Resource Code sections 21002 and 21002.1, "no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:**

   (a) The public agency makes one or more of the following findings with respect to each significant effect:

   (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

   (b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."

   Siskiyou County is an economically depressed area. The census indicates that between 1990 and 2008, Siskiyou County experienced a 25% loss in the population of children under the age of 18. The County saw a 45% increase in the population age 45-64 and an 18% increase of those age 65 and older. This shows that our population is aging dramatically, and younger family wage earners are migrating elsewhere.

In 2008, the average wage for jobs in Siskiyou County was 63% of the California average. The rate of unemployment from 2001 -2007 was 8-9.5% It climbed to an average of 10.2% in 2008 and, as of October 2011, is currently at 15.4%. In 2008, the Siskiyou County median income was $36,823 - 60% of the California median. Siskiyou County ranks 51 out of 58 California Counties in median income. In 2008, 25.4% of children under the age of 18 in Siskiyou County lived in poverty. That is 6.9% greater than the California rate.

Social and economic impact analysis under various CEQA analysis have been inadequate and have discounted serious local impacts. Rural counties are no longer in a position where we can afford to tolerate this. The legislature and the Department must either temper its regulatory zeal, or our communities and local government will no longer be able to exist. It is so bad, that many rural people have become convinced that it is exactly the intent to push people off their land and into planned high density sustainable communities.

7. **The Public Resources Code 21153 indicates that (a) "Prior to completing an environmental impact report, every local lead agency shall consult with, and obtain comments from, each responsible agency, trustee agency, any public agency that has jurisdiction by law with respect to the project..." (b) "the lead agency may provide for early consultation to identify the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in the environmental impact report. At the request of the lead agency, the Office of Planning and Research shall ensure that each responsible agency, and any public agency that has jurisdiction by law with respect to the project, is notified regarding any early consultation."**

   The California legislature has mandated in Section 65040 that the State Office of Planning and Research shall "coordinate, in conjunction with...local agencies: with regard to matters relating to the environmental quality of the state."

   California Code of Regulations Chapter 3. Guidelines for Implementation of the California Environmental Quality Act, Article 9. Contents of Environmental Impact Reports 15125. Environmental Setting (d) The EIR shall discuss any inconsistencies between the proposed project and applicable general plans and regional plans…. (e) Where a proposed project is compared with an adopted plan, the analysis shall examine the existing physical conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced as well as the potential future conditions discussed in the plan.

   In 1957, the bi-state Congressional Klamath Compact created the Siskiyou County Flood Control and Water Conservation District with jurisdiction throughout the County, (with the exception of the BoR's Klamath Project.) See CA Water Code Section 5900-5901**.** The District was given the power "to prevent interference with or diminution of, or to declare the rights in natural flow of any stream or surface or

subterranean supply of waters used or useful for any purpose of the district or of common benefit of the lands within the district or to its inhabitants; to prevent unlawful exportation of water from said district; to prevent contamination, pollution or otherwise rendering unfit for beneficial use the surface or subsurface water used or useful in said district, and to commence, maintain and defend actions and proceedings to prevent any such interference with the aforesaid waters as may endanger or damage the inhabitants, lands, or use of water in, or flowing into, the district…"

Siskiyou County has General Land Planning authority and police powers to pass legislation to protect public health and safety within the County. The plan includes Land Use, Open Space, Conservation, Recreation and Water Supply Elements.

In recognition of joint jurisdictional issues, Siskiyou County has established a formal government to government "coordination" process between the elected full Board of Supervisors/Flood Control and Water Conservation District Board and state and federal agencies. During the past year, we have been successfully coordinating plans and policies with both the Forest Supervisors of the Klamath National Forest and the Shasta Trinity National Forest.

Each year the CDFG is formally notified of our desire to coordinate on regulatory issues. Here is our longstanding ordinance to that effect: CHAPTER 12. of Siskiyou County Code COUNTY PARTICIPATION IN STATE AND FEDERAL AGENCIES LAND TRANSACTIONS, which reads as follows:

> Sec. 10-12.01. Findings.
> The Board finds:
> (a) Actions of state and federal agencies to plan, adopt rules or regulations, acquire land or interest in land, in fee or through easements, promulgation of programs, land adjustments, and other activities of these agencies can have significant effects on the customs, culture, economy, resources, and environment of the County of Siskiyou and its citizens.
> (b) In order to protect the customs, culture, economy, resources, and environment of the County of Siskiyou, it is critical that federal and state agencies recognize and address the effects of any actions proposed within the County which may affect matters, including, but not limited to, economic growth, public health, safety and welfare, land use, the environment, conservation of natural resources, such as timber, water, fish, wildlife, mineral resources, agriculture, grazing, and recreational opportunities.
> (c) The coordination and consideration of the County's interest is required by law, such as in those requirements set forth in the National Environmental Protection Act, the National Forest Management Act, the Intergovernmental Cooperation Act, the Federal Land Policy and Management Act, the Federal Administrative Procedures Act, the State of California Public Resources Code, the California Environmental Quality Act, and numerous other federal and state statutes and administrative procedures.

(d) These various state and federal laws provide for participation by Siskiyou County and the public through opportunities for comment on proposed projects and actions.
(e) There is general County concern that, in the past, the legally required process of notification, referral, and coordination of activities described above may not have been consistently followed by state and federal agencies, which has led to concerns by the County and its residents that uncoordinated actions may have been adopted contrary to the requirements of law and potentially detrimental to the customs, culture, economy, resources, and environment of the County of Siskiyou.
(f) There is a clear need to establish an effective and consistent joint procedure for advance notification, referral, coordination, and participation to be followed by all state and federal agencies when undertaking activities or actions affecting the public health, safety, land use, customs, culture, economy, conservation of natural resources and environment of the County of Siskiyou, which procedure provides for a timely advance notice of opportunities for participation which are essential to the integrity of the decisionmaking processes of these state and federal agencies.
(g) In order for this coordination and consultation to be meaningful, the said notice and opportunity for input shall be given at the earliest possible stage of the federal and/or state governments' contemplation or consideration of a particular course of action with regard to land use plans, actions, or decisions affecting land use in Siskiyou County and such notice shall be given with sufficient specificity and prior to any psychological momentum having been developed with regard to the particular plan, action, or decision.
(§ I(part), Ord. 99-08, eff. May 4, 1999)

Sec. 10-12.02. Notification, referral, and consultation procedures.
In order to permit timely advance notification, referral, consultation, coordination, and participation in proposed actions of state and federal agencies:
(a) All federal and state agencies shall inform the County of Siskiyou, or its designee, of all pending, contemplated or proposed actions affecting local communities, citizens, or affecting County policy, and shall, if requested by the County, coordinate the planning and implementation of those actions with the County or its designee(s). Such notification shall include a detailed description of the proposed plan, procedure, rule, guideline, or amendment sufficient to fully inform lay persons of its intent and effects, including the effects on the resources, environment, customs, culture, and economic stability of the County of Siskiyou.
(b) The Siskiyou County Board of Supervisors shall be consulted in accordance with the laws and regulations of the State of California and the United States regarding any pending, contemplated, or proposed actions affecting local communities and citizens.
(c) All federal and state agencies shall, to the fullest extent permissible by law, comply with all applicable procedures, policies, and practices issued by the County of Siskiyou.

(d) When required by law or when requested by the County of Siskiyou, all federal and state agencies proposing actions that may impact citizens of the County of Siskiyou shall prepare and submit in writing, and in a timely manner as soon as is practicable, report(s) on the purposes, objectives and estimated impacts of such actions, including environmental, health, social, customs, cultural and economic impacts, to the County of Siskiyou. Those reports shall be provided to the County of Siskiyou for review and coordination with sufficient time to prepare a meaningful response for consideration by the federal or state agency.
(e) Before federal and state agencies can alter land use(s), environmental review of the proposed action shall be conducted by the lead agency and mitigation measures adopted in accordance with policies, practices, and procedures applicable to the proposed action and in accordance with all applicable federal, state, and local laws. Impact studies shall, as needed, address the effects on community and economic resources, the environment, local customs and public health, safety, and welfare, culture, grazing rights, flood prone areas and access and any other relevant impacts.
(f) For the purposes of this ordinance, each federal and state agency shall, unless specifically authorized otherwise, give the required notices) to the County of Siskiyou and the Board of Supervisors, via certified mail, as follows:
Siskiyou County Board of Supervisors
P.O. Box 750
Yreka, CA 96097
Siskiyou County Planning Director
P.O. Box 1085
Yreka, CA 96097
Siskiyou County Assessor
County Courthouse, Rm. 108
Yreka, CA 96097
(g) Not less than five (5) complete copies of the written documents supporting the proposed action shall be provided to the Clerk of the Board of Supervisors at the above referenced address in such a timely manner so that there can be meaningful review and input sufficiently in advance of the action.
(h) Notification of the availability of related documents shall be available for the minimum time set forth by the federal and state statute for such review or, if none is established by law, for a period of not less than forty-five (45) days prior to the proposed date of action, adoption or approval. This time is necessary to ensure adequate local opportunity for consideration and response.
(§ I(part), Ord. 99-08, eff. May 4, 1999)

The CA DFG has refused to meet with the full Board of Supervisors in formal, noticed, designated and agendized coordination meetings. (These are government to government sessions where the public may watch, but not participate – public comment is sequestered from the coordination process.) It is an opportunity to work together as partners to harmonize the goals, policies and plans of the two jurisdictions, to exchange pertinent information, and craft a consistent approach that meets the objectives of both local human welfare and management of fish and wildlife.

