

**LOOKING BEYOND THE BANG FOR MORE
BUCKS: A LEGISLATIVE GIFT TO FUND
WILDLIFE CONSERVATION ON ITS 75TH
ANNIVERSARY**

KATIE SPIDALIERI*

I.	INTRODUCTION	770
II.	FROM PRIVATE RIGHTS TO THE PUBLIC TRUST: THE TRAJECTORY OF WILDLIFE CONSERVATION IN EARLY AMERICA	772
	A. <i>Royal Developments in Medieval England: Private Rights and the Evolution Towards Sovereign Rule</i>	772
	B. <i>Defining the Legal Relationship Between Hunters, Wildlife, and the Public Trust in America</i>	773
	C. <i>The Federal Aid in Wildlife Restoration Act (Pittman- Robertson Act)</i>	775
III.	AN ASSESSMENT OF THE PITTMAN-ROBERTSON ACT AND THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION ON THEIR 75 TH ANNIVERSARY	779
	A. <i>The Success of the Act and the North American Model of Wildlife Conservation</i>	779
	B. <i>A Fall from Grace</i>	781
	1. Recent Trends in Hunter Participation and Equipment Sales	781
	2. Problems Associated with Staying the Course	784
	3. The Incompatibility of the “Iron Triangle” and the Public Trust Doctrine.....	786
IV.	A PROPOSAL FOR WILDLIFE CONSERVATION REFORM	788
	A. <i>The Benefits of Adopting Holistic Updates to the Act and the Model</i>	788

* J.D. expected May 2013, Cleveland State University, Cleveland-Marshall College of Law; B.A. History, B.A. Environmental Thought and Practice, 2009, University of Virginia. First of all, I am thankful for Professor Kelly K. Curtis and her frighteningly accurate sixth sense of editing. Her ability to effectively reach a diverse body of student writers on an individual plain is a rare educational skill. Second, it is important to convey the gratitude I have for my parents, Benjamin and Cathleen Spidalieri, and their attention to my educational and artistic pursuits. Lastly, I cannot help but remember the day Mrs. Nanci Bush instilled a sense of written confidence in a shy teenager. I may have never shared a written word without her considerate and constructive comments and for the ability to express myself and grow as a person, I will forever be grateful.

B. Legislation and Regulations with a “Primary Objective”	791
C. Imposition of a New Excise Tax on the Outdoor Industry.....	794
1. An Excise Tax with Precedent	794
2. The Return on Investment (ROI).....	795
V. CONCLUSION	796

I. INTRODUCTION

The North American Model of Wildlife Conservation started with a bang. Certainly this bang was not of the cosmic variety, although it did spark the creation of a movement. And even if the gunshots that produced this bang failed to be used like those in the pursuit of independence, both shots were ultimately heard ‘round the world.

Somewhere in between the universal big bang catalyst and the first ear-catching battle at Lexington and Concord, the artillery of hunters¹ in the United States produced one collective bang that targeted a sustainable approach to wildlife conservation. At the beginning of the twentieth century, the American landscape, once plentiful with open land, rich resources, and the promise of Manifest Destiny, displayed unequivocal signs of wear and tear.² Caught in the whirlwind of the Second Industrial Revolution, an ever-expanding civilization had to confront the reality that its young nation was not immune from overexploitation.

Evidence of this reality was no more apparent than in the decimated numbers of wildlife encountered by America’s sportsmen.³ Whether on the Western prairies or in the Eastern forests, furry, feathered, and scaly targets alike were the objects of hunting desires. Throughout the colonization and early development of America, the abundance of species encouraged an uninhibited approach to hunting. Therefore, hunters had no qualms about bagging a limitless number of trophies until species populations shrank immensely. Smaller populations were harder to track and the perpetuation of the sport was threatened by the destitute state of wildlife.

¹ For the purposes herein, a distinction is drawn between “hunters and sportsmen” and “outdoorsmen and wildlife watchers.” Hunters and sportsmen collectively refer to all persons that pursue the chase and capture of game species with firearms, handguns, or bows and arrows. Conversely, outdoorsmen and wildlife watchers encompass those persons participating in outdoor recreation that is affiliated with the observation of or interaction with all wildlife. See *infra* Part III.B.2. and Part IV. for further clarification.

However, all of the aforementioned actors are alike in one respect. Specifically, the terms referenced throughout this Note, including but not limited to hunters, sportsmen, and outdoorsmen, are written with a gender-neutral intent to cover both the men and women engaged in hunting and outdoor activities.

² See generally MARK DAMIEN DUDA, MARTIN F. JONES & ANDREA CRISCIONE, *THE SPORTSMAN’S VOICE: HUNTING AND FISHING IN AMERICA* 1-4 (2010).

³ See generally *id.*

As wildlife species faced extinction, so did the art of hunting. Hunters were thus propelled to lobby for the regulation of wildlife in the nation.⁴ The efforts of sportsmen coalitions, joined by other wildlife conservationists and preservationists, culminated in the passage of the Federal Aid in Wildlife Restoration Act (Pittman-Robertson Act) in 1937.⁵ The Act directed the revenue collected from a 10-11% excise tax on hunting arms and ammunitions towards wildlife conservation on public lands. The tax was to be managed by the federal government and then distributed to states based on a prescribed formula. In turn, states were mandated to allocate their portion of the excise tax for the sustainable management of wildlife for future generations.

In essence, the federal and state governments were called upon to conserve wildlife not on behalf of the species themselves, but on behalf of the American citizenry. Wildlife was held in the public trust whereby the government acted as a trustee protecting the resource from private abuses.⁶

The concept of hunter-supported wildlife conservation behind the Pittman-Robertson Act has been termed the North American Model of Wildlife Conservation.⁷ Since 1937, the Pittman-Robertson Act and this unique Model have been recognized as “the oldest and most successful wildlife management program in the nation’s history.”⁸ Today, many species suffering in the early twentieth century have rebounded to achieve healthy population levels. The Model has been overwhelmingly placed on an untouchable pedestal where America seems content to keep pace with its hunter status quo.⁹

Nevertheless, all that bangs is not a sweet symphony. Scarce funding and the disproportionate force of hunters in the nation’s Capitol have drawn criticism from disparate conservationists.¹⁰ With the advent of the Endangered Species Act and the rise of animal rights advocates, many feel that wildlife should be valued not only in death, but also in life. To compound these dreary truths is the fact that the hunting tax base has decreased in the twenty-first century, thereby depleting an already insufficient funding source.¹¹

To counteract the erosion of the Model, the federal government has turned to the sportsmen of America to solve the problem. Concerted efforts have been made to

⁴ See *id.* at 8-10; see also *infra* Part II.B.

⁵ Federal Aid in Wildlife Restoration Act (Pittman-Robertson Act), 16 U.S.C.S. § 669 et seq. (LexisNexis 2011); see also *infra* Part III.B-C.

⁶ DUDA, JONES & CRISCIONE, *supra* note 2, at 12.

⁷ *Id.* at 11-12; see also *infra* Part III.A.

⁸ U.S. FISH & WILDLIFE SERV., WILDLIFE AND SPORT FISH RESTORATION PROGRAM (June 2011) (educational pamphlet); see also *infra* Part III.A.

⁹ Daniel J. Decker, *Critiquing the North American Model: Debate and Open Minds Keep the Model Dynamic*, WILDLIFE PROF., Summer 2011, at 57 (“Pride in our profession’s accomplishments as described in narratives about the Model is important, but unfortunately, many people feel that the Model is sacrosanct and should not be tampered with. To some, disagreeing with tenets of the Model or even critiquing it has been regarded as akin to blasphemy.”).

¹⁰ See *infra* Part III.B.2.

¹¹ See *infra* Part III.B.1-2.

enhance the recruitment of new hunters and grant hunters more access to public and private lands.¹²

While the government's actions were not poor in judgment, they have indeed been limited in scope. This Note will argue that the government's historical preoccupation with hunting overlooks the potential to extend the Model's reach to the great outdoor industry prevalent in America. Specifically, the Model can be resuscitated if additional categories of outdoorsmen, like campers, hikers, and birdwatchers, are included as financial stakeholders in wildlife conservation. To broaden the conservation tax base, this Note proposes that the government should impose an excise tax on outdoor products that emulates the Pittman-Robertson Act. Endowed with a monetary voice, outdoorsmen will be incorporated into the public trust and their conservation goals can complement the Model's prevailing hunting agenda. Furthermore, such a tax will not only supplement funding for the conservation of game species, but also provide fiscal support for often overlooked non-game species.

Part II of this Note sets forth a history of the public trust doctrine and the early legal standing of wildlife in England and then America. The narration illustrated in Part II culminates with a description of the excise tax collected under the Pittman-Robertson Act. Next, Part III begins with the Act's evolution towards becoming the Model. By exploring the link between the Act and the Model, Part III ultimately examines the interaction between hunters and the present state of wildlife conservation. Lastly, Part IV will explore the benefits of a new excise tax, one levied on the manufacturers and importers of outdoor products, for both the public trust and wildlife at large.

The Model's expansion is not intended to displace the successful work of hunters in the past, but to advocate for a more holistic approach to wildlife conservation in the present. If the Act and the Model can be modernized and thus improved, there is hope that neither will be anywhere near an end, whether that ending comes complete with a bang or not.

II. FROM PRIVATE RIGHTS TO THE PUBLIC TRUST: THE TRAJECTORY OF WILDLIFE CONSERVATION IN EARLY AMERICA

A. *Royal Developments in Medieval England: Private Rights and the Evolution Towards Sovereign Rule*

Before that infamous collective bang was heard on American soil, there was England. Those that braved the New World inherited concepts about the legal status of wildlife from their Mother Country. In medieval England, the monarchy held title to all lands and wildlife game species contained within said lands.¹³ Hence, the dissemination of land ownership and hunting rights were at the Crown's pleasure. Technically the monarchy was free to keep all land for its private enjoyment and prohibit its subjects from hunting designated "royal" species.¹⁴ However, with too much land for one person to roam and too many creatures available for capture, kings and queens granted land and hunting rights to "favored persons," valuable for their services and political allegiance, at the expense of the "unfavorable," lower

¹² See *infra* Part III.B.1.

