Apply public trust doctrine to 'rescue' wildlife from politics, researchers say

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When a species recovers enough to be removed from the federal endangered species list, the public trust doctrine – the principle that government must conserve natural resources for the public good – should guide state management of wildlife, scientists say.

In the Sept. 30 issue of the journal *Science*, the researchers note that the public trust doctrine holds that certain natural resources, including wildlife, have no owners and therefore belong to all citizens. So, they add, when federal statutory law no longer offers protection to a species, the public trust doctrine imposes upon states an obligation to conserve the species for their citizens.

The researchers cite the case of the gray wolf, which lost federal protection in the northern Rocky Mountains last spring under a rare Congressional legislative rider. This rider was passed after courts had reversed three previous U.S. Fish and Wildlife Service attempts to delist the wolf in the region, which includes Idaho, Montana and parts of Oregon, Washington and Utah.

The merits of protecting gray wolves have been hotly debated for years in the northern Rocky Mountains, where public opinion varies considerably among livestock owners, hunters and wildlife advocates. Idaho and Montana have launched public hunts aimed at reducing wolf populations since federal protections were lifted. Wolf advocates fear that heavy-handed “lethal management” of wolves could deplete the population so rapidly that the species will require federal protections

again. Under the Endangered Species Act, the federal government monitors a species for at least five years after it is delisted, but state wildlife agencies take over management.

Lost in these bitter arguments is any attempt to clarify state agencies' obligation to their citizens, said Jeremy Bruskotter, assistant professor in Ohio State University's School of Environment and Natural Resources and lead author of the *Science* paper.

The wildlife trust doctrine, a branch of the public trust doctrine, defines that obligation, the paper's authors argue. The public trust doctrine has roots in ancient Roman and English common law, but its application to wildlife in the United States dates to the late 19th century. In an 1896 case, Geer vs. Connecticut, the U.S. Supreme Court ruled that the wildlife trust doctrine imposed on states a duty "to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state."

"If you recognize a wildlife trust doctrine, and that the state has the obligation to maintain these populations in perpetuity not just for current residents but for future residents, then there is a degree of protection for species in the absence of the statutory protection," Bruskotter said.

The researchers note that natural resource agency professionals are likely to be aware that all wildlife are communally owned by each state, but western politicians' open hostility toward this formerly protected species raises the question: What are states actually going to do?

"Some of the rhetoric about the killing of wolves might be political showmanship. But when they make exaggerated claims – for example, comparing wolf restoration to the resurrection of the T. rex, which was done in Utah – that adds layers of ambiguity and fear. Conservationists wonder if they will try to eliminate wolves and wonder if they can do it,"

Bruskotter said. “But the public trust doctrine holds that if state politicians were to intervene to try to prevent the maintenance of a viable wolf population, they could be taken to court. There is a legal mechanism to prevent that type of action.”

Traditionally, the conservation and management of wildlife resources in the United States has been driven by state governments, which established agencies to monitor wildlife populations and regulate activities like hunting and trapping. However, the federal government began to take an interest in imperiled species in the 1960s, culminating with the passage of the Endangered Species Act in 1973.

“This is where the conflict turns. Until then, the impetus for wildlife management had come primarily from the states. Then the feds came in and said, ‘We’re taking over the protection and, hopefully, the recovery,’” Bruskotter said.

The federally led reintroduction of gray wolves to western states didn’t sit well with many of those states’ officials, who characterized the action as an unwanted federal intervention. When the wolf population was deemed to have met federal recovery goals in the region in 2002, state politicians began “clamoring for management authority,” Bruskotter said.

To date, wildlife advocates haven’t had to rely on the wildlife trust doctrine to guide their management because states generally show a strong desire to conserve species. The case of gray wolves in the northern Rockies has been unusual, with western legislatures continually expressing the desire to minimize or even remove wolf populations altogether.

While case law exists to define the reach of the public trust doctrine, additional case law would be beneficial to firmly establish states’

obligations in the management of species no longer covered by federal protection, the authors contend.

“If this obligation is going to be more than just understood, there will need to be case law established, which is going to require somebody to take things to court to see what those obligations are,” said Sherry Enzler, a co-author of the paper and a public trust scholar at the University of Minnesota.

The authors note that this argument for the application of the wildlife trust doctrine should not be construed as an appeal on behalf of the gray wolf.

“It’s not about protecting any particular species. It’s about how we ensure we have adequate protection for all imperiled species under state-led management. Not all species are a perfect fit for federal protection, so this is a better long-term solution,” Bruskotter said.

“There is a middle ground here, and there is a legal process for defining this middle ground. States have an obligation to maintain, at minimum, a viable population of a species that has been removed from the endangered species list.”

Better clarity about state management could also apply to the case of the grizzly bear, which the U.S. Fish and Wildlife Service stands ready to delist in the greater Yellowstone region. As part of a recent plan to remove protection, federal officials asked states to agree to certain management practices under a series of memoranda of understanding. A federal court rejected the plan because the memoranda were not legally binding – states could not be compelled to conserve.

“This court-made law could be that regulatory mechanism,” Bruskotter said, noting that this represents how the wildlife trust doctrine’s

application could support delisting a previously threatened species. “This common law could have been used to help remove grizzly bears from protection because it could have provided the regulatory mechanism the court sought in that case.”

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