

THE ALASKAN WOLF WAR: THE PUBLIC TRUST DOCTRINE MISSING IN ACTION

By
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Wolf killing in Alaska is authorized by the Board of Game (BOG), an agency captured by hunting and trapping interests. The BOG's wolf killing policies have generally been supported by state legislatures and governors. Alaskan courts have not halted the wolf killing. The courts have viewed wolf killing as an issue of administrative law and deferred to BOG expertise. This article argues that the courts should have invoked Alaska's public trust doctrine, which prevents the granting of preferences over state natural resources. The courts should have also rigorously examined the BOG's wolf killing policies and protected the wolf as a valuable public trust resource. The BOG's wolf killing policies have not been supported by the public, leading to ballot initiatives to protect the wolf. Congress is currently considering the Protect America's Wildlife Act, which will prevent the same day airborne hunting of Alaska's wolves.

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I. INTRODUCTION

The killing of wolves in Alaska has been very controversial. Prior to statehood, there was aggressive wolf killing by the federal and territorial governments, which continued after statehood in 1959. After statehood, wolf management fell under the purview of the Alaska Board of Game (BOG), a seven-member board appointed by the Alaska Governor, which determines wolf control policy throughout the state.¹ The Alaska Department of Fish and Game (ADF&G), Alaska's wildlife management agency, implements the policies set by the BOG.² This article asserts that the BOG is a "captured" entity that is largely controlled by the interests it serves—hunters and trappers.³ The BOG authorizes the killing of wolves to increase the big game available for hunters and trappers.⁴ Alaska's governors and state legislature have, for the most part, supported BOG policies.⁵ Alaska state courts have characterized challenges to the BOG's wolf killing policies as questions of judicial review over administrative decision making.⁶ The state courts have deferred to the BOG's expertise and only reviewed its decisions for compliance with the Alaska Administrative Procedure Act (APA).⁷

In response to the state government intransigence, opponents of wolf killing in Alaska have resorted to ballot initiatives to hold the state government accountable to the public will and protect the wolves. In 1996 and 2000, voters passed ballot initiatives that prohibited the same day airborne hunting—also known as "land-and-shoot" hunt-

¹ See Alaska Stat. § 16.05.050(b) (Lexis 2008) (mandating the commissioner of fish and game's reporting requirements to the BOG); Alaska Dept. of Fish & Game, *Board of Game, About Boards*, <http://www.boards.adfg.state.ak.us/gameinfo/index.php> (last accessed Apr. 12, 2009).

² Alaska Stat. § 16.05.050(b).

³ Martin Nie, *State Wildlife Governance and Carnivore Conservation*, in *People and Predators: From Conflict to Coexistence* 197, 201 (N. Fascione, A. Delach & M. Smith eds., Island Press 2004).

⁴ *Id.* at 208.

⁵ *Infra* n. 75.

⁶ *Infra* n. 76.

⁷ Alaska Stat. §§ 44.62.010–44.62.950; see also *infra* n. 77 and accompanying text.

ing—of wolves.⁸ However, the state legislature reversed both initiatives.⁹ In August 2008, wolf advocates placed a third initiative prohibiting the practice before Alaska's voters.¹⁰ This initiative was defeated as a result of an aggressive effort on the part of Governor Sarah Palin and the state legislature.¹¹ None of the ballot initiatives violated the Alaska Constitution, which prohibits the appropriation of state assets through the ballot initiative.¹²

Advocates have also attempted to compel the federal government to stop the killing of Alaska's wolves by invoking the federal Airborne Hunting Act (AHA).¹³ These efforts have also been unsuccessful because the AHA contains a loophole that allows airborne hunting pursuant to a state permit.¹⁴ Currently, Congress is considering the Protect America's Wildlife Act,¹⁵ which, if enacted, will close the loophole.

This article reviews the history of wolf control in Alaska and argues that BOG policies have granted a virtual state monopoly to hunters and trappers over Alaska's wildlife. Part II examines the public trust doctrine in Alaska, which precludes the granting of a state monopoly over state natural resources,¹⁶ and asserts that the Alaska courts should have viewed the challenges to the BOG policies as violations of the public trust doctrine. It then examines wolf control policies during the administrations of Alaskan Governors and the resulting litigation, in which state courts largely upheld the BOG's consumptive policies. Part III analyzes the ballot initiatives that were designed to stop the BOG's wolf killing policies. Part IV advocates the enactment of the Protect America's Wildlife Act, which will constitute a major step towards the settlement of the Alaskan wolf war.

II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine, derived from common law, posits that certain natural resources are common property held in trust by the

⁸ *Infra* Part III.

⁹ *Infra* Part III(c).

¹⁰ *Infra* nn. 389, 390.

¹¹ Alex deMarban, *\$400,000 Says Aerial Wolf Kills OK*, Anchorage Daily News (Aug. 26, 2007).

¹² *Infra* nn. 355, 356.

¹³ 16 U.S.C. § 742(j)(1) (2000).

¹⁴ *Id.* at § 742(b)(1).

¹⁵ H.R. 3663, 110th Cong. (Sept. 25, 2007).

¹⁶ See *Owsichuk v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 493 (Alaska 1988) (tying the state's public trust duty to an anti-monopoly constitutional "common use clause"). Alaska law reaffirms this constitutional mandate: "The [ADF&G] Commissioner shall . . . manage . . . resources of the state in the interest of the economy and general well-being of the state." Alaska Stat. § 16.05.020(2); *Mesiar v. Heckman*, 964 P.2d 445, 449 (Alaska 1998); Gregory F. Cook, *The Public Trust Doctrine in Alaska in Recent Developments in Wildlife and Fisheries Law in Alaska* (Alaska Bar Assn. 1992) (describing the constitution's framers' intent to implicitly adopt the public trust doctrine).

state government for the benefit of its citizens.¹⁷ William Rodgers, a professor at the University of Washington School of Law, points out that the doctrine serves the same function for state courts reviewing state legislative actions regarding natural resources as federal courts' duty to take a "hard look" at federal agency decisions that affect the environment.¹⁸ In the seminal public trust case, *Illinois Central Railroad Co. v. Illinois*, the U.S. Supreme Court invalidated the transfer of lakeshore property by the Illinois state legislature.¹⁹ Justice Stephen Field recognized that Illinois held title to lands under Lake Michigan "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from obstruction or interference of private parties."²⁰ Further, the Court held the state legislature retains police powers over public trust lands, but cannot abdicate its public trust responsibilities.²¹ The Court declared:

[The] State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned . . . than it can abdicate its police powers in the administration of government and the preservation of peace. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the State.²²

The public trust originally encompassed tidelands, but was extended to other public resources by state statutes, state constitutions, and judicial decisions.²³ Lloyd Cohen, an associate professor at Chicago-Kent College of Law, observed the public trust doctrine's "journey from the sea, up navigable streams, to unnavigable streams, its leap to inland ponds, and then like our amphibian ancestors its eventual emergence from the water and march across the land."²⁴

The public trust doctrine also includes state management of wildlife.²⁵ The U.S. Supreme Court in *Geer v. Connecticut*²⁶ upheld a state export ban on game, declaring that the state can "control and regulate the common property in game" because it holds such a right in "trust

¹⁷ For a discussion of the how the public trust doctrine developed in early U.S. law, see *Martin v. Waddell*, 41 U.S. 367 (1842); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U. Cal. Davis L. Rev. 195 (1980); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, the Future of Private Property*, 16 N.Y.U. Env'tl. L.J. 711, 713-15 (2008).

¹⁸ William H. Rodgers, *Environmental Law* 170-71 (1st ed., West 1986).

¹⁹ 146 U.S. 387 (1892).

²⁰ *Id.* at 452.

²¹ *Id.* at 452-53.

²² *Id.* at 453-54.

²³ Rodgers, *supra* n. 18, at 158-59.

²⁴ Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 256 (1992).

²⁵ Rodgers, *supra* n. 18.

²⁶ 161 U.S. 519, 519-21 (1896), *overruled*, *Hughes v. Okla.*, 441 U.S. 322 (1979).

for the benefit of the people.”²⁷ The Court stressed that state authority over common property “is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”²⁸

Although the Court later overruled *Geer* in *Hughes v. Oklahoma* as a violation of the dormant Commerce Clause, the doctrine of public trust regarding wildlife was not affected.²⁹ The Court stated, “[The] whole ownership theory, in fact, is . . . a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”³⁰

The public trust doctrine further imposes a fiduciary duty on state government to protect and preserve public resources.³¹ Rodgers noted that the public trust doctrine “demands fair procedures, decisions that are justified, and results that are consistent with protection and perpetuation of the resource.”³² The following section will discuss the evolution of the public trust doctrine in Alaska and the governmental duties derived from it.

A. *The Public Trust Doctrine in Alaska*

Wildlife is protected as part of the public trust under Article VIII of the Alaska Constitution,³³ which was modeled after the rationale in *Geer*.³⁴ Article VIII, section 1 provides: “It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with

²⁷ *Id.* at 528–29.

²⁸ *Id.* at 529.

²⁹ 441 U.S. 322, 322 (1979).

³⁰ *Id.* at 334.

³¹ Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of State's Natural Resources*, 16 Duke Envtl. L. & Policy Forum 57, 76 (2005–06); Seth Macinko, *Public or Private?: United States Commercial Fisheries Management and the Public Trust Doctrine, Reciprocal Changes*, 33 Nat. Resources J. 919, 951 (1993).

³² Rodgers, *supra* n. 18, at 172.

³³ *Metlakatla Indian Community, Annette Is. Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962); *Owsichek*, 763 P.2d at 492–96; *Gilbert v. State*, 803 P.2d 391, 398–99 (Alaska 1990); Cook, *supra* n. 16, at 23–24. Article VIII calls for the development of natural resources, but “it will not abide that which is wasteful, biologically exhaustive, rooted in special privilege, narrowly selfish or contrary to the rights of others and the larger public interest.” Gordon S. Harrison, *Alaska's Constitution: A Citizen's Guide* 128 (4th ed., Alaska Leg. Affairs Agency 2002) (http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf) (last accessed Apr. 12, 2009).

³⁴ *Owsichek*, 763 P.2d at 495. On the floor of the Convention, members of the Resources Committee declared, “The language here has a lot of history behind it. . . . The language in this section harks back to the old tradition whereby wildlife in its natural state was in the presumed ownership of the sovereign until reduced to possession.” *Id.* at 493 n. 11 (1988) (internal citation omitted). See also Cook, *supra* n. 16, at 13–18.

the public interest.”³⁵ Article VIII, section 2 states: “The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”³⁶ Section 3 declares: “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”³⁷ Section 4 provides: “Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”³⁸ Section 17 mandates: “The use and disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purposes to be served by the law or regulation.”³⁹

The public trust imposes a duty to protect and preserve wildlife, including wolves.⁴⁰ Commentators noted, “The public trust doctrine protects natural resources, and therefore the public, from the failure of

³⁵ Alaska Const. art. VIII, § 1. According to Harrison, this provision encourages the development of natural resources, “but in a manner that recognizes the collective interests of the people as the owners of these lands and resources.” Harrison, *supra* n. 33, at 129. The phrase “consistent with the public interest” means

that the principles of conservation must govern resource management (Sections 2 and 4); that everyone should be treated equally by management rules, particularly rules adopted in the interests of conservation that limit the access of some groups to certain resources (Sections 3, 15, 16, and 17); The delegates wanted the state’s resources developed, not plundered.

Id. at 129.

³⁶ Alaska Const. art. VIII, § 2. The framers of the Alaska Constitution intended that utilization, development, and conservation be the goals of resource management. Conservation was defined “in its traditional sense of ‘wise use.’” Harrison, *supra* n. 33, at 129. The Alaska Supreme Court stated, “The terms ‘conserving’ and ‘developing’ both embody concepts of utilization of resources. ‘Conserving’ implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. ‘Developing’ connotes management of a resource to make it available for use.” Harrison, *supra* n. 33, at 129–30 (quoting *Kenai Peninsula Fisherman’s Co-op Assn. v. State*, 628 P.2d 897, 902 (Alaska 1981)).

³⁷ Alaska Const. art. VIII, § 3. According to Harrison, “This section enshrines in the Alaska Constitution the common law doctrine that natural resources must be managed by the state as a public trust for the benefit of the people as a whole, rather than for the benefit of the government or of special individuals.” Sections 15 and 17 work together “to prohibit the state from granting to any person or group privileged or monopolistic access to the wild fish, game, waters, or lands of Alaska.” Harrison, *supra* n. 33, at 130.

³⁸ Alaska Const. art. VIII, § 4. According to Harrison, “The principle of sustained yield management is a basic tenet of conservation: [The] annual harvest of a biological resource should not exceed the annual regeneration of that resource. Maximum sustained yield is the largest harvest that can be maintained year after year.” Harrison, *supra* n. 33, at 132.

³⁹ Alaska Const. art. VIII, § 17. According to Harrison, this section reasserts the doctrine of “‘equal protection of the laws’ provision . . . that pertains specifically to natural resource management. It is one of the three ‘equal access’ clauses of Article VIII.” Harrison, *supra* n. 33, at 141.

⁴⁰ Inga Haggenson Causey, *Reintroduction of the Wolf in Yellowstone: Has the Program Fatally Wounded the Very Species It Sought to Protect?*, 11 Tul. Envtl. L.J. 461, 474–76 (1998).

legislatures, state agencies, and administrative personnel to recognize the state's duty to protect the corpus of the wildlife trust for future generations.⁴¹ The state as trustee must protect the corpus of the trust by preventing unreasonable exploitation and seeking compensation for any loss.⁴² The state also holds the trust property in its sovereign capacity and must manage the trust for the public good and future generations.⁴³

The Alaska Constitution establishes a strong public trust doctrine.⁴⁴ The Alaska Supreme Court has declared that the doctrine creates a property interest in wildlife.⁴⁵ In *Owsichek v. State*, the Alaska Supreme Court first considered the scope of permissible regulations regarding fish and wildlife in light of the state's public trust responsibilities.⁴⁶ In that case, the Court invalidated the state's grant of exclusive hunting guide licenses, holding that the "common use" clause in Article VIII "strongly protects public access to natural resources."⁴⁷ The Court upheld the framers' intent in "constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife, and waters."⁴⁸ The Court rejected Alaska's argument that the public trust gave the state unlimited discretion, noting that the "common use clause is intended to provide independent protection of the public's access to natural resources."⁴⁹ Furthermore, the history of the common use clause "reveals an antimonopoly intent to prohibit 'exclusive grants' and 'special privileges,' wholly apart from the limits imposed by other constitutional provi-

⁴¹ Deborah G. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 Pub. Land L. Rev. 87, 109 (1995).

⁴² *Id.* at 88.

