

# Rescuing Wolves from Politics: Wildlife as a Public Trust Resource

Jeremy T. Bruskotter,<sup>1\*</sup> Sherry A. Enzler,<sup>2</sup> Adrian Treves<sup>3</sup>

In April 2011, the U.S. Congress removed Endangered Species Act (ESA) protections for gray wolves in the northern Rocky Mountains. In an unprecedented action, Congress sidestepped the provisions of the law, removing protections via a legislative rider (1). Absent these protections, management authority has returned to state governments, which, citing wolves' impacts on domestic livestock and wild game, have exhibited hostility toward wolves. We examine the wildlife trust doctrine as a tool for promoting the conservation of wolves and other imperiled species under state management. We argue that this doctrine is best understood as establishing a legal obligation for states to conserve species for the benefit of their citizens. However, for the wildlife trust to act as a check against interests that promote exploitation over conservation, courts must use the doctrine to hold states accountable rather than grant excessive deference to management agencies.



## Federal Protections, States' Hostility

Once systematically eliminated throughout the western United States for their impact on livestock (2, 3), gray wolves (*Canis lupus*) are making a comeback following their protection under the ESA and reintroduction into Yellowstone National Park and Idaho in the mid-1990s. The ESA protects species by prohibiting "take" (killing), including regulated hunting and trapping, and makes it a federal crime to "take" a species in violation of its provisions. These protections led to a substantial population increase and range expansion in the northern Rocky Mountains (4, 5),

prompting the U.S. Fish and Wildlife Service (FWS) to attempt to remove ESA protections and return management authority to states in 2003, 2008, and 2009. However, the FWS's efforts have been stymied by legal challenges from environmental groups, who argue that wolves have not yet fully recovered. Some scientists also have questioned whether wolf populations are viable (4), whether wolves' distribution is sufficient to constitute recovery (6), and whether existing regulations are adequate to ensure populations persist (7).

Long frustrated by federal efforts at wolf recovery, which some in the American West view as an infringement upon states' rights, politicians unleashed a wave of angry rhetoric after a 2010 federal court ruling that again returned wolves to ESA protections. Utah's director of the Department of Natural Resources compared wolf restoration to a "resurrection of the *T. rex*," and asserted that wolves were a "biological weapon" used to end sport hunting (8). Idaho's Governor ordered state agencies not to enforce federal law protecting wolves, and Utah enacted a law that explicitly attempts to prevent wolf recovery in the state (7).

The 2010 court ruling ultimately prompted federal legislators from Montana and Idaho to sidestep the ESA's delisting process altogether. They attached a rider to the Federal Continuing Budget Resolution that ordered the FWS to reissue the 2009 rule the federal court had recently invalidated. However, to avoid another loss in court, the rider explicitly exempts this rule from judicial review—meaning the rule cannot be challenged in federal court. Yet, research indicates the FWS's analysis underestimated the threat humans pose to wolves (7), and the actions of state politicians in the West along with recent

Long-term conservation of gray wolves is possible if states recognize a legal obligation to conserve species as a public trust resource.

research (9, 10) suggest that the threats that led to wolves' extirpation (i.e., human persecution) have not abated.

Although environmentalists have decried the budget rider delisting wolves as an attempt to eviscerate the ESA, it is yet unclear whether Congress's approach to delisting wolves will become the new norm. However, these actions demonstrate the need for state-based approaches to protecting imperiled species. Herein, we detail one such approach.

## State Control and the Wildlife Trust

In the absence of ESA protection, wolf management reverts to states. Will states honor the substantial public investment made in wolf restoration or seek to dramatically reduce or even eliminate wolf populations, as opponents of delisting claim? The answer may depend on how states interpret a legal doctrine with roots dating back to ancient Roman and English common law (11). This doctrine, sometimes referred to as the "wildlife trust doctrine," holds that wildlife, having no owners, are *res communes*, belonging "in common to all of the citizens" (12), and states have a sovereign trust obligation to manage wildlife resources for the benefit of their citizens (13). The wildlife trust doctrine is a branch of the broader "public trust doctrine," which traces its legal roots in the United States back to the mid-19th century (12–14).

The public trust doctrine was most famously articulated by the U.S. Supreme Court in *Illinois Central Railroad v. Illinois*, where the Court maintained that certain tideland resources to which the state held title, including lands under navigable waters, are "held in trust for the people" (15), and states, as trustees, had an affirmative duty to supervise trust assets and preserve them as fully as possible (16). Four years later, in *Geer v. Connecticut*, the U.S. Supreme Court recognized the wildlife trust doctrine as imposing on states a duty "to enact such laws as will best preserve the subject of the trust [i.e., wildlife] and secure its beneficial use in the future to the people of the state" (17).

The courts' opinions in *Geer* and *Illinois Central* rely on the same historical roots and employ virtually identical language (18);

<sup>1</sup>School of Environment and Natural Resources, The Ohio State University, Columbus, OH 43210, USA. <sup>2</sup>Department of Forest Resources and Institute on the Environment, University of Minnesota, St. Paul, MN 55108, USA. <sup>3</sup>Nelson Institute for Environmental Studies, University of Wisconsin–Madison, Madison, WI 53706, USA.

