

## **FISH AND WILDLIFE MANAGEMENT ON FEDERAL LANDS: DEBUNKING STATE SUPREMACY**

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### **EXECUTIVE SUMMARY**

This Article reviews the authority of federal and state governments to manage wildlife on federal lands. It first describes the most common assertions made by state governments regarding state powers over wildlife and then analyzes the relevant powers and limitations of the U.S. Constitution and federal land laws, regulations, and policies. Wildlife-specific provisions applicable within the National Park System, National Wildlife Refuge System, National Forest System, Bureau of Land Management, the special case of Alaska, and the National Wilderness Preservation System are covered, as is the Endangered Species Act. We reviewed an extensive collection of cases of conflict between federal and state agencies in wildlife management on federal lands. These cases show how federal land laws, regulations, and policies are frequently applied by federal agencies in an inconsistent and sometimes even unlawful fashion. They also demonstrate how commonalities found in state wildlife governance, such as sources of funding and adherence to the North American Model of Wildlife Conservation, often exacerbate conflict over wildlife management on federal lands.

Federal land management agencies have an obligation, and not just the discretion, to manage and conserve fish and wildlife on federal lands. We debunk the myth that "the states manage wildlife and federal land agencies only manage wildlife habitat." The myth is not only wrong from a legal standpoint but it leads to fragmented approaches to wildlife conservation, unproductive battles over agency turf, and an abdication of federal responsibility over wildlife. Another problem exposed is how the states assert wildlife ownership to challenge the constitutional powers, federal land laws, and supremacy of the United States. While the states do have a responsibility to manage wildlife as a sovereign

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trust for the benefit of their citizens, most states have not addressed the conservation obligations inherent in trust management; rather, states wish to use the notion of sovereign ownership as a one-way ratchet—a source of unilateral power but not of public responsibility. Furthermore, the states' trust responsibilities for wildlife are subordinate to the federal government's statutory and trust obligations over federal lands and their integral resources.

The Article finishes by reviewing the ample opportunities that already exist in federal land laws for constructive intergovernmental cooperation in wildlife management. Unfortunately, many of these processes are not used to their full potential and states sometimes use them solely as a means of challenging federal authority rather than a means of solving common problems. Intergovernmental cooperation must be a mutual and reciprocal process, meaning that state agencies need to constructively participate in existing federal processes, and federal agencies should be provided meaningful opportunities to participate in, and influence, state decision making affecting federal lands and wildlife.

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## INTRODUCTION

Some of the most significant cases in the development of federal lands and resources law revolve around questions pertaining to federalism and wildlife management. At stake are weighty issues related to constitutional law, sovereignty, and ownership. Complicating matters is the enduring tension between federal and state governments that is built into American politics, the opaque language sometimes found in federal lands law, and the interjurisdictional nature of wildlife conservation. And, of course, there is the politics of it all, as these cases force federal and state agencies to consider their sources of power and authority, their organizational values and biases, and issues that can be deeply polarizing and confrontational.

To begin, consider some of the following questions that were decided long ago by the courts: Does the U.S. Forest Service (USFS) have the authority to kill over-browsing deer deemed to be causing harm to the Kaibab National Forest and to do so in violation of state game laws? Similarly, does the National Park Service (NPS) have the authority to kill deer within Carlsbad Caverns National Park for research purposes without obtaining a state permit? Does Congress have the power to protect wild horses and burros on federal lands when those species compete with ranchers and their cattle for forage? And can the U.S. Fish and Wildlife Service (FWS) refuse to permit the state of Wyoming to vaccinate elk on the National Elk Refuge?

The courts answered these questions, all in the affirmative, but standoffs between federal and state governments have nonetheless intensified in recent years. We examined several of these conflicts to help guide our research so that we could address the key arguments made by state and federal governments and focus our analysis on the most relevant provisions related to wildlife as found in federal law, regulation, and policy. Included in our review were cases receiving national attention, such as the recent decision by the NPS and FWS to preempt those hunting regulations of the state of Alaska that are in conflict with National Park and Refuge laws. These are rare cases where federal agencies pushed back against state interests. In other high profile cases, federal agencies acquiesced to the states, such as Grand Teton National Park's refusal to apply federal regulations to private inholdings within the boundaries of the Park, thus effectively ceding wildlife management authority to the state of Wyoming on roughly 2,300 acres of land within the Park. Other problematic cases include the management of wolves in federally designated wilderness areas, such as the decision made by the USFS to permit the state of Idaho to land helicopters in the Frank Church River of No Return Wilderness in order to track and collar wolves, and to not take action to regulate the state of Idaho's plan to hire a professional trapper to kill two packs of wolves living within the Wilderness for the purpose of increasing the area's elk population. We also investigated cases receiving far less national attention, such as an annual predator killing contest on federal lands in Idaho managed by the USFS and Bureau of Land Management (BLM) and the state of Utah's introduction of non-native mountain goats to establish a population on National Forest lands.

In cases like these, the states frequently claim that federal land agencies have limited authority over wildlife management, especially on multiple-use lands managed by the USFS and BLM. In making this argument, states commonly assert that they own wildlife and manage it as a trust resource. As they see it, their power and authority over wildlife on federal lands reign supreme and, as the argument goes, neither federal land laws nor the courts have done much to change this historical arrangement. The states often justify their positions and actions by reference to the “North American Model of Wildlife Conservation,” which is a set of principles to guide state management of wildlife.

In comparison to the states, the federal government responds in a more varied and often inconsistent fashion. Rare is the situation where a federal agency challenges state interests, such as the case with the NPS and FWS in Alaska. More common is a federal agency sending mixed messages about its authority over wildlife on federal lands, sometimes flexing its muscle, sometimes acquiescing to the states, and sometimes doing everything it can to watch from the sideline. This inconsistency may be why questions about wildlife management on federal lands have resurfaced with such force in recent years.

This Article sets the record straight by providing a comprehensive examination of the authority of federal agencies to manage wildlife on federal lands, with the goal of providing a more common understanding amongst federal and state agencies. To help ground the research and make it usable to decision makers and federal land and wildlife managers, the research team consists of three academics (Zellmer, Joly, and Nie) and three consultants having decades of experience, working for the U.S. Department of Agriculture’s Office of the General Counsel (Pitt), USFS (Haber, a former planning specialist for the agency), and BLM (Barns, a former wilderness specialist at the Arthur Carhart National Wilderness Training Center).

The Article comes in three parts. Part I begins by providing the context of state wildlife governance. It highlights the core claims and arguments most often made by the states and their representative institutions in conflicts like those described above. It reviews the common assertion that states own wildlife and manage it as a trust resource. From here, the Part reviews common themes in state wildlife laws, decision making processes, and sources of funding. The North American Model of Wildlife Conservation is then described insofar as it relates to federal lands and conflict over wildlife management. The Model was invoked frequently in the cases we examined and we explain its relevance in Part I and what we view as its shortcomings in Part III. Part I closes by summarizing some of the most common complaints and recommendations made by the states, through the Association of Fish and Wildlife Agencies (AFWA), regarding the management of wildlife on federal lands. We do so in part because of the role played by AFWA in negotiating agreements with federal land agencies.

Part II provides the legal context of wildlife management on federal lands. The constitutional setting comes first, with a review of the U.S. Constitution’s Property Clause, Treaty Clause, Commerce Clause, and the Tenth Amendment. This section closes by reviewing the doctrine of federal preemption and the use of savings clauses in federal land law. It shows that while states have well-established historical authority over wildlife

within their borders this authority is neither exclusive nor necessarily dominant. As found repeatedly by the courts, the U.S. Constitution grants the federal government the authority to manage its lands and resources, fulfill its treaty obligations, and control interstate commerce, even when the states object.

The next section of Part II reviews the federal land laws, regulations, and policies of most significance to the management of wildlife on federal lands. Provisions governing the management of endangered and threatened species, the National Park System, National Wildlife Refuge System, National Forest System, public lands administered by the Bureau of Land Management, the special case of Alaska, and the National Wilderness Preservation System are covered in this section. Extra attention is provided to the latter because of the disproportionate amount of conflict and controversy generated by wildlife management in federally designated wilderness. The section shows that federal land agencies have considerable powers and statutory duties to manage wildlife on federal lands, even if they have chosen not to exercise those powers consistently in the past.

Also reviewed in each section are agency-specific savings clauses and provisions related to intergovernmental cooperation. Though each statute differs in important ways, all provide the states with meaningful and privileged opportunities to participate in decisions regarding the management of wildlife on federal lands. The savings clauses demonstrate Congress's desire to acknowledge some level of state responsibility over wildlife management. But in no way should these clauses be interpreted to diminish the federal government's vast constitutional and statutory authority to manage its own lands and resources, even when objected to by a state.

Our conclusions, analysis, and recommendations come in Part III. We begin by explaining that federal land management agencies have an *obligation*, and not just the discretion, to manage and conserve fish and wildlife on federal lands, contrary to the myth that "the states manage wildlife, federal land agencies only manage wildlife habitat." We found this mantra repeated throughout our study and it was commonly made by state *and* federal agencies in multiple cases and contexts. We explain the origins of this myth and explain why it is wrong from a legal standpoint and limited from a biological one. The myth must be debunked, not only because it is legally deficient, but also because federal lands are significant reservoirs of biodiversity and will become even more significant in the future because of the rapid pace of development on non-federal lands.

We next address the common claim that states own wildlife and that such ownership necessarily limits the authority of federal land agencies to manage and make decisions concerning wildlife. We conclude that the states' assertion that they own wildlife—full stop—is incomplete, misleading, and needlessly deepens divisions between federal and state governments. It is especially problematic when states assert ownership as a basis to challenge or undermine federal authority over wildlife on federal lands. The states are on solid footing when declaring a "sovereign ownership" of wildlife that must be managed as a public trust resource. But invoking the public trust as a source of authority is simply not credible without its mirror-image, which is the conservation responsibility for trust resources.

We also explain in this section why it is important for the federal government to respond to state assertions of trust ownership by emphasizing that it too has statutory and trust obligations over federal lands, which often encompass the conservation of wildlife. The section concludes by discussing how the all too often adversarial relationship between federal and state governments might be addressed in the future by embracing a more cooperative form of “co-trusteeship” between federal, state, and tribal governments. In moving forward, we also recommend a reexamination of how wildlife is managed and funded at the state-level, such as finding a more secure and predictable source of funding for non-game management. We also suggest that advocates of the North American Model of Wildlife Conservation consider the significant role played by federal lands in the conservation of wildlife.

Addressed next are two issues of a more technical nature, both of which figured prominently in the cases reviewed for this research. The first is the Interior Department’s policy statement on state-federal relations in wildlife policy. Some of the provisions found in the policy sow confusion amongst federal and state agencies. Most problematic is how the policy proclaims that states have “primary authority” for management of fish and wildlife on federal lands. We take issue with this misinterpretation of the law, the process used to write it, and explain how it can lead to unnecessary confusion and conflict between federal and state governments.

We then discuss the issue of what happens when federal agencies refuse to take action to protect wildlife on federal lands. This scenario played out in several of the cases reviewed as part of this project, with the distinction being between when the agency has a duty to act and when the agency has the authority to act but the action is discretionary. When a federal agency has a duty to act under a statute, regulation, or other legal requirement, the failure to do so through permit issuance or otherwise warrants an injunction of the non-permitted and non-federal activity.

The issue of wildlife management in the National Wilderness Preservation System is also addressed again in Part III. We review the Wilderness Act’s unambiguous affirmative obligation to preserve wilderness character, which includes fish and wildlife species within wilderness areas, and discuss problematic trends where federal agencies have skirted legal obligations in order to accommodate more political demands, often from state interests advancing a view of management that is antithetical to the Wilderness Act.

Part III concludes by discussing the importance of intergovernmental cooperation in the management of wildlife on federal lands. Multiple opportunities for cooperation already exist in federal decision making and planning processes but they are not used to their full potential. We found that states too often view such opportunities not as a way to meaningfully inform federal decision making, but as a political platform to challenge federal authority. As we see it, intergovernmental cooperation is a two-way street, and while federal agencies must provide opportunities for state participation in federal planning processes, the states should reciprocate by providing opportunities for federal entities to participate meaningfully in state wildlife management decision making and, in appropriate cases, to influence the resolution of issues related to wildlife conservation.



To make the research accessible to those who need it most, the Article is accompanied by a set of frequently asked questions that is available online (in progress).<sup>2</sup> This resource enables users to find succinct answers to their questions with linkages to the most relevant parts of the Article for additional information.

## **I. STATE MANAGEMENT CONTEXT & STATE PERSPECTIVES ON MANAGING WILDLIFE ON FEDERAL LANDS**

This Part provides some initial background on state wildlife law and governance. Common state perspectives on wildlife ownership, the wildlife trust, state wildlife commissions, funding, and the North American Model of Wildlife Conservation are reviewed insofar as they pertain to intergovernmental conflict. These issues emerged frequently in several of the disputes we examined. The Part reviews some of the most common claims and arguments made by state wildlife agencies and their representative institutions. Of course, there is no singular state wildlife agency perspective and readers should appreciate the diversity found amongst the states. To simplify, we emphasize the views and position of the Association of Fish and Wildlife Agencies (AFWA). The Association represents North America's state fish and wildlife agencies and is a principle actor in the debate over wildlife management on federal lands.<sup>3</sup> Particular emphasis is placed on AFWA because of its role in negotiating agreements with federal land agencies. We take issue with some of the positions and arguments explained below in this section and we return to some of the more substantive issues in subsequent parts of the Article.

### *A. State Ownership and the Wildlife Trust*

Forty-eight states claim sovereign ownership of wildlife.<sup>4</sup> Sovereign ownership differs from proprietary ownership in that it is constrained by the public interest with the requirement that wildlife be managed for the greater good and the benefit of the public. Most often referenced by the states in this context is *Geer v. Connecticut*, in which the Supreme Court recognized the common state ownership of wildlife and that this power is to be exercised “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 or private individuals as distinguished from the public good.”<sup>5</sup> As we discuss in Part II(A), the Supreme Court subsequently overruled *Geer* in *Hughes v. Oklahoma*, but did so in the

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<sup>2</sup> Available at [http: \[address still to be determined: FAQs in Progress\]](http://[address still to be determined: FAQs in Progress]).

<sup>3</sup> See Ass'n of Fish and Wildlife Agencies, *Overview*, The Voice of Fish and Wildlife Agencies, <http://www.fishwildlife.org/index.php?section=about> (last visited May 24, 2016).

<sup>4</sup> See Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 6 UTAH L. REV. 1437, 1462, 1488-1504 (2013).

<sup>5</sup> *Geer v. Connecticut*, 161 U.S. 519, 529 (1896). Though AFWA considers *Geer* as providing “the single strongest statement of state public trust ownership of fish and wildlife in the Court’s jurisprudence,” Brief for Ass’n of Fish and Wildlife Agencies as Amici Curiae at 10 – 11, *Wisconsin v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin*, 135 S.Ct. 1842 (2015), *Geer* traces the idea to *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. Sup. Ct. 1821), and *Martin v. Waddell*, 41 U.S. 367 (1842). *Geer*, 161 U.S. at 529.

context of federal laws preempting state laws (based on claims of state ownership).<sup>6</sup> States, in other words, cannot discriminate against interstate commerce based on claims of state ownership of wildlife.<sup>7</sup> The general rule adopted in *Hughes* “makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wildlife animals underlying the 19<sup>th</sup>-century legal fiction of state ownership.”<sup>8</sup>

Assertions of sovereign ownership provide the basis for states claiming a “public trust” in wildlife. In their analysis, Blumm and Paulsen find that “courts and legislatures in at least twenty-two states have expressly employed the words ‘trust’ or ‘trustee’ when discussing state management of wildlife” and that courts and legislatures in “at least twenty-two other states use trust-like language ... in proclaiming state ownership of wildlife.”<sup>9</sup> The public trust in wildlife is most often invoked by states when declaring broad power and authority to regulate fish and wildlife resources. Less clear are what affirmative conservation duties go along with this trust responsibility. In other words, what must states do, and not do, in order to meet the responsibilities of the wildlife trust?<sup>10</sup> There is relatively little case law on this matter and states have generally done little to fill in the details.<sup>11</sup> As is the case with the public trust doctrine more broadly, there are many unanswered questions about the exact parameters and possible applications of a “wildlife trust,” if the term is to be taken literally. But for purposes here, it is enough to note how the open-ended nature and ambiguity of the wildlife trust doctrine is used by the states to assert jurisdictional powers and control over wildlife. We return to the important issues of wildlife ownership and trust management in Part III (A)(2).

### *B. State Wildlife Laws, Decision-Making, and Funding*

State wildlife agencies implement their wildlife trust duties through an array of state wildlife laws and regulations. Some of the most common categories found in state codes pertain to protected species, hunting, fishing and trapping, animal damage control, habitat

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<sup>6</sup> *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The erosion of *Geer* began with *Missouri v. Holland*. See 252 U.S. 416 (1920). Here, the Court upheld the constitutionality of the Migratory Bird Treaty Act and rejected state claims of “exclusive authority” to manage wildlife under the state ownership doctrine. See *id.* As eloquently stated by the Court, “[T]he state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed.” *Id.* at 434.

<sup>7</sup> *Id.*

<sup>8</sup> *Hughes*, 441 U.S. 322, 336 (1979).

<sup>9</sup> “Of the fifty states, only Nevada and Utah have yet to make some acknowledgement of the public trust in wildlife.” Blumm & Paulsen, *supra* note, 1477. Similarly, AFWA emphasizes that “[s]tates, as public trustees, hold wildlife in trust for their citizens.” Brief for the Petitioners, *supra* note, at 11.

<sup>10</sup> See generally Susan Morath Horner, *Embryo, Not Fossil: Breathing Life Into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23 (2000); Patrick Redmond, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RESOURCES J. 249 (2009); and Gary D. Meyers, *Variations on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

<sup>11</sup> See *supra* notes \_\_\_\_ and accompanying text.

protection, tribal provisions, law enforcement, and hunter harassment-interference.<sup>12</sup> Nineteen states also have “right to hunt” constitutional provisions.<sup>13</sup> These vary in terms of substance and effect.<sup>14</sup> Some simply recognize a hunting heritage in a state<sup>15</sup> and the opportunity to harvest wild fish and game subject to state law and regulation,<sup>16</sup> while others create more explicit rights that are nonetheless subject to state management.<sup>17</sup> All but one of these amendments (Vermont) passed since the mid-1990s and they collectively reflect some fear that state hunting traditions are under threat. As we discuss below, they also signify the importance of hunting to state wildlife management.

While state fish and wildlife agencies are structured in numerous ways, a commonality that most share is that the Director or Head of the agency is responsible to some sort of politically-appointed fish and wildlife commission, board or advisory council.<sup>18</sup> The powers granted to state wildlife commissions vary, from setting fish and game seasons and bag limits to charting broader management goals and objectives for the states. Members are typically appointed by the governor and subject to state legislative approval. Most states also have requirements for commission membership, such as a general knowledge of wildlife issues, political and geographic balance, or that they hold a sporting license. The Commission framework stems from sport hunters and conservationists wanting to secure their hard-fought protections for fish and game; thus, commissions were created so that sport hunters had a voice in preventing a return of widespread market hunting.<sup>19</sup> This history aside, state wildlife commissions received criticism more recently, mostly because some interests believe that their memberships do not adequately represent the diverse values and interests of those people who do not hunt, fish or trap.<sup>20</sup>

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<sup>12</sup> See Ruth S. Musgrave & Mary Anne, *STATE WILDLIFE LAWS HANDBOOK* 14 (1993); see also Michigan State University’s Animal Legal & Historical Center for searchable database of hunter harassment and interference laws, available at <https://www.animallaw.info/> (last visited May 24, 2016).

<sup>13</sup> See National Conference of State Legislatures, *State Constitutional Right to Hunt and Fish*, (11/9/2016), <http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx>.

<sup>14</sup> See generally Stacey L. Gordon, *A Solution in Search of a Problem: The Difficulty With State Constitutional “Right to Hunt” Amendments*, 35 *PUB. LAND & RES. L. REV.* 3 (2014)

<sup>15</sup> See e.g., Mont.Const. art. IX, § 7 (stating, “The opportunity to harvest wild fish and game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right to trespass on private property or diminution of other private rights.”).

<sup>16</sup> See, e.g., Wyo.Const. art I, § 39 (stating, “The opportunity to fish, hunt and trap wildlife is a heritage that shall forever be preserved to the individual citizens of the state, subject to regulation as prescribed by law, and does not create a right to trespass on private property, diminish other private rights or alter the duty of the state to manage wildlife.”).

<sup>17</sup> See, e.g., Va. Const. art. XI, § 4 (proclaiming “a right to hunt, fish and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by law”).

<sup>18</sup> See Martin Nie, *State Wildlife Policy and Management: The Scope and Bias of Political Conflict*, 64(2) *PUB. ADMIN. REV.* 221, 222 (2004).

<sup>19</sup> JOHN F. REIGER, *AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION* (1st ed. 1975).

<sup>20</sup> See Nie, *supra* note, at 223.

Funding for state wildlife management generally comes from the sale of hunting, fishing and trapping licenses at the state level and from federal funds generated through targeted excise taxes. The result is that hunting, fishing and trapping-derived revenue “comprise between 60 and 90 percent of the typical state fish and wildlife agency budget.”<sup>21</sup> This arrangement is often referred to as a “user-pay, user-benefit” funding model because states apply most of these funds to the management of sport fish and game species.<sup>22</sup> This funding mechanism serves to reinforce the complaint of non-hunters that their values and interests are not adequately considered in management decisions. As we discuss below, this funding model helps us better understand the position of states in some intergovernmental disputes, as decisions made by federal land agencies can have implications for state wildlife agency budgets that are so dependent on fish and game-generated revenue.

Another initial observation is that the “user-pay, user-benefit” moniker is more complicated than generally stated. A case can be made, for example, that taxpayers, including the non-hunting and non-fishing public, do indeed pay for wildlife *conservation* through the acquisition and management of wildlife *habitat*, both public and private. This takes the form of funding for federal lands, state lands, and contributions to private land conservation. But in more precise terms of funding wildlife *management* and state wildlife agencies, the user-pay, user-benefit model is less disputed.

The history of the user-pay, user-benefit funding model illustrates the cooperative relationship between federal and state governments in the management of wildlife. Prior to 1937, many states regularly diverted game license revenue to general governmental purposes, other than fish and wildlife management. The Federal Aid in Wildlife Restoration Act of 1937, more commonly known as the Pittman-Robertson Act, put an end to this practice.<sup>23</sup> The program put in place by “Pittman-Robertson” provides federal assistance to states for wildlife restoration projects and plans (and hunter education). In order to secure a more certain and predictable stream of funding for wildlife, the Act (and subsequent amendments to it) created a fund from taxes imposed on firearms, ammunition, and archery equipment.<sup>24</sup> However, in order to receive federal funding, the law requires states to prohibit “the diversion of license fees paid by hunters for any other purpose than the administration of said State fish and game department.”<sup>25</sup> In other words, the law conditions federal funding on states using state game license revenue for wildlife management and conservation.

A similar program focused on fisheries emerged from Congress in 1950. The Federal Aid in Sport Fish Restoration Act, also referred to as the Dingell-Johnson Act, funds sport fish restoration through excise taxes on fishing equipment, motorboat/small engine fuel, and

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<sup>21</sup> J.F. ORGAN ET. AL., THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION: TECHNICAL REVIEW 12-04, 9 (Theodore A. Bookhout, December 2012).

<sup>22</sup> *Id.*

<sup>23</sup> 16 U.S.C. §§ 669–669k (1937).

<sup>24</sup> See M. Lynn Corn & Jane G. Gravelle, CONG. RESEARCH SERV., GUNS, EXCISE TAXES, AND WILDLIFE RESTORATION, at 2 (2013) (providing a breakdown of PR receipts and distributions).

<sup>25</sup> 16 U.S.C. §669.

baits.<sup>26</sup> It similarly includes a predicate for federal funding: states receiving Dingell-Johnson money must apply it to the administration of state fish and game departments.<sup>27</sup> Funding is used for fish restoration and management projects, defined in the law as “the restoration and management of all species of fish which have material value in connection with sport or recreation in the marine and/or fresh waters of the United States.”<sup>28</sup>

The Pittman-Robertson and Dingell-Johnson Acts primarily focus on sport fish and game species. State funding for non-game species has not fared as well. Congress addressed this issue in passing the Fish and Wildlife Conservation Act of 1980.<sup>29</sup> Frequently referred to as the “Non-Game Act,” this law recognizes that the traditional focus on “recreationally and commercially important species” and “traditional financing mechanisms are neither adequate nor fully appropriate to meet the conservation needs of nongame fish and wildlife.”<sup>30</sup> The purpose of the Act is to fix this problem by providing “financial and technical assistance to the States for the development, revision, and implementation of conservation plans and programs for nongame fish and wildlife.”<sup>31</sup> Promise notwithstanding, this law never achieved its stated purpose because unlike the Pittman-Robertson and Dingell-Johnson Acts, it does not include an independent and more secure funding mechanism. Instead, the law relied on funding from general congressional appropriations, which to date Congress never provided to the program.<sup>32</sup>

Several initiatives have been waged in the past, at both national<sup>33</sup> and state<sup>34</sup> levels, to deal with the lack of funding for nongame species management and a related campaign is currently underway.<sup>35</sup> AFWA is part of a broad coalition seeking a solution to the problem of non-game funding. We return to this issue in Part III, as we believe it is imperative that states have the capacity and incentives to manage nongame species. Providing these resources will build trust and capacity at the state level and help harmonize federal-state responsibilities over wildlife on federal lands.

### *C. The North American Model of Wildlife Conservation*

<sup>26</sup> 16 U.S.C. §§ 777–777m (1988).

<sup>27</sup> 16 U.S.C. § 777(a).

<sup>28</sup> 16 U.S.C. § 777a(1).

<sup>29</sup> 16 U.S.C. §§ 2901–2911 (1980).

<sup>30</sup> 16 U.S.C. § 2901(a)(4).

<sup>31</sup> 16 U.S.C. § 2901(b)(1).

<sup>32</sup> See 75 Fed. Reg. 51,420 (Aug. 20, 2010) (removing regulations that implement the Fish and Wildlife Conservation Act because funds to carry out the Act never became available).

<sup>33</sup> One of the more memorable campaigns was the unsuccessful effort in passing the Conservation and Reinvestment Act (CARA) of 2000. H.R. 701, 106<sup>th</sup> Cong. (2000).

<sup>34</sup> See generally Cindy McKinney et al., Investing in Wildlife: State Wildlife Funding Campaigns (April 2005) (unpublished Master’s thesis, University of Michigan), available at <http://www.snre.umich.edu/ecomgt/pubs/documents/finalReport.pdf>.

<sup>35</sup> See generally ASS’N OF FISH AND WILDLIFE AGENCIES, *The Blue Ribbon Panel on Sustaining America’s Diverse Fish & Wildlife Resources* (2016), <http://www.fishwildlife.org/index.php?section=blueribbonpanel>.

The North American Model of Wildlife Conservation figures prominently in state claims and positions regarding wildlife management on federal lands. The Model was formally adopted by AFWA in 2002 and it views the Model (along with the public trust doctrine) as “the basis for state wildlife law.”<sup>36</sup> While the Model has no independent legal authority, it is referenced extensively in AFWA legal and educational materials and is also invoked frequently by state wildlife agencies and other institutions.<sup>37</sup> While it is beyond the scope of this Article to provide a thorough accounting and analysis of the Model, it plays a significant role in how states frequently frame issues and view their political and legal authority over wildlife. We discuss the Model again in Part III(B)(2) by explaining how it can exacerbate conflict between Federal and state governments.

First articulated by University of Calgary biologist Valerius Geist in the mid-1990s, the Model is a set of seven broadly stated principles, which include the following: (1) Wildlife resources are a public trust, (2) Markets for game are eliminated, (3) Allocation of wildlife is by law, (4) Wildlife can be killed only for a legitimate purpose, (5) Wildlife is considered an international resource, (6) Science is the proper tool to discharge wildlife policy, (7) Democracy of hunting is standard.<sup>38</sup>

Embedded within each principle is a descriptive-historical accounting of wildlife conservation and a more normative-prescriptive component. The Model places extraordinary emphasis on the role played by hunters in American wildlife conservation, while paying relatively little regard to the preservation movement or the role played by federal lands and federal environmental law more generally. Conspicuously missing from the Model, for example, is a principle focused on wildlife habitat, of which federal lands would be of obvious significance.

The normative and prescriptive part of the Model is more difficult to assess because of how differently actors interpret and use it. Some proponents of the Model, for example, claim that it “has often been interpreted to be more than its original articulators’ intention to describe key components of the philosophy and approach to wildlife conservation that

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<sup>36</sup> ASS’N OF FISH AND WILDLIFE AGENCIES, Wildlife Management Authority: The State Agencies’ Perspective 13 (Feb. 2014), at [http://www.fishwildlife.org/files/AFWATaskForce\\_State\\_Authorities\\_v3-5-14.pdf](http://www.fishwildlife.org/files/AFWATaskForce_State_Authorities_v3-5-14.pdf) [hereinafter AFWA Task Force Report].

<sup>37</sup> See, e.g., ARIZ. GAME AND FISH DEP’T, NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION, [http://www.azgfd.gov/h\\_f/documents/NAM%20Brochure.pdf](http://www.azgfd.gov/h_f/documents/NAM%20Brochure.pdf) (last visited May 26, 2016). The policy of The Wildlife Society is to “promote and support adherence to the seven core components [of the Model], identified by the Society, as the bedrock of the Model, by state, provincial and federal governments...” Final TWS Position Statement on the North American Model of Wildlife Conservation (approved Mar. 2007, expired in Mar. 2012).

<sup>38</sup> Conference Report, Valerius Geist et. al., Why Hunting has Defined the North American Model of Wildlife Conservation: Transactions of the 66th North American Wildlife and Natural Resources Conference, 175 (2001) (citing earlier references and antecedents to the Model), [http://conservationvisions.com/sites/default/files/why\\_hunting\\_has\\_defined\\_the\\_north\\_american\\_model\\_of\\_wildlife\\_conservation.pdf](http://conservationvisions.com/sites/default/files/why_hunting_has_defined_the_north_american_model_of_wildlife_conservation.pdf).

developed in North America.”<sup>39</sup> Critics of the Model, by contrast, see it as more than just a description of the past but rather as a narrow set of guiding principles for future wildlife conservation.<sup>40</sup> This is because most references to the Model, as discussed further below, go beyond description and use it to justify various positions or decisions made by state wildlife agencies. Clark and Milloy summarize: “Functionally, the model’s doctrine (principles) and formula (rules to implement the doctrine) guide current decision making about wildlife; they dictate how decisions are made, by whom, and for what purposes.”<sup>41</sup> What is striking to us about the Model is how little academic and professional scrutiny has been applied to it, as it is clearly but one possible accounting of wildlife conservation—past, present and future.

Whatever might be its strengths and limitations, the Model clearly has political and policy influence and helps us understand state positions on wildlife management, though often indirectly. Of most relevance here is the Model’s emphasis on the public trust doctrine, state primacy, and the importance of hunting to wildlife conservation. The public trust doctrine, as applied to wildlife, is regarded as the Model’s cornerstone.<sup>42</sup> Asserting that public trust principles relating to wildlife are most clearly found in state law, AFWA references the Model to advocate “the primacy of state management authority for resident wildlife.”<sup>43</sup> Again, AFWA’s emphasis is that states have authority to manage fish and wildlife resources through a public trust and that it “assigns trustee ownership of fish and wildlife to the states.”<sup>44</sup> Access to public resources is commonly asserted in public trust cases (e.g., to oysters, tidelands, streams) and state wildlife agencies and AFWA make similar linkages between states owning wildlife in trust, which necessitates providing

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<sup>39</sup> John F. Organ, et al., *Public Trust Principles and Trust Administration Functions in the North American Model of Wildlife Conservation: Contributions of Human Dimensions Research*, 19 Hum. Dimensions of Wildlife: An Int’l J. 407, 408 (2014).

<sup>40</sup> See Susan J. Clark & Christina Milloy, *The North American Model of Wildlife Conservation: An Analysis of Challenges and Adaptive Options*, in LARGE CARNIVORE CONSERVATION: INTEGRATING SCIENCE AND POLICY IN THE NORTH AMERICAN WEST 301 (Susan G. Clark & Murray B. Rutherford ed., 2014) (questioning “whether the model is capable of conserving wildlife and ecosystems into the future without major adaptations.”). See also Michael P. Nelson, Ph.D. et al., *An Inadequate Construct? North American Model: What’s Flawed, What’s Missing, What’s Needed*, THE WILDLIFE PROF., Summer 2011, at 58 (arguing, “The rise in the Model’s popularity is worrisome in both its descriptive and prescriptive modes: one rests upon an inadequate account of history and the other on an inadequate ethic.”).

<sup>41</sup> Clark & Milloy, *supra* note, at 312.

<sup>42</sup> See generally Organ et al., *supra* note, at 11. See also THE WILDLIFE SOC’Y, THE PUBLIC TRUST DOCTRINE: IMPLICATIONS FOR WILDLIFE MANAGEMENT AND CONSERVATION IN THE UNITED STATES AND CANADA: TECH. REVIEW 10-01, Sept. 2010, at 9.

<sup>43</sup> Ass’n of Fish and Wildlife Agencies, *The States: Trustees of America’s Wildlife* (powerpoint presentation and slides by M. Carol Bambery and Martin Bushman, [year unknown]), at 13 (on file with authors).

<sup>44</sup> *Federal Interactions with State Management of Fish and Wildlife, Hearing Before the S. Comm. On Environment and Public Works*, 114th Cong. 9 (2016) [hereinafter *Hearing*] (statement of Ron Regan, Exec. Dir. of Ass’n Fisheries and Wildlife Agencies).

public access to fish and wildlife.<sup>45</sup> We return to the public trust in wildlife issue in Part III(A)(2).

Also of relevance is the Model's emphasis on hunting. As explained by the Model's originators, though other interest groups such as bird enthusiasts played roles in the conservation movement, "It is hunters, however, or more accurately, hunting, that led to development [of the Model's principles] and form[s] the foundation for North American wildlife conservation."<sup>46</sup> AFWA similarly states that "hunting and angling are the cornerstones of the North American Model with sportsmen and women serving as the foremost funders of conservation."<sup>47</sup> In this vein, proponents of the Model often speak to the importance of sportsmen and women-derived funds to state fish and wildlife agency budgets.<sup>48</sup> This is not to suggest, however, that all proponents of the Model are necessarily endorsing an exclusive "user-pay, user-benefit" model of funding for the future. In fact, some proponents are actively searching for ways to increase funding for non-game species and want the Model applied to the conservation of biodiversity more broadly.<sup>49</sup> However malleable the Model may prove itself to be in the future, at this point, it is very much hunting-centric and this helps explain a common position of the states in various disputes, such as when federal agencies make decisions to restrict types of hunter access or when states advocate for more "active management" of wildlife on federal lands.<sup>50</sup>

#### *D. The 2014 AFWA Task Force Report*

In 2014, AFWA commissioned a task force to investigate how state wildlife agency directors "perceive the relationship between state and federal agencies, by determining the

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<sup>45</sup> See THE WILDLIFE SOC'Y, *supra* note 42, at 9 (emphasizing the importance of access to the public trust doctrine, including fishing, hunting, trapping and travel routes).

<sup>46</sup> Conference Report, *supra* note 38, at 179. See also James R. Heffelfinger et al., *The Role of Hunting in North American Wildlife Conservation*, 70 INT'L. J. ENVTL. STUDIES 399, 399 (2013) (noting that "regulated hunting is the foundation of the North American Model of Wildlife Conservation").

<sup>47</sup> Ass'n of Fish & Wildlife Agencies, *Investing in America's Conservation Legacy*, The Voice of Fish & Wildlife Agencies (2016), [http://www.fishwildlife.org/index.php?section=north\\_american\\_model\\_of\\_wildlife\\_conservation](http://www.fishwildlife.org/index.php?section=north_american_model_of_wildlife_conservation) [hereinafter *Investing*].

<sup>48</sup> See, e.g., AFWA TASK FORCE REPORT, *supra* note, at 30.

<sup>49</sup> See, e.g., ORGAN ET AL., *supra* note, at 30 (recommending that all wildlife be managed under the principles of the Model and that it is not synonymous with the user-pay, user-benefit funding model); David Willms & Anne M. Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding It, Preserving It, and Funding Its Future*, 14 WYO. L. REV. 659 (2014) (recommending alternative funding sources for wildlife management).

<sup>50</sup> For example, AFWA states that the Model "is the world's most successful system of policies and laws to restore and safeguard fish and wildlife and their habitats through sound science and active management." Ass'n of Fish & Wildlife Agencies, *Investing*, *supra* note 47 (emphasis added). See also Joanna Prukop & Ronald J. Regan, *The Value of the North American Model of Wildlife Conservation: An International Association of Fish and Wildlife Agencies Position*, 33 Wildlife Soc'y Bulletin 374, 376 (2005) (linking the Model to the importance of state primacy to the issue of access to wildlife resources).



relationship's implications on states' authority to manage wildlife, and by making recommendations to strengthen the relationship between state and federal conservation agencies.”<sup>51</sup> The Task Force Report illuminates how several state directors view the relationship between federal and state governments and the perceived legal sources of tension. Furthermore, many of the recommendations made by the Task Force are made by AFWA in other contexts and the document was approved by state membership.<sup>52</sup>

The report begins by invoking the North American Model of Wildlife Conservation, the wildlife trust doctrine, and the Tenth Amendment of the U.S. Constitution, which it asserts, “relegates to the states the responsibility of managing wildlife.”<sup>53</sup> To make the Model work, says the report, a productive relationship between federal and state agencies is necessary. Unfortunately, the report finds that “[s]tate wildlife agency leadership harbors growing concern about the increasingly strained relationship between state wildlife agencies and their federal partners”<sup>54</sup> and that there is “considerable and widespread frustration with the interface between federal and state efforts to conserve wildlife.”<sup>55</sup>

Survey respondents were asked to identify specific laws, regulations or policies that they believed were successful or challenging. Most frequently identified as a challenge to the states was the ESA, which is perceived by some state agency directors as a “vehicle for federal overreach, or of inappropriate reallocation of states' wildlife management duties into federal hands.”<sup>56</sup> Also standing out in the survey are respondents' citing NEPA as a “hindrance to states' efforts to manage wildlife,”<sup>57</sup> due to threats of NEPA-based litigation and the “continued exclusion of states from meaningful partnerships in planning, decision-making, and management, except in the most cursory of consultative efforts.”<sup>58</sup>

Of relevance to Part II(B) of this Article are some state views on federal land laws in general. Emphasized in the report are the perceived problems associated with the open-ended nature of federal land laws that are believed to be interpreted in a preservationist “hands-off” fashion that makes active management of wildlife more difficult. The task force report summarizes:

These laws leave room for loose interpretations of land management agency authority. The ambiguity allows local land managers latitude in their decision making, and they often implement preservationist interpretations that encroach on state authorities. These interpretations, often based on unwritten values, drive

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<sup>51</sup> *AFWA Task Force Report*, *supra* note, at 2.

<sup>52</sup> *See Hearing*, *supra* note, at 60–61 (statement of Ron Regan, Exec. Dir. of Ass'n Fisheries and Wildlife Agencies) (elaborating on the origins of the Task Force Report).

<sup>53</sup> *AFWA Task Force Report*, *supra* note, at 5.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 11.

agency decisions that are typically contrary to principles of wildlife, fisheries, and habitat management critical for state management.<sup>59</sup>

The Federal Land Policy Management Act (FLPMA) and the National Forest Management Act (NFMA) are discussed in this context, with both laws often viewed as presenting obstacles to the management of “state trust species.”<sup>60</sup> These laws were not identified as inherently problematic, rather respondents focused on the “subjective and inconsistent application of their precepts.”<sup>61</sup>

The AFWA Task Force makes a number of recommendations for improving relations between federal and state governments, most of which revolve around strengthening the position of state agencies in managing wildlife on federal lands. It also initiated a “legal strategy” in 2013 to enable state agencies “to act in concert to address challenges to their statutory authority to manage wildlife.”<sup>62</sup> In short, AFWA aims to clarify—in law, regulation, policy, and public perception—what it sees as the rightful role of the states in managing wildlife on federal lands. Some of these recommendations are offered by AFWA and the Western Association of Fish and Wildlife Agencies (WAFWA) in other contexts,<sup>63</sup> such as recent congressional testimony.<sup>64</sup> For now, we simply summarize the core recommendations of the Task Force, and we provide the requisite background in other parts of the paper. We return and respond to AFWA’s recommendations in Part III.

The AFWA Task Force begins by recommending training state and federal line managers “on the historic, principled underpinnings of state-federal authority and jurisdiction for managing fish and wildlife in the United States.”<sup>65</sup> The proposed training initiative is to be implemented through a Memorandum of Understanding (MOU). A public affairs strategy “to market and defend state wildlife authority interests” is also envisioned as part of this educational effort.<sup>66</sup> Establishing a mediation team to more constructively resolve conflict between federal and state agencies is also recommended.<sup>67</sup>

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<sup>59</sup> *Id.* at 9.

<sup>60</sup> *Id.* at 12.

<sup>61</sup> *Id.* at 2.

<sup>62</sup> ASS’N OF FISH & WILDLIFE AGENCIES, PROTECTING STATE AUTHORITY FOR FISH AND WILDLIFE MANAGEMENT, THE LEGAL VOICE FOR FISH & WILDLIFE AGENCIES: PROTECTING STATE AUTHORITY FOR FISH & WILDLIFE MANAGEMENT 2, [http://www.fishwildlife.org/files/About\\_AFWA-Legal-Strategy\\_v6\(1\).pdf](http://www.fishwildlife.org/files/About_AFWA-Legal-Strategy_v6(1).pdf) (last visited May 26, 2016).

<sup>63</sup> *See, e.g.,* W. ASS’N OF FISH & WILDLIFE AGENCIES COMMISSIONERS’ ST. AUTHORITIES SUBCOMMITTEE, WHITE PAPER: WILDLIFE MANAGEMENT SUBSIDIARITY 4 (Wyo. 2011) (“WAFWA recommends that Congress adopt new provisions that clearly establish state fish and wildlife management authority and direct that all federal regulations and policies be consistent with congressional intent”).

<sup>64</sup> *See Hearing, supra* note, at 17 (statement of Ron Regan, Exec. Dir. of Ass’n Fisheries and Wildlife Agencies).

<sup>65</sup> *Id.* at 17.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> *See id.* at 28.

Driving some of the Task Force's recommendations is a concern that federal land agencies are evolving in a way that is inconsistent with their organic legislation. According to the Task Force, "As conservation becomes more focused on landscape scale efforts, it is important that federal agencies integrate their conservation programs with the state agency programs and not get out ahead of the states and the public we serve."<sup>68</sup> The Task Force elaborates:

[W]e must remember that the foundation for our fish and wildlife programs continues to be the people who enjoy our sports and continue to pay the lion's share of the costs that provide these services. Many state fish and wildlife programs across our nation do not receive either state or federal general appropriations and as such must answer to a narrow constituency of supporters."<sup>69</sup>

This concern leads to the Task Force recommending more substantive legislative changes. The first is to modify the Sikes Act<sup>70</sup> so that management by the Departments of the Interior and Agriculture comport with the law's section pertaining to fish and wildlife management on lands administered by the Department of Defense.<sup>71</sup> This law, often referred to as the "Sikes Act Extension," requires the Secretaries of Interior and Agriculture to "plan, develop, maintain, and coordinate programs for the conservation and rehabilitation of wildlife, fish, and game."<sup>72</sup> The military section of the Act requires the cooperative preparation of natural resource management plans and that these plans "shall reflect the mutual agreement of the [federal and state] parties concerning conservation, protection, and management of fish and wildlife resources."<sup>73</sup> There is no such language in the law pertaining to "mutual agreement" in the sections pertaining to the Departments of the Interior and Agriculture.<sup>74</sup> The Task Force would like this changed to include the following

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<sup>68</sup> *Id.* at 21.

