



RECLAIMING THE NATIONAL INTEREST IN FEDERAL PUBLIC LANDS & WILDLIFE CONSERVATION

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EXECUTIVE SUMMARY

“States’ Rights” and the Trump Administration

The Report reviews the executive actions taken by the Trump Administration to provide state governments an unprecedented amount of control and authority over federal public lands and wildlife. These include multiple executive orders, secretarial orders and memoranda, federal rulemakings, and other federal agency policies and initiatives. These actions:

- 1) Fundamentally redefine the *public* in public lands management,
- 2) Make federal law subservient to more narrow state, local, and economic interests, and
- 3) Threaten the integrity of the federal public lands and wildlife conservation systems.

The Trump Administration has mostly used “states’ rights” as a way to deregulate federal environmental protection and to prioritize commodity production over conservation purposes. Revealed is a selective preference for state and local authority, with the litmus test being whether it comports with increased energy development and commodity production on federal lands. By itself, this finding is not all that surprising, as previous Presidents, both Republicans and Democrats, have selectively applied federalism principles to advance their political agendas. The difference now is in the scope and degree of actions being taken by the Trump Administration and members of Congress to divest the American public of its land and resources.

While the Administration seeks to provide states more power, it has simultaneously taken actions to eliminate opportunities for the citizens of those states to meaningfully participate in federal decision making processes. “Putting states back in charge,” as the President declares and this Report investigates, has nothing to do with enhancing public participation, fostering collaboration, engaging rural communities, or better utilizing the science and innovation often found at the state level.

The Affirmative Case for the National Interest in Public Lands and Wildlife Conservation

The recognition and celebration of a national interest is the foundation of federal public lands and wildlife conservation law. Though states are often provided a role to play in the administration of these laws, the priorities are

clear: these lands and resources shall be managed and conserved for the *American people of present and future generations*. Appendix I of the Report reviews these national interest provisions, many of which stem from the progressive-era roots of the public land and wildlife conservation systems.

These national interest declarations are forceful and unambiguous, embracing a common national purpose, heritage and obligation to conserve public lands and wildlife. The statutes create national systems to fulfill “vital national conservation purposes” and “for the benefit and inspiration of all the people of the United States.” Public lands and wildlife conservation can once again serve as a unifying force in the nation.

The movement to transfer federal public lands to the states precipitated a powerful political backlash. The response, however, was most often defensive in nature—with arguments focused on why state ownership or control of public lands is a bad idea. Arguments that states cannot afford management, that public lands would be privatized, that conservation will suffer, and so forth, are important but insufficient. Also needed is a more assertive and affirmative case for why the federal public land and wildlife conservation systems are in the national interest. This Report makes that case, drawing lessons from the progressive roots of the American conservation system.

To recognize the national interest in public lands and wildlife is not to solve all of the challenges, competing uses, and tensions evident in their management. Neither is it code for no commodity production on public lands. But it does call into question actions that transfer the ownership or control of public lands and resources from the American public to more exclusive state, local and economic interests.

As the American population increases, and more non-federal land becomes developed, the remaining public lands of the U.S. become increasingly significant for a wide range of uses and values, from providing recreational opportunities to protecting the nation’s wildlife and water. The Report explains the national significance of public land systems, such as the National Wildlife Refuge System, and the particular places found within those systems, such as the Tongass National Forest in Alaska.

Part III of the Report reviews the promise and peril of state authority in public lands and wildlife management. It recognizes the innovative governance that can be demonstrated at the state level, with several recent examples of states taking action in the absence of federal leadership. But the failure of some states to adequately conserve lands, resources and wildlife is the flip side of this story.

In this context, the Report provides two examples of what might happen if ownership or management authority was shifted from federal to state governments. First reviewed is the stark contrast between federal public lands and the revenue-generating model of state trust lands. This is followed by a discussion of why the federal government became active in wildlife conservation and how state level wildlife protection laws differ from the

federal Endangered Species Act (ESA). Transferring ownership and/or control to the states comes with serious consequences for conservation, as this section makes clear.

A Primer on Federal-State Relations in Public Lands and Wildlife Law and Management

A primer on the law and politics of federal-state relations, as it pertains to public lands and wildlife, is provided in Parts II and IV. It is written to assist conservationists, the media, political decision makers, and the public in understanding the complicated nature of this topic. Congress carefully balanced the tensions between national and state interests through an approach referred to as “cooperative federalism,” which safeguards federal supremacy while also carving out a role for state governments to play in effectuating the purposes of these laws. The most common mechanisms used to promote cooperative federalism are reviewed, including a discussion of savings clauses, cooperation and coordination provisions, and revenue-sharing programs. These and other mechanisms can be used in the future to build more constructive federal-state relationships.

