AS EASY AS SHOOTING FISH IN A BARREL? WHY PRIVATE GAME RESERVES OFFER A CHANCE TO SAVE THE SPORT OF HUNTING AND CONSERVATION PRACTICES

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This Note argues that private game reserves can benefit the sport of hunting and conservation efforts simultaneously. Private game reserves benefit the sport of hunting by isolating animals on a large tract of land, while not capturing them, offering an alternative to decreasing public hunting lands while allowing the sport of hunting to continue. They may also stimulate conservation efforts by providing habitats in which animals can prosper. For these reasons, Illinois should amend its proposed hunting regulation bill to encourage private game reserves. In defending this conclusion, this Note analyzes the history of property rights in animals and the socio-political, economic, ethical, and environmental benefits of private game reserves.

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I. INTRODUCTION

Over the past fifty years, private landowners in the United States have stocked their fields with wild game, including species imported from other countries, to create private hunting reserves. These reserves have grown in popularity over the years due to the decrease in public hunting lands and the convenience these reserves offer hunters.[1] These reserves, sometimes confused with "canned hunting," raise important questions regarding the property rights over wild animals, the role of hunting in modern society, and the role of private actors in conserving wildlife.

Property rights in wild animals have evolved over the centuries and have been influenced by many cultures and institutions. Property rights in animals run along a spectrum—on one end, an animal theoretically can be classified as belonging to no one until captured,[2] to a person having essentially "absolute property rights" in the animal on the other end.[3] In the United States today, many states believe a property interest in

1. Diana Norris et al., *Canned Hunts: Unfair at Any Price*, THE FUND FOR ANIMALS (2002), http://www.animallaw.info/articles/arusfund22002.htm.

2. Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 677–78 (2005).

3. Dean Lueck, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 NAT. RESOURCES J. 625, 630–31, 635 (1995).

wildlife falls somewhere in between these two extremes and is either codified in the state's statute or constitution.[4] Private game reserves operating in the United States provide unique situations where animals are located on often very large tracts of land bordered by fencing,[5] thereby not allowing the animals to leave the property but also not completely capturing the animal.

The federal government has attempted to address the ethical questions regarding hunting reserves and whether these reserves further the "sport" of hunting. For instance, U.S. Representative Steve Cohen has attempted to pass the Sportsmanship in Hunting Act in 2007, 2009, and 2011, which proposed a prohibition on the transportation of "confined exotic animal[s]," intended to be killed for entertainment.[6] None of these bills ever became law. Several states, however, have issued legislation similar to the proposed federal legislation. Even the Illinois legislature is contemplating a bill addressing canned hunts.[7]

It is important to recognize the difference between private game reserves and canned hunting, since the terms are often comingled intentionally and unintentionally. A private game reserve allows the public to pay to hunt animals on private property,[8] whereas canned hunting takes place on much smaller areas, and hunters often kill the animals in small enclosures or with unfair tactics.[9] This Note, however, argues that when the property is large enough to simulate a species' natural home range, the property should not be considered a canned hunting property.[10]

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4. ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 21–22 (2009).

5. *See, e.g.*, THE NON-TYPICAL RANCH, http://www.thenontypicalranch.com/hunting/index.html (last visited Feb. 7, 2015); *Saskatchewan Elk Hunting on a High Ranch*, OUTDOORS INT'L, http://gothunts.com/saskatchewan-high-fence-elk-hunt/ (last visited Feb. 7, 2015) [hereinafter OUTDOORS INT'L]. For instance, male white-tailed deer had mean home ranges from 1.0 to 7.0 square kilometers (with a range from 0.1—17.4 square kilometers). Robert A. Sargent & Ronald F. Labisky, *Home Range of Male White-Tailed Deer in Hunted and Non-Hunted Populations*, 49 PROCEEDINGS ANN. CONF. SOUTHEASTERN ASS'N FISH & WILDLIFE 389, 393 (1995), *available at* http://www.seafwa.org/resource/dynamic/private/PDF/SARGENT-389-398.pdf. The size of one of the private game reserves previously mentioned was twenty square kilometers, exceeding the natural range of the deer. See OUTDOORS INT'L *supra*.

6. Sportsmanship in Hunting Act of 2011, H.R. 2210, 112th Cong. § 49(a) (2011); Sportsmanship in Hunting Act of 2009, H.R. 2308, 111th Cong. § 49(a) (2009); Sportsmanship in Hunting Act of 2007, H.R. 3829, 110th Cong. § 49(a) (2007). For the related bill introduced in the Senate, see Sportsmanship in Hunting Act of 2008, S. 2912, 110th Cong. § 50(a)(1) (2008).

7. H.B 3118, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

8. This Note does not include in its definition of private game reserves instances where farmers allow hunters to enter their lands during hunting season since these operations are more informal and temporary, although these operations do provide useful analogies and comparisons for private game reserves.

9. Definitions of "canned hunting" vary. *See* Laura J. Ireland, Comment, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate the Unethical Practice of Canned "Hunting,"* 8 ANIMAL L. 223, 225 (2002) (noting the critical factor as the animal's dependency on food supplied by humans, "not the size of the enclosure").

10. The animal would realistically not travel farther than the boundaries of the property, thus resulting in no difference in the animal being on unenclosed lands or the private game reserve. It should be noted that this Note does not include small enclosures that more likely mimic a cage rather than a natural habitat in its definition of private game reserves. These types of enclosures do raise im-

Private game reserves can benefit the sport of hunting and conservation of wildlife. By taking into account these benefits, the Illinois legislature should amend its proposed bill by taking into account the property, economic, and policy implications surrounding private game reserves. Part II of this Note addresses the evolution of property rights, wildlife law, and hunting policies. Part II also discusses the history of private game reserves in the United States, as well as African countries, which have extensively developed these systems. Part II concludes with an overview of the past and current legal atmosphere of the federal government and the states regarding private game reserves. Part III analyzes how to classify property rights in animals located on private game reserves in the United States. Part III scrutinizes the economic, political, and ethical implications of private game reserve legislation, providing examples of how private game reserves can benefit society. Afterwards, Part IV recommends that the Illinois legislature should amend its proposed bill banning private game reserves. Part V concludes the overall discussion on private game reserves in the United States.

II. BACKGROUND OF PROPERTY RIGHTS, WILDLIFE LAW, AND PRIVATE GAME RESERVES

This Part introduces several important topics that are essential to the understanding of private game reserves and wildlife law. First, this Part discusses the evolution of wildlife ownership, wildlife law, and private game reserves in the United States and Africa. While discussing the development of wildlife law, this Part also examines the advancement of U.S. hunting policies. This Part also discusses the evolution of the public trust doctrine. Subsequently, this Part examines African countries' approaches to private game reserves as a comparison to the United States' approaches and development of private game reserves. The Part concludes with an overview of current and prospective state and federal statutes regarding private game reserves in the United States.

A. Types of Property Rights in Wildlife

Before reviewing the history of wildlife ownership, it is beneficial to first discuss several property right concepts. Harold Demsetz, an economics professor affiliated with the University of Chicago, has developed several property rights theories that are widely accepted.[11]

First, property rights will only be sought out when the benefits accrued from the rights outweigh the costs of implementing those rights.[12] Second, property rights convey either a harm or benefit to a person.[13]

portant ethical concerns for the welfare of the animal and likely violate anticruelty statutes. *See id.* at 237–38.

11. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

12. *Id.* at 354–55.

13. *Id.* at 347–48.

The harmful or beneficial effect becomes an externality when it is not economical for the actor to internalize those effects.[14] As stated by Professor Demsetz, "[a] primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."[15] For instance, a factory is able to dispose of wastewater in a nearby lake, and it pollutes the lake where people receive their drinking water.[16] The factory owner does not experience the same costs the public incurs when they drink polluted water since the owner is able to freely dispose of the wastewater. If the citizens negotiated with the factory owner, entitling the citizens to clean water (thereby allocating property rights to the citizens), the parties then internalize the costs to pollute the lake. As a result, the allocation of property rights including the right of sale allows externalities to be internalized.[17]

Property rights are an essential tool to incentivize internalization. As stated by Professor Demsetz, "property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization."[18] In the previous example, the property rights were created because the benefits to internalizing the costs of pollution were greater than the costs for the public to assert their rights against the company. In the context of wildlife, societies historically have applied property rights to wildlife to capitalize on an animal's economic value. As animals became valuable for their furs and meats, incentives to privatize land increased to foster the promotion of hunting.[19]

As property rights can be used to incentive internalization, several forms of property right ownership have developed: private property, communal property, and collective property.[20] It is useful to view these three forms as each forming a corner of a triangle—the types of ownerships can blend together creating, such as quasi-communal or quasi-private.[21]

In the context of communal ownership, externalities relating to wildlife arise, such as overhunting.[22] This externality, also known as the "tragedy of the commons,"[23] occurs when no property rights are assigned to the wildlife, and actors only internalize their personal gains in capturing the animal and personal costs expended to pursue the animal. As the

14. *Id.* at 348.
15. *Id.*
16. For additional examples regarding the allocation of property rights, see *id.* at 348–49.
17. *Id.* at 349.
18. *Id.* at 350.
19. *Id.* at 353. The privatization of land in relation to hunting will be further discussed in this Note. See *infra* Part II.B.
20. Demsetz, *supra* note 11, at 354.
21. Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 241 (1992).
22. Demsetz, *supra* note 11, at 351.
23. For more in depth analysis regarding tragedy of the commons and conservation implications, *see generally* Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533 (2007).

number of actors increases, however, social costs emerge, such as increased costs in reproduction of the animal due to its decreased population.[24] To combat this communal ownership issue, the allocation of property rights helps internalize the externalities associated with communal ownership.[25]

B. The History of Property Rights in Wildlife and Hunting in the United States

Several cultures greatly influenced the evolution of property rights in the United States.[26] This Section first analyzes the history of sovereign ownership and hunting rights over wild animals. Then, this Section examines the history of hunting policies and the rise of the public trust doctrine.

1. History of Sovereign Ownership and Hunting Rights of Ferae Naturae

The ownership of *ferae naturae*, or wild animal, has evolved over the years. In ancient Roman law, wild animals were classified as *res nullius*—something belonging to no one until the wildlife was actually captured.[27] This right to capture under Roman law was not absolute; the Roman government retained a sovereign power over *ferae naturae*.[28] England, conversely, maintained exclusive control over *ferae naturae* and had absolute power to grant and restrict its subjects' property rights over wildlife.[29]

After the Norman Conquest in 1066, the Normans established royal forests for the benefit of the monarchy and "favored subjects."[30] In these royal forests, it was illegal to hunt or take timber from the royal forests, and violators were punished severely.[31] The British monarchy also restricted the taking of wild animals through the allocation of hunting rights.[32] Although hunting rights were granted to the select few, landowners began to assert common law trespasses against hunters based on the doctrine of *ratione soli*—the landowner's constructive possession over all animals on his or her property.[33] The landowner's new found power did not last for long.