⁴³ Harry R. Bader, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. Envtl. Aff. L. Rev. 749, 754 (1992). Bader notes that the public trust doctrine "reflects the fundamental precept that some resources in natural systems are so central to the well-being of the community that they must be protected by distinctive principles." *Id.* Further, he asserts "the doctrine rests on the idea that the continued diminishment of these common heritage resources would have such inestimable consequences that the state cannot allow their impairment 'to happen carelessly, accidentally, or by legerdemain.'" *Id.*

⁴⁴ G. D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Wildlife*, 19 Envtl. L. 723, 730-31 (1989). See also Bader, *supra* n. 43, at 750 (discussing application of the public trust doctrine in Alaska). The Alaska Supreme Court recognized and expanded the scope of the public trust doctrine in *Metlakatla Indian Community, Annette Is. Reserve*, 362 P.2d at 915; *Herscher v. State*, 568 P.2d 996, 1003, 1005 (Alaska 1977); *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1117-21 (Alaska 1988); *Gilbert v. State*, 803 P.2d 391, 398-99 (Alaska 1990).

⁴⁵ *Pullen v. Ulmer*, 923 P.2d 54, 59-61 (Alaska 1996).

⁴⁶ 763 P.2d at 492.

⁴⁷ *Id.* at 492. See also Bader, *supra* n. 43, at 750 (stating, "Access, however, is an illusion if such resources exist only as atrophied forms of their former quality and quantity. To preserve access is not enough—the public trust doctrine must be applied as an affirmative instrument for ecological protection.")

⁴⁸ *Owsichek*, 763 P.2d at 493.

⁴⁹ *Id.* at 495.

sions.⁵⁰ The Court in *Owsichek* also determined that the grant of exclusive guide privileges may violate the equal access requirement of section 17.⁵¹ It noted that section 17 "may require 'more stringent review' of a statute than does the equal protection clause in cases involving natural resources."⁵² It also found that the constitutional history accompanying section 17 indicated that it "is intended to exclude any *especially privileged status* for any person in the use of natural resources subject to disposition by the state."⁵³

In *State v. Ostrosky*, the Alaska Supreme Court reaffirmed that the common use clause precludes the granting of state monopolies.⁵⁴ The Court determined that limited entry fishing violated the Alaska Constitution, stating, "We have difficulty squaring the section 3 reservation of fish to the people for common use with a system that grants an exclusive right to fish to a select few who may continue to exercise that right season after season."⁵⁵

The Alaska Supreme Court acknowledged in *McDowell v. State* that Article VIII, sections 3, 15, and 17 of the Alaska Constitution prohibit "the exclusive grants or special privileges to take fish and wildlife."⁵⁶ Relying on *Owsichek* and *Ostrosky*, the Court rigorously reviewed a state statute that burdened the common use of state resources.⁵⁷ The Court required the state to employ the least restrictive means when impinging on the common use of natural resources "in view of the 'highly important interest running to each person within the state' by virtue of the common use clause."⁵⁸ The Court stated:

In reviewing legislation which burdens the equal access clauses of Article VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on Article VIII's open access values.⁵⁹

Both the Alaska Constitution and the Alaska Supreme Court have laid the foundation for a strong public trust doctrine in the state. Unfortunately, as the next section will illustrate, its state agencies and courts have not abided by this mandate in the realm of wolf management.

⁵⁰ *Id.* at 496.

⁵¹ *Id.* at 498 n. 17.

⁵² *Id.* (citing *Gilman v. Martin*, 662 P.2d 120, 126 (Alaska 1983)).

⁵³ *Id.* (emphasis in original).

⁵⁴ 667 P.2d 1184 (Alaska 1983).

⁵⁵ *Id.* at 1189.

⁵⁶ 785 P.2d 1, 6 (Alaska 1989) (observing that a memo of the Constitutional Convention Committee on Resources stated: "The expression 'for the common use' implies that these resources are not to be subject to exclusive grants or special privileges as was so frequently the case in ancient royal tradition.").

⁵⁷ *Id.* The Court also noted that "in *State v. Ostrosky*, we accepted the view that the common use clause reflects 'anti-exclusionist values.'" *Id.* at 16 (citations omitted).

⁵⁸ *Id.* at 10 (quoting the dissent in *Ostrosky*, 667 P.2d at 1195).

⁵⁹ *Id.* at 10.

B. The BOG: A "Captured" Agency

After achieving statehood in 1959, Alaska gained control over wildlife management.⁶⁰ The joint Board of Fish and Game developed wildlife policy that was implemented by the ADF&G.⁶¹ Professional wildlife managers generally came from rural backgrounds, worked for the government in rural areas, socialized with rural residents, and identified with the local custom and culture, which was utilitarian.⁶² Managers worked in a political environment that considered wildlife subservient to other interests.⁶³

In 1975, the joint board was divided into the BOG and the Board of Fisheries.⁶⁴ The BOG consists of seven members nominated by the governor and confirmed by the state legislature, who serve three-year terms.⁶⁵ The BOG reflects the policies of the governor and state legislature, and these policies reflect traditional wildlife management, the goal of which is "to ensure healthy populations of a wide range of species."⁶⁶ State legislative committees dealing with wildlife are generally dominated by members from rural backgrounds, so wildlife proposals must run the gamut of rural utilitarian interests.⁶⁷ The BOG operates pursuant to the Alaska Administrative Procedure Act (APA).⁶⁸ It can hear testimony on proposals during meetings in the game management units (GMUs), but it can only change a regulation for which legal notice had been posted prior to the meeting.⁶⁹

⁶⁰ Tim Mowry, *Statehood Changed Wildlife Management for Alaska*, Fairbanks Daily News-Miner (Jan. 2, 2009) (available at <http://www.newsminer.com/new/2009/jan/02/statehood-changed-wildlife-management-alaska/>) (last accessed Apr. 12, 2009).

⁶¹ See *Defenders of Wildlife v. Alaska*, Case No. 3AN-06-101956 CI & 3AN-06-13087 CI, Pl.'s Memo in Support of Mot. for a TRO & Prelim. Inj. Prohibiting the Def.'s Payment of Bounties 2-4 (Mar. 27, 2007) (available at <http://www.trustees.org/Supporting%20Documents/Memo%20PI%20Bounty%20Motion.pdf>) (last accessed Apr. 12, 2009) (reviewing ADF&G's authority).

⁶² Bruce Gill, *The Wildlife Professional Subculture: The Case of the Crazy Aunt*, in *Human Dimensions of Wildlife* 1(1): 60, 62-64 (1996) (stating that the culture of wildlife managers, which was imported from the Prussia forest service, embodied four values: 1) the utilitarian philosophy that resources be put to their best use; 2) permissible uses are determined by professionally trained elites; 3) efficient scientific management is best administrated by government bureaucracy; and 4) wise use constitutes sustainable use).

⁶³ *Id.*

⁶⁴ Alaska Stat. §§ 16.05.221, 16.05.241, 16.05.251, 16.05.255.

⁶⁵ Alaska Dept. of Fish & Game: Boards Support, *Board of Game*, <http://www.boards.adfg.state.ak.us/gameinfo/index.php> (last updated Apr. 2, 2009) (last accessed Apr. 12, 2009).

⁶⁶ G.C. Coggins & M.E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 Or. L. Rev. 59, 69 (1981).

⁶⁷ Gill, *supra* n. 62, at 64.

⁶⁸ Alaska Stat. § 16.05.260.

⁶⁹ *Id.* at § 16.62.190.

The relationship between the BOG and hunters and trappers can be viewed as that of client-manager.⁷⁰ The BOG, the “manager,” provides game resources to its “clients,” hunters and trappers.⁷¹ As a result, “nongame species suffer from neglect, ignorance, and misplaced priorities.”⁷² Additionally, the board’s “capture” is reinforced because hunters and trappers, who are consumptive users, provide funds to the BOG through the payment of license fees.⁷³ Researcher R. Bruce Gill observed,

Though perhaps unintentional, license fees effectively married public servants to special interests. It was an unholy marriage because it blurred the essential distinction between public interest and special interest and inevitably eroded both scientific credibility and public trust.⁷⁴

Although the governor and state legislature have, for the most part, upheld the BOG’s consumptive policies, wolf advocates have viewed them as contrary to ecological management and wildlife conservation.⁷⁵

Despite their oversight duties, state courts in Alaska have failed to protect the wolves. The state courts have characterized challenges to the BOG wolf killing policies as administrative law questions, deferring to the BOG expertise and only reviewing BOG decisions to ensure procedural compliance with the Alaska APA.⁷⁶ The courts never acknowledged the dominant orientation of the BOG policies, which favored consumptive users. The courts should have invoked the public trust doctrine, which is built into the Alaska Constitution, to protect the wolves and combat the BOG capture.

Joseph Sax, professor of environmental regulation at Berkeley School of Law, points out that the public trust doctrine “is no more—and no less—than a name courts give to their concerns about the insuf-

⁷⁰ Daniel J. Decker et al., *From Clients to Stakeholders*, in *Human Dimensions of Wildlife* 1(1):70, 71-73 (1996).

⁷¹ Martin Nie, *State Wildlife Policy and Management: The Scope and Bias of Political Conflict*, 64 *Pub. Admin. Rev.* 221, 223 (2004).

⁷² Coggins & Ward, *supra* n. 66, at 73.

⁷³ Alaska Stat. § 16.05.110. See also Ruth S. Musgrave & Mary Anne Stein, *State Wildlife Laws Handbook* Alaska 61-62 (1st ed., Govt. Inst., Inc. 1993) (discussing ways in which state wildlife agencies impose fees on “users,” such as through the sale of hunting and fishing permits and licenses).

⁷⁴ Gill, *supra* n. 62, at 63.

⁷⁵ Martin Nie, *Beyond Wolves: The Politics of Wolf Recovery and Management* 180-81 (U. Minn. Press 2003).

⁷⁶ Chapter 62 of the Alaska APA articulates steps boards must follow when engaging in rulemaking, i.e. when they issue legally enforceable administrative regulations that implement the law. These administrative steps are designed to curtail administrative discretion. Alaska Stat. §§ 44.62.010-44.62.950. Key provisions require administrators to: 1) cite statutory authority upon which the regulations are based; 2) allow the interested public to comment on the proposed regulation at an open hearing; and 3) give the public notice thirty days prior to a hearing on the regulations. *Id.* at §§ 44.62.040, 44.62.210, 44.62.190. Another important provision requires open meetings. *Id.* at § 44.62.310.

ficiencies of the democratic process.”⁷⁷ Sax noted a “problem that frequently arises in public trust cases . . . is [that] a diffuse majority is made subject to the will of a concerted minority.”⁷⁸ The “concerted minority”⁷⁹ in Alaska is hunters and trappers who have taken over control of public resources. Sax argues that “public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in legislative and administrative process.”⁸⁰ The public trust doctrine provides the means for judicial oversight of legislative and administrative process, which diminish ecological values in relation to competing economic use values.⁸¹ Sax stated, “The public trust concept is, more than anything else, a medium for democratization.”⁸²

The public trust doctrine has a number of critics. They assert that the doctrine is unnecessary because the legislature has enacted statutes that protect wildlife and require administrators to consider environmental factors in their decision making process.⁸³ The courts oversee administrative actions to insure compliance with statutory mandates. One commentator called the doctrine “a backward-looking, antidemocratic vestige whose time, if it ever existed, has passed.”⁸⁴ Furthermore, the critics argue, the courts are incapable of making complex decisions about natural resources, which should be left to politically accountable administrators.⁸⁵

The critics of the public trust doctrine fail to account for systemic political imbalance evidenced through agency capture.⁸⁶ BOG deci-

⁷⁷ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 521 (1970).

⁷⁸ *Id.* at 560.

⁷⁹ Takacs, *supra* n. 17, at 715–18.

⁸⁰ Sax, *supra* n. 77, at 509.

⁸¹ Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 *Envtl. L.* 477, 482–83 (2001).

⁸² Sax, *supra* n. 77, at 509. See also Cook, *supra* n. 16, at 52 (declaring that “the Public Trust Doctrine is merely the name given to the rationale relied on by a republican government to limit the power of those who temporarily occupy the seats of governmental power when the governors seek to transfer the common wealth of the governed into private hands”).

⁸³ William D. Araiza, *Democracy, Distrust, and the Public Trust: Process Based Constitutional Theory, the Public Trust Doctrine, and the Search for Substantive Environmental Value*, 45 *UCLA L. Rev.* 385, 404 (1997).

⁸⁴ Ryan, *supra* n. 81, at 486.

⁸⁵ Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resource: Questioning the Public Trust Doctrine*, 71 *Iowa L. Rev.* 631, 712–13 (1986); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 *Envtl. L.* 527 (1989); Richard Stewart, *Judicial Review of EPA Decisions*, 62 *Iowa L. Rev.* 713, 714–21, 762–69 (1977); Carole M. Rose, *Joseph Sax and the Idea of Public Trust*, 25 *Ecol. L. Q.* 351, 356 (1998).

⁸⁶ Sax, *supra* n. 77, at 495 (stating that

public officials are frequently subjected to intensive representations on behalf of interests seeking official concessions to support proposed enterprises. The concessions desired by those interests are often of limited visibility to the general public so that public sentiment is not aroused; but the importance of the grants to those

sions reflect private concerns, not the public interest. Such decisions should not be granted a presumption of regularity but should be subject to heightened judicial scrutiny to ensure the protection of public trust resources.⁸⁷

BOG policies regarding wolf killing must be subject to heightened judicial scrutiny. Sax identified four situations that demand heightened judicial scrutiny because they have "not been properly handled at the administrative or legislative level."⁸⁸ They are: 1) when public property has been disposed of at less than market value; 2) when private interests have been granted the authority to make public resource use decisions; 3) when there has been an attempt to relegate diffuse public uses to private use or to public uses with less breadth; and 4) when the natural resource is not being used for its natural purpose.⁸⁹ The policies regarding wolf killing meet the second, third, and fourth criteria.

The public trust doctrine reasserts the doctrine of "equal protection of the laws' . . . that pertains specifically to natural resource management" in Alaska.⁹⁰ The doctrine can be analogized to constitutional law scholar John Ely's representation reinforcing theory of equal protection.⁹¹ Ely argues that there should be strong judicial review of legislation burdening certain groups that prejudice their ability to fully participate in the political process.⁹² Public trust resources, particularly wolves, should be treated like "discrete and insular minorities"⁹³ and should receive heightened judicial scrutiny when threatened because of defects in the political process, such as BOG capture.⁹⁴ The BOG has essentially granted hunters and trappers a monopoly over public trust resources, in violation of the Alaska Constitution, by consistently favoring consumptive users (hunters and trappers) over non-consumptive users (conservationists and environmentalists).

Judicial protection of public trust resources would have loosened the hold of hunters and trappers over the BOG policies. Some commentators argue that public interest litigation establishes destabilization

who seek them may lead to extraordinary vigorous and persistent efforts. It is in these situations that public trust lands are likely to be put in jeopardy and that legislative watchfulness is likely to be at the lowest levels.)

⁸⁷ Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 Land & Water L. Rev. 23, 57 (2000); Bader, *supra* n. 43.

⁸⁸ Sax, *supra* n. 77, at 562. See also Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 Harv. Envtl. L. Rev. 393, 411-14 (1991) (arguing, "Through interpretation and expansion of the common law public trust doctrine, state courts are identifying governmental duties to redefine existing private property rights where such rights may threaten the ecological value of natural areas.").