Recommendations

It is time to reclaim the national interest in public lands and wildlife conservation. Part V of the Report concludes with the following recommendations that are a mix of administrative and legislative actions that should be taken. Going back to first principles and the system’s progressive-era roots is the path to be taken after the Trump Administration’s exploitation of public lands and “states’ rights.” Upon this foundation are a number of feasible and constructive approaches to improve federal-state relations. Congress and the next Presidential Administration can help ensure that they are used in the future.

1. To issue a new “National Interest in Federal Public Lands” Executive Order

The Order would require federal land management agencies to determine whether proposed rules and major federal agency actions would have a “substantial effect” on the national interest in public lands. The example of roadless area conservation in the National Forest System is used for illustration. The federal government’s trust responsibility to Native Nations, as it applies to public lands and wildlife, would also be included and make clear that any proposal or action shifting management control to state governments must also be evaluated in terms of this federal trust responsibility and how the action may impact tribes.



Going back to first principles and the system’s progressive-era roots is the path to be taken after the Trump Administration’s exploitation of public lands and “states’ rights.”

2. To more constructively use the cooperative federalism and collaboration provisions currently provided in federal public land and wildlife laws; to plan at the landscape-level; and to use existing authority to establish national advisory committees.

Public land and wildlife laws already provide state and local governments ample opportunity to meaningfully participate in management and planning. State and local governments must participate in these processes with an understanding that federal agencies have statutory obligations to make decisions in the national interest; and federal agencies should more strategically use these existing mechanisms as a way to address conservation issues that are interjurisdictional in nature.

Part of this approach should be planning and managing at larger-landscape levels, and the Report provides two examples (in planning and statute) of how this could be done and how it facilitates a constructive rethinking of the binary and traditional tension between federal and state governments.

Another recommendation is for federal agencies to use national advisory committees in accordance with the Federal Advisory Committee Act (FACA). While the Trump Administration has targeted them for elimination, national advisory committees provide an important voice for federal, state, tribal and other interests and they can be chartered in a way to help reconcile potential conflicts between federal and state governments.

3. To provide federal agencies the funding necessary to fulfill public land and wildlife conservation mandates.

How best to erode confidence in federal public land and wildlife agencies? To decrease their funding to the point they cannot effectively and efficiently perform their duties and meet their legal obligations. And the solution to this politically manufactured problem? To transfer ownership and control of national public lands and resources to the states. This recommendation begins with the history of this strategy followed by a review of the decreasing share of total federal spending devoted to federal public lands, recreation and conservation purposes. It makes clear the implications for federal agencies and recommends the funding necessary to fulfill their missions and mandates.

4. To provide federal incentives to enhance conservation laws, public participation and administrative capacity at the state level.

Federal inducements, incentives and revenue-sharing mechanisms are common methods used to promote cooperative federalism. Key to the success of these programs are the legal requirements to receive federal funds. Federal decision makers should build on the design of these programs and use federal funding and other inducements as a way to incentivize state conservation of public lands and wildlife. An example of how federal funding for future wildlife conservation could be tied to making institutional changes in state wildlife governance is provided. The ESA is used for further illustration, with the Report showing how some concerns about increasing state authority could be mitigated if the edge between federal and state management was softened.

I. INTRODUCTION

Each case is significant in its own right, but when viewed collectively they represent a fundamental redefinition of the public in public lands management and threaten the integrity of the federal public lands and wildlife conservation systems.

There is a national interest in the conservation of federal public lands and wildlife, one celebrated since the creation of Yellowstone National Park in 1872. Federal public land and wildlife laws obligate federal agencies to sustain and not impair public lands and to manage them for the “American people,” in the “national interest,” and for “present and future generations” of Americans. This is the *public* of public lands management.

For good reason, many of these laws also provide state and local governments multiple opportunities to constructively engage in federal lands and wildlife management and planning. A tension between federal and state power is evident from the beginning of the public land system. Incremental dial tuning—between increasing federal or increasing state powers—is to be expected with shifts in control of the executive and legislative branches. This tension is built into the fabric of American governance, animated so brilliantly in *The Federalist Papers*, and so we should not be surprised to expect the same intergovernmental tensions impacting public lands and wildlife.