Elected County government is not a "special interest" or a "stakeholder." It is a legal jurisdiction with regulatory power and authority. It is inappropriate to relegate County government to participatory status on an advisory committee to the CADF&G in parity with an individual or special interest stakeholder. This is precisely what the CDF&G did in the recent dam removal/Klamath Basin Restoration Act CEQA process and what they attempted to do in the recent flow study assessment on the Scott and Shasta Rivers.

8. **The U.S. Supreme Court stated in and Dolan v. City of Tigard, 512 U.S. 374 (1994): "Under the well-settled doctrine of 'unconstitutional conditions', the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See Perry v. Sindermann, 408 U. S. 593 (1972); Pickering v. Board of Ed. Of Township High School Dist., 391 U. S. 563, 568 (1968)."**

   The value of private property ownership lies in the right to exclusive use, disposal and enjoyment of the property. Under the aborted "programmatic incidental take" permit attempted for the Shasta and Scott river areas, the CA DFG imposed a variety of extortive mitigations that amounted to uncompensated property takings: (a) reallocation of Gold Rush era pre-1914 water rights to instream flows; (b) land conversion from crop and grazing land (a commercial crop) to riparian forest (non-income producing); and (c) waiver of the right to control access.

   Regulation without compensation has historically been constrained to the protection of general public health, safety and welfare from substantial injury. Under the fifth amendment to the U.S. Constitution, private property can also be taken for a legitimate public use, such as the promotion of a public benefit, however, the owner must be made whole with just compensation.

   The incidental take permit requirements caused a firestorm of negative reaction from landowners and destroyed much of the good will, trust and cooperative relationships that had previously been established between the DFG and landowners over the previous decade. It also condemned many of the established leadership in the farming community who had collaborated with the CA DFG in the permit application. The fact that armed Game Wardens visited folks who had not opted to sign up for the permit and allegedly acted in an intimidating manner to coerce them to sign, only intensified the situation. The fact that CDF&G meetings in Siskiyou County and Redding are conducted with a cadre of armed enforcement agents present is indicative of this oppressive atmosphere of intimidation.

9. **Article 1, Section 1 of the Constitution of the State of California states:**

   "All men are by nature free and independent, and have certain unalienable rights, among which are those of enjoying and defending life and liberty,

acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness."

In January 1993, the Siskiyou County Board of Supervisors Passed Resolution 93-19 pointing out that the State must evaluate possible takings of the private property or private property rights of the citizens of Siskiyou County prior to the implementation of any action, decision or regulation effecting said citizens; to formally evaluate and avoid the risk of unanticipated private property takings and investment backed expectations; and that the property owner shall be justly compensated for losses as mandated by the Fifth Amendment of the U.S. Constitution and Article 1, Section 8 of the Constitution of the State of California without undue delay.

Siskiyou County Resolution 93-19 states:

"WHEREAS, the U.S. Supreme Court in its decision under First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2386 (1987) established that government action resulting in temporary or permanent interference with any of the freedoms embodied in an individual's personal property rights may constitute a "taking" under the Fifth Amendment with a Constitutional obligation to pay just compensation.

"WHEREAS, the U.S. Court has ruled that governmental action resulting in physical intrusion or invasion on property may constitute a compensable taking of private property in Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 426 (1982.)

"WHEREAS, the U.S. Supreme Court in Lucas v. South Carolina Coastal Commission, cite omitted (1992)[*505 U.S. 1003, 1027 (1992)*] **; and Nollan v. California Coastal Commission, 107 S.Ct. 3141, 3146 (1987), citing Agins v. Tiburon, 447 U.S. 255, 260 (1980); has deemed governmental regulatory conduct that places a burden on property rights to constitute a compensable takings in instances where:**

1) **Regulations do not substantially advance legitimate state interests;**
2) **Regulations deny an owner economically viable use of his land;**
3) **Restrictions are disproportionate to the extent in which the property use contributes to the overall problem for which the regulation is imposed to redress."**

The Mining Act of 1872 is a unique law that vests an individual with the right to prospect and extract locatable mineral upon public lands. This right upon location, is a grant by Congress which carries with it a property right protectable by the Constitution (5th Amendment). This location is a severance from ownership from the U.S. to a private party (subject to BLM validity exam) of a locatable mineral estate. This "location" or claim acts as a relinquishment of land by the United States to the private sector to

perfect to full patent if the individual wishes. The Mining Act of 1872 is a "Location System" and not a "discretionary grant system".

Obviously, a mineral claim is a valuable property right. By imposing a moratorium on the use of that property, the state has temporarily physically taken the property, which is subject to reimbursement of just compensation for the takings.

The proposed ITP, Klamath Basin Restoration Agreement, various plans and the recent announcement of an Instream Flow Incremental Methodology Assessment of the Scott and Shasta Rivers herald the intention to redirect water from private use for irrigation to instream uses for fish and habitat. Indeed, the CA DF&G has been attempting to incrementally redirect flows through fish screens with screen mesh that won't permit the full adjudicated water right to pass, fish bypass structures that return more and more water to instream use and away from irrigation and ITP requirements to surrender water.

Many of the water use rights in Scott Valley are either riparian or were established by appropriation and continuous beneficial use in the mid 19th century - well before 1911 when the People of the State claimed ownership of surplus water beyond vested rights. (In San Bernardino v. Riverside (1921) and Palmer v. Railroad Commission (1914) the Court specifically stated that the 1911 statute declaring water the "property of the people" did not apply to appropriated private water use rights already vested.)

Most water use rights in the Scott are vested, privately owned and valuable property, and not revocable "permitted" or "licensed" water use subject to conditions from the state**. (**A "vested" right is a covenant that cannot be resumed, annulled or later modified by the grantor through legislation or otherwise. (A right vested, cannot be divested. Cited, 2 Dall. 297, 304; 9 Cranch 52; Green v. Biddle, 8 Wheat. 1; Fletcher v. Peck, 6 Cranch 136.) States are barred from impairing the obligation of contracts, including these vested rights Hughes v. Washington (1967.) It is also established in law that whenever a grant is made, it also included whatever was necessary for taking and enjoying the property, (diversion of an appropriative right.)

In the recent United States Court of Appeals for the Federal Circuit case –Casitas Municipal Water District v. United States (2008), it was reinforced that a physical invasion of privately owned property (water use right) by government appropriation, or a regulatory action which causes "an owner to suffer a permanent invasion of her property – however minor," or a regulatory action that "completely deprive[s] an owner of 'all economically beneficial use" constituted a compensable property taking under the Fifth Amendment of the Constitution. Restrictions on (beneficial) water use rights for the public use of protection of endangered species – including instream use was recognized as a "taking" of property. The case further denies claims that appropriation of natural resources for environmental use is not for government use under the Fifth Amendment: "…preservation of an endangered species is for government and third party use – the public- which serves a public purpose." In addition, Casitas makes a distinction between the ruling in Tahoe-Sierra on the basis that the Tahoe decision did not physically appropriate anything, change or diminish the property.

On appeal, the Federal Circuit upheld our dismissal of plaintiff's contract claim, but reversed our dismissal of plaintiff's takings claim on the ground that the taking was physical rather than regulatory in nature. Casitas, 543 F.3d 1276. In explaining its conclusion, the Federal Circuit wrote as follows: [T]he government admissions make clear that the United States did not just require that water be left in the river, but instead physically caused Casitas to divert water away from the Robles-Casitas Canal and towards the fish ladder. Where the government plays an active role and physically appropriates property, the *per se* takings analysis applies.Id. at 1295.

I am concerned that a "permit" (1602) requirement is being categorically imposed on the mere exercise of a long vested and valuable property right (pre-1914 water use right) - making it, essentially a discretionary conditional privilege. As outlined in the current Siskiyou County Farm Bureau case against the CA DF&G, the law is being interpreted to require the mere turning on of a longstanding head gate to require a permit. Further, it is apparent that this requirement is not being universally applied on all water rights users in California – raising the question of a guarantee of equal protection of the law.