24. *See id.* at 546 (discussing the original example of "the tragedy of the commons" proposed by Garrett Hardin).
25. Demsetz, *supra* note 11, at 354–57.
26. See *infra* Part II.B.1.
27. Blumm & Ritchie, *supra* note 2, at 677–78.
28. *Id.* at 678.
29. DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 99–100 (2002); Blumm & Ritchie, *supra* note 2, at 679; *see also* Lueck, *supra* note 3, at 630–31.
30. Blumm & Ritchie, *supra* note 2, at 680.
31. *Id.*
32. GOBLE & FREYFOGLE, *supra* note 29, at 100.
33. Blumm & Ritchie, *supra* note 2, at 683.

As the British monarchy relaxed the old property rights regime, the British Parliament in the 1300s began restricting game rights through legislation known as the Game Laws to only individuals who owned "land specified by these qualification statutes."[34] It would take more than 500 years for subsequent legislation to abolish the Game Laws and assign property rights of wildlife explicitly to landowners.[35]

The United States' history regarding sovereign wildlife ownership is more complicated than the Roman and British systems.[36] Before European colonists began settling in the United States, American Indian tribes created rights to specific wildlife "by protecting hunting and fishing territories."[37] These tribes enforced their hunting rights through establishing territories and limiting the time period and methods when tribe members were allowed to hunt.[38] As colonists began to settle, Native Americans were unable to enforce their territorial property rights regime.[39] American settlers did not accept the British doctrine that the sovereign owned the rights in wildlife and then granted rights to its subjects.[40] Before the American Revolution, the "free-take" system was so highly regarded that pursuers of game could even trespass on private property to take wildlife without suffering any recourse from the landowner.[41]

Although under the concept *ratione soli* American landowners had constructive possession of all wildlife on its property, the states still preferred hunters' rights over a landowner's right to exclude.[42] States encouraged the absolute right to take wildlife by creating a statutory presumption against trespass when hunters entered unenclosed property.[43] Throughout the nineteenth century, the United States experienced an extremely broad rule of capture with little interference from the government, as evidence by the renowned *Pierson v. Post* and whaling in the 1800s.[44]

The incident that led to the prominent opinion in *Pierson v. Post* began with a dispute over a fox. In *Pierson v. Post*, Post was hunting the fox with his hounds when Pierson, aware of Post's pursuit of the animal, intercepted and killed the fox.[45] In its analysis of what it meant to own an animal, the court alluded to the tension between the upper class' hunting

34. *Id.*; Lueck, *supra* note 3, at 631–32.
35. Lueck, *supra* note 3, at 632.
36. *See* Geer v. Connecticut, 161 U.S. 519, 523–28 (1896) (examining the right for sovereign ownership in wildlife).
37. Lueck, *supra* note 3, at 630.
38. *Id.*
39. *Id.*
40. Blumm & Ritchie, *supra* note 2, at 685.
41. *Id.* at 688.
42. *Id.* at 688–89.
43. *Id.* at 688–89.
44. *See* 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).
45. *Id.* at 175.

activities and the lower class.[46] The court found that a person does not gain possession of a wild animal until he or she has brought it into his or her own possession.[47] The court also held that the hunter who had invested the time and effort did not, on that reasoning alone, gain possession.[48] Since there was no such thing as hunting rights in the United States, the court struggled to determine how to establish ownership rights of an animal.[49]

Contrasted to the limited cases regarding land mammals, whales created many disputes (and thus sophisticated custom regimes) in the 1800s due to their highly marketable attributes. In the whaling trade, whalers would kill fin-back whales but would not immediately retrieve the carcass.[50] Instead, they would allow the whale to sink, resurface, and either float to shore or be retrieved by boat a few days later.[51] The whales would have markers to identify the specific whaler, and the finder of the carcass would usually retain a finder's fee after notifying the whaler of the find.[52] In *Ghen v. Rich*, the court adopted the aforementioned custom when determining who had the property rights to the harpooned whale—the court allocated the ownership rights to the party who harpooned the whale, in spite of the party not maintaining actual possession of the whale.[53]

The unfettered rule of capture led to over-exploitation of wildlife, resulting in the government's first regulations to conserve wildlife populations.[54] In *Geer v. Connecticut*, the U.S. Supreme Court tempered the broad rule of capture and solidified the government's role in determining wildlife property rights by holding that property rights in wildlife could only be a qualified right, and states had the power to control game ownership for "the common benefit."[55] States became the central authority over wildlife regulation through hunting laws.[56] Since the federal government at the time had few wildlife regulations, states were able to enforce an absolute power to regulate wildlife, with little interference from the federal government.[57]

The federal government began to diminish some of the states' powers to regulate wildlife through several acts of legislation and judicial de-

46. *See id.* at 178–81. Judge Livingston's dissenting opinion seems to favor those who exert more effort with greater resources (i.e. wealthy hunters). *Id.* at 181–82.

47. *Id.*

48. *Id.* at 178.

49. FREYFOGLE & GOBLE, *supra* note 4, at 38–39.

50. *See* Ghen v. Rich, 8 F. 159, 159 (D. Mass. 1881).

51. *See id.* at 159–60; FREYFOGLE & GOBLE, *supra* note 4, at 39.

52. *Ghen*, 8 F. at 159–60.

53. *Id.* at 162; FREYFOGLE & GOBLE, *supra* note 4, at 39–40.

54. GOBLE & FREYFOGLE, *supra* note 29, at 129; *see also* BARRY C. FIELD, NATURAL RESOURCE ECONOMICS: AN INTRODUCTION 243 (2d ed. 2008).

55. 161 U.S. 519, 529 (1896).

56. Lueck, *supra* note 3, at 633.

57. George Cameron Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295, 306–07 (1980) (illustrating courts' interpretations of conflicts between state and federal regulation of wildlife).

cisions at the turn of the twentieth century. The Lacey Act of 1900 made it a federal offense to transport any fish or wildlife through interstate or foreign commerce if it was "taken" or "possessed" in violation of a state regulation or law.[58] Throughout the twentieth century, the federal government expanded its role in wildlife regulation through several pieces of legislation.[59] The Supreme Court limited the states' role even further by limiting *Geer* in *Hughes v. Oklahoma*.[60] In *Hughes,* the Court prohibited states from exclusively reserving wildlife for state residents thereby discriminating against those outside of the state when "equally effective nondiscriminatory conservation measures [we]re available."[61]

Although the federal government retains a significant amount of power over wildlife law today, the states continue to play a central role in regulating wildlife.[62] In Illinois, it is a common law principle that fish are property of the state,[63] and "that the State is a trustee of property it owns, including wildlife."[64] In other states, such as, Minnesota, Utah, and Wyoming; the notion that wildlife is property of the state has been codified in statutes.[65] Other states explicitly and implicitly declare the State's rights in wildlife in their own constitutions.[66]

2. History of Hunting Policies and Current Hunting Principles

Rebelling from their British roots, American settlers did not want a hunting system that restricted public access or allowed a king to own all the wildlife.[67] The settlers did not view wildlife as a sport for elitists; rather, they needed to hunt game in order to survive.[68] American settlers' view of wildlife ownership, therefore, more closely resembled the Roman System than the British System. The early United States of America adopted more of a "free-take" system of wildlife ownership where settlers believed wildlife was better "as a choice dinner course or tailored into a coat or hat" rather than pestering in the wilderness.[69] As men-

58. Lacey Act of 1900, 16 U.S.C. §§ 3371–3378 (2012) (originally enacted as Act of May 25, 1900, ch. 553, 31 Stat. 187 (1900).

59. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12 (2006); Endangered Species Act of 1973, §§ 1531–44; 50 C.F.R. § 14 (2012) (establishing regulations for the importation, exportation, and transportation of captive wildlife). See Lueck, *supra* note 3, at 634, for more information on the expansion of federal authority in wildlife ownership.

60. 441 U.S. 322, 336 (1979).

61. *Id.* at 334–38.

62. Lueck, *supra* note 3, at 634–35.

63. Tyrrell Gravel Co. v. Carradus, 619 N.E.2d 1367, 1368–69 (Ill. App. Ct. 1993).

64. Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

65. MINN. STAT. ANN. § 97A.025 (West 2013); UTAH CODE ANN. § 23-13-3 (West 2013); WYO. STAT. ANN. § 23-1-103 (West 2013).

66. MINN. CONST. art. XIII, § 12 ("Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good."); PA. CONST. art. I, § 27 ("[P]ublic natural resources are the common property of all the people.").

67. Blumm & Ritchie, *supra* note 2, at 684–85.

68. *Id.* at 685.

69. *Id.* at 686–87.

tioned previously, this consumerism mentality greatly expanded the rule of capture in the United States and discouraged any legislation that hindered or restricted hunting.[70]

Nowadays, the purpose of modern hunting practices is to conserve wildlife while abiding by the doctrine of fair chase. The Boone and Crockett Club defines fair chase as "the ethical, sportsmanlike, and lawful pursuit and taking of any free-ranging wild, native North American big game animal in a manner that does not give the hunter an improper advantage over such animals."[71] Other organizations do not limit the fair chase doctrine to native North American animals.[72]

3. Rise of the Public Trust Doctrine

While the main policies behind American hunting encouraged hunting to be accessed by all in the 1800s, the public trust doctrine began to take hold in the United States. The public trust doctrine traces its roots to Roman law, where the Emperor Justinian declared,

> [t]hings common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, and which are not in common as the sea is.[73]

A more modern definition of the public trust doctrine is that the "government must conserve natural resources for the public good."[74] Professor Richard J. Lazarus postured "the [purpose of the] public trust doctrine has been to provide a public property basis for resisting the exercise of private property rights in natural resources deemed contrary to the public interest."[75] If the government indeed has ownership over certain natural resources, such as wildlife, the doctrine may prevent private actors from having an ownership interest in wildlife.[76]

The U.S. Supreme Court first alluded to a public trust doctrine in *Martin v. Waddell*.[77] In *Illinois Central Railroad Co. v. Illinois*,[78] the Supreme Court further analyzed the public trust doctrine. The Court de-

70. *Id.* at 687.

71. *Fair Chase Statement*, BOONE & CROCKETT CLUB, http://www.boone-crockett.org/huntingEthics/ethics_fairchase.asp?area=huntingEthics (last visited Feb. 7, 2015).

72. *Fair Chase*, ORION HUNTER'S INST., http://www.huntright.org/where-we-stand/fair-chase (last visited Mar. 14, 2014).

73. THOMAS COOPER, THE INSTITUTES OF JUSTINIAN: WITH NOTES 67 (3d ed. 1812).

74. Jeremy Bruskotter et al *Researchers: Apply Public Trust Doctrine to 'Rescue' Wildlife from Politics*, RESEARCH NEWS, (Sept. 29, 2011), http://researchnews.osu.edu/archive/publictrust.htm.

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

76. *See* Reed Watson, *Public Wildlife on Private Land: Unifying the Split Estate to Enhance Trust Resources*, 23 DUKE ENVTL. L. & POL'Y 291, 293–94 (2013).