Also to be expected is the politics and situational nature of federalism. Republican or Democrat, the tendency of a President is to be most amenable to state power and influence when the position of that state aligns with the position of the Administration.

What is new is the scope and unrestrained nature of recently proposed federal legislation and executive actions taken by the Trump Administration to assert state control and authority over national public lands and wildlife. These actions are far outside the mold of cooperative federalism and are of a new order entirely. Several recently introduced congressional bills radically depart from how federalism is normally employed in federal public lands and wildlife law, essentially making federal law subservient to more narrow state and local interests.

Other pathways, the primary focus of this Report, are the executive actions taken by the Trump Administration to provide state governments increased control, power and authority—especially if the state positions align with the Administration’s emphasis on commodity production and energy development. These include multiple executive orders, secretarial orders and memoranda, federal rulemakings, and other agency policies and initiatives.

The following cases reveal the breadth of these actions and the implications for public lands and wildlife. Each case is significant in its own right, but when viewed collectively they represent a fundamental redefinition of the public in public lands management and threaten the integrity of the federal public lands and wildlife conservation systems. Each of these cases are returned to for illustration in subsequent parts of the Report.

The Land Seizure Movement: From Seeking Ownership to Control of Federal Public Lands

The most prominent example is the so-called “land seizure movement.” Beginning in 2012, western state legislatures reinitiated old efforts to transfer federal lands into state ownership. What started in Utah with the Transfer of Public Lands Act (TPLA) quickly spread to every western state but California.¹ The TPLA called for legislation to establish actions to secure, preserve, and protect the state’s rights and benefits in the event that the federal government failed to transfer public lands to Utah.² But when other western states and their attorneys general conveyed skepticism about the legal arguments being made by Utah,³ the movement pivoted to the federal arena, with a focus on a Republican-controlled White House and Congress.

The political strategy coalesced in 2017, when Representative Jason Chaffetz of Utah introduced federal legislation that authorized the disposal of 3.3 million acres of federal land.⁴ The legislation was withdrawn a week after its introduction and it looked as though the transfer movement might be losing momentum given the unsuccessful attempts, at the federal and state levels, to transfer or privatize federal public lands.

But the land seizure movement is far from finished, though the political strategy has shifted from legislation seeking state *ownership* of federal public lands to a spate of bills providing state and local governments *control* over federal lands and resources. Previous work by the Bolle Center analyzes this development, and the multiple bills introduced and passed in the 115th Congress, that radically alter the traditional paradigm of federal lands management and essentially make federal law subservient to state authority.⁵ One bill, for example, permits any interested state to “assume exclusive jurisdiction” over leasing, permitting, and regulation of oil and gas activities on federal land upon approval of a “regulatory program” submitted to the Secretaries of Interior and Agriculture.”⁶ Another bill requires the approval of a State’s Governor, legislature and county governments before the designation of future national monuments,⁷ while another exempts from the ESA “any noncommercial species found entirely within the borders of a single state.”⁸

Other than the executive actions reviewed herein, the most significant developments since the introduction of these bills includes the political appointment of William Perry Pendley as acting director of the Bureau of Land Management. Pendley believes that the public lands administered by the agency he now leads are unconstitutional and should be privatized.⁹ Second, rancher Cliven Bundy, one of the central figureheads of the land seizure movement, continues to assert in court that all public lands within Nevada are “the property of the People of Nevada and Clark County, unencumbered and free of any claim by The United States of America.”¹⁰ Perhaps losing patience with the repetition of this argument, the state district court judge hearing the case concluded that “[i]t is simply delusional

The land seizure movement’s political strategy has shifted from legislation seeking state ownership of federal public lands to a spate of bills providing state and local governments control over federal lands and resources.

to maintain that all public land within the boundaries of Nevada belongs to the State of Nevada.”¹¹

Executive Order 13792 (Apr. 26, 2017), Review of Designations Under the Antiquities Act

In signing the National Monument Order, President Trump declared that he was ending “another egregious abuse of federal power,” and that, “Today we’re putting the states back in charge. It’s a big thing.”