Under the proposed ITP, the CA DF&G also sought to control a riparian buffer from crop production and livestock grazing. Because of meanders and geography creating small pocket valleys, Siskiyou County determined in its 1999 comments regarding a proposed federal 300 foot critical habitat designation for coho, that 21% of the irrigated agriculture land base in the Shasta Valley (9,817 acres) and 35% (11,215 acres) in the Scott would be implicated and largely converted from production ag. A decade ago at that proposed level of involvement, the combined loss of annual ag production was estimated to be $4,420,766. Using the multiplier effect of an income/output model by UCE, this was estimated to result in lost sales in other economic sectors of the county of $5,913,173, losses in income of $1,847,079 and 132 lost jobs.

It was also estimated at that time that weed infestation from projected management prohibitions in the buffer areas would amount to another $1,225,095 in ag loss. Loss in annual timber stumpage value from riparian buffer strips was estimated at $4,941,695. No "multiplier effect" on local economy was calculated for these projected losses. Loss in ag land value from prohibitions was estimated at $40 million.

10. Decisions should be informed by science, not dictated by science. According to the U.S. Supreme Court case <u>Daubert v. Merrell Dow Pharmaceuticals</u>, 509 U.S. 579 (1993): "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." <u>Daubert</u> also points out that: "Scientific conclusions are subject to perpetual revision."

As we have just seen in the Klamath dam removal EIR, the so-called science is inadequate and incomplete (ref. comments "fish experts" on coho, steelhead and Chinook.); often misquoted and misrepresented (as substantiated by our official comments); often normative - motivated by a predetermined advocacy and subject to political pressure (ref. various CalTrout financed studies.). It certainly does not meet the

Daubert standards. After 20 some years of experience with “science” on the Klamath, to claim otherwise is laughable. We have lived with too many dictates that were later reversed because they were found to be wrong headed. (Ref. current outcry to remove gravel that was specifically placed in the Trinity for spawning.) We have suffered through too many regulations based on incorrect data, flawed assumptions, “studies” paid for by advocates, faulty lab work, studies contrary to agency desired outcome that were buried (initial CDM study) , etc. In the Klamath, “science” is just as political as any other leverage point.

Decisions based singularly on “science” that excludes human needs and communities are beyond the purpose of government. Blackstone in his commentaries stated that: "...the end of civil society is the procuring for the citizens whatever their necessities require, the conveniences and accommodations of life, and, in general, whatever constitutes happiness: with the peaceful possession of property, a method of obtaining justice with security; and in short, a mutual defense against all violence from without. “ In short, the fundamental purpose of government is to protect the general public health and safety from substantial injury while securing the rights and liberties of individuals. This seminal duty comes first and foremost - it cannot be subordinated by “science” as some empirical arbiter. This is why it is so important that the design and implementation of a regulatory program be tempered in coordination with local governments that have joint jurisdiction with the Agencies over the police powers, conservation, land and water use issues. Local governments can bring vital information and perspective to the table about the welfare and well-being of the people most affected by the regulation.

11. The “strategic vision” seeks to pursue “comprehensive biodiversity management” and “sustainable ecosystem functions.” Sustainable Ecosystem Management was the product of the Convention on Biological Diversity (Biodiversity Treaty) requiring participating nations to conform to protocols established by the Conference of the Parties. The Treaty also required the development of a Global Biodiversity Assessment (GBA) (Article 25) to provide the "scientific" basis for the COP's protocols. The principle of ecosystem management is deeply ingrained in the GBA. Article 8 of that treaty committed to protecting ecosystems and establishing a system of protected areas to conserve biological diversity. However, the Senate refused to ratify the Convention on Biodiversity in 1994 so it is not binding on the nation.

“Ecosystem Management” was the basis for President Clinton’s "Forest Plan for a Sustainable Economy and a Sustainable Environment." It was institutionalized by Vice President Al Gore as part of his National Performance Review. (See Improving Environmental Management, Accompanying Report of the National Performance Review (Washington: Government Printing Office, September 1993.) **I**n August 1993 the White House Office of Environmental Policy (OEP) took the lead for the federal initiative on ecosystem management by establishing the Interagency Ecosystem Management Task Force (IEMTF) to carry out Vice President Gore's mandate. In January, 1996, the White House executed a Memorandum of Understanding to Foster the Ecosystem Approach (OEP 1996) that was signed by the 14 federal agencies that had participated in the

interagency task force on ecosystem management. Ecosystem Management was an initiative of the Clinton Administration, not a Congressional mandate.

Ecosystem Management was the outcome of The World Conservation Strategy formulated in 1980 by the International Union for the Conservation of Nature and Natural Resources (IUCN) in cooperation with the U.N. Environmental Program (UNEP,) World Wildlife Fund (WWF), FAO and UNESCO. The overall strategy is to set aside core wild preserves (biosphere reserve) surrounded by a buffer area where multiple use can take place if it is compatible with maintaining the ecological values of the core area. This is set aside from areas of human settlement. Core areas are connected by wide biodiversity corridors contributing to regional mega-linkages. Outside of the buffer areas are transition areas or "areas of cooperation" where private land use is regulated to favor biodiversity, ecosystems and sustainability.

This biosphere reserve pattern was used by FEMAT for Forest use restrictions to protect the northern spotted owl. The Late Successional Reserves were the core reserves, the matrix land was the buffer area. True to pattern, the states were to establish corresponding conservation ecosystem objectives on private lands within the watershed. By listing the northern spotted owl as threatened under the federal Endangered Species Act, Conservation Biologists were intentionally selecting a "keystone," "umbrella," or "indicator species" for old growth forests. As a result, FEMAT actually considered 1,098 species in its Forest Ecosystem Management Assessment.

The concept of "sustainability" or "sustainable development" was outlined in Agenda 21, the action plan document which also came out of the 1992 Earth Summit in Rio de Janeiro and was a companion to the unratified Convention on Biological Diversity**.** As an ecocentric economic ideology, it seeks to change consumptive patterns and lifestyles to facilitate equitable redistribution to the poor, to reduce the use of materials and energy in production processes and to use economic instruments to influence consumer behavior. This is fundamentally in opposition to the tenets of individual rights and liberty that are foundational to America.

12. I am very concerned about the increasing and inappropriate use of "public trust" as a vehicle to subordinate private property rights and destroy their integrity and value. There seems to be some notion of a superior communitarian easement – the idea of "public goods" and the idea that a private owner must be punished for any use that encroaches upon or diminishes these collective benefits. This is completely contrary to our American notion of liberty and property and its legal history.

The vision defines "public trust responsibilities" as "protect[ing] and manage[ing] the state's fish and wildlife for their ecological values and for the use and benefit of the people of the state."

The CADF&G derives its authority from: (1) the authority of the State to establish the actions necessary to appropriate or "take" an animal from the public domain

into private property; (2) a general stewardship responsibility of the state to conserve resources important to the food supply and other basic needs necessary for survival of the human population. The State does not "own" the fish and wildlife, nor does it own the habitat in which they live. [Please see the attached recap of caselaw regarding public trust.]

Thank you for the opportunity to comment. I hope the CADF&G, the Fish and Game Commission and the legislature seriously considers what I have said and retreats from the tunnel vision of its current punitive path.

Marcia H. Armstrong
Supervisor District 5
Siskiyou County
P.O. Box 750
Yreka, CA 96097

Appendix:

DFG and Public Trust State Claims of Public Ownership

There is a difference between territorial domain as defined among nations[i] and dominion in the sense of proprietary ownership in the title to land. Arguments in the U.S. Supreme Court case of Martin v. Waddell's Lessee, 41 U.S. 367 (1842) cite the "law of nations" regarding ownership among nations as a separate element from that of investiture of the sovereign king or queen with allodial title to the nation's lands and resources:

> "The laws of nature and nations establish the following propositions, pertinent to this question: 1. Every nation is the proprietor [owner] as well of the rivers and seas as of the lands within its territorial limits. Vattel 120, 266. 2. The sea itself, to a certain extent, and for certain purposes, may be appropriated and become exclusive property as well as the land. Vattel 127, 287; Ruth. book 1, ch. 5, p. 76, 3. 3. The nation may dispose of the property in its possession, as it pleases; may lawfully alienate or mortgage it. Vattel 117, 261-2. 4**.** The nation may invest the sovereign with the title to its property, and thus confer upon him the rights to alienate or mortgage it. Vattel 117, 261-2. The laws of England establish the following propositions material **to** this point: 1**.** The common law of England vests in the king the title to all public property. 1 Bl. Com. ch. 8, 298-9; 2 Ibid. 15, 261-2; Harg. Law Tracts, de Jure Maris, ch. 4, 10, 11, 12; 6 Com. Dig. tit. Prerogative, 60, B. 63; Tenure 337; 5 Com. Dig. tit. Navigation, 107; 3 Co. 5, 109. 2."