<sup>69</sup> *Id.*

<sup>70</sup> Sikes Act, Pub. L. No. 86-797, 16 U.S.C. 670a-670o (1960) (prior to 1974 amendment).

<sup>71</sup> Sikes Act, Pub. L. No. 93-452, ch. 88, sec. 201-202 (1974) (codified as amended at 16 U.S.C. §§ 670g-670h).

<sup>72</sup> 16 U.S.C. § 670g(a).

<sup>73</sup> 16 U.S.C. § 670a(2).

<sup>74</sup> Instead, the Sikes Act makes clear that the "[c]onservation and rehabilitation programs developed and implemented pursuant to this subchapter shall be deemed as *supplemental* to wildlife, fish, and game-related programs conducted by the Secretary of the Interior and the Secretary of Agriculture pursuant to other provisions of law. Nothing in this subchapter shall be construed as limiting the authority of the Secretary of the Interior or the Secretary of Agriculture, as the case may be, to manage the national forests or other public lands for wildlife and fish and other purposes in accordance with the Multiple-Use Sustained-Yield Act of 1960." 16 U.S.C. § 670h(c)(1)(C) (emphasis added). Furthermore, any wildlife conservation and rehabilitation plans prepared pursuant to the Sikes Act must be consistent with applicable USFS or BLM land management plans. See 16 U.S.C. § 670h(b). See Michael J. Bean, *The Developing Law of Wildlife Conservation on the National Forest and National Resource Lands*, 60 J. Contemporary L. 58 (finding the Sikes Act Extension to offer "no resolution, indeed no guidance for the resolution, of conflicts involving wildlife conservation and other uses of the public lands [and] that "it does nothing to narrow the broad discretion which the federal land management agencies have traditionally exercised in fulfilling their multiple use mandates"). *Id.*, at 65.

language: “The conservation plans and resulting programs shall reflect the mutual agreement of the parties concerning conservation, protection, and management of fish and wildlife resources.”<sup>75</sup>

As we explain later, federal land laws often include a “savings” clause addressing the relationship between federal and state powers.<sup>76</sup> AFWA emphasizes the importance of these provisions and makes a recommendation to “[s]trengthen existing Savings Clauses, expand new Savings Clauses to new congressional legislation as opportunities arise, and [to] vigorously defend savings clauses to establish legal precedent.”<sup>77</sup>

The Task Force expresses frustration in how the courts have viewed wildlife savings clauses in the past, most notably in the case of managing wildlife in the National Elk Refuge in Wyoming.<sup>78</sup> As AFWA sees it, these savings clauses should be viewed as unambiguous and represent the clear intention of Congress to “reserve” state power and authority over wildlife on federal lands, as “a necessary incident of state sovereignty.”<sup>79</sup> To fix this problem the Task Force recommends replacing existing savings provisions with the following language:

Nothing in this Act shall be construed as affecting or intending to interfere with the laws of the several states to regulate hunting and fishing or to supersede, abrogate or otherwise impair the state’s primary jurisdiction to manage or control fish and resident wildlife in a manner not inconsistent with the purpose of this Act. The Secretary, in carrying out this Act, shall proceed in conformity with such applicable state laws, policies and management plans and shall cooperate with the states and develop jointly agreed upon wildlife management plans.<sup>80</sup>

This proposal is a fundamental reinterpretation of existing wildlife law and we explain why it should be rejected in Part III. We discuss savings clauses again in the context of federal preemption (Part II (A)(4)) and in each section reviewing federal land laws (Part II (B)).

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<sup>75</sup> AFWA Task Force Report, *supra* note, at 23.

<sup>76</sup> These provisions “delimit the degree to which a federal agency should pursue national objectives at the expense of a state’s different view” and can provide “a statement, and sometimes a mechanism, for incorporating state interests notwithstanding a statute that seeks to implement a uniform federal program.” Robert L. Fischman & Angela M. King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 ENVTL. L. & POL’Y. REV. 129, 145 (2007).

<sup>77</sup> AFWA Task Force Report, *supra* note, at 17.

<sup>78</sup> See *supra* notes.

<sup>79</sup> Brief for Int’l Ass’n of Fish & Wildlife Agencies as Amici Curiae at 8, *Wyoming v. United States*, 279 F.3d 1214 (10<sup>th</sup> Cir. 2002) (on file with authors).

<sup>80</sup> AFWA Task Force Report, *supra* note, at 27.

## **II. THE LEGAL CONTEXT OF WILDLIFE MANAGEMENT ON FEDERAL LANDS**

### ***A. Constitutional Context***

The U.S. Constitution provides the framework for federal-state relations and power sharing arrangements, as well as individual obligations and limitations on authority for each level of government. Key provisions include the Property Clause, the Treaty Clause, the Commerce Clause, the Supremacy Clause, and the Tenth Amendment. This section explains the relevant constitutional clauses and legal precedents regarding federal powers and duties for wildlife management, and consequent implications for state authority.

#### ***1. The Property Clause***

The United States' vast landholdings are concentrated in the American West and Alaska, but federal land can be found in all fifty states. As a landowner, the United States has proprietary interests over its lands and resources; as a government, it also has sovereign powers over its lands and resources. This Part focuses on the proprietary nature of the federal interest in public lands and wildlife.

##### ***a. The Nature and Scope of the Property Clause***

The Property Clause gives Congress “the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>81</sup> Although the U.S. Supreme Court has found that the “full scope of this paragraph has never been definitely settled,” it has held that “[p]rimarily, at least, it is a grant of power to the United States of control over its property.”<sup>82</sup> In theory, this plenary power is tempered by special duties regarding the administration of public lands and resources. “Executive branch officials, while having wide latitude to make all needful rules regarding the public lands, may have a countervailing trust-like responsibility to protect those resources on behalf of the public.”<sup>83</sup> While the Supreme Court and several other federal courts have alluded to a federal trust responsibility for public lands and resources, the

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<sup>81</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>82</sup> *Kansas v. Colorado*, 206 U.S. 46, 89 (1907). See *Gratiot v. U.S. United States*, 40 U.S. 336 (1841) (holding that, despite a state’s objection, Congress had broad Property Clause authority to dispose of mineral leases however it saw fit).

<sup>83</sup> Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 Ariz. St. L.J. 941, 1032 (2000). Accord *Complaint of Steuart Transp. Co., In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (“Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from the ownership of the resources but from a duty owing to the people.”) (emphasis added).

contours of such a responsibility are ill-defined.<sup>84</sup> The contours of the Property Clause power, however, are relatively clear.<sup>85</sup>

*U.S. v. Grimaud* was one of the first tests of the Property Clause power to protect federal public lands.<sup>86</sup> The Forest Reserve Act of 1897 authorized the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . and . . . such rules and regulations . . . as will

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<sup>84</sup> See *Light v. U.S.*, 220 U.S. 523, 536 (1911) (identifying a duty "to protect the public domain from trespass and unlawful appropriation"); *W. Va. Div. of Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945, 948, 950–55 (4th Cir. 1975) (noting the historic role of the Forest Service as "custodian and protector" of forest reserves); *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1241 (D. Colo. 2006) (finding a duty to assert federal reserved water rights for the Black Canyon of the Gunnison). In a series of cases involving Redwood National Park, the trust doctrine was invoked to require affirmative action to protect park resources from external threats posed by logging. See *Sierra Club v. Dep't. of Interior*, 424 F. Supp. 172, 174–75 (N.D. Cal. 1976); *Sierra Club v. Dep't. of Interior*, 398 F. Supp. 284, 294 (N.D. Cal. 1975); *Sierra Club v. Dep't. of Interior*, 376 F. Supp. 90, 95–96 (N.D. Cal. 1974).

<sup>85</sup> It is important to note that federal enclaves are distinct from federal public lands. Under the Enclave Clause, Congress may acquire derivative legislative power from a state by consensual acquisition of land, or by nonconsensual acquisition followed by the state's cession of authority over the land. U.S. Const. art. I, § 8, cl. 17. Specifically, the Clause gives Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." *Id.* In addition to giving Congress exclusive authority over the seat of federal government (Washington, DC), the Enclave Clause provides authority to purchase state land for a variety of federal purposes. See Robert L. Glicksman and George Cameron Coggins, *Powers Over Federal "Enclaves"—Creation*, 1 Pub. Nat. Res. L. § 3:7 (2nd ed. 2016) (noting that "Needful Buildings" include most federal purposes, including dams, national parks, and forests). Congress's power over federal enclaves is highly nuanced. Spencer Driscoll, *Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement*, 2012 B.Y.U. L. Rev. 999, 1000 (2012). If the state legislature expressly cedes jurisdiction over an enclave purchased by the United States, the United States exercises all legislative powers over the parcel to the exclusion of state authority. *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976). Otherwise, the federal and state governments are free to make whatever jurisdictional arrangements they choose regarding wildlife, transportation, and other civil and criminal laws. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525 (1885). See *Kleppe*, 426 U.S. at 542 ("[T]he legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power, to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority."); *United States v. Parker*, 36 F. Supp.3d 550, 575–76 (W.D.N.C. 2014) (holding that, where both the U.S. and North Carolina had concurrent jurisdiction within a forest enclave, the federal court had authority over a prosecution for the illegal taking of wildlife). Once agreed upon, states cannot unilaterally amend or cancel cession agreements. *U.S. v. Armstrong*, 186 F.3d 1055, 1061 (8th Cir. 1999).

<sup>86</sup> *United States v. Grimaud*, 220 U.S. 506 (1911). For an in-depth history of the Property Clause, see Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 Minn. L. Rev. 1, 16–36 (2001).

insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction.”<sup>87</sup> With this authority, the Secretary issued rules requiring ranchers to secure permits to graze livestock in a forest reserve.

The defendants were charged with grazing sheep in a forest reserve without a permit. They argued that the Act was unconstitutional insofar as it delegated power to make regulations to the Secretary. The Supreme Court was unsympathetic. It held, “Each reservation had its peculiar and special features,” and Congress properly wielded the Property Clause to give the Secretary power to consider local conditions and “to fill up the details” of regulating “occupancy and use . . . to preserve the forests from destruction.”<sup>88</sup> The Ninth Circuit reached a similar conclusion in a recent case involving rancher Wayne Hage, who gained a good deal of notoriety for his repeated trespasses on federal public lands in Nevada. The court rejected Hage’s argument that state-sanctioned water rights entitled him to any additional easements or appurtenances to graze livestock on federal lands.<sup>89</sup>

The Property Clause power to protect the public lands may also be used to protect natural resources that are intimately associated with the public lands, such as wildlife, water, and air. In *Hunt v. United States*, the Supreme Court held that the Property Clause included the power to thin overpopulated herds of deer on federal lands in order to protect forest resources, even if the federal action was contrary to state law.<sup>90</sup> The Court subsequently construed *Hunt* quite broadly in *Kleppe v. New Mexico*, stating that, while *Hunt* found that “damage to federal land is a sufficient basis for regulation. . . , it contains no suggestion that it is a necessary one.”<sup>91</sup>

*Kleppe* upheld the Wild Free-roaming Horses and Burros Act,<sup>92</sup> which prohibited the capture and destruction of unclaimed horses and burros on public lands.<sup>93</sup> When the BLM invoked the Act to prevent New Mexico from capturing and selling burros, the state asserted that the BLM lacked authority because the burros were neither moving in interstate commerce nor damaging public land. The issue was whether, under the Property Clause, the BLM’s jurisdiction over burros was a “needful” regulation “respecting” public lands.<sup>94</sup>

The district court below had found that the Act was unconstitutional, and opined that the Property Clause authorized the regulation of wild animals only if necessary to protect the

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<sup>87</sup> Forest Reserve Act of 1897, 16 U.S.C. 1246 (1901).

<sup>88</sup> *Grimaud*, 220 U.S. at 516 (citing *Wayman v. Southard*, 10 Wheat. 42, 6 L.Ed. 262). *Accord* *Light v. U.S.*, 220 U.S. 523, 536 (1911)) (enjoining grazing on a national forest without a permit and stating, “The United States can prohibit absolutely or fix the terms on which its property may be used”).

<sup>89</sup> *See* *United States v. Estate of Hage*, 810 F.3d 712, 718 (9th Cir. 2016) (citing, *inter alia*, *Light*, 220 U.S. at 536).

<sup>90</sup> *Hunt v. United States*, 278 U.S. 96 (1928).

<sup>91</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 537 (1976) (citations omitted).

<sup>92</sup> Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331–1340.

<sup>93</sup> *See generally* Robert L. Fischman and Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 Univ. Colorado L. Rev. 123 (providing the legal history and political implications of this decision)

<sup>94</sup> *Kleppe*, 426 U.S. at 536.

public lands from damage.<sup>95</sup> The Supreme Court disagreed, stating that the Property Clause power “necessarily” includes protection of wildlife “integral” to the public lands.

In passing the Wild Free-roaming Horses and Burros Act, Congress deemed these animals “an integral part of the natural system of the public lands,” and found that federal management was necessary “for achievement of an ecological balance on the public lands.” According to Congress, these animals, if preserved in their native habitats, “contribute to the diversity of life forms within the Nation and enrich the lives of the American people.”<sup>96</sup>

In reaching its conclusion, the Court explicitly rejected the district court’s rationale that federal power over wild horses and burros “conflicts with . . . the traditional doctrines concerning wild animals.”<sup>97</sup> It explained that, while “the States have broad trustee and police powers over wild animals within their jurisdictions . . . , those powers exist only ‘in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.’”<sup>98</sup> The Court clarified the balance of power between the federal and state governments:

No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of (wildlife), but it does not follow that its authority is exclusive of paramount powers. . . . *We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding.*<sup>99</sup>

In *Wyoming v. United States*,<sup>100</sup> Wyoming challenged the refusal of the U.S. Fish and Wildlife Service (FWS) to permit the state to vaccinate elk on the National Elk Range (NER). The Tenth Circuit stated that the Property Clause gives Congress the power to choose: “(1) to assume all management authority over the National Wildlife Refuge System, including the NER, (2) to share management authority over those federal lands with the states, or (3) to preserve to its fullest extent the states’ historical role in the management of wildlife within their respective borders.”<sup>101</sup> The court held that federal law would preempt state management in the event of an actual conflict or where state management stands as an obstacle to the accomplishment of federal objectives, and remanded for further findings.<sup>102</sup>

<sup>95</sup> See *id.* at 534 (citing *New Mexico v. Morton*, 406 F.Supp. 1237 (D.N.M. 1975)).

<sup>96</sup> *Id.* at 535–536 (citations omitted).

<sup>97</sup> *Id.* at 535.

<sup>98</sup> *Id.* at 545 (citing *Geer v. Connecticut*, 161 U.S. 519, 528 (1896); *Missouri v. Holland*, 252 U.S. 416, 434 (1920)) (other citations omitted).

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Wyoming v. U.S.*, 279 F.3d 1214 (10th Cir. 2002).

<sup>101</sup> *Id.* at 1230.

<sup>102</sup> See *id.* at 1234. According to the court, Congress “rejected complete preemption of state wildlife regulation” in the Wildlife Refuge Administration Act, but rather “intended ordinary principles of conflict preemption to apply in cases such as this.” *Id.* (citing 16 U.S.C. § 668dd). A California district court followed *Wyoming* in holding that a state ballot proposition that banned the use of certain kinds of traps and poisons on federal lands was preempted by the Property Clause. *Nat’l Audubon Soc’y v. Davis*, 144 F. Supp. 2d 1160, 1180–1181 (N.D. Cal. 2000), *aff’d*



States often assert their police powers to regulate the public health and welfare through measures that protect natural resources within the state, such as game species, trees, and water.<sup>103</sup> Although there is no explicit “property clause” authority in the U.S. Constitution extending to state interests in wildlife, water, or other natural resources, states occasionally assert an ownership interest as an additional source of their authority.<sup>104</sup> The U.S. Supreme Court has repeatedly rejected this theory, at least as it relates to wildlife and migratory birds: “To put the claim of ... [State authority] upon title is to lean upon a slender reed.”<sup>105</sup> Even absent title, states have “ample allowance for preserving . . . the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership,”<sup>106</sup> but as noted in *Kleppe v. New Mexico*, *Wyoming v. U.S.*, and numerous other cases, state law may not contravene federal law.<sup>107</sup>

*b. Property Clause Power to Protect Federal Lands and Resources from External Threats*

Not only does the Property Clause supply authority to regulate activities that occur on federal lands, but, in certain cases, it also authorizes federal regulation of activities outside of the federal boundaries where necessary to protect the public lands and resources. In *Camfield v. U.S.*, the owner of several sections of private land acquired from the Union Pacific Railroad fenced his land in a way that also enclosed about 20,000 acres of public lands.<sup>108</sup> When the United States sought to remove the fence under the 1885 Unlawful Enclosures Act, Camfield argued that the United States had no power to control private land use.<sup>109</sup> The Supreme Court upheld the application of the Act to Camfield’s property, explaining that under the Property Clause, the federal government “doubtless has a power over its own property analogous to the police power of the several States . . . and the extent

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*in part, rev'd in part*, 307 F.3d 835 (9th Cir.), *amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002). The Ninth Circuit did not reach the Property Clause issue, instead holding that the proposition was preempted by the Wildlife Refuge Administration Act. 307 F.3d at 854. *Accord*, *Defenders of Wildlife v. Salazar*, 651 F.3d 112 (D.C. Cir 2011): “We take the Secretary at his word that Wyoming has no veto over the Secretary’s duty to end a practice that is concededly at odds with the long-term health of the elk and bison in the Refuge” (and pointing out Wyoming’s brief “agreeing that Wyoming does not have a veto”).

<sup>103</sup> *See, e.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding Virginia’s decree to cut down infected cedars that were fatal to nearby apple orchards); *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“[Each state] retains broad regulatory authority to protect . . . the integrity of its natural resources” such as fisheries).

<sup>104</sup> *See, e.g.*, *Geer v. Connecticut*, 161 U.S. 519, 528 (1896) (claiming that ownership of all wild game taken within the state allowed the state to prohibit its removal from the state) (overruled by *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)).

<sup>105</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 332 (1979) (citing *Missouri v. Holland*, 252 U.S. 416, 434 (1920)).

<sup>106</sup> *Id.* at 335.

<sup>107</sup> *Wyoming v. U.S.*, 279 F.3d 1214, 1227 (10th Cir. 2002); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). *Accord* *Hughes*, 441 U.S. at 332.

<sup>108</sup> *Camfield v. U.S.*, 167 U.S. 518 (1897).

<sup>109</sup> *See id.* at 522 (citing 43 U.S.C. §§ 1061–1063 (1885)).

to which it may go in the exercise of such power is measured by the exigencies of the particular case.”<sup>110</sup>

The courts have consistently upheld broad federal power “to control extraterritorial private activities that might adversely affect federal property.”<sup>111</sup> For instance, federal restrictions on businesses situated outside of a national park have been upheld when those business enterprises affected neighboring parklands.<sup>112</sup> Moreover, federal regulation of activities on state-owned waters was upheld as a valid exercise of Property Clause power to manage the Boundary Waters Canoe Area Wilderness.<sup>113</sup>

Beyond the land itself, it is fair to ask how far federal authority over wildlife and other migratory resources “integral” to the public lands goes when those resources are found outside of the boundaries of the public lands. In *Kleppe*, the contested issue involved the federal regulation of nonfederal activity on federal land (*i.e.*, the State of New Mexico captured wild burros on a grazing allotment), and while the Act in question reached

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<sup>110</sup> *Id.* at 525–26. *See also* *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (upholding president’s decision to withdraw land to preserve oil reserves); *Light v. U.S.*, 220 U.S. 523, 536 (1911) (“The United States can prohibit absolutely or fix the terms on which its property may be used.”); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987) (“The Property Clause grants Congress plenary power to regulate and dispose of land within the Territories”). *Accord* *Organized Fisherman v. Andrus*, 488 F. Supp. 1351, 1355 (S.D. Fla. 1980) (refusing to enjoin enforcement of federal regulations restricting fishing in a national park given Congress’s “complete power” over public lands, which “necessarily includes the power to regulate and protect the wildlife living there”) (citing *Kleppe v. New Mexico*, 426 U.S. 529, 540–541 (1976)); *Organized Fisherman v. Hodel*, 775 F.2d 1544, 1549 (11th Cir. 1985) (finding that Florida law provided no vested property right to fish in a national park).

<sup>111</sup> Appel, *supra* note, at 77–78.

<sup>112</sup> *See, e.g.*, *United States v. Armstrong*, 186 F.3d 1055, 1061–62 (8th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000); *United States v. Richard*, 636 F.2d 236, 240 (8th Cir. 1980) (“[F]ederal regulation may exceed federal boundaries when necessary for the protection of human life or wildlife or government forest land or objectives.”).

<sup>113</sup> *See, e.g.*, *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981) (“Congress’ power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.”); *United States v. Brown*, 552 F.2d 817, 822 (8th Cir. 1977) (stating that “congressional power over federal lands . . . include[s] the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands”). *See also* *Stupak-Thrall v. U.S.*, 89 F.3d 1269 (6th Cir. 1996), *rev’d en banc* (an equally divided court held that the federal government could regulate private activities that occurred on the surface of a lake even if the surface was private property); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979), *rev’d per curiam*, (stating that the Property Clause “grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters”); *Organized Fisherman*, 775 F.2d at 1549 (11th Cir. 1985) (upholding federal restrictions on fishing on waters within Everglades National Park, some of which were presumably under state jurisdiction); *Grand Lake Estates Homeowners Ass’n v. Veneman*, 340 F. Supp. 2d 1162 (D. Colo. 2004) (holding USFS could require special use permits on docks and marinas on Association’s land if reasonably necessary to protect the environment and water quality of Arapaho National Recreation Area).

nonfederal land as well, the Supreme Court was not required to address the regulation of state or private activities on nonfederal land.<sup>114</sup>

Other than *Kleppe*, few cases touch upon the Property Clause power to regulate “integral” wildlife outside of the boundaries of the federal lands, perhaps because federal agencies and their employees tend to be reluctant to exercise their power aggressively.<sup>115</sup>

## 2. The Treaty Clause

The Treaty Clause provides that: “[The President] shall have the Power . . . to make Treaties, provided two-thirds of the Senators present concur.”<sup>116</sup> In recognition of the international nature of wildlife conservation, the United States has entered into several landmark wildlife treaties within the past century, which Congress has implemented through domestic legislation. With respect to the management of wildlife on federal lands, the most notable of these include the Migratory Bird Treaty of 1916<sup>117</sup> and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>118</sup> Other international provisions include the Agreement on the Conservation of Polar Bears,<sup>119</sup> the Pacific Salmon Treaty,<sup>120</sup> the Northwest Atlantic Fisheries Treaty,<sup>121</sup> the Migratory Bird

<sup>114</sup> *Kleppe*, 426 U.S. at 546 (“We need not, and do not, decide whether the Property Clause would sustain the Act in all of its conceivable applications.”).

<sup>115</sup> See generally Joseph L. Sax and Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 Ecology L.Q. 207, 226, 261 (1987) (describing how the Park Service’s “distaste for confrontation makes it timid,” and how, “constrained by bureaucratic prudence and timidity, . . . [NPS] is reluctant to use the law; highly deferential to the traditional turf prerogatives of its neighbors; and hesitant to subject itself to criticism by speaking out forcefully on transboundary issues”).

<sup>116</sup> U.S. CONST. art. II, § 2.

<sup>117</sup> Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit, Aug. 16, 1916 (codified as amended at 16 U.S.C. §§ 703–712); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Jul. 1, 1975; IUCN Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, Mar. 3, 1973, 27 U.S.T. 1087.

<sup>118</sup> Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243. CITES is implemented in the U.S. through the ESA, which, like CITES, controls imports and exports of protected species. 16 U.S.C. §§ 1531(a)(4)(F); 1538(a)(1)(A), (a)(2)(A), (c)-(d). See *Safari Club Int’l v. Jewell*, 960 F. Supp. 2d 17, 67-68 (D.D.C. 2013) (“Conserving species within their ecosystems is one purpose of the ESA, but other purposes are ‘to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a)[,]’ including the CITES.”). As such, the ESA finds its constitutional basis in part in the Treaty Clause, though other provisions of the ESA are more firmly founded on the Commerce Clause. See *infra* Section II.A.3.

<sup>119</sup> Agreement on the Conservation of Polar Bears, Nov. 15, 1973, T.I.A.S. No. 8409, 27 U.S.T. 3918.

<sup>120</sup> Treaty Between the United States of America and the Canada Concerning Pacific Salmon (Pacific Salmon Treaty Act of 1985), Can.-U.S., Mar. 15, 1985, T.I.A.S. 11091.

<sup>121</sup> Northwest Atlantic Fisheries Treaty, Jul. 3, 1950, 64 Stat. 1067, 1 U.S.T. 477 (codified at 16 U.S.C. 981-991). This Convention binds 18 parties to the “investigation, protection and

and Game Mammal Treaty with Mexico,<sup>122</sup> and the International Convention for the Regulation of Whaling.<sup>123</sup> These treaties are implemented through the Marine Mammal Protection Act,<sup>124</sup> the Magnuson-Stevens Fishery Conservation and Management Act,<sup>125</sup> the Whaling Convention Act,<sup>126</sup> and other pieces of domestic legislation.<sup>127</sup> This part of the article focuses on the Migratory Bird Treaty implementing legislation.

#### *a. Migratory Bird Treaty of 1916*

In 1916, the United States entered into a treaty with Great Britain (on behalf of Canada) to ensure the preservation of “such migratory birds as are either useful to man or harmless.”<sup>128</sup> The Migratory Bird Treaty Act of 1918 (MBTA) ratified the treaty and imposed stringent prohibitions on the take, capture, hunting, and killing of protected birds.<sup>129</sup> According to George Cameron Coggins, “[t]he origins of modern federal wildlife law may be traced back to the MBTA.”<sup>130</sup>

Almost immediately after ratification and enactment, states challenged the constitutionality of the treaty and the MBTA.<sup>131</sup> Today, the Supreme Court’s opinion in *Missouri v. Holland* remains a significant benchmark for federal Treaty Clause authority.<sup>132</sup> The case involved a suit brought by the State of Missouri to enjoin a federal game warden from enforcing the MBTA, which implements the 1916 Treaty by prohibiting any person from pursuing or

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conservation of the fisheries of the northwest Atlantic Ocean, in order to make possible the maintenance of a maximum sustained catch from those fisheries.” *See id.*

<sup>122</sup> Migratory Bird and Game Mammal Treaty with Mexico, Mex.-U.S., Feb. 7, 1936, 23 U.S.T. 260 (as amended in 1972).

<sup>123</sup> International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, TIAS No. 1849; 62 Stat. 1716 (1946). For an assessment of wildlife and biodiversity related treaties that have not yet been ratified by the United States, including the Convention on Biological Diversity, see Mary Jane Angelo et al., *Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties*, Center for Progressive Reform White Paper No. 1201 (2012), available at SSRN: <https://ssrn.com/abstract=2079630>.

<sup>124</sup> 16 U.S.C. §§ 1361-1423h.

<sup>125</sup> 16 U.S.C. § 1801.

<sup>126</sup> 16 U.S.C. §§ 916-916l.

<sup>127</sup> *See generally* Angelo, *supra* note , at 2; David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075, 1314 (2000).

<sup>128</sup> Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit, Aug. 16, 1916 (codified as amended at 16 U.S.C. §§ 703-712).

<sup>129</sup> 16 U.S.C §§ 703-712.

<sup>130</sup> George Cameron Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970s*, 1978 DUKE L.J. 753, 764 (1978). For additional details, see Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 Env'tl. L. 1167, 1179 (2008).

<sup>131</sup> *See, e.g., Missouri v. Holland*, 252 U.S. 416 (1920). Prior to ratification and passage of the MBTA, an earlier version of a statute to protect migratory birds had been invalidated as beyond constitutional authority. *See also United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594, 595 (1919) (mem.).

<sup>132</sup> *See Missouri*, 252 U.S. at 416.

killing migratory birds except as authorized by regulations issued by the Secretary of Agriculture.<sup>133</sup> More specifically, the MBTA states that it is:

unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof. . . .<sup>134</sup>

In *Missouri v. Holland*<sup>135</sup>, the Supreme Court held that the Treaty Clause<sup>136</sup> provided a viable avenue for federal regulation of wildlife, despite the state's claim of a predominant interest in the wildlife in question. Under *Missouri v. Holland*,<sup>137</sup> the test to determine a treaty's validity is two-fold: (1) Is the matter involved of national interest? (2) Does the treaty contravene any specific constitutional prohibition? If the first is answered in the affirmative, and the second in the negative, the treaty is valid.<sup>138</sup>

With respect to the Migratory Bird Treaty, the answer to the first question was a resounding “yes,” according to the Supreme Court:

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<sup>133</sup> The MBTA's prohibitions apply broadly to state actors and others. *Id.*; 16 U.S.C §§ 703(a). However, courts have reached conflicting results on the MBTA's application to federal actors. *See Humane Soc'y v. Glickman*, 217 F.3d 882, 885-87 (D.C. Cir. 2000) (applying the MBTA to federal actors because its take prohibition does not make the identity of the perpetrator relevant, and because the Act enforces a treaty binding upon the United States and therefore binding on the federal agencies); *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 174-75 (D.D.C. 2002) (applying the MBTA to the Department of Defense), *vacated as moot*, 2003 WL 179848 (D.C.Cir. 2003); *Audubon Soc'y of Portland v. U.S. Fish & Wildlife Serv.*, No. 04-670-KI, 2005 WL 1713086, at 4 (D. Or. 2005) (applying the MBTA to federal agencies but finding that they were not liable for habitat destruction). *But see Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997) (holding that the MBTA's take prohibition did not bind the Forest Service because federal agencies must conserve birds through other statutes).

<sup>134</sup> 16 U.S.C. § 703(a).

<sup>135</sup> 252 U.S. at 416.

<sup>136</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>137</sup> 252 U.S. at 416.

<sup>138</sup> *See Oona A. Hathaway, et al., The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 266, 279 (2013) (explaining that Treaty Powers are limited by “affirmative guarantees [that] are set forth explicitly in the Bill of Rights' recognition and guarantee of individual rights and in the Constitution's provisions prescribing the structure of the national government . . . [including] the preservation of a continuing role for the states and maintenance of certain areas of state authority and control,” but concluding that invalidation is exceedingly rare, so “the real protections against abuse of the treaty power derive from the structural, political, and diplomatic checks on the exercise of the power”).

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter [*i.e.*, migratory birds] is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain. . . .<sup>139</sup>

As to the second question, the Court explicitly rejected the states' argument that the Treaty contravened the Tenth Amendment, which reserves power to the states if not delegated to the United States by the Constitution.<sup>140</sup> According to the Court, "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution," nor is the treaty "forbidden by some invisible radiation from the general terms of the Tenth Amendment."<sup>141</sup> Thus, the state's interest in managing migratory birds covered by the MBTA, whether that interest rested upon some claim of ownership (which the Court disregarded) or on traditional state police powers, must give way.<sup>142</sup> It explained, "Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.'"<sup>143</sup> In the end, the Court held that the Treaty was lawful, and thus the MBTA was lawful as well, pursuant to the Treaty Clause,<sup>144</sup> the Supremacy Clause,<sup>145</sup> and the Necessary and Proper Clause.<sup>146</sup>

### ***3. The Tenth Amendment and the Commerce Clause***

The Tenth Amendment often forms the basis of state claims of exclusive jurisdiction over wildlife.<sup>147</sup> The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>148</sup> The Tenth Amendment and the Commerce Clause<sup>149</sup> seem to be inextricably entwined in federal wildlife management discussions, so it is necessary to discuss the interplay of both provisions together in the same section. This part will address

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<sup>139</sup> *Missouri*, 252 U.S. at 435.

<sup>140</sup> *Id.* at 433.

<sup>141</sup> *Id.* at 434.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (citing *Baldwin v. Franks*, 120 U. S. 678, 683 (1887)).

<sup>144</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>145</sup> See U.S. CONST. art. VI, cl.2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...").

<sup>146</sup> See U.S. Const. Art. 1, § 8 (Congress has power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof"); Oona A. Hathaway, et al., *supra* note 139, at 279 ("The scope of Congress's powers under the Necessary and Proper Clause are especially broad in the area of foreign relations").

<sup>147</sup> U.S. CONST. amend. X.

<sup>148</sup> *Id.*

<sup>149</sup> U.S. CONST. art. I, § 8, cl. 3.

the limited role of the Tenth Amendment in wildlife management, and the Tenth Amendment's relationship to the Commerce Clause.

*a. The Evolution of the Anti-Commandeering Doctrine*

The Tenth Amendment was ratified on December 15, 1791,<sup>150</sup> and is similar to an earlier provision of the Articles of Confederation which read: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled."<sup>151</sup> Ultimately, the word "expressly" did not appear in the Tenth Amendment as ratified.

Early in American history, the U.S. Supreme Court seemed to assume the Tenth Amendment was a strong and limiting power of the Constitution.<sup>152</sup> However, by the early 20th century the Court's view of the Tenth Amendment shifted significantly. In *United States v. Darby*,<sup>153</sup> the Court stated:

The [10<sup>th</sup>] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment, or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.<sup>154</sup>

Since *Darby*, it has become exceedingly uncommon for the Supreme Court to invalidate federal laws under the Tenth Amendment.<sup>155</sup> The Anti-Commandeering Doctrine arising from *New York v. United States*<sup>156</sup> is the exception. There, the Court invalidated a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("RWPA").<sup>157</sup> RWPA required states to take title to any undisposed low level radioactive waste within their borders, and made each state liable for all damages directly related to that waste. The

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<sup>150</sup> National Archives, The Bill of Rights: A Transcription (2016), <https://www.archives.gov/founding-docs/bill-of-rights-transcript> .

<sup>151</sup> ARTICLES OF CONFEDERATION OF 1777, art. II in Comments by James Madison, June 8, 1789, "House of Representatives, Amendments to the Constitution," University of Chicago (emphasis added).

<sup>152</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 275, 276 (1918) (invalidating federal child labor laws, and remarking upon the "inherent" power of the states to regulate "purely internal affairs"); *Carter v. Carter Coal Co.*, 298 U.S. 238, 294–295 (1936) (invalidating federal regulation of coal production, and stating that the Framers "meant to carve from the general mass of legislative powers then possessed by the states only such portions as it was thought wise to confer upon the federal government . . . with the result that what was not embraced by the enumeration remained vested in the states without change or impairment").

<sup>153</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>154</sup> *Id.* at 124.

<sup>155</sup> U.S. CONST. amend. X.

<sup>156</sup> *New York v. U.S.*, 505 U.S. 144 (1992).

<sup>157</sup> 42 U.S.C. § 202c(a)(1)(A) (1985) (codified as amended in 42 U.S.C. § 2021c(a)(1)(A)).

Court ruled that the imposition of taking title violated the Tenth Amendment as the federal government could not directly compel states to enforce federal regulations.<sup>158</sup>

In *Printz v. United States*,<sup>159</sup> the Court, again utilizing the Anti-Commandeering Doctrine, found that provisions of the Brady Bill<sup>160</sup> requiring state and local law enforcement officials to conduct background checks on persons attempting to purchase handguns was a violation of the Tenth Amendment, as the Bill forced participation of the state officials in the administration of a federal program. Similarly, in *National Federation of Independent Business et al. v. Sebelius*,<sup>161</sup> the Court held that the Affordable Care Act (also known as Obamacare)<sup>162</sup> coerced the states to expand Medicaid. Although other provisions of the Act were upheld, the Court found that the Medicaid provision effectively forced states to participate by conditioning the continued provision of funds on their agreement to materially alter their Medicaid eligibility criteria.<sup>163</sup>

In the modern era, the Tenth Amendment's primary role in regulating the balance of powers between the federal and state governments is expressed through the Anti-Commandeering Doctrine.<sup>164</sup> Commandeering occurs when Congress "require[s] the States in their sovereign capacity to regulate their own citizens," *not* when federal legislation with an administrative and financial impact on state bureaucracy regulates public and private conduct alike.<sup>165</sup>

#### *b. The Tenth Amendment's Application to Wildlife Management*

Prior to 1920, very little judicial activity occurred regarding the interplay of the Tenth Amendment and federal wildlife control.<sup>166</sup> One of the first decisions on the scope of the

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<sup>158</sup> 505 U.S. at 176–177.

<sup>159</sup> *Printz v. U.S.*, 521 U.S. 898 (1997) (citing *New York*, 505 U.S. 144).

<sup>160</sup> 18 U.S.C. § 922(t).

<sup>161</sup> *National Federation of Independent Business et al. v. Sebelius*, 132 S.Ct. 2566 (2012).

<sup>162</sup> 124 Stat. 119 (2010). The Medicaid expansion was codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

<sup>163</sup> *Sebelius*, 132 S.Ct. at 2566.

<sup>164</sup> *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012) ("Supreme Court interpretations of the Tenth Amendment have varied over the years but those in force today have struck down statutes only where Congress sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government.") (emphasis in original).

<sup>165</sup> *Reno v. Condon*, 528 U.S. 141, 151 (2000). *See United States v. Washington*, 887 F.Supp.2d 1077, 1101 (D. Mont. 2012) (rejecting Tenth Amendment challenge to federal prosecution of participants in state-authorized medical marijuana program); *Nuclear Energy Inst., Inc. v. Env'tl. Prot. Agency*, 373 F.3d 1251 (D.C. Cir. 2004) (holding that Congress's designation of a federally owned site for a nuclear repository did not commandeer the state legislative process or officials, but rather merely prescribed the use of federal property).

<sup>166</sup> Although it did not address the Tenth Amendment, in *Geer v. Connecticut*, the Court held that "the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as a representative and for the benefit of all its people in



Tenth Amendment regarding federal wildlife control was *Missouri v. Holland*,<sup>167</sup> which upheld the Migratory Bird Treaty Act (MBTA).<sup>168</sup> As noted above, the Supreme Court flatly rejected Missouri's argument that the MBTA violated the Tenth Amendment, finding that there were no reserved state powers that would stand in the way of federal enforcement of an act arising under the Treaty power.<sup>169</sup>

It was not until *Palila v. Hawaii Department of Land and Natural Resources* that the courts again took up the issue of the Tenth Amendment's implications for federal wildlife management.<sup>170</sup> There, the Hawaii Department of Land and Natural Resources maintained herds of feral sheep and goats for sport hunting purposes on state owned lands. These herds were causing significant habitat modification and destruction within the critical habitat of the Palila bird (*Psittirostra bailleui*), a listed species under the Endangered Species Act (ESA).<sup>171</sup> Conservation groups sought declaratory and injunctive relief requiring Hawaii to adopt a plan to eradicate the feral herds from the Palila's critical habit.<sup>172</sup> Because the Palila was only found in Hawaii, and because no federal lands or funds were involved, Hawaii argued that the state retained exclusive sovereignty over the Palila's fate under the Tenth Amendment.<sup>173</sup> The court held that the Tenth Amendment does not constrain enforcement of the ESA, given Congress's power to enact legislation implementing valid treaties and to regulate commerce.<sup>174</sup> It explained, "[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons . . . who come to a state to observe and study these species, that would otherwise be lost by state inaction."<sup>175</sup>

In *Gibbs v. Babbitt*,<sup>176</sup> individuals and several North Carolina counties challenged a U.S. Fish and Wildlife Service (FWS) regulation prohibiting the taking of wolves on private property as an infringement on traditional state power over wildlife.<sup>177</sup> The Fourth Circuit Court of Appeals found that the regulated activity did not involve an "'area of traditional state concern,' one to which 'States lay claim by right of history and expertise.'"<sup>178</sup> It reasoned that, while "states have important interests in regulating wildlife and natural

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common." 161 U.S. 519, 529 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

<sup>167</sup> *Missouri v. Holland*, 252 U.S. 416, 456 (1920).

<sup>168</sup> 16 U.S.C. 703 *et seq.* (2016).

<sup>169</sup> *See Missouri v. Holland*, 252 U.S. at 416.

<sup>170</sup> *Palila v. Hawaii Department of Land & Natural Resources*, 471 F.Supp. 985, 992 (D. Hawaii 1979), *aff'd on other grounds*, 639 F.2d 495 (9th Cir. 1981).

<sup>171</sup> 16 U.S.C. § 1531 *et seq.*

<sup>172</sup> 16 U.S.C. § 1540(g).

<sup>173</sup> *Palila*, 471 F.Supp. at 992.

<sup>174</sup> *See id.* at 995.

<sup>175</sup> *Id.* at 994–995. For a detailed discussion of the Commerce Clause and the ESA, see *supra* notes and accompanying text.

<sup>176</sup> *Gibbs v. Babbitt*, 214 F.3d 485, 499 (4th Cir. 2000).

<sup>177</sup> 50 C.F.R. § 17.84(c).

<sup>178</sup> *Id.* at 499 (citing *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring)). The court added, "[T]he federal government possesses a historic interest in such regulation—an interest that has repeatedly been recognized by the federal courts." *Id.* at 501.

resources within their borders,” state power over wildlife has long been circumscribed by federal regulatory power.<sup>179</sup> The *Gibbs* court explained that the regulated activity—the taking of wolves—“is not an area in which the states may assert an exclusive and traditional prerogative in derogation of an enumerated federal power,” *i.e.*, the Commerce Clause.<sup>180</sup> The court also took note of “the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans.”<sup>181</sup>

The Tenth Circuit Court of Appeals had the opportunity to consider similar Tenth Amendment arguments in *Wyoming v. United States*,<sup>182</sup> where the State of Wyoming tried to compel the FWS to allow it to vaccinate elk against brucellosis at the Jackson Hole National Elk Range (NER). In response to Wyoming’s argument that the Tenth Amendment reserved the sovereign authority to manage wildlife to the states, the court explained that, while states have historically had broad authority to regulate the wildlife within their borders, that authority is not constitutionally derived. Moreover, given the strength and breadth of the federal Property Clause power, the court found it “painfully apparent that the Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife, or more specifically vaccinate elk, on the NER, regardless of the circumstances.”<sup>183</sup>

Subsequently, in *Wyoming v. U.S. Dept. of Interior*,<sup>184</sup> the state of Wyoming argued that federal regulation of wolves violated the Anti-Commandeering Doctrine. Wyoming objected to having only two choices: to change state law to eliminate its predator classification for wolves and commit to maintaining at least fifteen packs of wolves, or to endure the restrictions imposed by the continued protection of wolves under the ESA. The court held that Wyoming had failed to show a violation of the Tenth Amendment through commandeering or otherwise.<sup>185</sup> It explained, “Wyoming is under no mandate to regulate gray wolves. . . . If Wyoming chooses to ignore the . . . [federal requirement], the State simply will find itself perpetually preempted from regulating the gray wolf.”<sup>186</sup>

In sum, except for those rare instances when the Anti-Commandeering Doctrine is successfully invoked, attempts to use the Tenth Amendment as a basis for state sovereignty

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<sup>179</sup> *Id.* (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999)). *See id.* at 501 (stating that “it is clear from our laws and precedent that federal regulation of endangered wildlife does not trench impermissibly upon state powers”).

<sup>180</sup> *Id.* at 499.

<sup>181</sup> *Id.* at 492. The portion of the court’s opinion rejecting the Commerce Clause challenge is discussed below at *supra* notes \_\_\_ and accompanying text.

<sup>182</sup> *Wyoming v. U.S.*, 279 F.3d 1214 (10th Cir. 2002).