President Trump’s Executive Order is premised on the belief that National Monument designations can result from a lack of public outreach and proper coordination with State and local officials and may “create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal and local governments, and otherwise curtail economic growth.”¹² It requires the Secretary of Interior to review those Presidential designations or expansions under the Antiquities Act made since 1996, where the designation or expansion covers more than 100,000 acres, or “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders,” and to provide a final report and recommendations to the President. One primary consideration in making the Secretary’s determinations are “concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities.” In signing the E.O, President Trump declared that he was ending “another egregious abuse of federal power,” and that, “Today we’re putting the states back in charge. It’s a big thing.”¹³ (Part II of the Report explains the inaccuracy of this claim and why states were never in charge of federal public lands.)

Roadless Area Conservation on National Forest System Lands in Alaska and Utah

In 2001, the U.S. Forest Service (USFS) adopted a national-level approach and federal rule for the conservation of 58.5 million acres of inventoried roadless lands.¹⁴ The 2001 Rule immediately faced a barrage of lawsuits from an assortment of states and other interests.¹⁵ Alaska fought a prolonged legal battle over the Rule,¹⁶ with the state once exempted from the Rule, but then covered by it once again.¹⁷ The Bush Administration sought a more state-based approach to resolving the roadless issue and it proposed replacing the 2001 Rule with a state petitioning process providing governors an opportunity to seek establishment of management requirements for roadless areas within their states.¹⁸ A variation of this state petitioning process, using the Administrative Procedure Act,¹⁹ was used by Idaho in 2008²⁰ and Colorado in 2012.²¹ More recently, as petitioned by the Governor of Alaska, the USFS initiated another state-based roadless rulemaking process for the roughly 9.5 million acres of roadless areas on the Tongass National Forest in southeast Alaska.²² The state believes application of the 2001 Rule “substantially impacts the social and economic

fabric of southeast Alaska”²³ and the Governor created a state-based citizen advisory committee to provide him and the State Forester recommendations on roadless area management.²⁴ In October, 2019, the USFS proposed to exempt the Tongass National Forest from the 2001 Roadless Rule. In doing so, the agency gave “substantial weight to the State’s policy preferences” and emphasis on “rural economic development opportunities.”²⁵ The rule, framed as a “deregulatory action” by the agency, is proposed as being preferable to a “one-size-fits-all approach to roadless area management.”²⁶

The State of Utah is similarly petitioning the U.S. Department of Agriculture for a Utah-specific Roadless Rule, with the proposal including several broad exemptions for timber cutting, sale and removal to “promote healthy and resilient forests and watersheds,” among other purposes.²⁷

Bureau of Land Management’s “Planning 2.0”

In 2017, the BLM finalized a new resource management planning rule, dubbed “Planning 2.0.” These regulations replaced those in effect since 1983 and covered more than 245 million acres of land managed by the agency. One of the primary goals of the Planning 2.0 initiative was to “improve the BLM’s ability to address landscape-scale resource issues and to apply landscape-scale management approaches.”²⁸ This, according to the Rule, would “enable the BLM to more readily address landscape-scale resource issues, such as wildfire, habitat connectivity, or the demand for renewable and non-renewable energy sources and to respond more effectively to environmental and social changes.”²⁹ In order to do this, the Rule permitted planning areas “to extend beyond traditional BLM administrative boundaries” and provided the Director of the BLM the authority to determine at what level in the agency decisions would be made when a plan crosses state boundaries, therefore permitting decisions at a national rather than more localized level.³⁰

The BLM’s rule was immediately condemned by a number of Western counties and extractive industries who stated that it “dilutes local and state input into land management decisions, further centralizes power with bureaucrats in Washington, D.C. and opens the door to allow radical environmental groups to insert their agenda into critical Resource Management Plans.”³¹ The political debate over the Rule centered on themes of national versus local decision making and the rhetoric and clichés about “federal overreach,” “federal takeovers,” “top-down bureaucracy,” and “one size fits all” policy making were predictable. “This rule takes away authority and power from those who know best how to manage our lands [and] resources” and “opens up our planning process to such an extent that we could have foreign, nongovernmental organizations having just as much say in how we manage our land and resources as the very stakeholders—the ranchers, the farmers across Wyoming and the West, and the people that they have elected to speak for them.”³² Shortly after its promulgation, the 2.0

Rule was nullified by Congress using the Congressional Review Act.³³ On the same day it was nullified, Secretary of Interior Ryan Zinke directed the BLM to devise a planning process that “is more responsive to local needs.”³⁴

Secretary of the Interior, Memorandum on State Fish and Wildlife Management Authority on Department of Interior Lands and Waters (Sept. 10, 2018)

Alaska responded to the Memo by providing the Secretary a 42 page list of priority issues and proposed regulatory reforms that would “amend statutes, regulations and policies to properly reflect the management authorities of the states for the management and use of fish and wildlife.”