⁸⁹ Sax, *supra* n. 77, at 562-65.

⁹⁰ Harrison, *supra* n. 33, at 141.

⁹¹ Araiza, *supra* n. 83, at 405-24.

⁹² *Id.* at 405-07.

⁹³ *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

⁹⁴ Horner, *supra* n. 87, at 73.

rights, which are defined as the "claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability."⁹⁵ Similarly, judicial intervention may have destabilized the BOG's and consumptive users' expectations and made them more willing to negotiate with non-consumptive users.

C. *The Alaskan Wolf War*

1. *The Territory of Alaska*

In the early 20th century, there was indiscriminate killing of wolves in the territory of Alaska.⁹⁶ The wolf was viewed as an evil predator of game, a competitor for food, and a valuable furbearer.⁹⁷ The first territorial bounty of \$10 per wolf was established in 1915.⁹⁸ Reported wolves harvested progressed from less than 100 at the turn of century, to 100 to 300 before the 1920s, and to 350 to 1,000 from 1923 to 1959.⁹⁹ The practice of paying bounties for dead wolves continued until 1968, and even later in some areas.¹⁰⁰

Predator control in the territory of Alaska was conducted by territorial legislatures and the federal government beginning in 1915.¹⁰¹ The Predator and Rodent Control (PARC) branch of the Biological Survey conducted aggressive wolf control in the Alaska territory in 1948 to increase game populations.¹⁰² Poisons, bounties, aerial shooting, and year-round trapping were utilized to maximize the number of wolves killed.¹⁰³ Poisons were effective but killed other wildlife.¹⁰⁴ In the 1950s, public outcry over the rampant use of poisons for predator control forced state wildlife officials to begin to reexamine the role of the wolf in game management.¹⁰⁵

⁹⁵ Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1020 (2004).

⁹⁶ T. W. Clark et al., *Crafting Effective Solutions to the Large Carnivore Conservation Problem*, 10 Conserv. Biology 940, 944 (1996).

⁹⁷ Robert A. Rausch & Robert A. Hinman, *Wolf Management in Alaska—An Exercise in Futility?*, in *Proceedings of the 1975 Predator Symposium* 147, 147–49 (Robert L. Phillips & Charles Jonkel eds., U. Mont. 1977).

⁹⁸ Samuel Harbo & Frederick Dean, *Historical and Current Perspectives on Wolf Management in Alaska*, in *Wolves in Canada and Alaska: Their Status, Biology, and Management* 51, 52 (Ludwig Carbyn ed., Can. Wildlife Serv. 1981).

⁹⁹ Natl. Research Council, *Wolves, Bears, and their Prey in Alaska* 29 (Norman Grossblat ed., Natl. Acad. Press 1997).

¹⁰⁰ Harbo & Dean, *supra* n. 98.

¹⁰¹ Natl. Research Council, *supra* n. 99.

¹⁰² *Id.*

¹⁰³ Rausch & Hinman, *supra* n. 97, at 148.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

2. *Governors Egan (D-1959–1966, 1970–1974), Hickel (R-1966–1969), and Hammond (R- 1974–1982)*

In the early 1960s, critics of predator control policies were appointed to state agencies and local boards.¹⁰⁶ The ADF&G instituted new policies after it determined that ungulates should be viewed as an underutilized game resource.¹⁰⁷ The poisoning of wolves ended in 1960, and PARC's role decreased.¹⁰⁸ In 1963, the wolf was classified as a furbearer and big game animal.¹⁰⁹ Administrative regulations governing the harvesting, hunting seasons, and bag limits provided protection for the wolves.¹¹⁰ In 1968, the state legislature authorized the ADF&G to abolish bounties in the twenty-six GMUs.¹¹¹ By 1975, bounties on wolves had been abolished except in three GMUs in southeast Alaska.¹¹² Comprehensive state management during the 1960s allowed the wolf to return throughout Alaska.¹¹³

Alaska's wolf control in 1960s and 1970s consisted of both aerial shooting and "land-and-shoot" hunting—tracking by plane, landing, and then shooting the animal. Both practices were legal for anyone holding a trapping or hunting license.¹¹⁴ The use of aircraft to kill wolves resulted in "artificially high populations of moose and caribou."¹¹⁵ In 1969, NBC aired the documentary "Wolves and the Wolf Men," which depicted the aerial killing of wolves in Alaska.¹¹⁶ The resulting public outrage prompted Congress to enact the federal Airborne Hunting Act (AHA) in November 1971,¹¹⁷ which made aerial hunting illegal except with a state permit.¹¹⁸ However, this exception was virtually big enough to "swallow up the law."¹¹⁹ Pursuant to this loophole, Alaska continued to issue aerial hunting permits in 1971 and 1972, which infuriated wolf control opponents.¹²⁰ The ADF&G eventu-

¹⁰⁶ Natl. Research Council, *supra* n. 99, at 30.

¹⁰⁷ Rausch & Hinman, *supra* n. 97, at 149.

¹⁰⁸ Natl. Research Council, *supra* n. 99, at 30; Rausch & Hinman, *supra* n. 97, at 149.

¹⁰⁹ Rausch & Hinman, *supra* n. 97, at 149.

¹¹⁰ *Id.* at 149–50.

¹¹¹ Natl. Research Council, *supra* n. 99, at 15, 30.

¹¹² *Id.* at 30; Rausch & Hinman, *supra* n. 97, at 149.

¹¹³ Rausch & Hinman, *supra* n. 97, at 149–50.

¹¹⁴ Defenders of Wildlife, *History of Wolf Control in Alaska*, http://www.defenders.org/programs_and_policy/wildlife_conservation/imperiled_species/wolves/wolf_recovery_efforts/alaska_wolves/background/history_of_wolf_control_in_alaska/ (last accessed Apr. 11, 2009).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 16 U.S.C. § 742j-1 (2000). The AHA was amended in October 1972 to grant the Secretary of Interior enforcement authority. Pub. L. 92-502, 86 Stat. 905 (Oct. 18, 1972).

¹¹⁸ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

¹¹⁹ Thomas G.P. Guilbert, *Wildlife Preservation Under Federal Law*, in *Federal Environmental Law* 550, 582 (Erica L. Dolgin & Thomas G.P. Guilbert eds., West 1974).

¹²⁰ Rausch & Hinman, *supra* n. 97, at 150–51.

ally curtailed the permits in 1972,¹²¹ but there was still much illegal hunting.¹²²

Environmental consciousness grew nationwide during the 1960s and 1970s, in part as a result of the criticism of federal predator control.¹²³ The Leopold Report in 1964 urged the end of indiscriminate poisoning of wildlife on public lands.¹²⁴ Echoing a similar sentiment, the Cain Report in 1971 recommended the regulation of hunting of wildlife from aircraft and called "for long term research on predator ecology . . . [and the] socio-economic costs and benefits of predation," studies of "alternative[s] or supplement[s] to predator control," and the "elimination of the financial and operational partnership between governmental and private interests in predator control programs."¹²⁵

In the 1970s, Congress enacted new federal statutes, such as the Endangered Species Act,¹²⁶ to protect wildlife. The wolf was listed as an endangered species in 1974, but not in Alaska.¹²⁷ Policies regarding carnivores were changing from eradication to preservation.¹²⁸ Environmental groups concerned with non-consumptive policies, such as recreation, preservation, and ecosystem maintenance, emerged and wanted to participate and influence the BOG's policies.¹²⁹ When environmental groups failed to influence the BOG's policies through the administrative process, they resorted to the courts.¹³⁰

a. State Court Supports Wolf Killing

Alaska experienced severe winters with deep snow in the early 1970s.¹³¹ This resulted in a sharp decrease in prey populations, which was blamed in part on wolf predation.¹³² There was a clamor for greater wolf control, even though other factors such as winter mortality and hunting were responsible for the decline in prey.¹³³ In January 1975, the ADF&G announced plans to conduct aerial hunting of wolves in a 24,000 square mile area known as Tanana Flats.¹³⁴ The ADF&G's new plan was to kill up to 80% of the wolf population, which was esti-

¹²¹ *Id.* at 151.

¹²² Bruce Hampton, *The Great American Wolf* 229 (Owl Book 1997).

¹²³ Michael Bean, *The Evolution of National Wildlife Law* 265-66 (Envtl. L. Inst. 1977).

¹²⁴ H.R. Subcomm. on Fisheries and Wildlife Conserv., Comm. on Merchant Marine and Fisheries, *Predatory Mammals and Endangered Species* H.R. 689, 92d Cong. 506 (Apr. 11, 1972); Bean, *supra* n. 123, at 266-69.

¹²⁵ Bean, *supra* n. 123, at 266-69.

¹²⁶ *Endangered Species Act of 1973*, Pub. L. No. 93-205, § 1, 87 Stat. 884, 884 (1973).

¹²⁷ 39 Fed. Reg. 1157 (Jan. 4, 1974).

¹²⁸ Clark et al., *supra* n. 96, at 945.

¹²⁹ Decker, *supra* n. 70, at 72-76; Natl. Research Council, *supra* n. 99, at 191.

¹³⁰ Nie, *State Wildlife Governance*, *supra* n. 3, at 201-03, 205-06.

¹³¹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

¹³² *Id.*

¹³³ Harbo & Dean, *supra* n. 98, at 56.

¹³⁴ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

mated to be between 136 to 272 animals.¹³⁵ The plan raised significant concerns among wildlife and conservation advocates because scientific research suggested that killing wolves affects the

size, number, stability, and persistence of family-group social units (packs); on reproductive, hunting, and territorial behavior; on the role of learning and related traditions in wolf packs; . . . on within-group and between-group patterns of genetic variation; and on overall mortality.¹³⁶

Defenders of Wildlife (DOW), a wildlife conservation organization, filed suit in state court in February 1975, seeking an injunction to stop the plan.¹³⁷ This was classic public interest litigation.¹³⁸

In March 1975, in *Cordano v. ADF&G*, Alaska Superior Court Judge Edmonde W. Burke stopped the plan because the regulations had not been promulgated in compliance with the Alaska APA.¹³⁹ The court did not "question the wisdom of the measures proposed" or "prevent the department from utilizing other means authorized by law to accomplish a better balance between the species involved."¹⁴⁰ Rather, it merely suggested certain alternative measures that might be considered, stating, "The final decision, of course, is properly left to those charged with the responsibility of managing Alaska's natural resources . . ."¹⁴¹ After the *Cordano* decision, the ADF&G maintained the position that aerial permits could still be issued to private individuals, and ADF&G personnel could take an unlimited number of wolves for scientific purposes.¹⁴²

Although the Alaska Supreme Court had previously recognized the state's public trust responsibilities for protecting natural resources,¹⁴³ the *Cordano* court did not base its decision on the public trust doctrine.¹⁴⁴ The court simply deferred to agency expertise and reviewed the administrative decision to ensure that the proper procedures were followed.¹⁴⁵ The court's adherence to procedure, particularly public involvement, reflected New York University School of Law

¹³⁵ *Id.*

¹³⁶ Natl. Research Council, *supra* n. 99, at 51.

¹³⁷ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

¹³⁸ See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) (describing the development and characteristics of public interest litigation in the United States).

¹³⁹ Rausch & Hinman, *supra* n. 97, at 153-54.

¹⁴⁰ *Id.* at 154.

¹⁴¹ *Id.*

¹⁴² Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

¹⁴³ The Alaska Supreme Court recognized state public trust responsibilities in *Metlakatia Indian Community v. Egan*, 362 P.2d at 915 (stating that "these migrating schools of fish, while in inland waters, are the property of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state"); *Herscher v. State*, 568 P.2d at 1003 (noting the state acts "as trustee of natural resources for the benefit of its citizens").

¹⁴⁴ Rausch & Hinman, *supra* n. 97, at 154.

¹⁴⁵ *Id.*

professor Richard Stewart's "interest representation" model.¹⁴⁶ Stewart pointed out that courts' roles in environmental litigation should be limited to ensuring that all concerned interests are granted access to the administrative process when they otherwise may be excluded.¹⁴⁷ Yet the weakness of the interest representation model is that it fails to address agency capture. Concerned interests are heard but the agency decision does not implement the public interest.¹⁴⁸ The *Cordano* court should have invoked the public trust doctrine and subjected the BOG decision to heightened review to protect the public trust resource.

b. State Wolf Killing on Federal Lands

Alaska authorized the killing of wolves on federal lands in the mid- and late- 1970s.¹⁴⁹ Environmental groups brought suits to halt the wolf killings, asserting violations of the National Environmental Policy Act (NEPA)¹⁵⁰ and the Federal Land Policy and Management Act (FLPMA).¹⁵¹ In a series of decisions known collectively as the *Alaska Wolf Kill Litigation*, federal courts held that the Secretary of Interior had the authority pursuant to FLPMA to halt the state wolf killings on federal lands, but such authority was discretionary.¹⁵² Furthermore, the courts held environmental impact statements pursuant to NEPA were not warranted because there was no federal action.¹⁵³ The federal court decisions were dubious,¹⁵⁴ but comprehensible in light of the ongoing controversy in Alaska dealing with the reservation of public lands pursuant to the Alaska Native Claims Settlement Act

¹⁴⁶ See Richard Stewart, *Judicial Review of EPA Decisions*, 62 Iowa L. Rev. 713, 714 (1977) (arguing that "court decisions that appear to reflect special judicial solicitude for environmental interests must be understood as part of a more general judicial effort to curb perceived agency biases and ensure consideration of the full range of interests affected by agency decisions").

¹⁴⁷ *Id.*

¹⁴⁸ Nie, *State Wildlife Governance*, *supra* n. 3, at 201–02.

¹⁴⁹ George C. Coggins & Parthenia B. Evans, *Predators Rights and American Wildlife Law*, 24 Ariz. L. Rev. 821, 868–71 (1982).

¹⁵⁰ 42 U.S.C. §§ 4321–4343 (1970).

¹⁵¹ 43 U.S.C. §§ 1701–1782 (1976).

¹⁵² *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980); *Alaska v. Andrus*, 429 F.Supp. 958 (D. Alaska 1977), *aff'd*, 591 F.2d 537 (9th Cir. 1979); *Defenders of Wildlife v. Andrus*, 9 Env. Rep. Cas. (BNA) 2111 (D.D.C. 1977). For a chronology and descriptions of these cases, see Coggins & Evans, *supra* n. 149.

¹⁵³ *Id.*

¹⁵⁴ Coggins & Evans, *supra* n. 149, at 170 (stating that "the [*Alaska Wolf Kill Litigation*] . . . is riddled with false certainty. The court left open more important questions, and it ignored the potential dangers it created").