<sup>183</sup> *Id.* at 1227.

<sup>184</sup> *Wyoming v. U.S. Dep’t of Interior*, 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005), *aff’d*, 442 F.3d 1262 (10th Cir. 2006).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1240. *Cf.* *New Mexico Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, No. CV 16-00462 WJ/KBM, 2016 WL 4536465, at \*9 (D.N.M. June 10, 2016) (distinguishing *Wyoming*, and noting that FWS’s own regulation required FWS to release wolves in compliance with state permit requirements) (citing 43 C.F.R. § 24.4(i)(5)).

over federally protected wildlife have universally failed, from *Missouri v. Holland* to present.

*c. The Commerce Clause and Federal Wildlife Management*

As noted above, the federal courts did not immediately support federal wildlife control based on the Commerce Clause.<sup>187</sup> In an early case, *Geer v. Connecticut*,<sup>188</sup> the Supreme Court held that game killed within the state concerned internal state commerce rather than interstate commerce. In subsequent years, several district court opinions followed suit.<sup>189</sup>

With the New Deal, however, the federal government's use of the Commerce Clause power began to expand.<sup>190</sup> By the 1970s, it was clear that *Geer* had lost favor. In *Douglas v. Seacoast Products, Inc.*, the United States Supreme Court struck down a Virginia statute prohibiting federally licensed vessels owned by nonresidents of Virginia from fishing in Chesapeake Bay, and also prohibiting ships owned by noncitizens to catch fish anywhere in Virginia.<sup>191</sup> The Court stated, "While [Virginia] may be correct in arguing that at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce."<sup>192</sup> It concluded that the movement of fishing boats within and between states and to processing plants "certainly" affects interstate commerce.<sup>193</sup>

Subsequently, when a Montana hunting guide sued the State of Montana for discriminating against out of state hunters in the price it charged for elk tags, the Supreme Court observed that, in recent years, "the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their

<sup>187</sup> *Supra* notes \_\_\_\_ and accompanying text (citing U.S. CONST., art. I, § 8, cl 3).

<sup>188</sup> *Geer v. Connecticut*, 161 U.S. 519 (1896).

<sup>189</sup> *See, e.g.*, *United States v. Shauver*, 214 F. 154, 159 (D.Ark. 1914) (following *Geer* and setting aside an indictment for violation of a federal migratory bird protection act); *United States v. McCullagh*, 221 F. 288, 292 (D.Kansas 1915) ("The power of the states, by their laws in the protection of their trust title for the common good of all the inhabitants of the state, to exclude wild bird and animal life lawfully reduced to the exclusive possession of the individual from the operation of the commerce clause of the national Constitution, as was held in *Geer*..., has been uniformly maintained by the courts of this country."). Note, however, that the courts upheld Congress' use of the Commerce Clause to regulate interstate trafficking of state-protected wildlife under the Lacey Act, 16 U.S.C. § 3371, *et seq.* *See e.g.*, *Rupert v. U.S.*, 181 F. 87 (8th Cir. 1910) (upholding the Lacey Act as a valid exercise of the commerce power).

<sup>190</sup> *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 118 (1942) (upholding federal Commerce Clause power over wheat grown for home consumption because of its aggregated effects on wheat sold in interstate commerce). For a more recent case with similar reasoning, see *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that growing marijuana for personal use affects interstate commerce).

<sup>191</sup> *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977).

<sup>192</sup> *Id.* at 281.

<sup>193</sup> *Id.*

wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce.”<sup>194</sup>

With this backdrop, it was not surprising when the Supreme Court expressly overruled *Geer* in 1979 in *Hughes v. Oklahoma*.<sup>195</sup> In that case Hughes challenged his conviction for unlawfully transporting minnows that had been procured within Oklahoma waters for sale outside the state.<sup>196</sup> On appeal, the Court held that the state law, which forbade the out-of-state sale of commercially significant numbers of minnows, was repugnant to the commerce clause.

The cases defining the scope of permissible state regulation in areas of congressional silence reflect an often controversial evolution of rules to accommodate federal and state interests. *Geer v. Connecticut* was decided relatively early in that evolutionary process. We hold that time has revealed the error of the early resolution reached in that case, and accordingly *Geer* is today overruled. . . . The ‘ownership’ language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing ‘the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’<sup>197</sup>

Although the Supreme Court began to establish limits on Congress’ use of the Commerce Clause in the 1990s, none of its opinions dilute the strength of *Hughes* or related wildlife precedents. In *United States v. Lopez*,<sup>198</sup> the federal gun-free school zone law was struck down as “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” Similarly, in *U.S. v. Morrison*,<sup>199</sup> a provision of the Violence Against Women Act was struck down because it attempted to regulate activities that did not substantially affect interstate commerce.<sup>200</sup>

The federal courts that have addressed wildlife-related issues since *Lopez* and *Morrison* have had no trouble finding federal Commerce Clause power. In the *Gibbs* case discussed above, the court emphasized the direct relationship between the removal of red wolves and negative effects to interstate commerce, finding no need to “pile inference upon inference” to reach that conclusion:

The taking of red wolves implicates a variety of commercial activities and is closely connected to several interstate markets. The regulation in question is also an

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<sup>194</sup> *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371, 385 (1978).

<sup>195</sup> *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

<sup>196</sup> *See id.* at 331 (1979).

<sup>197</sup> *Id.* (internal citations omitted).

<sup>198</sup> *United States v. Lopez*, 514 U.S. 549, 561 (1995).

<sup>199</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating 42 U.S.C. § 13981).

<sup>200</sup> *Id.* at 608. The Commerce Clause provides federal power over: 1) the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) activities that, in the aggregate, have a substantial effect on interstate commerce. *Id.* at 609.

integral part of the overall federal scheme to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country.<sup>201</sup>

Similarly, the D.C. Circuit Court of Appeals rejected a real estate developer's challenge to the application of the ESA to the arroyo toad, stating that the focus of the Commerce Clause inquiry must be on the regulated activity, not just the toad. When the regulated activity is commercial development, "both the 'actor,' a real estate company, and its 'conduct,' the construction of a housing development, have a plainly commercial character. . . [with] a plain and substantial effect on interstate commerce."<sup>202</sup>

It is now well settled that if the Commerce or Property Clauses are successfully invoked by the federal government as the authority to regulate wildlife, then by definition, inconsistent state law is preempted notwithstanding the 10<sup>th</sup> Amendment.

#### ***4. Federal Preemption and Savings Clauses***

The doctrine of federal preemption, derived from the Supremacy Clause of the U.S. Constitution, holds that state law must yield to federal law where the two conflict.<sup>203</sup> This can happen expressly, for instance under the Marine Mammal Protection Act where Congress stated: "No State may enforce...any State law or regulation related to the taking of any species...of marine mammal."<sup>204</sup> Preemption can also be implied. The Supreme Court, in *California Coastal Comm'n v. Granite Rock Co.*, defined the concept of implied preemption:

If Congress evidences intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.<sup>205</sup>

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<sup>201</sup> *Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

<sup>202</sup> *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert denied*, 540 U.S. 1218 (2004), *rehearing denied*, 541 U.S. 1006 (2004) (citing *National Ass'n. of Home Builders of United States v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S.937 (1998)).

<sup>203</sup> *See* U.S. CONST. art. VI, § 2, cl.2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."); *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (stating that "federal legislation necessarily overrides conflicting state laws under the Supremacy Clause"); *Wyoming v. U.S.*, 279 F.3d 1214, 1227 (10th Cir. 2002) ("If Congress so chooses, federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives...").

<sup>204</sup> 16 U.S.C. § 1379(a).

<sup>205</sup> *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (internal citations omitted). The Court found that a state mining permit requirement was not preempted because the

Therefore, preemption can occur where Congress expressly preempts state law, where Congress occupies a field of law, or where state law interferes with the implementation of federal law.<sup>206</sup> Federal regulations have the same preemptive effect.<sup>207</sup>

Federal law occupies a field of law (also known as field preemption) where a federal statutory scheme is interpreted to be “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>208</sup> Because federal land management and wildlife laws often contain savings clauses preserving some level of state authority, field preemption rarely applies in these areas. Conflict preemption, on the other hand, arises whenever “compliance with both federal and state regulations is a physical impossibility.”<sup>209</sup> Conflict preemption is also invoked where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>210</sup> The conflict between federal and state laws may be subtle and yet still trigger preemption, as where state law discourages conduct that federal law attempts to encourage, or vice versa.<sup>211</sup> For example, in *National Audubon Society v. Davis*, California law banned the use of all leg hold traps, even by federal officials in the course of their duties.<sup>212</sup> The court found that, by eliminating a method of predator control, the ban conflicted with the purposes of the ESA by preventing agencies from protecting listed species.<sup>213</sup> Therefore, the state’s action prevented the federal law from receiving full effect and was preempted.<sup>214</sup>

Congress may negate or otherwise temper preemption by including a “savings clause” in its legislation. Many federal public health, environmental, and natural resources statutes

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federal land use and state environmental regulations in question could be interpreted to avoid conflict.

<sup>206</sup> *Id.*; *National Audubon Soc’y v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002).

<sup>207</sup> *Granite Rock Co.*, 480 U.S. at 581. *See Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.”).

<sup>208</sup> *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, at 98 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (holding that state occupational health and safety regulations were preempted by OSHA, which occupied that field of law).

<sup>209</sup> *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). For a full treatment of this issue, see Julie Lurman & Sanford P. Rabinowitch, *Preemption of State Wildlife Law In Alaska: Where, When, and Why*, 24 ALASKA L. REV. 145 (2007), and Julie Lurman Joly, *National Wildlife Refuges and Intensive Management in Alaska: Another Case for Preemption*, 27 ALASKA L. REV. 27 (2010).

<sup>210</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>211</sup> *See Lurman & Rabinowitch, supra* note, at 161.

<sup>212</sup> *National Audubon Society v. Davis*, 307 F.3d 835 (9th Cir. 2002)

<sup>213</sup> *Id.* at 852. The court also found that the state’s action was preempted by the Wildlife Refuge Administration Act because it conflicted with FWS’s management authority within national refuges. *Id.* at 854.

<sup>214</sup> *Id.* *See North Dakota v. U.S.*, 460 U.S. 300, 318 (1983) (stating that state statutes that are “plainly hostile to the interests of the United States” will not be applied); *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (stating that “the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”).

include savings clauses intended to leave room for state law to provide increased protection consistent with congressional purposes and objectives. In public lands and natural resources statutes, Congress has embraced the principle of cooperative federalism through a variety of savings clauses that disclaim an intention to displace state law related to wildlife, water, and other resources, so long as state law does not conflict with or undermine federal prerogatives.<sup>215</sup> These statutory disclaimers are often quite vague, having been included as compromise measures to ensure passage of a piece of legislation. As Professor Robert Fischman notes:

Judicial interpretation of a savings clause may elevate or undermine the importance of state interests in federal natural resources programs. Largely, it is the interpretive approach used by a court that determines whether an ambiguous savings clause will compel special consideration not otherwise required under federal law.<sup>216</sup>

Fischman adds that, “[a]lthough the judiciary places the interpretive fulcrum establishing how much leverage states can expect in federal decision-making, administrative policies have and will play the dominant role in shaping cooperative federalism.”<sup>217</sup> Other sections of this article analyze the language, agency implementation, and judicial review of savings clauses related to wildlife management on federal lands.

In conclusion, states undoubtedly have well-established historical authority over the wildlife within their borders. However, as this section demonstrates, that authority is not exclusive, nor dominant, nor constitutionally derived. The U.S. Constitution grants the federal government the authority to manage its own lands and resources, fulfill its treaty obligations, and control interstate commerce, even in the face of objections from the states. And while the Tenth Amendment prevents the federal government from forcing state governments to carry out federal regulatory schemes, it cannot prevent the federal government from implementing those schemes itself.

## ***B. Federal Land Laws and Regulations***

This section reviews the laws and regulations of most relevance to wildlife management on federal lands. The section begins by explaining how the Endangered Species Act (ESA) fundamentally alters the management of all federal land systems. Next, it reviews the laws and regulations governing wildlife management in the National Park and National Wildlife Refuge Systems. This is followed by a review of the more contentious management and planning frameworks of the U.S. Forest Service (USFS) and Bureau of Land Management

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<sup>215</sup> See Robert L. Fischman & Angela M. King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 129, 129 (2007). Congress has also peppered the organic acts of the federal land management agencies with various directives to cooperate with states in planning and other processes. See *id.* at 130. See also Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179 (2006).

<sup>216</sup> *Id.* at 168.

<sup>217</sup> *Id.*

(BLM). A concise overview of the special case of Alaska is then provided. The Part closes by reviewing wildlife management and the National Wilderness Preservation System. In Part III, we return to many of the laws, regulations and policies introduced here to dispel some of the common myths surrounding wildlife management on federal lands and to explain why federal land agencies have an obligation, and not just the discretion, to manage and conserve fish and wildlife on federal lands. The background provided here also shows that multiple opportunities for intergovernmental cooperation already exist within federal decision making processes, but Part III(F) explains that they are not generally used to their full potential.

### *1. The Endangered Species Act*

Congress passed the Endangered Species Act (ESA)<sup>218</sup> in 1973 “to provide a program for the conservation of ... endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered...and threatened species depend may be conserved.”<sup>219</sup> The ESA establishes an affirmative obligation for the federal government to use “all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided in this [act] are no longer necessary,”<sup>220</sup> and states that “all federal departments and agencies shall seek to conserve endangered ... and threatened species.”<sup>221</sup> “Conserve” and “conservation” are defined by the statute as using “all methods and procedures which are necessary to bring any endangered ...or threatened species to the point at which the measures provided” by the statute are no longer necessary.<sup>222</sup>

A secondary indicator as to the goals of the statute can be found in Congress’s explicit recognition of the “esthetic, ecological, educational, historical, recreational, and scientific value” of rare species.<sup>223</sup> As Freyfogle and Goble have argued, this list of recognized values suggests that the statute is intended to do more than preserve a remnant population in a zoo or at easily visited locations (though this might meet the needs for the esthetic and recreational values). Instead, in order to preserve their ecological and scientific values, species and their habitats must be preserved in many natural locations, potentially including areas where they have been extirpated.<sup>224</sup>

To understand the role of the ESA in federal land and wildlife management, three central pieces of the statute are most relevant: (1) the listing determination,<sup>225</sup> (2) the obligation for federal agencies to conserve species and to avoid jeopardizing the continued existence

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<sup>218</sup> 16 U.S.C. §§ 1531–1543.

<sup>219</sup> 16 U.S.C. § 1531(b).

<sup>220</sup> 16 U.S.C. §1532(3). The goal of the statute is not to “list” species but to recover their populations so that they can be “delisted”.

<sup>221</sup> 16 U.S.C. § 1531(c).

<sup>222</sup> 16 U.S.C. § 1532(3).

<sup>223</sup> 16 U.S.C. § 1531(a)(3).

<sup>224</sup> ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 233–234 (1st ed. 2009).

<sup>225</sup> 16 U.S.C. § 1533.



of the listed species or destroying critical habitat,<sup>226</sup> and (3) the take prohibition.<sup>227</sup> These sections of the statute detail the government’s responsibilities and sources of authority. In addition, several provisions of the ESA address federal-state relations with respect to the conservation and management of listed species.<sup>228</sup> Each of the relevant sections is addressed below.

#### a. Listing determinations (§4)

Only those species listed as threatened or endangered are protected by the ESA.<sup>229</sup> Listing a species as threatened or endangered is often the result of a citizen petition requesting the listing, though listings may also stem from direct agency initiative (either the Fish and Wildlife Service (FWS) or, for anadromous and ocean species, the National Marine Fisheries Service (NMFS)).<sup>230</sup> In either case, the species must meet the definition of either “threatened” or “endangered” in order to secure the protections provided under the statute. An “endangered” species is one that is “in danger of extinction throughout all or a significant portion of its range”<sup>231</sup> and “threatened” species are “likely to become an endangered species within the foreseeable future.”<sup>232</sup>

The decision to list a species as either threatened or endangered must be made “solely on the basis of the best scientific and commercial data available.”<sup>233</sup> The data hurdles that must be surmounted are formidable and even if met the agency may decide that the listing is “warranted but precluded” by other more urgent species’ needs given the agency’s historically tight funding.<sup>234</sup> However, once species are listed they are entitled to the full protections of the statute regardless of the economic consequences.<sup>235</sup>

Section 4 includes a number of factors to be considered in the listing decision. One inquiry is to assess “the inadequacy of existing regulatory mechanisms.”<sup>236</sup> This means that state laws and regulations pertaining to wildlife, or the lack thereof, are assessed when making listing determinations. Another factor is particularly relevant when it comes to state involvement in ESA implementation: “[conservation] efforts, if any, being made by any State.”<sup>237</sup> Accordingly state efforts to conserve a species may be deemed to offset other

<sup>226</sup> 16 U.S.C. § 1536(a)(1)– (2).

<sup>227</sup> 16 U.S.C. § 1538.

<sup>228</sup> 16 U.S.C. §§ 1535 (cooperation with states); *see also* § 1533(b)(1)(A) (listing criteria); § 1539(a)(2)(B) (incidental take permits).

<sup>229</sup> 16 U.S.C. § 1533(d).

<sup>230</sup> 16 U.S.C. § 1533(b)(3)(A); *see* ERIC T. FREYFOGLE & DALE D. GOBLE, *supra* note, at 236–247.

<sup>231</sup> 16 U.S.C. § 1532(6).

<sup>232</sup> 16 U.S.C. § 1532(20).

<sup>233</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>234</sup> ERIC T. FREYFOGLE & DALE D. GOBLE, *supra* note, at 249. These “candidate species” receive no protection under the Act, but the candidate status may provide an opportunity and an incentive for state and private action to prevent listing.

<sup>235</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

<sup>236</sup> 16 U.S.C. § 1533(a)(1)(D)

<sup>237</sup> 16 U.S.C. § 1533(b)(1)(A).

threats, such as habitat destruction, and effectively bring the species below the threshold necessary to warrant a federal listing.<sup>238</sup> FWS's Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) allows FWS to consider conservation efforts that have not yet been implemented, so long as FWS evaluates the certainty with which the efforts will be implemented and effective.<sup>239</sup> However, courts have found that speculative future plans and voluntary conservation efforts will not suffice to avoid listing.<sup>240</sup>

## b. Federal obligations (§7)

### i. Affirmative duty to conserve (§7(a)(1))

The ESA states that the Departments of the Interior and Commerce must utilize all of their programs to promote the statute's goals.<sup>241</sup> The ESA also mandates that *all* federal agencies

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<sup>238</sup> FWS Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE), 68 Fed.Reg. 15,100 (Mar. 28, 2003). See Kevin Cassidy, *Endangered Species' Slippery Slope Back to the States: Existing Regulatory Mechanisms and Ongoing Conservation Efforts Under the Endangered Species Act*, 32 ENVTL. L. 175, 178 (2002) (cataloguing instances where state and local conservation efforts were invoked to avoid listing).

<sup>239</sup> 68 Fed. Reg. at 15,114. See *Permian Basin Petroleum Ass'n v. Department of the Interior*, 127 F.Supp.3d 700 (W.D. Tex. 2015) (invalidating FWS's decision to list the lesser prairie chicken as inconsistent with PECE), *appeal dismissed*, No. 16-50453 (5<sup>th</sup> Cir. 2016).

<sup>240</sup> See *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 219–20 (D.D.C. 2011) (rejecting Alaska's claim that NMFS failed to consider the state's conservation efforts before listing the beluga whale, and concluding that it is not enough for the state to identify measures that may be beneficial to a species' conservation; instead, the efforts must actually be in place and have achieved some measure of success to count); *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9<sup>th</sup> Cir. 2001) (rejecting FWS's reliance on a Conservation Agreement (CA) to justify withdrawing a proposed listing because, in several areas designated as management areas for the species, "the designation process was either incomplete or wholly unstated [and] [n]owhere [did] the Secretary account for the effects of failure to implement the CA immediately in those areas where delay was expected"); *Oregon Natural Resource Council v. Daley*, 6 F. Supp. 2d 1139, 1154 (D. Or. 1998) ("NMFS may only consider conservation efforts that are currently operational"; NMFS cannot rely on voluntary measures to preclude listing because "like those planned in the future, [they] are necessarily speculative"); *Southwest Center for Biological Diversity v. Babbitt*, 939 F. Supp. 49, 51 (D.D.C. 1996) (FWS "cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record"). But see *Defenders of Wildlife v. Zinke*, No. 14-5300 (D.C. Cir. Mar. 3, 2017) (FWS properly relied on future implementation of a wolf management plan by the state of Wyoming because the plan was not speculative but rather was "sufficiently certain to be implemented based on the strength of the State's incentives."); and *Defenders of Wildlife v. Jewell*, 70 F. Supp. 3d 183, 197–98 (D.D.C. 2014) (FWS may consider state programs that are not yet fully implemented, as "implementation and effectiveness are often assessed in relative rather than absolute terms; when faced with regulatory uncertainty and risk to certain species, the Service can still chart a course of action, provided it assesses and controls for that uncertainty and risk").

<sup>241</sup> 16 U.S.C. § 1536(7)(a)(1). For convenience, we reference the FWS throughout this memo, but similar duties are imposed upon NMFS, which is an agency within the Department of Commerce.

utilize their authority in the furtherance of the purposes of the ESA.<sup>242</sup> There are few reported cases directly on point, but at least a handful of courts have found that Section 7(a)(1) has substantive “teeth.” In *Defenders of Wildlife v. Andrus*,<sup>243</sup> the advocacy group argued that regulations for bird hunting at twilight failed to protect listed species against misidentification by hunters.<sup>244</sup> The court, interpreting this section of the statute, found that the ESA requires that the agency “do far more than merely avoid the elimination of protected species,” rather there is “an affirmative duty to increase the population of protected species.”<sup>245</sup>

The court came to a similar decision in *Carson-Truckee Water Conservancy District v. Watt*.<sup>246</sup> The cities of Reno and Sparks, Nevada challenged DOI’s refusal to release greater quantities of water from the Stampede Reservoir. DOI cited Section 7(a)(1) to support its position that the water levels in the reservoir must be maintained at higher levels in order to preserve the spawning ability of two endangered fish (the cui-ui and the Lahotan cutthroat trout). Ultimately, the court agreed with the federal government’s argument that it had a duty “to replenish the species so that they are no longer endangered or threatened with extinction,” rather than merely avoiding jeopardy.<sup>247</sup>

By contrast, several courts have refused to mandate the implementation of specific conservation measures, instead finding that the federal agencies have a great deal of discretion in the steps that they take to satisfy 7(a)(1).<sup>248</sup> For example, in *Defenders of Wildlife v. U.S. Fish & Wildlife*, the court rejected arguments that the USFS should develop and implement its own conservation program for the endangered Mexican wolf, and deferred to the agency’s decision to act in cooperation with FWS’s recommendations in furtherance of previously established wolf reintroduction and recovery goals.<sup>249</sup> Similarly, in *Defenders of Wildlife v. Babbitt*, the court held that the federal agencies had not violated 7(a)(1), even though they had not implemented all possible measures for conservation of the endangered Sonoran pronghorn suggested by third parties, absent a showing that the agencies had failed entirely to carry out conservation programs.<sup>250</sup>

<sup>242</sup> 16 U.S.C. § 1536(7)(a)(1) (emphasis added).

<sup>243</sup> *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977).

<sup>244</sup> *See id.* at 169.

<sup>245</sup> *Id.* at 170.

<sup>246</sup> 549 F. Supp. 704 (D. Nev. 1982) *aff’d*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985).

<sup>247</sup> 549 F. Supp. 708–709. *See also* *Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir.1998) (finding that § 7(a)(1) required USDA to develop its own conservation program for listed species dependent on the Edwards aquifer).

<sup>248</sup> *See, e.g.,* *Leatherback Sea Turtle v. Nat’l Marine Fisheries Service*, 1999 WL 33594329 (D. Hawaii 1999) (finding that NMFS satisfied its Section 7(a)(1) duty by issuing conservation recommendations and biological opinions); *Coalition for Sustainable Res., Inc. v. U.S. Forest Ser.*, 48 F. Supp. 2d 1303, 1315-1316 (D. Wyo. 1999) (rejecting plaintiff’s argument that the Forest Service should implement certain timber harvest and snow management programs for the benefit of listed species), *vacated for lack of ripeness*, 259 F.3d 1244 (10th Cir. 2001).

<sup>249</sup> *Def. of Wildlife v. U.S. Fish & Wildlife*, 797 F. Supp. 2d 949 (D. Ariz. 2011).

<sup>250</sup> *Def. of Wildlife v. Babbitt*, 130 F.Supp.2d 121 (D.D.C. 2001). *See* *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410 (9th Cir. 1990) (holding that Section 7(a)(1) did

To summarize, the FWS and other federal agencies are obligated to prevent jeopardy and authorized to proactively improve the circumstances of listed species. Additionally, while the ESA creates a duty to increase populations of protected species, it appears that courts are often unwilling to require the implementation of specific conservation measures.

*ii. Prohibition against jeopardy (§7(a)(2))*

Federal agencies must also ensure that their actions do not “jeopardize the continued existence” of listed species. In *Tennessee Valley Authority v. Hill*,<sup>251</sup> the Supreme Court established that, instead of balancing interests between wildlife conservation and economic development, the ESA demands that species conservation be elevated above other concerns,<sup>252</sup> which could include state interests in wildlife.

In order to ensure that federal actions do not jeopardize listed species, federal agencies undertaking actions that could harm species must formally consult with the FWS.<sup>253</sup> For purposes of Section 7, “federal actions” include projects that are funded, authorized, or constructed directly by any federal agency, and projects with discretionary involvement or control by any federal agency.<sup>254</sup> If a listed species may be present within the project area, the federal “action agency” must conduct a biological assessment (BA) to identify any such species likely to be affected by the federal action and evaluate the effects.<sup>255</sup> In turn, through its biological opinion (BO), the FWS must determine whether the potential harm to the species violates section 7(a)(2) and if so, devise less harmful alternatives or mitigation measures.<sup>256</sup>

The FWS has interpreted the phrase “jeopardize the continued existence of a species” as any action “that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a species in the wild.”<sup>257</sup> According to the Ninth Circuit in *National Wildlife Federation v. National Marine Fisheries Service*,<sup>258</sup> an action that may jeopardize a species can be of any magnitude, slight or severe, since the important factor is the degree of risk to the particular species.<sup>259</sup> Furthermore, the court stated that jeopardy determinations must consider the action’s effect on species recovery, not simply species survival.<sup>260</sup> Therefore, even actions that pose only slight dangers may

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not require the Navy to adopt the “least burdensome alternative” to ensure the conservation of listed species; rather, the Navy retained discretion in meeting the ESA’s conservation mandate).

<sup>251</sup> 437 U.S. 153 (1978).

<sup>252</sup> *See id.* at 184 (holding that the ESA requires the federal government to “halt and reverse the trend toward species extinction, whatever the cost”).

<sup>253</sup> 16 U.S.C. § 1536(a)(2).

<sup>254</sup> *Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1224-1225 (9th Cir. 2015) (citing 50 C.F.R. § 402.02).

<sup>255</sup> 16 U.S.C. § 1536(c).

<sup>256</sup> 16 U.S.C. § 1536(b)(3).

<sup>257</sup> 50 C.F.R. § 402.02.

<sup>258</sup> 524 F.3d 917 (9th Cir. 2008)

<sup>259</sup> *Id.* at 930.

<sup>260</sup> *Id.* at 931.

be considered to “jeopardize” the species if the effect of that action is to pose a high degree of risk to the species.

*iii. Prohibition against adversely modifying critical habitat (§7(a)(2))*

At the time a species is listed as endangered or threatened, the FWS must also designate its critical habitat.<sup>261</sup> Critical habitat is an area where there are “physical or biological features essential to the conservation of the species and which may require special management considerations.”<sup>262</sup> Critical habitat designation is based on “the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact.”<sup>263</sup> By directing FWS to consider economic impacts, the designation decision involves a much broader inquiry than is required for the listing determinations.

Section 7 prohibits federal agencies from taking actions that may “result in the destruction or adverse modification” of critical habitat.<sup>264</sup> FWS regulations specify that “destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. . . . includ[ing] . . . those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.”<sup>265</sup> In *Center for Native Ecosystems v. Cables*, the court held that critical habitat is adversely modified by any actions “that adversely affect a species’ recovery and the ultimate goal of delisting.”<sup>266</sup> This interpretation makes the critical habitat protection a significant prohibition.

*c. Take prohibition (§9)*

The ESA prohibits the “take” of listed species.<sup>267</sup> “Take” is defined by Congress as “to harass, harm, pursue, hunt, shot, wound, kill, trap, capture, or collect.”<sup>268</sup> This broad protection has been further enlarged by the Supreme Court’s determination that “harm” in this definition includes habitat modification or degradation,<sup>269</sup> though a showing that animals have actually been killed or injured may be required to prove that harm has occurred.<sup>270</sup> A prohibited take can be either intentional (*e.g.*, hunting and trapping) or unintentional (poisoning and other contamination, for example).<sup>271</sup> Unlike the requirements of section 7, section 9 applies to all persons, not just federal agencies.<sup>272</sup>

<sup>261</sup> 16 U.S.C. § 1533(a)(3), (b)(6)(c).

<sup>262</sup> 16 U.S.C. § 1532(5)(A)(i).

<sup>263</sup> 16 U.S.C. § 1533(b)(2).

<sup>264</sup> 16 U.S.C. § 1536(a)(2).

<sup>265</sup> 50 C.F.R. § 402.02.

<sup>266</sup> 509 F.3d 1310 (10th Cir. 2007).

<sup>267</sup> 16 U.S.C. § 1538 (a)(1)(B)–(C).

<sup>268</sup> 16 U.S.C. § 1532(19).

<sup>269</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687 (1995) (citing 50 C.F.R. § 17.3).

<sup>270</sup> *See id.* at 696; FREYFOGLE and GOBLE, *supra* note , at 266.

<sup>271</sup> FREYFOGLE and GOBLE, *supra* note, at 236.

<sup>272</sup> 16 U.S.C. § 1538(a)(1).

While the take prohibition is unqualified for endangered species, it is up to the agency to determine the breadth of its applicability for threatened species.<sup>273</sup> The FWS can make the prohibitions of section 9 applicable, either in whole or in part, to threatened species. However, the FWS's discretion in this area is not without limits. In *Sierra Club v. Clark*,<sup>274</sup> the court struck down FWS regulations that permitted the hunting of threatened wolves because the ESA only empowers the FWS to issue regulations for the "conservation" of species, and regulated taking is only permissible under "extraordinary" circumstances that were not present in that case.<sup>275</sup>

*i. Incidental Take Statements and Incidental Take Permits (§7(a)(2) and §10)*

Federal activities covered by a "no jeopardy" BO may be shielded from Section 9 "take" liability if FWS has also issued an incidental take statement (ITS) that excuses the actor from liability when a covered species is incidentally taken during the course of an otherwise lawful activity.<sup>276</sup> While an ITS provides protection against federal prosecution it also constitutes a binding agreement with the FWS that may include limitations and other prohibitions for the shielded activity. In addition, Section 10(a) permits "take" by non-federal actors under prescribed conditions in exchange for a habitat conservation plan (HCP). To issue an incidental take permit (ITP) under Section 10(a), FWS must find that:

1. the taking will be incidental;
2. the applicant will minimize and mitigate impacts to the maximum extent practicable;
3. the applicant will ensure adequate funding for the plan;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the species; and
5. the other measures that the Services deemed appropriate for the HCP will be met.<sup>277</sup>

In recent years, FWS has utilized its ability to issue ITPs more frequently, in part to alleviate the perceived harshness of the ESA's prohibitions and in part to foster "creative partnerships between the private sector and all levels of government in the interests of

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<sup>273</sup> 16 U.S.C. § 1533(d).

<sup>274</sup> 755 F.2d 608 (8th Cir. 1985)

<sup>275</sup> See *id.* at 613 (citing ESA §1538(a)(1) that the "extraordinary case" where population pressure that cannot be managed in any other way is the only permissible circumstance in which regulated taking of threatened species may lawfully be allowed).

<sup>276</sup> 16 U.S.C. §§ 1536(b)(4), (o)(2). See also *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996) (holding that states did not violate the ESA when they issued fishing regulations allowing taking of listed salmon without obtaining a §10 permit where NMFS issued a §7 incidental take statement that clearly anticipated that states would promulgate fishing regulations in accordance with its terms).

<sup>277</sup> 16 U.S.C. § 1539(a)(2)(B).

protected species and habitat conservation.”<sup>278</sup> For example, a court upheld an ITP that authorized Utah, Cedar City, and the Paiute Tribe to trap prairie dogs that were damaging private and tribal land and relocate them to a parcel of land covered by a conservation easement and surrounded by BLM lands.<sup>279</sup>

States have avoided liability for a “take” under both ITSs and ITPs, and both tools have the potential to be used to foster cooperation with states in the interest of species conservation. If either an ITS or an ITP is issued without adequate safeguards for the species, however, the ESA’s conservation objectives may be undermined.

#### *d. Cooperation with States (§6)*

The ESA carves out a role for the states to assist in achieving the ESA’s protective purposes by providing that, in carrying out the statute, the FWS should cooperate “to the maximum extent practicable with the States.”<sup>280</sup> Through this provision, Congress recognized the expertise of state agencies and required FWS to solicit and consider relevant information from them, such as preparing proposed and final rules to designate critical habitat.<sup>281</sup> In addition, the ESA empowers FWS to enter into agreements with states for the administration and management of any area established for the conservation of listed species.<sup>282</sup> FWS may also enter into cooperative agreements with any state that establishes and maintains an “adequate and active” program for the conservation of listed species.<sup>283</sup> These programs are enacted statutorily and are referred to as “state endangered species acts.”

In addition, the statutory savings clause states that the ESA should not be construed “to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife.”<sup>284</sup> However, states may not take measures to protect or enhance non-endangered resident wildlife if such measures would take or otherwise endanger listed species.<sup>285</sup>

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<sup>278</sup> Robert L. Fischman & Jaelith Hall-Rivera, A Lesson for Conservation From Pollution Control Law: Cooperative Federalism for Recovery Under The Endangered Species Act, 27 COLUM. J. ENVTL. L. 45, 69 (2002) (internal citation omitted).

<sup>279</sup> *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 622 F. Supp. 2d 1155, 1159 (D. Utah 2009).

<sup>280</sup> 16 U.S.C. § 1535(a).

<sup>281</sup> See *Alaska Oil & Gas Ass’n v. Salazar*, 916 F. Supp.2d 974, 997 (D. Alaska 2013) (finding that FWS complied with § 1535(a) in designating polar bear critical habitat).

<sup>282</sup> 16 U.S.C. § 1535(b).

<sup>283</sup> 16 U.S.C. § 1535(c)(1). For details, see George Cameron Coggins and Robert L. Glicksman, *The Role of States*, 3 Pub. Nat. Resources L. § 29:19 (2nd ed.) (2016).

<sup>284</sup> 16 U.S.C. § 1535(f).

<sup>285</sup> *National Audubon Soc’y v. Davis*, 307 F.3d 835, 853 (9th Cir. 2002) (invalidating California’s prohibition on leghold traps), amended & reh’g denied, 312 F.3d 416 (9th Cir. 2002). Cf. *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008) (finding that the saving clause did not shield a state hunting program from judicial invalidation or protect the state game agency from liability for violating the ESA’s taking clause); *U.S. v. Glenn-Colusa Irr. Dist.*, 788 F.Supp.

FWS and NFMS also adopted an interagency policy to guide their work with the states in ESA implementation.<sup>286</sup> The policy begins by recognizing that “[s]tates possess broad trustee and police powers over fish, wildlife and plants and their habitats within their borders [and] unless preempted by Federal authority, States possess primary authority and responsibility for protection and management of fish, wildlife and plants and their habitats.”<sup>287</sup> The policy specifies ways in which the states can help carry out the purposes of the ESA, such as by taking prelisting conservation actions and utilizing state expertise and information in the ESA recovery process.

Section 6 and the Interagency Policy provisions encourage cooperative federalism to effectuate the purposes of the ESA. Like many other federal environmental statutes, the ESA provides a floor, not a ceiling, for species protection.<sup>288</sup> The ESA clearly preempts inconsistent or less restrictive state laws.<sup>289</sup> And most state-level endangered species acts are relatively limited in comparison to the federal law, with most states having no mechanism for recovery, consultation, critical habitat or citizen enforcement.<sup>290</sup>

## **2. The National Park System**

### *a. 1916 Organic Act*

The Park Service Organic Act makes conservation of park resources, including wildlife, a primary management goal:

[To] promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose . . . *to conserve the scenery and the natural and historic objects and the wild life therein* and to provide for the enjoyment of the same in

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1126 (E.D. Cal. 1992) (holding that, to the extent that a state's law on “taking” is less protective than the ESA, it is preempted).

<sup>286</sup> Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34,275 (July 1, 1994).

<sup>287</sup> *Id.*, at 34,725.

<sup>288</sup> 16 U.S.C. § 1535(f). See Robert L. Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 Env'tl. L. 451, 462 (2004).

<sup>289</sup> “[A]ny State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemption or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.” 16 U.S.C. § 1535(f). See, e.g., *National Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002), opinion amended on denial of rehearing, 312 F.3d 416 (2002); *Swan View Coalition v. Turner*, 824 F. Supp. 923, 939 (D. Mont. 1992); *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1133 (E.D. Cal. 1992).

<sup>290</sup> Susan George and William J. Snape III, *State Endangered Species Acts*, in DONALD C. BAUR AND WM. ROBERT IRVIN (Eds.), *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* Ch. 16 (2d ed. 2010) (concluding that “most acts lack all but the most basic elements of a legislative scheme to protect a state’s imperiled species”), at 346.



such manner and by such means as will leave them *unimpaired* for the enjoyment of future generations.<sup>291</sup>

Courts have construed this provision as a directive that, between the competing goals of conservation of park resources and facilitating public enjoyment of park resources, conservation generally takes precedence.<sup>292</sup> Notably, the Organic Act's phrase authorizing management for the enjoyment of scenery, natural and historic objects, and wildlife is cabined by the admonition that enjoyment may only occur in "such manner and by such means as will leave them [*i.e.*, park resources] unimpaired for the enjoyment of future generations."<sup>293</sup> Absent an explicit contrary mandate in the relevant individual park establishment act, in the event of a conflict, the National Park Service (NPS) must prioritize conservation over public enjoyment.<sup>294</sup>

#### *b. National Park Service Management Policy*

NPS's own management policies recognize that conservation of park resources is "predominant." More specifically:

Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving

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<sup>291</sup> 16 U.S.C. § 1 (emphasis added).

<sup>292</sup> *See, e.g.*, *Greater Yellowstone Coalition v. Kempthorne*, 577 F.Supp. 2d 183, 192-193 (D.D.C. 2008) (invalidating NPS's Winter Use Plan because it violated the conservation mandate by impairing Yellowstone's soundscape, wildlife, and air quality); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 108 (D.D.C. 2003) (overturning decision to allow snowmobiles in Yellowstone because NPS had not explained reversal of earlier conclusion that snowmobiles caused impairment); *Fund for Animals v. Norton*, 512 F. Supp. 2d 49, 54-55 (D.D.C. 2007) (finding that NPS had articulated a satisfactory explanation regarding limited use of snowmobiles in Yellowstone). *See also* *Bicycle Trails of Marin v. Babbitt*, 82 F.3d 1445, 1453 (9th Cir.1996) (The "overarching concern" of the Organic Act is "resource protection."); *Defenders of Wildlife v. Salazar*, 877 F. Supp. 2d 1271, 1301 (M.D. Fla. 2012) (remanding decision to increase ORV use because of failure to explain change in position as to ORV's adverse impacts to wildlife, soil, and hydrology); *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 24 (D.D.C. 2010) (remanding NPS's decision to allow jet skis in two national parks given the impacts to wildlife, water and air quality, soundscapes, aquatic vegetation, and visitor experience); *Edmonds Inst. v. Babbitt*, 42 F.Supp.2d 1, 16 (D.D.C.1999) (noting that the primary purpose of the Organic Act is "conservation of wildlife resources"); *Nat'l Rifle Ass'n of Am. v. Potter*, 628 F.Supp. 903, 909 (D.D.C.1986) ("In the Organic Act, Congress speaks of but a single purpose, namely conservation.").

<sup>293</sup> 16 U.S.C. § 1.

<sup>294</sup> Eric Biber & Elisabeth Long Esposito, *The National Park Service Organic Act and Climate Change*, 56 Nat. Res. J. 193, 223-224 (2016). For an assessment of an establishment act that shuffles these priorities, see *National Parks Conservation Ass'n v. U.S. Dept. of Interior*, 46 F.Supp.3d 1254, 1278 (M.D. Fla. 2014) (finding that the establishment acts for Big Cypress Preserve and Addition Lands mandate multiple uses, including ORV use on designated trails), *aff'd*, 835 F.3d 1377 (11th Cir. 2016).

resources and values and providing for enjoyment of them, conservation is to be predominant. This is how courts have consistently interpreted the Organic Act.<sup>295</sup>

Issues related to wildlife management come squarely within the purview of the conservation mandate. “Impairment” includes disruption of natural abundance, diversity, and ecological integrity, and is not limited to those impacts that “are so intense or sustained that they result in ‘the elimination of a native species or significant population declines in a native species.’”<sup>296</sup>

NPS’s Management Policies direct NPS to “maintain as parts of the natural ecosystems of parks all plants and animals native to park ecosystems.”<sup>297</sup> Native species are “all species that have occurred, now occur, or may occur as a result of natural processes on lands designated as units of the national park system.”<sup>298</sup> NPS commits itself to preserving, maintaining, and restoring both populations of species and their habitats, and to “minimizing human impacts on native plants, animals, populations, communities, and ecosystems, and the processes that sustain them.”<sup>299</sup> In addition, the Policies state that NPS will cooperate and work with state and tribal governments, federal agencies, and other land managers to encourage the conservation of species populations and habitats “whenever possible.”<sup>300</sup> Although the Policies are not judicially enforceable, courts have not hesitated to find that deviations from the Policies are arbitrary and capricious.<sup>301</sup>

### *c. Hunting and Fishing*

Courts have occasionally upheld NPS decisions that adversely impact wildlife, including decisions to cull deer and other wildlife from parks where the wildlife is undermining conservation goals by destroying vegetation or harming other species.<sup>302</sup> As a general rule,

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<sup>295</sup> NPS Management Policies § 1.4.3 (2006), available at <https://www.nps.gov/policy/mp2006.pdf>.

<sup>296</sup> *Bluewater Network*, 721 F. Supp. 2d at 36 (rejecting NPS’s interpretation of impairment to allow mortality and other “regular” adverse effects to wildlife as a “draconian” definition that was inconsistent the Organic Act).

<sup>297</sup> NPS Management Policies, *supra* note, at § 4.4.1.

<sup>298</sup> *Id.* 4.4.1.3.

<sup>299</sup> *Id.* 4.4.1.

<sup>300</sup> *Id.* 4.4.1.1.

<sup>301</sup> *See Bluewater Network*, 721 F. Supp. 2d at 20 (“While these Policies are not judicially enforceable, *Wilderness Soc’y v. Norton*, 434 F.3d 584, 596–97 (D.C.Cir. 2006), they are “relevant insofar as NPS puts forth the policies as justification for the decision under review,” *Greater Yellowstone Coal. v. Kempthorne*, 577 F.Supp. 2d 183, 206 (D.D.C.. Cir. 2008)).