77. 41 U.S. 367, 412–14 (1842); Paul Wilson, *The Public Trust in Wildlife Conservation*, MOUNTAIN ST. SIERRAN (July 2005), http://westvirginia.sierraclub.org/sites/westvirginia.sierraclub.org/files/newsletter/archives/2005/07/WV_SC_NL-07-05.pdf.

78. 146 U.S. 387 (1892).

termined that ownership of land underneath tide waters belonged to the respective state that had the power to use and dispose of the land,[79] but the Court stipulated that a state could not exercise its ownership rights in the land if it impaired the public's interest in the waters.[80] The Court applied the public trust doctrine where it was necessary to protect the public use of lands under navigable waters "from private interruption and encroachment."[81] The Court declared that the state's title in the lands underneath navigable waters was "held in trust for the people of the state."[82]

After *Illinois Central Railroad*, the U.S. Supreme Court also held that the public trust doctrine encompassed wildlife in *Geer v. Connecticut*.[83] States have included wildlife as a natural resource protected under the public trust doctrine throughout the twentieth and twenty-first centuries.[84] For instance, the Alaska Supreme Court found that although the state does not own wildlife as it does land,[85] the state does have a responsibility in conserving wildlife for the public.[86] The public trust doctrine, however, remains an elusive concept, and state and federal courts continue to struggle on the exact nature of the public trust doctrine.[87]

C. The Development of Private Game Reserves in Africa

When one thinks of private game reserves, it is usually a visual of tall grasses with lions, zebras, and giraffes roaming the lands. The development of private game reserves does indeed have an extensive history in African countries. Beginning in the 1830s, the development of what many may consider to be the typical "African safari" began to form due

79. *Id.* at 435.

80. *Id.*

81. *Id.* at 436.

82. *Id.* at 452.

83. 161 U.S. 519, 521–23 (1896); *see also* Blake Hudson, *The Public and Wildlife Trust Doctrines and the Untold Story of the* Lucas *Remand*, 34 COLUM. J. ENVTL. L. 99, 111–12 (2009).

84. Envtl. Prot. Info. Ctr. v. Cal. Dept. of Forestry & Fire Prot., 187 P.3d 888, 926 (Cal. 2008) (stating two forms of the public trust doctrine: common law and statutory); Pullen v. Ulmer, 923 P.2d 54, 60 (Alaska 1996) (recognizing wildlife falls within the state's public trust responsibilities); State v. Sorenson, 436 N.W.2d 358, 362 (Iowa 1989) (suggesting that Iowa would recognize wildlife under the public trust doctrine); Orion Corp. v. State, 747 P.2d 1062, 1072–73 (Wash. 1987) (recognizing the public trust covenant acts as "a covenant running with the land . . . for the benefit of the public and the land's dependent wildlife") (citation omitted).

85. *Pullen*, 923 P.2d at 59.

86. *Id.* at 60–61.

87. *See* Douglas v. Seacoast Prods, Inc., 431 U.S. 265, 283–84 (1977) ("The Submerged Lands Act does give the States 'title,' 'ownership,' and 'the right and power to manage, administer, lease, develop, and use' the lands beneath the oceans and natural resources in the waters within state territorial jurisdiction. . . . A State does not stand in the same position as the owner of a private game preserve . . . . Neither the States nor the Federal Government . . . has title to these creatures until they are reduced to possession by skillful capture.") (citations omitted); Toomer v. Witsell, 334 U.S. 385, 402 (1948) (holding that communal ownership in wildlife is "but a fiction expressive in legal shorthand"); State v. Longshore, 5 P.3d 1256, 1263 (Wash. 2000) (en banc) (holding that the public trust doctrine does not extend the right to take shellfish "naturally occurring" on private property); FREYFOGLE & GOBLE, *supra* note 4, at 98–99.

to an abundance of wildlife, unregulated lands, and suitable weapons capable of hunting "big game."[88] While this industry has extensively developed, countries in southern and eastern Africa have significantly diverted in approaches to "sport hunting" regimes.[89]

Many southern and eastern African countries recognized the concept of *res nullius* in which wildlife was generally not owned by anybody.[90] African countries interpret property rights in wildlife differently, but a few countries are worth noting specifically. Namibia recognizes liberal property rights for private game reserve owners, but the Namibian government reserves the right to determine what game is allowed to be hunted, the minimum size of private game reserves, and it encourages the creation of conservancies, established by multiple private game reserve owners to promote resource conservation.[91] Prior to 1991, South Africa essentially allowed wildlife to be legally taken regardless of whether the hunter was trespassing.[92] Subsequently, South Africa enacted legislation that granted landowners the right to capture and contain most species without separate permits, the right to hunt year round, and the right to market and sell wildlife.[93] South African provinces, however, regulate these rights by implementing regulations on permits, property size, type of game, and hunting tactics.[94] Similarly, Zimbabwe grants extensive rights to landowners to use the wildlife on their land, as long as the landowners do not abuse their privilege and submit quotas to a governmental authority.[95]

Several African countries have had diverse histories regarding the development of private game reserves. Kenya was a leader in recreational hunting until the government banned all forms of hunting in 1977 because the industry had become corrupted.[96] The ban on all forms of hunting did not improve wildlife populations; rather, wildlife populations drastically decreased due to poaching and alternative land use.[97] Namibia, South Africa, and until recently, Zimbabwe had thoroughly developed private game reserve systems. Zimbabwe had an extensively de-

88. WILLIAM M. ADAMS, AGAINST EXTINCTION: THE STORY OF CONSERVATION 21 (2004).

89. *See generally* ROB BARNETT & CLAIRE PATTERSON, SPORT HUNTING IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) REGION: AN OVERVIEW (2006) (discussing sport hunting regimes in Botswana, Namibia, South Africa, Tanzania, and Zimbabwe).

90. Lance Van Sittert, *Bringing in the Wild: The Commodification of Wild Animals in the Cape Colony/Province c. 1850–1950*, 46 J. AFR. HIST. 269, 269–70 (2005).

91. *See* BARNETT & PATTERSON, *supra* note 89, at 25–42.

92. Dhoya Snijders, *Wild Property and Its Boundaries—On Wildlife Policy and Rural Consequences in South Africa*, 39 J. PEASANT STUD. 503, 507–08 (2012).

93. *Id.* at 507–08.

94. *S. Afr. Predator Breeders Ass'n v. Minister of Envtl. Affairs & Tourism* 2009 (2009) ZAFSHC 68 at para. 23 (S. Afr.); Snijders, *supra* note 92, at 508–09. For dangerous species, such as lions, hippopotami, rhinoceroses, and elephants, one province requires the property to be at least 2000 hectares and large animals must have fences of 2.4 meters high. *See id.* For a further discussion of the requirements for game farmers, see *id.*

95. Vernon Booth, *International and Regional Best Practice and Lessons Applicable to Sport and Recreational Hunting in Southern Africa* 15 (Aug. 26, 2005) (final draft), 40 (on file with author).

96. *Id.* at 24.

97. *Id.* at 82.

veloped private game reserve system, but in 2000 legislation was passed that essentially dissolved the private land programs.[98] In Namibia, private land used for game reserves averages around 7000 hectares (roughly 17,000 acres) for each property, and the land owners must construct standard fences and allow their properties to be monitored by officials.[99]

South Africa's private game reserve system has recently undergone extensive changes.[100] Historically, private landowners received significant backlash from South African authorities when trying to implement "business models that were based on the commodification of wildlife" in the 1960s.[101] Recently, South Africa has seen a shift in an increase in private game reserves.[102] In 2007, South Africa passed regulations prohibiting canned hunting practices.[103] The regulations required lions to be released two years prior to being hunted, an effort to promote fairer hunting practices.[104] In 2010, the South African Supreme Court of Appeal overturned the regulations, allowing canned hunting practices to resume.[105]

D. The Development of Private Game Reserves in the United States

Private game reserves began to take hold in the United States in the latter half of the twentieth century. Y.O. Ranch became a prominent private game reserve in the United States that introduced exotic species in 1953.[106] Private game reserves, particularly those operations that import nonnative species for their reserves, have grown due to the lucrative market of "exotic hunting."[107] Today, there are over 500 private game reserves in Texas, the most popular state for private game reserve operations.[108]

There are multiple types of private game operations in the United States. First, there are ranches that allow hunters onto the owner's land that charge a fee to the visitors to hunt on their land, but these ranches do not plant "food plots" or try to lure game in any other way.[109] These

98. *Id.* at 37.

99. *Id.* at 37–38.

100. *See* Mnqobi Ngubane & Shirley Brooks, *Land Beneficiaries as Game Farmers: Conservation, Land Reform and the Invention of the 'Community Game Farm' in KwaZulu-Natal*, 31 J. CONTEMP. AFR. STUD. 399, 399 (2013) (discussing how the game system in South Africa is "not new").

101. Snijders, *supra* note 92, at 506.

102. *Id.* at 504.

103. Clare Nullis, *South Africa Bans Hunting Caged Lions*, COSMOS (Feb. 22, 2007), http://fgdf gfd.cosmosmagazine.com/news/south-africa-bans-hunting-caged-lions/.

104. *Id.*

105. *SA Predator Breeders Ass'n v. Minister of Envtl. Affairs & Tourism* 2010 (2010) ZASCA 151 (A) at para. 52 (S. Afr.); *Dismay Greets Court Ruling that Puts Captive Lions Back in the Firing Line*, IFAW (Dec. 1, 2010), http://www.ifaw.org/united-states/node/10856.

106. Norris et al., *supra* note 1.

107. *See* James Westhead, *'Exotic Hunting' Thrives in Texas*, BBC (Feb. 7, 2006), http://news.bbc.co.uk/2/hi/americas/4689428.stm.

108. *Id.*

109. Norris et al., *supra* note 1. Critics to private game reserves attempt to further divide and classify different types of private game reserves. *Id.*

ranches may specialize in either nonnative or native species. Another type of ranch may employ tactics to decrease the possibility of the animal escaping and keep its wildlife in enclosures ranging in size from a "large pen" to a few hundred acres.[110] This last type is also known as canned hunting. This Note will analyze the benefits of the former type of private game reserves.

E. Private Game Reserves' Legality Within the United States

Since states have historically been the central authority legislating hunting practices, the federal government has little legislation regarding hunting reserves. This Section first explores previous federal attempts to prohibit hunting exotic wildlife. Then, this Section depicts the different approaches states have taken regarding canned hunting and private game reserves.