(ANCSA).¹⁵⁵ This conflict became part of the Sagebrush Rebellion, which focused on the federal control over western public lands.¹⁵⁶

3. *Governors Hammond (R-1974–1982) and Sheffield (D-1982–1986)*

The BOG continued wolf control in six areas in 1980 and 1981 to “rehabilitate and restore depressed ungulate populations.”¹⁵⁷ During that winter, 113 wolves were taken by the ADF&G and private hunters.¹⁵⁸ Between 1981 to 1982, the BOG authorized wolf killing in six areas, and eighty-five wolves were killed.¹⁵⁹ Public input into the 1982 plan was extremely limited, with less than a twenty-four hour period for written public comments.¹⁶⁰ The Alaska Wildlife Alliance (AWA) filed a complaint with the state ombudsman in the spring of 1982, claiming the BOG violated Alaska’s APA, which requires the BOG to authorize predator control through the promulgation of regulations.¹⁶¹ The ombudsman agreed that regulations were required, but the BOG and the ADF&G refused to stop the killing of wolves.¹⁶² The AWA then filed a lawsuit seeking a preliminary injunction to halt the killing of the wolves.¹⁶³ In December 1983, the Alaska Superior Court

¹⁵⁵ The Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601–1628 (1971), began the settlement of aboriginal claims and the establishment of major public land reservations. ANCSA directed the Secretary of Interior to withdraw eighty million acres of federal land from all appropriation and report his recommendations to Congress for possible inclusion into public land management systems. The Secretary had two years to make his recommendations regarding these lands. Congress was instructed to act on the recommendations by December 1978 or the lands would revert back to their prior status. 43 U.S.C. §§ 1601–1628 (1971). The final designations were made in the Alaska National Interest Land Act (ANILA), 16 U.S.C. 3120 (1980). For background information on ANCSA and ANILA, see Gigi Berardi, *The ANCSA-Whose Settlement Was It?*, 25 J. Land, Resources, & Envtl. L. 131, 132–33 (2005); Glenn E. Cravez, *The Alaska National Interest Lands Conservation Act: Directing the Great Land’s Future*, 10 Alaska L. Rev. 33, 34–35 (1980); Julie Lurman, *Subsistence at Risk: Failure to Act and NEPA Compliance in Post-ANILCA Alaska*, 36 Envtl. L. 289 (2006).

¹⁵⁶ There was resentment over ANILCA in Alaska, which gave rise to the Tundra Rebellion, Alaska’s version of the Sagebrush Rebellion. In 1982, Alaska residents voted by almost a three-to-one margin for a ballot initiative that called for the transfer of public lands to the state. Gerald A. Mcbeath & Thomas A. Morehouse, *Alaska Politics & Government* 87 (U. Alaska Press 1994). The initiative also specifically recognized the public trust doctrine, stating “all land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the benefit of the people.” Cook, *supra* n. 16, at 34. For background on the Sagebrush Rebellion, see R. MacGregor Cawley, *Federal Land, Western Anger: The Sagebrush Rebellion & Environmental Politics* (U. Press of Kansas 1993).

¹⁵⁷ Robert O. Stephenson et al., *Wolf Biology and Management in Alaska 1981-92, in Ecology and Conservation of Wolves in a Changing World* 43, 50 (Ludwig N. Carbyn, Steven H. Fritts & Dale R. Seip eds., Canadian Circumpolar Inst. 1995).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 51.

¹⁶⁰ Hampton, *supra* n. 122, at 233; Stephenson, *supra* n. 157, at 51.

¹⁶¹ Stephenson, *supra* n. 157, at 51.

¹⁶² Hampton, *supra* n. 122, at 234.

¹⁶³ *Id.*

granted the preliminary injunction but not until nine wolves had been killed.¹⁶⁴ In March 1984, the BOG adopted a policy that wolf control authorizations must be done through regulations, which require public input.¹⁶⁵ The policy required the wolf control program to be reauthorized every three years, as well as prohibited such control practices as denning and poisoning.¹⁶⁶ Additionally, state wolf control on federal lands had to be approved by the federal agency that managed those lands.¹⁶⁷ AWA believed “it had achieved its goal of forcing public review before control plans could be implemented” and dropped the lawsuit.¹⁶⁸

The new BOG policy did not signify the end of lethal wolf control in Alaska. Later that year, pursuant to the new regulations, the BOG authorized wolf control in the eastern and central interior of Alaska, but only by ADF&G staff.¹⁶⁹ Additionally, the BOG authorized the use of radio collars on wolves for tracking “to increase efficiency of control.”¹⁷⁰ In 1984, the Federal Communications Commission sent a letter to ADF&G, stating that the agency could not use radio telemetry in the wolf control program.¹⁷¹ This generated national controversy about the ethics of wolf control and accusations of federal meddling.¹⁷² In January 1985, Alaska legislators introduced five bills regarding wolf control, which ranged from a proposed total ban on aerial hunting to the establishment of a \$250 bounty.¹⁷³ None of the bills were enacted.¹⁷⁴

4. Governor Cowper (D-1986–1990)

Steve Cowper became governor in December 1986 and prohibited wolf control by the state during his four-year term.¹⁷⁵ However, controversy continued regarding land-and-shoot hunting, which remained a lawful practice.¹⁷⁶ In 1986, AWA and Greenpeace brought suit claiming land-and-shoot was de facto wolf control that should be subject to the Alaska APA requirements.¹⁷⁷ The suit also alleged that the ADF&G was using the land-and-shoot method to circumvent wolf con-

¹⁶⁴ Stephenson, *supra* n. 157, at 51.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Hampton, *supra* n. 122, at 234.

¹⁶⁹ Stephenson, *supra* n. 157, at 51.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 52.

¹⁷² Hampton, *supra* n. 122, at 235.

¹⁷³ Stephenson, *supra* n. 157, at 52.

¹⁷⁴ *Id.*

¹⁷⁵ Wayne L. Regelin, *Wolf Management in Alaska with an Historic Perspective*, http://www.wc.ADFG.state.ak.us/index.cfm?ADFG=wolf.wolf_mgt (last accessed Apr. 12, 2009) (referring to Governor Cowper as Governor “Cooper”).

¹⁷⁶ *Id.*

¹⁷⁷ Stephenson, *supra* n. 157, at 52–53.

trol regulations.¹⁷⁸ The plaintiffs asserted that the BOG should hold hearings to develop plans for land-and-shoot in each GMU.¹⁷⁹ In January 1987, Alaska Superior Court Judge Justin Ripley determined that the land-and-shoot regulations were “reasonably necessary to carry out the board’s authorities to regulate methods and means of harvest . . . that the regulations are not arbitrary and capricious, and that they do not constitute an authorized program of wolf control.”¹⁸⁰ In November 1987, the BOG placed some restrictions on the practice by classifying the method as hunting rather than a trapping practice, and authorizing it only in limited areas.¹⁸¹ Additionally, it restricted hunters’ bounties to a bag limit of ten wolves.¹⁸² In December 1987, the Alaska Supreme Court held that the land-and-shoot was not a form of wolf control and allowed the practice to continue without regulations.¹⁸³

Alaska’s state courts allowed the BOG to circumvent the Alaska APA and its 1984 policy. Private individuals were allowed to kill wolves with extremely limited public input. The courts simply reviewed the exercise of state police power and deferred to the BOG’s expertise. The courts did not inquire as to whether the BOG’s decision violated its public trust responsibility. The courts should have treated the wolves as a “discrete and insular minority”¹⁸⁴ and subjected the BOG’s decision to heightened scrutiny to protect the wolves.

5. Governor Hickel (1-1990–1994)

In 1990, the ADF&G hoped to build a strategic plan to defuse the issue and provide stable predator control through stakeholder participation, which is also known as “collaborative conservation.”¹⁸⁵ Governor Hickel was elected near the end of the strategic planning process, and “the new administration was less willing to share authority for decision-making with a planning team.”¹⁸⁶ In April 1991, Governor Hickel appointed David Kelleyhouse, a strong supporter of wolf con-

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 53.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Stephenson, *supra* n. 157, at 53.

¹⁸⁴ *Carolene Prods. Co.*, 304 U.S. at 153 n. 4.

¹⁸⁵ Nie, *Beyond Wolves*, *supra* n. 75, at 152–53 (stating collaborative conservation

emphasizes the importance of local participation, sustainable natural and human communities, inclusion of disempowered voices, and voluntary consent and compliance rather than enforcement by legal and regulatory coercion. In short, collaborative conservation reaches across the great divide connecting preservation advocates and developers, commodity producers and conservation biologists, local residents, and natural interest groups to find workable solutions to intractable problems that will surely languish unresolved in the existing policy system)

(internal citation omitted).

¹⁸⁶ Regelin, *supra* n. 175.

trol, as ADF&G Director of Division of Wildlife Conservation.¹⁸⁷ Greenpeace characterized the appointment as “our worst nightmare come true.”¹⁸⁸

Stakeholders began meeting in the fall of 1990 and issued their final report in June 1991.¹⁸⁹ In October 1991, the ADF&G made a proposal to the BOG that was based partly on the committee’s recommendations.¹⁹⁰ Seven zones would be established in which wolf management ranged from a total ban to intensive control.¹⁹¹ Land-and-shoot by the public would not be allowed without a state permit.¹⁹² Additionally, the plan set forth that the state would manage the wolf control program in those zones where “sustained high harvests” of prey animals were targeted.¹⁹³ Environmental groups were concerned because they had only agreed that wolf control was necessary when there was an imbalance between prey and predator and such areas would be “no larger than absolutely essential.”¹⁹⁴ This did not include a sustained high harvest yield of prey animals.¹⁹⁵

The majority of Alaska’s citizens opposed wolf control. Two polls by the AWA and Alaska Visitors Association in 1990 demonstrated that 70% of Alaskans opposed it.¹⁹⁶ Despite public opposition, the BOG adopted the ADF&G draft wolf control proposal and, in 1992, approved plans that permitted the killing of 300 to 400 wolves in the first year in the three large areas in Alaska’s eastern interior, near the Delta, and in the central interior, and 100 to 300 wolves annually for the next three to five years.¹⁹⁷ This would reduce the wolf population by more than 80% in the 20,000 square mile area and increase moose and caribou for sport hunters.¹⁹⁸

Environmentalists throughout the lower forty-eight and Europe felt betrayed and organized a boycott of Alaska tourism.¹⁹⁹ Despite Governor Hickel’s defense of the plan, the tourist boycott gained mo-

¹⁸⁷ Hampton, *supra* n. 122, at 240–41.

¹⁸⁸ *Id.* (internal citation omitted).

¹⁸⁹ Regelin, *supra* n. 175. (The key points of consensus were: 1) the wolf population in Alaska is secure and plentiful; 2) wolves are highly valued; 3) wolves can limit the prey population; 4) no single management scheme will be effective statewide; and 5) zonal management offers best chance of success. There was no consensus on: 1) whether same day airborne hunting of wolves should be allowed; and 2) the circumstances under which wolf control by department personnel would be acceptable and how such control would be implemented.)

¹⁹⁰ Hampton, *supra* n. 122, at 240; Alaska Board of Game, *Strategic Wolf Management Plan for Alaska*, <http://www.boards.ADFG.state.ak.us/gameinfo/regs/9153Abog.pdf> (Oct. 30, 1991) (last accessed Apr. 12, 2009).

¹⁹¹ Hampton, *supra* n. 122, at 240.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (quoting wolf management plan).

¹⁹⁵ *Id.*

¹⁹⁶ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Hampton, *supra* n. 122, at 242.

mentum.²⁰⁰ “[The] boycott . . . already cost the state’s tourist industry, valued in 1992 at approximately \$1.1 billion, between \$100 and \$150 million.”²⁰¹ In comparison, Alaska’s hunters only contributed \$67 million per year to the state’s economy.²⁰² After a futile wolf summit in January 1993, the BOG withdrew the 1992 plan and “postponed any further discussion of wolf control until summer.”²⁰³ Some BOG members protested that environmentalists were holding Alaska as an “economic hostage” and threatened to open the entire state to wolf control in the future.²⁰⁴

a. State Court Supports BOG Policies

In June 1993, the BOG readopted the land-and-shoot policy in the trapping regulations.²⁰⁵ Any Alaskan resident could legally kill wolves simply by “holding a \$15 trapping permit, shooting during trapping season, and walking at least 100 yards from the plane before opening fire.”²⁰⁶ The new regulations further allowed wolf killing state wide and imposed no bag limit on the number of wolves that could be killed.²⁰⁷ In addition, the BOG extended the trapping season until the end of April. This was intended to increase the number of wolves killed by providing favorable conditions of longer days and often deep snow ideal for tracking.²⁰⁸ In the 1993 to 1994 season, more than “1,500 of the estimated 5,000 to 7,000 wolves in Alaska” were killed—a twenty-year record high.²⁰⁹

The DOW and four other groups filed suit in state court, challenging the new regulations.²¹⁰ In August 1994, the Alaska Superior Court rejected the DOW’s motion for summary judgment despite three FWS officials testifying in court documents in support of the DOW’s action.²¹¹ Nevertheless, in September 1994, the FWS stopped aerial hunting in National Wildlife Refuges, which constitute 20% of Alaska.²¹² The National Park Service also ended wolf killings in national parks.²¹³ This excluded the killing of wolves on 33% of the land

²⁰⁰ *Id.*

²⁰¹ *Id.* at 243.

²⁰² Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

²⁰³ Hampton, *supra* n. 122, at 244.

²⁰⁴ *Id.*

²⁰⁵ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114. See generally Ostrosky, 667 P.2d at 1191 (rejecting arguments in favor of the motion).

²¹² Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114; Hampton, *supra* n. 122, at 247.

²¹³ *Id.*

in Alaska.²¹⁴ Federal officials felt Alaska's wolf killing violated the AHA.²¹⁵

b. Intensive Management

In July 1994, the Alaska legislature passed and Governor Hickel signed an intensive management law.²¹⁶ This law was supported by hunting and trapping interests, but opposed by the ADF&G.²¹⁷ The intensive management law establishes hunting as the dominant purpose for wildlife management and that the best use of wildlife is for human benefit.²¹⁸ The law dictates that caribou and moose populations must be restored to previously attained historically high levels.²¹⁹ However, such peak populations, which resulted from large scale predator control in the 1950s and 1960s, are unsustainable and restoring them is unattainable.²²⁰ If current prey populations are not sufficient to meet human consumptive needs, the state may not respond by lowering harvest levels or implementing conservation measures unless accompanied by intensive management practices.²²¹ The intensive management law codified the older discredited view that it is necessary to kill wolves to boost game populations.²²² The ADF&G and the BOG were mandated to kill wolves.²²³ The bill's sponsor, Senator Bert Sharp (R), declared that his intent was "to force the BOG to adopt regulations and practices that would reallocate moose and caribou from consumption by predators (such as wolves) to consumption by humans."²²⁴

The intensive management statute violates the state's public trust duty to "equitably and wisely regulate the harvest" of Alaska's wildlife.²²⁵ The public trust doctrine imposes a fiduciary duty on the state

²¹⁴ Hampton, *supra* n. 122, at 247.

²¹⁵ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114; Hampton, *supra* n. 122 at 247; Ostrosky, 667 P.2d at 1191.

²¹⁶ Regelin, *supra* n. 175.

²¹⁷ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

²¹⁸ Regelin, *supra* n. 175.