These two concepts form the difference in concept between "imperium" - or right to regulate or govern as references a definable place and "dominium," or ownership. In Toomer v. Witsell, 334 U.S. 385 (1948,) Justice Vinson made the statement: "The whole ownership theory, in fact, is now generally regarded as 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." To this he footnoted:

> "See, e.g., Pound, An Introduction to the Philosophy of Law, 197- 202. The fiction apparently gained currency partly as a result of confusion between the Roman term imperium or governmental power to regulate, and dominium, or ownership. Power over fish and game was, in origin, imperium." Ibid.

Neither the governments of the United States or the States have the constitutional capacity to claim the English monarchical right of underlying allodial ownership in public property in **a** sovereign capacity. [ii] This concept of underlying ownership formed

the basis for the English and European "feudal" system, where property was conditionally granted to subjects by the sovereign. We do not have a feudal system in America.

In applying English precedent to early American cases, the Court did decide that certain limited prerogative proprietary rights of the Crown in "Royal Rivers" and the "sea and its arms" did pass to the new States. In addition, the States also inherited the Crown's specific role as Trustee for public rights or "commons"[iii] in the fishery [iv] and right of free navigation that were associated with the lands of the beds and banks of these Royal Rivers.

This concept of a very specific public trust became mired in difficulties in grasping the differences between [v] the concepts of "commons" (active collective ownership by the public,) "res nullius" (wild things with no owner,) and "public domain" (a "negative community of interest" in which citizens could appropriate resources for their free use-not collective ownership.) Early cases, such as Mc Cready v. State of Virginia,[vi] which involved the specific right of common fishery were inappropriately applied to all fish and wildlife resources. The Court then developed the concept of a sort of technical State "ownership"[vii] in all fish and wildlife as trustee of commonly owned resources. [viii] At other times the Court appeared to recognize a "proprietary" right and title by the State in fish and game resources, a claim that supported the right by the State to tax for severance of its "sovereign title" into private possession and use.

The traditional legal concepts of fish and "wildlife" as in the public domain - subject to private property acquisition through acts of possession or "take," became obscured. The real property rights of "fishery" and transient ownership in "ferae naturae-propter privilegium" [ix]of migratory and resident species, such as bees, became obscured.

Eventually, the idea of underlying ownership was overturned in Hughes v. Oklahoma. The surviving general basis for the authority of the State to regulate hunting and fishing is found its police powers to determine what constitues acquisition and to conserve the resource for survival of the community. There is also some limited regulatory authority based in management of the "public trust" relating to the limited "common right of piscary," (common public property rights in "fisheries" or places of fishing attached to tidelands and underlying bed and banks of navigable streams.) There may also be a limited form of ownership in resident fish and wildlife by virtue of State proprietary land ownership in parks and refuges,

---

[i] **NATIONS**

Internationally, nations are defined by geographical boundaries or borders. Certain aspects of national sovereignty relate to this geographical definition. One of these aspects is the concept of ownership or "title and dominion" among nations, to land/water/air and other resources.

Arguments in the U.S. Supreme Court case of Martin v. Waddell's Lessee, 41 U.S. 367 (1842) cite the "law of nations" regarding ownership among nations and the investiture of the sovereign king or queen with allodial title to its lands and resources:

> "The laws of nature and nations establish the following propositions, pertinent to this question: 1. Every nation is the proprietor [owner] as well of the rivers and seas as of the lands within its territorial limits. Vattel 120, 266. 2. The sea itself, to a certain extent, and for certain purposes, may be appropriated and become exclusive property as well as the land. Vattel 127, 287; Ruth. book 1, ch. 5, p. 76, 3. 3. The nation may dispose of the property in its possession, as it pleases; may lawfully alienate or mortgage it. Vattel 117, 261-2. 4. The nation may invest the sovereign with the title to its property, and thus confer upon him the rights to alienate or mortgage it. Vattel 117, 261-2. The laws of England establish the following propositions material to this point: 1. The common law of England vests in the king the title to all public property. 1 Bl. Com. ch. 8, 298-9; 2 Ibid. 15, 261-2; Harg. Law Tracts, de Jure Maris, ch. 4, 10, 11, 12; 6 Com. Dig. tit. Prerogative, 60, B. 63; Tenure 337; 5 Com. Dig. tit. Navigation, 107; 3 Co. 5, 109. 2."

"TERRA NULLIUS" - UNAPPROPRIATED, UNINHABITED, VACANT OR "WASTELANDS"

Justice Taney for the Court in Martin v. Waddell's Lessee, describes the role of the English Crown in receiving title to discoveries of vacant wastelands as national domain:

> "The country mentioned in the letters-patent was held by the king in his public and regal character, as the representative of the nation, and in trust for them. The discoveries made by persons acting under the authority of the government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent. The doctrine upon this subject is clearly stated in the case of Johnson v. McIntosh, 8 Wheat. 595. In that case, the court, after stating it to be a principle of universal law, that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers, proceed to say, that, 'if the discovery be made and possession taken under the authority of an existing government, which is acknowledged by the emigrants, that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains; by that organ, in which all territory is vested by law. According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative**.** It has been already shown, that this principle was as fully recognized in America as in the island of Great Britain.'"

THE SEA AND ITS ARMS

> Similarly, the Crown held national title to "the sea and its arms." This included the marginal lands under the sea from the low water mark along the shoreline, bays and inlets, outwards to the 3 mile limit; the lands underlying navigable rivers and other submerged lands effected by the ebb and flow of the tides to the high water mark. Such navigable rivers were termed "Royal Rivers." [Banne Case, Davies 155; Shultze on Aquatic Rights; 1 Bl. Com. 264.]

[ii] **SOVEREIGN CAPACITY**

The case Lacoste v. Dept. of Conservation of State of Louisiana, 263 U.S. 545 (1924,) looked at the 1920 Act 135 of the General Assembly of Louisiana, which declared all l wild fur-bearing animals and alligators in the state, and their skins to be the property of the State until a severance tax had been paid. The Court let stand a lower Court ruling that the tax was a police power function for conservation of the resource and not a revenue measure. The Court declared::

> "The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and property rights that may be acquired therein**.** Geer v. Connecticut, 161 U.S. 519, 528, 16 S.Sup. Ct. 600; Ward v. Race Horse, 163 U.S. 504, 507, 16 S. Sup. Ct. 1076; Silz v. Hesterberg, 211 U.S. 31, 39, 29 S. Sup. Ct. 10; Patsone v. Pennsylvania, 232 U.S. 138, 143, 34 S. Sup. Ct. 281; Kennedy v. Becker, 241 U.S. 556, 562, 36 S. Sup. Ct. 705; Carey v. South Dakota, 250 U.S. 118, 39 Sup. Ct. 403; State v. Rodman, 58 Minn. 393, 400, 59 N. W. 1098
>
> "The Supreme Court of Louisiana held that...payment of the tax is a condition precedent to the divestiture of the state's title and its transfer to the dealer paying the tax..."
>
> "Our examination of this act discloses no reason why the decision of the state court should be disturbed....It is within the power of the state to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership**.** Expressly, the tax is imposed upon all skins and hides taken within the state..."

In the case of Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928,) the Court further refined and clarified the concept of State ownership:

"The authority of the state to regulate and control the common property in game is well established. Geer v. Connecticut, 161 U.S. 519, and cases cited at page 528 (16 S. Ct. 600, 604). These and many other cases show that the state owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people. In Geer v. Connecticut the court, speaking through Mr. Justice White, said (161 U. S. at page 529 (16 S. Ct. 604)):

'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. Therefore, for the purpose of exercising this power, the state, as held by this court in Martin v. Waddell, 16 Pet. (367) 410 (10 L. Ed. 997), represents its people, and the ownership is that of the people in their united sovereignty.'

[iii] **De COMMUNI JURE" and "PUBLIC TRUST"**

Certain lands and resources were designated as "public" by longstanding tradition or specific dedication. Although the king held sovereign title to the land and resources themselves, he had a fiduciary responsibility to maintain them in trust for the public right of common use. In actuality, English kings, prior to the Magna Carta, occasionally granted private use rights that extinguished the public right. Three public trust responsibilities were those of:

- "Commons";
- Common piscary (fishery or fishing rights); and
- Common right of "free" navigation.

Commons

A **"public place" or** "commons" is **positively designated by the community as a place common to all, either by formal dedication or longstanding common use.** It is in a civil state of common ownership, governed by public law, (jus publicum or de communi jure.) Such public places are reserved from appropriation (purpresture) by any individual. The naked title is generally held in "public trust," inalienable by the sovereign or chartered municipality, although subject to regulation of use.