1. Federal Government

Although the federal government does not have any legislation addressing private game reserves, there have been several attempts by Congress to implement federal legislation. The first attempt occurred in the mid 1990s when House Representative George Brown Jr. from California and Senator Frank Lautenberg from New Jersey proposed similar bills titled the Captive Exotic Animal Protection Act of 1995 to prohibit the transportation of a "confined exotic animal, for the purposes of allowing the killing or injuring of that animal for entertainment or the collection of a trophy."[111] The legislation was never enacted.[112] Several representatives and senators, however, have attempted to reintroduce the bill on numerous occasions thereafter, yet none have succeeded.[113]

Congress again attempted to prohibit the transportation of captive exotic animals for the aforementioned purposes in another piece of legislation titled the Sportsmanship in Hunting Act.[114] The legislation used very similar language compared to the Captive Exotic Animal Protection Act, but it also included a prohibition on remote computer assisted hunt-

110. *Id.*

111. Captive Exotic Animal Protection Act of 1995, H.R. 1202, 104th Cong. § 48(a) (1995); Captive Exotic Animal Protection Act of 1995, S. 1493, 104th Cong. § 48(a) (1995).

112. *H.R. 1202 (104th): Captive Exotic Animal Protection Act of 1995*, GOVTRACK.US, https://www.govtrack.us/congress/bills/104/hr1202#overview (last visited Feb. 7, 2015).

113. Captive Exotic Animal Protection Act of 2004, S. 2731,108th Cong. § 49(a) (2004); Captive Animal Protection Act of 2001, H.R. 3464, 107th Cong. § 49(a) (2001); Captive Exotic Animal Protection Act of 1999, S. 1345, 106th Cong. § 48(a) (1999); Captive Exotic Animal Protection Act of 1997, S. 995, 105th Cong. § 48(a) (1997).

114. Sportsmanship in Hunting Act of 2011, H.R. 2210, 112th Cong. § 49(a) (2011); Sportsmanship in Hunting Act of 2009, H.R. 2308, 111th Cong. § 49(a) (2009); Sportsmanship in Hunting Act of 2007, H.R. 3829, 110th Cong. § 49(a) (2007). See Sportsmanship in Hunting Act of 2008, S. 2912, 110th Cong. § 50(a)(1) (2008), for the related bill introduced in the Senate.

ing techniques.[115] Yet, none of these bills have been enacted at the time of this writing.[116]

2. *State Legislation*

Texas is by far the most lenient state in regard to private game reserves, with over 500 reserves within the state.[117] Texas does not place any restrictions on canned hunting among native or nonnative species.[118] Eighteen states also follow Texas' model and do not prohibit canned hunting or private game reserves.[119]

Contrasting Texas, Montana banned all forms of private game reserves in 2000.[120] In a voter initiative, citizens in Montana narrowly approved the ban in an effort to prevent disease transmission among wildlife and to prohibit canned shooting.[121] Eight other states explicitly ban captive hunting practices,[122] and several states have some form of limitations for private game reserves.[123]

New York recently proposed legislation that would prohibit private game reserves for nonnative species.[124] Idaho also attempted to ban and limit the use of private game reserves.[125] Most recently, Illinois State

115. *Compare* Sportsmanship in Hunting Act of 2011, H.R. 2210 § 49(a)–(b) *with* Captive Exotic Animal Protection Act of 2004, S. 2731 § 49(a).

116. *H.R. 2210 (112th): Sportsmanship in Hunting Act of 2011*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr2210 (last visited Feb. 7, 2015); S. 2731 (108th): Captive Exotic Animal Protection Act of 2004, GOVTRACK.US, https://www.govtrack.us/congress/bills/108/s2731 (last visited Feb. 7, 2015).

117. *See* Patrick Graves et al., *2011 Legislative and Administrative Review*, 18 ANIMAL L. 361, 368 (2012).

118. *See Fact Sheet: State Laws on Canned Hunts*, HUMANE SOC'Y, http://www.humanesociety.org/assets/pdfs/hunting/captive_hunt_states.pdf (last visited Feb. 7, 2015).

119. *See id.*

120. MONT. CODE ANN. § 87-4-414 (2013); Jim Robbins, *Montana Ban on Private Hunting Means an Excess of Elk*, N.Y. TIMES, Nov. 25, 2000, http://www.nytimes.com/2000/11/25/us/montana-ban-on-private-hunting-means-an-excess-of-elk.html.

121. J.M. Kelley, Note, *Implications of a Montana Voter Initiative that Reduces Chronic Wasting Disease Risk, Bans Canned Shooting, and Protects a Public Trust*, 6 GREAT PLAINS NAT. RESOURCES J. 89, 101, 103–05 (2001).

122. *See* ARIZ. REV. STAT. ANN. § 17-306 (2014); CONN. GEN. STAT. §§ 26-40(a), -48 (2014); HAW. REV. STAT. § 183D-51 (2014); MD. CODE ANN., NAT. RES. § 10-901 to 904-906 (2014); NEV. REV. STAT. § 504.295 (2014); OR. REV. STAT. § 497.248 (2014); WASH. REV. CODE § 77.15.340 (2014); WYO. STAT. ANN. § 23-1-103 (2014). *See also* Trisha Marczak, *The 'Canned Hunting' Business Is Alive and Well in America*, MINTPRESS NEWS (Sept. 30, 2013), http://www.mintpressnews.com/the-canned-hunting-business-is-alive-and-well-in-america/169820/.

123. ALA. CODE § 9-11-501 (2014) (allowing for hunting of native and exotic species in an enclosure if it has "adequate space" and the animal has "a reasonable opportunity to evade the hunter"); CAL. FISH & GAME.CODE § 3006 (2014); DEL. CODE ANN. tit. 7, § 704 (2014); GA. CODE ANN. § 27-3-9 (2014) (banning the use of feed plots); MISS. CODE ANN. § 49-7-34 (2014) (excepting rabbit, fox, and coyote from enclosure hunting ban); VA. CODE ANN. § 29.1-525.1 (2014) (prohibiting deer enclosure hunting); WIS. STAT. § 169.09 (2014) (prohibiting hunting of captive wild animals except those who have certain licenses).

124. *Report on Legislation by the Animal Law Committee*, N.Y. CITY BAR 1 (May 2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072494-CannedHuntingShoots.pdf.

125. *ID Sportsmen Draw a Bead on Canned Hunts*, PUB. NEWS SERVICE (Feb. 12, 2007), http://www.publicnewsservice.org/index.php?/content/article/1558-1; *ISCAC Position Memo on High Fence,*

Representative Kelly Burke proposed a bill to ban "canned hunting" in Illinois.[126] The proposed bill broadly defines "confinement" as "any structure or other means intended to keep an animal within bounds, restrict its movement, or prevent an animal from leaving a particular environment."[127] The bill, however, died at the end of the session last year.[128]

III. ANALYSIS

As Part II illustrated, states remain sharply divided on the issue of private game reserves and whether private game reserves conform to U.S. policies of hunting, conservation, ethical treatment of animals, and the public trust doctrine. This Part first examines why wildlife on private game reserves should be treated as quasi-private property in consideration of the common law principles, case law, and conservation policies. Then, this Part analyzes the economic, political, and historical reasons behind hunting laws and briefly differentiates between private game reserves and canned hunting. This Part will then discuss how private game reserves support hunting policies and conservation practices. This Part concludes by analyzing the current Illinois bill and other jurisdictions' approaches to private game reserves.

A. Landowners Should Have Quasi-Private Property Rights in Wildlife on Private Game Reserves

Property rights are an integral theme underlying wildlife's interaction with society. Wildlife can be viewed as a natural resource: it is a commodity that is renewable and can be marketed for economic value.[129] Unlike traditional property rights in a market system which can be assigned as exclusively private or public, natural resource property rights may be "a mixture of private and public institutions."[130] By denoting wildlife on private game reserves as a quasi-private property interest, it protects animals from over-exploitation problems that result from communal ownership and allows a public entity to participate in the maintenance of the wildlife.[131] This Section examines how animals on private game reserves should be classified as wildlife, not domesticated animals.

Shooter-Bull Operations in Idaho, IDAHO SPORTSMEN'S CAUCUS ADVISORY COUNCIL (Feb. 7, 2008), http://www.idahoscac.org/wp-content/uploads/2008/02/07_shooter_bull_-_high_fence_memo.pdf.

126. H.B 3118, 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013).

127. *Id.*

128. *Bill Status of HB3118*, ILL. GEN. ASSEMBLY, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3118&GAID=12&DocTypeID=HB&LegId=74973&SessionID=85 (last visited Feb. 24, 2015)].

129. Even the U.S. Supreme Court implied wildlife is a natural resource. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 393 (1978).

130. Lueck, *supra* note 3, at 626.

131. *See* Johanna Searle, Note, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897, 911 (1990) (acknowledging that the public trust doctrine provides a form of quasi-private property); *see generally* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (analyzing the distinction between public and private entities).

Afterward, this Section will explain why a quasi-property right in wildlife on private game reserves would most effectively apply economic concepts and the public trust doctrine.

1. Animals on Private Game Reserves Are Wildlife, Not Domesticated Animals

Wildlife on private game reserves cannot be considered solely private property since many states declare wildlife as collective property of the State in their statutes, their constitutions, or in trust.[132] Many critics to private game reserves contest the animals on these properties are not wildlife but rather domesticated animals.[133]

The distinction between domestic animals and wildlife is difficult to differentiate. At common law, animals were classified either as "animals *domitæ naturæ* (of a domestic nature) or animals *feræ naturæ* (of a wild nature)."[134] The distinction was important since owners of domestic animals retained their property interests if the animal wandered away, while owners of wildlife lost their property interests as soon as they lost physical possession.[135] Since states retain most of the power to regulate animals, the differences between domestic animals and wildlife depend on the state's statutes or regulations.[136] In Illinois, for instance, "'[w]ild' means not ordinarily domesticated, and ordinarily living unconfined in a state of nature without the care of man."[137] In comparison, "'[w]ildlife' means any bird or mammal that are by nature wild by way of distinction from those that are naturally tame and are ordinarily living unconfined in a state of nature without the care of man."[138]

In *Schultz v. Morgan Sash & Door Co.*, the Supreme Court of Oklahoma held that deer enclosed on a 160-acre farm owned by a private corporation were not wildlife, but rather domesticated pets, and could be hunted outside of the state's game law restrictions.[139] The court found that the deer had been enclosed for ten years by a high fence, would be fed and cared for in the owner's barn daily, and would eat from a person's hand.[140] The farm on which the deer lived was also home to other animals and was primarily used as a "recreation place," not as a hunting reserve.[141]

132. *See supra* note 66 and accompanying text.

133. Ireland, *supra* note 9, at 226 ("Even though the animals in large facilities have more space to roam, they are essentially domesticated animals who have little or no fear of humans.").

134. GOBLE & FREYFOGLE, *supra* note 29, at 10–11.

135. *Id.* at 11.

136. For a brief description explaining the difficulties in classifying animals as domestic or wild, see FREYFOGLE & GOBLE, *supra* note 4, at 17–20.

137. 520 ILL. COMP. STAT. 5/1.2s (2014).

138. *Id.* 5/1.2t (2014).

139. 344 P.2d 253, 256–57 (Okla. 1959).

140. *Id.* at 255.

141. *Id.* at 256.