¹³ ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 22 (2009).

¹⁴ *Id.*

class masses.¹⁵ Often, a monarch would vest the ownership to a piece of land and the hunting rights associated with that land in a single individual; however, this practice of land ownership and hunting exclusivity was by no means the only norm.¹⁶ Frequently a king or queen would grant hunting rights to someone other than a landowner.¹⁷ While landowners did not regard this as a pleasant practice, the monarchy was legally endowed with the authority to do away with lands and hunting rights as it pleased.¹⁸

As time advanced and Parliament's supremacy grew over England, the Crown's land and wildlife decisions became tempered by public opinion. Specifically, English courts determined that the two powers were sovereign and, thus, governmental in nature.¹⁹ At least theoretically, this sovereign designation meant that the monarchy's ability to devolve lands and hunting rights was done on behalf of the people and not solely in a king or queen's proprietary or personal interest.²⁰ In essence, sovereign rule foreshadowed the nascent allure of a democratic tendency in lieu of a monarchial autocracy. Furthermore, Parliament, the legislative component of England's federal government, was entrusted with the duty of policing the monarchy and lessening its centralized authority.²¹

Ultimately, the medieval period left future colonists with two impressions regarding the legal status of wildlife. First, the English criticized the structure of hunting rights in which access to wildlife game species was solely in the hands of private individuals, whether they were landowners or not.²² Second, the classes exempt from private hunting entitlements were introduced to the idea that wildlife could be held by a government for *all* of its people.²³ Hence, sovereign rule had gained appeal amongst the masses.

With these two lessons in tow, English men, women, and children emigrated across an ocean to a place where the legal status of wildlife had yet to be defined. Although neither lesson found itself immediately transplanted in the rebellious colonies, each came to play a role as America transformed into a nation.

B. Defining the Legal Relationship Between Hunters, Wildlife, and the Public Trust in America

Upon arriving in America, the English immigrants were unaccustomed to the bountiful natural resources present and the lack of legal impediments that accompanied them. Somehow these immigrants had to meld a dislike of private use rights and a preference for sovereign rule with a new environment to construct a

¹⁵ *Id.* at 22-23.

¹⁶ *Id.* at 23.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *See id.* at 23-24.

²³ *See id.* at 23.

distinct American legal framework for wildlife.²⁴ However, it took until the 1930s for America to reflect upon the Mother Country's two parting lessons.

Early America was characterized by a turbulent period of wildlife takings.²⁵ Neither the federal nor the state government regulated hunting beyond the control of predator and nuisance species that threatened agriculture and livestock.²⁶ It was not until 1842 that the U.S. Supreme Court first examined the relationship of a government and its citizens with wildlife.²⁷ In *Martin v. Waddell*, the Court held that a public right to a natural resource, fish, was superior to the plaintiff's right to deplete the resource for his own private enjoyment.²⁸ *Martin* "set the stage for major developments in future fish and wildlife management policy in the United States, including the doctrine of state ownership, which asserts state ownership, and therefore legal authority, over fish and wildlife management."²⁹

Reminiscent of the Crown's sovereign power, the beginnings of the state ownership doctrine enunciated in *Martin* did not become institutionalized for nearly one-hundred years. In the midst of Westward Expansion, every state had some type of game law by 1880 and whispers of an end to market hunting floated in the air.³⁰ Despite such nationwide progress, governments were hesitant to forcefully interject themselves between bullets and animalian bloodshed. Overall, Americans were satisfied with their land freedoms. By the late nineteenth century, the size and abundance of species populations were still too grand to pull back the guns. At least temporarily, people were content to have the right to hunt wildlife remain in private hands. When the prospect of the hunt became available to the average New World man, Americans disregarded the Old World's lesson about sovereign rule and the need for public supervision and oversight. So long as the access to wildlife was not limited by a monarchy's preference for a favored few, Americans championed the private doctrine lower-class Englishmen once abhorred.

However, the private rights free-for-all could not be sustained indefinitely. Soon enough, America could no longer guarantee its infinite supply of land and wildlife. As the un-restricted abuses of private ownership accumulated, a rundown environment made the America of yesteryear seem like a distant utopia.

Between the 1890s and 1920s, the Progressive Era turned citizens' attention back to the benefits of England's sovereign rule and the Supreme Court's decision in *Martin*.³¹ With a visible decline in wildlife numbers by the 1890s and industrial excesses begging to be curbed, the Progressives pushed the formerly inactive federal and state governments for reform.³² One area targeted by the Progressives resulted

²⁴ See DUDA, JONES & CRISCIONE, *supra* note 2, at 1.

²⁵ See *id.* at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (citing *Martin v. Waddell*, 16 Pet. 367 (1842)).

²⁹ *Id.* at 2-3.

³⁰ *Id.* at 3-4.

³¹ See *id.* at 4.

³² See *id.*

in a populist movement recognized today as conservation.³³ “The natural resources that had been seen as [private] property to be exploited at the beginning of the nineteenth century were now viewed as resources that the government should manage for the greatest good for the greatest number of people over the longest period of time.”³⁴

By the early twentieth century, federal and state governments increased efforts to address concerns over the country’s dilapidated landscape.³⁵ Most significantly, states took bigger strides towards accepting their role as trustee over wildlife under the state ownership or public trust doctrine. Whereas wildlife is held in the public trust, this doctrine emphasizes that all states have a legal duty to guard against the deterioration of their species resources for private consumption.³⁶ Henceforth, private hunting rights could no longer manipulate species populations at the expense of government administration and the interests of society-at-large. Instead, hunters looked to science and, most importantly, themselves for answers to the nation’s inefficient treatment of wildlife.³⁷

In the new public trust organization, hunters led the conservation movement for two reasons. First, hunters had a special stake in wildlife conservation not shared by others. Although thwarting extinction was a national concern, hunters were worried about something above and beyond the inherent nature of species survival: the survival of their sport. Threatened species equated with a threatened sport; if hunters ignored America’s downward species spiral, the future of their sport could have been jeopardized. Second, hunters were the sector of society largely accountable for the rickety status of wildlife. As such, the nation’s predominant “users” of wildlife were charged with the duty to ameliorate their own missteps.

Accordingly, sportsmen relied on the bang producing instruments that caused the wildlife problem to solve it. Essentially, states required monetary support to effectively assert legal force behind the public trust doctrine. Therefore, hunters and, in turn, the federal government devised a banging legislative strategy to help fund states in their conservation quests. Consequently, as America reached its wildlife management apex in the 1930s, the Pittman-Robertson Act and the North American Model of Wildlife Conservation emerged.³⁸

C. *The Federal Aid in Wildlife Restoration Act (Pittman-Robertson Act)*

On September 2, 1937, Franklin Delano Roosevelt signed the Federal Aid in Wildlife Restoration Act (Pittman-Robertson Act) into law.³⁹ As a result, gone were

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 5, 7.

³⁶ See generally FREYFOGLE & GOBLE, *supra* note 13, at 21-35. See also S. REP. NO. 75-868, at 2 (1937) (“The people of the several States are the proprietors of the wildlife within their borders, and the State, under its police power, has jurisdiction over it.”).

³⁷ DUDA, JONES & CRISCIONE, *supra* note 2, at 6-8.

³⁸ *Id.* at 8-10.

³⁹ ANDREW LOFTUS CONSULTING & SOUTHWICK ASSOCS., INC., FINANCIAL RETURNS TO INDUSTRY FROM THE FEDERAL AID IN WILDLIFE RESTORATION PROGRAM 10 (Feb. 15, 2011), available at <http://www.southwickassociates.com/sites/default/files/reports/Wildlife%20>

the days of private, uncontrolled hunting. Harkened was a future where the government would hold those who disturbed wildlife resources liable for their replenishment. Appropriately, the tools of the hunting trade were taxed so that the users of wildlife resources would pay for species recovery.

The strategic engineers behind the Pittman-Robertson Act were Senators Key Pittman of Nevada and Congressman A. Willis Robertson of Virginia.⁴⁰ The purpose of the Act was to provide a stable source of funding for wildlife conservation financed by a 10% excise tax on firearms and ammunitions.⁴¹ Fortunately, the Act did not have to overcome the obstacles associated with the creation of a new tax. Coincidentally, America already imposed a 10% excise tax on the manufacturers and importers of firearms and ammunitions.⁴² The tax, along with all excise taxes, had been suspended in 1925 and reinstated in 1932 to timely coordinate with the Act.⁴³

Under the Act, the federal government annually dispenses excise tax dollars to each state.⁴⁴ States then spend their portion of the total excise tax fund on conservation projects that benefit America's ailing species. Originally, state projects were evaluated only for their ability to promote wildlife conservation through species and habitat restoration, land acquisitions, and scientific research and management.⁴⁵ However, amendments in 1969 and 1972 permitted the new expenditure of funds.⁴⁶ In 1969, Senator Hugh Scott of Pennsylvania and Congressman John Dingell of Michigan captured a pre-existing 10% excise tax on handguns and handgun ammunition.⁴⁷ Next, Senator Frank Moss of Utah and Congressman George Goodling of Pennsylvania incorporated archers under the

Restoration%20ROI%20report%20-%20Southwick%20Loftus%20-%202018-11.pdf (report financed by the Multistate Conservation Grant Program, a program supported with funds from the Sport Fish and Wildlife Restoration Program of the U.S. Fish and Wildlife Service and jointly managed with the Association of Fish and Wildlife Agencies).