Secretary Zinke’s Memo requires Interior agencies to review all “regulations, policies, and guidance that pertains to the conservation and management of fish and wildlife species on lands and waters under their jurisdiction that are more restrictive than otherwise applicable State provisions” and to prepare a report containing detailed recommendations for how to “better align” them with State preferences.³⁵ The Memo “recognizes States as the first-line authorities for fish and wildlife management and hereby expresses its commitment to defer to the States in this regard except as otherwise required by Federal law.”³⁶ At the time of this writing, agencies inside Interior are completing their required “regulatory alignment assessments” and some states are interpreting the Memorandum as an invitation to propose changes to federal laws, regulations and policies that will improve consistency with state fish and wildlife management. For example, Alaska responded to the Memo by providing the Secretary a 42 page list of priority issues and proposed regulatory reforms that would “affirm State fish and wildlife management authority” and “amend statutes, regulations and policies to properly reflect the management authorities of the states for the management and use of fish and wildlife.”³⁷ Included in the list are recommended changes to laws and regulations governing the National Parks, National Wildlife Refuges, lands managed by the BLM, federal wilderness areas, and threatened and endangered species.

Predator Hunting on National Preserves and Wildlife Refuges in Alaska

In 2015, the National Park Service (NPS) adopted regulations prohibiting several predator hunting practices on National Preserves in Alaska.³⁸ The U.S. Fish and Wildlife Service (USFWS) followed suit the next year by generally prohibiting predator control in Alaska refuges.³⁹ Such control measures were being implemented by the State under its “intensive management” law to increase ungulates (deer, moose and caribou) by permitting practices such as harvesting grizzly bears over bait, taking wolves and coyotes during denning seasons, and shooting bears from aircraft, among other controversial practices. The NPS and USFWS found the wildlife management actions of Alaska to be in direct conflict with federal law and the agency’s obligation to conserve fish and wildlife in the national interest. In 2017, Congress used the Congressional Review Act to nullify the Refuges

Rule.⁴⁰ Though the NPS Rule was safe from repeal because the window for challenging it closed prior to the end of the Obama Administration, the Trump Administration directed the Park Service to reconsider the decision, especially those elements that “directly contradict State of Alaska authorizations and wildlife management decisions.”⁴¹ The NPS’s proposed rule reverses course and once again permits the prohibited practices, with the goal of aligning NPS rules with those of the State of Alaska.⁴²

Secretary of Interior Order No. 3353, Greater Sage-Grouse Conservation and Cooperation with Western States (June 7, 2017)

The decades-long controversy and litigation over the proposed listing of greater sage-grouse came to a head in 2015 with the USFWS’s decision not to list the species as threatened or endangered under the ESA. The USFWS concluded that “adequate regulatory mechanisms” for the bird had been put in place by the states (and other actors) following an extensive collaborative effort to secure protections that would obviate the need for listing.⁴³ Then Secretary of Interior, Sally Jewell, referred to the “unprecedented” federal, state and private collaborative actions to prevent listing as “the largest land conservation effort in U.S. history.”⁴⁴ Because more than half of the bird’s remaining habitat is found on lands managed by the USFS and BLM, these agencies integrated the state-led conservation strategies into signed records of decision amending 98 land and resource management plans covering the range of the species.

Notwithstanding the significant leadership and role played by the states in developing the sage grouse conservation strategy, Secretary of Interior Ryan Zinke ordered a controversial review of the 2015 amendments. Secretarial Order No. 3353, issued in 2017, seeks “to enhance cooperation with the Eleven Western States primarily responsible for the management and conservation of Sage Grouse,”⁴⁵ even though the majority of the bird’s habitat is on federal public land. The Order calls for greater “cooperation,” “coordination,” “collaboration,” and “integration of State and local concerns and approaches into sagebrush management and conservation on Federal lands.” But there is a proviso: all of the cooperation articulated in the Order is to first comport with previous secretarial and executive orders promoting oil and gas development on federal land (Secretarial Order 3349 and E.O. Mar. 28, 2017). As a result, the subsequent actions taken by the review team implementing the sage grouse order closely follow the recommendations made by the Western Energy Alliance, an oil and gas industry trade group.⁴⁶

All of the cooperation articulated in the Sage Grouse Order is to first comport with previous secretarial and executive orders promoting oil and gas development on federal land.