There are several factors that clearly distinguish the applicability of *Schultz* to private game reserves. In determining whether the deer were domestic, the court seemed to focus on the fact that the deer knew where they could receive food and care, and would go there daily.[142] The court did not focus on whether the size of the property was comparable to the deer's natural home range. The property owners also only hunted the deer to cull the herd.[143] Conversely, a proper private game reserve does not provide food plots. A private game reserve that attempts to imitate the wildlife's habitat and home range is very different than the farm in *Schultz*.[144] More importantly, the primary function of a private game reserve is to allow hunting on the property for a fee. Therefore, the analysis in *Schultz* regarding the domestication of wildlife should not apply to private game reserves.

Many of the private game reserves in the United States import exotic species to lure hunters who yearn for the thrill to hunt nonindigenous animals. Do these animals classify as domestic or wild? In *State v. Couch*, the Oregon Supreme Court, in applying the intent of Oregon statutes, held that for mammals to be wildlife, the mammal must "exist untamed and undomesticated in a state of nature."[145] The Oregon Court of Appeals, when interpreting its state statute regarding the definition of wildlife, concluded that "all animals existing, uncaptured, in a state of nature qualified as 'wildlife.'"[146] On appeal to the supreme court, the defendant in the case insisted that wildlife meant "all animals existing, uncaptured, [and] in a state of nature."[147] The State contended that wildlife should follow its dictionary definition, and would include all species, indigenous and nonindigenous.[148] When determining its definition of wildlife, the Oregon Supreme Court looked to the Oregon statute defining wildlife.[149] Although the court did not determine whether the nonindigenous deer in the case were in fact wild, it found that Oregon's wildlife laws still applied since the deer fit under the statute's definition of game mammal, even extending to animals that are considered private property.[150] Therefore, the court found that the state could regulate nonnative deer either as wildlife if the definition applied, or as a game mammal.[151]

The approach taken by the court in *Couch* provides an alternative approach on how to classify wildlife on private game reserves: even if the animal may be deemed domesticated (not wildlife) and is private proper-

142. *Id.* at 255.
143. *Id.* at 256.
144. *See infra* text accompanying notes 168–79.
145. 147 P.3d 322, 327 (Or. 2006).
146. *Id.* at 325. (noting the Court of Appeals' reliance on ORS 498.002 in defining "wildlife").
147. *Id.*
148. *Id.* at 325–26.
149. *Id.* at 326 (""[w]ildlife' means fish, shellfish, wild birds, amphibians and reptiles, feral swine as defined by State Department of Agriculture rule and other wild mammals.'"). For the most recent version of this statute, see OR. REV. STAT. § 496.004(19) (2014).
150. *Couch*, 147 P.3d at 327–28.
151. *Id.* at 329.

ty, the state can still regulate the animals under another statute, regardless of the fact the state does not have a possessory interest in the animal.[152] The approach does allow the state to be able to further the policies behind private game reserves that may not be fully captured by complete private property rights, however, it is a more convoluted approach. The *Couch* approach still relies on the vague concepts of domestication and taming that are hard to specifically define. Analyzing factors regarding the reserve's similarity in size to the animal's range and habitat and primary function as a hunting operation, as well as the limited human interaction, provide a more effective way to determine if the animals on the property are still wild.

States may also have statutes that determine the property rights in animals that would otherwise be considered wild. In Illinois, a person who raises or domesticates an animal which was naturally wild or keeps the animal in enclosures will have personal property rights in that animal.[153] This statute fails to accurately capture the policies of a private game reserve. Under the Illinois statute, a landowner who keeps wildlife on his or her property and encloses his or her property would have personal property rights in all of the wildlife on the property, regardless of the property's size.[154] Similar to the approach in *Couch*, the statute fails to ask whether the property is similar to the animal's habitat.

2. *Property Interests in Wildlife on Private Game Reserves Should be a Quasi-Private Property Interest*

Wildlife on private game reserves should not be considered solely private property, because private property systems fail to accurately capture nonquantitative uses for wildlife. One economic theory regarding property is that the property will be put to its most valuable use since the property owner is incentivized to maximize his or her profits under that use.[155] Although private game reserves capture some of wildlife's economic value by charging the public to hunt on the reserves, many other values that wildlife possesses (nonconsumptive uses) are very difficult for a market to capture.[156] Additionally, several states consider wildlife to be owned collectively.[157] The Illinois Supreme Court determined that ownership interests in wildlife is a collective ownership, "in trust for the benefit of its citizens," which allows the state to regulate hunting of game

152. *Id.* at 328–29.
153. 510 ILL. COMP. STAT. 60/1 (2014).
154. *Id.*
155. Cohen, *supra* note 21, at 255.
156. Although private game reserves only valuate their wildlife for consumptive use, the rise in safari trips and eco-tourism reveal the market's ability to valuate some nonconsumptive uses of wildlife.
157. *See supra* notes 64–66 and accompanying text.

through its police power,[158] as well as through legislative action.[159] Therefore, pure property rights in wildlife would not be an appropriate classification.

Juxtaposing private property, wildlife should not be considered solely communal property. As discussed previously, when wildlife is considered solely communal property, wildlife usually becomes overexploited and fails to be consumed in a conservative manner.[160] Therefore, a communal property right in wildlife on private game reserves would also not be appropriate.

Quasi-private property stems from a mixture of collective ownership and private property ownership. Quasi-private property is best defined as property that is not available for public use, but is publicly owned.[161] For instance, while the Atlantis space shuttle is owned by the U.S. federal government, it is not openly available for public use.[162] Wildlife should be viewed in this manner. The public trust doctrine may provide support to classify wildlife as quasi-private property on private game reserves.

"[T]he historical function of the public trust doctrine has been to provide a public property basis for resisting the exercise of private property rights in natural resources deemed contrary to the public interest."[163] First, the public trust doctrine includes wildlife.[164] Since the public trust doctrine extends to wildlife, it is rational to infer that the public trust doctrine promotes the conservation of wildlife. By entrusting the government to protect and maintain these resources for the public, it instills a property interest in those resources. Since the public trust doctrine applies to wildlife, wildlife on private game reserves are not purely private property interests.

Opponents to private game reserves may assert that these reserves should be closed because of the public trust doctrine. Opponents ac-cuse private game reserves of transforming wildlife into "commodities" from natural assets, which fails to properly evaluate the animal for its qualitative traits.[165] Private game reserves are not contrary to the public interest for an important reason: private game reserves further hunting policies, which include the conservation of wildlife. Thus, the conservation of wildlife is not a purely private matter but rather an interest that the public doctrine also pursues to protect. This convergence of interests from hunting policies and the public trust doctrine exemplifies that the public

158. Cummings v. People, 71 N.E. 1031, 1034 (Ill. 1904). The U.S. Supreme Court also held that states can exercise their police power to protect wildlife. Lacoste v. Dep't of Conservation, 263 U.S. 545, 552 (1924) ("Protection of the wild life of the state is peculiarly within the police power . . . .").

159. People v. Diekmann, 120 N.E. 490, 491 (Ill. 1918).

160. *See supra* notes 22–25 and accompanying text.

161. Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635, 646.

162. Cohen, *supra* note 21, at 241.

163. Lazarus, *supra* note 75, at 633.

164. *See supra* notes 83–87 and accompanying text.

165. Van Sittert, *supra* note 90, at 271.

trust doctrine is not in conflict with private game reserves but rather promotes the activity and classifies wildlife on these reserves as a quasi-private property.

Using the public trust doctrine as evidence that wildlife on private game reserves should be considered quasi-private property, landowners of these reserves may receive additional protection as well. In *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, the Supreme Court of New Jersey held that a private, nonprofit corporation that operated its property as a conservation for wildlife could potentially prevent a pipeline from being constructed through the property.[166] The court refused to recognize the corporation as a public agency or public utility but acknowledged the lands used as a wildlife preserve had a "special and unique status."[167] If a state had collective ownership in wildlife, the holding in *Wildlife Preserves* could easily extend to properties that were conserving these wildlife populations, i.e., private game reserves. Therefore, if wildlife on private game reserves retained a quasi-private property interest, landowners of private game reserves could be provided extra protection against unwanted interference. The animals located on private game reserves should be considered wild, quasi-private property of the landowner due to the benefits received from this property status and the support by the public trust doctrine.

B. The Benefits of Private Game Reserves

While hunting sustained a way of life for early American settlers, its dominant purpose today is to manage wildlife populations. Since state wildlife agencies are the primary authority to manage state wildlife populations, hunting provides a unique labor force that is willing to pay (in the form of hunting licenses or game tags) to be able to hunt.[168] Keeping in mind that wildlife on private game reserves should be considered quasi-private property, private game reserves offer significant benefits that purely communal and other mixed collective ownership systems fail to capture. When operated properly, private game reserves further the policies of hunting: protecting the principles of "fair chase" and promoting conservation of wildlife. Private game reserves also fuel a lucrative market which feeds back to government conservation programs. This Section first attempts to "de-villianize" private game reserves and differentiate those reserves from canned hunting practices and state fisheries. This Section also highlights the economic benefits accrued from hunting and private game reserves. This Section then examines how private game reserves further hunting policies through fair chase and conservation. It al-

166. 225 A.2d 130, 134 (N.J. 1966); *see also* Searle, *supra* note 131, at 911–12.

167. *Wildlife Preserves* 225 A.2d at 134.

168. *See* SOUTHWICK ASSOCIATES, HUNTING IN AMERICA: AN ECONOMIC FORCE FOR CONSERVATION 3 (Nat'l Shooting Sports Found. 2013), *available at* http://www.nssf.org/PDF/research/HuntingInAmerica_EconomicForceForConservation.pdf.

so compares private game reserves as endangered species recovery programs to those of the Endangered Species Act.

1. The Differences Between Private Game Reserves, Canned Hunting Facilities, and State Fisheries

Much of the public backlash concerning private game reserves stems from the graphic visual of animals kept in a small cage and released while people shoot from close proximity. While these practices, also known as canned hunting, unfortunately exist,[169] and well-intentioned legislation attempts to discourage these operations, private game reserves are vastly different from canned hunting practices. Many who see and hear of these accounts confuse the two practices and believe that the wildlife in these private game reserves have no chance to escape or that all private game reserves employ unfair tactics to kill animals.[170]

Canned hunting practices apply to hunting practices where the animal has no realistic attempt to escape.[171] As one article noted, "[a]nimals in these facilities no longer roam freely, and they depend on humans for food and shelter."[172] Actual private game reserves in Africa and the United States do not employ canned hunting tactics; they more closely resemble public hunting grounds. Many of these private game reserves own thousands of acres to simulate animals' natural ranges and limit human interaction to uphold the hunting principle of a fair chase.[173] The analysis in this Note thus only analyzes private game reserves that are sufficiently large enough to resemble a specific species' habitat composition and size.