COMMON PISCARY AND FREE NAVIGATION

Under English common law, navigable waters were only those effected by the ebb and flow of the tides. The "Crown" owned navigable riverbeds up to the ordinary high water mark. The public had the common right or "liberty" to use a navigable waterways as a public fishery, as well as a public highway. The public also had a right to use the river's banks to the high water mark for purposes of access, cleaning fish or towing barges by draft animals.

Lord Hale was cited in authority by both Justice Taney and Justice Thompson in the case Martin v. Waddell's Lessee, 41 U.S. 367 (1842):

> "The rules and principles laid down by Lord HALE, as we find them in Hargrave's Law Tracts, are admitted as containing the correct common-law doctrine as to the rights and power of the king over the arms of the sea and navigable streams of water. We there find it laid down, that the king of England hath a double right in the sea, viz., a right of jurisdiction, which he ordinarily exercises by his admiral, and a right of propriety or ownership. Harg. 10. *The king's right of propriety or ownership in the sea and soil thereof, is evinced principally in these things that follow. The right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the crown; as the right of depasturing is originally lodged in the owner of the coast whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great coast, and as a consequence of his propriety, hath the primary right of fishing in the sea, and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty (p. 11).* In many ports and arms of the sea, there is an exclusion of public fishing by prescription or custom (p. 12), although the king hath prima facie this right in the arms and creeks of the sea, communi jure, and in common presumption; yet a subject may have such a right in two ways. 1. By the king's charter or grant; and this is without question. The king may grant fishing within some known bounds, though within the main sea, and may grant the water and soil of a navigable river (p. 17); and such a grant (when apt words are used) will pass the soil itself; and if there shall be a recess of the sea, leaving a quantity of land, it will belong to the grantee. 2. The second mode is by custom or prescription. There may be the right of fishing, without having the soil, or by reason of owning the soil, or a local fishery that arises from ownership of the soil (p. 18). *That, de communi jure, the right of the arms of the sea belongs to the king; yet a subject may have a separate right of fishing, exclusive of the king and of the common right of the subject (p. 20). But this interest or right of the subject must be so used as not to occasion a common annoyance to the passage of the ships or boats; for that is prohibited by the*

common law, as well as by several statutes. For the jus privatum that is acquired to the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers or arms of the sea are affected for public use (p. 22)-as the soil of a highway, in which, though in point of property, may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified (p. 36)."

In his review of matters applying to the "sea and its arms," Justice Gray in Shively v. Bowlby, 152 U.S. 1 (1894) states:

'The shore is that ground that is between the ordinary high-water and low-water mark. This doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea.' Harg. Law Tracts, pp. 11, 12. And he afterwards explains: 'Yet they may belong to the subject in point of propriety, not only by charter or grant whereof there can be but little doubt, but also by prescription or usage.' 'But, though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz.: ... (2) That the people have a public interest, a jus publicum, of passage and repassage with their goods by water, and must not be obstructed by nuisances;' 'for the jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the king's subjects, as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.' Id. pp. 25, 36.

"So in the second part, De Portibus Maris, Lord Hale says that 'when a port is fixed or settled by' 'the license or charter of the king, or that which presumes and supplies it, viz. custom and prescription,' 'though the soil and franchise or dominion thereof prima facie be in the king, or by derivation from him in a subject, yet that jus privatum is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce, trade, and intercourse.' 'But the right that I am now speaking of is such a right that belongs to the king jure prerogativae, and it is a distinct right from that of propriety; for, as before I have said, though the dominion either of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that jus publicum that belongs to all men, and so it is charged or affected with that jus regium, or right of prerogative of the king, so far as the same is by law invested in the king.' Id. pp. 84, 89.

"In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage**,** (Fitzwalter's Case, 3 Keb. 242, 1 Mod. 105; 3 Shep. Abr. 97; Com. Dig. 'Navigation,' A, B; Bac. Abr. 'Prerogative,' B;

King v. Smith, 2 Doug. 441; Attorney General v. Parmeter, 10 Price, 378, 400, 401, 411, 412, 464; Attorney General v. Chambers, 4 De Gex, M. & G. 206, 4 De Gex & J. 55; Malcomson v. O'Dea, 10 H. L. Cas. 591, 618, 623; Attorney General v. Emerson, [152 U.S. 1, 1891] App. Cas. 649;) and that this title, jus privatum, whether in the king or in a subject, is held subject to the public right, jus publicum, of navigation and fishing, (Attorney-General v. Parmeter, above cited; Attorney General v. Johnson, 2 Wils. Ch. 87, 101- 103; Gann v. Free Fishers, 11 H. L. Cas. 192.) The same law has been declared by the house of lords to prevail in Scotland. Smith v. Stair, 6 Bell, App. Cas. 487; Lord Advocate v. Hamilton, 1 Macq. 46, 49. It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. Lord Hale, in Harg. Law Tracts. pp. 17, 18, 27; Somerset v. Fogwell, 5 Barn. & C. 875, 885, 8 Dowl. & R. 747, 755; Smith v. Stair, 6 Bell, App. Cas. 487; U. S. v. Pacheco, 2 Wall. 587.

"By the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in Harg. Law Tracts, p. 85; Mitf. Eq. Pl. (4th Ed.) 145; Blundell v. Catteral, 5 Barn. & Ald. 268, 298, 305; Attorney General v. Richards, 2 Anstr. 603, 616; Attorney General v.Parmeter, 10 Price, 378, 411, 464; Attorney General v. Terry, 9 Ch. App. 425, 429, [152 U.S. 1, 14] note; Weber v. Commissioners, 18 Wall. 57, 65; Barney v. Keokuk, 94 U.S. 324, 337.

Stated Justice Baldwin in his assenting opinion in Proprietors of Charles River Bridge v. Proprietors of, 36 U.S. 420 (1837) 36 U.S. 420 (Pet.):

"By the common law, it is clear, that all arms of the sea, coves, creeks, etc. where the tide ebbs and flows, are the property of the sovereign, unless appropriated by some subject, in virtue of a grant, or prescriptive right which is founded on the supposition of a grant' (6 Pick. 182); 'the principles of the common law were well understood by the colonial legislature.' 'Those who acquired the property on the shore, were restricted from such a use of it, as would impair the public right of passing over the water.' 'None but the sovereign power can authorize the interruption of such passages, because this power alone has the right to judge whether the public convenience may be better served by suffering bridges to be thrown over the water, than by suffering the natural passages to remain free.' Ibid. 184. By the common law, and the immemorial usage of this government, all navigable waters are public property, for the use of all the citizens, and there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them.' 'A navigable river is, of common right, a public highway, and a general authority to lay out a new highway must not be so extended as to

give a power to obstruct an open highway, already in the use of the public.' Ibid. 185, 187." (Emphasis mine.)

[iv] **FISHERY** (a place)

Reference: John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and the Several States of the American Union, Childs & Peterson, c1856.)

FISHERY, estates. A **place** prepared for catching fish with nets or hooks. This term is commonly applied to the **place** of drawing a seine, or net. 1 Whart. R. 131, 2.

- The **right of fishery** is to be considered as to tide or navigable waters, and to rivers not navigable. A river where the tide ebbs and flows is considered an arm of the sea. By the common law of England ***every navigable river within the realm as far as the sea ebbs and flows is deemed a royal river, and the fisheries therein as belonging to the crown by prerogative,*** **yet capable of being granted to a subject to be held or disposed of as private property.** The profit of such fisheries, however, when retained by the crown, is not commonly taken and appropriated by the king, unless of extraordinary value, but left free to all the people. Dav. Rep. 155; 7 Co. 16, a: Plowd, 154, a. Within the tide waters of navigable rivers in some of the United States, private or several fisheries were established, during the colonial state, and are still held and enjoyed as such, as in the Delaware. 1 Whart. 145, 5; 1 Baldw. Rep. 76. ***On the high seas the right of fishing jure gentium is common to all persons, as a general rule. In. rivers, not navigable, that is, where there is no flux or reflux of the tide, the right of fishing is incident to the owner of the soil, over which the water passes, and to the riparian proprietors, when a stream is owned by two or more.*** 6 Cowen's R. 369; 5 Mason's R. 191; 4 Pick. R. 145; 5 Pick. R. 199. ***The rule, that the right of fishery, within his territorial limits, belongs exclusively to the riparian owner, extends alike to great and small streams.*** The owners of farms adjoining the Connecticut river, above the flowing of the tide, have the exclusive right of fishing opposite their farms, to the middle of the river although the public have an easement in the river as a public highway, for passing and repassing with every kind of water craft. 2 Conn. R. 481. The right of fishery may exist, not only in the owner of the soil or the riparian proprietor, but also in another who has acquired it by grant or otherwise. Co. Litt. l22 a, n. 7; Schul. Aq. R. 40 41; Ang. W. C. 184; sed vide 2 Salk. 637.
- Fisheries have been divided into: 1**. *Several fisheries. A several fishery is one to which the party claiming it has the right of fishing, independently of all others, as that no person can have a coextensive right with him in the object claimed,*** but a partial and independent right in another, or a limited liberty, does not derogate from the right of the owner. 5 Burr. 2814. ***A several fishery, as its name imports, is an exclusive property***; this, however, is not to be

understood as depriving the territorial owner of his right to a several fishery, when he grants to another person permission to fish; for he would continue to be the several proprietor, although he should suffer a stranger to hold a coextensive right with himself. Woolr. on Wat. 96.