⁴⁰ Even though the Pittman-Robertson Act was not passed until 1937, its beginnings trace back to at least 1919. It was in that year that John B. Burnham, president of the American Game Association wrote, "If the young men of the next generation are to enjoy from the country's wildlife anything like the benefits derived by present outdoor man, we must be the ones that shoulder the burden and see that our thoughtlessness or selfishness does not allow us to squander that which we hold in trust." The American Game Association unsuccessfully attempted to influence a law that would have used the revenues gained from a federal hunting stamp to pay for wildlife conservation. Subsequently, in 1925, the 10% excise tax scheme was first discussed. However before the plan could take-off, all excise taxes, including those on firearms and ammunitions, were repealed. *See id.* at 9-10.

⁴¹ DUDA, JONES & CRISCIONE, *supra* note 2, at 9; *see also infra* note 49 (regarding the list of items taxed under the Act).

⁴² ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*; *see also infra* note 51 (discussing the law that governs the type of state wildlife activities funded by the Act).

⁴⁶ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10.

⁴⁷ *Id.*; *see also infra* note 49 (regarding the list of items taxed under the Act).

Pittman-Robertson Act.⁴⁸ Specifically, a 1972 amendment levied a new 11% excise tax on archery equipment.⁴⁹

As a result of the two amendments, states may assign a specific percentage of their money for sportsmen education and safety programs.⁵⁰ The aforementioned allocations reflect Congress's intent to cultivate competent, ethical hunters across the country. Concurrently, the excise tax can also fund the construction and operation of outdoor and indoor shooting ranges; shooting ranges offer hunters controlled training facilities and opportunities.⁵¹

The Alcohol and Tobacco Tax and Trade Bureau (TTB) collects the tax on firearms, handguns, and ammunition.⁵² Similarly, the Internal Revenue Service (IRS) was designated the companion executive agency for archery equipment.⁵³ Tax revenue is then deposited in the Wildlife Restoration Account.⁵⁴ The Wildlife

⁴⁸ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10-11.

⁴⁹ *Id.* See U.S. FISH & WILDLIFE SERV., ITEMS TAXED TO SUPPORT WILDLIFE AND SPORT FISH RESTORATION IN AMERICA (Jan. 2011) (educational pamphlet) for a reader-friendly list of most firearms, ammunitions, handguns, handgun ammunitions, and archery items taxed by the Pittman-Robertson Act. However, the Internal Revenue Code (IRC) and Treasury and Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations should be consulted for a complete list of all products that are either taxed or have the potential to be taxed. See also I.R.C. § 4161(b) (LexisNexis 2011) (imposition of tax on bows and arrows) and Treas. Reg. § 48.4161(b)(1)-(2) (2011) (imposition and rates of tax; bows and arrows); I.R.C. § 4181 (LexisNexis 2011) (firearms) and 27 C.F.R. 53.1 et seq. (2011) (manufacturers excise taxes—firearms and ammunitions).

⁵⁰ See ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10 (summarizing 16 U.S.C.S. § 669h-1 (LexisNexis 2011) (firearm and bow hunter education and safety program grants)); see also *infra* note 51 (discussing the law that governs the type of state wildlife activities funded by the Act).

⁵¹ See ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10 (summarizing 16 U.S.C.S. § 669h-1 (LexisNexis 2011) (firearm and bow hunter education and safety program grants)).

Check 16 U.S.C.S. § 669 et seq. (LexisNexis 2011) and USFWS regulations for the specific range of state wildlife activities funded by the Act. See also 50 C.F.R. § 80.50 (2011) (lists what activities are eligible for funding under the Pittman-Robertson Act); 50 C.F.R. § 80.52 (2011) (describes how an activity may be eligible for funding if it is not explicitly eligible under 50 C.F.R. § 80.50). See generally 76 Fed. Reg. 46,150 (Aug. 1, 2011) for the most recent amendments to 50 C.F.R. pt. 80.

Additionally, the USFWS makes it possible to discover how the Act and its regulations translate into what activities and projects are finally approved to receive grants. See also U.S. Fish & Wildlife Serv., *Wildlife Restoration Program—Accomplishments*, WILDLIFE & SPORT FISH RESTORATION PROGRAM, http://wsfrprograms.fws.gov/Subpages/GrantPrograms/WR/WR_Accomplishments.htm (last updated May 18, 2011) (click on “State Reports” and follow the on-screen instructions; feel free to choose a particular state and fiscal year but under the tab for “Grant Program,” select “Wildlife Restoration”) to generate a report that narrates what program grants were awarded to a state each fiscal year since 1980.

⁵² U.S. FISH & WILDLIFE SERV., WILDLIFE AND SPORT FISH RESTORATION PROGRAM (June 2011) (educational pamphlet).

⁵³ *Id.*

⁵⁴ *Id.*

Restoration Account is administered by the U.S. Fish and Wildlife Service (USFWS) on behalf of the states.⁵⁵ Project grants are made available one year after excise taxes are placed in the Wildlife Restoration Account.⁵⁶ At that time, a legislatively prescribed formula determines the annual amount of money apportioned to each state.⁵⁷ The formula compels the USFWS to factor a state's current population, area, and number of hunting license holders in its final calculations.⁵⁸

Nevertheless, the federal Account cannot foot 100% of the bill for any state conservation projects. Projects are funded on a 3:1 matching basis where states must furnish at least 25% of a project's cost.⁵⁹ Each state possesses its own distinctive means to generate capital for the 25% requirement.⁶⁰ However, one common funding thread ties all states together: licensing.

Year after year, the sale of hunting licenses predominantly funds wildlife conservation at the state-level. The Act even explicitly acknowledges the importance of the fees accrued from license sales. Specifically, the Act premises program eligibility on the condition that each state legislature pass a law that prohibits the diversion of hunting license fees for any intention not in accord with the Act.⁶¹ This notable and applauded feature of the Pittman-Robertson Act ensures that the federal and state governments work in tandem to save America's wildlife.⁶² Prior to 1937, states had the freedom to spend license fees as they saw fit.⁶³ Yet,

⁵⁵ *Id.*

⁵⁶ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10-11.

⁵⁷ *Id.* (summarizing 16 U.S.C.S. § 669c (LexisNexis 2011) (allocation and apportionment of available amounts)). See also U.S. Fish & Wildlife Serv., *Wildlife Restoration Program—Funding, WILDLIFE & SPORT FISH RESTORATION PROGRAM*, http://wsfrprograms.fws.gov/Subpages/GrantPrograms/WR/WR_Funding.htm (last updated May 31, 2011) for a reader-friendly diagram illustrating the Pittman-Robertson Act apportionment formula and the final apportionment records for each state from 1939-2012.

⁵⁸ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10-11. Annually, the apportionment formula is most heavily influenced by the changing number of license holders in each state. In other words, that number is not a static constant in the USFWS calculation. See Email from USFWS Wildlife and Sport Fish Restoration Program Headquarters, to author (Jan. 12, 2012, 17:17 EST) (on file with author). Therefore, because the number of license holders fluctuates, “a state is not guaranteed the same amount [of excise tax dollars] each year.” *Id.* The amount of money apportioned to a state is also affected by the total amount of money in the Wildlife Restoration Account. See *infra* note 93 for further discussion.

⁵⁹ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10-11. While a state may choose to contribute more than 25% of a project's cost, federal involvement cannot financially exceed 75%.

⁶⁰ *Id.* at 11.

⁶¹ *Id.* (as stated in 16 U.S.C.S. § 669 (LexisNexis 2011) (cooperation of the Secretary of the Interior with states; conditions)).

⁶² See S. REP. NO. 75-868, at 2 (1937) (“The time has come when the Federal Government and the States must cooperatively engage in a broad program which will not only conserve our present day limited supply of wildlife, but restore it to some semblance of its former-day abundance.”).

⁶³ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 4.

without the provision, a state would not necessarily have had a guaranteed source of money to meet its 25% matching requirement; thus, the Act could have been null and void from its inception.

III. AN ASSESSMENT OF THE PITTMAN-ROBERTSON ACT AND THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION ON THEIR 75TH ANNIVERSARY

A. *The Success of the Act and the North American Model of Wildlife Conservation*

Amended in 1969 and 1972, the Pittman-Robertson Act has marginally evolved since its 1937 inception. Moreover, the Act's fundamental tax collection has not been altered but rather extended to include handgun and archery equipments. The Pittman-Robertson Act stands as an emblematic culmination of the historical, political, legal, and financial factors that shaped a uniquely American approach to wildlife conservation. Certainly, the Pittman-Robertson Act only marks one aspect of a complex, tenuous, and dynamic battle for numerous game and non-game species in America's tale. Nevertheless, its significance and prominence must be underscored.

The Act inextricably links wildlife, hunters, and the federal and state governments in an interconnected cycle. In the cycle, each counterpart directly affects the other individual counterparts. In an ideal cycle, abundant wildlife populations would lead to sport opportunities that require the purchase of hunting equipment.⁶⁴ Consequently, the purchase of taxable equipment should then impact the amount of excise taxes collected by the federal government and distributed to states for wildlife conservation.⁶⁵ The final phase of the cycle is completed when state conservation projects achieve and then maintain sustainable wildlife populations.⁶⁶ If sustainable population levels are attained, species can be safely hunted and simultaneously immune from the disruptions caused by past episodes of private exploitation. As recurrent wildlife births entice interested sportsmen, the cycle reverts back to its initial phase and continues on.⁶⁷

To evaluate the success of the Act's multi-faceted cycle, the number of wildlife harvested in 1937 is compared against the number of modern wildlife harvests. For example, in 1937, Missouri had a three-day deer season where 108 deer were harvested.⁶⁸ Then in 2009, 295,000 deer were killed.⁶⁹ As of 2011, sportsmen were

⁶⁴ *Id.* at 21.

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ Behind the conceptual framework underlying the hunt is contained a dichotomy between the life and death of wildlife. Where hunters sponsor the lives of wildlife through their purchase of taxable equipment, the fundamental bang of their sport also takes those sponsored lives away. While the dichotomy of the hunt poses intellectual and philosophical questions about the sport and the value of non-human life, any perspectives on that subject are beyond the scope of this Note. Hunters have indeed played an essential role in the conservation of America's wildlife and should thus be featured in the future legislative strategy proposed herein.