Furthermore, private game reserves uphold hunting principles that are better and are more ethical than states who participate in another form of canned hunting: stocking ponds and lakes with indigenous, and even nonindigenous, fish—although state fisheries receive much less attention than canned hunts and private game reserves. States take it upon themselves to stock waterways with fish to maintain fish populations and supply enough fish for fishermen. The Illinois Department of Natural Resources ("IDNR") has three hatchery facilities that provides for fish distribution throughout the state.[174] These hatcheries allow IDNR to

169. Meredith Bennett-Smith, *Canned Lion Hunting Report Suggests South African Business Booming After Regulations Lifted*, HUFFINGTON POST (June 5, 2013), http://www.huffingtonpost.com/2013/06/05/canned-lion-hunting-video-south-africa_n_3386878.html; see also Norris et al., *supra* note 1.

170. P.A. Lindsey et al., *Economic and Conservation Significance of the Trophy Hunting Industry in sub-Saharan Africa*, 134 BIOLOGICAL CONSERVATION 455, 465 (2007).

171. Norris et al., *supra* note 1.

172. Ireland, *supra* note 9, at 237. This Note agrees that animals in "canned hunting" facilities are not wildlife and should be protected under state anti-cruelty statutes. *Id.* at 237–40.

173. *See 60 Minutes: Big Game Hunting* (CBS television broadcast June 10, 2012), *available at* http://www.cbsnews.com/videos/can-hunting-endangered-animals-save-the-species-50126066/.

174. *Fish Hatcheries in Illinois*, ILL. DEPT. OF NAT. RES., http://www.ifishillinois.org/programs/hatchery.html (last visited Feb. 7, 2015).

stock ponds and lakes with nonnative fish, such as rainbow trout.[175] Since rainbow trout are native only to areas west of the Rocky Mountains in cold water settings, rainbow trout cannot reproduce in any ponds or lakes in Illinois, so they must be exclusively developed in hatcheries.[176]

Comparing the rainbow trout stocking in Illinois to private game reserves, private game reserves better serve traditional hunting practices. For instance, while many fish stocking programs are used for ecological reasons,[177] IDNR's policy behind stocking rainbow trout in Illinois ponds and lakes seems to focus on encouraging families to go fishing and consume trout, rather than on ecological benefits.[178] Private game reserves incentivize operators to manage their wildlife populations so the populations do not exploit their habitat's resources, nor fall below necessary reproduction levels.

Private game reserves also provide "fair chase" for the animals where fish stocking does not. Many private game reserves encompass large areas of land,[179] which allow the animals opportunities to escape, whereas ponds and lakes can be much smaller in size, providing a smaller opportunity of escape. Understanding these comparisons reveals that it is unfair to scandalize private game reserves when they in fact promote traditional hunting practices whereas local governments participate in their own form of canned hunting.

2. Economic Benefits from Hunting and Private Game Reserves

Hunting has also become a lucrative industry. According to the U.S. Fish and Wildlife Service ("FWS"), 13.7 million people over the age of sixteen hunted in 2011, or six percent of the population.[180] FWS reported people also spent $38.3 billion on hunting expenditures, including licenses and equipments.[181] Although many of these expenditures help support small communities during hunting seasons, the license and permit sales, which totaled $796 million, also are paid directly to the proper state wildlife agency.[182] Under the Federal Aid in Wildlife Restoration Act, hunters have contributed over $7.2 billion in taxes on firearms and ammunition that exclusively support conservation programs.[183] Contrary to common

175. *The Illinois' 2014 Fall Trout Fishing Season Opens Oct. 18*, ILL. DEPT. OF NAT. RES., http://www.ifishillinois.org/programs/trout_stocking.html (last visited Feb. 7, 2015).

176. *Id.*

177. Univ. of Bournemouth, *Non-Native Fish May be a Benefit Not a Burden*, SCIENCE DAILY (Feb. 28, 2008), http://www.sciencedaily.com/releases/2008/02/080226171618.htm.

178. *See The Illinois' 2014 Fall Trout Fishing Season Opens Oct. 18*, *supra* note 171.

179. Through a licensing program in New Mexico, the average shooting preserve for game birds is 2225 acres, with a range from 1000 acres to 5000 acres with "actual acres hunted" averaging around 220 acres, though it was unclear whether these lands were exclusively privately owned. Casey Roberts et al., *Establishing a Shooting Preserve as a Means of Diversification for Landowners in New Mexico,* NEW MEX. ST. UNIV., 1 (Mar., 2005), available at http://aces.nmsu.edu/pubs/_circulars/CR605.pdf.

180. SOUTHWICK ASSOCIATES., *supra* note 168, at 3.

181. *Id.*

182. *Id.* at 6.

183. *Id.*

belief, several states do require a license to hunt on private property and private game reserves.[184] If wildlife on private game reserves was quasi-private property, states could tax for these hunting operations, increasing its revenue streams, which, would likely be unopposed if the taxes provided for further conservation and wildlife management programs.

3. Private Game Reserves Preserve Hunting Principles

Private game reserves do promote the sport of hunting while respecting established hunting principles.[185] Opponents to private game reserves also believe that these operations do not promote the sport of hunting and do not abide by the principles of hunting. Again, many of these opponents confuse private game reserves with canned hunting facilities.

An integral principle hunters and the sport of hunting observe is the theory of a fair chase. The theory of fair chase mandates, "[f]undamental to ethical hunting is the idea of fair chase. This concept addresses the balance between the hunter and the hunted. It is a balance that allows hunters to occasionally succeed while animals generally avoid being taken."[186] One club's interpretation of the rules of fair chase mandates rules for individual hunters to follow: a hunter should not take an animal when it is trapped in snow or ice, when hunting from a vehicle or use of vehicle to herd animals, or when using electronic devices to lure game.[187] The structure of a private game reserve does not violate any of these mandates. As long as the property is sufficiently large enough to allow the animal to flee or has sufficient vegetation, private game reserves respect the fair chase theory. In regard to the individual mandates, it is the responsibility of the specific operator to make sure his or her patrons follow the fair chase ethical standards. Thus, the nature of private game reserves preserves the fair chase principle.

184. *See, e.g.*, *Private Land,* SOUTH DAKOTA GAME, FISH & PARKS, http://gfp.sd.gov/hunting/areas/private-land.aspx (last visited Feb. 7, 2015). *But see* Norris et al., *supra* note 1 (claiming that hunting on private game reserves does not require a hunting license).

185. For a personal account by a private game reserve operator, see *Pro-Hunting: It's Ethical When Done Right*, 60 MINUTES: SEGMENT EXTRA (Jan. 30, 2012), http://www.cbsnews.com/news/can-hunting-endangered-animals-save-the-species/.

186. WILD GAMES: HUNTING AND FISHING TRADITIONS IN NORTH AMERICA 132 (Dennis Cutchins & Eric A. Eliason eds., 2009) (quoting JIM POSEWITZ, BEYOND FAIR CHASE: THE ETHIC AND TRADITION OF HUNTING 57 (1994)); see *Fair Chase Statement*, *supra* note 69; *Rules of Fair Chase*, POPE & YOUNG CLUB, http://pope-young.org/fairchase/default.asp (last visited Feb. 7, 2015) [hereinafter *Fair Chase*].

187. *Fair Chase*, *supra* note 186. The club also stipulates that a hunter should not take an animal inside "escape-proof fenced enclosures." *Id.* It seems that this rule alludes to canned hunting practices, rather than private game reserves that have much more open land for the animal to use.

4. Private Game Reserves Offer Opportunities to Conserve Wildlife and Restore Endangered and Rare Species

Another principle of hunting is that it promotes the conservation of wildlife—if a hunter kills too many animals and they are not able to reproduce, the hunter will not be able to hunt anymore, thus ruining any opportunity to hunt in the future. Private game reserves prevent the "tragedy of the commons" problem discussed in Part II by internalizing the over-exploitation costs found in communal ownership systems. Even under the quasi-private property model, the landowners would still be able to exclude other individuals from entering their land and taking the wildlife. Additionally, significant funding from hunting expenditures promotes conservation programs.[188]

Private game reserves also offer another benefit: restoring endangered species populations through privatization of the species. Though this concept does not receive as much attention as other programs, such as the Endangered Species Act, privatization of endangered species has been successful in the past.[189] The notion that one must hunt the species in order to save the species, indeed, is an odd proposition at its first impression. The two leading causes of extinction, indubitably, are destruction of wildlife habitat and over-exploitation.[190] This Subsection compares the Endangered Species Act to the private game reserves approach and provides examples of successful privatization case studies.

Congress passed the Endangered Species Act in 1973 in response to a growing concern that plants and animals were becoming extinct at an increasing rate. The Endangered Species Act was enacted for three purposes: to conserve endangered species, to create conservation programs for these species, and to allow further action to restore these species.[191] The Act created a register of animal and plant species to be protected under the act, prohibited "takings" of any endangered species, granted federal agencies authority to carry out recovery plans, and acquired land to carry out the recovery programs.[192] When the Secretary of Interior determines that a species should be listed as endangered, the Secretary designates the species' habitat as a "critical habitat" and develops a plan for the survival of the species.[193]

It is debatable whether the Endangered Species Act is effective at restoring these populations. Since its inception in 1973, twenty-six species

188. SOUTHWICK ASSOCIATES, *supra* note 168, at 6.

189. *See Media Guide: 40 Years of the Endangered Species Act—Facts, Stats, Stories and Photos,* CTR. FOR BIOLOGICAL DIVERSITY (May 31, 2013), http://www.biologicaldiversity.org/news/press_releases/2013/endangered-species-act-05-31-2013.html.

190. Darren K. Cottriel, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L. J. 1235, 1273 (1996).

191. 16 U.S.C. § 1531(b) (2012).

192. 16 U.S.C. §§ 1531–44; *Endangered Species Act: A History of the Endangered Species Act of 1973*, U.S. FISH & WILDLIFE SERV.: ENDANGERED SPECIES (last updated July 15, 2013), http://www.fws.gov/endangered/laws-policies/esa-history.html.

193. 16 U.S.C. § 1533(b), (f).

have recovered to be delisted under the Endangered Species Act.[194] While the numbers vary, roughly 1400 to 2105 species have been protected under the Act, providing a delisting success rate of 1.2 percent to 1.8 percent.[195] Considering the fact that the federal and local governments spent over $1.7 billion under the Endangered Species Act in 2012,[196] the Act should be heavily scrutinized when comparing its success rate to annual expenditures.

Critics of private game reserves may believe that these reserves cannot legally restore endangered species under the Endangered Species Act, however, the regulations for the Endangered Species Act in the past allowed exemptions to private game reserves for certain species.[197] On the date when the FWS listed the scimitar-horned oryx, addax, and dama gazelle under the Endangered Species Act, the agency created an exemption for captive breeding to continue since it was imperative to "provide[] an incentive to continue captive breeding of these species."[198]

Under FWS' regulations, a person could "take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce live wildlife, including embryos and gametes, and sport-hunted trophies of [listed species]."[199] The exemption allowed private game reserves to breed and hunt the scimitar-horned oryx, addax, and dama gazelle.[200] The FWS allowed the exception for private game reserves because it acknowledged sport hunting was a way to improve species' populations.[201] The exemption illustrated the federal government's recognition of the benefits that private management of endangered species can create.