²¹⁹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

²²⁰ *Id.*

²²¹ Alaska Stat. § 16.05.255(f) (Lexis 2008); Julie Lurman & Sanford P. Rabinowitch, *Preemption of State Wildlife Law in Alaska: Where, When, and Why*, 24 Alaska L. Rev. 145, 154–58 (2007).

²²² Lurman & Rabinowich, *supra* n. 221, at 155–56. The regulations stress that hunters' demand for big game is one of the four criteria for "identifying big game prey populations that are important for providing high levels of human consumptive uses." Alaska Admin. Code tit. 5, § 92.106(1)(D) (1998). The regulations also require the BOG to "utilize active management of habitat and predation as the major tools to reverse any significant reduction in the allowable human harvest of the population." *Id.* at § 92.106(6).

²²³ Hampton, *supra* n. 122, at 246–47.

²²⁴ Order at 19, *Defenders of Wildlife v. St. of Alaska*, No. 3AN-06-10956 CI (Alaska Super. Order Issued Mar. 13, 2008).

²²⁵ See *Metlakatla Indian Community*, 362 P.2d at 915 (finding that wild fish are "property of the state, held in trust for the benefit of all the people of the state, and the

to protect resources for future generations.²²⁶ The doctrine is an “affirmative instrument” that links protection of the biotic community with resource utilization.²²⁷ Biotic systems are too complex to focus on a single component, so the concern must be on the ecosystem.²²⁸ The healthier the ecosystem, the greater the long term human gain that can be derived from the natural resources.²²⁹ Disruptions in the ecosystem cause environmental instabilities that diminish nature’s ability to establish food chains, cycle nutrients, maintain air and water quality, control the climate, maintain the soil, dispose of waste, pollinate crops, and control pests and disease.²³⁰ Robert Costanza, director and founder of the Gund Institute for Ecological Economics at the University of Vermont, estimated the value of ecosystem services in the range of \$16 to \$54 trillion per year.²³¹ The intensive management statute, which eliminates predators to increase prey for hunters and trappers, creates a pathological condition that denigrates the habitat and diminishes the future value of public trust resources.²³²

The elimination of the wolf, a critical link in the ecosystem, causes a trophic cascade that disrupts the ecological balance.²³³ The wolf, which is a summit predator, sustains biological diversity and maintains ecological balance.²³⁴ In particular,

obligation and authority to equitably and wisely regulate the harvest is that of the state”).

²²⁶ Cook, *supra* n. 16, at 30–34.

²²⁷ Bader, *supra* n. 43, at 750.

²²⁸ *Id.* at 756. The ecosystem is defined as “community of organisms interacting with one another and with the chemical and physical factors making up their environment.” Jacqueline Lesley Brown, *Preserving Species: The Endangered Species Act versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform*, 12 J. Envtl. L. & Litig. 151, 228–29 (1997).

²²⁹ Bader, *supra* n. 43, at 756–57; Rieser, *supra* n. 88, at 418–22.

²³⁰ Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 Wm. & Mary Envtl. L. & Policy Rev. 227, 236–44 (1998). See also Paul Ehrlich & Anne Ehrlich, *Extinction: The Causes and Consequences of the Disappearance of Species* 86–95 (Ballantine Books 1981) (providing examples of how disruptions in ecosystem affect nature).

²³¹ Robert Costanza et al., *The Value of the World’s Ecosystem Services and Natural Capital*, 387 Nature 253, 253 (1997) (available at http://www.uvm.edu/~giee/publications/Nature_Paper.pdf) (last accessed Apr. 12, 2009). Costanza noted that: “[Because] ecosystem services are not fully ‘captured’ in commercial markets or adequately quantified in terms comparable with economic services and manufactured capital, they are often given too little weight in policy decisions. This neglect may ultimately compromise the sustainability of humans in the biosphere. The economies of the Earth would grind to a halt without the services of ecological life-support systems, so in one sense their total value to the economy is infinite.” *Id.*

²³² See Stephen Stringham, Alaska Wildlife Alliance, *Misuse of Public Funds?*, www.akwildlife.org/content/view/121/61 (last accessed Apr. 12, 2009) (providing a detailed critique of intensive management).

²³³ Mark Hebblewhite et al., *Human Activity Mediates A Trophic Cascade Caused By Wolves*, 86 Ecology 2135, 2143 (2005).

²³⁴ Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 Vill. Envtl. L.J. 1, 19–28 (2002). See also John Terborgh et al., *The Role of Top Carnivores in Regulating Terrestrial Ecosystems*, in *Continental Conservation: Scientific Foundations of Regional Re-*

[The] wolf helps its prey by providing for 1) sanitation-(removal of diseased animals to prevent epidemics); 2) natural selection (culling of deformed or genetically inferior animals before reproduction); 3) stimulation of prey productivity (acceleration of reproduction rates among prey through higher twinning and fertility); and 4) population control (maintenance of prey populations that can be supported by the habitat, protecting against overgrazing and erosion.).²³⁵

The wolf benefits the ecosystem.²³⁶ When wolves make a kill, sustenance is provided for the entire food chain.²³⁷ After the wolves are finished, scavengers take their share of the kill.²³⁸ Insects clean the carcass.²³⁹ Birds come to feed on the insects.²⁴⁰ The wolves also maintain the balance among predators.²⁴¹ Wolves limit the coyote population, which grows in their absence.²⁴² This leaves much of the coyote's prey, mainly small rodents, for predatory birds such as hawks, eagles, and owls.²⁴³ The diminution of coyotes helps the fox because coyotes will occasionally kill foxes that compete with them for food.²⁴⁴ The wolves also help plant regeneration and diversity by discouraging profligate grazing by their prey.²⁴⁵

6. Governor Knowles (D-1994–2002)

Governor Tony Knowles, who was inaugurated in December 1994,²⁴⁶ cancelled the state's wolf killing program because of its poor design as well as in response to a provocative video that showed a wolf biting off its leg in a snare.²⁴⁷ The state-sponsored program resulted in the killing of 134 wolves prior to its suspension.²⁴⁸ Governor Knowles declared that wolf control would have to be cost effective, scientifically

serve Networks 39, 64 (Michael E. Soulé & John Terborgh eds., Island Press 1999) (discussing the interaction between gray wolves, moose and balsam firs in Michigan).

²³⁵ Edward A. Fitzgerald, *Lobo Returns from Limbo: New Mexico Cattle Growers Assn. v. U.S. Fish & Wildlife Serv.*, 46 Nat. Resources J. 9, 60 (2006).

²³⁶ Hebblewhite, *supra* n. 233, at 2135; *see also* Terborgh, *supra* n. 234 (discussing predation and the maintenance of biodiversity); William S. Boyd, *Federal Protection of Endangered Wildlife Species*, 22 Stan. L. Rev. 1289, 1290 (1970) (arguing that species loss has damaging effects on ecosystems).

²³⁷ Craig R. Enochs, *Gone Today, Here Tomorrow: Policies and Issues Surrounding Wildlife Reintroduction*, 4 W.N.W. L. Rev. 91, 99 (1997).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Nina Fascione et al., *People and Predators* 4 (Island Press 2004).

²⁴⁴ *Id.* at 125.

²⁴⁵ Stringham, *supra* n. 232. This phenomenon is known as a "trophic cascade." Ken Kostel, *A Top Predator Roars Back*, 26 On Earth 6 (2004) (available at <http://www.nrdc.org/onearth/04sum/briefings.asp>) (last accessed Apr. 12, 2009).

²⁴⁶ Ralph Thomas, *Knowles Takes Charge: Democrat Sworn in as Alaska Governor*, Anchorage Daily News A1 (Dec. 6, 1994).

²⁴⁷ Hampton, *supra* n. 122, at 248.

²⁴⁸ Steve Rinehart, *Knowles Scrubs Wolf-Kill Project*, Anchorage Daily News A1 (Feb. 4, 1995).

valid, and acceptable to the public.²⁴⁹ He also requested a study by the National Academy of Science (NAS) of wolf control in Alaska and called for a stakeholder meeting.²⁵⁰ David Kelleyhouse, the head of ADF&G Wildlife Conservation, resigned and took a position as the fur industry spokesman.²⁵¹ Governor Knowles' actions were not well received by the Republican state legislature.²⁵² A proposed bill offered a \$200 bounty for a dead wolf.²⁵³

In October 1997, the NAS released its study, which was critical of predator control in Alaska²⁵⁴ and concluded that "shortcomings in the design of past predator control programs make it impossible to determine whether wolf or bear reduction programs are effective in the long term."²⁵⁵ Following the NAS recommendations, the ADF&G implemented nonlethal wolf control program to rebuild the 40-mile caribou herd.²⁵⁶ From November 1997 until April 2001, the ADF&G sterilized alpha males and females in the control area and moved subdominant wolves to other areas.²⁵⁷ The caribou herd increased from 22,000 to 38,000 during this period.²⁵⁸ The nonlethal program was not as controversial as lethal control.²⁵⁹

a. *Direct Assault on the Hunter/Trapper Monopoly*

In 2001, the Alaska Wildlife Alliance (AWA) filed an unsuccessful lawsuit, challenging the alleged hunter/trapper monopoly of the BOG.²⁶⁰ The AWA alleged that the composition of BOG violated the Alaska Constitution and Alaska Statute 16.05.221(b)²⁶¹ because all its members were hunters, trappers, hunting guides, or other supporters

²⁴⁹ Hampton, *supra* n. 122, at 248.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 248–50.

²⁵⁴ See National Research Council, *supra* n. 99, at 1–27 (summarizing the NRC conclusions and recommendations).

²⁵⁵ *Id.*

²⁵⁶ CBCnews.ca, *Biologists Hail Results of Wolf-Control Program*, <http://www.cbc.ca/canada/north/story/2004/02/10/feb10wolfcontrol10022004.html> (last accessed Apr. 12, 2009).

²⁵⁷ Gordon C. Haber, *Biological, Conservation, and Ethical Implications of Exploiting and Controlling Wolves*, 10 *Conservation Biology* 1068 (1996).

²⁵⁸ Alaska Dept. of Fish and Game, *Fortymile Caribou Herd Harvest Plan 2006-2012*, 2–3 (2006).

²⁵⁹ Haber, *supra* n. 257, at 1068.

²⁶⁰ Alaska Wildlife Alliance, *Hunter/Trapper Monopoly*, *The Spirit* 19:1 (2000–2001).

²⁶¹ 2 Alaska Stat. § 16.05.221(b) (Lexis 2008) (stating,

For purposes of the conservation and development of game resources of the state, there is created a BOG composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The governor shall appoint each member on the basis of interest in public affairs, good judgment, knowledge, and ability in the field of action of the board, and with a view to providing the diversity of interest and points of view in the membership.)

of those interests.²⁶² The AWA asserted that the BOG composition violated the requirement of “diversity of interest and points of view,” and the “trust duty and . . . fiduciary obligation” under the common use clause of Article VIII of the Alaska Constitution.²⁶³ The AWA further asserted that failure to include representatives of non-consumptive interests violated the uniform application section of Article VIII of the Alaska Constitution.²⁶⁴ The common use clause required nongame membership on the BOG in its proportion to the population.²⁶⁵ The AWA argued that because hunters only comprised 25% of the Alaska population, they should only occupy two of the seven seats.²⁶⁶ The AWA wanted the BOG composition declared illegal and a new BOG approved under the proper legal grounds.²⁶⁷ The Alaska Superior Court dismissed the suit as a non-justiciable controversy.²⁶⁸

Again, there was no recognition by the court that the BOG had consistently violated its fiduciary duty as trustee to manage the public trust resources for the long term benefit of the public by favoring consumptive over non-consumptive users of wildlife.²⁶⁹ As SuzAnne Miller, former ADF&G biometrician, noted, “Trying to develop wildlife management policies via an official group of hunters [the Board] established to regulate hunting is simply asking for problems.”²⁷⁰

7. Governor Murkowski (R-2002–2006)

Senator Frank Murkowski, a strong supporter of active game management and the killing of wolves, was elected governor in 2002.²⁷¹ In 2003, the Alaska legislature passed and Governor Murkow-

²⁶² *Alaska Wildlife Alliance v. Alaska*, 74 P.3d 201, 203 (Alaska 2003).

²⁶³ *Id.* Article VIII, section 3 of the Alaska Constitution states: “Wherever occurring in their natural state, fish, wildlife, and waters are reserved for the people for common use.”

²⁶⁴ *Alaska Wildlife Alliance*, 74 P.3d at 204 (stating that Article VIII, section 17, Uniform Application: Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purposes to be served by the law or regulation).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 208–09. WLFA President Bud Pidgeon declared, “I am delighted to see that the courts dismissed the antis claim to place non-hunters on the Alaska BOG. The anti-hunters ultimate goal is to force the BOG to lose its purpose and become a propaganda pulpit for the animal rights movement.” U.S. Sportsmen’s Alliance, *Lawsuit Threatening Sportsmen on Alaska’s Board Dismissed* (May 10, 2001).

²⁶⁹ One commentator noted, “One of the most fundamental duties of a trustee and all other fiduciaries is to be loyal to the beneficiaries, to perform every act of trust administration with the sole objective of bringing advantages to the beneficiaries, to refrain from placing himself in any position where his personal interest does or may conflict with the interest of the beneficiaries, and to exclude completely from consideration the welfare and financial gain of third persons.” Horner, *supra* n. 87, at 45 (quoting George Gloason Bogert, *The Law of Trusts and Trustees* § 484, at 343 (2d ed., West 1987)).

²⁷⁰ Nie, *Beyond Wolves*, *supra* n. 75, at 180–81.

²⁷¹ Van Ballenberghe, *Biological Standards and Guidelines for Predator Control in Alaska: Application of the National Research Council’s Recommendations* 7–11.

ski signed a House bill that restricted public access to the state courts.²⁷² The bill adopted the British rule and required “public interest litigants” to pay the opposing parties attorney costs.²⁷³ The Alaska Superior Court held that the bill violated Article IV, section 15, of the Alaska Constitution which requires a two-thirds majority vote in both houses of the state legislature to change court rules. The bill violated the due process and equal protection clauses of the Alaska Constitution by creating an obstacle to public interest litigants that was not superseded by any legitimate state interest.²⁷⁴ The court stated that “awarding fees in this type of controversy will deter citizens from litigating questions of general public concern for fear of incurring the expense of the other party’s attorney’s fees.”²⁷⁵

In late 2003 and early 2004, the BOG expanded its wolf control program to more than 60,000 square miles in five areas.²⁷⁶ Nearly 150 wolves were killed by April 2004, the end of the first aerial gunning season.²⁷⁷ Environmental groups organized a boycott of Alaska’s \$2 billion per year tourist industry, and more than 200,000 people nationwide pledged not to go to Alaska.²⁷⁸ The boycott, however, had limited effect because of federal efforts to encourage tourism post 9/11.²⁷⁹

In 2005, the Alaska legislature attempted to spur predator control by introducing a Senate bill that would have raised hunting fees while requiring an enhancement of game populations and hunting opportunities.²⁸⁰ ADF&G predator control policies had to be approved by the

²⁷² Press Release, Earthjustice. *Court Rules Alaska State Law Illegal* (Apr. 7, 2004) (available at http://www.earthjustice.org/news/press/004/court_rules_alaska_state_law_illegal.html) (last accessed Apr. 12, 2009).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Native Village of Nunapitchuk v. State*, Trial Order, 2004 WL 5190042 (Alaska Super. Apr. 6, 2004) (later overturned on other grounds) (citing *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974)); Earthjustice, *supra* n. 272. Representative Seaton (R), who voted against the bill, stated, “my concerns last year were that the legislation placed too high of a financial barrier on concerned citizens, who were attempting to overturn illegal actions by the state.” Representative Kerttula (D) voted against the bill and declared, “This is about access to justice. It is about whom we let participate in our court system. The Superior Court recognized that there are people who bring cases for the public good and they deserve to be able to do so. Thankfully, the court re-opened the door for the public.” *Id.*

²⁷⁶ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

²⁷⁷ Mary Pemberton, Associated Press, *Aerial Wolf Control Programs Wind Down for Season*, Anchorage Daily News B1 (Apr. 29, 2004).