⁶⁸ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 26.

⁶⁹ *Id.*

capable of hunting Missouri deer for 123 days, a 4,000% increase from 1937.⁷⁰ Likewise, in Kansas, hunters now harvest more than 100,000 deer each year despite the fact that the state's deer season was closed between 1937 and 1965.⁷¹ In 1937, elk hunters in Wyoming had limited local seasons.⁷² By 2011, more than 53,000 hunters participated in 23,000 elk harvests.⁷³ In Ohio, hunters captured twelve turkeys in 1966.⁷⁴ However in 2009, 20,710 turkeys were taken.⁷⁵ Although quantifying harvest counts is not an exact science, it is evident that "the hunting and shooting-sports industries of today exist largely because wildlife populations have been restored to numbers inconceivable in the early 1900s."⁷⁶

As of 2011, states have received \$6.8 billion in funds for wildlife conservation projects like those previously mentioned.⁷⁷ The projects reveal the Act's cyclical species and sporting achievements. As the USFWS proudly and frequently proclaims, "No other single conservation effort in the United States can claim a greater contribution to [wildlife] conservation than the excise tax-funded [Pittman-Robertson Act.]"⁷⁸

This user-pay, sportsmen triumph has provided the funding for the North American Model of Wildlife Conservation. The Model was conceived as an ideological enunciation of wildlife conservation in America. In 2001, the Model was formally described for the first time.⁷⁹ The Model is defined by seven elements concerning how: (1) state governments oversee wildlife conservation on behalf of the public trust; (2) a democratic approach to wildlife management should encourage civic involvement; (3) under the law, every citizen has equal access to wildlife and the right to participate in hunting; (4) wildlife cannot be harvested for commercial uses that would exploit the hunt for private economic gain; (5) non-commercial uses of wildlife are restricted to the harvest of wildlife for food and fur, self-defense, and property protection; (6) wildlife can be considered an international resource because of its migratory nature; and (7) wildlife management is guided by science.⁸⁰

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 21.

⁷⁷ U.S. FISH & WILDLIFE SERV., WILDLIFE AND SPORT FISH RESTORATION PROGRAM (June 2011) (educational pamphlet).

⁷⁸ *Id.*

⁷⁹ Michael P. Nelson et al., *An Inadequate Construct? North American Model: What's Flawed, What's Missing, What's Needed*, WILDLIFE PROF., Summer 2011, at 58.

⁸⁰ For an introduction to the seven tenets of the Model, see DUDA, JONES & CRISCIONE, *supra* note 2, at 11-12. *But see generally* Nelson et al., *supra* note 79, for a criticism of the idealistic and inaccurate character of the seven tenets.

Since 2001, the Model has received overwhelming approval.⁸¹ By and large, it can be said that:

literature about [the Model] has grown, professional organizations have endorsed it, institutions have developed curricula to teach it, state agencies have built it into their strategic plans, sessions at professional meetings have focused on explaining it, and an entire issue [of a scientific publication, *The Wildlife Professional*,] was devoted to it.⁸²

Both the Act and the Model overlap with their focus on the public trust doctrine and the place of hunters in American conservation.⁸³ However, conceptually, the Model embraces fundamental tenets of wildlife conservation and hunting etiquette not embedded within the text of the Pittman-Robertson Act. Essentially, the Model more fully articulates the ethical role hunters should play as conservationists.

Despite the Model's broader context, the Act and the Model can be discussed in tandem. Without the funding from the Pittman-Robertson Act, the ideals of the Model are incapable of reaching fruition. Since 1937, the federal excise tax has allowed for states to have a dependable means to fund wildlife conservation projects. In other words, absent the Act's excise tax coffers, the state feats of wildlife conservation, guided by the Model's seven elements, would have been severely limited, if not non-existent.

Throughout 2012, the USFWS is sponsoring a year-long celebration of the Act and the Model as America commemorates their 75th anniversary.⁸⁴ Against the backdrop of a rousing twenty-one-gun salute, it is clearly evident that both were indispensable to the development of an American conservation identity.

B. A Fall from Grace

1. Recent Trends in Hunter Participation and Equipment Sales

Despite the Pittman-Robertson Act and the Model's accomplishments, the buck does not stop here. In fact, a decrease in hunting participation and equipment sales could result in consequences for governments, hunters, and species alike where past victories are not guaranteed in the future.

On August 16, 2007, President George W. Bush issued Executive Order 13443.⁸⁵ Within the Order's titular words, the "Facilitation of Hunting Heritage and Wildlife

⁸¹ Nelson et al., *supra* note 79, at 58.

⁸² *Id.*

⁸³ Generally, the Pittman-Robertson Act and the North American Model are discussed as if there is no difference between a piece of legislation and a conservation ideology. Although the Act and the Model are necessarily tied to wildlife conservation, it is important to recognize that the two are still distinct entities. Hence, this Note seeks to clarify an often muddled nomenclature practice.

⁸⁴ U.S. Fish & Wildlife Serv., *Wildlife & Sport Fish Restoration—75 Years*, WILDLIFE & SPORT FISH RESTORATION PROGRAM (2011), <http://wsfr75.com/>. The website contains a plethora of general information about the Wildlife Restoration Program. It also provides a list of proposed anniversary events set to occur in 2012.

⁸⁵ Exec. Order No. 13443, 72 Fed. Reg. 46,537 (Aug. 16, 2007) (titled "Facilitation of Hunting Heritage and Wildlife Conservation").

Conservation,” the President’s objectives were more than apparent.⁸⁶ President Bush sought immediate joint federal and state action “to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat.”⁸⁷

President Bush’s call for legislative and administrative action marked the urgency of a trend that began in the 1980s. Since 1955, the USFWS has conducted a National Survey of Fishing, Hunting, and Wildlife-Associated Recreation every five years.⁸⁸ The Survey compiles information on the number of hunters and wildlife watchers and how much they spend on their respective activities.⁸⁹ The most recent Survey was finalized in 2006. At the time, it was found that 12.5 million people, age sixteen and older, hunted in the U.S.⁹⁰

The 12.5 million figure perpetuated a twenty-six year decline in hunting participation. Between 1980 and 2006, Survey data indicates a 10% drop in the number of licensed hunters.⁹¹ Research gathered by other sporting outlets supports this trend. For instance, between 1987 and 2004, there has been a 40% decrease in the number of hunters wielding a shotgun or rifle.⁹² Even bow hunting had a 22% decline from 1998 to 2004.⁹³

While the waning pursuit of an American tradition is startling in and of itself, the participation decline could have deleterious long-term effects on the Pittman-Robertson Act and the North American Model. Specifically, in consideration of the Act’s cyclical interconnectivity, a sportsmen deficit can send negative ripples to the amount of excise taxes accumulated and made available for wildlife projects. Thus far, the Model’s notoriety and wildlife successes have been possible because of the Act’s stable funding source. However, that stable funding source may no longer be dependable. Evidence has already accrued to hint at the potential for a dependability rift.

Like participation trends, Survey results show that expenditures on hunting equipment have also decreased. Between 1996 and 2006, there was a 24% decline in such expenditures from \$7.1 billion to \$5.4 billion.⁹⁴ Subsequently, a 24% decline in

⁸⁶ *Id.*

⁸⁷ *Id.* at § 1 (written in the Executive Order’s statement of purpose).

⁸⁸ U.S. DEP’T OF THE INTERIOR, U.S. FISH & WILDLIFE SERV., U.S. DEP’T OF COM. & U.S. CENSUS BUREAU, 2006 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION vii (2006) [hereinafter 2006 NATIONAL SURVEY], *available at* http://library.fws.gov/pubs/nat_survey2006_final.pdf.

⁸⁹ *Id.*

⁹⁰ *Id.* at 22.

⁹¹ DUDA, JONES & CRISCIONE, *supra* note 2, at 59.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 2006 NATIONAL SURVEY, *supra* note 88, at 33; *see also id.* at 119. The Survey includes items not taxed under the Pittman-Robertson Act in its calculation of total hunting equipment expenditures. Specifically, the category is more inclusive of hunting equipment not subject to the Act’s excise tax. Nevertheless, the numbers are general indicators of the causal relationship between a decreased hunting participant demand and a decreased purchase of

equipment sales might reduce the future pool from which excise tax revenues are drawn. Here, the federal government would be deprived of excise tax funds for state distribution.

The loss of federal funding could then be compounded by the loss of license revenue at the state level. State law mandates that hunters purchase a government-issued license each year.⁹⁵ With a 10% decrease in the number of hunting participants, it follows that fewer license sales could take place.⁹⁶ Given that states primarily depend on license sales to meet their 25% matching requirement, the reality might impact each state's capacity to achieve the Model's conservation goals.

Furthermore, excise tax and license profits may be falling at a time when the call for wildlife management is at an apex.⁹⁷ With the long-term threat of scarce dollars and species a plenty, the Act's efficiency and the Model's survival are on the cusp of change.

equipment supplies. Thus, a diminished demand and supply could equate with diminished excise tax revenues.

But cf. U.S. Fish & Wildlife Serv., *Wildlife Restoration Program—Funding*, WILDLIFE & SPORT FISH RESTORATION PROGRAM http://wsfrprograms.fws.gov/Subpages/GrantPrograms/WR/WR_Funding.htm (last updated May 31, 2011). Final apportionment records may or may not support this diminished federal revenue theory. For select years in the period between 1996-2006, excise tax funds actually increased. Even so, there were years of decline. For instance, the largest amount of money collected under the Act, \$472,467,886, was recorded in 2010. Then in 2011, funding decreased by nearly \$172 million to \$300,083,188. Overall, the apportionment data unexpectedly fluctuates; this makes it difficult to say whether there is a definite increase or decrease in excise tax funds relative to trends in hunter participation and equipment sales. Excise tax amounts could fluctuate for any number of reasons. One reason could be that "apportionments can fluctuate due to states not using all funding within an allotted time frame. When this occurs, those funds are added back to the fund and reapportioned the next year. If a large amount is unused in a year, the apportionment can be higher the next year even though revenues declined a small amount." Email from USFWS Wildlife and Sport Fish Restoration Program Headquarters, to author (Jan. 12, 2012, 17:17 EST) (on file with author). Therefore, fluctuations do not solely reflect the year-to-year changes in equipment taxed.