Opponents to 50 C.F.R. § 17.21(h) argued that this exemption would continue to support illegal animal trafficking.[202] When looking at

194. John R. Platt, *The 5 Biggest Myths about the Endangered Species Act*, SCIENTIFIC AM. (Sept. 18, 2013), http://blogs.scientificamerican.com/extinction-countdown/2013/09/18/endangered-species-act-myths/. Proponents of the Endangered Species Act would attest that the Act has had a ninety-nine percent success rate in preventing the 1400 plants and animals from extinction, and in a study of over one hundred protected species, ninety percent of the species met or exceeded federal recovery guidelines. *Media Guide: 40 Years of the Endangered Species Act—Facts, Stats, Stories and Photos*, *supra* note 185.

195. Louis Jacobson, *Only 1 Percent of Endangered Species List have been taken Off List, says Cynthia Lummis*, TAMPA BAY TIMES POLITIFACT.COM (Sept. 3, 2013, 4:38 PM), http://www.politifact.com/truth-o-meter/statements/2013/sep/03/cynthia-lummis/endangered-species-act-percent-taken-off-list/ (last visited Feb. 7, 2015); Platt, *supra* note 190.

196. John R. Platt, *How Much Did the U.S. Spend on the Endangered Species Act in 2012?*, SCIENTIFIC AM. (Nov. 1, 2013), http://blogs.scientificamerican.com/extinction-countdown/2013/11/01/endangered-species-act-2012.

197. Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions, 70 Fed. Reg. 52, 310, 52, 317 (Sept. 2, 2005) (to be codified at 50 C.F.R. pt. 17).

198. Safari Club Int'l v. Jewell, 960 F. Supp. 2d 17, 37 (D.D.C. 2013) (citation omitted).

199. 50 C.F.R. § 17.21(h) (2006).

200. *Id.*

201. *Id.* § 17.21(h)(1).

202. *See* Joann Kinsey, *Critical Analysis: Does the Use of a Captive-Bred Endangered Species Promote Its Propagation and Survival?*, DENV. J. INT'L L. & POL'Y, Nov. 6, 2013, http://djilp.org/4615/

the language of §17.21(h), it is evident that the Fish and Wildlife Service took precaution to prevent this exception from encouraging illegal animal trafficking and laundering.[203]

In *Friends of Animals v. Salazar*, the federal district court held that the § 17.22(h) blanket exemption violated the plain language of the Endangered Species Act.[204] Friends of Animals, an animal rights groups, sued FWS alleging that the exemptions under the Endangered Species Act allowing game hunting of the scimitar-horned oryx, addax, and dama gazelle should only be allowed on a case-by-case basis.[205] The court applied the *Chevron* doctrine and held that the Endangered Species Act required a case-by-case analysis of exceptions under § 1539 of the Act.[206]

Though *Friends of Animals* is one of the first cases in a federal court examining the rights of private game reserves under the Endangered Species Act, the court avoided the broader issue of the legality of these private game reserves. The court based its ruling on the fact that § 17.21(h) lacked a "meaningful opportunity" for comments from the public that was required under § 1539(a)(2)(B).[207] The court accepted the animal rights group's concerns that under a blanket exception, it would be difficult to determine whether private game reserves were "enhanc[ing] the propagation or survival of the species."[208] The court, however, never addressed whether a private game reserve could operate legally under the Endangered Species Act in managing endangered species.

Applying *Friends of Animals*, it seems that a private game reserve could operate under the accepted exceptions (either § 17.21(g) or § 17.22) of the Endangered Species Act. Although the decision by the *Friends of Animals* court led to the redaction of § 17.21(h) in the 2013 Code of Federal Regulations, the court never explicitly disapproved of the exception to allow hunting of endangered species on private game reserves. The *Friends of Animals* court even acknowledged that the captive breeding significantly contributed to the "'conservation of these species.'"[209] FWS stated in its final rule that private game reserves could still

critical-analysis-does-the-commercialization-of-a-captive-bred-endangered-species-promote-its-prop-agation-and-survival/.

203. *See* § 17.21(h)(6)–(8) ("The sport-hunted trophy consists of raw or tanned parts, such as bones, hair, head, hide, hooves, horns, meat, skull, rug, taxidermied head, shoulder, or full body mount, of a specimen that was taken by the hunter during a sport hunt for personal use. It does not include articles made from a trophy, such as worked, manufactured, or handicraft items for use as clothing, curios, ornamentation, jewelry, or other utilitarian items for commercial purposes.").

204. Friends of Animals v. Salazar, 626 F. Supp. 2d 102, 115 (D.D.C. 2009).

205. *Id.*

206. *Id.* at 119.

207. *Id.* at 118–19; *see also* Gerber v. Norton, 294 F.3d 173, 179 (D.C. Cir. 2002) (noting the "opportunity for public comment" under §1539(a)(2)(B) "must be a meaningful opportunity").

208. *Friends of Animals*, 626 F. Supp. 2d. at 118–19.

209. *Id.* at 107 (citation omitted). *But see* Removal of the Regulation that Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions, 77 Fed. Reg. 431, 432 (Jan. 5, 2012) (to be codified as 50 C.F.R. pt. 17) (denying that the court in *Friends of Animals* concluded that the private game reserves met the enhancement criteria under § 17.21(h)).

continue their operations by applying for a permit under § 17.21(g) or § 17.22.[210]

The same district court recently re-addressed the redaction of § 17.21(h) in *Safari Club International v. Jewell*.[211] The *Safari Club International* Court held that the Removal Rule issued by the U.S. Fish and Wildlife Agency was proper and was not arbitrary and capricious.[212] Over a sixty-six page opinion, the district court heavily examined the history behind § 17.21(h) and FWS' response to the ruling issued in *Friends of Animals v. Salazar*, though the district court again failed to determine the legality of private game reserves under the Endangered Species Act.

The decisions in *Friends of Animals* and *Safari Club International* are an unfortunate step back for the use of private game reserves as a tool to restore endangered species' populations. What makes the decisions even more difficult to accept is that the private game reserves were actually successful at improving the species' populations and were able to send some species back to African countries.[213] The federal government recognized that "providing opportunities for sport hunting of captive-bred wildlife may relieve pressure on wild populations by providing an alternative to legal and illegal hunting of animals in the wild."[214] According to a census conducted by the Exotic Wildlife Association, there were 11,032 scimitar-horned oryx on Exotic Wildlife Association member ranches.[215] In another study conducted by Dr. Elizabeth Mungall for the Exotic Wildlife Association, she determined that the oryx population privately held in Texas which began with thirty-two in 1979, had increased to 2145 by 1996.[216]

This Note does not suggest that the United States should abandon the ESA based on one successful privatization of an endangered species, but courts and legislators should note how useful a tool like private game reserves can be when trying to implement endangered wildlife policy in light of this overwhelming success. While the regulations theoretically allow private game reserve owners to apply for an exemption to the rule change,[217] it is uncertain how effective private game reserves will be in

210. Removal of the Regulation that Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions, 77 Fed. Reg. at 432.

211. 960 F. Supp. 2d 17 (D.D.C. 2013).

212. *Id.* at 76.

213. *Sending the Oryx Back to Africa,* 60 MINUTES: SEGMENT EXTRAS (Jan. 30, 2012), http://www.cbsnews.com/news/can-hunting-endangered-animals-save-the-species/; *see also* Westhead, *supra* note 107.

214. Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions, 70 Fed. Reg. 52310, 52312 (Sept. 2, 2005) (to be codified at 50 C.F.R. pt. 17).

215. Letter from Exotic Wildlife Association Federal Register Public Comments Processing (Aug. 2, 2011) *available at* http://myewa.org/Original_Backup/www/forms/Public%20Comment%20Letter.pdf.

216. *Safari Club International*, 960 F. Supp. 2d at 33.

217. Removal of the Regulation that Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibition, 77 Fed. Reg. at 432.

the future in attempting to restore endangered species in light of the ESA.[218]

Private game reserves in African countries have been successful in restoring endangered species, such as the black and white rhinos. The black and white rhinos were listed under Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1977, due to significant market hunting.[219] The Southern white rhino greatly benefited from the CITES listing, increasing its numbers from around thirty in 1900 to 11,000 in 2005.[220] While the white rhino was also listed under Appendix I, it was already recovering prior to the listing, so its increase in population was less substantial than its fellow black rhino.[221] Two reasons, however, helped improve the white rhino's population: first, white rhinos were moved to private lands, and second, trophy hunting was allowed.[222] The white rhino population increased from 840 in 1960 to 6770 in 1994.[223]

Beyond the economic benefits gained by the private game reserves and the increase in the species population, rhino trophy hunting also eliminated "surplus" male rhinos that would damage the herds through competition for resources.[224] As the white rhino's value increased from these private game reserve operations, local government was more incentivized to enforce illegal trade of rhino products.[225] The increase in the white rhino's value also increased the incentive for private game reserve owners to conserve these animals.[226] Despite the program's success for both black and white rhinos, countries did not actively begin to encourage private game reserves until the 1990s.[227] These programs, however,

218. The ESA even has international critics. Tanzania's highest ranking wildlife official encouraged the United States to not list the African lion as an endangered species since Tanzania has an extensive game management program that helps conserve the animals through hunting revenues. Alexander N. Songorwa, Op-Ed., *Saving Lions by Killing Them*, N.Y. TIMES, Mar. 17, 2013, http://www.nytimes.com/2013/03/18/opinion/saving-lions-by-killing-them.html?_r=0.

219. N. Leader-Williams et al., *Trophy Hunting of Black Rhino* Diceros Bicornis: *Proposals to Ensure Its Future Sustainability*, 8 J. INT'L WILDLIFE L. & POL'Y 1, 3 (2005).

220. *Id.*

221. *Id.* at 3–4.

222. *Id.*

223. Keryn Adcock & Richard Emslie, *The Role of Trophy Hunting in White Rhino Conservation, with Special Reference to BOP Parks, in* PROCEEDINGS OF A SYMPOSIUM ON RHINOS AS GAME RANCH ANIMALS 36 (B.L. Penzhorn & N.P.J. Kriek eds., 1994), *available at* http://www.rhinoresourcecenter.com/pdf_files/127/1275003311.pdf.

224. *Id.* at 37.

225. *Id.*

226. *Id.* at 38.