<sup>302</sup> *See, e.g., Davis v. Latschar*, 202 F.3d 359 (D.C. Cir. 2000) (upholding NPS plan to cull of deer); *Grunewald v. Jarvis*, 930 F.Supp. 2d 73, 84-86 (D.. 2013) (similar); *N.M State Game Comm’n v. Udall*, 410 F.2d 1197, 1201 (10th Cir. 1989) (similar); *Friends of Animals v. Caldwell*, No. 2:09-CV-5349, 2010 WL 4259753 (E.D. Pa. Oct. 27, 2010) (similar). *See also* *Wildearth Guardians v. Nat’l Park Serv.*, 703 F.3d 1178, 1190 (10th Cir. 2013) (upholding NPS plan to cull elk); *Greater Yellowstone Coal. v. Babbitt*, 952 F.Supp. 1435 (D. Mont. 1996) (upholding NPS plan to authorize capture or killing of bison by state officials); *Intertribal Bison Coop. v. Babbitt*, 26 F.Supp. 2d 1135 (D. Mont. 1998) (upholding NPS plan to manage

however, hunting and other types of consumptive resource utilization within units of the National Park System are prohibited as contrary to the conservation ethic articulated in the Organic Act.<sup>303</sup> Specific establishment legislation for individual parks authorizes limited subsistence or recreational hunting, trapping, or fishing within approximately thirty-one NPS units.<sup>304</sup> Those areas permitting hunting, trapping, or fishing typically do so in conformance with applicable federal and state laws.<sup>305</sup> NPS regulations prohibit commercial fishing in the parks.<sup>306</sup> However, in *Alaska Wildlife Alliance v. Jensen*, the Ninth Circuit held that NPS has the discretion to permit commercial fishing in non-wilderness areas of certain Alaska parks.<sup>307</sup>

### 3. *The National Wildlife Refuge System*

#### a. *The National Wildlife Refuge System Improvement Act (1997)*

The National Wildlife Refuge System is unique among federal land conservation units in its explicit focus on wildlife and ecosystem conservation as its dominant use. The U.S. Fish and Wildlife Service (FWS) manages the Refuge System under the auspices of the National Wildlife Refuge System Administration Act,<sup>308</sup> which was amended in 1997 by the National Wildlife Refuge System Improvement Act.<sup>309</sup> The agency also provides detailed

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Yellowstone bison); *Wilkins v. Sec'y of Interior*, 995 F.2d 850 (8th Cir. 1993) (upholding NPS plan to remove wild horses).

<sup>303</sup> George Cameron Coggins and Robert L. Glicksman, *Hunting, Fishing, and Trapping on Federal Lands: National Park System*, 3 Pub. Nat. Resources L. § 32:14 (2nd ed.) (2016). *See* *United States v. Jarrell*, 143 F. Supp. 2d 605 (W.D. Va. 2001) (upholding conviction for hunting in Shenandoah National Park); *Organized Fisherman of Fla. v. Andrus*, 488 F.Supp. 1351, 1355 (S.D. Fla. 1980) (denying a preliminary injunction to enjoin enforcement of NPS regulations that restricted fishing practices in a national park).

<sup>304</sup> Jessica Almy, *Note, Taking Aim at Hunting on National Park Service Lands*, 18 N.Y.U. Envtl. L.J. 184, 185 (2010). *See* *Nat'l Rifle Ass'n v. Potter*, 628 F. Supp. 903, 907, 911 (D.D.C. 1986) (finding express authorization for hunting in the enabling acts of 31 NPS units and implied authorization in the Padre Island Seashore enabling act).

<sup>305</sup> 36 C.F.R. § 2.2(b)(4); 43 C.F.R. § 24.4(f). *See* *Organized Fishermen of Fla. v. Hodel*, 775 F.2d 1544 (11th Cir. 1985) (finding that, despite Florida law, there was no right to engage in commercial fishing in Everglades National Park); *United States v. Knauer*, 635 F.Supp. 2d 203 (E.D.N.Y. 2009) (holding that permission for commercial fishing or hunting in Gateway National Park was left to NPS). *See also* *Fund for Animals v. Mainella*, 294 F.Supp. 2d 46 (D.D.C. 2003) (refusing to enjoin state's bear hunt in Delaware Gap National Recreation Area, since statutory language provided that federal regulation was required only when NPS exercised its discretion to place limitations on hunting or to provide areas for intensive management).

<sup>306</sup> 36 C.F.R. §§ 2.3(d)(4), 5.3. *See* *S.F. Herring Ass'n v. U.S. Dept. of Interior*, 2014 WL 172232 (N.D. Cal. 2014) (finding that NPS had authority to issue citations to commercial fishermen in San Francisco Bay near the Golden Gate Recreational Area).

<sup>307</sup> *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1067, 1074 (9th Cir. 1997).

<sup>308</sup> Pub. L. No. 89-669, 80 Stat. 927 (1966) (codified at 16 U.S.C. §§ 668dd-668ee).

<sup>309</sup> Pub. L. No. 105-57, 111 Stat. 1252-1260 (1997).

explanations of its statutory obligations in its regulations<sup>310</sup> and the U.S. Fish and Wildlife Service Manual.<sup>311</sup>

The Act authorizes the agency to permit the use of any area within the system for any purpose as long as it is determined that the proposed use is compatible with the “major purposes for which the area was established.”<sup>312</sup> The Act further clarifies that all actions on a refuge must be compatible with both the mission of the refuge system and the purposes of the relevant individual refuge (as determined by the establishment legislation of that refuge).<sup>313</sup> Where the system mission and refuge purposes conflict, refuge purposes should be given precedence, while still fulfilling the system mission to the extent that is possible.<sup>314</sup> The agency’s discretion in determining whether a use is compatible is further limited by the requirement that compatibility be based on “sound professional judgment.”<sup>315</sup> Furthermore, agency regulations require compatibility determinations to: “(1) be written; (2) identify the proposed or existing use that the compatibility determination applies to; and (3) state whether the proposed use is in fact a compatible use based on “sound professional judgment.”<sup>316</sup>

The mission of the refuge system, as provided by the Act, is “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”<sup>317</sup> In meeting the mission of the system, the statute lays out explicit obligations for the agency. Three of these statutory requirements are particularly relevant to this discussion and are elaborated upon in greater detail below:

In administering the system the Secretary shall- (A) provide for the conservation of fish, wildlife, and plants, and their habitat within the system; (B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans; ... (E) ensure effective coordination, interaction, and cooperation with owners of land

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<sup>310</sup> See 50 C.F.R. §27.51, parts 31-32.

<sup>311</sup> U.S. Fish & Wildlife Serv. U.S. DOI, USFWS Manual: Land Use and Mgmt. Series, Series 600, *available at* <http://www.fws.gov/policy/manuals>.

<sup>312</sup> 16 U.S.C. § 668dd(d)(1).

<sup>313</sup> 16 U.S.C. § 668ee(a)(1). Establishment legislation is of key importance in refuge management as a source of refuge purposes and a guide to refuge management. Many refuges have purposes derived from multiple pieces of establishment legislation which can lead to confusion regarding the relative priorities of the various refuge purposes. ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 164 (2003).

<sup>314</sup> 16 U.S.C. § 668dd(a)(4)(D).

<sup>315</sup> 16 U.S.C. § 668ee(a)(1). See, *Delaware Audubon Soc. v. Salazar*, 829 F.Supp. 2d 273, 288 (D. Del. 2011) (finding that a dune restoration decision was within sound professional judgment when it was “supported by scientific literature”).

<sup>316</sup> 50 C.F.R. § 25.12.

<sup>317</sup> 16 U.S.C. § 668dd(a)(2).

adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located...<sup>318</sup>

Two significant court cases interpret many of the provisions of the Act. In *Wyoming v. U.S.*,<sup>319</sup> the state argued that the FWS interfered with the state's sovereign right to manage wildlife by prohibiting the state from vaccinating elk against brucellosis on refuge lands.<sup>320</sup> The court ultimately determined that ordinary principles of preemption applied; if the state's actions would conflict with federal mandates or present an obstacle to their accomplishment then the state is preempted by the Improvement Act.<sup>321</sup> In *National Audubon Society v. Davis*,<sup>322</sup> environmental groups challenged California over a state law banning the use of all leg hold traps in the state, including those used on federal lands or to protect endangered species. The court found that the ban conflicted with the FWS' statutory authority to manage refuges and so the state law was preempted.<sup>323</sup> These two cases are discussed in detail below.<sup>324</sup>

i. Provide for the conservation of fish, wildlife, plants, and their habitats

The Refuge Improvement Act groups the terms 'conserving,' 'conservation,' 'manage,' 'managing,' and 'management' together and provides a single definition for all of them: "to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants..."<sup>325</sup> As the *Wyoming* court states, it would be impossible for the agency to meet its obligation for conservation "unless [Refuges] are consistently directed and managed as a national system."<sup>326</sup> Furthermore, that court found that "Congress undoubtedly intended a preeminent federal role for the FWS in the care and management of the [National Wildlife Refuge System]."<sup>327</sup> The *Audubon* court concurred in this reasoning referencing the goals of the Improvement Act and the FWS' authority over refuge lands in its finding that state law was preempted.<sup>328</sup>

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<sup>318</sup> 16 U.S.C. § 668dd(a)(4).

<sup>319</sup> 279 F.3d 1214 (10th Cir. 2002).

<sup>320</sup> *Id.* at 1222.

<sup>321</sup> *Id.* at 1234.

<sup>322</sup> 307 F.3d 835 (9th Cir. 2002).

<sup>323</sup> *Id.* at 854.

<sup>324</sup> See *infra* notes \_\_\_\_ and accompanying text.

<sup>325</sup> 16 U.S.C. § 668ee(4).

<sup>326</sup> 279 F.3d at 1233 (citing H.R. Rep. No. 105-106 at 8).

<sup>327</sup> *Id.* at 1234. In another case, *Defenders of Wildlife v. Salazar*, 651 F.3d 112 (D.C. Cir. 2011), the D.C. Circuit defines "conservation" in this context by referencing the specific facts of the case. In that case the FWS is accused of violating the conservation mandate of the Improvement Act by failing to end the agency's elk feeding program in the National Elk Refuge. In that case the court found that "there is no doubt that unmitigated continuation of supplemental feeding would undermine the conservation purpose of the National Wildlife Refuge System" yet the court determined that a phased (rather than an abrupt) ending of that program was reasonable (651 F.3d at 117).

<sup>328</sup> 307 F.3d at 854.

ii. Ensure that the biological integrity, diversity, and environmental health of the System are maintained

The statute itself does not define these terms, however the FWS defines them in its manual.<sup>329</sup> The manual states that the “highest measure of biological integrity, diversity, and environmental health is viewed as those intact and self-sustaining habitats and wildlife populations that existed during historic conditions.”<sup>330</sup> Therefore, the agency favors “management that restores or mimics natural ecosystem processes or functions.”<sup>331</sup> The agency’s manual also lays out the major principles underlying the biological integrity policy, the first of which is that wildlife conservation must always be the primary concern in the management of the refuges,<sup>332</sup> and that ensuring biological integrity, diversity, and environmental health is necessary for the agency to fulfill the system mission of conservation.<sup>333</sup>

The requirement to maintain “biological integrity, diversity and environmental health” requires refuges to “manage lands to conserve the full range of wild species and plant communities” that existed in a refuge before it was substantially changed by humans, and also “calls for the conservation of basic ecological processes with little human alteration, including the natural biological processes that shape genomes, organisms, and communities.”<sup>334</sup> As Fishman describes the biological integrity requirement, “No other organic mandate employs as unconditional or specific a series of ecological criteria to constrain management and promote conservation.”<sup>335</sup>

iii. Ensure effective coordination, interaction, and cooperation

Congress clearly intended for the FWS to cooperate meaningfully with other land managers, particularly states. Elsewhere in the statute Congress included a requirement that the agency issue a conservation plan for each refuge that is “consistent with the provisions of this Act and, to the extent practicable, consistent with the fish and wildlife conservation plans of the State in which the refuge is located.”<sup>336</sup> As the *Wyoming* court states, the Improvement Act calls for “at a minimum, state involvement and participation in the management of the [National Wildlife Refuge System] as that system affects surrounding state ecosystems.”<sup>337</sup> However, in understanding the statute we must give effect to all of the language provided and while Congress strongly encourages cooperation,

<sup>329</sup> U.S. Fish and Wildlife Serv. Manual: Land Use and Mgmt. Series: Biological Integrity, Diversity, and Env’t Health, 601 FW 3.6(A)-(E), *available at* [www.fws.gov/policy/601fw3.html](http://www.fws.gov/policy/601fw3.html).

<sup>330</sup> 601 FW 3.10.

<sup>331</sup> 601 FW 3.7(E).

<sup>332</sup> 601 FW 3.7(A).

<sup>333</sup> 601 FW 3.7(B).

<sup>334</sup> ERIC T. FREYFOGLE and DALE D. GOBLE, *WILDLIFE LAW* 212 (2009) (referencing 66 Fed. Reg. 3810 (Jan. 16, 2001)).

<sup>335</sup> ROBERT L. FISCHMAN, *The NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 126 (2003). *See also* *Defenders of Wildlife v. Salazar*, 651 F.3d 112, 116 (D.C. Cir. 2011) (emphasizing the agency’s “biological integrity” mandate).

<sup>336</sup> 16 U.S.C. § 668dd(e)(1)(A)(iii).

<sup>337</sup> 279 F.3d at 1231.

it also tempers that goal by finding that it is only necessary “to the extent practicable,” otherwise the agency would not be capable of fulfilling its Congressionally designated mission. As the *Wyoming* court stated, “Congress undoubtedly intended a preeminent role for the FWS in the care and management of the [National Wildlife Refuge System].”<sup>338</sup>

#### iv. Savings Clause

The Improvement Act also contains two savings clauses. First, the Act prohibits the taking of any fish or animal within refuges without FWS permission,<sup>339</sup> but the prohibition does not extend beyond refuge boundaries: “[n]othing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of fish and resident wildlife on lands or waters that are not within the System.”<sup>340</sup> Next, the Act provides that:

Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.<sup>341</sup>

The state in *Wyoming* argued that the first sentence of the savings clause retains to the state “the absolute right to manage wildlife...free from federal intervention.”<sup>342</sup> However, the Tenth Circuit found that as a matter of statutory construction the first sentence cannot be read in isolation; instead the clause must be understood in its entirety, giving effect to the whole clause.<sup>343</sup> The second sentence of the savings clause indicates that federal regulation of wildlife on refuges only has to be consistent with state law “to the extent practicable.”<sup>344</sup> So while consistency is encouraged it is not mandated at the expense of the other requirements of the statute.

The *Wyoming* court also found that if the first sentence is read so as to exclude the possibility of FWS authority to manage wildlife in ways that might conflict with state law such a result would be inconsistent with the Improvement Act’s mission to “administer a national network of lands.”<sup>345</sup> Interpreting the statute as prohibiting the FWS from ever acting contrary to state law would leave the state “free to manage and regulate the [refuge] in a manner the FWS deemed incompatible with the ... [refuge’s] purpose.”<sup>346</sup> The

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<sup>338</sup> *Id.* at 1234.

<sup>339</sup> 16 U.S.C. § 668dd(c). *See* *United States v. Kilpatrick*, 347 F.Supp. 2d 693 (D. Neb. 2004) (upholding conviction for trespassing on and shooting deer in a closed portion of a wildlife refuge).

<sup>340</sup> 16 U.S.C. § 668dd(l).

<sup>341</sup> 16 U.S.C. § 668dd(m).

<sup>342</sup> 279 F.3d at 1231.

<sup>343</sup> *Id.* at 1231-1232.

<sup>344</sup> *Id.* at 1232.

<sup>345</sup> *Id.* at 1234 (citing § 668dd(a)(2)).

<sup>346</sup> *Id.* at 1233.

*Wyoming* court stated that “[w]e find highly unlikely the proposition that Congress would carefully craft the substantive provisions of the ... [Improvement Act] to grant authority to the FWS to manage the [refuge] and promulgate regulations thereunder, and then essentially nullify those provisions and regulations with a single sentence.”<sup>347</sup> The *Audubon* court agreed stating “the first sentence of the savings clause was not meant to eviscerate the primacy of federal authority over [National Wildlife Refuge] management.”<sup>348</sup> To the extent that state law conflicts with or undermines statutory requirements or federal objectives, it is preempted.<sup>349</sup> The Department of the Interior has adopted this cooperative federalism interpretation of the savings clause as well.<sup>350</sup>

#### v. Compatibility Determinations

The compatibility determination forms the central criteria for determining whether or not actions will be allowed to proceed on refuge lands and therefore is the key mechanism in implementing the statute’s goal of conservation. A compatible use is one that “in the sound professional judgment of the [FWS] will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.”<sup>351</sup> In implementing this provisions the FWS must consider direct, indirect, and cumulative impacts of the proposed use.<sup>352</sup> However, actions categorized as “refuge management activity” do not require compatibility determinations,<sup>353</sup> though refuge management activities must be actions in furtherance of the system mission or refuge purposes and so are inherently compatible.<sup>354</sup> State wildlife management activities may be considered “refuge management activities” if they are taken “pursuant to an agreement between the State and the FWS where the Refuge Manager has made a written determination that such activities support fulfilling the refuge purposes or the System mission.”<sup>355</sup> Because compatibility determinations must be made using “sound professional judgment”<sup>356</sup> the *Wyoming* court

<sup>347</sup> *Id.* at 1234-1235 (*internal citations omitted*). See also *Geier v. American Honda Motor Co.*, 599 U.S. 861, 868 (2000) (“The Supreme Court has repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.”).

<sup>348</sup> 307 F.3d at 854.

<sup>349</sup> *Id.* See *School Bd. of Avoyelles Parish v. U.S. Dept. of the Interior*, 647 F.3d 570, 582 (5th Cir. 2011) (finding that Louisiana law was in direct conflict with Property Clause and the National Refuge Act and was therefore pre-empted insofar as Louisiana statute, allowing owner of estate that has no access to public road to claim right of passage over neighboring property, would permit school board to enter, use, or otherwise occupy refuge lands in violation of FWS regulations).

<sup>350</sup> 43 C.F.R. § 24.4(e) (*emphasis added*).

<sup>351</sup> 16 U.S.C. § 668ee(a)(1).

<sup>352</sup> 50 C.F.R. § 25.12; Final Compatibility Policy Pursuant to the Nati’l Wildlife Refuge Sys. Improvement Act of 1997, 65 Fed. Reg. 62,489 (Oct. 18, 2000).

<sup>353</sup> U.S. Fish and Wildlife Serv. Manual: Land Use and Mgmt. Series: General Overview of Wilderness Stewardship Policy, 610 FW 2.10(A) (2008); 65 Fed. Reg. 62,484, 62,488.

<sup>354</sup> 65 Fed. Reg. 62,484, 62,488; 50 C.F.R. § 25.12; *and see* Joly, *supra* note \_\_\_\_.

<sup>355</sup> 65 Fed. Reg. 62,484, 62,488.

<sup>356</sup> 16 U.S.C. § 668ee(3).



found that a reviewing court has “law to apply” and the determinations are reviewable at court.<sup>357</sup>

In conclusion, Congress delegated to the FWS the responsibility to manage the national wildlife refuges in accordance with the specific requirements laid out in both the Refuge Improvement Act and the establishment legislation for individual refuges. Ultimately it is up to refuge managers to determine whether it is “practicable” and “compatible” for state laws to be applied on refuge lands.<sup>358</sup> As the *Wyoming* court stated, “The first sentence of the saving clause does not deny the FWS, where at odds with the state, the authority to make a binding decision bearing upon the ‘biological integrity, diversity, and environmental health of the System’.”<sup>359</sup> Both the compatibility requirement and the mandate to promote biological integrity, diversity, and environmental health impose legally enforceable restrictions and obligations on the FWS that cannot be cast aside at the request of states.

#### **4. The National Forest System**

##### *a. The 1897 Organic Act*

The Forest Service’s 1897 “Organic Act” authorizes the establishment of national forests. It states in part that “[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”<sup>360</sup> The law also authorizes the USFS to regulate “the occupancy and use” of the national forests and “to preserve the forests thereon from destruction.”<sup>361</sup>

The Organic Act is silent on fish and wildlife management on National Forests. In an early wildlife decision, however, the Supreme Court found the USFS to have broad powers in protecting the national forests (in this case the Kaibab) from damage inflicted by deer in northern Arizona. The power of the U.S., said the Court, to “protect its lands and property does not admit of doubt, the game laws of any other statute of the state to the contrary notwithstanding.”<sup>362</sup>

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<sup>357</sup> 279 F.3d at 1237.

<sup>358</sup> FREYFOGLE and GOBLE, *supra* note, at 215.

<sup>359</sup> 279 F.3d 1234.

<sup>360</sup> 16 U.S.C. § 475.

<sup>361</sup> *Id.* See 16 U.S.C. § 551 (“The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.”). See *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 689 F.Supp.2d 891, 905 (D.D.C. 2010) (finding that USFS unlawfully delegated its Organic Act authority in allowing National Wild Turkey Federation to issue special use permits on forest lands).

<sup>362</sup> *Hunt v. United States*, 278 U.S. 96, 100 (1928).

*b. The Multiple Use Sustained Yield Act (1960)*

In 1960, Congress passed the Multiple Use Sustained Yield Act (MUSYA).<sup>363</sup> For the first time, it was statutorily recognized that the USFS had some responsibility to consider fish and wildlife values on the National Forests. MUSYA states in pertinent part: “It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, *and wildlife and fish* purposes.”<sup>364</sup> This language does not require the USFS to conserve wildlife in any specific way, only to consider wildlife and fish in the context of multiple use decision making. As defined in the law, multiple use means:

The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.<sup>365</sup>

As the courts generally view it, the multiple use mandate “breathes discretion at every pore”<sup>366</sup> and grants the USFS wide latitude in determining the proper mix of uses for National Forest lands.<sup>367</sup> In *Perkins v. Bergland*, the plaintiffs argued that the MUSYA contained standards that cabined the USFS’s discretion over the proper number of grazing permits to protect the public land from damage. The Ninth Circuit disagreed:

These sections of MUSYA . . . contain the most general clauses and phrases. For example, the agency is “directed” in section 529 to administer the national forests “for multiple use and sustained yield of the several products and services obtained therefrom,” with “due consideration (to) be given to the relative values of the various resources in particular areas.” This language, partially defined in section 531 in such terms as “that (which) will best meet the needs of the American people” and “making the most judicious use of the land,” can hardly be considered concrete limits upon agency discretion. Rather, it is language which “breathe(s) discretion at every pore” ... What appellants really seem to be saying when they rely on the multiple-use legislation is that they do not agree with the Secretary on how best to

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<sup>363</sup> 16 U.S.C. §528.

<sup>364</sup> *Id.*

<sup>365</sup> 16 U.S.C. § 531(a).

<sup>366</sup> *Perkins v. Bergland*, 608 F.2d. 803 (9<sup>th</sup> Cir. 1979).

<sup>367</sup> *Wyoming v. U.S. Dept. of Agriculture*, 661 F.3d 1209, 1268-1269 (10<sup>th</sup> Cir. 2011), *cert. denied*, 133 S.Ct. 417 (2012).

administer the forest land on which their cattle graze. While this disagreement is understandable, the courts are not at liberty to break the tie by choosing one theory of range management as superior to another.<sup>368</sup>

Since *Perkins v. Bergland*, the courts have consistently found that USFS has broad discretion under the multiple use framework.<sup>369</sup> This includes *Wyoming v. U.S. Dept. of Agriculture*,<sup>370</sup> where the Tenth Circuit upheld the 2001 Roadless Rule<sup>371</sup> over challenges that the Rule failed to satisfy the statutory multiple-use mandate because it precluded timber harvesting in certain areas. The court reaffirmed the MUSYA's discretionary nature and found that, while the Rule did not permit timber harvesting, it permitted other multiple uses, such as "outdoor recreation," "watershed," and "wildlife and fish purposes."<sup>372</sup>

A relatively short and simple savings clause is also provided in the MUSYA: "Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests."<sup>373</sup> However, as noted above, in *California Coastal Comm'n v. Granite Rock Co.*,<sup>374</sup> the U.S. Supreme Court held that federal law preempted the extension of state land use plans onto national forest lands because the savings clause merely indicates that ordinary principles of preemption govern such disputes. By the same token, contradictory state regulation of wildlife on the National Forests would be preempted despite the savings clause.<sup>375</sup>

### *c. The National Forest Management Act (NFMA) (1976)*

Born out of the timber clear-cutting controversies of the 1960s and 1970s, the NFMA was passed in order to better balance timber management, resource use and environmental protection. Unlike the highly discretionary Organic Act and MUSYA, the NFMA provides substantive and procedural planning requirements, goals, and constraints on the agency,

<sup>368</sup> 608 F.2d. at 806.

<sup>369</sup> See e.g., *Griffin v. Yuetter*, 944 F.2d 908, 908 (9th Cir.1991) (unreported); *Big Hole Ranchers Assc. Inc. v. U.S. Forest Service*, 686 F.Supp. 256, 264 (D. Mon. 1988); *Wind River Multiple-Use Advocates v. Espy*, 835 F.Supp. 1362, 1372 (D. Wyo. 1993), *affirmed*, 85 F.3d 641 (10<sup>th</sup> Cir.1996); *Sierra Club v. Marita*, 845 F.Supp. 1317, 1328 (E.D. Wis. 1994); *Clinch Coal. v. Damon*, 316 F.Supp.2d 364, 378 (W.D. Va 2004); *Natural Res. Defense Council, Inc. v. U.S. Forest Serv.*, 634 F.Supp. 2d 1045, 1058 (E.D. Cal. 2007); *Cal. Forestry Assoc. v. Bosworth*, 2008 WL 4370074 (E.D. Cal., 2008); *Pacific Rivers Council v. U.S. Forest Serv.*, 2008 WL 4291209 ( E.D. Cal. 2008); *People of Cal. ex rel. Lockyer v. U.S. Dept. of Agric.*, 2008 WL 3863479 (E.D. Cal.. 2008).

<sup>370</sup> 661 F.3d 1209, 1268-1269 (10<sup>th</sup> Cir. 2011), *cert. denied*, 133 S.Ct. 417 (2012). *Accord American Whitewater v. Tidwell*, 959 F.Supp. 2d 839, 863 (D.S.C. 2013), *affirmed*, 770 F.3d 1108 (4th Cir. 2014); *Ark Initiative v. Tidwell*, 816 F.3d 119, 128 (D.C. Cir. 2016).

<sup>371</sup> Special Areas; Roadless Area Conservation Final Rule, 66 Fed. Reg. 3244 (2001).

<sup>372</sup> 661 F.3d at 1268-1269.

<sup>373</sup> 16 U.S.C. § 528.

<sup>374</sup> 480 U.S. 572, 585 (1987).

<sup>375</sup> See *Hunt v. U.S.*, 278 U.S. 96, 100 (1928) (upholding federal removal of deer from the Kaibab National Forest to protect the forest from damage caused by overgrazing, despite objections from the state); *Wyoming*, 61 F.Supp. 2d at 1220, 1232 (construing the NWRIA's savings clause).

including obligations for managing fish and wildlife. The NFMA requires the writing of land and resource management plans (LRMPs or “forest plans”) by every national forest and grassland in the NFS.

NFMA created a three-tiered regulatory approach to planning.<sup>376</sup> At the highest level, national-level NFMA regulations govern the development and revision of second-tier forest plans. Forest plans typically make zoning and suitability decisions and limit and regulate various activities within a forest area, therefore acting as a gateway through which subsequent project-level proposals must pass.<sup>377</sup> Forest plans also include long-term goals and desired conditions of the land and resources.<sup>378</sup> Site-specific projects make up the third tier of planning. Any such proposed use of a national forest is subject to the requirement in NFMA that “[r]esource plans and permits, and other instruments for use and occupancy of National Forest System lands shall be consistent with” the applicable forest plan.<sup>379</sup> To the extent that states are subject to USFS authority, that authority must be exercised in conformance with the provisions in the current forest plan.

#### *i. NFMA and Wildlife*

One of NFMA’s most powerful provisions is its wildlife diversity mandate.<sup>380</sup> It requires that forest plans “provide for a diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.”<sup>381</sup> According to Wilkinson and Anderson’s authoritative history of NFMA’s development, the diversity provision was meant to require “Forest Service planners to treat the wildlife resource as a controlling, co-equal factor in forest management and, in particular, as a substantive limitation on timber production.”<sup>382</sup> Regulations implementing NFMA address requirements for diversity in greater detail. If state wildlife management actions occur on national forest lands they must be considered in this statutory and regulatory context, and may be subject to preemption based on the USFS’s authority and obligations for wildlife diversity.

Most “first-generation” forest plans were written pursuant to the 1982 NFMA regulations. Those regulations required that “[f]ish and wildlife habitat shall be managed to maintain

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<sup>376</sup> For a more elaborate explanation of this tiered approach, see *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961 (9th Cir. 2003).

<sup>377</sup> Scott W. Hardt, *Federal Land-Use Planning and Its Impact on Resource Management Decisions*, 46B RMMLF-INST 4, 4-7 (1997).

<sup>378</sup> See Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. LAW. 149, 153–55 (1996) (discussing the various planning processes under NFMA). See also *Ohio Forestry Assn. Inc. v. Sierra Club*, 523 U.S. 726 (1998) (describing the nature of forest plans).

<sup>379</sup> 16 U.S.C. 1604(i).

<sup>380</sup> See generally Courtney A. Schultz et al., *Wildlife Conservation Planning Under the United States Forest Service’s 2012 Planning Rule*, 77 J. Wildlife Mgmt. 428-44 (2013).

<sup>381</sup> 16 U.S.C. 1604(g)(3)(B).

<sup>382</sup> CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* 296 (1987).

viable populations of existing native and desired non-native species in the plan area.”<sup>383</sup> While this language emphasized management of habitat, the regulation also established a minimum population threshold, at least in concept, by defining “viable population” as “one which has the estimated number and distribution of individuals to insure its continued existence is well distributed in the planning area.”<sup>384</sup>

Existing forest plans will be revised (many during the next decade) and amended under new NFMA implementing procedures codified in the 2012 Planning Rule.<sup>385</sup> They include a different set of substantive requirements for management of wildlife. For ESA-listed species, forest plan components (e.g., desired future conditions, objectives, standards, and guidelines) must provide the “ecological conditions necessary to contribute to” their recovery.<sup>386</sup> For other at-risk species, referred to as species of conservation concern (“SCC”), forest plan components must provide the “ecological conditions to maintain a viable population of each species of conservation concern in the plan area.”<sup>387</sup> There is an exception for SCC management: where population viability is beyond the authority of the USFS or capability of the land, the USFS must coordinate to the extent practicable with others having management authority over lands relevant to a larger population.<sup>388</sup>

The 2012 Planning Rule defines “ecological conditions” to include “habitat and other influences on species and the environment.”<sup>389</sup> Other influences include “human uses.”<sup>390</sup> The Rule defines “viable population” as “(a) population of a species that continues to persist over the long term with sufficient distribution to be resilient and adaptable to stressors and likely future environments.”<sup>391</sup> Like its predecessor, the 2012 Planning Rule thus establishes population levels for at-risk species as a goal, which is to be achieved by providing ecological conditions and regulating human uses.

Forest plans may be considered as “regulatory mechanisms,” as defined by ESA, during the listing process, and may be a basis for not listing a species.<sup>392</sup> Regulations of the U.S.

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<sup>383</sup> 36 C.F.R. §219.19 (1982). See e.g. *Seattle Audubon Society v. Moseley* (80 F. 3d 1401, 9th Cir. 1996), *Friends of the Wild Swan v. U. S. Fish and Wildlife Service* (945 F. Supp. 1388, D. Oregon 1996).

<sup>384</sup> *Id.*

<sup>385</sup> 36 C.F.R. Part 219 – Planning (2016).

<sup>386</sup> 36 C.F.R. §219.9(b)(1) (2016).

<sup>387</sup> *Id.* Agency planning policy requires that species identified by states as being at risk be considered as potential SCC. Forest Service Handbook 1909.12 §1252d(3).

<sup>388</sup> 36 C.F.R. §219.9(b)(2) (2016).

<sup>389</sup> 36 C.F.R. §219.19 (2016).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> See *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F. 3d 1015, 9th Circuit (2011) (Forest plan direction was properly considered a valid regulatory mechanism for providing protection for grizzly bears). The decision to list Canada lynx as a threatened species was based largely on the lack of regulatory mechanisms in federal plans (“Therefore, amendment of Forest Plans to provide protection for lynx and lynx habitat is needed to conserve habitat for lynx and its prey on Federal forest lands. Without such amendments, the species is threatened.” (65 Fed. Reg.

Department of Agriculture require the USFS (and other USDA agencies) to “avoid actions which may cause a species to become threatened or endangered.”<sup>393</sup> Under current plans and policies, species identified as “sensitive” were so designated in part to avoid their listing under ESA, and agency actions may not create “significant trends towards federal listing.”<sup>394</sup> Current forest plans must ensure that viable populations of sensitive species are maintained.<sup>395</sup> The relationship of newly identified SCC and ESA has not been as clearly articulated, but their role in developing adequate forest plan regulatory mechanisms should be similar.

When forest plans are amended or revised, they are also subject to the substantive requirements of the ESA for listed species. This means that they cannot jeopardize the continued existence of listed species<sup>396</sup> or destroy or adversely modify any critical habitat that has been designated,<sup>397</sup> or result in prohibited incidental take.<sup>398</sup> Forest plans may also be viewed as the primary means by which the agency is “carrying out programs for the conservation of” listed species, in accordance with Section 7(a)(1) of ESA.<sup>399</sup>

When it prepares forest plans under NFMA, the USFS may include plan components that govern activities affecting wildlife. These plan components may include both desired ecological conditions and restrictions on activities that are likely to adversely affect these conditions. Such restrictions could be applicable to state actions occurring on a national

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16074 (Mar. 24, 2000). The decision to not list the greater sage grouse was based largely on plans for federal lands that conserved the species (80 Fed. Reg. 59858 (Oct. 2, 2015)).

<sup>393</sup> USDA Departmental Regulation, 9500-04

([https://www.ocio.usda.gov/sites/default/files/docs/2012/DR9500-004\\_0.pdf](https://www.ocio.usda.gov/sites/default/files/docs/2012/DR9500-004_0.pdf)).

<sup>394</sup> FSM 2670.22(1), FSM 2670.32(4)

<sup>395</sup> FSM 2672.41

<sup>396</sup> See e.g. *Resources Limited, Inc. v. Robertson*, 35 F. 3d 1300, 9th Circuit 1993 (FWS conditioned its “no jeopardy” conclusion on the Forest Service’s continued adherence to grizzly bear guidelines).

<sup>397</sup> See *Cottonwood Envtl. Law Center v. US Forest Serv.*, 789 F. 3d 1075 - 9th Circuit 2015 (reinitiation of consultation on forest plans required after designation of critical habitat for Canada lynx).

<sup>398</sup> Pending litigation involving the Superior National Forest Plan claims that the Forest Service is responsible for take of Canada lynx resulting from hunting and trapping on the national forest. *Center for Biological Diversity v. Tidwell*, D. D.C., Case 1:16-cv-01049-TSC, June 6, 2016, Complaint for Declaratory and Injunctive Relief, at 15.

<sup>399</sup> 16 U.S.C. §1536 (2016). The Preamble to the 2012 Planning Rule states that the requirement to contribute to recovery, “will further the purposes of § 7(a)(1) of the ESA, by actively contributing to threatened and endangered species recovery and maintaining or restoring the ecosystems upon which they depend. 77 Fed. Reg. 21215 (Apr. 9, 2012). The U.S. Fish and Wildlife Service Handbook for consultation states that a programmatic review based on §7(a)(1) is appropriate for Federal agency planning and program management documents. FWS Consultation Handbook, available at [https://www.fws.gov/ENDANGERED/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/ENDANGERED/esa-library/pdf/esa_section7_handbook.pdf) (p. 5-1) (last visited Aug. 8, 2016).

forest.<sup>400</sup> However, the 2012 Planning Rule states that plans do not themselves regulate uses by the public, such as hunting and fishing.<sup>401</sup>

## *ii. Wildlife and Special Use Authorization*

Several wildlife conflicts playing out on the National Forests involve the question of whether or not the USFS should authorize a wildlife-focused action by a non-federal actor. For example, states may be engaged in introducing new species on national forest lands, or limiting or removing species that are undesirable from the state's perspective. Questions may arise about the Forest Service's role in these state actions, and the applicability of federal law to them.

The USFS implements forest plans by authorizing specific uses that promote achievement of the desired outcomes, such as plant and animal diversity and viable populations. It may also authorize activities that would not necessarily promote these outcomes. This is often the case with requests for special use authorizations by applicants for permits, which could include state and local governments. A forest plan may include mandatory requirements (standards or guidelines) applicable to the issuance of such permits.

The objectives of the USFS special uses program are to authorize and manage special uses of National Forest System lands in a manner that protects natural resources and public health and safety, consistent with forest plans.<sup>402</sup> Permits may be granted only if the proposed use cannot reasonably be accommodated on non-National Forest System lands.<sup>403</sup>

Almost all uses of NFS lands, improvements, and resources are designated "special uses."<sup>404</sup> Wildlife management activities on national forests by non-Federal parties would be considered special uses. Before conducting a special use, individuals or entities must obtain a special use authorization from the authorized officer, unless that requirement is

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<sup>400</sup> While courts have not yet found a direct conflict between a state action and NFMA's diversity requirement, such conflict could arise where a state game species is considered at-risk by the Forest Service. This is the case for bighorn sheep, where the State of Wyoming passed a law authorizing removal of bighorn sheep if the USFS were to reduce domestic sheep grazing. Enrolled Act No. 83, Senate, Sixty-third legislature of the State of Wyoming, 2015 General Session (<http://legisweb.state.wy.us/2015/Engross/SF0133.pdf>). See *Idaho Wool Growers Ass'n v. Vilsack*, 7 F.Supp. 3d 1085 (D. Idaho 2014) (affirmed by 9<sup>th</sup> Circuit on 3/2/16) (forest plan decision reduced domestic sheep grazing in order to prevent disease transmission to bighorn sheep).

<sup>401</sup> 36 C.F.R. §219.2(b)(2) (2016). Forest plan direction to limit public uses must be implemented by a closure order, pursuant to 36 CFR §261.50, and may include special closures to protect wildlife pursuant to 36 CFR §261.53(a).

<sup>402</sup> FSM 2702

<sup>403</sup> FSM 2703.2

<sup>404</sup> Some uses are not considered "special uses" because they are regulated by separate authorities, as described in 36 CFR §250 (2016). The various authorities for different kinds of special uses are listed in FSM 2701.1.

waived by regulation.<sup>405</sup> There is no waiver provision that necessarily allows state actions taken on national forest system lands without a permit. A special use authorization is normally not required for hunting or fishing. However, the USFS may manage public recreation of any kind by issuing a closure order.<sup>406</sup>

### iii. Coordination with State and Local Governments

NFMA includes a requirement to coordinate with the land and resource management planning processes of state and local governments in the development of forest plans.<sup>407</sup> The 2012 Planning Rule requires review of the planning and land use policies of state and local governments, and consideration of the objectives of these policies and opportunities to reduce conflicts.<sup>408</sup> However, it explicitly does not permit the responsible USFS official to “conform the management to meet non-USFS objectives or policies.”<sup>409</sup>

The 2012 Planning Rule also requires the official responsible for forest planning to “encourage States, counties, and other local governments to seek cooperating agency status in the NEPA process for development, amendment, or revision of a plan.”<sup>410</sup> The role of such cooperating agencies is to assist in the environmental review process. NEPA also includes a requirement to “cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements.”<sup>411</sup> In addition, NEPA documents must identify any inconsistencies with state and local plans or laws, and “describe the extent to which the agency would reconcile its proposed action with the plan or law.”<sup>412</sup> There is no general NEPA requirement to coordinate decision-making processes or for USFS decisions to be consistent with state plans.

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<sup>405</sup> The requirement for a special use permit is waived for most noncommercial recreational activities not involving a large organized group, most forms of travel on National Forest System roads, uses with nominal effects, and uses regulated by a state agency or another federal agency in a manner that adequately protects National Forest lands and resources. 36 CFR §251.50 (c)-(e).

<sup>406</sup> 36 CFR §261.50 (2016). Among other reasons, closure orders are authorized for the “protection of threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish, or special biological communities” 36 CFR §261.70(a)(4) (2017).

<sup>407</sup> See 16 U.S.C. § 1604(a) (stating that, “as appropriate,” forest plan revisions should be “coordinated with the land and resource management planning processes of State and local governments and other Federal agencies”). See also 36 C.F.R. §219.4(b)(1) (2016) (using the phrase “equivalent and related planning efforts”).

<sup>408</sup> 36 C.F.R. §219.4(b)(2)(2016).

<sup>409</sup> 36 C.F.R. §219.4(b)(3) (2016). For example, the Bridger-Teton National Forest refused to commit to “adopting” a Wyoming plan for bighorn sheep, describing it only as “a valuable framework.” Letter from USDA Forest Service, Intermountain Region to the Honorable Matt Mead, Governor of Wyoming. February 20, 2015 (copy on file)

<sup>410</sup> 36 C.F.R. §219.4(a)(1)(iv)(2016).

<sup>411</sup> 40 C.F.R. §1506.2 (2016).

<sup>412</sup> See 40 C.F.R. §1506.2(d) (2016) (“To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.”).



In conclusion, although it is clear that the USFS must coordinate the development of LRMPs with tribal, state and local governments, this coordination requirement does not give such non-federal entities equal footing in managing NFS lands, nor does it require the USFS to act and manage NFS lands consistent with these non-federal plans.

*d. USFS Cooperation in Wildlife Management.*

Federal regulations applicable to the USFS require “cooperation in wildlife management”:

The Chief of the Forest Service, through the Regional Foresters and Forest Supervisors, shall determine the extent to which national forests or portions thereof may be devoted to wildlife protection in combination with other uses and services of the national forests, and, in cooperation with the Fish and Game Department or other constituted authority of the State concerned, he will formulate plans for securing and maintaining desirable populations of wildlife species, and he may enter into such general or specific cooperative agreements with appropriate State officials as are necessary and desirable for such purposes. Officials of the Forest Service will cooperate with State game officials in the planned and orderly removal in accordance with the requirements of State laws of the crop of game, fish, furbearers, and other wildlife on national forest lands.<sup>413</sup>

Forest Service directives provide additional coordination guidance.<sup>414</sup> In particular, they require development of a written memorandum of understanding (“MOU”) with each state involving policies or procedural matters.<sup>415</sup>

Hunting, fishing, and trapping on NFS lands are subject to state fish and wildlife laws and regulations, unless those regulations conflict with federal laws or they would permit activities that conflict with land and resource management responsibilities of the USFS or that are inconsistent with direction in forest plans.<sup>416</sup> Memorandums with state fish and wildlife agencies must recognize the role of the USFS in cooperating in the development of state fish and wildlife laws and regulations, especially those addressing hunting, fishing, and trapping as they would apply to occupancy and use of National Forest System lands.<sup>417</sup>

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<sup>413</sup> 36 C.F.R. 241.2 (2016).

<sup>414</sup> FSM 2610 “Cooperative Relations”, available at <https://www.fs.fed.us/dirindexhome/fsm/2600/2610.txt>.

<sup>415</sup> FSM 2611.1 (2016).

<sup>416</sup> FSM 2643.1 (2016). *See e.g., Center for Biological Diversity v. United States Forest Service, D. Arizona 2013* (rejecting a standing causation argument, holding that the USFS has authority to regulate the use of lead bullets to protect California condors) (reiterating this holding on remand, but dismissing the case on other grounds, *D. Arizona* filed 3/15/17), *Louisiana Sportsmen Alliance v. Vilsack*, 984 F.Supp.2d 600 (W.D. Louisiana 2013) (Forest plan may prohibit hunting deer with dogs to reduce conflicting uses), *Meister v. USDA*, 623 F.3d 363 (6<sup>th</sup> Cir. 2010) (not beyond USFS authority to consider using a forest plan to prohibit gun hunting in areas to be managed for non-motorized recreation).