The purpose of this footnote is to highlight the limited scope of current data. Ultimately, further research must be performed to accurately assess whether there is indeed a statistically significant or correlated relationship between hunting participation, equipment sales, and excise tax revenue over time.

In order for the USFWS to conduct said statistical analysis, two variables need to be cleaned-up and isolated. First, the type and number of equipment items taxed under the Pittman-Robertson Act must be extracted from the broader context of the Survey data. Second, the USFWS needs to calculate the total annual excise tax earnings absent the overflow funds from previous years. Unless or until the aforementioned controls are factored into a statistical study, one can only set forth an informed hypothesis, given available information, about the long-term effect that hunting could have on conservation funds.

⁹⁵ *See supra* Part II.C.

⁹⁶ WHITE HOUSE CONF. ON N. AM. WILDLIFE POL'Y, THE RECREATIONAL HUNTING AND WILDLIFE CONSERVATION PLAN AS DIRECTED BY EXECUTIVE ORDER 13443 6 (Dec. 14, 2008).

⁹⁷ *Id.*

The federal government has recognized the possibility that hunter participation can negatively impact wildlife conservation. In an effort to address the risks to hunting and conservation, President Bush sought an impetus towards action. The Order called for requisite federal and state partners to attend a North American Wildlife Policy Conference.⁹⁸ The Conference was to produce a Recreational Hunting and Wildlife Resource Conservation Plan that would create short and long-term strategies to facilitate the Order's intent over a ten-year period.⁹⁹ At best, it was hoped that participation and expenditure trends could be reversed and at the least, slowed down or abated.¹⁰⁰

The Sporting Conservation Council (SCC) played a chief role in drafting the Conference Action Plan.¹⁰¹ Overall, the Action Plan focused on renewed hunter recruitment and retention.¹⁰² For instance, the Action Plan addressed solutions overcoming impediments to land availability and entry. In 2008, a national study revealed that the top two factors influencing a decline in hunting related to land.¹⁰³ It is largely agreed that there are not enough public or private places to hunt and that sizeable access barriers exist on public and private land where hunting is allowed.¹⁰⁴

According to the Action Plan, hunters are at the heart of conservation in America and through their actions the Act and the Model can be salvaged. Nearly every facet of the Action Plan concentrates on sportsmen in some capacity.¹⁰⁵ In other words, the Conference looked to conservation's tried and true stakeholders to counteract emerging declines. Although the Action Plan sparked creative debate, its limited focus will only perpetuate the problems.

2. Problems Associated with Staying the Course

President Bush's White House Conference put sportsmen at the center of wildlife conservation. Read in a historical context, there is little to contradict the place of hunters in the nation's conservation of wildlife. With guns and arrows in hand, the sportsmen of America have shot themselves into a fixed position of influence in the government. Hunters have earned gratitude and respect for breakthrough achievements in species restoration and the maintenance of a national tradition. However, in light of actual declines in hunting participation and equipment expenditures and the anticipated loss of excise tax and license revenues, that time-honored reputation cannot thwart the onset of conservation progress.

⁹⁸ Exec. Order No. 13443, *supra* note 85, at § 3.

⁹⁹ *Id.* at § 4.

¹⁰⁰ *See generally id.*

¹⁰¹ WHITE HOUSE CONF. ON N. AM. WILDLIFE POL'Y, *supra* note 96, at 1-2.

¹⁰² *See generally id.*

¹⁰³ *See DUDA, JONES & CRISCIONE, supra* note 2, at 207-08.

¹⁰⁴ *See id.* Societal demographics also affect hunter recruitment and retention. In particular, increasing urbanization, an aging American citizenry, and a declining number of Caucasians in the population are often cited. Historically, hunters have been from rural areas and members of the Caucasian race. The rise of urbanization and minorities in the nation has left older teachers of the sport without eager pupils to whom they pass on their skills.

¹⁰⁵ *See generally* WHITE HOUSE CONF. ON N. AM. WILDLIFE POL'Y, *supra* note 96.

Like anything and everything in the world of man, American conservation is not perfect. Awe-inspiring compliments and praise cannot be permitted to conceal the Act and the Model's hunter-dependent blemishes. Specifically,

[w]hile the Pittman-Robertson Act is generally hailed as landmark legislation, it has also created a modern dilemma. While wildlife policy should serve the needs of all society, the funding of wildlife management is tied to a [user-pay, user-benefit] system, which arguably compels [the government] to give greater consideration to the needs and wildlife values of hunters, who generate the revenue, over those of the general public.¹⁰⁶

Incorporated under the Act's user-pay, user-benefit system, the government has deferred to hunters on conservation matters. In fact, an "iron triangle" relationship has formed between hunters, wildlife agencies, and policymakers.¹⁰⁷ Unable to penetrate the sanctity of the iron triangle, non-hunters have been politically marginalized.¹⁰⁸ Nevertheless, the past does not entirely justify the course of conservation in the present.¹⁰⁹

Participation and equipment declines inherently jeopardize the future of wildlife conservation. Consequently, the federal and state governments can no longer grasp the hunting exclusivity of the Pittman-Robertson Act and the North American Model so tightly. It is not suggested that the Act or the Model be dismantled in any capacity. Even more so, the government should continue to pursue its Action Plan to tackle industry declines. Nonetheless, the government does not have to disregard the new in its fight to keep the old.

Today, hunters are not the only sector of society to revel in the wonders of wildlife. According to the 2006 Survey, one-third of or 72.1 million Americans enjoyed wildlife watching in the great outdoors.¹¹⁰ By comparison, hunter participation decreased by 10% in the decade preceding 2006.¹¹¹ As a result, the number of hunters in the nation dropped to 12.5 million. In contrast, wildlife watching participation increased 13% over the same period.¹¹²

Furthermore, outdoorsmen have a distinct set of conservation values. Outdoorsmen take pride in their interaction with live species where hunters profit from the harvest of dead species. Additionally, wildlife watchers do not generally discriminate in their observation of game and non-game species. While hunters have a decided preference for the conservation of game species, outdoorsmen are less

¹⁰⁶ DUDA, JONES & CRISCIONE, *supra* note 2, at 9.

¹⁰⁷ Peter Dratch & Rick Kahn, *Moving Beyond the Model: Our Ethical Responsibility as the Top Trophic Predator*, WILDLIFE PROF., Summer 2011, at 61, 62.

¹⁰⁸ *Id.*

¹⁰⁹ Nelson et al., *supra* note 79, at 59.

¹¹⁰ 2006 NATIONAL SURVEY, *supra* note 88, at 36. The Survey defines "wildlife watching" as any recreational activity in which the "primary objective" is to closely observe, feed, and photograph wildlife or to visit public parks to view wildlife or to maintain plantings and natural areas that could function as wildlife habitat. Secondary or incidental participation is not factored into the Survey.

¹¹¹ *Id.* at 32.

¹¹² *Id.* at 52.

discerning in their conservation tastes. Neither use or species type is superior to the other. Rather, both uses and species types can coexist if the two industries are endowed with equal political clout. However, as previously explored, hunters and their wildlife uses are granted more esteem in the government.

Given the iron triangle discord, the government needs to reconcile the conservation interests of hunters and outdoorsmen. To counter the strength of the iron triangle, outdoorsmen must turn to the legal ideology at the core of American conservation: the public trust doctrine.

3. The Incompatibility of the “Iron Triangle” and the Public Trust Doctrine

The government’s preferential treatment of hunters and their chosen game species begets a problem for the disproportionate legal consideration afforded outdoorsmen and non-game species conservation projects. Currently, American conservation conflicts with the fundamental purpose of the public trust doctrine. The doctrine obligates the government to make wildlife resources available for the enjoyment of *all* Americans without regard for special interest groups. In spite of this legal obligation, the Pittman-Robertson Act, the North American Model, and their iron triangle assert a contradictory public trust doctrine where governments primarily protect select game species for hunters; here, outdoorsmen only tangentially benefit from species restored for the hunt. This modified interpretation of the public trust doctrine is disconnected from the concept of sovereign rule that dates back to medieval England. In order to solve the problem, the Act and the Model must be revised to coordinate with outdoorsmen and non-game species, in addition to hunters.

In 2000, Congress attempted to remedy the representation imbalance when it created the Wildlife Conservation and Restoration Account.¹¹³ As quoted in the amendment to the Pittman-Robertson Act:

There is established in the Federal aid to wildlife restoration fund a subaccount to be known as the [“Wildlife Conservation and Restoration Program (WCRP).]” There are authorized to be appropriated for the purposes of the Wildlife Conservation and Restoration [Program] \$ 50,000,000 in fiscal year 2001 for apportionment in accordance with this Act to carry out State wildlife conservation and restoration programs.¹¹⁴

Administered by the USFWS, the WCRP is a subaccount of the Pittman-Robertson Act.¹¹⁵ Excise tax money not to exceed \$50 million can be transferred from the general Wildlife Restoration Account to the Wildlife Conservation and Restoration Account “to address the unmet needs for a diverse array of wildlife and associated habitats, including species that are not hunted or fished, for wildlife conservation, wildlife conservation education, and wildlife-associated recreation projects.”¹¹⁶

¹¹³ 16 U.S.C.S. § 669b(a)(2) (LexisNexis 2011) (authorization of appropriations; disposition of unexpended funds).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 16 U.S.C.S. § 669b(c)(1) (LexisNexis 2011) (authorization of appropriations; disposition of unexpended funds).