227. Leader-Williams et al., *supra* note 219, at 5. The private game reserves had initial complications. *See* Adcock & Emslie, *supra* note 223, at 38 (detailing the negative attributes of problems with private game reserves where owners managed rhino populations without expert advice); *see also* Clive H. Walker, *Black Rhino on Private Land—The Experience of Lapalala Wilderness, South Africa*, *in* PROCEEDINGS OF A SYMPOSIUM ON RHINOS AS GAME RANCH ANIMALS 108 (B.L. Penzhorn & N.P.J. Kriek eds., 1994), *available at* http://www.rhinoresourcecenter.com/pdf_files/127/1275003442.pdf (depicting initial setbacks of an inexperienced game ranch who lost a female black rhinoceros).

became even more valuable as governments had to cut back on their budgets for conservation practices.[228]

The purpose of this Section is not to determine whether the Endangered Species Act or CITES is effective, but rather that private game reserves are valid, alternative ways to conserve wildlife, even endangered wildlife, that have yet to be utilized in this country. Even in the privatization of the black and white rhinos in Africa, there was considerable public backlash, yet scholars recognized that countries must exercise multiple approaches in conservation.[229]

There are a few ethical concerns in using private game reserves as programs to restore endangered species. The valid concern regarding the use of private game reserves is that it puts a price on the animal and makes it a commodity. Critics believe that an endangered species should not be so callously commoditized and animals have an intangible value no market should ever try to quantify.[230] While it is true that animals may have incalculable value, mankind historically has attempted to define and claim property rights in wildlife,[231] mainly to be able to consume the animal.[232] Although it may seem perverse to place a value on an endangered species, the use of private game reserves better internalizes the costs and benefits to kill that animal, capturing relatively more of the animal's value than in other property ownership systems.[233] Therefore, while it may seem odd that private game reserves place a value on endangered species, it is not out of place with the American pursuit to create property rights, and it more precisely captures the value of the animal.

With increasing public pressure on federal expenditures, private game reserves can help ease the constraints on FWS and state agencies to conserve wildlife. FWS and state agencies would be able to more efficiently allocate their resources to monitoring, assisting, and educating private game reserves to implement effective conservation practices. By allowing the federal and state agencies to act as more of an oversight to private game reserves, while still retaining a property interest in the wildlife, the agencies would be able to help coordinate larger policies that individual private game owners may not have had incentives otherwise to implement.

228. Adcock & Emslie, *supra* note 223, at 39.

229. J.G. du Toit, *White and Black Rhinoceros as Game Ranch Animals*, *in* PROCEEDINGS OF A SYMPOSIUM ON RHINOS AS GAME RANCH ANIMALS 115–16 (B.L. Penzhorn & N.P.J. Kriek eds., 1994), *available at* http://www.rhinoresourcecenter.com/pdf_files/127/1275003932.pdf.

230. *See supra* note 186.

231. *See supra* Part II.B.1.

232. The word "consume" is meant beyond edible consumption and includes consumption of the animal's products.

233. *See supra* Part II.A.

C. How Should Illinois Treat Private Game Reserves?

Realizing the impacts private game reserves can have on conserving wildlife and promoting the sport of hunting, Illinois should be cautious when drafting legislation prohibiting canned hunting practices so that it does not discourage any future private game reserve development. Illinois currently does not have a statute banning canned hunting or private game reserves, but Representative Kelly Burke's proposed new legislation in 2013 would have severely impacted any development of private game reserves in Illinois if it had survived committee.[234] This Section analyzes whether the approaches taken in Texas, Montana, or several African countries to canned hunting and private game reserves would be helpful in drafting Illinois legislation.

If Illinois encouraged private game reserves in future legislation, Texas would be a useful jurisdiction to analyze since it has the most private game reserves in any state, but it should not be the model Illinois adopts.[235] While Texas does provide favorable legislation towards private game reserves and some ranches in Texas breed and maintain endangered species that are "virtually extinct in [their] native Africa,"[236] it fails to address valid concerns regarding canned hunting facilities which do not further the ethical treatment of animals and hunting principles. Texas' approach, while not violating the principles of fair chase, does not adequately enforce them either. Texas' laws also do not encourage larger scale conservation practices. If the lands become more segmented through privatization, it may be difficult for landowners to try to implement macro-scale conservation policies due to collective bargaining problems—an increase in the number of private owners decreases the probability a bargain will be made. Practically, Texas' climate is also different compared to Illinois, thus its model may not be conducive to Illinois. If landowners in Illinois wanted to develop private game reserves for nonnative species, these reserves probably will have to be located in the southern portion of the state, which has a more moderate climate. Therefore, Texas is not the best model for Illinois to use when drafting future private game reserve policies even though it endorses private game reserve development.

When analyzing Montana as an alternative source for drafting legislation, it is apparent that Illinois should not use Montana as a model either. Montana declared an outright ban against any form of private game reserves in 2000.[237] While Montana's limitations on private game reserves may protect the fair chase theory, it does not contemplate that when op-

234. H.B. 3118, 98th Gen. Assemb., Reg. Sess. (Ill. 2013); *Bill Status of HB3118*, ILL. GEN. ASSEMBLY, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3118&GAID=12&DocTypeID=HB&LegId=74973&SessionID=85 (last visited Feb. 24, 2015).

235. Graves et al., *supra* note 117, at 368.

236. Westhead, *supra* note 107.

237. MONT. CODE ANN. § 87-4-414 (2014); Spoklie v. Mont. Dept. of Fish, Wildlife & Parks, 56 P.3d 349, 351 (Mont. 2002).

erated correctly, private game reserves can promote hunting policies and conservation practices. One benefit to Montana's blanket ban, however, is that it easier to administer hunting regulations since, if wildlife would be considered quasi-private property, the wildlife agency would have to monitor these properties to make sure they comply with state law. While Montana may have good reasons for banning all forms of private game reserves, Montana's ban should not be a model used for Illinois legislation.

Several concepts from different African countries could be very beneficial for Illinois to use when drafting legislation for private game reserves. For instance, some African countries require certain minimum acreage requirements for properties that are used for private game reserves.[238] This requirement prevents the main form of canned hunting by requiring the animals to be on property that, although is technically enclosed, does not realistically restrict the animals' ability to move and escape capture. Additionally, Namibia encourages private landowners to set up conservancies, which allows landowners to negotiate and implement larger scale conservation policies if needed.[239] While South Africa does not follow its previous release period regulation anymore, this regulation further protected the fair chase theory since it provided the animal time to re-adapt to its surroundings and to become wary of humans before it was hunted.[240] While each country vastly differs from each other, and there are apparent physical differences between Illinois and these African countries, Illinois could adopt these types of provisions that allow private game reserves to be effective.

D. Illinois' Proposed Bill

Illinois' most recent proposed canned hunting statute, while aiming to deter cruel practices committed by canned hunting facilities, failed to differentiate and further the goals of private game reserves. First, the bill prohibited any person from confining or releasing a native animal from confinement "for the purposes of taking."[241] This language could have foreclosed any possibility for Illinois landowners to operate private game reserves. This ban against all private game reserves would have prevented Illinois landowners from being able to use their land to further the sport of hunting, conserve wildlife, and potentially help recover endangered species.

The bill also failed to differentiate between canned hunting practices and private game preserves. The bill banned the taking of an animal in an enclosure, "regardless of the enclosure's size."[242] While it is clear that the bill aimed to prevent hunting animals in small enclosures that pro-

238. *See supra* Part II.C.
239. *See supra* note 89, at 39, 52.
240. Nullis, *supra* note 103.
241. H.B 3118, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).
242. *Id.*

vided the animal with no real opportunity to escape, the bill was too broad. If the bill was interpreted literally, a plot that was 1000 acres, but fenced in, could still be applicable under this statute, regardless of whether the owner provided its wildlife population with a natural environment and did not interact with the population. Private game reserves provide excellent alternatives to traditional conservation practices and promote hunting. Therefore, any future Illinois legislation should not comingle private game reserves with canned hunting practices which destroy the sport of hunting as well as conservation.

IV. RESOLUTION

Since Illinois' previously proposed bill failed to accurately protect private game reserves and the benefits they can provide to the state, the Illinois legislature should consider proposing a new bill, different from the 2013 version. The Illinois legislature, should: (1) differentiate between canned hunting and private game reserves, thus banning canned hunting while allowing private game reserves to operate, and (2) recognize wildlife on private game reserves as quasi-private property.

When private game reserves are operated properly, they can provide society an extensive amount of benefits. For a private game reserve to be deemed not a canned hunting facility under the amended bill, the reserve should be: (1) large enough to be comparable in size to the wildlife's natural range, (2) maintain wildlife populations with minimum human contact, and (3) not lure the wildlife to areas or take any action that deprives the animal of a realistic chance to escape.

By allowing minimum acreage requirements for private game reserves, this requirement preserves the theory of fair chase and the sport of hunting. Since operators will likely have to enclose their property due to liability concerns and the risk of escaping animals, it is reasonable to believe they enclose the borders of the property in some manner. If private game reserve owners have property that is large enough to mimic an animal's roaming territory and would not impede an animal's escape from the chase of a hunt, the new bill would find that this type of operation is different from canned hunting and furthers the policies of hunting even though it is technically "enclosed."

If a private game reserve operator maintains the wildlife populations with little human contact, that operation should be allowed in Illinois. Many concerns regarding canned hunting is that the animals become used to humans and do not fear human interaction,[243] obviously frustrating the goals behind the fair chase theory. Owners of game reserves would have to maintain their game populations as if they were wild (with minimal human contact) to preserve the animal's natural instincts. If the owners were trying to restore an endangered species where

243. Ireland, *supra* note 9, at 226.

the owners had to breed the animals, as long as the operators continued to prevent any animals becoming acquainted with humans, these practices would still support the goals of hunting and differentiate its practice from canned hunting.

Lastly, if a private game reserve promoted traditional methods of stalking and chasing during the hunt, it should be able to operate in Illinois. The operators could not use a food plot or other tactics to lure the animals into a situation where the animal could not escape. By observing accepted hunting practices, private game reserves would be distinct from canned hunting.

Once a private game reserve could prove that it was not a canned hunting operation, the bill would allow these private game reserves to operate. Opponents may contest that once these private game reserves are allowed to operate, the reserves will only focus on making a profit and not implement valuable conservation efforts. Although privatization of the wildlife incentivizes the owner to practice conservation to make a profit, the wildlife's quasi-private property status would also allow the state to oversee the conservation programs. With the quasi-private property status, the state would be able to issue larger-scale conservation programs. Allowing this government oversight would help overcome any collective bargaining issues the private game reserves may face individually. More importantly, reserving an interest in wildlife for the citizens of Illinois preserves the idea that natural resources are for the public.

V. CONCLUSION

Private game reserves, when executed properly, offer many benefits to the public. They promote the principles of hunting and the theory of fair chase, conserve wildlife, and provide an alternative solution to protecting and restoring endangered species. While the status of wildlife is difficult to specifically define, it is important to remember that wildlife is for all people to enjoy. Opponents may contend that animals should be preserved and not be raised and killed to simply turn a profit. Turning a profit, though, is sometimes the only way to compel people to respect and value underappreciated assets. Maybe years from now private game reserves will be unnecessary, and wildlife will be protected without needing a price tag. For now, the price tag ensures the survival of wildlife. Although private game reserves may not be a perfect way to conserve wildlife, it is a step in the right direction.