<sup>417</sup> FSM 2643 (2016).

Introductions or stocking of species may be made to restore resources following environmental changes, and to provide recreation opportunities where reproduction is insufficient to meet demand.<sup>418</sup> Authority is also provided to restore locally extinct indigenous species, to recover threatened and endangered species, and to introduce new species in coordination with state and federal agencies.<sup>419</sup> A prior joint agreement with appropriate state fish and wildlife agencies is needed for any introductions.<sup>420</sup> Such MOUs must document agreements on each fish and wildlife translocation project and appropriate environmental documentation.<sup>421</sup> When stocking and reintroductions occur, the USFS has the responsibility to prevent damage to resources occurring on NFS lands and comply with the ESA and Wilderness Act.<sup>422</sup>

State cooperative agreements are found in MOUs that are appended to the USFS Manual as regional supplements that pertain to the states found in each region. For example, an MOU between Idaho and the USFS commits the USFS to considering state goals when developing its forest plans.<sup>423</sup> It also recognizes that special use permits may be needed for some state actions on federal lands. The MOU requires prior consultation (but not permission) for use of chemicals and for transplants or introductions of wildlife or fish “with sufficient lead time to permit joint field investigations regarding the effects of such programs on National Forest System lands.” It also contains a savings clause regarding state and federal authorities.

*e. Special Designated Areas Managed by USFS*

The laws and regulations reviewed above generally apply throughout the National Forest System. But the System also includes special areas, designated by Congress or the President, that may include additional authority and direction for managing wildlife. These include an assortment of USFS-administered national recreation areas, conservation areas and other specially-designated landscapes.<sup>424</sup> These include National Monuments that are

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<sup>418</sup> FSM 2640.3 (2016). *See also* Exec. Order 11987 (1977) (generally restricting federal agencies from introducing species to lands they administer, and encouraging the prevention of introductions by other levels of government and by private citizens).

<sup>419</sup> *Id.* The State has the responsibility to make the determination as to which wildlife and fish species are native or indigenous.

<sup>420</sup> FSM 2640.4 (2016).

<sup>421</sup> FSM 2641 (2016).

<sup>422</sup> *Id.*

<sup>423</sup> FSM 1561.2 - Exhibit 02, R4 Supplement 1500-94-3 (2016).

<sup>424</sup> For a comprehensive listing of “special recreation and conservation overlays,” *see* George Cameron Coggins et al., *Federal Public Land and Resources Law* 946–47 (2007). Included in the listing for National Forest lands are special management areas (such as Greer Spring, Missouri, 16 U.S.C. § 539h (2006)), recreation management areas (such as Fossil Ridge, Colorado, 16 U.S.C. § 539i (2006)), protection areas (such as Bowen Gulch, Colorado, 16 U.S.C. § 539j (2006)), scenic areas (such as Columbia River Gorge, Oregon-Washington, 16 U.S.C. § 544-544m (2006)), scenic research areas (such as Opal Creek, Oregon, 16 U.S.C. § 545b (2006)), national scenic areas (such as Mount Pleasant, Virginia, 16 U.S.C. § 545 (2006)), national forest scenic areas (such as Mono Basin, California, 16 U.S.C. § 543 (2006)), and national preserves (such as Valles Caldera, New Mexico, 16 U.S.C. § 698v (2006)). *See also* NATURAL RESOURCES

established by the President using the Antiquities Act.<sup>425</sup> A recent national monument established on National Forest System lands (which also includes BLM lands) is the Sand to Snow National Monument in California.<sup>426</sup> President Obama's Proclamation establishing the Monument emphasizes the area's "remarkable species richness that makes it one of the most biodiverse areas in southern California" and that it is "home to 12 federally listed threatened and endangered animal species" and "frequented by over 240 species of birds" and that the area's "intersection of mountains makes this area a critical bridge for wildlife traversing the high elevations of southern California's desert landscape." The Proclamation orders the USFS and BLM to use their "respective applicable legal authorities" to implement these wildlife-focused purposes of the National Monument and includes a savings clause stating that the Proclamation does nothing to "enlarge or diminish the jurisdiction of the State of California, including its jurisdiction and authority with respect to fish and wildlife management."<sup>427</sup>

## ***5. Public Lands Managed by the Bureau of Land Management***

### *a. Federal Land Policy Management Act (1976)*

Of most relevance to wildlife on public lands managed by the BLM is the Federal Land Policy Management Act (FLPMA) of 1976.<sup>428</sup> FLPMA is considered to be the BLM's Organic Act because it consolidated and articulated the agency's mission and management responsibilities. Its full history is beyond the purview of this Article, but it is commonly recognized that the Act was designed, in part, to correct the agency's historic practice of prioritizing livestock grazing and mining as the dominant uses of public lands.<sup>429</sup> In FLPMA, Congress declared that fish and wildlife values were to be balanced with other resources and uses of the public lands, and expressed a policy that:

[T]he public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish

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LAW CTR., PROTECTIVE DESIGNATIONS ON FEDERAL LANDS: CASE STUDIES OF NATIONAL CONSERVATION AREAS, NATIONAL MONUMENTS, NATIONAL PARKS, NATIONAL RECREATION AREAS, AND WILDERNESS AREAS 2 (2004); Martin Nie and Michael Fiebig, *Managing the National Forests Through Place-Based Legislation*, 37 Ecology L.Q. 1 (2010).

<sup>425</sup> 54 U.S.C. §320301.

<sup>426</sup> Presidential Proclamation, Establishment of the Sand to Snow Nat'l Monument, Feb. 12, 2016, <https://www.whitehouse.gov/the-press-office/2016/02/12/presidential-proclamation-establishment-sand-snow-national-monument>

<sup>427</sup> *Id.*

<sup>428</sup> Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2744, 43 U.S.C. §§1701 *et seq.*

<sup>429</sup> See e.g., DEBRA L. DONAHUE, THE WESTERN RANGE REVISITED, REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY (1999); JAMES R. SKILLEN, THE NATION'S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST (2009).

and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.<sup>430</sup>

FLPMA also codified a multiple use mandate,<sup>431</sup> which is defined as follows:

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, *wildlife and fish*, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.<sup>432</sup>

Three components of this definition are essential to understanding the BLM's multiple use mandate. First, it means that some lands may be used for less than all of the possible resources and values present in an area. In fact, some land may be used for only one resource or value. Second, "multiple use" means that some lands may be used for purposes that do not return the greatest profit to individuals, corporations, or federal, state, or local governments. Third, the diverse resources for which the BLM is given direction to manage include "wildlife and fish," and not just fish and wildlife *habitat*. We return to this issue in Part III(A).

Similar to other federal land laws, Congress recognized the national interest in these public lands and wanted their management to be based on a systematic inventory and informed land use planning process. To this end, FLPMA requires the preparation of resource management plans.<sup>433</sup> In preparing these plans, the agency must consider such things as the "present and potential uses of the public lands," "the relative scarcity of the values involved," to "rely, to the extent it is available, on the inventory of the public lands, their resources, and others values," and to "weigh long-term benefits to the public against short-term benefits."<sup>434</sup>

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<sup>430</sup> 43 U.S.C. §1701(a)(8).

<sup>431</sup> Congress first codified multiple use management for the BLM in the Classification and Multiple Use Act of 1964, Pub. L. No. 88-607, 78 Stat. 986.

<sup>432</sup> 43 U.S.C. §1702(c) (emphasis added).

<sup>433</sup> 43 U.S.C. §1712.

<sup>434</sup> 43 U.S.C. §1712(c).

As in the case of the national forests, the multiple use mandate given to the BLM provides a great deal of agency discretion.<sup>435</sup> But this discretion is not boundless. The agency violates FLPMA if it fails to “engage in any reasoned or informed decisionmaking process” concerning the implementation of multiple use.<sup>436</sup> FLPMA’s multiple use mandate is also bounded by two additional provisions of FLPMA: (1) the requirement to avoid “permanent impairment...to the quality of the environment,”<sup>437</sup> and (2) the requirement that the Secretary of Interior (and hence the BLM) must “take any action necessary to prevent unnecessary or undue degradation of the lands.”<sup>438</sup>

#### *i. Areas of Critical Environmental Concern*

FLPMA requires the BLM’s land use planning process to “give priority to the designation and protection of areas of critical environmental concern [ACECs].”<sup>439</sup> As defined in FLPMA,

The term “areas of critical environmental concern” means areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, *fish and wildlife resources* or other natural systems or processes, or to protect life and safety from natural hazards.<sup>440</sup>

This is a unique provision in federal land law. ACECs are often designated because of the fish and wildlife values associated with them.<sup>441</sup> Congress, in unambiguous fashion, ordered the agency to *prioritize* the designation and protection of ACECs. This means that the BLM should be giving ACECs priority for consideration in the planning process and extra weight in decision making.<sup>442</sup> As summarized in a recent study, “The legislative history of FLPMA documents Congress’ consistent and purposeful intent to provide for the protection of ACECs and to require BLM to give priority to that protection in the

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<sup>435</sup> See e.g., *Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), *aff’d*, 819 F. 2d 927 (9<sup>th</sup> Cir. 1987).

<sup>436</sup> *Nat’l Wildlife Fed’n et al. v. BLM*, 140 I.B.L.A. 85 (1997). For a more complete history of this case and its implications for multiple use see Joseph M. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 Pub. Land L. Rev. 25 (1996).

<sup>437</sup> 43 U.S.C. §1702(c).

<sup>438</sup> 43 U.S.C. §1732(b). See generally Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815 (2005) (reviewing the application of this provision as it relates to water, mining and property rights).

<sup>439</sup> 43 U.S.C. § 1712(c)(3).

<sup>440</sup> 43 U.S.C. §1702(a) (emphasis added).

<sup>441</sup> Karin P. Sheldon, Pamela Baldwin, and Trevor J. Pellerite, *Areas of Critical Environmental Concern: Unfulfilled Potential for Public Land Conservation: A Report to the Pew Charitable Trusts* Appendix A (July 30, 2015) (providing a comparison of ACECs in selected resource management plans).

<sup>442</sup> See Debra L. Donahue, *Federal Rangeland Policy: Perverting Law and Jeopardizing Ecosystem Services*, 22 J. LAND USE & ENVTL. L. 299, 338 (2007) (noting that Congress repeatedly emphasized the “priority” to be given to ACECs).

agency's inventory, designation and planning processes.”<sup>443</sup> The study finds that such prioritization has not taken place and recommends a number of steps be taken to meet FLPMA's mandate. This includes restoring “the visibility and effectiveness of ACECs” in BLM regulations, policy guidance and budget justifications and providing them “the heightened level of protection called for by FLPMA.”<sup>444</sup>

## *ii. BLM Regulation and Policy*

Three provisions are of particular importance to wildlife management on public lands managed by the BLM.<sup>445</sup> The first is the “fundamentals of rangeland health” regulation that requires standards and guidelines to be developed by the BLM, including those focused on wildlife habitat. The regulation requires that “[h]abitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal proposed or candidate threatened and endangered species, and other special status species.”<sup>446</sup>

The second is found in the BLM Manual for management of “special status species.”<sup>447</sup> This policy was written pursuant to FLPMA, the ESA, and other laws. BLM special status species are defined as: “(1) species listed or proposed for listing under the [ESA], and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA.”<sup>448</sup> The objectives of the policy are “[t]o conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species,” and “[t]o initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.”<sup>449</sup> Candidate species for ESA listing are included in the Bureau's sensitive species category.<sup>450</sup> Furthermore, the BLM must address “Bureau sensitive species and their habitats in land use plans and associated NEPA documents.”<sup>451</sup> With respect to implementation-level planning, the BLM “should consider all site-specific methods and procedures needed to bring species and their habitats to the condition under which management under the Bureau sensitive species policies would no longer be necessary.”<sup>452</sup>

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<sup>443</sup> Karin P. Sheldon, Pamela Baldwin, and Trevor J. Pellerite, *Areas of Critical Environmental Concern: Unfulfilled Potential for Public Land Conservation: A Report to the Pew Charitable Trusts* (July 30, 2015), at v. *See also* DONAHUE, THE WESTERN RANGE REVISITED, *supra* note, at 208-210.

<sup>444</sup> Sheldon, *supra* note, at vii.

<sup>445</sup> *See e.g.*, *W. Watersheds Project v. Salazar*, 843 F. Supp. 2d 1105 (2012).

<sup>446</sup> 43 C.F.R. §4180.1(d).

<sup>447</sup> BLM Manual, Special Status Species Mgmt., §6840 (2008), available at [http://www.blm.gov/style/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_manual.Par.43545.File.dat/6840.pdf](http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.43545.File.dat/6840.pdf).

<sup>448</sup> BLM Manual, *supra* note, § 6840.01.

<sup>449</sup> *Id.* §6840.02.

<sup>450</sup> *Id.* §6840.01 (and Glossary 5).

<sup>451</sup> *Id.* § 6840.2A1 (Planning).

<sup>452</sup> *Id.*

The third regulation pertains to the issuance of special recreation permits. Wildlife is implicated when it is the object of a commercial or competitive event. The BLM is obligated to regulate the use and occupancy of public lands<sup>453</sup> and its regulations and policy require special recreation permits for commercial use, organized group activities or events, competitive use, and for use of special areas.<sup>454</sup> Discretion is provided to the agency over whether to issue a permit based on the following factors: (a) “conformance with laws and land use plans;”<sup>455</sup> (b) public safety; (c) conflicts with other uses; (d) resource protection; (e) the public interest served; (f) whether in the past [the applicant] complied with the terms of [the] permit or other authorization from BLM and other agencies; and (g) other information BLM finds appropriate.<sup>456</sup> The BLM may also impose stipulations and conditions on the permit “to meet management goals and objectives and to protect lands and resources and the public interest.”<sup>457</sup>

*b. The National Landscape Conservation System*

The BLM is also tasked with managing units within the National Landscape Conservation System (NLCS).<sup>458</sup> These include BLM-administered national conservation areas (NCAs) and similar designations, national monuments, and wilderness study areas, providing direction, either through statute or presidential proclamation, in how to manage individual units.<sup>459</sup> It is beyond the scope of this Article to review the full extent and diversity of this System. Importantly, however, several conservation areas and monuments managed by the BLM include special provisions, going beyond FLPMA, that pertain to wildlife management and the biological values associated with the designations. For example, a purpose declared by Congress in establishing the Morley Nelson Snake River Birds of Prey NCA in Idaho is to “provide for the conservation, protection, and enhancement of raptor populations and habitats and the natural and environmental resources and values associated

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<sup>453</sup> 43 U.S.C. § 1732(b)

<sup>454</sup> 43 C.F.R. § 2931.2. A competitive use is defined as “[a]ny organized, sanctioned, or structured use, event, or activity on public land in which 2 or more contestants compete” and either register, enter, or apply for the event and/or use a “predetermined course or area.” *Id.*, §2932.5(2). Commercial use means “recreational use of the public lands and related waters for business or financial gain” and the activity, service or use is commercial if any “person, group, or organization makes or attempts to make a profit, receive money, amortize equipment, or obtain goods or services, as compensation from participants in recreational activities occurring on public lands led, sponsored, or organized by that person, group, or organization. *Id.*

<sup>455</sup> Permits must be consistent with the applicable resource management plan for the area. *See* 16 U.S.C. §1732(a); 43 C.F.R. §1610.5-3(a).

<sup>456</sup> 43 C.F.R. §2932.26.

<sup>457</sup> 43 C.F.R. §2932.41.

<sup>458</sup> 16 U.S.C. § 7202.

<sup>459</sup> The BLM manages roughly 4.1 million acres of NCAs and lands with similar designations and roughly 8.1 million acres of national monuments. Federal wilderness areas are also included in the NLCS and we address those areas in Part II(B)(7). Figures from the National Landscape Conservation System, available at [http://www.blm.gov/wo/st/en/prog/blm\\_special\\_areas/NLCS/nlcs\\_resources\\_.html](http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/nlcs_resources_.html) (last visited July 20, 2016).

therewith.”<sup>460</sup> Many of these laws also include wildlife savings clauses, some simply stating that nothing in the designation “shall be deemed to enlarge or diminish the jurisdiction” of the state “with respect to fish and wildlife management.”<sup>461</sup> In 2009, Congress formally recognized and established the NLCS and provided another wildlife-specific savings clause that would serve as a back-up if the enabling legislation was silent on the matter.<sup>462</sup>

### *c. Federal-State Interactions*

FLPMA includes a provision encouraging the coordination and consistency of federal and state land use plans.

[T]o the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located...In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section *shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.*<sup>463</sup>

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<sup>460</sup> Pub. L. No. 103-64 (1993).

<sup>461</sup> See e.g., Proclamation 7398 (Jan. 17, 2001), Establishment of the Upper Missouri River Breaks National Monument, 66 Fed. Reg. 7359 (Jan. 22, 2001).

<sup>462</sup> “Nothing in this chapter shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations, including the regulation of hunting, fishing, trapping and recreational shooting on public land managed by the Bureau of Land Management. Nothing in this chapter shall be construed as limiting access for hunting, fishing, trapping, or recreational shooting.” 16 U.S.C. §7202(d)(2).

<sup>463</sup> 43 U.S.C. §1712(c)(9) (emphasis added).



This provision provides state governors the opportunity to advise the BLM of their positions on draft land use plans. The BLM must consider this advice in so-called “consistency reviews.”<sup>464</sup>

In short, there are several engagement points for state and local governments to participate in the land use planning process; and multiple responsibilities on the part of the BLM to respond to state and local concerns. But this entire process is conditioned on federal primacy—that priority be given to federal law and purposes in the land use planning processes. We return to this provision in Part III(F), as we believe the coordination/consistency provisions of FLPMA provide a constructive opportunity for federal and state governments to plan for the management and conservation of wildlife across political jurisdictions.

FLPMA’s savings clause pertaining to wildlife provides additional direction on federal-state interactions regarding wildlife management:

That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, *administration*, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species.<sup>465</sup>

This provision was at the center of a dispute involving a proposed wolf hunt on federal lands by the State of Alaska. In *State of Alaska v. Andrus*, the district court found that this provision of FLPMA, along with the multiple use mandate, “taken together clearly provide the Secretary with the power to halt the wolf hunt.”<sup>466</sup> Furthermore, said the court, under the power of “administration,” “[T]he Secretary is commanded to manage the public lands under principles of multiple use [and] [m]ultiple use includes the management of wildlife.”<sup>467</sup> Although FLPMA grants authority to either permit or prohibit the wolf hunt, this authority, in and of itself, did not trigger NEPA when the agency failed to exercise it

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464 See 43 C.F.R. §1610.3-2; *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009) (“A meaningful opportunity to comment is all the regulation requires.”). See also *Western Exploration v. USDI* (D. Nevada, March 31, 2017) (“The statute and regulations are silent on how detailed or specific BLM needs to be,” and that BLM met its obligation to resolve inconsistencies between local plans and federal sage grouse plans “to the extent practical.”)

465 43 U.S.C. § 1732(b) (emphasis added).

466 429 F.Supp. 958, 962 (1977), *aff’d*, 591 F.2d 537 (9th Cir. 1979).

467 *Id.*

because there was no major federal action.<sup>468</sup> The NEPA application question was at the heart of two circuit court reviews, both affirming that the non-exercise of power by the Secretary did not trigger NEPA, though the Ninth Circuit seemed to lament that it did not “reach the intriguing questions of statutory construction and application that would lurk in defining the Secretary’s power to supersede the State in managing wildlife.”<sup>469</sup> We return to the questions unresolved by these courts in Part III(D).

The Department of the Interior sought to provide more guidance on state-federal relationships through a policy statement in 1983.<sup>470</sup> In essence, Interior’s Policy simply recognizes some of the principles of wildlife federalism that we covered in Parts I and II(A) of the Article, from states as trustees of wildlife to federal constitutional powers to manage wildlife. For example, the Policy states that “[f]ederal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal Law.”<sup>471</sup>

The Policy goes further than these fundamental principles of federalism, however, by stating that it is intended “to reaffirm the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility, and to foster improved conservation of fish and wildlife.”<sup>472</sup> In other sections, the Policy recognizes that “[s]tate jurisdiction remains concurrent with Federal authority,”<sup>473</sup> and asserts that, in passing FLPMA, Congress “recognized and reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands.”<sup>474</sup> While the Policy does acknowledge basic constitutional principles pertaining to the Property Clause, Commerce Clause, federal preemption and treaty-making powers,<sup>475</sup> it also makes the often-repeated assertion that the BLM “has custody of the land itself and the habitat upon which fish and resident wildlife are dependent” and that

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<sup>468</sup> 42 U.S.C. 4332(c). See George Cameron Coggins and Robert L. Glicksman, “*Federal Action*,” 2 Pub. Nat. Resources L. § 17:16 (2016) (noting that “[i]f federal and state projects are sufficiently interrelated to constitute a single ‘federal action’ for NEPA purposes, state agencies may be enjoined for NEPA violations”).

<sup>469</sup> *State of Alaska v. Andrus*, 591 F. 2d 537, 538 (9<sup>th</sup> Cir. 1979). The District of Columbia Circuit Court reached the same conclusion regarding NEPA, but used language in dicta that was relatively favorable to the state’s authority to manage wildlife. See *Defenders of Wildlife v. Andrus*, 627 F. 2d 1238, 1249 (D.C. Cir. 1980) (“We are simply unable to read [FLPMA’s] cautious and limited permission to intervene in an area of state responsibility and authority as imposing such supervisory duties on the Secretary that each state action he fails to prevent becomes a ‘Federal action.’”).

<sup>470</sup> Dept. Interior Fish and Wildlife Policy; State-Federal Relationships, 48 Fed. Reg. 11,642 (Mar. 18, 1983) (43 C.F.R. Part 24). Although the Policy appears in the C.F.R. “as a matter of convenience to the public,” *id.* at 11,642, it was not subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553, and as such does not carry the force of law. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

<sup>471</sup> 43 C.F.R. § 24.1(a).

<sup>472</sup> 43 C.F.R. § 24.2(a).

<sup>473</sup> 43 C.F.R. § 24.3(c).

<sup>474</sup> 43 C.F.R. § 24.4(c).

<sup>475</sup> 43 C.F.R. § 24.3.

“[m]anagement of the habitat is a responsibility of the Federal Government,”<sup>476</sup> thereby implying that BLM only has power over the land and not the wildlife that inhabit it.

In Part III(C), we explain the fundamental problems with Interior’s Policy on federal-state relationships and discuss the implications resulting from this problematic interpretation of law.

## 6. *The Special Case of Alaska*

### a. *Alaska National Interest Lands Conservation Act (ANILCA)*

Alaska presents a unique situation within the federal public lands system. Alaska includes all of the same land categories and federal laws that exist elsewhere in the country. However, federal land managers in Alaska must also contend with the Alaska National Interest Lands Conservation Act (ANILCA),<sup>477</sup> which creates new land categories<sup>478</sup> and statutory exceptions<sup>479</sup> that do not exist elsewhere, as well as an overarching system of subsistence management, which adds an additional management mission/goal to nearly all federal lands in Alaska.<sup>480</sup> In *Sturgeon v. Frost*,<sup>481</sup> the Supreme Court explicitly acknowledged this unusual status, stating that “ANILCA repeatedly recognizes that Alaska is different, and ANILCA itself accordingly carves out numerous Alaska-specific exceptions...”<sup>482</sup>

#### i. *Subsistence*

It is the subsistence requirement that is the single biggest difference between managing wildlife on federal lands in Alaska and managing them in the rest of the country. ANILCA is the establishment legislation for nearly every federal conservation unit in the State.<sup>483</sup> This creates an opportunity for uniformity in management strategy across agencies and conservation units that could not exist elsewhere in the country where units were set aside in a more haphazard manner. Taking advantage of that opportunity, ANILCA establishes that subsistence shall be permitted on all federal lands with few exceptions<sup>484</sup> and creates

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<sup>476</sup> 43 C.F.R. § 24.4(d).

<sup>477</sup> 16 U.S.C. §§ 3101-3233 (1980).

<sup>478</sup> Such as National Preserves (a subcategory of National Park Lands on which sport hunting is permitted). ANILCA § 203 and § 1313.

<sup>479</sup> Such as exceptions to the prohibitions laid out by the Wilderness Act. For instance, snow machine use, which is banned as mechanized transport in every other state, is permitted in Alaska Wilderness Areas where that use was established before the creation of the Wilderness Area. ANILCA § 811, § 1110(a), and § 1111(a).

<sup>480</sup> ANILCA §§ 801-816.

<sup>481</sup> *Sturgeon v. Frost*, 136 S.Ct. 1061 (2016).

<sup>482</sup> *Id.* at 1070.

<sup>483</sup> ANILCA §§ 201-202, 302-303, 401, 403, 501, 601-603, and 701-704.

<sup>484</sup> The exceptions are within the original boundaries of Denali National Park and Preserve and Glacier Bay National Park and Preserve, which were both expanded by ANILCA. ANILCA § 202 (1) and (3)(a).

a subsistence preference that applies to rural Alaskans and grants them a priority position in relation to other consumptive users of fish and game.<sup>485</sup>

Subsistence is defined by ANILCA as the “customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption...”<sup>486</sup> More colloquially, it refers to rural hunting, fishing, and gathering of resources for personal use.<sup>487</sup> When ANILCA was originally passed, the intent of the statute was for the state to administer the subsistence hunting program (like all other hunting programs) on federal lands, and merely required that the state abide by ANILCA’s requirements.<sup>488</sup> It soon became clear however that the state could not implement the rural subsistence preference, because it violated the state’s constitutional requirement for equal access to fish and game, according the Alaska Supreme Court.<sup>489</sup> Several efforts were made to amend the Alaska constitution so that the state could reclaim authority over all hunting, but those attempts were never successful.<sup>490</sup> In 1990 the Federal Subsistence Board, which mirrors the functions of the state’s Board of Game, was created and the federal government began to assume control of subsistence hunting on federal lands.<sup>491</sup>

ANILCA instructs the agencies to manage subsistence “consistent with sound management principles, and the conservation of healthy populations of fish and wildlife”<sup>492</sup> and “consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit.”<sup>493</sup> ANILCA also states that “[n]othing in this title shall be construed as (1)...permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife.”<sup>494</sup> So the management standard for all federal public lands is the requirement to maintain healthy populations, but for National Park lands the requirement is to maintain natural and healthy populations of wildlife. Agencies must also evaluate the effect of all uses on public lands

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<sup>485</sup> See ANILCA § 804 (“nonwasteful subsistence uses of fish and wildlife and other such resources shall be the priority consumptive uses of all such resources on the public lands of Alaska”).

<sup>486</sup> ANILCA § 803.

<sup>487</sup> ANILCA states that “the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses.” ANILCA § 801(2).

<sup>488</sup> ANILCA § 805(d).

<sup>489</sup> *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989).

<sup>490</sup> FRANK NORRIS, *The Federal Assumption Process 1989-1993*, in ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE HISTORY Ch. 7 (2002).

<sup>491</sup> *Id.*; Kyle Joly, Sanford P. Rabinowitch, and Julie Lurman Joly, *Dual Management of Wildlife in Alaska: Making Federal Practice Align with Federal Mandates*, 32 GEORGE WRIGHT FORUM 18 (2015).

<sup>492</sup> ANILCA § 802(1).

<sup>493</sup> *Id.*

<sup>494</sup> ANILCA § 815.

on subsistence uses and needs and formally notify subsistence users if there could be any effects on subsistence harvests as a result of other uses.<sup>495</sup>

## *ii. Sport Hunting*

Sport hunting (non-subsistence hunting) is permitted on most non-Park lands in Alaska<sup>496</sup> and is managed largely through the state regulatory process, as it is elsewhere in the U.S. However, ANILCA creates a new category of Park lands called Preserves where sport hunting and commercial trapping are permitted.<sup>497</sup> The State of Alaska regulates sport hunting state-wide, including on federal lands. However, conflicts have arisen between the state's hunting regulations, which express the state's wildlife laws and goals, and the wildlife management goals expressed by several federal statutes. For instance, the State of Alaska is required to intensively manage wildlife populations in order to maximize a sustained yield of desirable prey (moose, caribou, and deer).<sup>498</sup> This intensive management requirement often leads to predator reduction efforts.<sup>499</sup> The NPS on the other hand is required to maintain natural and healthy populations of all species according to ANILCA and "to conserve the scenery, natural and historic objects, and the wild life" according to the National Park Service Organic Act.<sup>500</sup> NPS policies implementing the Organic Act require the agency to "protect natural ecosystems and processes, including the natural abundances, diversities, distributions, densities, age-class distributions, populations, habitats, genetics, and behaviors of wildlife."<sup>501</sup> These state and federal goals are mutually exclusive.<sup>502</sup>

In 2015 NPS promulgated new regulations restricting how the state's sport hunting laws could apply within Parks, so that they do not conflict with the Park Service's legal obligations under the Organic Act and ANILCA.<sup>503</sup> The new rules clarify that state wildlife regulations that conflict with Park Service regulations or laws are not applicable on Park Service lands.<sup>504</sup> The Alaska Regional Park Service Director will publish a list, at least annually, of all state-permitted activities that are prohibited on Park Service lands.<sup>505</sup>

There has been a great deal of criticism of these rule changes and the FWS' ultimately successful effort to follow a similar course was initially marked by efforts to block the

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<sup>495</sup> ANILCA § 810.

<sup>496</sup> ANILCA § 1314(c).

<sup>497</sup> ANILCA § 203 and § 1313; 16 U.S.C. § 3201. *See* 80 Fed. Reg. 64,325, 64,325 (2015).

<sup>498</sup> ALASKA STAT. § 16.05.255.

<sup>499</sup> Alaska; Hunting and Trapping in National Preserves, 80 Fed. Reg. 64,325, 64,326 (Nov. 23, 2015) (codified at 36 C.F.R. pt. 13).

<sup>500</sup> 16 U.S.C. § 1.

<sup>501</sup> NPS Management Policies 2006 §§4.1, 4.4.1, 4.4.1.2, and 4.4.2; 80 Fed. Reg. 64,325, 64,326.

<sup>502</sup> Joly and Rabinowitch, *supra* note , at 165.

<sup>503</sup> 80 Fed. Reg. 64,325. As we saw above, *supra* notes \_\_\_\_, this rule change has been followed by a similar rule change on National Wildlife Refuges.

<sup>504</sup> 80 Fed. Reg. 64,325, 36 C.F.R. § 13.42(a) and (f).

<sup>505</sup> 80 Fed. Reg. 64,325, 36 C.F.R. § 13.42(f)(1).

development of such rules on NWRs.<sup>506</sup> Ultimately, in 2017 Congress, exercising its authority under the Congressional Review Act,<sup>507</sup> abolished the FWS regulations.<sup>508</sup> Therefore, the FWS regulations are no longer in force (though this elimination of the regulations does not speak in any way to their legality), while the NPS regulations remain in place. Furthermore, while the FWS regulations have been eliminated the statutes animating them are still in place as well. The FWS still possesses the authority, and often the obligation, to prevent the state from acting in ways contrary to federal mandates regarding wildlife management on refuges, regardless of the status of these particular regulations. Additionally, the Park Service's effort has been criticized by the state as statutory overreach and a violation of the public trust doctrine,<sup>509</sup> though both ANILCA and the Organic Act recognize the Park Service's authority to regulate these activities.<sup>510</sup> As the Park Service states, "the State's responsibility [to manage fish and wildlife] is not exclusive and it does not preclude federal regulation of wildlife on federal public lands, as is well-established in the courts and specifically stated in ANILCA."<sup>511</sup>

## ***7. The National Wilderness Preservation System***

### ***a. The Policy and Objectives of Wilderness Act***

The Wilderness Act of 1964<sup>512</sup> expresses the following policy:  
In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and *these shall be administered for the use and enjoyment of the American people in such*

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<sup>506</sup> Senator Sullivan (R. AK) submitted an amendment, which was ultimately never passed, to the Bipartisan Sportsmen's Act of 2015 that would prohibit the FWS from implementing regulations restricting the application of state hunting rules on Refuge lands. Sam Friedman, *Sullivan moves to prohibit federal refuge predator hunt rules*, NEWSMINER, Jan. 20, 2016, available at [http://www.newsminer.com/news/alaska\\_news/sullivan-moves-to-prohibit-federal-refuge-predator-hunt-rules/article\\_cb73cb86-bff4-11e5-8ae5-3704d5ccd02b.html](http://www.newsminer.com/news/alaska_news/sullivan-moves-to-prohibit-federal-refuge-predator-hunt-rules/article_cb73cb86-bff4-11e5-8ae5-3704d5ccd02b.html).

<sup>507</sup> 101 Stat. 847 at 868-874 (1996), Pub. L. 104-121. The law authorizes Congress to review and repeal federal agency regulations passed within the last 60 legislative days.

<sup>508</sup> Pub. L. 115-20 (04/03/2017).

<sup>509</sup> Doug Vincent Lang, *Alaska must reject feds' claim to control hunting in preserves and refuges*, ALASKA DISPATCH NEWS, Jan. 10, 2016 available at <http://www.adn.com/article/20160110/alaska-must-reject-feds-claim-control-hunting-preserves-and-refuges>. Lang is the former director of Wildlife Conservation at the Alaska Department of Fish and Game.

<sup>510</sup> 80 Fed. Reg. 64,325, at 64,329 and 64,333.

<sup>511</sup> 80 Fed. Reg. 64,325, 64,331.

<sup>512</sup> Pub. L. No. 88-577 (codified at 16 U.S.C. §§ 1131-1136).

*manner as will leave them unimpaired for future use and enjoyment as wilderness.*<sup>513</sup>

The Act defines wilderness<sup>514</sup> and imposes a duty on the federal agencies to administer designated areas for “the preservation of their wilderness character.”<sup>515</sup> In addition, Congress designated fifty-four areas managed by the USFS,<sup>516</sup> detailed inventory procedures,<sup>517</sup> prohibited a number of uses,<sup>518</sup> and adopted special provisions to clarify certain other uses.<sup>519</sup> Parts of the Act particularly relevant to managing wildlife in wilderness areas include the definition of wilderness and the federal responsibility to preserve wilderness character; the prohibited uses; and the congressionally-authorized special provisions that apply to managing wildlife in wilderness.

#### *i. Preserving Wilderness Character*

Congress directed each federal agency managing a wilderness to “preserve its wilderness character.”<sup>520</sup> To implement this requirement, the four wilderness-managing agencies have endorsed<sup>521</sup> the following definition of wilderness character:

Wilderness character is a holistic concept based on the interaction of (1) biophysical environments primarily free from modern human manipulation and impact, (2) personal experiences in natural environments relatively free from the encumbrances and signs of modern society, and (3) symbolic meanings of humility, restraint, and interdependence that inspire human connection with nature. Taken together, these tangible and intangible values define wilderness character and distinguish wilderness from all other lands.<sup>522</sup>

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<sup>513</sup> 16 U.S.C. § 1131(a) (emphasis added). [Note to Editor: this punctuation (comma outside quotation mark) is as in official version from Congress].

<sup>514</sup> 16 U.S.C. § 1131(c).

<sup>515</sup> 16 U.S.C. § 1133(b).

<sup>516</sup> 16 U.S.C. § 1132(a).

<sup>517</sup> 16 U.S.C. § 1132(b)-(d). The BLM’s authority to inventory for wilderness characteristics and to manage areas designated by Congress was expressed in FLPMA, 43 U.S.C. § 1711 and § 1782.

<sup>518</sup> 16 U.S.C. § 1133(c).

<sup>519</sup> 16 U.S.C. § 1133(d).

<sup>520</sup> 16 U.S.C. § 1133(b).

<sup>521</sup> Memorandum from Chair, Interagency Wilderness Steering Committee to Chair, Interagency Wilderness Policy Council, “Interagency Wilderness Steering Committee’s *Keeping It Wild 2* Recommendations” (Sep. 21, 2015) (approved by the Wilderness Policy Council Dec. 23, 2015).

<sup>522</sup> Peter Landres *et al.*, *Keeping It Wild 2: An Updated Interagency Strategy to Monitor Trends in Wilderness Character Across the National Wilderness Preservation System*, For. Service Gen. Tech. Rept. RMRS-GTR-340 at 7 (2015) (*hereinafter* KIW2). Understanding the complex meaning of the term “wilderness character” has been an ongoing task for the federal agencies mandated to preserve it for over a decade. *See* Peter Landres *et al.*, *Keeping It Wild: An Interagency Strategy to Monitor Trends in Wilderness Character Across the National Wilderness Preservation System*, For. Service Gen. Tech. Rept. RMRS-GTR-212 (2008); Peter Landres *et al.*, *Monitoring Selected Conditions Related to Wilderness Character: A National Framework*, For. Service Gen. Tech. Rept. RMRS-GTR-151 (2005).

Specifically, five qualities of wilderness character are identified in the Act's definition of wilderness: untrammeled; natural; undeveloped; solitude or primitive and unconfined recreation; and other features of value, including ecological and scientific features.<sup>523</sup> We review each of these qualities below.

*Untrammeled.* In one of the most poetic passages found in the U.S. Code, the Wilderness Act provides that “wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man” that “generally appears to have been affected primarily by the forces of nature” and “retain[s] its primeval character and influence.”<sup>524</sup> Untrammeled means “essentially unhindered and free from the intentional actions of modern human control or manipulation.”<sup>525</sup> In terms of wildlife management, this concept precludes intentional manipulation of species, populations, and individuals (with the exception of casual, non-commercial hunting and fishing, where allowed).<sup>526</sup> The Untrammeled Quality is a unique requirement among federal land management legislation; it is what puts the “wild” in “wilderness.” When manipulation is necessary (for instance, to comply with another law such as the Endangered Species Act or to improve another quality of wilderness character), action should be taken with the utmost restraint and humility.<sup>527</sup>

*Natural.* The Act provides that wilderness is “protected and managed so as to preserve its natural conditions.”<sup>528</sup> This means that ecological systems within wilderness areas “are substantially free from the effects of modern civilization.”<sup>529</sup> In terms of wildlife management, wilderness ecosystems should retain their native or indigenous species composition, distribution patterns, and ecological processes (including predator-prey dynamics, disturbance regimes, and abiotic and biotic fluctuations). These ecosystems should be uncompromised by non-native species, or by artificially increased (or decreased) populations of native species or other biophysical conditions. While the Untrammeled Quality reflects the wilderness character mandate to halt actions undertaken to consciously manipulate “the earth and its community of life,” the Natural Quality minimizes the adverse ecological effects to a wilderness area from intentional or unintentional actions, as well as the adverse effects from larger scale ecological change occurring outside the wilderness -- for example, the spread of non-native species and habitat fragmentation.<sup>530</sup>

*Undeveloped.* The Wilderness Act also identifies wilderness as “an area of undeveloped Federal land . . . without permanent improvements or human habitation, . . . where man

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<sup>523</sup> 16 U.S.C. § 1131(c).

<sup>524</sup> *Id.*

<sup>525</sup> KIW2, *supra* note, at 10-11, 33-36 and app. 6.

<sup>526</sup> *See id.* at 104.

<sup>527</sup> Sandra B. Zellmer, *Wilderness Imperatives and Untrammeled Nature*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 179 (Keith H. Hirokawa, ed. 2014).

<sup>528</sup> 16 U.S.C. § 1131(c).

<sup>529</sup> KIW2, *supra* note, at 11. *See id.* at 39-43 and App. 7.

<sup>530</sup> *See* KIW2, *supra* note, App. 7.



himself is a visitor who does not remain . . . with the imprint of man's work substantially unnoticeable.”<sup>531</sup> This means that wilderness is unmarred by “the sights and sounds of modern human occupation.”<sup>532</sup> The Act's prohibition on “improvements” is not restricted to those that are permanent, but includes any physical developments (such as structures, installations, and both permanent and temporary roads) as well as temporal developments (that is, where the wilderness is “developed” for the duration of the use of the prohibited tool -- such as motor vehicles, motorized equipment, and mechanical transport).<sup>533</sup> Again, restraint and humility are key: “[In wilderness areas] we stand without our mechanisms that make us immediate masters over our environment.”<sup>534</sup> The implications for wildlife management are discussed in greater detail in “Prohibition of Certain Uses,” below.

*Solitude or Primitive and Unconfined Recreation.* Wilderness areas provide “outstanding opportunities for solitude or a primitive and unconfined type of recreation.”<sup>535</sup> This means that, in wilderness, recreational opportunities occur “in an environment that is relatively free from the encumbrances of modern society, and for the experience of the benefits and inspiration derived from self-reliance, self-discovery, physical and mental challenge, and freedom from societal obligations.”<sup>536</sup> In terms of wildlife management, recreational opportunities to enjoy wildlife (including hunting and fishing) are allowed within the constraints of preserving wilderness character as a whole—that is, without structures, installations, the use of motorized equipment, motor vehicles, or mechanical transport, and without manipulating populations for a more “desirable” (and less natural) assemblage of species.

*Other Features of Value.* Finally, the Wilderness Act provides that wilderness “may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.”<sup>537</sup> “This quality captures important elements or ‘features’ of a particular wilderness that are not [necessarily] covered by the other four qualities.”<sup>538</sup> In terms of wildlife management, the ecological and scientific values are key, and in most cases they are already addressed within the purview of the Natural Quality.

## ii. *Within and Supplemental*

Under section 4(a) of the Wilderness Act, “The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered.”<sup>539</sup> As section 4(b) makes clear, however, “each agency administering any area designated as

<sup>531</sup> 16 U.S.C. § 1131(c).

<sup>532</sup> KIW2, *supra* note, at 11. *See id.* at 45-48.

<sup>533</sup> 16 U.S.C. § 1133(c).

<sup>534</sup> Howard Zahniser, *The Need for Wilderness Areas*, in 59 THE LIVING WILDERNESS 37, 38 (1956).

<sup>535</sup> 16 U.S.C. § 1131(c).

<sup>536</sup> KIW2, *supra* note, at 11. *See id.* at 51-55.

<sup>537</sup> 16 U.S.C. § 1131(c).

<sup>538</sup> KIW2, *supra* note, at 12. *See id.* at 57-60.

<sup>539</sup> 16 U.S.C. § 1133(a).

wilderness shall be responsible for *preserving the wilderness character* of the area, and shall administer the area for such other purposes for which it may have been established in such away also *to preserve its wilderness character*.”<sup>540</sup> For all four agencies, upon designation as wilderness, the preservation of wilderness character becomes the primary duty of the underlying unit,<sup>541</sup> and management of the other purposes must meet the requirements of the Wilderness Act in addition to the requirements of each agency’s Organic Act.

All four land management agencies struggle with this concept, but it has been especially problematic for the FWS and NPS, largely because they believe that their conservation-oriented purposes are equivalent to wilderness preservation.<sup>542</sup> How these agencies have addressed this problem is discussed in the Agency Policy section below. Implications and continuing issues surrounding “within and supplemental” are discussed in Part III(E). The “within and supplemental” requirement crops up routinely with respect to justifying uses explicitly prohibited by the Wilderness Act.

### *iii. Prohibition of Certain Uses*

Section 4(c) of the Wilderness Act specifically prohibits ten uses. These are all subject to two exceptions: “Except as specifically provided for in this Act, and subject to existing private rights.”<sup>543</sup> Notably, there are no “existing private rights” associated with the management of wildlife in wilderness, and other specific provisions are discussed below in the section “Special Provisions.” Two of the ten prohibited uses—commercial enterprise and permanent roads—are subject *only* to these two exceptions (unless specifically authorized in subsequent legislation). The prohibition on commercial enterprises has been a significant issue in wildlife management.