The WCRP's purpose was to secure \$50 million dollars for those "species that are not hunted or fished" and remain on the fringes of concern for the hunting populace.¹¹⁷ Essentially, the WCRP recognized wildlife recreation and non-game species as legitimate recipients of the Pittman-Robertson Act's dollars.¹¹⁸ Unfortunately, Congress had to go so far as to amend the Pittman-Robertson Act and textually command that a relatively substantial sum of the excise tax fund go towards conservation projects that benefit non-game species and the non-hunting outdoor activities they support.¹¹⁹ It might be inferred that anything less than a Congressional majority and presidential assent may have been futile to overcome the strength of the iron triangle. However, in practice, even the legislative pronouncement was not fiery enough to weaken the iron protecting America's hunting coalition.

Between 2002 and 2007, the Wildlife Conservation and Restoration Account received but a few million dollars each year.¹²⁰ For example, \$3,092,422 was recorded in the Account for 2007.¹²¹ From 2008 to 2011, the millions turned into hundreds of thousands or nothing at all.¹²² In 2010, no money was placed in the Account.¹²³ A few dollars were found in the Account's coffers in 2011. However, \$663,784 is a distant cry from \$50 million.¹²⁴

Currently, the WCRP remains authorized but it is unlikely that it has received any additional funding through the appropriations process. It is difficult to discover the exact explanation behind an unfulfilled WCRP. However, the suspected culprits are hunters unwilling to share the excise tax wealth and a government administration succumbing to their political sway. Nevertheless, the WCRP is demonstrative of an important point. Specifically, ad-hoc appropriations under the WCRP do not guarantee that outdoorsmen and non-game species will benefit from the Pittman-Robertson Act and the Model. Although the WCRP was on the right conservation track, it did not go far enough to target the true source of the iron triangle representation imbalance: the Pittman-Robertson excise tax.

The excise tax on hunting equipment elevated one industry and its consumers above all others in the nation's conservation of wildlife. In order to correct that heightened elevation, the government needs to recognize what separates hunters from the wildlife recreation masses. Consequently, the government must examine

¹¹⁷ *Id.*

¹¹⁸ See 16 U.S.C.S. § 669b (LexisNexis 2011).

¹¹⁹ See *id.*

¹²⁰ See also U.S. Fish & Wildlife Serv., *Wildlife Restoration Program—Accomplishments*, WILDLIFE & SPORT FISH RESTORATION PROGRAM, http://wsfrprograms.fws.gov/Subpages/GrantPrograms/WR/WR_Accomplish%20ments.htm (last updated May 18, 2011) (click on "National Summary of Accomplishments" and follow the on-screen instructions to choose a fiscal year between 2001 and 2011 but under the tab for "Grant Program," select "Wildlife Restoration & Conservation (WCRP)—WCRP") to generate a report that breaks down the annual funds transferred into the Wildlife Conservation and Restoration Account.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

the shattering bang of a difference encapsulated by the excise tax on hunting equipment that has deafened its attention to outdoor interests.

Since 1937, the Act has provided hunters with a financial voice in the field of American conservation. In the past, hunters and hunters only were taxed and it is logical that the government would give their opinions more weight. Conversely, outdoorsmen have been free riders benefitting from the public lands, research, and wildlife species conserved on another's dime.

Nevertheless, outdoorsmen can no longer be content with their free rider status. As one-third of the American population, outdoorsmen have a sizeable stake in the fate of the nation's wildlife held in the public trust. Accordingly, state governments have a legal duty to protect wildlife resources on behalf of outdoorsmen too. To resurrect the force of the public trust doctrine and eliminate the iron triangle, outdoorsmen need an opportunity to be heard concurrent with the nation's hunters. In order to achieve a concurrent stance, the federal government must go farther than the WCRP and extend the Pittman-Robertson excise tax to outdoor equipment. To that end, an excise tax reform will update the Act and the Model and bring users of wildlife resources, in addition to hunters, into the acknowledged purview of American conservation. In turn, the common thread of taxation amongst hunters and outdoorsmen can lead the federal and state governments to recognize the wildlife recreation industry and non-game species largely ignored throughout conservation's past seventy-five anniversaries.

IV. A PROPOSAL FOR WILDLIFE CONSERVATION REFORM

A. *The Benefits of Adopting Holistic Updates to the Act and the Model*

Outdoor equipment affiliated with wildlife resources must be subject to an excise tax like the Pittman-Robertson excise tax on hunting equipment. An excise tax on outdoor equipment will allow outdoorsmen to join hunters as the fiscal guardians of American wildlife. Specifically, the current Act and Model will be broadened to incorporate a new tax base that can ameliorate the three legal shortfalls now plaguing the hunter-centric American conservation of wildlife: (1) a discrepancy in the public trust doctrine where states account for the interests of hunters at the expense of outdoorsmen; and (2) the negligent representation of outdoorsmen; and (3) non-game species that has resulted. Therefore, Congress should impose a new excise tax on the manufacturers and importers of specific types of outdoor equipment.¹²⁵

First, an outdoor excise tax can correct the public trust discrepancy. From monarchical rule in England to *Martin v. Waddell*, the public trust doctrine has set a bar for the state conservation of natural resources.¹²⁶ Since the 1930s, the law has required that states account for *all* interests in their jurisdiction to the greatest extent possible.¹²⁷ Consequently, states cannot renege on their public trust obligations in favor of sporting constituents.

¹²⁵ This Note does not suggest what might be an appropriate number at which a new excise tax could be set. The federal government should evaluate the potential to generate desired revenues given the quantity of products taxed and the market price for each type of product. The government may even choose to place varying tax rates on different products. In the end, the goal is to select a tax rate that is manageable for manufacturers but still capable of soliciting enough money to benefit wildlife conservation.

¹²⁶ See *supra* Part II.A-B.

¹²⁷ *Id.*

Private rights dominated the early days of American wildlife policy. Similarly enough, hunters dominate wildlife conservation today. Certainly the comparison is not absolute because modern hunters have reversed the trend of overexploitation beget by privately minded mongers. Then again, the comparison cannot be entirely dismissed either. Each faction overshadowed another group's right to be heard and validated by the government. Where principles of sovereignty rule and resource management were staved off for some time, outdoorsmen do not have to be excluded from the public trust for another seventy-five years. A new excise tax can directly bring outdoorsmen into a position corresponding with hunters in the public trust. Hence, the public trust can better account for a wider range of Americans, that benefit from the use of wildlife, as the legal doctrine should dictate.

In turn, the revitalized public trust can correct the second legal shortfall of conservation that implicates the negligent representation of outdoorsmen in both the federal and state governments. Without a new tax, outdoorsmen will continue to lack the dollars needed to dismantle the iron triangle and gain access to the public trust. Indeed, a new excise tax is the proper impetus to honorably thrust outdoorsmen into the public trust and rid them of their free rider stigma. An excise tax would give wildlife watchers a monetary platform to dialogue with the federal and state governments about conservation. While sportsmen maintain an important place in wildlife conservation, they no longer stand alone. Hunters are neither the only users nor the predominant users of wildlife in America. Joined by 72.1 million outdoorsmen, the two industries must be equally taxed and thus represented in the government with equal political clout.

Where all users must pay for conservation projects, all users must benefit from wildlife populations. As such, the success of the Act and the Model can no longer be measured solely in terms of game species harvests; to do otherwise would prolong the third legal shortfall where state wildlife projects overwhelmingly benefit game species in lieu of non-game species. Due to the outdoor excise tax, wildlife recreation enthusiasts will have the requisite influence to bring attention to non-game species. Accordingly, the funds from both interest groups should be combined and then granted to states for conservation projects that simultaneously address game and non-game species concerns.¹²⁸ Here, hunters no longer have to bear the monetary weight of conservation alone. Furthermore, their excise tax dollars can go further

¹²⁸ Given the appropriations trend established by the Pittman-Robertson Act, a limited percentage of the annual outdoor tax fund should be invested in wildlife recreation itself. The Pittman-Robertson Act allows a portion of the money collected from its excise tax to pay for hunter safety programs and indoor and outdoor shooting ranges. 16 U.S.C.S. § 669h-1 (LexisNexis 2011) (firearm and bow hunter education and safety program grants); *see also supra* Part II.C. It follows that the revenue generated from an outdoor excise tax should have a similar authorization for spending in its legislation. Specifically, the new act should have companion provisions for environmental education and programs that introduce novice or inexperienced persons to outdoor marvels. For instance, local classes could instruct people about the keys to bird watching and identification or offer tips on how to hike safely. Furthermore, the grant money could be used to publish books or brochures that provide the same information to state citizens, just in written form. In conclusion, the majority of both excise taxes must be combined to sponsor state projects explicitly necessary for the conservation of wildlife and the administrative fees associated with said exploits. However, a lesser percentage of the tax funds should be separated. Accordingly, each tax would nurture the growth and perpetuation of its respective activity.

when supplemented by a tax on outdoor equipment. Concurrently, non-game species will finally have a more or less guaranteed source of permanent funding premised on the Congressional authorization of spending in lieu of the unpredictable, fickle appropriations under the failed Wildlife Conservation and Restoration Account. Also, the recreational activities associated with non-game species can obtain an economic boost.

Overall, the outdoor excise tax can take the current Pittman-Robertson Act and the North American Model beyond the narrow confines of hunting. In turn, states will be capable of reaching additional, diverse wildlife conservation and recreation projects that contribute to the holistic nature of wildlife management in America.

Survey figures are indicative of what an all-encompassing approach to wildlife conservation might attain. In regards to the wildlife watching Survey, both wildlife watching and auxiliary equipment have the potential to be taxed.¹²⁹ In 1996, the total of said equipments was \$11.7 billion.¹³⁰ Then in 2006, a total of \$11 billion marked a 7% decline over the decade. Nevertheless, \$11 billion, decreased as it may be, is \$11 billion not figured into the federal conservation bank as of today.