²⁷⁸ Press Release, Friends of Animals. *Alaska Tourism Boycott Continues* (Nov. 4, 2004) (available at <http://www.friendsofanimals.org/news/2004/november/alaska-tourism-boyco.html>) (last accessed Apr. 12, 2009); Mary Pemberton, Associated Press, *Ad Campaign Aims to Finish Aerial Wolf Kills*, Anchorage Daily News B1 (Apr. 23, 2004).

²⁷⁹ Daniel Hammer, *Outraged by Government-Assisted Shootings, Activists Intervene for Wolves*, Friends of Animals Action Line (Winter 2004–05) (available at <http://www.friendsofanimals.org/actionline/winter-2005/activists-intervene-for-wolves.html>) (last accessed Apr. 12, 2009).

²⁸⁰ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

BOG and aggressive predator control was mandated.²⁸¹ The bill failed to pass through the Republican legislature.²⁸² During the winter of 2004 to 2005, the BOG approved additional predator control in a variety of areas for aerial or land-and-shoot.²⁸³ By April 30, 2005, the close of the season, 276 wolves had been killed by aerial gunning.²⁸⁴

a. State Court Supports BOG Policy

Wolf control opponents continued to bring suit in state court but with little success. The state courts continued to defer to BOG expertise and ignore their constitutional public trust responsibilities. In January 2006, Alaska Superior Court Judge Sharon Gleason halted state wolf control on the grounds that the regulations were not adopted pursuant to Alaska's APA.²⁸⁵ The BOG "had not examined alternatives to wolf control, had not sufficiently evaluated prey population numbers and had failed to meet other procedural requirements."²⁸⁶ The ruling led to a brief cessation of the aerial program.²⁸⁷ The BOG enacted new emergency regulations, which addressed the problems identified by the court. In February 2006, Judge Gleason allowed state wolf control to resume.²⁸⁸

In August 2006, the DOW filed another suit to halt the killing of wolves by land-and-shoot hunting.²⁸⁹ The DOW asserted that BOG changed the intensive game management regulations without the required public notice, so the predator control implementation plans were invalid.²⁹⁰ The DOW claimed that the predator control plans also failed to comply with sustained yield principles as required in applicable statutes, regulations, and the Alaska Constitution.²⁹¹ The DOW pointed out that of the 550 wolves that had been killed during the past three years pursuant to land-and-shoot permits, more than 150 wolves were killed in 2006.²⁹² In January 2007, the Alaska Superior Court

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Defenders of Wildlife v. State of Alaska, Bd. Of Game, & Commr. of Fish and Game*, Case No. 3AN-06-10956 CI and 13087 CI (March 14, 2008) at 20–23 [FOA v. *State of Alaska*, 3 AN-03-13489 CI].

²⁸⁶ *Defenders of Wildlife, History of Wolf Control in Alaska*, *supra* n. 114.

²⁸⁷ *Id.* Alaska was ordered to pay \$95,000 in attorney fees to FOA for its effort to halt predator control. Friends of Animals, *State Ordered to Pay Friends of Animals' Fees*, <http://www.friendsofanimals.org/news/2007/january/state-ordered-to-pay.html> (last accessed Apr. 7, 2009).

²⁸⁸ *Id.*

²⁸⁹ *Defenders of Wildlife, Alaska Wolf: Defenders of Wildlife v. Alaska Board of Game*, http://www.defenders.org/programs_and_policy/in_the_courts/legal_docket/alaska_wolf.php (last updated June 16, 2008) (last accessed Apr. 12, 2009).

²⁹⁰ *Id.* (citing *Defenders of Wildlife v. St. of Alaska, Bd. of Game*, No. 3AN-06-10956, slip op at 25 (Alaska Super. 3d Dist. Mar. 14, 2008)).

²⁹¹ *Id.* at 42–43.

²⁹² Press Release, *Defenders of Wildlife. Defenders of Wildlife Requests Halt in Issuance of Aerial Gunning Permits* (Nov. 20, 2006) (available at <http://www.defenders.org/>)

denied the injunction, allowing the state's predator control plans that covered more than 80 million acres and jeopardized 70 to 80% of wolves in the area to proceed.²⁹³

8. Governor Palin (R-2006–2008)

a. Bounty Restoration

In November 2006, Sarah Palin (R), a strong supporter of intensive game management and aerial killing of predators, defeated former Governor Knowles in Alaska's gubernatorial election.²⁹⁴ The Palin administration attempted to restore bounties on wolves. In March 2007, the ADF&G announced the State Incentive Program (SIP), which paid \$150 for the left foreleg of wolves caught in certain regions.²⁹⁵ Environmental groups brought suit challenging the bounty program.²⁹⁶ The Alaska Superior Court determined that no statutory authority existed to support Governor Palin's bounty.²⁹⁷ The Alaskan territorial law, which allowed game managers to establish bounties for wolves and coyotes, was codified at statehood.²⁹⁸ The legislature repealed almost all bounty authority in 1984.²⁹⁹ The only remaining authority was Alaska Statute § 16.05.255(a)(6), which authorized the BOG to issue regulations for

investigating and determining the extent and effects of predation and competition among game in the state, exercising control measures considered necessary to the resources of the state and designate game management units or parts of game management units in which bounties for predatory animals shall be paid.³⁰⁰

In 1984, the legislature amended Alaska Statute § 16.05.255(a)(6) to allow BOG to decide the "methods, means, and harvest levels necessary to control predation and competition among game in the state."³⁰¹

newsroom/press_releases_folder/2006/11_20_2006_aerial_gunning_permits.php) (last accessed Apr. 12, 2009).

²⁹³ Press Release, Defenders of Wildlife, *Alaska Wolves and Bears Are Still Targets for State's Ill-Advised Aerial Gunning Programs* (Jan 31, 2007) (available at http://www.defenders.org/newsroom/press_releases_folder/2007/01_31_2007_alaska_wolves_and_bears_are_still_aerial_gunning_targets.php) (last accessed Apr. 12, 2009).

²⁹⁴ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

²⁹⁵ Press Release, Alaska Department of Fish and Game, *ADF&G Enhances Predator Control Efforts Commissioner Directs Testing of New Ideas* (Mar. 21, 2007) (available at http://www.ADFG.state.ak.us/news/2007/3-21-07_nr.php) (last accessed Apr. 12, 2009).

²⁹⁶ For a criticism of bounties, see Thomas Lund, *America's Wildlife Law* 32–34 (U. Cal. Press 1980); George Cameron Coggins & Parthenia Blessing Evans, *Predators' Rights and American Wildlife Law*, 24 *Ariz. L. Rev.* 820, 828 (1982).

²⁹⁷ Defenders of Wildlife, *Alaska Wolf: Defenders of Wildlife v. Alaska Board of Game*, *supra* n. 289 (citing *Defenders of Wildlife v. St. of Alaska, Bd. of Game*, No. 3AN-06-10956 CI, slip op. at 6 (Alaska Super. 3d Dist. Mar. 13, 2007)).

²⁹⁸ *Id.* (citing *Defenders of Wildlife*, slip op. at 8–10) (ORDER).

²⁹⁹ *Id.* (citing *Defenders of Wildlife*, slip op. at 3) (TRO).

³⁰⁰ *Id.*

³⁰¹ *Defenders Of Wildlife v. St. of Alaska*, Case No. 3AN-06-10956 CI & 3AN-06-13087 CI.

The court held that the BOG, not the ADF&G, could adopt regulations regarding bounties.³⁰² The court rejected the state's allegations that the SIP was not a bounty program and was authorized under other general statutory provisions.³⁰³ The SIP program was terminated following the court's decision.³⁰⁴

b. Set the BOG Free

Governor Palin continued to pursue aggressive predator control. In the final days of the 2007 legislative session, she introduced the active game management/aerial hunting bill, which would add brown bears to the list of predators that can be shot by private aerial hunters.³⁰⁵ This legislation would end the requirement that predator control must be based on scientific evidence provided by the ADF&G and limit public participation.³⁰⁶ There was no requirement that aerial predator control be part of an existing game management program or be necessary to insure subsistence or to avoid a biological emergency.³⁰⁷ The bill granted the BOG complete discretion regarding predator control.³⁰⁸ The House approved the bill.³⁰⁹

c. State Court Supports BOG Policy

In March 2008, the Alaska Superior Court in a continuation of the 2006–2007 litigation reiterated that the ADF&G lacked statutory authority to offer bounties.³¹⁰ The court held that the BOG did not violate the Alaska APA when it had authorized predator control programs in 2006.³¹¹ The court allowed most of the existing predator control pro-

³⁰² *Id.* at 3–5.

³⁰³ *Id.*; Alaska Stat. § 16.05.050 (a)(1) and (5) (Lexis 2009).

³⁰⁴ Press release, Defenders of Wildlife, *Defenders Pleased as Alaska's Wolf Bounty Ends: Concern as State Targets Black Bears* (Apr. 13, 2007) (available at http://www.defenders.org/newsroom/press_releases_folder/2007/04_13_2007_alaska_wolf_bounty_ends.php) (last accessed Apr. 12, 2009).

³⁰⁵ Mark Richards, Backcountry Hunters and Anglers, Alaska Chapter, *Palin's Active Management/Airborne Shooting Bill* (available at <http://www.alaskabackcountryhunters.org/Palin's%20Active%20Management%20-%20Airborne%20Shooting%20Bill.pdf>) (last accessed Apr. 12, 2009).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Testimony Tom Banks, Defenders of Wildlife, before Alaska State Legislature House Resources Committee (Jan. 30, 2008) (available at <http://www.akwildlife.org/content/view/101/67/>) (last accessed Apr. 12, 2009).

³⁰⁹ Defenders of Wildlife, *One Bill Fails, One Bill Passes, as Legislature Continues to Threaten Alaska's Citizens' Right to Vote on Wildlife Issues*, http://wolfsongnews.org/news/Alaska_current_events_2738.html (Apr. 15, 2008) (last accessed Apr. 12, 2009).

³¹⁰ *Defenders of Wildlife v. St. of Alaska*, Case No. 3AN-06-10956 CI & 3AN-06-13087 CI at 1–17; Trustees for Alaska, *Judge Strikes Down Predator Control and Bounty Programs* (Mar. 14, 2008) (available at http://www.defenders.org/resources/publications/programs_and_policy/in_the_courts/akwolf/judge_strikes_down_predator_control_and_bounty_programs.pdf) (last accessed Apr. 8, 2009).

³¹¹ *Id.*

gram to proceed.³¹² However, it ruled that the BOG did not make the requisite findings when it allowed the same day airborne shooting of wolves in various regions.³¹³ The court held that the sustained yield principle in Article VIII, section 4, of the Alaska Constitution applied to predators, but upheld the BOG's decision.³¹⁴

The state court continued to allow BOG to ignore its public trust responsibility to prevent the degradation of public trust resources. The court specifically noted that deference had to be afforded the BOG wildlife "expertise" because the statute addressed "a specialized field of science."³¹⁵ The court failed to acknowledge that scientists were very critical of BOG wolf killing policies.³¹⁶ In January 2005, 120 scientists sent a letter to Governor Murkowski asserting that the BOG's seven predator control programs were not based on science.³¹⁷ The American Society of Mammalogy³¹⁸ reiterated the same concerns in 2005 and

³¹² The court held that judicial deference should be afforded to administrative game management decisions, stating:

Under this deferential standard, the BOG was properly within its discretion in not managing moose in the KCUA as a distinct game population. We are satisfied with the board's rationale and will not second guess its assessment of the manageability of moose in the KCUA. Such a determination falls within the purview of agency expertise and discretion. The team failed to show that the board's population determinations were not reasonably related to the purposes of the subsistence law, or that they were somehow manipulated to achieve a predetermined outcome. Given the planning effort undertaken by the state . . . we will not overturn a resource management decision simply because one group of resource users believes that a different outcome is more desirable.

Defenders of Wildlife, *Alaska Wolf: Defenders of Wildlife v. Alaska Board of Game*, *supra* n. 289 (citing *Defenders of Wildlife v. St. of Alaska, Bd. of Game*, No. 3AN-06-10956, slip op at 41 (Alaska Super. 3d Dist. Mar. 14, 2008) (citing *Koyukuk Rivers Basin v. Bd. of Game*, 76 P.3d 383, 390 (Alaska 2003))).

³¹³ Defenders of Wildlife, *Alaska Wolf: Defenders of Wildlife v. Alaska Board of Game*, *supra* n. 289 (citing *Defenders of Wildlife*, slip op. at 39).

³¹⁴ The court again invoked a deferential standard of review, stating

The Board must balance economic, ecological, cultural, international, and other policy concerns when it makes decisions about Alaska's fisheries. It must accommodate all of these legitimate interests in the face of substantial scientific uncertainty. Moreover, it is the Board's role to reach this accommodation. Courts are singularly ill-equipped to make natural resource management decisions. Consequently, we do not substitute our judgment for that of the Board.

Defenders of Wildlife, *Alaska Wolf: Defenders of Wildlife v. Alaska Board of Game*, *supra* n. 289 (citing *Defenders of Wildlife v. St. of Alaska, Bd. of Game*, No. 3AN-06-10956, slip op at 48 (Alaska Super. 3d Dist. Mar. 14, 2008) (citing *Native Village of Elim v. State*, 990 P.2d 1, 8-9 (Alaska 1990))).

³¹⁵ Defenders of Wildlife, *Alaska Wolf: Defenders of Wildlife v. Alaska Board of Game*, *supra* n. 289 (citing *Defenders of Wildlife*, slip op. at 36).

³¹⁶ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³¹⁷ *Id.*

³¹⁸ The American Society of Mammalogy was established in 1919 and currently has more than 4,500 members, many of whom are professional scientists. American Society of Mammalogy, *About ASM: An Overview*, <http://www.mammalsociety.org/aboutasm/index.html> (last accessed Apr. 12, 2009).