- ***Free fisheries. A free fishery is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil***. 3 Kent, Com. 329. Mr. Woolrych says, that sometimes a free fishery is confounded with a several, sometimes it is said to be synonymous with common, and again treated as distinct from either. Law of Waters, &c. 97.
- ***Common of Fishery. A common of fishery is not an exclusive right, but one enjoyed in common with certain other persons.*** 3 Kent, Com. 329. ***A distinction has been made between a common fishery, (commune piscarium,) which may mean for all mankind, as in the sea, and a common of fishery, (communium piscariae,) which is a right, in common with certain other persons, in a particular stream.*** 8 Taunt. R. 183. Mr. Angell seems to think that common of fishery and free fishery, are convertible terms, Law of Water Courses, c. 6., s. 3, 4.
- These distinctions in relation to several, free, and common of, fishery, are not strongly marked, and the lines are sometimes scarcely perceptible. "Instead of going into the black letter books, to learn what was a fishery, and a free fishery, and a several fishery," says Huston, J., "I am disposed to regard our own acts, even though differing, from old feudal times." 1 Whart. R. 132. See 14 Mus. R. 488; 2 Bl. Com. 39, 40; 7 Pick. R. 79. Vide, generally, Ang. Wat. Co.; Index, h. t; Woolr. on Wat. Index, h. t; Schul. Aq. R. Index, h. t; 2 Rill. Ab. ch. 18, p. 1,63; Dane's Ab. h. t; Bac. Ab. Prerogative, B 3; 12 John. R. 425; 14 John. R. 255 14 Wend. R. 42; 10 Mass., R. 212; 13 Mass. R. 477; 20 John. R. 98; 2 John. It. 170; 6 Cowen, R. 369; 1 Wend. R. 237; 3 Greenl. R. 269; 3 N. H. Rep. 321; 1 Pick. R. 180; 2 Conn. R. 481; 1 Halst. 1; 5 Harr. and Johns. 195; 4 Mass. R. 527; and the articles Arm of the sea; Creek; Navigable River; Tide. (Emphasis mine.)

[v] **Difference between public trust and commons**

Justice White in Geer v. Connecticut, 161 U.S. 519 (1896,) attempted to explain the very subtle and confusing difference between "public domain" or negative community of interest and "commons" or positive joint public onwership in resources:

> "Among other subdivisions, **things were classified by the Roman law into public and common. The latter embraced animals ferae naturae, which, having no owner, were considered as belonging in common to all the citizens of the state.** After pointing out the foregoing subdivision, the Digest says: 'There

are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law; that is to say, by methods which belong to the government. As the law of nature is more ancient, because it took birth with the human race it is proper to speak first of the latter. (1) Thus, all the animals which can be taken upon the earth, in the sea, or in the air,-that is to say, wild animals,-belong to those who take them , ... because that which belong to nobody is acquired by the natural law by the person who first possesses it..."

"...In tracing the origin of the classification of animals ferae naturae, as things common, Potheir moreover says:

> 'The first of mankind had in common all those things which God had given to the human race. **This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each have their particular portion**. *[e.g. "joint" or communal ownership"]* **It was a community, which those who have written on this subject have called 'a negative community,' which resulted from the fact that those things which were common to all belonged no more to one than to the others, and hence no one could prevent another from taking of these common things that portion which he judged necessary in order to subserve his wants.** *[e.g. "public domain."]* **Whilst he was using them, others could not disturb him; but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately re-entered into the negative community, and another could use them.** The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. **Some things, however, did not enter into this division, and remain, therefore, to this day, in the condition of the ancient and negative community**.' No. 21. [*Clarification mine*]

"Referring to those things which remain common, or in what he qualified as the negative community, this great writer says:

'**These things are those which the jurisconsults called 'res communes.' Marcien refers to several kinds,-the air, the water which runs in the rivers, the sea, and its shores. ... As regards wild animals, ferae naturae, they have remained in the ancient state of negative community.'**

"In both the works of Merlin and Pothier, ubi supra, will be found a full reference to the history of the varying control exercised by the law- giving power over the right of a citizen to acquire a qualified ownership in animals ferae naturae,

evidenced by the regulation thereof by the Salic law, already referred to, exemplified by the legislation of Charlemagne, and continuing through all vicissitudes of governmental authority. This unbroken line of law and precedent is summed up by the provisions of the Napoleon Code, which declares (articles 714, 715): '**There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws.' Like recognition of the fundamental principle upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and, indeed, it may be safely said in the law of all the countries of Europe.** 1 Saint Joseph Concordance, p. 68."

[vi] **McCready v. Virginia**

In Mc Cready v. State of Virginia, 94 U.S. 391 (1876,) a citizen of Maryland, was indicted, convicted, and fined for planting oysters in Ware River, a Virginia river in which the tide ebbs and flows, (the bed and banks of which are considered "sovereign lands" and to which the right of common piscary is attached.) The case was litigated on the basis of the "privileges and immunities" clause.

Stated Chief Justice Waite:

"..The principle has long been settled in this court, that each **State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away.** Pollard's Lessee v. Hagan, 3 How. 212; Smith v. Maryland, 18 How. 74; Mumford v. Wardwell, 6 Wall. 436; Weber v. Harbor Commissioners, 18 id. 66. In like manner, **the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty.** Martin v. Waddell, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. **There has been, however, no such grant of [federal] power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation**. **Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship**."

"...we think we may safely hold that the citizens of one State are not invested by this clause of the Constitution [privileges and immunities] with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. **They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality."**

[vii] **Attempts to Expand the "Commons" as Exception to the "Privileges & Immunities" Clause**

In Toomer v. Witsell, 334 U.S. 385 (1948,) the Court summarized the appellees' argument for special fishing privileges and immunities. The argument confuses "common piscary" in the "fishery," (a place of fishing associated with State) with the concept of "common" (meaning "joint") ownership of all the animals themselves by State residents. It claims a State obligation to manage said resources for the exclusive benefit of State residents - thereby exempting such management from the "Privileges and Immunities" clause.

"... Their argument runs as follows: Ever since Roman times, animals ferae naturae, not having been reduced to individual possession and ownership, have been considered as res nullius or part of the 'negative community of interests' and hence subject to control by the sovereign or other governmental authority. **More recently this thought has been expressed by saying that fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this 'ownership' for the benefit of its citizens. In the case of fish, it has also been considered that each government 'owned' both the beds of its lakes, streams, and tidewaters and the waters themselves; hence it must also 'own' the fish within those waters**. **Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest.** Finally, it is said that this special property interest, which

nations and similar governmental bodies have traditionally had, in this country vested in the colonial governments and passed to the individual States.

"Language frequently repeated by this Court appears to lend some support to this analysis. But in only one case, McCready v. Virginia**,** 1876, 94 U.S. 391, has the Court actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination. **In that case the Court sanctioned a Virginia statute applied so as to prohibit citizens of other States, but not Virginia citizens, from planting oysters in the tidal waters of the Ware River. The right of Virginians in Virginia waters, the Court said, was 'a property right, and not a mere privilege or immunity of citizenship.' And an analogy was drawn between planting oysters in a river bed and planting corn in state-owned land.**

"It will be noted that there are at least two factual distinctions between the present case and the McCready case. First, the McCready case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily. Secondly, the McCready case involved regulation of fishing in inland waters, whereas the statute now questioned is directed at regulation of shrimping in the marginal sea."

..."However satisfactory the ownership theory explains the McCready case, the very factors which make the present case distinguishable render that theory but a weak prop for the South Carolina statute. That the shrimp are migratory makes apposite Mr. Justice Holmes' statement in Missouri v. Holland, 1920, 252 U.S. 416, 434, 384, 11 A.L. R. 984, that '**To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.'** Indeed, only fifteen years after the McCready decision, a unanimous Court indicated that the rule of that case might not apply to free-swimming fish. The fact that it is activity in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownship doctrine. While United States v. California, 1947, 332 U.S. 19, as indicated above, does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired 'ownership' of the three-mile belt.

"**The whole ownership theory, in fact, is now generally regarded as 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.** And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States."

In Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371 (1978,) Justice Blackmun further explains the reasoning behind early claims:

> "**Many of the early cases embrace the concept that the States had complete ownership over wildlife within their boundaries, and, as well, the power to preserve this bounty for their citizens alone.** It was enough to say "that in regulating the use of the common property of the citizens of [a] state, the legislature is [not] bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens." Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3,230) (CC ED Pa. 1825). It appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people. In Corfield, a case the Court has described as "the first, and long the leading, explication of the [Privileges and Immunities] Clause," see Austin v. New Hampshire, 420 U.S., at 661, Mr. Justice Washington, sitting as Circuit Justice, although recognizing that the States may not interfere with the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal," 6 F. Cas., at 552, nonetheless concluded that access to oyster beds determined to be owned by New Jersey could be limited to New Jersey residents. **This holding, and the conception of state sovereignty upon which it relied, formed the basis for similar decisions during later years of the 19th century.** E. g., McCready v. Virginia, 94 U.S. 391 (1877); Geer v. Connecticut, 161 U.S. 519 (1896). See Rosenfeld v. Jakways, 67 Mont. 558, 216 P. 776 (1923). **In Geer, a case dealing with Connecticut's authority to limit the disposition of game birds taken within its boundaries, the Court roundly rejected the contention "that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own." 161 U.S., at 530.**
>
> "In more recent years, however, the Court has recognized that the States' interest in regulating and controlling those things they claim to "own," including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). Nor does a State's control over its resources preclude the proper exercise of federal power. Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977); Kleppe v. New Mexico, 426 U.S. 529 (1976); Missouri v. Holland, 252 U.S. 416 (1920). And a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that

is protected by the Privileges and Immunities Clause. Toomer v. Witsell, 334 U.S. 385 (1948). See Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

"Appellants contend that the doctrine on which Corfield, McCready, and Geer all relied has no remaining vitality. We do not agree. Only last Term, in referring to the "ownership" or title language of those cases and characterizing it "as no more than a 19th-century legal fiction," the Court pointed out that that language nevertheless expressed "`the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" Douglas v. Seacoast Products, Inc., 431 U.S., at 284, citing Toomer v. Witsell, 334 U.S., at 402. The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence..."

Yet, in his concurring opinion in Baldwin, Chief Justice Burger still reveal an attachment to the belief in common public ownership of game found within a State and a State obligation to manage as a public trust.

"The doctrine that a State "owns" the wildlife within its borders as trustee for its citizens, see Geer v. Connecticut, 161 U.S. 519 (1896), is admittedly a legal anachronism of sorts. See Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977). **A State does not "own" wild birds and animals in the same way that it may own other natural resources such as land, oil, or timber.** But, as noted in the Court's opinion, ante, at 386, and contrary to the implications of the dissent, **the doctrine is not completely obsolete. It manifests the State's special interest in regulating and preserving wildlife for the benefit of its citizens.** See Douglas v. Seacoast Products, Inc., supra, at 284, 287. Whether we describe this interest as proprietary or otherwise is not significant."

[viii] **Geer v. Connecticut the Confusion of the "Collective"**

After summarizing the subtle differences between "public domain"and "commons" as related to game in Geer v.Connecticut, 161 U.S. 519 (1896,) Justice White, never-the-less, takes a detour into positive "collective" public ownership and the concept of "public trust" or the State acting as the agent of the proprietor. This creates a confusion that persists until over-ruled in Hughes vs. Oklahoma in 1979.

Stated Justice White in Geer:

"...Therefore, for the purpose of exercising this power, the state, as held by this court in Martin v. Waddell, 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the state, is thus stated in a well-considered opinion of the supreme court of California:

'**The wild game within a state belongs to the people in their collective sovereign capacity**. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.' Ex parte Maier, ubi supra.

The same view has been expressed by the supreme court of Minnesota, as follows:

'**We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common.**' State v. Rodman, supra."

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the state, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the state of Connecticut here in controversy. **The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it,- the people of that state**. **The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own.... The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.** The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce..."

[ixix][ix] **"Ferae Naturae"**

It may be recalled that *"Res Nullius"* are physical things which "have not or have never had" an owner. This includes wild animals, fishes and wild fowl in which property may be acquired by "natural law." While the individual animal remains wild, it is *"res communes,"* or a "*thing common to all*" (public domain.)

The opinion in Geer v. Connecticut, 161 U.S. 519 (1896), provides an good summary of:

- The Roman concept of "res communes" or *"things common to all,"* as applies to *"ferae naturae"* or wild animals in nature and the qualified right to use them;

- **The transitory ownership in wild animals while resident upon privately owned land called "ferae naturae-propter privilegium".**
- **The exclusive private "territorial" right to pursue acquisition and possession (hunting grounds or fishery) as an incidence of land ownership or "right of soil" (ratione soli.;) and**
- **The individual acquisition of property or *dominion* in an animal ferae naturae through occupancy and possession or "take";**

USUFRUCTIORY INTEREST IN FERAE NATURAE - WILD ANIMALS

[Geer] "Referring especially to the common ownership of game, he [Blackstone] says:

'But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, ***must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them, and no longer.*** *Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generality of those* ***animals which are said to be ferae naturae or of a wild and untamable disposition, which any man may seize upon or keep for his own use or pleasure.'*** 2 Bl. Comm. 14.

FERAE NATURAE-PROPTER PRIVILEGIUM

[It should be noted that it was common for kings and lords to fence areas know as "chases" to contain wild deer for availability of the hunt. As such, they were temporarily controlled and "possessed," but still wild, falling short of acts necessary to constitute "take" or appropriation into private ownership. They were essentially "used," but not consumed, similar to the use of flowing water to power a mill.]

[Geer] ***'A man may lastly have a qualified property in animals ferae naturae-propter privilegium; that is, he may have the privilege of hunting, taking, and killing them in exclusion of other persons. Here he has a transient property in these animals usually called 'game' so long as they continue within his liberty, and he may restrain any stranger from taking them therein; but, the instant they depart into another liberty, this qualified property ceases. ...*** *A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can only admit of a precarious and qualified ownership, which* ***lasts so long as they are in actual use and occupation, but no longer.'*** 2 Bl. Comm. 394. (Emphasis mine.)

[Primary Reference: John Crook, Law and Life of Rome, Corne;; University Press, c1967, page 147.)

> ..."There being no game laws, game and fish were the property of those who caught them; though in the case of creatures such as **bees, pigeons or deer, so long as they had their hives or cotes or natural haunts on a man's land they were his, but if they moved permanently away they were open to first taking..."**

EXCLUSIVE HUNTING AND FISHING RIGHTS

> (As an "estate" in the land, "right of soil" or ratione soli)
>
> [Geer] "No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession, although ***the Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property,*** as, indeed, this right was impliedly admitted by the Digest in the passage just cited. Inst. Bk. 2, tit. 1, 12.
>
> ***"This inhibition was, however, rather a recognition of the right of ownership in land*** **than an exercise by the state of its undoubted authority to control the taking and use of that which belonged to no one in particular, but was common to all...."**

Similarly, in "private" or nonnavigable rivers, the owner had an **exclusive right of "piscary" or fishery** (fishing):

> Lord Mansfield in 4 Burr. 2163 stated, the rule of law is uniform. **In rivers not navigable, the proprietors of the land have the right of fishing on their respective sides, and it generally extends ad filum medium aquoe....**

DOMINION OR PROPERTY IN FERAE NATURAE - A WILD ANIMAL

The traditional body of Western law recognizes that **personal property in an individual wild animal or fish,** (*"ferae naturae,"*) may only be **appropriated, * acquired or "taken" through occupancy or possession; depriving the animal of its natural liberty and rendering it subject to the "control" of an individual. Originally, Roman Law held that property in an animal ferae naturae could be acquired by an individual only through bodily touch, (*"manucaption,"*) with the intention of converting it to private use.**

*APPROPRIATION or TAKE** - **ACQUIRING INDIVIDUAL PROPERTY IN A WILD ANIMAL OR THING**

Through the passage of history, various legal authorities have disagreed as to the **degree of control necessary to constitute a private *appropriation* or *"take"* of such animals through occupancy, so as to exclude the claims of all other persons to the same animals under law.** These concepts of "acquisition" and degree of "control," as relate to individual ownership by possession and occupancy, have also been applied to American legal principles governing ownership of oil, gas and water.

(A good review of historic arguments is provided in Pierson v. Post 3 Cai. R. 175 (N.Y. Sup. Ct. 1805.) The incident at issue in this case occurred upon unoccupied "wastelands", and therefore did not involve other issues such as the relationship of the exclusive right to appropriate (*"take"* or hunt) wild animals "*propter privilegium"* as an incident of land ownership - "right of soil" (*ratione soli.*)

Justice Tompkins delivered the opinion of the court and provided the summary:. . .