\*Author for correspondence: bruskotter.9@osu.edu

thus, while they arose independently, the wildlife trust is best thought of as a branch or subset of the broader public trust doctrine—which both courts and legal scholars have concluded is sufficiently flexible to apply to a wide range of natural resources (16–20). The public trust doctrine performs an important “gap-filling function” by protecting communal resources where statutory law has failed (21). Similarly, the wildlife trust can help fill the “gap” when species lose the statutory protections afforded by the ESA by imposing a fiduciary duty on states to maintain the species for future generations.

### What Is the Duty of the State-Trustee?

The power of the state over wildlife stems from the notion of “sovereign ownership” (13) or “ownership in trust” (22), which carries a duty owed to the people (13, 22). Thus, when managing wildlife, the state-trustee may not privilege private interests over the general public. Indeed, in *Geer* the Court noted that the state-trustee must exercise its power over wildlife “for the benefit of the people, and not . . . for the advantage of the government as distinct from the people or for the benefit of private individuals” (17). In a democratic society, courts should look with skepticism at attempts by state-trustees to allocate or restrict public resources for the benefit of private interests (19).

It is widely recognized under the public trust doctrine that the state-trustee has a duty to prevent substantial impairment of the trust asset absent a compelling government purpose supporting impairment of the asset (15). Applying this concept to wildlife, Musiker and colleagues [(13), p. 96] suggested that the public trust doctrine imposes an obligation on the state to

“(1) consider the potential adverse impacts [on the wildlife resource] of any proposed activity over which it has administrative authority; (2) allow only activities that do not substantially impair the state’s wildlife resources; and (3) continually monitor the impacts. . . . to ensure preservation of the corpus of the trust. . . .”

In perhaps the most notable example of modern application of the public trust doctrine, the California Supreme Court concluded the doctrine imposes a “duty o[n] the state to protect the people’s common heritage . . . surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust” (20). This duty is a continuing duty, which the state cannot abrogate.

We contend that the state-trustee’s obligation is heightened where, as is the case with the wolf, the species at issue has recently been removed from the list of endangered species. Indeed, the imposition of ESA protections for wolves was an indication that states failed in their past duties. Thus, the removal of ESA protections requires renewed diligence and attention on the part of the state to ensure federal protections are not required again. The state’s duty requires it to refrain from taking actions that substantially impair the species and, in all other cases where less than substantial impairment is at issue, to balance the public’s interest in preservation of the species against the interests advanced by the impairment. This duty applies equally to all imperiled species.

### Applying the Wildlife Trust Doctrine

Returning then to the issue of wolves in the West, application of the wildlife trust doctrine would be advantageous for a number of reasons. Formal recognition of a duty to preserve species under the wildlife trust would, at minimum, require states to maintain a viable population of wolves. Such an acknowledgment from states could help assuage fears that state-led wolf management will lead to a second wave of wolf eradications and could move debate about population baselines and distributions back into the scientific—as opposed to political—arena. Furthermore, the recognition of an obligation to preserve wildlife populations in perpetuity could provide a mechanism by which states could be compelled to maintain (or at least attempt to maintain) viable populations of species (22). The lack of such a mechanism recently caused a Federal District Court to return ESA protections for grizzly bears in the Greater Yellowstone Area, holding that agreements between states and the federal government were inadequate regulatory mechanisms for ensuring grizzly bears’ protection because the federal government “cannot compel any of the agencies to live up to their commitments” (23). The recognition of this common-law duty to conserve species as a trust resource could have provided the assurance the court sought, thereby permitting bears’ removal from ESA protections and the resumption of state management.

Although legal scholars (12–14, 18, 19, 21, 22) and wildlife professionals (24) alike recognize the importance of the wildlife trust as a tool for promoting conservation, its application in the state courts has been relatively rare (14). Although state courts have used the doctrine retroactively to support attempts to recover monetary damages

on behalf of citizen-beneficiaries, for example, when industrial pollution leads to large-scale die-off of fish (22), use of the doctrine to proactively require states to conserve trust assets is also entirely consistent with the historic application of both the wildlife trust (21, 22, 25) and the broader public trust doctrine (19). Yet, reliance on statutory law has made such applications unnecessary and relatively rare. For the wildlife trust to act as a check against narrow interests that promote exploitation over conservation, courts must use the doctrine to hold states accountable to their trust obligations. Building the case law necessary for broader judicial application of the wildlife trust will require interested citizens and the groups who represent them to force its application in the courts. Without judicial application of an enforceable obligation, the fate of wolves, and many other imperiled species, remains uncertain.

### References and Notes

- Legislative riders are provisions added to bills that often have little or no relation to the original bill. Riders are sometimes used to pass controversial legislation that would be unlikely to pass on its own.
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- In the United States there are two types of laws, written statutes or rules (adopted by legislatures or agencies) and common law adopted by courts through prior case law. Both statutory and common laws are legally binding, and the court is required to apply both types of laws.
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