Commercial enterprise is defined as “a project or undertaking of or relating to commerce.”<sup>544</sup> Only three types of commercial activity may be allowed in wilderness as they are specifically provided for in the Act: livestock grazing,<sup>545</sup> exercising certain mineral rights,<sup>546</sup> and commercial services.<sup>547</sup> Absent those three activities, no commercial enterprise can take place in wilderness, and no wilderness resources can be removed for

<sup>540</sup> *Id.* § 1133(b) (emphases added).

<sup>541</sup> *See* *Wilderness Watch v. Vilsack*, No. 4:16-cv-12-BLW, 2017 WL 241320 \*8 (D.Idaho Jan. 18, 2017) (“Congress made preservation of wilderness values ‘the primary duty of the Forest Service, and it must guide all decisions as the first and foremost standard of review for any proposed action.’”) (citing *Greater Yellowstone Coalition v. Timchak*, CV-06-04-E-BLW, 2006 WL 3386731 \*6 (D. Idaho Nov. 21, 2006)).

<sup>542</sup> For analysis of wilderness management on dominant use lands, see Sandra B. Zellmer, *Wilderness in National Parks and Wildlife Refuges*, 44 *Envtl. L.* 497 (2014).

<sup>543</sup> 16 U.S.C. § 1133(c).

<sup>544</sup> *See* *Wilderness Society v. USFWS*, 353 F.3d 1051, 1061 (9th Cir. 2003) (en banc) (hereinafter *Tustemena Lake*) (stating that commerce is “work that is intended for the mass market”; “even non-profit entities may engage in commercial activity”).

<sup>545</sup> 16 U.S.C. § 1133(d)(4)(2).

<sup>546</sup> 16 U.S.C. §§ 1133(d)(3), 1134.

<sup>547</sup> 16 U.S.C. § 1133(d)(5). *See infra* Part II(B)(7)(b)

financial gain, including animals or parts of animals, such as antlers and fur. Therefore, collection of wilderness wildlife resources may be allowed only for personal use. Not only is it a violation of the Wilderness Act to remove wilderness resources for financial gain, no action may be taken to enhance a commercial activity, even if the activity itself takes place entirely outside the wilderness, and even if it causes only “minimal intrusion on wilderness values.”<sup>548</sup>

Although commercial enterprises and permanent roads are tightly proscribed by the Wilderness Act, the other eight prohibited uses—temporary roads; use of motor vehicles, motorized equipment, and motorboats; landing of aircraft; any other form of mechanical transport; structures; and installations—are subject to an exception “as necessary to meet minimum requirements for the administration of the area for the purpose of this Act.”<sup>549</sup> This “minimum requirements” exception has three components.

“*For the purpose of this Act.*” As described above, the purpose of the Wilderness Act, and congressional direction to the federal agencies on the means of accomplishing that purpose, is to preserve wilderness character. Unless necessary in the exercise of a legal right, or unless specifically allowed elsewhere in the Wilderness Act (or other federal law), Congress has made it clear that otherwise-prohibited uses cannot be authorized for any purpose other than preserving wilderness character.<sup>550</sup>

“*For the administration of the area.*” Otherwise-prohibited uses cannot be authorized to facilitate management objectives or activities occurring *outside* of the wilderness area.<sup>551</sup> Notably, in Section 4(c), Congress clearly referenced “*the area*,” not, as the Act does elsewhere, the National Wilderness Preservation System as a whole. In other words, prohibited uses cannot be authorized in Wilderness A to preserve the wilderness character of Wilderness B, unless they also preserve the wilderness character of Wilderness A.

“*Necessary to meet minimum requirements.*” Defining the “minimum” “necessary” is a work of art. One court cautioned that a generic finding of necessity will not suffice, and while it declared that the agencies need not “make a finding of ‘absolute necessity,’”<sup>552</sup> it

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<sup>548</sup> *Tustemena Lake*, 353 F.3d at 37 (prohibiting FWS approval of salmon stocking within the Kenai Wilderness).

<sup>549</sup> 16 U.S.C. § 1133(c).

<sup>550</sup> *Id.*; 16 U.S.C. § 1133(b).

<sup>551</sup> See *High Sierra Hikers Ass'n v. U.S. Forest Service*, 436 F.Supp.2d 1117 (E.D. Cal. 2006) (holding that the repair, maintenance, and operation of dams in a wilderness area to enhance downstream flows for fisheries and to preserve historical values was not necessary to meet minimum requirements for the administration of the area, as the enhancement of fisheries was not necessary to meet minimum requirements for the administration of the area); *High Point, LLLP v. Nat'l Park Serv.*, No. 15-11825, 850 F.3d 1185, 1197 (11th Cir. 2017) (finding that, just as a van filled with tourists could not “be construed as ‘necessary’ to meet the ‘minimum requirements’ for administering the area,” neither could enlargement of a dock (a prohibited structure) be construed as an “existing private right” given the narrow construction applied to Wilderness Act exceptions) (citing *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1093 (11th Cir. 2004)).

<sup>552</sup> *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1037 n.8 (9th Cir. 2010) [hereinafter *Kofa*].

offered no measure of exactly how necessary is necessary enough to meet the statute's requirements when coupled with the qualifier "minimum."<sup>553</sup> To guide the agencies, the Arthur Carhart National Wilderness Training Center has devised a two-step process: first, managers must determine if any action is *necessary* to address a problem of wilderness stewardship; if so, managers must then determine what the *least amount* of an otherwise-prohibited use is necessary to accomplish the problem identified in the first step.<sup>554</sup> Though not specifically required by the Act, Carhart's *Minimum Requirements Decision Guide* is the most frequently used tool for making a minimum requirements decision, and the two-step analysis process has become ubiquitous.<sup>555</sup> In any event, the courts have made it clear that before the federal agency can authorize one of these prohibited uses, it must explain why non-prohibited uses would be insufficient to preserve the area's wilderness character.<sup>556</sup>

#### iv. Special Provisions

The Wilderness Act contains a number of "Special Provisions."<sup>557</sup> Three of these are applicable to the management of wildlife in wilderness. One special provision deals wholly with wildlife management, the so-called savings clause: "Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests."<sup>558</sup> Like similar savings clauses, this provision retains federal jurisdiction over wildlife on federal lands, while recognizing the traditional authority of the states with respect to wildlife management insofar as consistent with

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<sup>553</sup> See *id.* at 1049 n.9 (Bybee, J., dissenting) (arguing that the word "necessary" should be construed broadly, as it has with respect to other legislation, but failing to recognize that none of the other examples couples "necessity" with the Wilderness Act's qualifier "minimum").

<sup>554</sup> See Arthur Carhart National Wilderness Training Center, MINIMUM REQUIREMENTS DECISION GUIDE OVERVIEW (Dec. 19, 2016), at [http://www.wilderness.net/MRDG/documents/MRDG\\_overview.pdf](http://www.wilderness.net/MRDG/documents/MRDG_overview.pdf).

<sup>555</sup> See, e.g., Bur. Land Mgmt., MANAGEMENT OF DESIGNATED WILDERNESS AREAS, Manual 6340 App. B; FWS Wilderness Policy, 610 FW 1.18; U.S.D.A. For. Serv., RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT, CHAP. 2320 - WILDERNESS MANAGEMENT, FSM 2326; Nat'l Park Serv., DIRECTOR'S ORDER #41, WILDERNESS MANAGEMENT, § 6.4.

<sup>556</sup> See *Kofa*, 629 F.3d at 1037 ("The key question—whether water structures were necessary at all—remains entirely unanswered and unexplained by the record"; "[N]owhere in the record does the Service explain why [conforming] actions, alone or in combination, are insufficient."). Cf. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 646–47 (9th Cir. 2004) (construing the Act's provision for commercial services "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas," and holding that, in order to invoke that exception, the agency must make a reasoned finding of necessity).

<sup>557</sup> 16 U.S.C. § 1133(d).

<sup>558</sup> 16 U.S.C. § 1133(d)(7). This provision was extended to the BLM in 43 U.S.C. § 1782(c): "Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act . . . which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area."

Wilderness Act purposes.<sup>559</sup> Federal land managers cannot defer to state management prerogatives when doing so would violate the express terms of the Wilderness Act,<sup>560</sup> or undermine the purposes of the Act.<sup>561</sup>

The second relevant special provision involves pre-existing uses of aircraft or motorboats. The Wilderness Act states “the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such conditions as the Secretary . . . deems desirable.”<sup>562</sup> Agency regulations and policy specify the conditions to allow such uses, and also limit the permissible locations to established sites to be used by the public, rather than for any agency’s administrative uses (such as wildlife management), which is subject to the more liberal analysis of simply meeting the “minimum necessary” test.<sup>563</sup>

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<sup>559</sup> See Lindsay Sain Jones, *The Problem with the Bureau of Land Management's Delegation of Wildlife Management in Wilderness*, 47 Ga. L. Rev. 1281, 1310 (2013) (stating that the savings clause does not affect “the nature of the jurisdiction or responsibility of the states with respect to wildlife on federal lands,” thus “the federal government's jurisdiction over wildlife on federal lands remains intact”). Cf. *Izaak Walton League v. St. Clair*, 353 F.Supp. 698 (D.Minn.1973), *reversed and remanded on other grounds*, 497 F.2d 849 (8<sup>th</sup> Cir.), *cert. denied*, 419 U.S. 1009 (1974) (holding that, despite the general rule that the federal government has no inherent police power and that zoning is a power of the states, state zoning provisions were not applicable within a National Forest wilderness area).

<sup>560</sup> See *Tustemena Lake, amended on rehearing en banc*, 360 F.3d 1374 (9<sup>th</sup> Cir. 2004) (prohibiting a salmon enhancement project as a prohibited “commercial enterprise” even though the state had previously administered and maintained regulatory control over the project); *Kofa*, 629 F.3d at 1044 (invalidating a cooperative initiative with Arizona to maintain guzzlers); *Californians for Alternatives to Toxics v. U.S. Fish & Wildlife Serv.*, 814 F. Supp. 2d 992, 996 (E.D. Cal. 2011) (invalidating a joint federal-state plan to restore cutthroat trout to its historic range in a wilderness by eradicating non-native trout with rotenone); *High Sierra Hikers Ass’n. v. U.S. Forest Service*, 436 F.Supp.2d 1117 (E.D. Cal. 2006) (holding that the repair, maintenance, and operation of dams in a wilderness area to enhance fisheries were not necessary to meet minimum requirements and thus were prohibited despite involvement and support of the California Dept. of Fish and Game).

<sup>561</sup> See *Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F. Supp. 2d 1264, 1270 (D. Idaho 2010) (affirming a decision to allow the Idaho Fish and Game Commission to use helicopters to monitor wolves in the Frank Church Wilderness, but only because the activity “was designed to aid the restoration of a specific aspect of the wilderness character of the Frank Church Wilderness that had earlier been destroyed by man”).

<sup>562</sup> 16 U.S.C. § 1133(d)(1). See *U.S. v. Gregg*, 290 F. Supp. 706 (W.D. Wash. 1968) (upholding conviction for an unauthorized landing of an airplane in a wilderness, but noting that the Secretary could, by regulation, create an exception to this prohibition at places where the use of aircraft was established before passage of the Act); *Wilderness Watch, Inc. v. Bureau of Land Mgmt.*, 799 F. Supp. 2d 1172 (D. Nev. 2011) (holding that this exception supported BLM’s determination to allow police department to conduct search and rescue helicopter training where aircraft use pre-dated designation as protected wilderness area).

<sup>563</sup> See, e.g., U.S. Dep’t of Agric., U.S. Forest Serv., *Helicopter Landings in Wilderness Final Environmental Impact Statement*, R10-MB-340b, at 2-3 (Nov. 1997) (“Established helicopter use was for general public access, not helicopter access authorized by...law (...or administrative use by the Forest Service or other agencies).”). See also James Sippel, *Wilderness Planner*, Bureau of Land Management, Memorandum to Juan Palma, Las Vegas Field Manager, “Las Vegas

Third, while commercial activity in wilderness is severely restricted, commercial services are allowable “to the extent necessary for activities which are proper for realizing . . . wilderness purposes.”<sup>564</sup> In a series of cases over outfitters in wilderness areas on the Inyo National Forest as well as the Sequoia-Kings Canyon Wilderness, the courts have made it clear that “the [federal] agency’s primary responsibility is to protect the wilderness, not cede to commercial needs.”<sup>565</sup> Determining the “extent necessary” is paramount: “The...argument that [certain services] are not specifically forbidden in the wilderness area confuses the absence of a specific prohibition with the requirement of *necessity*; the fact that something is otherwise ‘legal’ does not make it necessary.”<sup>566</sup> In allocating guiding permits, the federal agency errs if it “elevate[s] recreational activity over the long-term preservation of the wilderness character of the land.”<sup>567</sup>

*b. Subsequent Wilderness Legislation with Wildlife Provisions*<sup>568</sup>

A common refrain from wilderness managers is that “the Act designating my wilderness contains special direction on the management of wildlife.” In most cases, however, the precise language of any given piece of subsequent legislation makes no substantive difference in the implementation of the Wilderness Act’s provisions.

As of 2017, Congress has designated 711 wilderness areas<sup>569</sup> since the original fifty-four were designated in 1964.<sup>570</sup> Each subsequent bill contains nearly identical “boilerplate” regarding administration of the area: “Subject to valid existing rights, this wilderness area shall be administered by the Secretary ... in accordance with the Wilderness Act.”<sup>571</sup>

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Metropolitan Police Department proposal for helicopter landing in Wilderness during search and rescue training” (Mar. 1, 2007) (on file with authors) (holding that this section of the Act is a reference to previously existing landing strips used as fly-in trailheads in a relatively few wilderness areas).

<sup>564</sup> 16 U.S.C. § 1133(d)(5).

<sup>565</sup> *High Sierra Hikers v. USDI*, 848 F.Supp.2d 1036 (N.D. Cal. 2012).

<sup>566</sup> *High Sierra Hikers v. Weingardt*, 521 F.Supp.2d 1065 (N.D. Cal. 2007) (emphasis added). The court noted that the agency’s conclusion “improperly equates ‘preference’ with ‘need.’” *Id.* at 1078.

<sup>567</sup> *High Sierra Hikers v. Blackwell*, 390 F.3d 630, 647 (9<sup>th</sup> Cir. 2004).

<sup>568</sup> For the comprehensive analysis of wildlife management provisions in post-1964 wilderness bills, see FAQ, available at.

<sup>569</sup> National Wilderness Preservation System, *Summary Fact Sheet*, <http://www.wilderness.net/factsheet.cfm> (last visited Apr. 21, 2017).

<sup>570</sup> 16 U.S.C. § 1132(a).

<sup>571</sup> *See, e.g.*, Pub. L. No. 90-271 § 3 (1968) (“The...Wilderness shall be administered by the Secretary...in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness areas, except that any reference in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the effective date of this Act.”); Pub. L. No. 114-46 § 102(a) (2015) (same). With minor variations, this wording is found in every subsequent law designating wilderness.

The first wilderness legislation to include extra special language<sup>572</sup> specifically pertaining to wildlife was passed in 1972, with the establishment of the Sawtooth National Recreation Area, including the Sawtooth Wilderness. The relevant language of this extra special provision makes no actual difference in wildlife management within the Sawtooth Wilderness.<sup>573</sup> In 1978, Congress started the custom of including not only the blanket “boilerplate” direction,<sup>574</sup> but also repeating or re-wording the Wilderness Act’s statement on wildlife jurisdiction and responsibilities.<sup>575</sup>

Of the 139 laws<sup>576</sup> designating wilderness since the passage of the 1964 Act, only four have extra special language that create minor effects in wilderness stewardship of wildlife resources in those particular wilderness areas,<sup>577</sup> and only one has extra special language affecting that particular wilderness that is completely out of the norm of all other wilderness legislation. That bill designated the Wovoka Wilderness as embedded within the Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015.<sup>578</sup> The unique provisions of this law are as confusing as they are astonishing, and so are given extended attention here as an extreme outlier. On the one hand, the legislation states the Wovoka “shall be administered by the Secretary in accordance with the Wilderness Act”<sup>579</sup> and House Report 101-405 Appendix B.<sup>580</sup> The law then adds: “The State, including a designee of the State, may conduct wildlife management activities...in accordance with...the ‘Memorandum of Understanding: Intermountain Region USDA Forest Service and the Nevada Department of Wildlife State

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<sup>572</sup> We use the term “extra special language” to describe provisions other than those found in the Special Provisions enumerated at 16 U.S.C. § 1133(d) or other direction found in the Wilderness Act of 1964.

<sup>573</sup> See Pub. L. No. 92-400 § 8 (1972) (stating that hunting and fishing “shall” be permitted “within the boundaries of the recreation area in accordance with applicable laws of the United States and the State of Idaho, except that the Secretary may designate zones where, and establish periods when, no hunting or fishing shall be permitted for reasons of public safety, administration, or public use and enjoyment,” after consultation with the State; the consultation requirement is inapplicable in emergencies); *id.* § 2(b) (“The lands designated as the Sawtooth Wilderness Area...shall be administered in accordance with the provisions of this Act and the provisions of the Wilderness Act...whichever is more restrictive.”).

<sup>574</sup> See *supra* notes \_\_\_ and accompanying text.

<sup>575</sup> Pub. L. No. 95-495, § 14 (1978). *Cf.* Pub. L. No. 107-282, § 208(a) (2002), where nothing “affects or diminishes” state jurisdiction.

<sup>576</sup> Methodology for counting wilderness bills varies. Here, we count as a separate law: bills with their own Public Law number: separate Titles within one Public Law: and separate sections where the law refers to that section as a wilderness Act.

<sup>577</sup> See Pub. L. No. 95-237 § 4(c) (1978) (directing the Forest Service to conduct wildlife research in cooperation with the state of Idaho in the Gospel-Hump Wilderness); Pub. L. No. 98-140 § 2(c) (1983) (limiting the use of motor vehicles for wildlife management in the Lee Metcalf Wilderness); Pub. L. No. 103-433 § 506(b) (1994) (directing the Secretary to allow hunting in the Mojave National Preserve Wilderness (created largely out of BLM lands where hunting was permitted)); Pub. L. No. 113-137 § 3 (2014) (mandating fish stocking in the Stephen Mather Wilderness).

<sup>578</sup> Pub. L. No. 113-291, Div. A, Title XXX, Subtitle E, § 3066 (2014).

<sup>579</sup> *Id.* § 3066(c)(1).

<sup>580</sup> *Id.* § 3066(d)(2)(B)(ii).

of Nevada’ and signed [in] 1984.”<sup>581</sup> The legislation says “may,” retaining a measure of federal discretion. But the cited MOU, which does not mention wilderness, contains contradictory direction and does not conform to federal law: “The Forest Service agrees to recognize the Department [of Wildlife of the State of Nevada] as the agency responsible for the preservation and management of the wildlife resources in Nevada and for determining the regulations under which fish and wildlife will be managed, utilized, and protected.”<sup>582</sup> There is no authority for a state to determine federal regulations, and this provision is contradicted later in the document: “[E]ach and every provision of the Memorandum is subject to the laws of the State of Nevada, the laws of the United States, and the regulations of the Secretary of Agriculture.”<sup>583</sup> The MOU also defines “exotic” wildlife species as “those species that do not or have not existed within the continental United States within recorded historical times.”<sup>584</sup> By this definition, any species from anywhere in the world that is currently anywhere within the continental United States is not exotic (and, according to the MOU, no Forest Service advanced approval is necessary for them to be transplanted by the State). This directly conflicts with the Executive Order defining exotic species as, “[w]ith respect to a particular ecosystem, any species... that is not native to that ecosystem,” and defining a native species as, “[w]ith respect to a particular ecosystem, a species that, *other than as the result of introduction*, currently occurs or historically occurred in that ecosystem.”<sup>585</sup>

Two other statutes are notable in that they contain language affecting the management of wildlife in multiple wilderness areas. The first is ANILCA,<sup>586</sup> which contains far more extra special language on a variety of issues than any other wilderness-designating language “in recognition of the unique conditions in Alaska.”<sup>587</sup> Concerning wildlife, ANILCA provides that in national forest wilderness areas the Secretary *may* allow activities and facilities to enhance aquaculture “in a manner which adequately assures protection, preservation, enhancement, and rehabilitation of the wilderness resource.”<sup>588</sup> Other provisions dealing with wildlife center on allowable public uses, rather than management actions *per se*. These include construction of certain structures—with some Secretarial discretion—to facilitate the taking of fish and wildlife,<sup>589</sup> and public use of motor vehicles for subsistence hunting.<sup>590</sup> Additional analysis of wildlife provisions in ANILCA is found in Part II(B)(6).

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<sup>581</sup> *Id.* § 3066(d)(5)(A).

<sup>582</sup> U.S. Dep’t of Agric., U.S. Forest Serv., External Relations, FSM Chapter 1500, R4 Supplement 1500-94-3, § 1561.2, Exhibit 03 at A.1 (Jun. 2, 1994).

<sup>583</sup> *Id.* at C.16.

<sup>584</sup> *Id.* at B.6.

<sup>585</sup> Exec. Order No. 13112, 64 Fed. Reg. 6183 (1999) (emphasis added).

<sup>586</sup> Pub. L. No. 96-487 (1980).

<sup>587</sup> *Id.* § 1315(a).

<sup>588</sup> *Id.* § 1315(b).

<sup>589</sup> *Id.* § 1316.

<sup>590</sup> *Id.* § 811(b).



The other wilderness legislation with extra special language affecting multiple areas is in Title I of the California Desert Protection Act of 1994,<sup>591</sup> which designated 69 wilderness areas under the stewardship of the BLM. Section 103(f) contains a unique provision: “Management activities to maintain or restore fish and wildlife populations and ... habitats ... may be carried out ... *and shall include the use of motorized vehicles by the appropriate State agencies.*”<sup>592</sup> The contradictory use of “shall” and “may” caused considerable confusion in the offices tasked with stewardship of these areas. Ultimately, the BLM determined the correct interpretation of this language is that “BLM continues to hold ultimate responsibility” for managing any actions in the wilderness areas and “[w]hen BLM and CDFG cooperatively determine the need [for any access by CDFG]...CDFG and their volunteer organizations will be allowed to continue to use motor vehicles to carry out these necessary activities.”<sup>593</sup>

Another notable wilderness bill is the Arizona Desert Wilderness Act of 1990,<sup>594</sup> which was the first of many laws to direct wildlife management “in accordance with appropriate policies and guidelines such as those set forth in Appendix B of . . . ([House Report] 101-405).”<sup>595</sup> As discussed below, this Report is a verbatim transcript of the substantive portions of the 1986 International Association of Fish and Wildlife Agencies (IAFWA) agreement,<sup>596</sup> and Congressional direction here contains two important points: 1) management actions “*may* be carried out” (emphasis added)—that is, action is not mandatory but discretionary; 2) actions should be “consistent with relevant wilderness management plans”—that is, discretion to take action lies with the federal land manager. In short, except for aerial fish stocking,<sup>597</sup> the federal responsibility to manage wildlife in such a way as to preserve an area’s wilderness character was not changed.

Some more recent laws in Nevada and Idaho have lengthy sections on wildlife management which reaffirm federal discretion, but (with one exception<sup>598</sup>) these sections change nothing of substance from the authority found in the Wilderness Act itself.<sup>599</sup> The

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<sup>591</sup> Pub. L. No. 103-433 (1994).

<sup>592</sup> *Id.* § 103(f) (emphasis added).

<sup>593</sup> Interpretation of Fish and Game Management Language in the California Desert Protection Act, BLM Cal. State Director Memorandum, Sep. 30, 1997.

<sup>594</sup> Pub. L. No. 101-628 (1990).

<sup>595</sup> *Id.* § 101(h).

<sup>596</sup> U.S. Dept. of Ag, U.S. For. Serv., and U.S. Dept. of the Int., *Policies and Guidelines for Fish and Wildlife Management in Wilderness Areas* (1986) [*hereinafter* IAFWA 1986 Agreement]. For details, see *infra* (“Wilderness and the Association of Fish & Wildlife Agencies”).

<sup>597</sup> Under the IAFWA 1986 Agreement, “Aerial stocking of fish *shall* be permitted for those waters in wilderness where this was an established practice before wilderness designation or where other practical means are not available.” *Id.* § 10 (emphasis added). While “[a]erial stocking requires approval by the administering agency,” agency discretion is limited in that such use of aircraft is exempted from the “minimum necessary” requirement discussed above in Section XX, *supra* (Prohibition of Certain Uses).

<sup>598</sup> See *supra* notes (discussing the Wovoka Wilderness legislation. We review extra special wildlife provisions in wilderness law in the FAQ accompanying this Article. See

<sup>599</sup> Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282 § 208(a)-(f); Lincoln County Conservation, Recreation, and Development Act of 2004,

considerable confusion and misinterpretation of these laws by federal managers, state employees, and non-governmental organizations is discussed in Part III(E).

*c. Agency Policy*

Each of the four agencies has developed policy measures to guide wilderness managers.

According to NPS policy, both planning and management activities “must ensure that wilderness character is likewise preserved” within designated units of the National Park System.<sup>600</sup> It provides: “The purpose of wilderness in the national parks includes the preservation of wilderness character and wilderness resources in an unimpaired condition and, in accordance with the Wilderness Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”<sup>601</sup> In addition to managing these areas for the preservation of the physical wilderness resources, planning for these areas must ensure that the wilderness character is likewise preserved.<sup>602</sup>

FWS policy provides that, upon designation, wilderness character becomes an additional purpose of any wilderness area within a refuge. More specifically, the agency’s policy states: “As we carry out individual refuge establishing purpose(s), the Administration Act purposes, the Refuge System mission and goals, and the Service’s mission in areas designated as wilderness, we do so in a way that preserves wilderness character.”<sup>603</sup>

For the National Forest System, USFS policy states that “[w]ildlife and fish management programs shall be consistent with wilderness values.”<sup>604</sup> It commits the agency to: “Base any Forest Service recommendation to State wildlife and fish agencies on the need for protection and maintenance of the wilderness resource”;<sup>605</sup> “Provide an environment where the forces of natural selection and survival rather than human actions determine which and what numbers of wildlife species will exist”;<sup>606</sup> and “Discourage measures for direct

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Pub. L. No. 108-424 § 209(a)-(f); Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 § 329(a)-(f); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11 § 1503(b)(8)(A)-(C); Pub. L. No. 113-291 §§ 3064(e)(1)-(5), 3066(d)(1)-(5) and (e) (2014). For a section-by-section analysis of these laws, see FAQ.

<sup>600</sup> Nat’l Park Serv., Management Policies 2006 §§ 6.1, 6.3.1, available at <https://www.nps.gov/policy/MP2006.pdf>.

<sup>601</sup> *Id.*

<sup>602</sup> *Id.* § 6.3.1.

<sup>603</sup> U.S. Fish and Wildlife Serv., NATURAL AND CULTURAL RESOURCES MANAGEMENT, WILDERNESS STEWARDSHIP, 610 FW 1.12(B) (2008), available at <https://www.fws.gov/policy/610fw1.html> [*hereinafter* FWS Wilderness Policy].

<sup>604</sup> U.S. Forest Service, *Recreation, Wilderness, and Related Resource Management*, FS Manual 2323.32(2) (2009), available at [https://www.fs.fed.us/cdt/main/fsm\\_2350\\_2300\\_2009\\_2.pdf](https://www.fs.fed.us/cdt/main/fsm_2350_2300_2009_2.pdf).

<sup>605</sup> *Id.* at 2323.32(1). This provision recognizes that states also have responsibilities for the protection of wildlife in wilderness, and calls for cooperative federalism in fish and wildlife management. *Id.*

<sup>606</sup> *Id.* at 2323.31(1).

control (other than normal harvest) of wildlife and fish populations.”<sup>607</sup> In addition, practical application of the USFS policies reflects the “Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness” developed with the Association of Fish and Wildlife Agencies (AFWA).<sup>608</sup> This document is discussed below.

The BLM’s wilderness policy was completely rewritten in 2012.<sup>609</sup> Though never explicitly stated, the wildlife section of this policy purposefully adheres more closely to the IAFWA 1986 Agreement than the 2006 Agreement.<sup>610</sup> Importantly, the 2012 BLM policy states that “States have a primary and critical role” rather than “*the* primary role” in wildlife management,<sup>611</sup> recognizing that the states’ interests are not supreme, but that either the states or the federal agency may initiate wildlife stewardship proposals in wilderness. In addition, the policy plainly declares “[t]he ultimate responsibility to preserve wilderness character rests with the BLM,”<sup>612</sup> emphasizes wilderness preservation and requires the use of the Carhart Minimum Requirements Decision Guide for any wildlife management action.<sup>613</sup> It also clarifies the prohibition on commercial use of wildlife.<sup>614</sup>

#### *d. Wilderness and the Association of Fish & Wildlife Agencies*

While Congress hasn’t substantially changed wildlife management in wilderness with the recent legislation discussed above, for a little more than a decade there have been significant efforts to do so through legally questionable policy channels and nontransparent agreements between federal agencies and the (International) Association of Fish and Wildlife Agencies (IAFWA or AFWA) (the Association changed names in 2006).

In 1986, the USFS and BLM made a comprehensive revision of their wilderness management directives with the cooperation of IAFWA.<sup>615</sup> This agreement consists of a statement of purpose, general sideboards for the management of fish and wildlife in wilderness, and details regarding specified actions that may or may not be taken in

<sup>607</sup> *Id.* at 2323.31(2).

<sup>608</sup> *See id.* 2323.32(5) (citing USDA For. Serv., Bur. of Land Mgmt., and Assoc. of Fish & Wildlife Agencies, Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness (2006), available at [https://www.blm.gov/style/medialib/blm/wo/Information\\_Resources\\_Management/policy/im\\_attachments/2007.Par.31564.File.dat/im2007-052attach1.pdf](https://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2007.Par.31564.File.dat/im2007-052attach1.pdf) [*hereinafter* AFWA 2006 Agreement]). For details on AFWA, see *infra* Section II.d.

<sup>609</sup> Bureau of Land Mgmt., Bureau of Land Mgmt. Manual 6340, Management of Designated Wilderness Areas § 1.6.C.21 (2012) [*hereinafter* BLM Manual 6340], superseding in part BLM Instruction Memorandum No. 2007-052, Feb. 5, 2007.

<sup>610</sup> *Id.* *See* AFWA 2006 Agreement, *supra* note ; IAFWA 1986 Agreement, *supra* note .

<sup>611</sup> BLM Manual 6340, *supra* note , at 1.6.C.21.b.i. This is a shift from the misleading language of 43 CFR 24.3, see *infra/supra* Section XXX.

<sup>612</sup> *Id.* at 1.6.C.21.b.ii.

<sup>613</sup> *Id.* at 1.6.C.21.b.iii (citing Arthur Carhart National Wilderness Training Center, Minimum Requirements Decision Guide, *supra* note).

<sup>614</sup> *Id.* at 1.6.C.21.c.ix.E.

<sup>615</sup> IAFWA 1986 Agreement, *supra* note.

cooperation with the states.<sup>616</sup> It maintains federal control over decision-making processes, recognizes the responsibility afforded federal managers by the Wilderness Act, and is guided by the following direction: “Fish and wildlife management activities will emphasize the protection of natural processes. . . . [and] by the principle of doing only the minimum necessary to manage the area as wilderness.”<sup>617</sup> As noted above, these guidelines were incorporated into House Report 101-405 and referenced in several subsequent wilderness bills.<sup>618</sup>

Although the USFS, BLM, and IAFWA “reaffirmed [their] mutual commitment” to the 1986 Agreement in 1995<sup>619</sup> and again in 2002,<sup>620</sup> within the year, the agencies initiated a complete revision of the document and ultimately issued a revamped “Policies and Guidelines” in 2006.<sup>621</sup> There were remarkable changes between the 1986 Agreement and the 2006 Agreement.<sup>622</sup> The solicitor assigned to review the 2006 Agreement on behalf of the Department of the Interior noted several problems with it, including significant

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<sup>616</sup> *Id.* Fourteen specific action areas are listed: use of motorized equipment; fish and wildlife research and management surveys; facility development and habitat alteration; threatened and endangered species; angling, hunting, and trapping; population sampling; chemical treatment; spawn taking; fish stocking; aerial fish stocking; transplanting wildlife; wildlife damage control; visitor management to protect wilderness wildlife resources; and management of fire.

<sup>617</sup> *Id.* at 1. The 1986 Agreement veers off course in one respect, found in the section on Aerial Fish Stocking: “Aerial stocking of fish *shall* be permitted for those waters in wilderness where this was an established practice before wilderness designation or where other practical means are not available.” *Id.* at 6 (emphasis added).

<sup>618</sup> See *supra* note \_\_\_\_ and accompanying text.

<sup>619</sup> Memorandum from Jack Ward Thomas, Chief, U.S. For. Serv., Mike Dombeck, Dir., Bur. of Land Mgmt., and R. Max Peterson, Executive Vice President, Intl. Assoc. of Fish & Wildlife Agencies, to Regional Foresters, State Directors, and State Govt. Members of the Intl. Assoc. of Fish & Wildlife Agencies 1 (Feb. 23, 1995) (on file with authors).

<sup>620</sup> See Memorandum from Dale N. Bosworth, Chief, U.S. For. Serv., Kathleen B. Clarke, Dir., Bur. of Land Mgmt., and R. Max Peterson, Executive Vice President, Intl. Assoc. of Fish & Wildlife Agencies, to State Govt. Members of the Intl. Assoc. of Fish & Wildlife Agencies, USDA For. Serv. Regional Foresters, and USDI Bur. of Land Mgmt. State Directors 3 (Aug. 9, 2002) (on file with the authors) (noting “the statutory endorsement of the existing guidelines by the Arizona Desert Wilderness Act”).

<sup>621</sup> See AFWA (2006), *supra* note.

<sup>622</sup> See Nie and Barns, *supra* note, at 258-263..

inconsistencies with federal law.<sup>623</sup> At least one AFWA officer was unconcerned: “USDI Solicitors balked but BLM Director made the decision to sign.”<sup>624</sup>

A complete inventory of the changes is available elsewhere,<sup>625</sup> but problematic additions or deletions include the following:

- Stating that “State fish and wildlife management activities that do not involve Wilderness Act prohibitions identified . . . in Section 4(c) . . . are generally exempt from authorizations by the Federal administering agencies,”<sup>626</sup> when in fact federal requirements to preserve wilderness character go beyond prohibiting Section 4(c) uses, and include prevention of any action that may degrade an area’s wilderness character (*e.g.*, introducing a non-native species).
- Giving states the responsibility to determine whether wildlife and fish species are indigenous, thereby possibly degrading the Natural Quality of wilderness character. Associated with this change is the deletion of the IAFWA 1986 Agreement prohibition on stocking exotic fish.<sup>627</sup>
- Identifying any state plans and agreements as sufficient to establish if action is necessary in wilderness, when the Wilderness Act states prohibited uses can be approved only to manage the area “for the purpose of the Act.”<sup>628</sup>
- Deleting a passage committing the agencies to being guided by the principle of doing only the minimum necessary to manage the area as wilderness, and assigning authority for completing the “minimum requirements” analysis to the states, when

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<sup>623</sup> See Memorandum from Kris Clark, USDI Off. of the Sol, Land & Water Res., to Dwight Fielder, Chief, BLM Div. of Fish, Wildlife, and Plant Conservation and Jeff Jarvis, Chief, Div. of Natl. Landscape Cons. Sys (Aug. 10, 2005) (on file with the authors) (“[T]he handling of the “minimum requirements” analysis appears to conflict with the Wilderness Act” and “materially changes the meaning of the provision [in the Wilderness Act, § 4(c)]; the memo fails to recognize that “Federal law, including regulations and discretionary actions, preempt[s] state jurisdiction.”). See also Memorandum from Kris Clark to Dwight Fielder (June 22, 2006) (on file with authors) (“[D]ecisions about federal agency management of wildlife in wilderness areas is not the appropriate subject for negotiation with an outside group”; the memo’s characterizations of the Wilderness Act “are misleading and in many cases incorrect”).

<sup>624</sup> See E-mail from Gary J. Taylor, Legislative Director, AFWA, to AFWA members, “Wilderness Policies and Guidelines Signed” (July 18, 2006) (on file with the authors) (“USDI Solicitors question[ed] [the] legal status of AFWA being able to speak for the states. Whatever...the important thing is that it is signed.”); *id.* (stating that the FS Chief, BLM Director, and AFWA executive vice president “all agreed no fanfare, news release or anything spotlighting it”).

<sup>625</sup> BLM and FS AFWA Policies Comparison Table (Dec. 7, 2016), *available at* <http://www.wilderness.net/wildlife#>.

<sup>626</sup> AFWA 2006 Agreement at 5, *supra* note.

<sup>627</sup> IAFWA 1986 Agreement § 9, *supra* note (“Exotic species of fish shall not be stocked.”).

<sup>628</sup> 16 U.S.C. § 1133(c).

the Act unequivocally gives federal agencies the sole responsibility to manage wilderness areas and preserve their wilderness character.<sup>629</sup>

- Analyzing implementation alternatives on the basis of impacts to “the wilderness characteristics (*sic*) (naturalness, outstanding opportunities for solitude or primitive and unconfined recreation, and other special features),” and omitting consideration of other important impacts, in particular, to the Untrammeled Quality and the Undeveloped Quality.<sup>630</sup>

These provisions and other AFWA initiatives reflect AFWA’s fundamental misunderstanding of the federal role in managing wildlife. According to AFWA, “The state fish and wildlife agencies are responsible for fish and wildlife management within their borders, even on most federal public lands—including federal lands designated as Wilderness.”<sup>631</sup> While the states have duties related to wildlife management, no statute grants them authority in wilderness—or other federal lands—superior to the federal agencies.<sup>632</sup>

It is clear from the plain text of the Wilderness Act that Congress intended the preservation of wilderness character as the primary purpose of the Act. Congress was adamant that wilderness areas shall be “administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment *as wilderness*,”<sup>633</sup> and that allowing otherwise prohibited uses to meet minimum necessary requirements must be “for the purpose of this Act,”<sup>634</sup> not for meeting “states’ abilities to accomplish big game harvest objectives.”<sup>635</sup> The misconception that federal agencies should only utilize “wilderness management planning processes that support the state wildlife agencies and their wildlife management responsibilities and goals”<sup>636</sup> is exactly backward. In wilderness, state wildlife agencies should support—and cannot undermine—the congressional mandate to preserve wilderness character. While the state agencies may not be required to do so, the federal agencies must evaluate any action that may degrade wilderness character, and are required to deny any action that fails to do so.

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<sup>629</sup> AFWA 2006 Agreement, *supra* note, at App. A.

<sup>630</sup> *Id.*

<sup>631</sup> John Kennedy, Fish and Wildlife Management in Wilderness, speech delivered at the National Wilderness Conference in Albuquerque, NM, Oct. 17, 2014, at 2 (on file with authors) [*hereinafter* Kennedy Speech].

<sup>632</sup> *See supra* section.

<sup>633</sup> 16 U.S.C. § 1131(a) (emphasis added).

<sup>634</sup> 16 U.S.C. § 1133(c).

<sup>635</sup> Kennedy Speech, *supra* note, at 6.

<sup>636</sup> *Id.* at 11.

### PART III. ANALYSIS AND RECOMMENDATIONS

#### *A. The Federal Obligation to Manage and Conserve Fish and Wildlife on Federal Lands*

We begin our analysis by recognizing that federal land agencies have an *obligation*, and not just the discretion, to manage and conserve fish and wildlife on federal lands. Before explaining, it is important to first dispel the common myth that “the states manage wildlife, federal land agencies only manage wildlife habitat.” We found this mantra repeated throughout our study and it was commonly invoked by state *and* federal agencies in multiple cases and contexts.

The mantra has a long history and can be traced to the different sources of federal and state powers regarding wildlife management. As discussed in Part I(A), states claim ownership of wildlife and a commensurate public trust duty to manage it in the public’s interest. On the other hand, the Property Clause of the U.S. Constitution provides federal land agencies with vast plenary powers to manage public lands—and the wildlife thereon.<sup>637</sup> Writing in 1970, the Public Lands Law Review Commission noted that historically “the states have regulated the game population, and the Federal Government has managed the habitat.”<sup>638</sup> But the Commission also observed that, increasingly, “[T]he line between the traditional functions has become shadowy” because of the interplay between wildlife populations and habitat.<sup>639</sup> The Commission released its report prior to passage of the ESA, NFMA and FLPMA. And while these laws gave federal land agencies new responsibilities to conserve at-risk species and manage wildlife, and not just wildlife habitat, the “federal lands-habitat” refrain continued.

Part of the mantra’s endurance is also due to the states’ traditional role in regulating hunting, fishing and trapping. As discussed in Part II(B)(5), the FLPMA and the Sikes Act include provisions related to hunting and fishing on public lands administered by the USFS and BLM, meaning that federal agencies most often defer to the states when it comes to regulating the harvest of fish and wildlife on federal lands.<sup>640</sup> Congress has shown no interest in usurping this traditional role of the states. However, wildlife management goes beyond simply setting harvest levels and methods. Just because the federal government has traditionally deferred to the states in establishing regulations pertaining to hunting, fishing and trapping does not mean “the states manage wildlife and federal land agencies manage wildlife habitat.” We suspect that this non sequitur explains why the mantra has been so rarely questioned in the past.

The mantra is wrong from a legal standpoint, limited from a biological one, and problematically simplifies the complexity of wildlife-habitat relationships. We take issue with the mantra because it invariably leads to fragmented approaches to wildlife

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<sup>637</sup> See Part II(A)(1).

<sup>638</sup> *One Third of the Nation’s Land: A Report to the President and to the Congress by the Public Land Law Review Commission* 158 (Washington, D.C.: Government Printing Office 1970).

<sup>639</sup> *Id.*

<sup>640</sup> See *supra* notes \_\_\_\_\_ accompanying text.

conservation, unproductive battles over agency turf, and it often leads to an abdication of federal responsibility over wildlife.

We begin with a review of the public land laws surveyed in Part II(B). We then turn to the public trust and national interest in federal lands, and finally to the biological and ecological concerns perpetuated by the wildlife/habitat mantra.

### *1. Federal Land Laws Governing Wildlife Management*

Part II(B) makes clear that Congress directed all four federal land management agencies to manage wildlife on federal lands and to not just provide wildlife habitat. The ESA is a good starting point because the Act and its regulations so clearly intertwine the fate of species and ecosystems. The two are linked together under the law and the statute mandates that all federal land agencies utilize their authorities to effectuate the purposes of the Act. And the purpose of the Act, after all, is “to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.”<sup>641</sup> Furthermore, the meaning of “harm,” in the definition of “take” in the Act, includes “significant habitat modification or degradation.”<sup>642</sup> The ESA obligates federal agencies to conserve species and to avoid jeopardizing the continued existence of the listed species or destroying critical habitat.<sup>643</sup>

The ESA is also significant because of the role played by federal lands in the conservation of listed and candidate species. The most recent assessment (2008) measures the distribution of ESA-status species (listed as endangered, threatened or candidate) and species defined by NatureServe as imperiled.<sup>644</sup> It finds that federal lands are significant reservoirs of biodiversity. Lands managed by the USFS and DOD stand out in terms of supporting the greatest number of species with status under the ESA. Both agencies harbor about 23 percent of species with ESA-status (at least 355 species for each agency), followed by the NPS (19 percent), the FWS (18 percent) and the BLM (16 percent).<sup>645</sup> The USFS also harbors the most NatureServe-defined imperiled species, approximately 27 percent of the total (at least 821 species).<sup>646</sup> This is followed by the BLM (20 percent) and military lands (15 percent).<sup>647</sup>

To put these percentages in context, consider the importance of National Forest lands to fish and wildlife more broadly:

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<sup>641</sup> 16 U.S.C. § 1531(b).