Furthermore, \$11 billion in equipment is more than twice the \$5.4 billion spent on hunting equipment in 2006.¹³¹ Another \$1.3 billion in auxiliary equipment from hunting might even be subject to the outdoor excise tax.¹³² In the end, a total of \$17.7 billion is greater than each individual counterpart.

The proposed strategy has a campaign predecessor. In the 1990s, a national "Teaming With Wildlife" movement called upon Congress to pass an excise tax equivalent for non-game species.¹³³ The movement was in response to the marginal scope of federal funding for non-game species.¹³⁴ Certainly, non-game species

¹²⁹ 2006 NATIONAL SURVEY, *supra* note 88, at 20. "Wildlife watching equipment" concerns "items owned primarily for observing, photographing, or feeding wildlife" like binoculars, photographic equipment, wild bird food, field guides, and other maps. *See also id.* at 118. The Survey defines "auxiliary equipment" as: "Equipment owned primarily for wildlife-associated recreation. For [hunters, items include] sleeping bags, packs, duffel bags, tents, binoculars and field glasses, special . . . hunting clothing, foul weather gear, boots and waders, maintenance and repair of equipment, and processing and taxidermy costs. For [wildlife watchers, items include] tents, tarps, frame packs, backpacking and other camping equipment and blinds." *Id.*

The items mentioned in the wildlife watching and auxiliary equipments represent the widest possible range of products that could be taxed for conservation. Yet, as this Note relays, not all items could nor should be taxed. Nonetheless, every dollar amassed can make a conservation difference.

¹³⁰ *Id.* at 53.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *TWRA Wildlife Action Plan & Network*, TENN. WILDLIFE RES. AGENCY, <http://www.tn.gov/twra/twraactionplan.html> (last visited Nov. 26, 2011). The movement was and is currently composed of state fish and wildlife agencies, wildlife biologists, hunters, anglers, birdwatchers, hikers, nature-based businesses, and other conservationists. *See also* Ass'n of Fish & Wildlife Agencies, *About Teaming With Wildlife (TWW)*, TEAMING WITH WILDLIFE, <http://www.teaming.com/about-teaming-wildlife-tww> (last visited Jan. 22, 2012).

¹³⁴ *Id.*

indirectly benefit from the Act's projects. For instance, land purchased for hunting and the preservation of game species habitat also protects the homes of non-game species; no ecosystem is exclusive to game or non-game species. Additionally, in 1973, a new American consciousness emerged with the Endangered Species Act (ESA).¹³⁵ The ESA provided the federal government tools to combat the extinction of the nation's most vulnerable non-game species.¹³⁶ In spite of indirect benefits and the ESA, legislative mandates have not affirmatively supported non-game species before they reach the point of becoming threatened or endangered. Hence, the Teaming With Wildlife movement was a twentieth century attempt to augment the amount of funding and national aid given to said species.

Nonetheless, the 1990s Teaming With Wildlife movement failed for two reasons.¹³⁷ First, the movement was not executed in a sensible, delineated format. The movement requested an excise tax on too many products not necessarily affiliated with wildlife.¹³⁸ Second, the manufacturers of outdoors equipment were resistant to a new excise tax.¹³⁹ Each Teaming With Wildlife lesson must be addressed in the pitch for a modern excise tax.

With the Teaming With Wildlife improvements in mind, the federal government must be compelled to pass legislation and promulgate regulations that promote essential updates to the Pittman-Robertson Act and the North American Model. In conjunction with the public trust, 72.1 million outdoorsmen, and a reinvigorated excise tax collection, that uniquely American approach to wildlife conservation needs a post-1937 expansion.

B. Legislation and Regulations with a "Primary Objective"

While the sum of all equipment expenditures is far more powerful than its distinct parts alone, \$17.7 billion is the elusive Holy Grail of excise tax funding. The proposal for an outdoor excise tax should not push for a broad, ill-defined list of equipment that marginally connects humans and wildlife. To do otherwise is to repeat the mistakes of the Teaming With Wildlife movement. Instead, the proposed

¹³⁵ Endangered Species Act (ESA), 16 U.S.C.S. § 1531 et seq. (LexisNexis 2011).

¹³⁶ *Id.*

¹³⁷ The Teaming With Wildlife movement did not dissolve as a result of the resistance to its campaign. However, the movement did confront one casualty. After the 1990s, the movement abandoned its push for a new excise tax. Instead, the movement looked to existing federal revenue from on and offshore oil and mineral development activities to fund non-game wildlife conservation. The movement's abrupt switch seems bizarre and out of step with: (1) the political palatability of the hunting excise tax; and (2) the infrastructure in place to administer the present excise taxes in America. By pursuing an outdoor excise tax, the government would be working within the already established American approach to wildlife conservation but in a revised form. To do otherwise disassociates the users of an abiotic resource, like oil, from the benefits of wildlife species. Given that the Teaming With Wildlife's oil agenda is incompatible with the current Act and Model, it will not be advocated here. See Ass'n of Fish & Wildlife Agencies, *Dedicated Funding*, TEAMING WITH WILDLIFE, <http://teaming.com/dedicated-funding> (last visited Jan. 22, 2012).

¹³⁸ See *Proposed Outdoor Equipment Tax Under Fire*, L.A. TIMES, June 10, 1998.

¹³⁹ *TWRA Wildlife Action Plan & Network*, *supra* note 133.

legislation and enacted administrative regulations must define a legally established list of outdoor products subject to the tax.¹⁴⁰

In deciding where the tax might apply, the federal government should choose a “primary objective” test, based off of the wildlife watching Survey, to differentiate amongst innumerable options.¹⁴¹ Specifically, the primary objective of an outdoor product needs to be linked to its principle use or purpose of manufacture. Only those items that immediately promote the observation of or interaction with wildlife have a primary objective in accordance with the Pittman-Robertson Act’s user-pay, user-benefit justification.

Examples from the Survey’s list of wildlife watching and auxiliary equipment can be illustrative of the primary objective test.¹⁴² Tents and miscellaneous camping equipment immediately promote both the observation of and interaction with wildlife. They were invented to better facilitate man’s contact with nature when he is distanced from the comforts of civilization. Each item enables Americans to experience the environment and temporarily live alongside Mother Nature and all her creatures.

Conversely, photographic equipment and maps should be excluded from a new excise tax. While cameras can be used to photograph wildlife and maps can assist a person in navigating a public park, cameras and maps were not created solely for outdoor enjoyment. Photos are taken indoors and maps can get a car from one point to another along an urbanized highway.

While it is easier to place equipment like tents and cameras on one side of the tax inclusion line, it is inevitable that some equipment will fall into a primary objective

¹⁴⁰ Like the Pittman-Robertson Act, a new tax would implicate Congress, the Treasury Department, and the USFWS. Additionally, the TTB and IRS are responsible for collecting the excise tax dollars from firearms and handguns and archery equipment, respectively. Therefore, administrative agencies, in addition to the USFWS, could have the power to create regulations regarding new outdoor items taxed. Given the number of known and potential federal players with the legal authority to influence what outdoor equipment is taxed, none will be referenced specifically here. Instead, the federal government, as a collective entity, will be named in an attempt to avoid cumbersome clutter.

¹⁴¹ See *supra* text accompanying notes 110 and 129. The Survey does not explicitly provide for the primary objective test advocated in this Note. However, the Survey’s definitions for “wildlife watching” and “wildlife watching equipment” supply a confined set of wildlife-associated activities and associated equipment that can be assessed. To be clear, the Survey’s definition for “wildlife watching” focuses on the main types of activities in which people use and then benefit from wildlife. Concurrently, the primary objective test would consider what outdoor or wildlife watching equipment is “primarily” manufactured or marketed to facilitate said uses.

Through the Survey, the federal government has already been classifying and quantifying a group of activities and equipment apart from hunting and hunting equipment. It follows that the process involved in drafting new outdoor legislation could be far simpler than if the government had yet to collect and evaluate the wildlife watching climate and data. In other words, the government does not have to start at the proverbial square one. The extraction of a primary objective test from the Survey can serve as evidence of this point; the Survey offered a foundation to evaluate the range of outdoor products that may be taxed. This only helps to bolster the advantageous promise and feasibility of constructing the bill for an outdoor excise tax.

¹⁴² See *supra* text accompanying note 129.

gray area. For example, millions of birdwatchers depend on binoculars to observe faraway, feathered bundles up-close. Then again, binoculars may bring athletes at a sporting event, performers at an artistic function, or other distant people into focus. In order to resolve such a conundrum, legislators have several options. First, binocular manufacturers and sellers could be solicited to discern if particular brands of binoculars are largely marketed towards or purchased by birdwatchers. For an alternative, the federal government may choose to include binoculars with specific capabilities that exact a higher sales cost for their greater potential to observe wildlife.

After reaching out to the binocular industry and consumers, Congress or an executive agency may correctly find that binoculars do not satisfy the primary objective test. Nevertheless, a conflict of functions does not automatically make products like binoculars ineligible for the excise tax. As previously declared, every outdoor product subject to the tax must have a primary use or purpose of manufacture inextricably connected to wildlife recreation. However, most products, such as those in the primary objective gray area, will have additional uses or purposes of manufacture unrelated to wildlife recreation. If an item satisfies the primary objective test, it cannot be excluded from a new law simply because it can also serve complimentary albeit incidental or less popular functions. The primary objective test is concerned with a piece of outdoor equipment's main and majoritarian use or purpose of manufacture. So long as additional uses or purposes do not seriously compete with or surpass the predominance of an item's wildlife objective, the test does not limit itself to outdoor products that have but one market.

Even the current Pittman-Robertson Act follows suit with the aforementioned standard. The primary objective of hunting equipment is to catch and detain game species. Nonetheless, not every firearm or bow and arrow purchased pierces the body of a wildlife species kept alive by excise tax dollars. Hunting equipment could be bought and stored only for a person's private collection. An archer may only aim at man-made, bulls-eye targets. The bottom line is that, even with hunting equipment, the government cannot eliminate an outdoor product that would otherwise pass the primary objective test solely because it has a function that does not comport with wildlife recreation; neither Americans nor wildlife gain from such legal nit picking.