2006.³¹⁹ In September 2007, 200 scientists wrote to Governor Palin, declaring that: “[We] urge the state of Alaska to consider the ecological role that large predators play in preventing eruptions and crashes [of prey populations], and to consider conservation and preservation of predators on an equal basis with the goal of producing more ungulates for hunters.”³²⁰

Scientists point out that predator control in Alaska is not based on biological science, but political science.³²¹ Alaska’s predator control program does not follow the 1997 NAS recommendations.³²² Predator control program should be based on sound design, adequate monitoring, and insure the long term sustainability of the wolf and ungulate populations and their habitat.³²³ Scientists are particularly critical of Alaska’s intensive management statute, which is based on artificially high ungulate population estimates.³²⁴

The court should have invoked the public trust and subjected the BOG decision to heightened scrutiny and protected the wolves.³²⁵ The court itself recognized that it was required to “consider whether the regulation conflicts with any other state statutes or constitutional provisions.”³²⁶

The BOG made corrections in the programs and the killing of wolves resumed.³²⁷ Priscilla Feral, executive director of Friends of Animals, criticized the BOG actions, declaring that,

When the courts have ruled that the state’s aerial wolf-shooting schemes are breaking the law, within days the Board of Game concocts new rules. Clearly, they make stuff up, their process is a sham and they just want to shoot wolves everywhere in Alaska. This is an abuse of power.³²⁸

The BOG decided to delay any further decisions on predator control until after the August 2008 voter initiative, the Alaska Wolf and Bear

³¹⁹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³²⁰ Defenders of Wildlife, *Defenders Hails Introduction of Bill to End Aerial Hunting of Wolves and Bears in Alaska* http://www.defenders.org/newsroom/press_releases_folder/2007/09_25_2007_defenders_hails_bill_to_end_aerial_hunting_in_alaska.php# (last accessed Apr. 12, 2009).

³²¹ Vic Van Ballenberghe, *Predator Control Programs Are Not Based on Sound Science*, 15-2 International Wolf 10 (Summer 2005); *Contra* Cathie Harms, *Sound Science is Basis for Alaska Wildlife Management*, 15-2 International Wolf 8 (Summer 2005).

³²² National Research Council, *supra* n. 99, at 17–20.

³²³ Ballenberghe, *supra* n. 321, at 9.

³²⁴ *Id.*

³²⁵ Alison Reiser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory* 15 Harv. Envtl. L. Rev. 393, 421; Bader, *supra* n. 43, at 750.

³²⁶ S.J. Or. at 25, *Defenders of Wildlife v. St. of Alaska*, 3AN-06-10956 CI (2008) (citing *Grunert v. State*, 109 P. 3d 924, 929 (Alaska 2005)).

³²⁷ Craig Medred, *Aerial Hunting Program Kills 124; Control: Wildlife Officials Estimate that More than 1400 Moose Saved*, Anchorage Daily News A1 (May 19, 2008).

³²⁸ Friends of Animals, *Wolf Control Program Back Up*, <http://www.friendsofanimals.org/news/2008/march/update-wolf-control.html> (last updated Mar. 28, 2008) (last accessed Apr. 8, 2009).

Protection Act (AWBPA), which would end predator control in the absence of a declared biological emergency.³²⁹

At the end of the 2008 wolf killing season, 124 wolves in six Game Management Units (GMU) were killed.³³⁰ This was fewer than the 407 to 608 wolves sought by state biologists but more than the ninety-seven taken in 2007.³³¹ State officials asserted that 1,400 moose and 3,000 caribou were saved by the aerial killing.³³² Environmentalists claimed these figures, which were the result of a \$1 million per year program, were “overly simplistic and inaccurate.”³³³

III. BALLOT INITIATIVES

Facing insurmountable judicial and political obstacles, Alaskan citizens, following a national trend,³³⁴ resorted to ballot initiatives to constrain the BOG. The Alaska Constitution allows the electorate to directly participate in the legislative process.³³⁵ Article XI, section 1, states “the people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.”³³⁶ Article XI, section 7, declares “the initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.”³³⁷ Article XII provides that “unless clearly inapplicable, the lawmaking powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.”³³⁸

The Alaska ballot initiative process was cumbersome. Article XI, section 2, required 100 voters to propose an initiative.³³⁹ Article XI, section 3, required 10% of the voters in the last election, representing

³²⁹ Tim Mowry, *Board of Game Delays Decisions on Predator Control* (Mar. 6, 2008) (available at http://wolfsongnews.org/news/Alaska_current_events_2649.html) (last accessed Apr. 12, 2009).

³³⁰ Craig Medred, *Aerial Hunting Program Kills 124 Wolves*, Anchorage Daily News A1 (May 19, 2008).

³³¹ *Id.*

³³² *Id.*

³³³ Tom Banks, *Letters from the People: Benefits of Aerial Wolf Hunting Based on Shaky Science*, Anchorage Daily News B5 (June 23, 2008).

³³⁴ The Initiative and Referendum Institute databased documents that thirty wildlife related ballot initiatives have been voted on through 2001. Nineteen of these have happened since 1990. Animal protection advocates have won ten of thirteen initiatives dealing with hunting and trapping since 1990. Nie, *supra* n. 71 at 224–25 (referenced in Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. Envtl. L. & Litig. 223, 272 (2004)).

³³⁵ Alaska Const. art. XI, § 1.

³³⁶ *Id.*

³³⁷ Alaska Const. art. XI, § 7.

³³⁸ Alaska Const. art. XII, § 11; For a review of the ballot initiative process, see generally Harrison, *supra* n. 33.

³³⁹ Alaska Const. art. XI § 2.

residents in at least two-thirds of the state's election districts, to sign a petition to place the issue on the ballot.³⁴⁰

Ballot initiatives are criticized on various grounds. First, the zero-sum approach is divisive and oversimplifies issues.³⁴¹ Second, voters may lack knowledge about issues.³⁴² Third, science and professional experience play no role in the process.³⁴³ Fourth, special interests with funds and organization have inordinate influence.³⁴⁴ Finally, the legitimacy of state wildlife agencies is undermined.³⁴⁵

Conversely, ballot initiatives are also applauded on many grounds. First, they increase government responsiveness and accountability.³⁴⁶ Second, they promote open educational debate among citizens.³⁴⁷ Third, they increase voter interest and decrease voter alienation. Fourth, they prevent the concentration of political power.³⁴⁸ Fifth, they tackle issues legislatures avoid.³⁴⁹ Finally, they break legislative deadlock.³⁵⁰

The benefits of the ballot initiative regarding wolf control far outweigh its costs in Alaska. The ballot initiative is the only way to combat state government violation of public trust responsibility, stop the killing of wolves, force the state government to respect the will of the people, and break the hold of hunters and trappers over the BOG.

A. *Same Day Hunting Prohibited: 1996 and 2000*

Despite Governor Knowles' pro-wolf sentiments, Alaska citizens resorted to a ballot initiative to counter the 1994 intensive management statute and constrain the BOG.³⁵¹ In November 1996, voters approved a statewide ballot initiative by a 60% majority that repealed the earlier regulation allowing people with a hunting or trapping license to fly over wolf habitat, land their plane, and open fire on wolves 100 yards from the plane.³⁵² In addition, the state was prohibited from using planes for wolf control unless a biological emergency was declared by the ADF&G Commissioner that was based on scientific

³⁴⁰ Alaska Stat. § 44.62 (Lexis 2008); Mcbeath & Morehouse, *supra* n. 156, at 297–98; Harrison, *supra* n. 33, at 95–96; M.K. Bradley and D.L. Williams, "Be It Enacted By the People of Alaska . . ."—A Practitioner's Guide to Alaska's Initiative Law, 9 Alaska L. Rev. 279 (1992).

³⁴¹ Nie, *State Wildlife Governance*, *supra* n. 3, at 204.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 204–05.

³⁴⁵ *Id.*

³⁴⁶ S.J. Williamson, *Origins, History, and Current Use of Ballot Initiatives in Wildlife Management*, 3 Human Dimensions in Wildlife 51, 55 (1998).

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³⁵² *Id.*

data.³⁵³ Wolf control must be carried out solely by ADF&G personnel.³⁵⁴

Shortly after the 1996 initiative was enacted, opponents filed suit challenging the initiative as unconstitutional.³⁵⁵ After the suit was rejected, opponents turned to the state legislature, which can amend a ballot initiative at any time or overturn an initiative two years after certification.³⁵⁶ In 1998, the Alaska legislature modified the 1996 initiative by removing any reference to “irreversible decline” in the prey population as the basis for declaring a biological emergency.³⁵⁷ The change permitted wolf control if predation decreased the prey population.³⁵⁸ The amendments mandated the BOG to “establish population and harvest goals” to “achieve a high level of human harvest.”³⁵⁹ The amendments were enacted despite a statewide poll in 1998 indicating that 70% of Alaskan voters opposed any effort to legislatively reverse the 1996 same-day airborne shooting ban.³⁶⁰

In 2000, the Alaska legislature passed a bill that allowed the public to shoot wolves on the same day as airborne shooting, but only in areas where predator control was necessary without the declaration of biological emergency.³⁶¹ The bill reversed the 1996 ballot initiative.³⁶² Governor Knowles’ veto of the bill was overridden.³⁶³ This spurred the second ballot initiative which prohibited the same-day airborne hunting of wolves in areas authorized by the BOG.³⁶⁴ The initiative passed in November 2000 by a 54% majority.³⁶⁵

B. Initiative to Prohibit Wildlife Ballot Initiatives: 2000

In the 2000 election, wolf killing opponents experienced another victory when Ballot Measure 1 was defeated by a 64% percent majority.³⁶⁶ The measure would have prevented future wildlife initiatives,

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ Alaska Const., art. XI, § 6; see generally, Harrison, *supra* n. 33, at 181–82 (discussing when the legislature may amend or repeal a ballot initiative).

³⁵⁷ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³⁵⁸ Regelin, *supra* n. 175.

³⁵⁹ Alaska Stat. § 16.05.255(g) (Lexis 2008).

³⁶⁰ Press Release, Defenders of Wildlife, *Actions Disregard Sentiment of Alaskan Voters*, http://www.defenders.org/newsroom/press_releases_folder/1999/03_04_1999_action_disregards_sentiment_of_alaskan_voters.php?ht=1998%20statewide%20poll%201998%20statewide%20poll (Mar. 4, 2009) (last accessed Apr. 8, 2009).

³⁶¹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.* The 2000 ballot initiative only repealed Sen. 267, which authorized private persons as permittees of the state (agents) to do the airborne shooting. Under the 1996 initiative, predator control was limited to ADF&G personnel only.

³⁶⁵ *Id.* Alaskan Senator Kelly declared that “animal rights groups are controlling Alaska wildlife policies at the state voting booths.” U.S. Sportsmen’s Alliance, *Alaska Closer to Removing Wildlife Issues from the Ballot* (May 16, 2000).

³⁶⁶ *Id.*

such as “laws that permit, regulate, or prohibit the taking or transporting of wildlife, or to prescribe seasons or methods for taking wildlife.”³⁶⁷ This measure was sponsored by the Virginia Ballot Initiatives Coalition, which sought to end all pro-wildlife measures.³⁶⁸

C. *The 2000 Ballot Initiative Reversed*

Governor Murkowski was committed to reversing the 2000 ballot initiative.³⁶⁹ Soon after being elected, he signed Senate Bill 155, which allowed same-day airborne shooting by the public as part of predator control; removed the requirement of low prey population before implementing predator control, so preemptive strikes against predators were permitted; and eliminated ADF&G approval of BOG land-and-shoot policy.³⁷⁰ BOG regulations required that non-state employees obtain licenses from ADF&G to comply with AHA.³⁷¹

In November 2004, Alaska voters approved a constitutional amendment that changed how signatures for ballot initiatives and referendum petitions are gathered.³⁷² The amendment requires signatures from more of the voting districts in the state.³⁷³ Signatures must be from thirty of the forty house districts (three more than previously required)³⁷⁴ and must equal 7% of the voters who voted in each of these districts in the last general election.³⁷⁵ Previously only one signature from a district satisfied the requirement for district participation.³⁷⁶ The total number of statewide signatures required did not change. Representative Bill Williams (R), the amendment’s sponsor, declared that “the initiative process has not been working the way the framers of our constitution intended it to.”³⁷⁷ Representative Williams said, “Alaska must not fall prey to the kind of ballot-box lawmaking that has hamstrung governments in places like California and Oregon.”³⁷⁸

³⁶⁷ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³⁶⁸ *Id.*; Bud Pidgeon, the President of the Wildlife Legislative Foundation of America (WLFA), a group opposed to ballot initiatives, stated “regretfully, voters in the state did not realize the benefits of restricting wildlife related ballot initiatives. As it stands, sportsmen must continue to worry about outsiders coming into their state and manipulating wildlife managers via state ballot box.” U.S. Sportsmen’s Alliance, *How Sportsmen Issues Ended Up in Alaska* (Nov. 8, 2000).

³⁶⁹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³⁷⁰ *Id.*; Alaska Stat. 16 § 05.783 (Lexis 2008).

³⁷¹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

³⁷² State of Alaska, *Constitutional Amendments*, <http://ltgov.state.ak.us/constitution.php?section=amendments> (last accessed Apr. 8, 2009).

³⁷³ Nick Jans, *Alaska Legislature Passes Amendment to Reform Initiative Process*, Stories in the News B5 (May 11, 2004) (available at http://www.sitnews.us/0504news/051104/051104_process_reform.html) (last accessed Apr. 12, 2009).

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

D. *Wildlife is a State Asset*

The Alaska legislature continued efforts to end wildlife ballot initiatives. In 2007, Representative Wes Keller (R)³⁷⁹ introduced an Act Relating to the Adoption of Conservation, Development, and Utilization Regulations by the BOG to Address Concerns Related to Public Assets, which declared wildlife to be a state asset.³⁸⁰ The House bill was also designed to end public involvement in wildlife decisions by preventing wildlife ballot initiatives. If wildlife was declared a state asset, ballot initiatives granting or limited the use of state wildlife might be viewed as an appropriation of state resources, which is specifically excluded from being the subject of a ballot initiative.³⁸¹ Article VII of the Alaska Constitution declares, “[The] initiative shall not be used to dedicate revenues, make or repeal appropriation, create courts, define jurisdiction of courts or prescribe their rules, or enact local or special legislation.”³⁸² The Senate passed a companion to the bill, which was agreed to by the House at the close of the legislative session in 2008.³⁸³

E. *The Alaska Wolf and Bear Protection Act (AWBPA)*

In January 2007, the Lieutenant Governor certified the Alaska Wolf and Bear Protection Act (AWBPA), a ballot initiative petition signed by more than 57,000 residents that prohibits the shooting of free ranging wolf, wolverine, or grizzly bear the same day the person has been airborne.³⁸⁴ The BOG may retract the rule if the ADF&G commissioner makes written findings based on adequate data demonstrating that a biological emergency exists and there is no other feasible solution to eliminate the biological emergency.³⁸⁵ Any shooting must be done by ADF&G personnel.³⁸⁶ The killing of wolves is limited to the specific geographic area where the biological emergency exists.³⁸⁷ Only the minimum number of wolves necessary to end the biological emergency can be removed.³⁸⁸ The initiative was placed on the primary ballot in August 2008,³⁸⁹ marking the third time that Alaska

³⁷⁹ Jans, *Alaska Legislature Passes Amendment to Reform Initiative Process*, *supra* n. 373.