<sup>642</sup> 50 C.F.R. § 17.3.

<sup>643</sup> 16 U.S.C. § 1536(a)(1)-(2).

<sup>644</sup> Bruce A. Stein, Cameron Scott, and Nancy Benton, *Federal Lands and Endangered Species: The Role of Military and Other Federal Lands in the Sustaining Biodiversity*, 58(4) *BioScience* 339 (2008). NatureServe provides independent conservation status assessments for extinction risks facing species in the U.S. *Id.* at 340; NatureServe, About Us, [www.natureserve.org](http://www.natureserve.org) (last visited May 3, 2017).

<sup>645</sup> Stein, *supra* note, at 343.

<sup>646</sup> *Id.*

<sup>647</sup> *Id.*



The 193 million acres of the National Forest System support much of North America's wildlife heritage, including: habitat for 430 federally listed threatened and endangered species, six proposed species, and 60 candidate species, with over 16 million acres and 22,000 miles of streams designated as critical habitat for endangered species; approximately 80% of the elk, mountain goat, and bighorn sheep habitat in the lower 48 States; nearly 28 million acres of wild turkey habitat; approximately 70% of the Nation's remaining old growth forests; over 5 million acres of waterfowl habitat; habitat for more than 250 species of migratory birds; habitat for more than 3,500 rare species; some of the best remaining habitat for grizzly bear, lynx, and many reptile, amphibian and rare plant species; over two million acres of lake and reservoir habitat; and over two hundred thousand miles of fish-bearing streams and rivers.<sup>648</sup>

Amongst federal land agencies, the BLM has the fewest ESA-status species and ranks second for number of imperiled species.<sup>649</sup> Nonetheless, 245 ESA-listed species and another 31 candidate species are found on BLM lands, and roughly 450 rare and listed plant and animal species "are believed to occur only on BLM-managed lands."<sup>650</sup> While private and other landholdings are essential to biodiversity conservation, federal lands will play an increasingly crucial role in the future.<sup>651</sup>

The wildlife conservation mandates given to the NPS and FWS are unambiguous in the obligation to prioritize the conservation of fish and wildlife. The National Park Service Organic Act makes the conservation of park resources, including wildlife, a primary management goal and the courts are consistent in their reading that conservation is to be prioritized over facilitating public enjoyment.<sup>652</sup> Furthermore, the enjoyment of park resources and wildlife may only occur in "such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>653</sup> The wildlife conservation mandate is even more well-defined for the National Wildlife Refuges. The 1997

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<sup>648</sup> U.S. FOREST SERV., BIOLOGICAL ASSESSMENT OF THE USDA NATIONAL FOREST SYSTEM LAND MANAGEMENT PLANNING RULE FOR FEDERALLY LISTED ENDANGERED AND THREATENED SPECIES; SPECIES PROPOSED FOR FEDERAL LISTING; SPECIES THAT ARE CANDIDATES FOR FEDERAL LISTING ON NATIONAL FOREST SYSTEM LANDS 17-18 (2011).

<sup>649</sup> Stein, *supra* note, at 345.

<sup>650</sup> BLM Threatened and Endangered Species Program, available at <https://www.blm.gov/programs/fish-and-wildlife/threatened-and-endangered> (last visited May 3, 2017).

<sup>651</sup> Stein and colleagues conclude that "[g]iven the current and projected pace of private land development, we can expect that federal lands will assume greater importance to the protection of our native species." Stein, *supra* note \_\_, at 346. See *The Disappearing West*, available at <https://www.disappearingwest.org/> (last visited May 3, 2017); see also U.S. Forest Serv., *Future of America's Forests and Rangelands: Forest Service 2010 Resources Planning Act Assessment*, Gen. Tech. Rep. WO-87, at 11 (2012) (reviewing how development pressure on nonpublic lands is affecting "the ability of those public lands to sustain important ecosystem services and biodiversity").

<sup>652</sup> See *supra* Part II(B)(2).

<sup>653</sup> 16 U.S.C. § 1.

Improvement Act prioritizes “the conservation of fish, wildlife and plants, and their habitat within the system” and seeks to “ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans.”<sup>654</sup> The laws governing the National Parks and Wildlife Refuges make clear the obligation to conserve fish and wildlife and its habitat.

The wildlife habitat mantra is most often invoked in the context of USFS and BLM management. But the multiple use mandates given to both agencies require that these lands be managed for fish and wildlife purposes, with no distinction made between wildlife and wildlife habitat. The multiple use mandates provide the USFS and BLM considerable discretion, but that does not mean that the agencies can arbitrarily opt out of managing fish and wildlife where laws or regulations require such management.

The NFMA provides a more substantive and enforceable mandate for the USFS: “to provide for a diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.”<sup>655</sup> Land and Resource Management Plans, whether written pursuant to the 1982 or 2012 NFMA regulations, must ensure the viability of species in planning areas. The regulations differ in how the viability requirement is defined, but both regulations emphasize the importance of habitat or “ecological conditions” in meeting the diversity mandate. Yet the definitions of viability, in both sets of regulations, focus on the population of species (e.g., their distribution, persistence, resilience, etc.).<sup>656</sup>

FLPMA provides the BLM with no wildlife diversity mandate and it possesses more discretion than other federal land agencies. But this discretion is limited by FLPMA and its regulations. Multiple use is defined in the Act to include “wildlife and fish.” Though “habitat for fish and wildlife and domestic animals” is referenced in FLPMA as well, the language is embedded in a more inclusive section focused on the ecological and other values for which public lands must be managed. The Act also requires the BLM’s land use planning process to “give priority to the designation and protection of areas of critical environmental concern [ACECs]”<sup>657</sup> and “to protect and prevent irreparable damage” to the “fish and wildlife resources” found within these areas.<sup>658</sup> Furthermore, whatever discretion the BLM has regarding wildlife conservation becomes much less relevant once a species found on BLM lands is protected by the ESA.

## *2. The Public Trust and National Interest in Federal Lands*

In addition to the statutory requirements summarized above, many of these federal land laws include trust-like language pertaining to the national interest in federal lands, non-impairment, and intergenerational responsibility that further clarifies the federal obligation

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<sup>654</sup> 16 U.S.C. § 668dd(a)(4).

<sup>655</sup> 16 U.S.C. § 1604(g)(3)(B).

<sup>656</sup> 36 C.F.R. § 219.19 (2016).

<sup>657</sup> 43 U.S.C. § 1712(c)(3).

<sup>658</sup> 43 U.S.C. § 1702(a).

to conserve wildlife. The National Park Service Organic Act, for example, requires the conservation of “scenery and the natural and historic objects and the wild life” therein and also requires the provision for the enjoyment of same “in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>659</sup> The mission of the National Wildlife Refuge System, as provided by the Improvement Act, is “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”<sup>660</sup> In the Wilderness Act, Congress secured “for the American people of present and future generations the benefits of an enduring resource of wilderness.”<sup>661</sup> Section 101 of NEPA expresses the federal government’s responsibility to use all practicable means to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”<sup>662</sup> Finally, the ESA includes similar language pertaining to the multiple values of species to “the Nation and its people” and the importance of “better safeguarding, for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and plants.”<sup>663</sup>

While the multiple use statutes of the USFS and BLM do not specifically reference an intergenerational trust, it is implied in various provisions pertaining to the national interest in federal lands and the command to not impair them. The Multiple Use Sustained Yield Act, for instance, requires the USFS to manage multiple uses in a combination “that will best meet the needs of the American people,” and “without impairment of the productivity of the land.”<sup>664</sup> The NFMA speaks to “the public interest” and serving “the national interest” in the renewable resources program.<sup>665</sup> And finally, the FLPMA similarly recognizes “the national interest” in public lands and requires multiple use management to “meet the present and future needs of the American people” as well as “long-term needs of future generations,” and to do so “without permanent impairment of the productivity of the land and the quality of the environment.”<sup>666</sup> The public trust is also acknowledged in Department of the Interior regulations on intergovernmental cooperation in fish and wildlife management: “The Secretary of Interior reaffirms that fish and wildlife must be maintained for their ecological, cultural, educational, historical, aesthetic, scientific,

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<sup>659</sup> 16 U.S.C. § 100101(a).

<sup>660</sup> 16 U.S.C. § 668dd(a)(2). *See also* Robert L. Fischman and Robert S. Adamcik, *Beyond Trust Species: The Conservation Potential of the National Wildlife Refuge System in the Wake of Climate Change*, 51 Natural Resources J. 1, 6 (2011) (analyzing the USFWS’s “variable and amorphous application of ‘trust terminology and the doctrine that such terminology reflects”).

<sup>661</sup> 16 U.S.C. § 1131.

<sup>662</sup> 16 U.S.C. § 4331(b)(1).

<sup>663</sup> 16 U.S.C. § 1531(a). *See also* *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985, 995, n.40 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9<sup>th</sup> Cir. 1981). According to the court, “It is also possible that Congress can assert a property interest in endangered species which is superior to that of the state . . . The importance of preserving such a national resource may be of such magnitude as to rise to the level of a federal property interest.” For analysis *see* Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 *Env’tl. L.* 605 (2004).

<sup>664</sup> 16 U.S.C. § 529.

<sup>665</sup> 16 U.S.C. § 1600(2)-(3)

<sup>666</sup> 16 U.S.C. §§ 1701(2), 1702(c).

recreational, economic, and social values to the people of the United States, and that these resources are held in public trust by the Federal and State governments for the benefit of present and future generations of Americans.”<sup>667</sup>

As the statutory language suggests, applying trust principles to lands as varied as those found in the federal system is challenging. It is one thing, for example, to find a trust duty for the National Parks, but it becomes murkier when thinking of the routine multiple use decisions that must be made by the USFS and BLM, decisions that often involve the private use of public resources. But even here, there is an understanding by the courts that such private uses must be for “national and public purposes,”<sup>668</sup> and that anti-monopoly restrictions impose a constraint on Congress in making decisions about federal lands as a trust resource.<sup>669</sup> At least one prominent authority places federal public lands “at the outer reaches of the public trust doctrine.”<sup>670</sup> This is in part because federal public land law is a field heavy with statutes and regulations, leaving some to question the relevance of applying a common law-based trust doctrine,<sup>671</sup> and also because, in the past, Congress has not hesitated to deploy its Property Clause powers to privatize federal public lands and resources.<sup>672</sup> But by the same token when it appears that Congress has chosen to dispose of federal property, the Court has demanded a clear expression of congressional intent.<sup>673</sup>

The issue of a federal trust duty has received vigorous judicial and scholarly debate in recent years,<sup>674</sup> but the courts have nonetheless referenced a public trust duty in numerous

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<sup>667</sup> 43 C.F.R. § 24.1(b).

<sup>668</sup> *Light v. United States*, 220 U.S. 523, 537 (1911).

<sup>669</sup> *Camfield*, 167 U.S. 524; *Trinidad Coal and Coking Co.*, 137 U.S. 160, 170 (1890).

<sup>670</sup> Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 273 (1980-1981).

<sup>671</sup> *See id.* at 276 (“The legislative matrix is sufficiently comprehensive that doubts can fairly be raised as to whether there is room for broad common law doctrine to operate.”).

<sup>672</sup> *Id. See, e.g., Light*, 220 U.S. at 537 (describing the federal public trust doctrine as applicable to “[a]ll the public lands of the nation [which] are held in trust for the people of the whole country,” but also stating that Congress had sole power to dispose of those lands).

<sup>673</sup> *See* John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. Colo. L. Rev. 1101, 1110 (2004) (explaining why “the Court demands that Congress express itself more clearly when it wants to dispose of federal lands than when it retains them”). Leshy places the *Light* opinion within the burgeoning conservation thrust of twentieth century cases. *Id.* at 1120. Although the Court remarked that Congress, when exercising its rights incident to proprietorship and sovereignty, holds the power to “establish a forest reserve for what it decides to be national and public purposes . . . [or] disestablish a reserve,” it in fact upheld federal authority to reserve and protect its public lands from destruction by unregulated grazing. *Light*, 220 U.S. at 537.

<sup>674</sup> Much of the recent debate stems from a misinterpretation of *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012). *See* Juliana v. U.S., Case No. 6:15-cv-01517-TC, 2016 WL 6661146 \*23 (D. Or. 2016) (“a close reading of PPL Montana reveals that it says nothing about the viability of federal public trust claims”). For additional background, see Amicus Curiae of Law Professors in Support of Granting Writ of Certiorari, *Alec L. v. McCarthy*, No. 14-405, 2014 WL 5841697 \*3-8 (Nov. 8, 2014); Michael C. Blumm and Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 *Envtl. L.* 399, 409 (2015).

federal land cases.<sup>675</sup> It is fair to say that the federal public trust, like the Property Clause, “favors retention of federal land in national ownership (retention), national over state and local authority (nationalization), and environmental preservation (conservation),” as a matter of constitutional common law.<sup>676</sup>

Whether employed as an interpretive canon by the courts or a conservation tool by the federal agencies, the federal public trust provides a useful way of understanding the broad obligations of federal agencies to manage and conserve wildlife located on or integral to federal lands.<sup>677</sup> We are not suggesting that the trust doctrine will provide a precise guide or formula that can be used by federal agencies to make complicated wildlife decisions. Rather, it will require that federal agencies explicitly consider their own trust obligations in decision making processes and stop the practice of reflexively acquiescing to state claims of wildlife authority.

The famous “Mono Lake decision” by the California Supreme Court provides a constructive way of thinking about this obligation and what it means in practice.<sup>678</sup> Here, the Court had to reconcile two different systems of legal thought—the prior appropriation doctrine and public trust doctrine of Western water law—that were on a “collision course.”<sup>679</sup> Though the Court did not dictate any “particular allocation” of water in the dispute, leaving that decision to the water management agencies, it did make clear that there is “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”<sup>680</sup> The public trust duty, said the Court, “imposes a duty of continuing supervision over the taking and use of the appropriated water.”<sup>681</sup> In this case, the Court asked state agencies to integrate two different doctrines of law and corrected the state of California who “mistakenly thought itself powerless to protect” trust resources.<sup>682</sup> Federal agencies

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<sup>675</sup> See Wilkinson, *supra* note, at 298 (identifying 36 court opinions describing “the inland public lands as being held in trust”); *Juliana*, 2016 WL 6661146 \*24-25 (applying the public trust doctrine to the federal government as a fundamental attribute of sovereignty).

<sup>676</sup> See Leshy, *supra* note, at 1101 (reviewing Property Clause powers); *Juliana*, 2016 WL 6661146 \*24 (finding that “public trust rights both predated the Constitution and are secured by it”).

<sup>677</sup> See Melissa K. Scanlon, *A Comparative Analysis of the Public Trust Doctrine for Managing Water in the United States and India* 4 (2016), available at SSRN: <https://ssrn.com/abstract=2863248> (describing the trust as a judicial presumption that the state cannot privatize or substantially impair trust resources without a clear statutory directives and findings); William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 UC Davis L Rev. 693, 738 (2012) (characterizing the public trust doctrine as an “interpretive canon . . . that provides courts with a judicially manageable method of vindicating the fundamental principle of public purpose in government management of natural resources”).

<sup>678</sup> *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419 (Cal. 1983), 658 P. 2d 709 (1983).

<sup>679</sup> *Id.* at 425.

<sup>680</sup> *Id.* at 446.

<sup>681</sup> *Id.* at 447.

<sup>682</sup> *Id.* at 452.

similarly have statutory and trust obligations for federal lands and wildlife and these responsibilities must be factored into their decision making processes.

Another trust responsibility of relevance is that between the federal government and Indian tribes. While we cannot give this complicated issue full consideration, it is important to recognize yet another layer of trust responsibilities found on federal lands. The federal government has a unique trust responsibility to protect the rights, assets, and property of Indian tribes.<sup>683</sup> This trust responsibility extends to protecting those off-reservation use rights that were reserved by tribes through treaties. Hundreds of treaties precede the creation of federal land agencies and many of these contain provisions that reserved rights on what is now federally managed land.<sup>684</sup> These off-reservation treaty rights often include hunting and fishing rights, gathering rights, water rights, grazing rights and subsistence rights. The trust responsibility to protect these rights is recognized by Congress, the Executive Branch and the courts.<sup>685</sup>

### *3. The Ecological Fallacy of Separating Wildlife From Habitat*

The “states manage wildlife, federal land agencies manage habitat” mantra is also problematic from a biological and wildlife management perspective. This is because it creates a reductionist and oversimplified dichotomy between wildlife and habitat. It is obvious that (1) land management decisions made by federal agencies impact fish and wildlife populations and (2) the decisions made by state agencies about fish and wildlife populations impact federal land and resources. Consider, for example, the impact a federal

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<sup>683</sup> Though sovereign, Indian tribes are not foreign nations, but rather distinct political communities “that may, more correctly, perhaps be denominated domestic, dependent nations,” whose “relation to the United States resembles that of a ward to his guardian.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831). A less paternalistic way of thinking about this trust relationship is cast in terms of property; the federal government has a duty to prevent harm to another sovereign’s property. See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994).

<sup>684</sup> See Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 Nat. Res. J. 585 (2008).

<sup>685</sup> See Exec. Order 13,175, §2(a) (Nov. 6, 2000):

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian Tribes.

See also Dept. of Interior Order 3335: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (Aug. 20, 2014) (providing background on the trust responsibility including a review of relevant statutes and case law). The Department of Agriculture and U.S. Forest Service “recognizes the Federal Government has certain trust responsibilities and a unique legal relationship with federally recognized Indian Tribes.” 36 C.F.R. § 219.4(a)(2). See also Forest Serv. Handbook 1509.13, Ch. 10; Joint Secretarial Order No. 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997).

oil and gas lease can have on a state-managed mule-deer population, or a state introducing non-native mountain goats to a national forest and the impact this introduction will have to that forest's alpine environment. Now, imagine in the latter case, the USFS acquiescing to the introduction of non-native mountain goats on the grounds that the agency does not have authority over wildlife management and that it simply manages habitat. In cases like this, the habitat mantra becomes an abdication of federal responsibility over wildlife and its habitat.

The fields of wildlife biology and management recognize the complex interplay between wildlife and habitat. For example, state wildlife agencies often make clear in their educational and outreach materials that “wildlife management *is* habitat management.”<sup>686</sup> And a popular text views habitat:

[A]s a concept that is related to a particular species, and sometimes even to a particular population, of plant or animal. Habitat, then, is an area with a combination of resources (like food, cover, water) and environmental conditions (temperature, precipitation, presence or absence of predators and competitors) that promotes occupancy by individuals of a given species (or population) and allows those individuals to survive and reproduce.<sup>687</sup>

What is wildlife? The authors propose a similarly inclusive definition that includes “the full array of all biota present in an ecosystem as well as their ecological functions”<sup>688</sup> From here, the text goes on to analyze the interconnections between wildlife and habitat, while noting the obvious: “That vegetation plays a central role in the life of many animals is self-evident.”<sup>689</sup> This text, as do others in the field, call for managing wildlife in this larger ecosystem context.<sup>690</sup> In some ways, the call differs little from Aldo Leopold's views of “thinking like a mountain” and protecting the integrity of biotic communities: “the land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.”<sup>691</sup>

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<sup>686</sup> See e.g., Montana Fish, Wildlife and Parks, *Fish Habitat*, <http://fwp.mt.gov/fishAndWildlife/habitat/fish/> (“Habitat is the KEY to wildlife management in Montana.”) (last visited Mar 3, 2017).

<sup>687</sup> MICHAEL L. MORRISON, BRUCE G. MARCOT, AND R. WILLIAM MANNAN, *WILDLIFE-HABITAT RELATIONSHIPS: CASES AND APPLICATIONS* 10 (3d ed. 2006).

<sup>688</sup> *Id.* at 380.

<sup>689</sup> *Id.* at 43.

<sup>690</sup> See e.g., J. MICHAEL SCOTT ET AL. (EDS.), *PREDICTING SPECIES OCCURRENCES: ISSUES OF ACCURACY AND SCALE* (2002); see also BRENDA C. MCCOMB, *WILDLIFE HABITAT MANAGEMENT: CONCEPTS AND APPLICATIONS IN FORESTRY* 7 (2d 3d. 2016) (noting that “vegetation management by forest-land managers is probably the greatest factor influencing the abundance and distribution of animals in our forests today”).

<sup>691</sup> ALDO LEOPOLD, *A SAND COUNTY ALMANAC: WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 239 (1949).

## ***B. State Wildlife Governance***

### *1. State Ownership and the Wildlife Trust*

The common claim that “states own wildlife”—full stop—is incomplete, misleading and needlessly deepens divisions between federal and state governments. The claim is especially dubious when states assert ownership as a basis to challenge federal authority over wildlife on federal lands. As reviewed in Part II(A), the U.S. Supreme Court has rejected this argument time and again. “To put the claim of the State upon title is to lean upon a slender reed,” ruled the Court in *Missouri v. Holland*.<sup>692</sup> Decades later, in *Hughes v. Oklahoma*, the Court called such claims a “19<sup>th</sup> Century legal fiction.”<sup>693</sup>

The states are on firm ground when declaring a “sovereign ownership” of wildlife that must be managed in the public interest. A more accurate phrase is to say that states manage wildlife under a doctrine of “sovereign trusteeship.”<sup>694</sup> In Part I, we highlighted trust-like language found in state constitutions, statutes, and case law. The so-called “wildlife trust doctrine” is essentially a branch of the public trust doctrine. It requires governmental trustees to manage the corpus of the trust—in this case wildlife—in the public interest and for the benefit of present and future generations, who are the beneficiaries of the trust.<sup>695</sup> But the development and application of the wildlife trust is limited when contrasted to other trust resources, such as navigable waterways, submerged lands, and public access.<sup>696</sup>

While rejecting claims of state ownership, the *Hughes* Court makes clear that there nevertheless remain “*legitimate state concerns* for conservation and protection of wild animals” and that the states are not “powerless to protect and conserve wild animal life within their borders.”<sup>697</sup> The *Kleppe* Court also acknowledged that states have “broad trustee and police powers over wild animals within their jurisdictions.”<sup>698</sup> Although it did not elaborate on these powers, the Court emphasized that they were nevertheless subject to

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<sup>692</sup> 252 U.S. 416, 434 (1920).

<sup>693</sup> 441 U.S. 322, 335 (1979), *overruling* *Geer v. Connecticut*, 161 U.S. 519 (1896).

<sup>694</sup> Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 Idaho L. Rev. 1, 59 (2000).

<sup>695</sup> “[B]asic trust principles . . . impose upon the trustee a fiduciary duty to ‘protect the trust property against damage or destruction’ . . . [and the] trustee owes this duty equally to both current and future beneficiaries of the trust.” *Juliana*, 2016 WL 6661146 \*19.

<sup>696</sup> See e.g., Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past and Charting Its Future*, 45 UC Davis L. Rev. 665, 678 (2012) (noting “precious little development of public trust principles in the fish and wildlife context over the past three decades” and that “the reported decisions that do exist seem reluctant to apply public trust principles vigorously to protect fish and wildlife resources”). But see Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L. Q. 53, 84 (2010) (noting that California courts, for example, have applied the public trust doctrine to wildlife).

<sup>697</sup> 441 U.S. at 336 (emphasis added).

<sup>698</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976).



the constitutional powers and supremacy of the Federal Government.<sup>699</sup> Similarly, in *Baldwin v. Fish and Game Commission of Montana*, the Court remarked that “the State’s control over wildlife is not exclusive and absolute in the face of federal regulation . . . .”<sup>700</sup> In Part II(A), we reviewed other cases where the courts struck down state wildlife laws—and assertions of state ownership of wildlife—as being in violation of the U.S. Constitution, thus clarifying that state powers over wildlife on federal lands are qualified.

The problem is that states seem to most frequently reference ownership and a public trust in wildlife when declaring broad powers to manage it in opposition to federal (or tribal) interests. In other words, states often claim the powers of a trustee without the accompanying responsibilities.<sup>701</sup> The public trust in wildlife raises a number of related questions. What are the state’s affirmative conservation duties under their trust obligations? What must they refrain from doing? Does the doctrine apply to just game species or to biological diversity more broadly?<sup>702</sup> Does it help resolve conflicts amongst species and if so how? Does the doctrine extend to the protection of wildlife habitat? How is the doctrine enforced and, in particular, do private citizens—the beneficiaries of the trust—have the ability to challenge state agencies to ensure protection of trust resources?<sup>703</sup> It is only when these and related questions are sufficiently answered by the states that the term “sovereign ownership” can be used meaningfully.<sup>704</sup>

To summarize, unqualified proclamations that states own wildlife and that the rights associated with ownership limit federal agencies from taking actions to conserve wildlife and its habitat must be challenged. We appreciate that the term “state ownership” is sometimes used as a shortcut to express the trust principles on which it is based and to characterize the state’s substantial interest in conserving wildlife. But the term is too often

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<sup>699</sup> *Id.*

<sup>700</sup> 436 U.S. 371, 386 (1978). *See id.* (“Nor does a State’s control over its resources preclude the proper exercise of federal power.”). *See also* *Otter v. Jewel*, D.C. District, January 5, 2017, Case No. 15-cv-1566, appealed to D.C. Circuit (Sovereign ownership of wildlife based on a state statute did not mean that management of sage grouse on federal lands by the federal government produced an injury-in-fact for the purpose of state standing to challenge federal land management plans).

<sup>701</sup> *See e.g.*, Susan Morath Horner, *Embryo, Not Fossil: Breathing Life Into the Public Trust in Wildlife*, 35 Land & Water L. Rev. 23 (2000).

<sup>702</sup> *See e.g.*, Jeremy T. Bruskotter, Sherry A. Enzler, Adrian Treves, *Rescuing Wolves from Politics: Wildlife as a Public Trust Resource*, 333 Science 1828 (2011); Edward A. Fitzgerald, *The Alaskan Wolf War: The Public Trust Doctrine Missing in Action*, 15 Animal L. 193 (2008-2009).

<sup>703</sup> *See* *Center for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588 (Cal. App. 2008) (affirming that the public has standing to challenge the State’s management of wildlife under the public trust doctrine).

<sup>704</sup> Eric Freyfogle and Dale Goble summarize: “The problem with taking the [wildlife] trust language literally is that there is no trust document that sets forth the precise terms of the trust.” So far, they say, “[C]ourts have had little or no occasion to struggle with these issues” and “[t]he duties states have and the limits they face in managing wildlife remain largely undecided.” ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 33-34 (2009). *Accord* Blumm and Paulsen, *supra* note , at 1471; and Horner, *supra* note , at 27.

used by the states as a way to challenge federal authority (as if “ownership” provides them with more clout than “trust responsibility”) and it does little to help solve conflict or find common ground with federal agencies.<sup>705</sup>

Further complicating matters is that the state’s wildlife trust duty, insofar as it is defined at all, is subject to the federal government’s statutory and trust obligations over federal lands. As we discuss above, courts have found a trust responsibility for federal lands and integral resources. Although its potential application and parameters remain ill-defined, the cases tend to reinforce and strengthen federal powers over public lands, not limit them.<sup>706</sup> This is in stark contrast to cases addressing the state public trust doctrine, which tend to restrict legislative and executive actions that run counter to trust responsibilities.<sup>707</sup> This is not to suggest, however, that the doctrine cannot be used to impose limits and obligations on federal agencies. The Redwood National Park litigation is the most well-known example. In a series of cases involving the Park, National Park statutes *and* the public trust doctrine were invoked to require affirmative action be taken to protect park resources from external threats posed by logging. There was, according to the court, an obligation to act: “[A]ny discretion vested in the Secretary concerning time, place and specifics of the exercise of such powers is subordinate to his paramount legal duty imposed, not only under his trust obligation but by the statute itself, to protect the park.”<sup>708</sup>

In moving forward, then, there would be value in attempting to harmonize the multiple trust obligations found on federal lands. As a starting place, the federal government must respond to state assertions of ownership and a wildlife trust by making clear that it too has statutory and trust obligations over federal lands, and they may extend to the conservation of wildlife. In some cases, the implication may be that the federal interest in wildlife preempts that of the states. But in other cases, when there are no competing objectives, a

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<sup>705</sup> As summarized by the Tenth Circuit in the Wyoming National Elk Refuge (NER) dispute, “The FWS’s apparent indifference to the State of Wyoming’s problem and the State’s insistence of a ‘sovereign right’ to manage wildlife on the NER do little to promote ‘cooperative federalism.’” *Wyoming v. U.S.*, 279 F.3d 1214, 1240 (2002).

<sup>706</sup> See *Wilkinson*, *supra* note , at 284 (“...the trust concept was used to reach results in favor of the United States, that is, to create and reinforce federal powers”); Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. Land, Res., & Envtl. L. 173, 174 (2004) (noting that the trust doctrine “supplements federal power rather than restricts it”). See also *Juliana*, 2016 WL 6661146 (applying the public trust doctrine to the federal government as a fundamental attribute of sovereignty, and finding that “plaintiffs’ public trust rights both predated the Constitution and are secured by it”). But see MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 305 (2<sup>nd</sup> ed 2015) (challenging the notion that the trust obligation does not impose a restraint on federal land management and noting that these early cases never tested the issue, as many of them centered on the federal government’s ability to protect federal lands from trespassers).

<sup>707</sup> See *Illinois Central Railroad Co.*, 146 U.S. at 453 (invalidating a transfer of state trust lands—submerged lands under Lake Michigan—to a private company). See also Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 Vt. L. Rev. 781, 783 (2010) (citing numerous cases to demonstrate limitations on the States’ ability to alienate trust resources).

<sup>708</sup> *Sierra Club v. Dept. of Interior*, 376 F. Supp. 90 (N.D. Cal. 1974).

more cooperative form of “co-trusteeship” is possible. Mary Christina Wood uses this term to characterize the multiple trust obligations—at the federal, state and tribal levels—as they apply to the interjurisdictional nature of salmon conservation and resource management more generally.<sup>709</sup> This co-trustee approach provides one way of re-framing what is too often an adversarial relationship between federal and state governments. As Wood explains, the co-trustee framework creates mutual rights to transboundary assets along with collective responsibilities for conserving the resource.<sup>710</sup>

## *2. Hunting and the North American Model of Wildlife Conservation*

Several conflicts examined as part of this project are partially driven by the way in which wildlife is managed and funded at the state-level. Many of the cases reviewed as part of this research involve federal agency actions that are perceived to be in conflict with the state’s interest in promoting and regulating fishing, hunting and trapping. The Alaska cases provide the clearest examples, as the State of Alaska views actions by the NPS and FWS to be in direct opposition to the state’s mandate to intensively manage wildlife population in order to maximize a sustained yield of prey species in order to achieve high levels of human harvest. The wolf management cases in Idaho provide another example. In the Frank Church River of No Return Wilderness, the State of Idaho undertook actions to protect elk from wolves and did so in complete contravention of the Wilderness Act.

In these cases, and others, those outside interests challenging federal agency action/inaction on state wildlife management, express a deep mistrust in a state’s willingness to protect non-game species and predators. Clearly, some interests prefer federal management, or continued protection under the ESA or federal land law, because they believe that most states prioritize the management of fish and game and the revenue it produces through their license-based funding systems.

This is one reason why it is important for the states to find a more secure and predictable stream of funding for non-game management. Increased funding for non-game species would build capacity at the state level and help harmonize federal-state responsibilities over wildlife on federal lands. It is also necessary to broaden the base of wildlife funding at the state level. Doing so would bring states closer to the principles wildlife trust management. Jacobson and others get to the crux of the matter:

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<sup>709</sup> Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 Env’tl. L. 43, 85 (2009).

<sup>710</sup> *Id.* at 84-85. Wood calls the approach the “sovereign cotenancy” over shared assets. A cotenancy is a “tenancy under more than one distinct title, but with unity of possession.” *Id.* at 85. She cites, among other cases, *Puget Sound Gillnetters Ass’n v. U.S. Dist. Court*, 573 F. 2d 1123, 1126 (9th Cir. 1978), where the Ninth Circuit invoked the cotenancy model to describe shared sovereign rights to migrating salmon. The most referenced case pertaining to co-trusteeship is *United States v. 1.58 Acres of Land* 523 F. Supp. 120 (D. Mass. 1981). *See Amicus Curiae, Alec L.*, 2014 WL 5841697 \*7 (reviewing the co-trustee/cotenancy model and its application to wildlife and other resources). *See also* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 Env’tl. L. 43, 71 (2009).

According to the [public trust doctrine], wildlife is owned by no one and held in trust for the benefit of all, but with the user pay-benefit model, those who both derive direct benefits from wildlife and fund wildlife conservation from user fees may believe they have the only legitimate voice in governance of public wildlife conservation and management. Further, this model logically encourages those who pay via licenses and permits for the privilege of using wildlife to expect greater benefits than those who do not pay. This is potentially fatal, deeply rooted inconsistency between rhetoric and reality in wildlife management in the United States, given the core premise of the [public trust doctrine] that wildlife is a public resource and no single stakeholder group should benefit from wildlife management more than others.<sup>711</sup>

It is beyond the scope of this Article to comprehensively address the North American Model of Wildlife Conservation. But we were surprised to find the Model referenced so often in the cases examined, as it is merely a set of principles and is not based in law or regulation. Its frequent invocation by AFWA and the states is problematic, from providing a particularly narrow and hunting-centric view of conservation history to asserting the power and authority of the states to regulate wildlife.<sup>712</sup>

First, the Model is often used to emphasize the importance of hunting, hunter access, and the significance of license-based revenue for state wildlife agencies.<sup>713</sup> This exacerbates the potential for intergovernmental conflict by displaying an institutional bias towards game species and hunters, primarily because of the role hunters play in funding state wildlife agencies. Instead of building bridges between federal and state governments, the Model is wielded to draw distinctions between federal and state priorities.

In addition, the Model further undermines the potential for cooperative federalism by failing to include a principle focused on habitat and the role played by federal lands in the conservation of wildlife. As detailed above, federal lands, and the habitat it provides, are increasingly significant to biodiversity. Any story of wildlife conservation failing to acknowledge the contribution of federal lands—and the laws and regulations governing them—is woefully incomplete.

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<sup>711</sup> Cynthia A. Jacobson, et al., *A Conservation Institution for the 21<sup>st</sup> Century: Implications for State Wildlife Agencies*, 74(2) J. WILDLIFE MGMT. 203, 205-206 (2010).

<sup>712</sup> See e.g., Brief for Ass’n of Fish and Wildlife Agencies as Amici Curiae 10, *Wisconsin v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin*, 135 S.Ct. 1842 (2015) (referencing the Model to assert that “States have legal authority to manage fish and wildlife within their borders, except for federally protected species”). See also Part I (providing examples of the Model’s role in various cases).

<sup>713</sup> See e.g., John Kennedy, Fish and Wildlife Management in Wilderness, National Wilderness Conference, Albuquerque, NM (Oct. 17, 2014) (paper on file with authors) (invoking the Model, on behalf of the Wyoming Game and Fish Department and AFWA’s State-Federal Relations Committee, to criticize management of federal wilderness areas because of restrictions on types of hunter use and access).

Another problem is that while the Model has a principle regarding wildlife as an international resource, it includes no such principle related to intergovernmental cooperation within the U.S. This makes little sense because of the transboundary and interjurisdictional nature of wildlife conservation. Some proponents of the Model suggest that it “must be viewed as a dynamic set of principles that can grow and evolve” and that its future “rests to a high degree on the adaptability and application of its principles to contemporary wildlife conservation needs.”<sup>714</sup> If so, the Model must consider more seriously how states can cooperate, as co-trustees, with federal and tribal governments in the conservation of wildlife.

### ***C. Interior’s Policy Statement on State-Federal Relationships***

In Part IIB(5)(C), we reviewed the Interior Department’s 1983 policy statement and regulations on state-federal relations in wildlife policy. Although the Policy appears in the Code of Federal Regulations “as a matter of convenience to the public,”<sup>715</sup> it was not subject to the rulemaking requirements of the Administrative Procedure Act,<sup>716</sup> and as such does not carry the force of law.<sup>717</sup> Despite its lack of weight, the Policy—which is not a bona fide regulation—was referenced in several of the cases we examined as part of this research and is frequently cited by agency officials.

Most of the provisions reiterate basic principles of federalism as applied to wildlife management on federal lands with references to the Property, Commerce, Treaty and Supremacy Clauses of the U.S. Constitution.<sup>718</sup> The Policy also provides that fish and wildlife “are held in public trust by the Federal and State governments for the benefit of present and future generations of Americans.”<sup>719</sup> It makes clear that “Congress may choose to preempt State management of fish and wildlife on Federal lands...,”<sup>720</sup> but then asserts that Congress nonetheless “reaffirmed” the “basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands.”<sup>721</sup>

The most plausible construction of this language is that the states manage wildlife (including regulating hunting, fishing, and trapping) up to the point where the federal government determines that state-regulated activities conflict with federal law and regulation. This construction comports with our review of the case law in Part II(A), which expresses the vast constitutional powers held by Congress to conserve wildlife on federal lands.

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<sup>714</sup> J.F. ORGAN ET AL., THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION: THE WILDLIFE SOCIETY TECH. REVIEW 12-04, at 29 (Bethesda, MD: The Wildlife Society and Boone and Crockett Club 2012).

<sup>715</sup> Dept. Interior Fish and Wildlife Policy; State-Federal Relationships, 48 Fed. Reg. 11,642 (1983) (43 C.F.R. Part 24).

<sup>716</sup> 5 U.S.C. § 553.

<sup>717</sup> Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

<sup>718</sup> 43 C.F.R. §24.3(b).

<sup>719</sup> 43 C.F.R. §24.1(b).

<sup>720</sup> 43 C.F.R. §24.3(a).

<sup>721</sup> 43 C.F.R. §24.3(b).

A separate provision of Interior's Policy muddies the water, however, by purporting to "reaffirm the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility, and to foster improved conservation of fish and wildlife."<sup>722</sup> The word "primary" is not defined and it is used in an inconsistent fashion throughout the Policy. Moreover, it is not clear "where" (or when) States have such "primary" authority. In one section, the Policy refers to state wildlife authority as providing a "comprehensive backdrop applicable *in the absence of specific, overriding Federal law*."<sup>723</sup> When placed in context, however, it becomes clear that this provision is merely another type of savings clause, recognizing state authority and responsibility where appropriate under existing law, and where appropriate to achieve the objective of "improved conservation of fish and wildlife."<sup>724</sup>

The Policy is more problematic with respect to lands managed by the BLM, where it asserts, without citing any specific statutory provision, that FLPMA "explicitly recognized and reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands."<sup>725</sup> The problem is that FLPMA did no so such thing. The word "primary" is not used in the statute nor is it implied.<sup>726</sup> And the regulations cannot "reaffirm" a principle of federalism that does not exist today and did not exist at the time of FLPMA's enactment.<sup>727</sup> Furthermore, as we discuss in Part II(B)(C)(5), FLPMA's savings clause does nothing to enlarge or diminish state responsibilities for wildlife management on federal lands and it explicitly reserves to the Secretary of Interior the authority to prohibit hunting and fishing for reasons of public safety, administration, and compliance with applicable laws.<sup>728</sup>

Interior's Policy on federal-state relations, particularly for BLM lands, represents an erroneous interpretation of the law. In its entirety, as currently written, the Policy is

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<sup>722</sup> 43 C.F.R. 24.2(a).

<sup>723</sup> 43 C.F.R. 24.1(a) (emphasis added).

<sup>724</sup> 43 C.F.R. 24.2(a).

<sup>725</sup> 43 C.F.R. § 24.4(c).

<sup>726</sup> Confusing matters even further, in another section of the same provision, Interior acknowledges its responsibility for multiple use management as defined in FLPMA, "including fish and wildlife *conservation*." 43 C.F.R. § 24.4(c) (emphasis added).

<sup>727</sup> Much of what eventually became FLPMA can be traced to the work of the Public Lands Law Review Commission whose recommendations were published as *One Third of the Nation's Land* in 1970. See *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (Washington, D.C.: Government Printing Office 1970). The Commission's chapter on fish and wildlife management demonstrates what was understood to be the balance of federal-state power prior to FLPMA's passage in 1976. Far from affirming the "primary authority" of the states to manage wildlife on federal lands, the Commission emphasized the extent of federal powers to preempt the states. Referenced within their recommendations pertaining to fish and wildlife is a 1964 opinion by the Solicitor of the Interior stating that "regulation of the wildlife populations on federally owned land is an appropriate and necessary function of the Federal Government when the regulations are designed to protect and conserve the wildlife as well as the land," and concluding that "this authority is superior to that of a state." *Id.* at 158 (Recommendation 60), citing Interior Dec. 469, 473, 476 (Dec. 1, 1964).

<sup>728</sup> 43 U.S.C. § 1732(b).

internally inconsistent, easily misconstrued, and provides little practical guidance because it does not sort through the fundamental tensions involved in managing wildlife on federal lands. To the extent it attempts to provide guidance, it is confusing and, in some passages, plainly contrary to law.<sup>729</sup> Although it is fair to say that states may manage wildlife on federal lands unless state management strategies or measures conflict with federal prerogatives, neither the BLM nor the Department of Interior has the authority to rewrite FLPMA,<sup>730</sup> much less to redraw the constitutional boundaries of federal and state powers that were so clearly addressed in *Kleppe v. New Mexico*.<sup>731</sup> There, the Court explained why “the complete power” that Congress has over public lands *necessarily* includes the power to regulate and protect the wildlife living there.”<sup>732</sup> Accordingly, we recommend that the Policy be corrected, this time using APA rulemaking procedures with adequate notice and meaningful opportunities for all interested stakeholders to comment.

#### ***D. Failure to Act: The APA, NEPA, and Beyond***

As shown in Part II(A), the constitutional authority of federal land agencies to manage wildlife is well settled, and federal land laws and regulations provide the discretion and sometimes the obligation to conserve wildlife on federal lands. One of the most difficult contemporary questions concerns circumstances where federal agencies have refused to take action to protect wildlife on federal lands.

When states are involved, the general questions tend to be 1) must the state ask the federal agency for permission to undertake its proposed use of federal land, and 2) if so, what if a state does not do so? The answer to the first question depends on whether the federal agency has a legal duty to act. Such duties may be found in the statutory authorities discussed in Part II(B) or in regulations furthering the purposes of those authorities. It is important to distinguish those circumstances where the agency has a duty to act from those where the agency has the authority to act but action is discretionary. A failure to engage in a discretionary act is characterized by law as mere “inaction” while a failure to execute a mandatory duty is characterized as a judicially reviewable “failure to act.”<sup>733</sup> The distinction has legal significance with regard to the second question above.

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<sup>729</sup> See 5 U.S.C. § 706(2) (directing courts to set aside agency actions that are “not in accordance with law; or . . . contrary to constitutional right, power, privilege, or immunity. . . .”); *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (finding that informal agency interpretations are not entitled to *Chevron* deference, but only receive the level of deference proportional to their “power to persuade”) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

<sup>730</sup> See 43 U.S.C. §§ 1702(a), 1702(c).

<sup>731</sup> 426 U.S. 529 (1976).

<sup>732</sup> *Id.* at 541 (emphasis added). *Kleppe* is discussed in detail in Section II(A), *supra* notes \_\_\_\_

<sup>733</sup> Under the Administrative Procedure Act, a reviewing court may “compel agency action unlawfully withheld.” 5 U.S.C. § 706(1). “Agency action” is defined as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*” 5 U.S.C. § 551(13) (emphasis added). For analysis, see Julie Lurman, *Subsistence at Risk: Failure to Act and NEPA Compliance in Post-ANILCA Alaska*, 36 Env. L. 289 (2006).