Under the primary objective test and the Pittman-Robertson Act, some product users will pay for the survival of a resource from which they never benefit. However, the primary objective test is intended to be fair and minimize the cost to non-benefitting users. Through informed and comprehensive decision-making, the narrowly circumscribed test will solely tax items closely identified with the observation of or interaction with wildlife resources.

Lastly, the primary objective evaluation communicates that the choice of taxed products is anything but an arbitrary or capricious attempt to forcefully impose tax hardships. By including the list of taxable products within legislation and administrative regulations, outdoor industry partners will be made aware of potential payment obligations; the industry can never become unexpectedly taxed. The federal government must encourage industry, and other interested parties, to air grievances and trepidations regarding the listing of an outdoor item. Where well-rounded government participation is promoted, it contributes to a stronger primary objective review.

In conclusion, a new excise tax is not intended to overwhelm the outdoor industry and its customers in any capacity. Instead, the excise tax is meant to

incorporate outdoorsmen under the Act and the Model. If outdoor equipment becomes taxed as result the primary objective review, outdoorsmen will no longer escape their share of financial liability for the maintenance and survival of game and non-game species. The primary objective test ensures that only those products most directly affiliated with wildlife recreation will be taxed. So long as the federal government does not abuse the test in favor of business profits or conservation distresses, the new excise tax might find its own livelihood trumpeted seventy-five years in the future.

C. Imposition of a New Excise Tax on the Outdoor Industry

1. An Excise Tax with Precedent

A tax by any other name would still be a tax, an unpopular, stigmatized, and unwanted instrument. Akin to protests that erupted during the Teaming With Wildlife movement,¹⁴³ it is highly probable that similar exhortations can and will arise from affected industries. In defense of their position, outdoor industries could resort to two arguments.

First, industry stakeholders might challenge that the establishment of a new excise tax is unwarranted. Nevertheless, a new excise tax is not without Pittman-Robertson Act precedent. In 1937, the Pittman-Robertson Act was palatable to industry stakeholders because an excise tax on firearms and ammunitions already existed.¹⁴⁴ An identical tax was also collected on handguns and handgun ammunitions when the Act was amended in 1969.¹⁴⁵ Conversely, the 1972 archery amendment was without an excise tax counterpart until Congress passed the bill.¹⁴⁶

Archers, like the outdoorsmen of today, were once free riders, too. However, one big difference separates the two groups. In 1972, the archery industry acknowledged the benefits their consumers realized from the Pittman-Robertson Act and the dollars of its firearm and handgun forbearers. As one advocate summarized,

For far too long . . . bow hunters and the archery industry have had a free ride in the national wildlife restoration effort, largely courtesy of the tax-paying firearms hunters. Archers and the industry have benefitted from the millions of acres purchased and developed and maintained for wildlife purposes . . . By participating in the Federal [A]id in [W]ildlife [R]estoration program . . . bow hunters and the archery industry would be acting in their own best interests . . . We believe the time is at hand for the archery industry to participate directly in this program because of its responsibility to the users of its products and wildlife.¹⁴⁷

Joining a coalition composed of other sport industries, the archery industry came to the “user-pay, user-benefit” conclusion reached in 1937 and 1969. In light of the lands, research, and restored species populations gained from an excise tax on guns, the archery industry accepted their monetary “responsibility” as conservationists.

¹⁴³ See *supra* Part VI.A.

¹⁴⁴ ANDREW LOFTUS CONSULTING ET AL., *supra* note 39, at 10.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 10-11.

¹⁴⁷ H.R. REP. NO. 92-1492, at 5-6 (1972).

The legislation was not thwarted by economic concerns; in fact, for reasons of in-house organization, the Department of the Treasury was the only opposing party on record.¹⁴⁸ Moreover, the legislation did not sneak under apathetic industry radar. Instead, enough of the industry rallied behind the bill so that the archery industry and archers could claim a role in funding wildlife conservation.¹⁴⁹

Beyond the legal theory of the public trust doctrine and the price of a newly imposed tax, the archery industry felt obliged to fall under the Act's jurisdiction as an environmental steward. Albeit, the industry did not proceed on purely altruistic grounds; the industry is first and foremost a free market institution that could have fought to remain beyond the Act's jurisdiction. However, the industry did not take that position. Instead, the industry accepted the tax burden associated with maintaining its sport; the un-funded disappearance of a beloved pastime was unmistakably the costlier alternative. In a world of social action and mounting environmental problems, similar to the 1970s, today's outdoor industry should take heed from the archery industry's stance.

2. The Return on Investment (ROI)

Even with precedent, the manufacturers of excise-tax-free items will still object to the introduction of any new tax, period. However, such an inflexible position ignores the bottom-line of business. In particular, outdoor industries should not belittle the cost of an excise tax in the short-term. Instead, industries should focus on the future where investment can breed profitable returns.

In 2011, two independent consulting agencies released a report summarizing the Act's economic viability and returns on investment (ROI). Between 1970 and 2006, hunting and shooting sports manufacturers saw an astonishing 1,000% annual return on their excise tax investments.¹⁵⁰ Specifically,

[excise tax] collections for [wildlife conservation] from 1970 to 2006 averaged \$251 million per year. Over the same period, hunters and shooters purchased an average of roughly \$3.1 billion . . . in tax-related items per year This results in an estimated average annual return on investment to industry of approximately 1,100%.¹⁵¹

Certainly, not all conservation projects generate satisfactory ROIs.¹⁵² Occasionally a project's ROI cannot even be quantified.¹⁵³ In spite of these

¹⁴⁸ *See id.* at 12-14.

¹⁴⁹ *See id.* at 3 (Congressmen George A. Goodling, the primary sponsor of the bill held that, "Sportsmen and conservationists have assured me that they will extend their strong support to [the archery amendment]. I have also received pledges of support from the archery industries and archers themselves . . .").

¹⁵⁰ ANDREW LOFTUS CONSULTING & SOUTHWICK ASSOCS., INC., THE BENEFITS TO BUSINESS FROM HUNTING AND FISHING EXCISE TAXES 1 (Feb. 2011), *available at* <http://www.southwickassociates.com/sites/default/files/reports/AFWA%20ROI%20Summary%20Report%203-3-11.pdf> (brief summary of a report financed by the Multistate Conservation Grant Program, a program supported with funds from the Sport Fish and Wildlife Restoration Program of the U.S. Fish and Wildlife Service and jointly managed with the Association of Fish and Wildlife Agencies).

¹⁵¹ *Id.*

¹⁵² *Id.*

admonitions, outdoor industries would be wise to recognize the long-term potential for an extraordinary ROI. Likewise, the report's conclusion can detract from the force of industry hostilities towards a new excise tax.

V. CONCLUSION

In 2012, America can choose to bestow a gift upon the nation's wildlife. Although a 75th anniversary is referred to as a golden or diamond occasion, wildlife do not comport well with illustrious metals or shiny carats. Instead, wildlife of all varieties might prefer to receive a holistic approach to wildlife conservation wrapped in a new excise tax.

The Pittman-Robertson Act and the resultant North American Model of Wildlife Conversation salvaged the country's wildlife from uninhibited resource exploitation. Nevertheless, the dollars gathered and the species restored cannot overshadow the fact that a success can become even more successful. An anniversary calls for a celebration of the past that is simultaneously mindful of the impending future. Therefore, the year of shining commemoration should be thankful for what American conservation has been and yet challenge conservation to be what it can become overtime. Concurrently, the admiration owed to hunters cannot distract from the sport's current circumstances and the human and wildlife representation imbalances in the government.

Hunter participation and equipment declines are startling trends that could inhibit the long-term growth and stability of the Pittman-Robertson Act as a source to fund the North American Model. The USFWS should conduct further Survey research to evaluate the specific relationship between hunter participation, the sale of taxable hunting equipment, and the annual amount of money collected in the excise tax fund.

While forthcoming research can ultimately provide a statistical framework to characterize the dilemma plaguing hunters, the nation does not have to wait for confirmation of the Act and the Model's legal constraints. The construct of American conservation has erected a barrier that prevents outdoor interests-at-large from reaching the public trust. A new excise tax on outdoor equipment would endow outdoorsmen with a financial voice the state public trust will have to recognize. Situated on an equal platform of representation, hunters and outdoorsmen can jointly sponsor the conservation of game and non-game species.

Like outdoorsmen, the government can no longer marginalize non-game species. A non-game species should not have to garner the attention of the Endangered Species Act before the nation takes stock of its survival. Aside from the costly nature of retroactive conservation, such a policy does little to contribute to a comprehensive approach to conservation.

The future hearkened by a new excise tax would require changes in the federal and state governments, albeit not dramatic changes. The government already possesses the user-pay, user-benefit infrastructure required for conservation reform. Data regarding wildlife recreation has been and continues to be gathered in the Survey. The Pittman-Robertson Act's administrative procedures and guidelines can serve as a model for an outdoor act. In reality, a new excise tax is but an update to the Pittman-Robertson Act and the North American Model inherently submersed in the American government.

¹⁵³ *Id.*

While the government is prepared for conservation reform, the manufacturers of outdoor equipment will have to adapt to an excise tax. Certainly, the outdoor industry will feel the greatest impact of the conservation proposal. However, the ideals of earthly stewardship and returns on investment make the imposition of a carefully executed tax less burdensome and rather necessary and promising.

In the end, each party in the conservation cycle will benefit if more bucks pour in from a second force just as loud as the bang. Indeed, 72.1 million outdoorsmen have the potential to perforate the status quo with a cacophonous sound. Seventy-five years ago, the law listened and then responded to the shots fired by sportsmen. America merely requires the wildlife-watching equivalent of a bang to catch the government's ear once again.