³⁸⁰ Nick Jans, *Stealth Bills Take Aim at Your Right to Vote on Game Issues*, <http://www.adn.com/opinion/compass/story/354362.html> (last accessed Apr. 12, 2009).

³⁸¹ *Id.*

³⁸² Alaska Const. art. XI, § 7.

³⁸³ Defenders of Wildlife, *One Bill Fails, One Bill Passes*, *supra* n. 309.

³⁸⁴ Alaska Stat. § 16.05.783(a) <http://www.elections.alaska.gov/petitions/05hunt.pdf> (last accessed Apr. 12, 2009) (proposed language change not enacted into law).

³⁸⁵ *Id.* at (1).

³⁸⁶ *Id.* at (2).

³⁸⁷ *Id.* at (3).

³⁸⁸ *Id.* at (4).

³⁸⁹ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

voters went to the polls to stop the same day airborne killing of predators.³⁹⁰

The enactment of the Senate bill in 2008 that declared wildlife a state asset raised the question of whether the AWBPA constituted an unconstitutional ballot appropriation of state assets (moose, caribou) to wolves, not hunters and trappers. Alternatively, did the AWBPA favor non-consumptive users over consumptive users of wildlife?

The Alaska Supreme Court examined a similar issue in *Pullen v. Ulmer*, which invalidated a ballot initiative granting preference for sport fishing, personal fishing, and subsistence regarding harvested salmon.³⁹¹ The Court found that the constitutional prohibition regarding appropriation by ballot initiative was designed to prevent an electoral majority from bestowing state resources on itself and to allow the state legislature to make final decisions regarding state assets.³⁹² The Court determined that wildlife was a state asset.³⁹³ The ballot initiative prohibition applied to any state asset, not just money.³⁹⁴ The Court invoked the state ownership doctrine from *Geer v. Connecticut* to establish the state's property interest in wildlife.³⁹⁵ The Court also held that the ballot initiative constituted an appropriation of state assets in violation of Article XI.³⁹⁶ The ballot initiative granted preferences to a few at a cost to many and reduced the Board of Fisheries' and state legislature's control over state assets.³⁹⁷

Chief Justice Allen Compton concurred, but found the initiative violated Article XII of the Alaska Constitution because wildlife management was a "clearly inapplicable" subject matter for a ballot initiative.³⁹⁸ The state did not possess a property right in wildlife, but a public trust responsibility, which was immune from the ballot initiative.³⁹⁹

In *Brooks v. Wright*,⁴⁰⁰ which dealt with the unsuccessful anti-snare ballot initiative in 1998, the Alaska Supreme Court rejected

³⁹⁰ State of Alaska, *1996 General Election Official Results*, <http://www.elections.alaska.gov/results/summary.txt> (last updated Nov. 27, 1996) (last accessed Apr. 12, 2009); State of Alaska, *2000 General Election Ballot Measures*, <http://www.elections.alaska.gov/oe2000/bm00.htm#00game>; State of Alaska, *2008 Primary Election Official Results*, <http://www.elections.alaska.gov/08prim/data/results.pdf> (Sept. 18, 2008) (last accessed Apr. 12, 2009).

³⁹¹ *Pullen v. Ulmer*, 923 P.2d 54 (1996). The issue was raised, but not answered, by the Alaska Supreme Court in *Brooks v. Wright*, 971 P.2d 1025, 1028 n.12 (Alaska 1998) (dealing with anti-snare ballot initiative).

³⁹² *Id.* at 63.

³⁹³ *Id.* at 59-60.

³⁹⁴ *Id.* at 58-59 (citing *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) and *Alaska Conservative Political Action Comm. v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987)).

³⁹⁵ *Id.* at 60.

³⁹⁶ *Id.* at 63-65.

³⁹⁷ *Pullen*, 923 P.2d at 63.

³⁹⁸ *Id.* at 65-66.

³⁹⁹ *Id.*

⁴⁰⁰ 971 P.2d at 1033.

Chief Justice Compton's position. The Court unanimously decided that the state's public trust responsibility regarding wildlife did not grant the state legislature exclusive authority over wildlife and wildlife policy can be changed by ballot initiative.⁴⁰¹ The Court declared that ballot initiative provisions are liberally construed and subject matter limitations narrowly interpreted.⁴⁰² Revisiting the 1955–1956 Constitutional Convention, the Court found no indication that natural resource management was excluded from the ballot initiative.⁴⁰³ The Court determined that the public trust responsibilities established through Article VIII in the Constitution did not establish exclusive legislative authority over natural resource decisions.⁴⁰⁴ The purpose of the public trust doctrine was not to exclude public participation, but rather to scrutinize government grants regarding the exclusive use of public resources in the royal tradition.⁴⁰⁵ The Court advocated the expansion of public trust doctrine to include all public uses.⁴⁰⁶ Furthermore, the Court found that wildlife management was not “clearly inapplicable” under Article XII from state ballot initiatives.⁴⁰⁷ The Court did not address whether the ballot initiative constituted an appropriation of a state asset in violation of Article XI.⁴⁰⁸

The AWBPA was not an unconstitutional allocation of state assets. The AWBPA did not grant state assets (moose, caribou, wolves) to any group through the ballot initiative.⁴⁰⁹ The AWBPA was distinguishable from a number of ballot initiatives that courts struck down, including initiatives awarding 30 million acres of state land to state residents,⁴¹⁰ approving the sale of a municipally owned utility to a private cooperative for \$1,⁴¹¹ mandating the transfer of state university land to establish the state community college system,⁴¹² and creating a new allocation for hotel bed tax revenues.⁴¹³ The AWBPA did not limit the power of the legislature to make decisions regarding the future allocation of state assets (moose, caribou, and wolves).⁴¹⁴ The central tenet of the aforementioned cases was loss of final authority over the asset. The AWBPA constrained same day airborne hunting to specified

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 1027.

⁴⁰³ *Id.* at 1029.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 1031.

⁴⁰⁶ *Brooks*, 971 P.2d at 1031.

⁴⁰⁷ *Id.* at 1027–34.

⁴⁰⁸ *Id.* at 1027–28 n.12.

⁴⁰⁹ Alaska Ballot Measure No. 2: 05HUNT (2008) <http://alaskapride.blogspot.com/2008/06/alaska-2008-state-primary-elections.html> (June 13, 2008) (last accessed Apr. 12, 2009).

⁴¹⁰ *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979).

⁴¹¹ *Alaska Conservative Political Action Comm. v. Anchorage*, 745 P.2d 936 (Alaska 1987).

⁴¹² *McAlpine v. U. of Alaska*, 762 P.2d 81 (Alaska 1988).

⁴¹³ *Fairbanks v. Fairbanks Conv. & Visitors Bureau*, 818 P.2d 1153 (Alaska 1991).

⁴¹⁴ Alaska Ballot Measure No. 2: 05HUNT, *supra* n. 409.

circumstances and limited the practice to ADF&G personnel.⁴¹⁵ The Alaska legislature would not lose final authority over the asset. The AWBPA, like the 1996 and 2000 ballot initiatives, could have been reversed by state legislative action.⁴¹⁶ Furthermore, there was no express preference for non-consumptive uses over consumptive uses of wildlife.⁴¹⁷

The AWBPA was reasonable regulation of wildlife that simply implemented the state's public trust responsibility regarding wildlife under Article VIII of the Constitution. The Alaska Supreme Court in *Owsichek v. State* recognized that the "common use" of fish and wildlife and water resources guaranteed under Article VIII of the Constitution "did not intend to prohibit all regulations of the use of these resources."⁴¹⁸ The Court recognized that "license requirements, bag limits, and seasonal restrictions, for example, are time honored methods of conserving resources that were respected by delegates of constitutional convention."⁴¹⁹ The AWBPA implemented the constitutional "common use" guarantee by countering the BOG policies that have established a hunter/trapper monopoly regarding the use of wildlife at the expense of other public interests.⁴²⁰

Governor Palin and the state legislature opposed the AWBPA. In 2007, the Alaska legislature authorized \$400,000 for a public education campaign to defeat the initiative.⁴²¹ On August 26, 2008, Alaskan voters rejected the AWBPA by a 56% majority. The AWBPA supporters blamed their defeat on the confusing wording of the initiative, massive out of state funding, the state public education campaign, the publication of an ADF&G pamphlet in Alaskan newspapers extolling the success of the state predator control prior to the election,⁴²² and a spate of recent bear attacks.⁴²³

IV. PROTECT AMERICA'S WILDLIFE ACT

There were many unsuccessful efforts to have the federal government stop Alaska's wolf killing for violating the AHA. In 1993, Representative Peter Defazio (D-OR) introduced legislation to amend the

⁴¹⁵ *Id.*

⁴¹⁶ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

⁴¹⁷ Alaska Ballot Measure No. 2: 05HUNT, *supra* n. 409.

⁴¹⁸ *Owsichek v. State*, 763 P.2d 488, 492 (Alaska 1998).

⁴¹⁹ *Id.* at 492.

⁴²⁰ *Id.* at 492-96 (finding that the common use clause was intended to be anti-monopoly).

⁴²¹ deMarban, *supra* n. 11.

⁴²² Alaska Department of Fish & Game, *Understanding Intensive Management and Predator Control in Alaska*, http://wildlife.alaska.gov/management/control/predator_brochure.pdf (last accessed Apr. 12, 2009).

⁴²³ Mary Pemberton, *Predator Control Limitations Likely to be Shot Down*, Assoc. Press State & Local Wire (Aug. 27, 2008) (available at 2008 WLNR 16195772); Opinion, *Ballot Measure Rejected*, *Anchorage Daily News* B4 (Aug. 28, 2008) (available at 2008 WLNR 16301481).

AHA to ensure same day land-and-shoot practices were restricted.⁴²⁴ Representative Defazio characterized Alaska's wolf control plan as voodoo biology, but his bill was not enacted into law.⁴²⁵ In November 1993, the DOW asked Secretary Bruce Babbitt to issue emergency regulations pursuant to the AHA prohibiting the use of fixed wing or rotary aircraft to kill wolves but did not receive a response.⁴²⁶ In 2004, environmental groups asked Secretary Gale Norton to issue regulations clarifying that the AHA does not allow the use of aircraft to kill wolves for the purpose of boosting the game population.⁴²⁷ The Secretary responded that Alaska's policy was consistent with the AHA and interpretative regulations were not necessary.⁴²⁸

In September 2007, Representative George Miller (D-CA) introduced the Protect America's Wildlife Act (PAW) to button up the loophole in AHA that allows states to kill wolves from the air or chase them to exhaustion before killing them.⁴²⁹ PAW prohibits the killing of predators to increase game populations for sport hunting.⁴³⁰ The aerial killing of predators is only permissible if a biological emergency is declared by the head of the state wildlife agency and is the only means to act.⁴³¹ Any killing must be done by state or Department of Agriculture employees, be limited to specified areas, and remove only the minimum number of predators necessary to circumvent the emergency.⁴³² Citizens can bring suit against any person, agency, or government if PAW is violated.⁴³³

Representative Donald Young (R-AK) criticized PAW as a deliberate attempt to federalize wildlife management in Alaska.⁴³⁴ Governor Palin stated that Representative Miller "doesn't understand rural Alaska, doesn't comprehend wildlife management in the North, and doesn't appreciate the Tenth Amendment of the U.S. Constitution that

⁴²⁴ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

⁴²⁵ Hampton, *supra* n. 122, at 242.

⁴²⁶ Defenders of Wildlife, *History of Wolf Control in Alaska*, *supra* n. 114.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ Defenders of Wildlife, *Aerial Hunting*, http://www.defenders.org/programs_and_policy/policy_and_legislation/aerial_hunting.php (last accessed Apr. 12, 2009).

⁴³⁰ Defenders of Wildlife, *Protect America's Wildlife (PAW) Act*, http://www.defenders.org/resources/publications/policy_and_legislation/paw_act_fact_sheet.pdf (last accessed Apr. 12, 2009).

⁴³¹ H.R. 3663, 110th Cong. at § 3, <http://www.govtrack.us/congress/billtext.xpd?bill=h110-3663> (Sept. 25, 2007) (last accessed Apr. 12, 2009).

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Ericka Bolstad, *Californian Files Bill to End Alaska Aerial Control*, Anchorage Daily News, http://wolfsonnews.org/news/Alaska_current_events_2375.html (Sept. 26, 2007) (last accessed Apr. 12, 2009).

gives states the right to manage their own affairs.”⁴³⁵ PAW had 129 cosponsors as of November 6, 2008.⁴³⁶

V. CONCLUSION

The Alaskan wolf war is the result of state wolf killing policies that favor consumptive users and ignore non-consumptive users of wildlife. The BOG wolf killing policies have been strongly criticized by scientists but have generally been supported by Alaska governors and the state legislature. The state courts have viewed the wolf killing controversy as an administrative law issue by deferring to the BOG’s expertise and only reviewing BOG decisions to ensure procedural conformity with the Alaska APA. By doing this, the state courts fail to acknowledge the bias in BOG decisions.

There is a strong public trust doctrine in the Alaska Constitution, which prohibits the grant of exclusive monopolies over state natural resources. BOG policies that have consistently favored hunters and trappers over those concerned with environmental protection constitute a grant of an exclusive monopoly over state resources. The Alaska courts should have invoked the public trust doctrine and subjected the BOG decisions to heightened scrutiny. Alaska’s wolves should have been treated as a “discrete insular minority” and been afforded greater judicial protection as a public trust resource. Judicial protection of public trust resources would have destabilized the capture of BOG by hunting and trapping interests and made the BOG more willing to negotiate with non-consumptive users.

The BOG wolf killing policies have not generally been supported by Alaska voters, who have resorted to ballot initiatives to influence the BOG policy. Ballot initiatives have been the only way for Alaskan voters to address state government intransigence regarding the killing of wolves. Voters enacted same day aerial hunting prohibitions in 1996 and 2000, but both initiatives were undermined by subsequent state legislative action. Recently, the third ballot initiative prohibiting the same day aerial hunting was defeated as a result of active opposition by Governor Palin and the state legislature. The three wildlife ballot initiatives did not constitute an appropriation of state assets in violation of the Alaska Constitution.

The federal government has been reluctant to stop Alaska’s wolf killing because of the loophole in the AHA. Federal legislation, PAW, is currently being considered, which will amend the AHA to prohibit aerial hunting unless there is a declared biological emergency. The enactment of PAW will help to achieve peace in the Alaskan wolf war.

⁴³⁵ Dina Cappiello, *Environmentalists Can’t Corral Palin*, http://www.usatoday.com/news/politics/2008-09-04-2587331719_x.htm (Sept. 4 2008) (last accessed Apr. 12, 2009).

⁴³⁶ Defenders of Wildlife, *PAW Act Cosponsor List*, http://www.defenders.org/resources/publications/policy_and_legislation/paw_act_cosponsor_list.pdf (last accessed Apr. 8, 2009).