As explained by the Supreme Court in *Norton v. SUWA*, in order for courts to “avoid judicial entanglement in abstract policy disagreements” there must be a discrete “agency action” that an agency is required to take.<sup>734</sup> There was no duty for the BLM to act to prohibit motorized use in wilderness study areas in *SUWA* because the statutory provision at issue in FLPMA “is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it.”<sup>735</sup> Similarly, the Department of the Interior had no duty under FLPMA to intervene in the state of Alaska’s aerial wolf control program on federal lands in *Defenders of Wildlife v. Andrus* because the statutory language was discretionary; thus, there was no judicially reviewable “failure to act.”<sup>736</sup>

In addition to FLPMA, the plaintiffs in both *SUWA* and *Defenders of Wildlife* alleged violations of NEPA. The courts determined that where there was simply inaction, NEPA procedures were not required. Conversely, failure to act when there is a legal obligation to do so may trigger NEPA.<sup>737</sup> While NEPA itself does not compel any particular federal action, a NEPA analysis is required whenever a federal action is otherwise compelled by law (whether the agency engages in that action or fails to do so).<sup>738</sup> Moreover, “Nonfederal actors may . . . be enjoined under NEPA if their proposed action cannot proceed without the prior approval of a federal agency.”<sup>739</sup>

As described in Part II(B), the federal agencies have, where necessary, determined through regulations the circumstances where permits or other approvals are required prior to the use and occupancy of federal lands. In general, failure by a federal agency to require the necessary approval represents a “failure to act” and may result in the non-permitted activity being enjoined.<sup>740</sup>

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<sup>734</sup> 542 U.S. 55, 66 (2004).

<sup>735</sup> *Id.* (citing 43 U.S.C. § 1782(c)).

<sup>736</sup> *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1245-49 (D.C. Cir. 1980) (citing 43 U.S.C. § 1732). Claimants also do not appear to be able to sue a state based on federal inaction. *See The Wilderness Soc. v. Kane County, Utah*, 632 F.3d 1162, 10th Circuit 2011 (environmental groups had no rights in federal lands that would give them standing to challenge defendant county’s actions on those lands based on preemption under Supremacy Clause of the U.S. Constitution).

<sup>737</sup> *See* 40 C.F.R. §1508.18 (defining “actions” subject to NEPA as including “circumstance[s] where the responsible officials fail to act and that failure to act is reviewable (under the APA or otherwise)).”

<sup>738</sup> *See* Lurman, *supra* note.

<sup>739</sup> *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992) (citing *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 329 (9th Cir.1975)).

<sup>740</sup> *See id.* Such injunctions are not limited to NEPA violations. *See Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1024 (9th Cir. 2012) (holding that Forest Service’s approval of Notices of Intent to mine constituted “agency action” under the ESA and thus required consultation), *cert. denied*, 133 S. Ct. 1579 (2013), discussed *supra* at. *See also* *Dubois v. USDA* 102 F.3d 1273 (1st Cir. 1996) (expansion of ski resort enjoined where Forest Service failed to require a NPDES permit in accordance with the Clean Water Act).



In *Maughan v. Vilsack*, a court declined to enjoin the state of Idaho from contracting to kill wolves in a national forest wilderness area.<sup>741</sup> However, the court cautioned that its decision was only for the purposes of a temporary restraining order, and “the USFS has not yet reached a determination regarding the IDFG program let alone concluded that a special use permit is required.”<sup>742</sup> Until that time, there was no federal action subject to NEPA. In *Wilderness Watch v. Vilsack*, the same court enjoined the use of data obtained by the state of Idaho under a special use permit to use helicopters in the same wilderness area.<sup>743</sup> It concluded that the state must obtain approval from the USFS before undertaking its project in the wilderness area, and that any action taken by Idaho without federal approval would be contrary to the Wilderness Act.<sup>744</sup>

In *Friends of Columbia Gorge, Inc. v. Elicker* the court construed the Forest Service special use permit regulations to apply to approval of a reintroduction plan that would use federal land to establish a population of mountain goats in the Columbia Gorge National Scenic Area on federal land.<sup>745</sup> For this and other reasons the Forest Service was required to comply with NEPA. In Utah, the state released mountain goats on land adjacent to the Manti-La Sal National Forest, which proceeded to occupy a research natural area on the national forest that was designated to protect plant species that would be vulnerable to trampling. These species included three plant species listed as “sensitive” by the Forest Service. The court held that “allowing” the mountain goats on national forest land was not a federal agency action, and that the same special use permit regulations did not require such permits “every time state-managed wildlife enters federal land.”<sup>746</sup> These cases indicate that it is incumbent on the land managers to evaluate any state action against the

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<sup>741</sup> *Maughan v. Vilsack*, No. 4:14-CV-0007-EJL, 2014 WL 201702, at \*3 (D. Idaho Jan. 17, 2014) (accepting, for the purpose of a TRO, the USFS’s conclusion that “the activity is regulated by a State agency in a manner adequate to protect the lands and resources,” which is one of the exceptions found in the USFS’s special use permit regulations, as quoted *supra*).

<sup>742</sup> *Id.*

<sup>743</sup> *Wilderness Watch v. Vilsack*, 4:16-CV-12-BLW, 2017 WL 241320 (D. Id. Jan. 18, 2017).

<sup>744</sup> *Id.* at \* 7-8 (citing 16 U.S.C. § 1133(c)). The injunction was based in part on a violation of NEPA. Section XX, *infra*, assesses other issues posed by this case, in particular, the Wilderness Act’s requirement that the Forest Service make a finding that the activity is “necessary to meet minimum requirements for the administration of the area” before issuing its approval. *But cf.* *Wildearth Guardians v. U. S. Forest Service*, D. Idaho, filed 3/31/17, Case 4:14-cv-00488-REB (Predator hunting “derbies” organized by private parties and occurring on national forest lands did not meet any of the regulatory criteria requiring a special use authorization, and did not have effects subject to NEPA. However, the court struck documents submitted by plaintiffs suggesting such permits had been issued by the Forest Service for six other organized hunts. The BLM was initially a defendant in this case but the parties reached an agreement to settle those claims, regarding different regulatory language, out of court.)

<sup>745</sup> 598 F.Supp.2d 1136 (D. Oregon 2007) (subsequently vacated as a result of settlement). *See* 36 C.F.R. §241.2.

<sup>746</sup> *Utah Native Plant Society v. U. S. Forest Service*, D. Utah – March 2, 2017. However, the court also indicated that the Forest Service would have authority to remove the goats and would “need to take a position” after sufficient study. *Id.* at 10. The authority to remove wildlife was established in *Hunt* and *Kleppe supra*. (The Forest Service had earlier told the state it objected to the reintroduction.)

regulatory criteria for permits so that they can properly authorize (or deny) the use and occupancy of federal lands.

As noted in Part II(B), federal agencies are encouraged to complete memorandums of understanding (MOUs) with the states for cooperative management of fish and wildlife resources. It is the purpose of these MOUs to clearly delineate the authorities of the parties and assign responsibilities among them, and this should include identification of actions that would require a permit. It is critical that the assignment of authorities reflect the legal principles described above. Moreover, the MOU process should not be used to relinquish federal authorities without recognizing that such decisions may constitute actions subject to federal procedures required by NEPA or ESA.<sup>747</sup> The agencies should expect scrutiny of the assignment of blanket authority to states using MOUs.<sup>748</sup> For example, the relinquishment of federal authority to manipulate water levels in a national wildlife refuge was enjoined because it constituted a federal action subject to NEPA.<sup>749</sup> Similarly, an MOU that delegated authority to the state to assert federal reserved water rights in the Black Canyon of the Gunnison was enjoined as violating the federal agency's nondiscretionary duties to protect federal resources.<sup>750</sup> Conversely, the BLM's decision to relinquish management of elk feeding grounds to the state of Wyoming through an MOU rather than through land use permits was upheld in *Greater Yellowstone Coalition v. Tidwell* because FLPMA authorized the BLM to enter into such agreements, rendering a permit requirement superfluous.<sup>751</sup> The court also affirmed the applicability of NEPA to the MOU in lieu of the permit process.

An important take-away point is that MOUs cannot be used to evade legal obligations. Neither can they change a regulatory requirement, as that can only be done through APA rulemaking, nor can MOUs be used to alter statutory provisions, as that power is reserved to Congress. As a subsidiary point, if a federal agency were to use an MOU to transfer authority to a state to undertake actions that would be subject to federal requirements such as those required by NEPA or ESA, those requirements would attach to the MOU decision

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<sup>747</sup> *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976)).

<sup>748</sup> See *Gallatin Wildlife Association v. U. S. Forest Service*, CV-15-27-BU-BMM, 2016 WL 3282047 (D. Mont. June 14, 2016) (finding NEPA violations in an EIS for a Forest Plan where the Forest Service failed to disclose MOUs with the state of Montana and grazing permittees that acknowledged that the state would allow permittees to kill bighorn sheep to prevent comingling with domestic sheep), *appeal filed*, No. 16-35665 (9th Cir. Aug. 19, 2016).

<sup>749</sup> *Bunch v. Hodel*, 642 F. Supp. 363, 365 (W.D. Tenn. 1985). See *High Country Citizens' All. v. Norton*, 448 F. Supp. 2d 1235, 1249 (D. Colo. 2006) (holding that the relinquishment of a federal reserved water right was an agency action subject to judicial review).

<sup>750</sup> *High Country Citizens' All.* 448 F. Supp. 2d at 1245. ("A permanent relinquishment of a water right with a 1933 priority date for such a scientifically, ecologically and historically important national park must be viewed as a major action requiring compliance with NEPA.")

<sup>751</sup> 572 F.3d 1115 (10<sup>th</sup> Cir. 2009).

itself because that decision would constitute “affirmative conduct” necessary before a non-federal actor could proceed.<sup>752</sup>

### ***E. The National Wilderness Preservation System***

While all agencies have the authority to assert federal supremacy over the management of fish and wildlife on federal lands in order to fulfill their statutory mission, in federal wilderness areas the affirmative obligation to preserve wilderness character—including fish and wildlife species within wilderness areas—is mandated to the federal land-managing agency.<sup>753</sup>

Courts have pointed out, “The Wilderness Act is as close to an outcome-oriented piece of environmental legislation as exists. Unlike NEPA, . . . the Wilderness Act emphasizes outcome (wilderness preservation) over procedure.”<sup>754</sup> That outcome, as detailed above in Section II(B)(7), is one where an area’s wilderness character is protected in full, meaning: as far as possible, without human manipulation; where otherwise-prohibited uses are limited only to those necessary for the purpose of preserving that area’s wilderness character; where all commercial uses are prohibited, except those commercial services necessary for realizing *wilderness* purposes; and where each federal agency recognizes that whatever the original reason for an area’s designation, once it is also designated as wilderness management must conform to the Wilderness Act. Moreover, where subsequent legislation mentions wildlife management, those provisions must be read in tandem with the Wilderness Act, keeping in mind “the elementary rule” of statutory construction that exceptions to the Act’s overarching preservation mission are to be construed narrowly.<sup>755</sup>

We have reviewed dozens of agency-approved or state-proposed wildlife management actions in wilderness areas, and where errors in stewardship have been made we observed certain trends. It has long been noticed that the most common flaw in making a minimum requirements analysis or other evaluation document is that they are often “written to

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<sup>752</sup> See *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 54-55 (D.D.C. 2003) (“whether the federal agency must undertake ‘affirmative conduct’ before the non-federal actor may act” is a factor in determining whether an action is a “major federal action”).

<sup>753</sup> *Wilderness Watch v. Vilsack*, 4:16-cv-12-BLW, 2017 WL 241320 \*8 (Jan. 18, 2017) (“Congress made preservation of wilderness values ‘the primary duty of the Forest Service, and it must guide all decisions as the first and foremost standard of review for any proposed action.’”) (citing *Greater Yellowstone Coalition v. Timchak*, 2006 WL 3386731 \*6 (D. Idaho Nov. 21, 2006)).

<sup>754</sup> *Wilderness Watch v. Iwamoto*, 853 F.Supp.2d 1063, 1071 (W.D. Wash. 2012) (citing *High Sierra Hikers Assn. v. U.S. For. Serv.*, 436 F.Supp.2d 1117, 1138 (E.D. Cal. 2006)).

<sup>755</sup> See *Wilderness Watch v. U.S. Forest Serv.*, 143 F. Supp. 2d 1186, 1206 (D. Mont. 2000) (quoting *Spokane & I.E.R. Co. v. United States*, 241 U.S. 344, 350 (1916)) (“[E]xceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.”). See *supra* Part II(B)(7)(b) (discussing subsequently enacted, site-specific wilderness legislation).

support a pre-determined decision”<sup>756</sup> where preserving wilderness character is not the default conclusion. But beyond that, we have observed a fundamental misunderstanding of many facets of the law, and an apparent willingness to skirt legal obligations so as to accommodate more political desires. Two illustrative examples are analyzed below.

In 2007, FWS and Arizona Game and Fish Department (hereinafter AGFD) proposed to build two new wildlife waters in the Kofa Wilderness in Arizona, in addition to the sixty-five waters previously developed, to halt bighorn sheep population decline.<sup>757</sup> FWS authorized the construction as a project “categorically excluded” from detailed environmental analysis under NEPA.<sup>758</sup> It made a rudimentary minimum requirements analysis,<sup>759</sup> and approved the construction. The Ninth Circuit found that FWS had not provided a reasoned determination of necessity in employing the prohibited use of an installation. Its opinion created a litmus test for a minimum requirements analysis:

[A] *generic* finding of necessity does not suffice” [and] “the Service must make a finding that the structures are ‘necessary’ to meet the ‘*minimum*’ requirements for the administration of the area.... The key question—whether water structures were necessary at all—remains entirely unanswered... The Service’s own...[Investigative Report] identified many different actions [FWS could have taken]. Importantly, in contrast to the creation of new structures within the wilderness, the Wilderness Act does not prohibit any of those actions.... Yet nowhere in the record does the Service explain why those actions, alone or in combination, are insufficient to restore the population of bighorn sheep.... The documents as a whole demonstrate that the Service began with the assumption that water structures are necessary and reasoned from that starting point.”<sup>760</sup>

Subsequently, FWS released a formal determination that concluded it was necessary to have built these two more wildlife waters in addition to the sixty-five already developed

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<sup>756</sup> USFS Wilderness Advisory Group, Minimum Requirements Analysis: FAQs and Common Errors 16 (2015), available at [http://www.wilderness.net/MRDG/documents/MRA\\_FAQ.pdf](http://www.wilderness.net/MRDG/documents/MRA_FAQ.pdf) (last viewed Feb. 2, 2017).

<sup>757</sup> Kofa Natl. Wildlife Refuge & Ariz. Game & Fish Dept., INVESTIGATIVE REPORT AND RECOMMENDATIONS FOR THE KOFA BIGHORN SHEEP HERD (Apr 17, 2007) [hereinafter *Investigative Report*].

<sup>758</sup> U.S. Fish & Wildlife Serv., YAQUI AND MCPHERSON TANKS REDEVELOPMENT PROJECTS (May 2007) [hereinafter *Redevelopment CX*].

<sup>759</sup> U.S. Fish & Wildlife Serv., MINIMUM REQUIREMENTS ANALYSIS AND NEPA WORKSHEETS, YAQUI AND MCPHERSON TANKS REDEVELOPMENT PROJECTS (May 30, 2007) [hereinafter *Kofa original MRA*].

<sup>760</sup> *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1037-1038 (9<sup>th</sup> Cir. 2010) [hereinafter *Kofa*] (emphasis in original). The court listed the options that should have been analyzed, including closing areas, eliminating hunting, cancelling the transplant program, and killing predators.

because the installations need to be no more than three miles apart for “[o]ptimal distribution of water, especially for lactating ewes.”<sup>761</sup>

In the meantime, FWS authorized the killing of certain mountain lions in the Kofa Wilderness to limit predation on bighorns.<sup>762</sup> The rationale was that “[a]lthough mountain lions are also a natural wildlife resource . . . , mountain lion predation is likely additive to other sources of mortality and sufficient to prevent the Service from attaining bighorn sheep population objectives.”<sup>763</sup> The explicit bighorn population objectives were “based on...the need to maintain a population large enough to support . . . regional and landscape level transplant programs,”<sup>764</sup> and to make it easier for hunters to locate “trophy rams.”<sup>765</sup> The minimum requirements analysis correctly identified the No Action alternative as the one which would best protect wilderness character.<sup>766</sup> However, the Preferred Alternative—the removal of “offending” lions—was chosen. This choice, as with others made in this series of decisions, was based on supporting analyses that were fundamentally flawed.

One of the new tanks (Yaqui) is itself outside the wilderness and only part of the catchment system is within the wilderness.<sup>767</sup> The Yaqui could have been constructed without a catchment system with water supplied by tanker on the adjacent road outside the wilderness. As constructed, the Yaqui tank cannot have been the minimum necessary under any circumstance. Yet the FWS claims these two particular installations are among only twenty-four critical for bighorn survival in the Kofa NWR.<sup>768</sup> At the least, that would mean all the remaining wildlife water developments in the Kofa Wilderness fail the test of “necessity” by the FWS’s own analysis. Therefore, these developments cannot be maintained and should be removed, since their presence manipulates the “community of life,” creates unnatural conditions in the desert environment, and violates the wilderness definition as “undeveloped Federal land retaining its primeval character and influence.”<sup>769</sup>

In addition, killing predators, while not explicitly prohibited by the Wilderness Act, is implicitly prohibited as an action that trammels “the earth and its community of life.”<sup>770</sup> Perhaps in response to the vastly greater number of pictures of predators and mule deer

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<sup>761</sup> U.S. Fish & Wildlife Serv., Necessity Determination: Construction of the McPherson and Yaqui Wildlife Water Catchments, Kofa National Wildlife Refuge (Dec. 2014) [*hereinafter* Necessity Determination].

<sup>762</sup> U.S. Fish & Wildlife Serv., LIMITING MOUNTAIN LION PREDATION ON DESERT BIGHORN SHEEP ON THE KOFA NAT’L WILDLIFE REFUGE FINAL ENVIRONMENTAL ASSESSMENT (Dec. 2009) [*hereinafter* *Lion EA*].

<sup>763</sup> *Id.*

<sup>764</sup> *Lion EA*, *supra* note, at 7.

<sup>765</sup> *Id.* at 10.

<sup>766</sup> *Id.* at 112.

<sup>767</sup> Redevelopment CX 5, *supra* note.

<sup>768</sup> *Id.* at 4, citing Investigative Report, *supra* note, at 32.

<sup>769</sup> 16 U.S.C. § 1131(c).

<sup>770</sup> See *supra* notes \_\_\_\_ and accompanying text (analyzing the untrammelled nature of wilderness).

than of bighorn sheep recorded at the guzzlers,<sup>771</sup> FWS wrote, “Desert bighorn sheep will likely use the new water sources more frequently as they become familiar with the location of the waters.”<sup>772</sup> There is no discussion of how the predators and mule deer became familiar with the locations so much faster than the sheep. To decrease predation on sheep, it would be more consistent with the area’s wilderness character to stop providing supplemental water for bighorn predators and their alternate prey that appear to be less well-adapted to the harsh desert environment of the Kofa Range than Desert bighorn sheep.<sup>773</sup>

In the end, though, these errors are dwarfed by the fundamental mistake of skewing management of the Kofa Wilderness to meet a population goal of 800 bighorns, “considered the carrying capacity of the refuge,”<sup>774</sup> and with the objective to re-establish them as a “transplant source herd.”<sup>775</sup> To do so, AFGD and FWS determined that they needed to provide water in all areas of suitable sheep habitat, including areas that were otherwise “unavailable” for sheep due to the absence of water sources.<sup>776</sup> Maximizing production is an agricultural model, not a wilderness model. In nature, not every nook and cranny is filled with a “desirable” species and devoid of “offending” animals. Although FWS claims that its objective is to “provid[e] the public with the opportunity to view wild sheep in their native habitat,”<sup>777</sup> native habitat is not one with artificial water provided every three miles in an area cleansed of predators. Policy guidance from FWS is quite clear: “On wilderness areas within the Refuge System, we conserve fish, wildlife, and plants by preserving the wilderness environment.”<sup>778</sup> In the Kofa Wilderness, FWS has failed to do so by taking actions that degrade Kofa’s untrammelled quality and that are not the minimum necessary, all for non-wilderness purposes.<sup>779</sup>

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<sup>771</sup> As found in remote camera studies of the two new guzzlers, in the first year bighorn were seen utilizing the guzzlers only twice. The three top predators of bighorns (lions, bobcats, and coyotes) were documented at the installations over 500 times; mule deer were photographed over 800 times. Chris Barns, Personal Inspection of FWS Photographs, April 2012.

<sup>772</sup> *Id.* at 1.

<sup>773</sup> Necessity Determination, *supra* note , at 6. See Bill Broyles & Tricia L. Cutler, *Effect of Surface Water on Desert Bighorn Sheep in the Cabeza Prieta National Wildlife Refuge*, 27 WILDLIFE SOC’Y BULL. 1082-88 (1999) (finding that the availability of perennial surface water did not affect bighorn populations on another desert wilderness refuge).

<sup>774</sup> Investigative Report, *supra* note , 14.

<sup>775</sup> *Id.* at 19.

<sup>776</sup> *Id.* at 9.

<sup>777</sup> Necessity Determination, *supra* note , at 2.

<sup>778</sup> FWS Wilderness Policy, 610 FW 2.16. Section 2.16.B.3 is especially notable: “All decisions and actions to modify ecosystems, species population levels, or natural processes must be: (a) Required to respond to a human emergency, or (b) The minimum requirement for administering the area as wilderness and necessary to accomplish the purposes of the refuge, *including Wilderness Act purposes*. In addition, such decisions and actions must: (i) Maintain or restore the biological integrity, diversity, or environmental health of the wilderness area; or (ii) Be necessary for the recovery of threatened or endangered species.” *Id.* (emphasis added).

<sup>779</sup> Other agencies have engaged in similar actions, based on similarly flawed analyses. See U.S. For. Serv., Tonto Natl. For., Preliminary Environmental Assessment for Authorization of Helicopter Landings in Wilderness, Aug. 2014 (authorizing up to 450 helicopter landings for

Sometimes federal agencies try to apply the law, but are opposed not only by state agencies but by wilderness-oriented advocacy groups. In 2011, the Nevada Department of Wildlife (NDOW) requested a multi-year permit from the BLM Ely and Southern Nevada District Offices for using helicopters to access wildlife water developments within designated wilderness areas. BLM failed to undertake any analysis to determine whether any water installations were necessary in the first place. However, in preparation for their draft EA, BLM conducted a minimum requirements analysis on methods of access, concluding that helicopter access was necessary for 15 of the 20 big game water developments but that the others could be accessed on foot or by horse.<sup>780</sup> In the comment period following release of the draft EA, comments from an advocacy group supported helicopter access to all of the installations because it would be more economical for NDOW.<sup>781</sup> In addition to prioritizing economics over preservation, the letter contained two other fundamental errors. First, it asserted that NDOW “is responsible for the maintenance of these large game guzzlers.”<sup>782</sup> To the contrary, at some point after wilderness designation, BLM needed to determine whether each of the water installations is necessary to meet minimum requirements for administration of the area as wilderness. If so, it is the BLM’s responsibility to maintain them (though BLM may ask the state to undertake that responsibility) because preserving wilderness character is solely a federal responsibility.<sup>783</sup> If not, no maintenance can be allowed, and eventually the installations should be removed to comply with the Act.

Second, the letter claimed, “It is clear in both the Clark and Lincoln County legislation that Congress intended that helicopter use be allowed.”<sup>784</sup> However, Congress used the word “may,” demonstrating its intent that helicopter use be considered, not that it be

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capturing bighorn sheep despite almost half of the bighorn habitat being outside wilderness); NPS Isle Royale NP: Draft EIS to Address the Presence of Wolves, Dec. 2016 (identifying a Preferred Alternative that re-stocks the island with wolves, despite correctly analyzing the No Action Alternative as the one that best preserves wilderness character).

<sup>780</sup> Bur. of Land Mgmt., Ely and Southern Nev. Dist. Offices, Environmental Assessment - Issuance of Authorizations to Nevada Department of Wildlife for Wildlife Water Development Inspection, Maintenance and Repairs within BLM Wilderness Areas in Nevada: DOI-BLM-NVL030–2012–0003–EA - Draft, (Dec. 1, 2011), App. A. Access to one of the wildlife waters was determined to be as little as 0.2 miles from the boundary on a closed road.

<sup>781</sup> Letter from Shaaron Netherton, Executive Director, Friends of Nevada Wilderness, to Rosemary Thomas, Dist. Manager, BLM Ely Dist. Office, RE: Environmental Assessment: Issuance of Authorizations to Nevada Department of Wildlife for Wildlife Water Development Inspection, Maintenance and Repairs within BLM Wilderness Areas in Nevada: DOI-BLM-NVL030–2012–0003–EA. (Dec. 30, 2011). (note to editor, Shaaron is spelled correctly)

<sup>782</sup> *Id.* at 1.

<sup>783</sup> *See supra* Section II(B)(7).

<sup>784</sup> *Id.* at 3. This instance is not the only time this organization has urged BLM to prioritize non-conforming wildlife developments. *See* E-mail from Shaaron Netherton, Executive Director, Friends of Nevada Wilderness, to Neil Kornze, Director, Bureau of Land Management (Apr. 1, 2014) (on file with the authors) (asking that radio collars no longer be defined as an installation so sportsmen could put them on wildlife in wilderness without agency determination of necessity).

automatically approved.<sup>785</sup> Senator Harry Reid, who introduced the legislation, specifically noted that while helicopter access may be needed for some monitoring and maintenance, “some guzzlers can be easily accessed after a short hike from a road.”<sup>786</sup>

In the end, BLM authorized NDOW helicopter access to all sites, referring to “[a]dditional information...obtained during the comment period”<sup>787</sup> in disregard of the Wilderness Act and the BLM’s own analysis. This result degrades wilderness character by allowing prohibited uses that were shown not to be the minimum necessary—due, in part, to a mistaken reading of the extra special language in designating legislation.

As we have shown, the Wilderness Act unequivocally expresses the federal obligation to assert authority over fish and wildlife to assure the interests of all Americans in the preservation of wilderness character. We are troubled by the cases discussed above, among others, that demonstrate a problematic tendency on the part of some federal land agencies to reflexively acquiesce to state interests, when contrary to wilderness law.

### ***F. Intergovernmental Cooperation***

The states and AFWA have repeatedly asserted that there are not enough opportunities for intergovernmental cooperation in wildlife management and that more opportunities need to be created.<sup>788</sup> Wildlife conservation absolutely requires intergovernmental cooperation and transboundary thinking beyond political jurisdictions. One early example of such cooperation can be found in the Lacey Act which, among other things, provides federal penalties for transporting in interstate commerce any wildlife taken in violation of state

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<sup>785</sup> See Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282 § 208(c) (“Consistent with section 4(d)(1) of the Wilderness Act . . . the State may continue to use aircraft, including helicopters, to survey, capture, transplant, monitor, and provide water for wildlife populations in the Wilderness.”). See also Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424 § 209(c); Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 § 329(c) (similar). Under the Wilderness Act, preexisting uses of aircraft are “subject to such restrictions as the Secretary...deems desirable,” 16 U.S.C. § 1133(d)(1), and those restrictions are set forth in agency policy: “The BLM has discretion to either allow or prohibit the continuation of aircraft use where it has already been legally established prior to the designation of a wilderness area. Administrative use of aircraft is normally authorized under section 4(c) of the Wilderness Act, only where it is necessary to meet minimum requirements for the administration of the area for the purpose of the Wilderness Act.” BLM Manual 6340, *supra* note , at 1.6.C.2.b.

<sup>786</sup> Letter from Sen. Harry Reid to Bob Abbey, Director, Bur. of Land Mgmt., May 27, 2010 (on file with authors).

<sup>787</sup> Bur. of Land Mgmt., Ely Dist. Office, Decision Record for the Issuance of Authorizations to Nevada Department of Wildlife for Wildlife Water Development Inspection, Maintenance and Repairs within BLM Wilderness Areas in Nevada 3 (Jan. 13, 2012).

<sup>788</sup> See, e.g., Association of Fish and Wildlife Agencies, *Wildlife Management Authority: The State Agencies' Perspective*, Recommendation 5, at 22, February 2014 (suggesting that the cooperative language found in the Sikes Act could be strengthened and extended to all of the land management agencies).



law.<sup>789</sup> Another example is provided by the Pittman-Robertson and Dingell-Johnson Acts, as discussed in Part I(B), as both provide significant sources of federal funding for state wildlife management.

There is real value in constructive relationships between federal and state agencies and we strongly encourage their development. To that end, there are three central points to be made:

- 1) Multiple opportunities for intergovernmental cooperation already exist within federal decision making processes, but they are not always fully utilized. For instance, the Sikes Act, ESA, FLPMA, NFMA, NWRSIA, and several others contain such opportunities.
- 2) Intergovernmental cooperation must be a mutual and reciprocal obligation in order to live up to the name and to be as effective as possible. Therefore, there ought to be equal opportunity for federal entities to comment on and participate in state wildlife management decision making processes, and that is not always the case.
- 3) Intergovernmental cooperation cannot be a euphemism for the idea that either entity always gets what it wants. It ought to be, and generally is, an opportunity for informing agency decision making in meaningful ways. The law determines which level of government has the final decision making authority.

#### *1. Existing opportunities for intergovernmental cooperation at the federal level*

In section II(B) of this paper it was noted that the authorizing statutes for the various land units already provide multiple opportunities for intergovernmental cooperation at the federal level. For instance, in the NWRSIA and FLPMA in the planning and land acquisition programs substantive opportunities for intergovernmental cooperation are prescribed by statute. In addition to these opportunities for cooperation are those opportunities provided in other federal statutes and programs such as the National Environmental Policy Act (NEPA), the Landscape Conservation Cooperative network coordinated by the FWS, the Joint Ventures program of the FWS, and the State Wildlife Grants Program.<sup>790</sup>

NEPA presents what is probably the best known opportunity for intergovernmental cooperation. NEPA declares that it is the policy of the U.S. government to work "in cooperation with State and local governments" to pursue the conditions under which man and nature can "exist in productive harmony."<sup>791</sup> To carry out the policy of cooperation, NEPA requires the federal agency conducting an EIS to provide early notification to, and solicit the views of, any state entity which may be significantly impacted.<sup>792</sup> Any

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<sup>789</sup> 16 U.S.C. § 3371-3378.

<sup>790</sup> For a review of these and other programs see Vicky J. Meretsky, et al., *A State-Based National Network for Effective Wildlife Conservation*, 62(11) BioScience 970 (2012).

<sup>791</sup> 42 U.S.C. § 4331(a).

<sup>792</sup> 42 U.S.C. § 4331(D)(iv).

disagreements about impacts, between federal and state agencies, must be enumerated within the EIS.<sup>793</sup> States may also obtain official cooperating agency status, which requires the lead NEPA agency to "[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency."<sup>794</sup> This provides state governments with much greater access to the federal decision making processes than the general public enjoys.

One example of successful cooperation wrought by NEPA is the EIS process that was initiated following the *Wyoming v. United States* case about the National Elk Refuge. In the aftermath of that decision the FWS and the NPS (which manages neighboring Grand Teton National Park) embarked on a joint EIS process to develop a plan to guide the management of bison and elk across that federal landscape.<sup>795</sup> Because of the intergovernmental integration and cooperation made possible by that process, the state chose to incorporate some of the recommendations from the EIS in their own Bison Brucellosis Management Action Plan in 2008.<sup>796</sup>

In an even more focused attempt to encourage integrated management, the Landscape Conservation Cooperative (LCC) program was developed in 2010 in an attempt to facilitate collaboration between all levels of government, including federal, state, local, and tribal governments, as well as interested nongovernmental organizations, in order to "tackle large scale and long term conservation challenges."<sup>797</sup> There are 22 LCCs in the network. Each is self-directed by a voluntary steering committee, though the whole enterprise is coordinated through the FWS. The goals of the LCC program are to develop science-based information about the implications of climate change and other stressors, develop shared landscape-level conservation objectives and strategies, facilitate scientific exchange, monitor and evaluate the effectiveness of the LCC's strategies, and develop linkages between LCCs.<sup>798</sup> A 2015 National Academy of Sciences review concluded the LCC program provided a framework for achieving landscape level cooperation and "recognized the LCCs' ability to create opportunities for identifying common conservation goals and

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<sup>793</sup> *Id.*

<sup>794</sup> 40 C.F.R. § 1501.6.

<sup>795</sup> U.S. Fish & Wildlife Service and National Park Service, Final bison and elk management plan and environmental impact statement for the National Elk Refuge and Grand Teton National Park/John D. Rockefeller, Jr., Memorial Parkway 2007, *available at* <https://www.fws.gov/bisonandelkplan/Final%20Bison%20and%20Elk%20Management%20Plan%20and%20Environmental%20Impact%20Statement.htm>.

<sup>796</sup> Wyoming Game and Fish Department, Jackson Bison Herd (B101) Brucellosis Management Action Plan, May 20, 2008, *available at* [https://wgfd.wyo.gov/WGFD/media/content/PDF/Wildlife/BMAP\\_JACKSONBISON\\_FINAL.pdf](https://wgfd.wyo.gov/WGFD/media/content/PDF/Wildlife/BMAP_JACKSONBISON_FINAL.pdf).

<sup>797</sup> Landscape Conservation Cooperation Network website, *available at* <https://lccnetwork.org/>.

<sup>798</sup> Landscape Conservation Cooperation Network, *About Landscape Conservation Cooperatives*, <https://lccnetwork.org/about/about-lccs> (visited May 3, 2017).

leveraging efforts of diverse partners at a much greater scale than any one entity could achieve alone."<sup>799</sup>

Unfortunately, simply because cooperative processes are in place, through NEPA and many other statutes, does not always ensure that the federal agencies apply them in a way designed to elicit true state and local government cooperation. Bryan and others document several instances where federal processes are merely used as hoops to jump through rather than opportunities for true collaboration.<sup>800</sup> Federal agencies will need to improve internal culture and education to ensure existing opportunities for collaboration are as successful as possible.

Furthermore, even when state and local governments take advantage of opportunities to participate in federal processes, their intention is not always true cooperation. Bryan and others write: "From the local government perspective, a guarantee of early and meaningful involvement in the federal process is an important factor in determining whether to participate at all...On the federal side, agencies desire local government participants who are well informed about the federal planning process do not use the process for political grand-standing, and reciprocate by including federal planners in local land use planning."<sup>801</sup> For instance, there has been a movement recently among local governments to try to use the coordination clauses in FLPMA and the NFMA to force federal agencies to conform their actions to the wishes of local interests.<sup>802</sup> However, this is not a reasonable interpretation of the statutes, as was demonstrated in Part II(B) of this Article. Both provisions temper the coordination clauses with additional language that emphasizes that even though coordination is a worthy goal it cannot come at the expense of federal agencies meeting their statutory obligations.<sup>803</sup> Local and state governments must work to improve

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<sup>799</sup> LCC Press Release, *National Academy of Sciences Releases Its Review of the Landscape Conservation Cooperatives*, Dec. 3, 2015, available at <https://lccnetwork.org/news/national-academy-sciences-releases-its-review-landscape-conservation-cooperatives>.

<sup>800</sup> See Michelle Bryan, et al., *Cause for Rebellion? Examining How the Federal Land Management Agencies & Local Government Collaborate on Land Use Planning*, 6 J. of Energy & Env. L. 1, 14 (2016) ("Collaboration must be genuine and not perfunctory to truly be successful in the long term....").

<sup>801</sup> *Id.* at 2.

<sup>802</sup> Joshua Zaffos, *Counties Use a 'Coordination' Clause to Fight the Feds*, High Country News, May 11, 2015, available at <http://www.hcn.org/issues/47.8/counties-use-a-coordination-clause-to-fight-the-feds>.

<sup>803</sup> See *Alaska v. Andrus*, 429 F. Supp. 958, 962 (1977) (citing 43 U.S.C. § 1732(b)), *aff'd*, 591 F.2d 537 (9<sup>th</sup> Cir. 1979). Even the Public Lands Council, an interest group which represents cattle and sheep producers who hold public grazing permits, has recognized that this is a disingenuous reading:

Unfortunately, some local governments have taken the BLM consistency requirement to mean that by simply handing the BLM their land use plan, the BLM will be forced to comply with it. Not only is this incorrect, it undermines the ongoing negotiation and information sharing process that is at the core of coordination. Experienced coordinators recognize that the BLM has no obligation to adhere to any local plan or policy that is inconsistent with federal laws and regulations.

their own use of federal processes, to get involved knowledgably and with the intention of being good partners.

## 2. *Opportunities to cooperate at the state level*

If states are truly looking for meaningful cooperation between federal and state entities regarding wildlife management, then significant opportunities for federal input in state decision making must exist as well. State and local governments regulate the uses of private and state lands that are adjacent to federal lands and that may cause spill-over effects onto federal lands.<sup>804</sup> For example, the National Parks Conservation Association (NPCA) recently complained that the proposed Greater Yellowstone grizzly bear de-listing plan "Fails to provide the Park Service a formal seat at the table to work with state agencies on the management of park bears that occasionally move beyond park borders."<sup>805</sup> Without formal mechanisms to promote and institutionalize intergovernmental cooperation those issues will rarely be considered. Federal law, regulation and policy encourage intergovernmental cooperation, but there does not appear to be a similar emphasis found in state law and regulation. Again, cooperation, to be effective, must be a two-way street.

For example, when it comes to local land use decisions that have obvious impacts to wildlife, there is rarely an opportunity for federal involvement in the decision making. One exception is Oregon, where "local governments are specifically instructed to collaborate with federal agencies in areas such as natural resources, estuaries, and coastal shorelands."<sup>806</sup> Oregon might serve as an example of how other states could modify laws and regulations to encourage such cooperation. "[W]estern states could do much to advance the issue of local-federal land use planning by simply noting, in nonadversarial language, the importance of that issue in their enabling legislation."<sup>807</sup> For true cooperation to be successful, local, state, and federal governments must work as partners.<sup>808</sup> To that end, states should create similar opportunities for federal agencies to engage in state and local decision making.

## 3. *Cooperation does not equal federal acquiescence*

In none of the cooperation sections reviewed in Part II(B) does the statute in question *require* the federal government to follow state preferences. And in all cases the statutes do not *permit* the federal agency to relinquish its statutory obligations, even in the face of state

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Public Lands Council, *A Beginner's Guide to Coordination*, at 10 (2012), available at [http://www.co.harney.or.us/PDF\\_Files/County%20Court/public%20land%20issues/Coordination%20Handbook%20-%20Public%20Lands%20Council%20-%202012.pdf](http://www.co.harney.or.us/PDF_Files/County%20Court/public%20land%20issues/Coordination%20Handbook%20-%20Public%20Lands%20Council%20-%202012.pdf).

<sup>804</sup> See Bryan, *supra* note , at 3-5 (providing an overview of local and state land use planning).

<sup>805</sup> Stephanie Adams, *Iconic grizzlies deserve a more thoughtful plan*, Bozeman Daily Chronicle, Oct. 15, 2016, available at

[http://www.bozemandailychronicle.com/opinions/guest\\_columnists/iconic-grizzlies-deserve-a-more-thoughtful-plan/article\\_282c4660-a561-58c7-a0a8-9ba58329490f.html](http://www.bozemandailychronicle.com/opinions/guest_columnists/iconic-grizzlies-deserve-a-more-thoughtful-plan/article_282c4660-a561-58c7-a0a8-9ba58329490f.html).

<sup>806</sup> Bryan, *supra* note , at 4.

<sup>807</sup> *Id.* at 5.

<sup>808</sup> *Id.* at 2.

dissent. Cooperation under these federal statutes is an opportunity for other levels of government to have privileged access to the decision making process, to ensure that concerns are considered and available data is exchanged.

Agencies should absolutely determine if it is at all possible to meet the needs of other governmental entities, but cannot be expected to jettison their own statutory or constitutional obligations to reach that goal. For instance, in Alaska, where the state determined that the requirements of ANILCA conflicted with the state constitution, the resolution was that the state could not be forced to implement that statute. Likewise, if a federal agency determines that a state's request conflicts with its own legal mandates it too must refuse to acquiesce to them. However, in the absence of legal conflicts we encourage state and federal entities to seriously consider, and if possible accommodate, the interests of other governmental entities.

"[W]ildlife move across eco-regions...but management approaches change across arbitrary boundaries."<sup>809</sup> it is crucial therefore, that all levels of government cooperate and coordinate their efforts as much as is possible given the legal framework in which they operate. As the court in *Wyoming* states, "Wildlife management policies affecting the interests of multiple sovereigns demands a high degree of intergovernmental cooperation."<sup>810</sup> A structure for such cooperation is still largely absent from state processes, and while such a structure is already embedded in federal programs federal agencies could still improve its implementation in order to better fulfill its intent.

## CONCLUSION

This is a tumultuous time to be writing about public lands, federalism, and wildlife. Each has been impacted by the deep ideological fissures, polarization and partisanship characterizing modern American politics. Of course, there has always been a tension between federal and state interests in the management of federal lands and resources. Some of the earliest and most precedential disputes in the field initially revolved around wildlife management and the respective powers of federal and state governments. Slowly, over time, the courts answered these questions and made clear the extensive powers of the federal government to manage public lands and the wildlife thereon. These include *Missouri v. Holland* (1920), *Hunt v. United States* (1928), *Kleppe v. New Mexico* (1976), *Hughes v. Oklahoma* (1979), and dozens of other cases at all levels of the judicial system. A consistent pattern of primary federal authority emerges from these cases, but even where the Supreme Court corrected itself in overturning *Geer v. Connecticut*, it did so carefully and constructively, finding in favor of the federal government and interstate commerce, but also recognizing the "legitimate state concerns for conservation and protection of wild animals."<sup>811</sup>

A tension between federal and state interests is embedded in federal land and resources law. In each of the statutes reviewed in Part II(B), Congress required these lands and

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<sup>809</sup> *Id.*

<sup>810</sup> 279 F.3d at 1218.

<sup>811</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

resources to be managed in the national interest and recognized that federal authority is superior to that of the states. At the same time, Congress appreciated the historical and important position of the states in managing wildlife, and these statutes accordingly provide them a meaningful role to play in federal lands planning and management.

While the law is clear, the politics of wildlife management is not. In 1981, George Coggins and Michael Ward reviewed the law of wildlife management on federal lands and concluded that the “jurisdictional imbroglio is more political than legal.”<sup>812</sup> Nothing has changed in this regard. As discussed in Part I, some state interests continue to insist on their “sovereign rights” to manage wildlife on federal lands, notwithstanding the decisions made by the courts and Congress over the years. On the other hand are federal land agencies that are often in self-denial about their responsibilities for wildlife management and conservation. Too often adopting an overly narrow view of their responsibilities, we found federal land agencies applying their authorities in an inconsistent fashion, to the dismay of the states and those outside interests willing to challenge them.

The most unfortunate consequence of the federal-state conflicts reviewed here is that they draw attention away from the practice of wildlife conservation. A more productive way to proceed in the future is by working more constructively within the carefully crafted legal framework provided by the U.S. Constitution and federal land law rather than against it, and by embracing the conservation obligations that are inherent in federal lands and wildlife trust management.

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<sup>812</sup> George Cameron Coggins and Michael E. Ward, *The Law of Wildlife Management on Federal Lands*, 60 Oregon L. Rev. 59, 84 (1981). Coggins and Ward note that, in creating the delicate allocation of management jurisdiction in federal land law, “Congress has been extremely solicitous of state sensibilities” and that some members of Congress applaud “the federal self-denial.” *Id.* at 75, 83. They conclude that “[t]he main legislative theory seems to be on the order of ‘let’s just muddle through as best we can and let the courts handle the hard cases.’” *Id.* at 84-85.