- "Justinian"s Institutes, lib. 2, tit. I, sect. 13 [Justinian: Byzantine emperor 527-565 A.D.], and Fleta, lib. III, c. II, page 175 [English legal treatise, late thirteenth century], adopt the principle, ***that pursuit alone, vests no property or right in the huntsman; and that even pursuit accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken.*** The same principle is recognized by Bracton, lib. II, c. I, page 8 [English legal treatise, early to mid-thirteenth century].
- "Puffendorf, lib. IV, c. 6, sec. 2, [[section]]10 [late Seventeenth century], ***defines occupancy of beasts ferae naturae, to be the actual corporal possession of them,*** and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues.
- "Barbeyrac, in his notes on Puffendorf, is of the opinion that *actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary,* ***the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them, in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them..."*** (Emphasis mine.)

Justice Field in his dissenting opinion in Geer v. Connecticut, 161 U.S. 519 (1896), expounds upon the concepts of possession, control and use: [It should be noted that the decision in Geer was later overruled in respect to any presumption of actual State ownership of animals *"ferae naturae,"* either as a proprietary interest or in ownership

in trust for the collective people of the State. See Hughes v. Oklahoma, 41 U.S. 322 (1979).]

- "....***Although there are declarations of some courts that the state possesses a property in its wild game, and, when it authorizes the game to be killed and sold as an article of food, it may limit the sale only for domestic consumption,*** and the supreme court of errors of Connecticut, in deciding the present case, appears to have held that doctrine, ***I am unable to assent to its soundness, where the state has never had the game in its possession or under its control or use. I do not admit that in such case there is any specific property held by the state by which in the exercise of its rightful authority, it can lawfully limit the control and use of the animals killed to particular classes of persons or citizens, or to citizens of particular places or states. But, on the contrary, I hold that where animals within a state, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the state in any respect, they are not the property of the state or of any one in a proper sense. I hold that, until they are brought into subjection or use by the labor or skill of man, they are not the property of any one, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit. When man, by his labor or skill, brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them, and the ownership of others in the animals is limited by the extent and right thus acquired. This is a generally recognized doctrine, acknowledged by all states of Christendom. It is the doctrine of law, both natural and positive. The Roman law, as stated in the Digest, cited in the opinion of the majority, expresses it as follows:***

  'That which belongs to nobody is acquired by the natural law by the person who first possesses it.' A bird may fly at such height as to be beyond the reach of man or his skill, and no one can then assert any right of property in such bird; it cannot, then, be said to belong to any one. But when, from any cause, the bird is brought within the reach and control or use of man, it becomes at that instant his property, and may be an article of commerce between him and citizens of the same or of other states. In an opinion written by me some years since, I had occasion to speak of this rule of law. I there said that it was a general principle of law, both natural and positive, that where a subject, animate or inanimate, which otherwise could not be brought under the control or use of man, is reduced to such control or use by his individual labor or skill, a right of property in it is acquired. The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession, it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property

in the gem. He has by his own labor reduced it to possession, and, in all communities and by all law, his right to it is recognized. So the trapper on the plains and the hunter in the North have a property in the furs they have gathered, though the animals from which they were taken roamed at large, and belonged to no one. They have added by their labor to the uses of man an article promoting his comfort, which, without that labor, would have been lost to him. They have a right, therefore, to the furs, and every court in Christendom would maintain it. So, when the fisherman drags by his net fish from the sea, he has a property in them, of which no one is permitted to despoil him. Water Works v. Schottler, 110 U.S. 374, 4 Sup. Ct. 48." (Emphasis mine)

The Court in Ohio Oil Co. V. State of Indiana, 177 U.S. 190 (1900,) also classified **oil, gas and water as *"ferae naturae,"*** the appropriation of which was subject to the same rationale as fish and game **"*propter privilegium"*:**

- ..."In Brown v. Spilman, 155 U.S. 665, 669, 670 S., 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245, 247, these distinctive features of deposits of gas and oil were remarked upon. The court said:

'Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. ***They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.*** Brown v. Vandergrift, 80 Pa. 142, 147; Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724.

"In Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, the supreme court of Pennsylvania considered the character of ownership in natural gas and oil as these substances existed beneath the surface of the earth. The court said:

'The learned master says gas is a mineral, and while in situ is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. ***Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too***

fanciful, as minerals feroe naturoe. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in Brown v. Vandergrift, 80 Pa. 147, 148, . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas.'

...."Again, in Jones v. Forest Oil Co., (January, 1900), 194 Pa. 379, 44 Atl. 1074, the same subject was once more considered. The complaint was filed by one land owner having a gas well on his land, to enjoin the owner of adjoining property from using in a gas well thereon a pump which was asserted to have such power that its operation would draw away the oil and gas from the well of the complainant to that of the defendant. Reviewing the cases to which we have just referred, and after quoting the language of Chief Justice Agnew, in Brown v. Vandergrift, 80 Pa. 142, 147, wherein, as we have seen, *oil and gas were by analogy classed as '**minerals feroe naturoe,'** the court decided:*

'From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp and brought to the surface.'

- ..."In People's Gas Co. v. Tyner, 131 Ind. 277, 281, 16 L. R. A. 443, 31 N. E. 59, ... After quoting authorities relating to subterranean currents of water, and treating gas and oil before being reduced to possession as of a kindred nature, the court said:

'Like water it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie.'

"The case of Brown v. Vandergrift, 80 Pa. 142, from which we have previously quoted, was then referred to, and the analogies between oil and gas and animals feroe naturoe were approved and adopted. In Townsend v. State, 147 Ind. 624, 37 L. R. A. 294, 49 N. E. 14,... ***it was decided that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting the oil and gas, had no right of property therein until by the actual drawing of the oil and gas to the surface of the earth they had reduced these substances to physical possession....***

"Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the state of Indiana to be as follows: ***Although in virtue of his proprietorship***

the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

..."Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. ***It being true as to both animals feroe naturoe and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession..."*** (Emphasis mine.)

** ACQUIRE/AQUSITION [Reference: John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and the Several States of the American Union, Childs & Peterson, c1856.)

TO ACQUIRE, descents, contracts. To make property one's own.

Title to property is acquired in two ways, by descent, (q.v.) and by purchase (q.v.). Acquisition by purchase, is either by, 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation, which is either by deed or by matter of record. Things which cannot be sold, cannot be acquired.

ACQUISITION, property, contracts, descent. The act by which the person procures the property of a thing.

- An acquisition, may be temporary or perpetual, and be procured either for a valuable consideration, for example, by buying the same; or without consideration, as by gift or descent.
- Acquisition may be divided into original and derivative. Original acquisition is procured by occupancy, 1 Bouv. Inst. n. 490; 2 Kent. Com. 289; Menstr. Leg. du Dr. Civ. Rom. Sec. 344 ; by accession, 1 Bouv. Inst. n. Sec. 499; 2 Kent., Com. 293; by intellectual labor, namely, for inventions, which are

secured by patent rights and for the authorship of books, maps, and charts, which is protected by copyrights. 1. Bouv. Inst. n. 508.

- Derivative acquisitions are those which are procured from others, either by act of law, or by act of the parties. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy. And by act of the parties, by gift or sale. Property may be acquired by a man himself, or by those who are in his power, for him; as by his children while minors; 1 N. Hamps. R. 28; 1 United States Law Journ. 513 ; by his apprentices or his slaves. Vide Ruth. Inst. ch. 6 & 7; Dig. 41, 1, 53; Inst. 2,9; Id. 2,9,3.

ACCESSION, property. The ownership of a thing, whether it be real or personal, movable or immovable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially; this is called the right of accession.

- The doctrine of property arising from accession, is grounded on the right of occupancy.
- The original owner of any thing which receives an accession by natural or artificial means, as by the growth of vegetables, the pregnancy of animals; Louis. Code, art. 491; the embroidering of cloth, or the conversion of wood or metal into vessels or utensils, is entitled to his right of possession to the property of it, under such its state of improvement; 5 H. 7, 15; 12 H. 8, 10; Bro. Ab. Propertie, 23; Moor, 20; Poph. 88. But the owner must be able to prove the identity of the original materials; for if wine, oil, or bread, be made out of another man's grapes, olives, or wheat, they belong to the new operator, who is bound to make satisfaction to the former proprietor for the materials which he has so converted. 2 Bl. Com. 404; 5 Johns. Rep. 348; Betts v. Lee, 6 Johns. Rep. 169; Curtiss v. Groat, 10 Johns. 288; Babcock v. Gill, 9 Johns. Rep. 363; Chandler v. Edson, 5 H. 7, 15; 12 H. 8, 10; Fits. Abr. Bar. 144; Bro. Abr. Property, 23; Doddridge Eng. Lawyer, 125, 126, 132, 134. See Adjunction; Confusion of Goods. See Generally, Louis. Code, tit. 2, c. 2 and 3.]

.