II. FEDERALISM, PUBLIC LANDS & WILDLIFE LAW: A PRIMER

“Federalism” refers to the distribution of power between national and state and tribal governments. It is a complex and nuanced area of public lands and wildlife law. This section provides a broad overview and background on the law and politics of federal-state relations in the context of public lands and wildlife. (The tribal dimension of federalism is not addressed herein except to focus on the federal government’s legal obligations and trust responsibilities to tribes, as discussed below).

A. The Constitutional Context

The U.S. Constitution provides the foundation for understanding the nature of federal-state relations. The cooperative federalism provisions described below are bounded by the authority ascribed to Congress and the federal government by the U.S. Constitution. The extent of this authority is explained in more detail elsewhere,⁴⁷ but key provisions include the Property Clause, Treaty Clause, Commerce Clause, and Supremacy Clause. The bottom line is that the U.S. Constitution grants the federal government vast 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.

The Property Clause is particularly important because it provides Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁴⁸ The Supreme Court has repeatedly found that this power over federal land is “without limitations.”⁴⁹ The dispositive case is *Kleppe v. New Mexico* (1976), where the Supreme Court explains in no uncertain terms the “complete power” that Congress has over federal lands; “And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.”⁵⁰ The Supremacy Clause provides the basis for the doctrine of federal preemption, holding that state law must yield to federal law where the two conflict.

Congress’s plenary power over federal lands means that “states have legal authority to manage federal lands within their borders to the extent that Congress has chosen to give them such authority.”⁵¹ As shown below, Congress has used this discretion in varying ways, from providing states a robust role to play in the management of public lands and wildlife to none at all.

Notwithstanding this substantial federal authority, states are not powerless to regulate some uses on federal land. This is especially so with

state environmental laws, regulations, and permitting processes that may impact activities such as mining on federal lands. In *California Coastal Commission v. Granite Rock* (1987), the Supreme Court ruled that states are permitted to participate in the regulation of some uses of federal lands. In this case, the state was “not seeking to *determine* basic uses of federal land; rather it [was] seeking to *regulate* a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion.”⁵²

More recent state regulatory actions, such as California and Oregon’s bans on particular mining practices on national forest lands that are important salmon habitat, have been upheld by the courts citing *Granite Rock*.⁵³ As it pertains to federal mining law, state environmental protections and reasonable regulations can coexist with federal authority on public lands.

Progressives believed that strong federal actions were necessary to counterbalance the predatory corporate and economic forces in the nation having undue political influence at the state level of governance.

B. The National Interest in Federal Public Lands

The constitutional context provides the history and foundation of federal public land and wildlife laws and explains the national orientation of these statutes. Appendix A of the Report reviews national interest provisions in selected federal public land and wildlife laws. What is remarkable about these statutes, and what is largely missing from today’s political debate, is the clear recognition and celebration of a national interest in federal public lands and wildlife conservation. Though states are often provided a role to play in the administration of these laws, the priorities are clear: these lands and resources shall be managed and conserved for the *American people of present and future generations*.

This is the longest thread running through the history of federal public land and wildlife law, from the creation of federal land systems to more recent legislation. These national interest declarations are forceful and unambiguous, embracing a common national purpose, heritage, and obligation to conserve public lands and wildlife. Embedded in these laws are core public trust (doctrine) principles.⁵⁴ The statutes create national systems, networks, and policies to fulfill “vital national conservation purposes”⁵⁵ and “for the benefit and inspiration of all the people of the United States.”⁵⁶

The prioritization of a national interest can be traced to the progressive-era roots of the public land system, epitomized by those such as President Theodore Roosevelt and the first Chief of the USFS, Gifford Pinchot. Progressives like these believed that strong federal actions were necessary to counterbalance the predatory corporate and economic forces in the nation having undue political influence at the state level of governance. Conservation and public lands were central to this vision, with all citizens of the nation having a stake in the country’s natural and public lands heritage.

Pinchot minced no words about why he believed that states were unable to resist anti-conservation political pressures:

Since the nation's first "blood and treasure" were devoted to public lands, generations of American taxpayers have financially invested in developing, managing, protecting, and restoring them.

It has been my experience that a Legislature can seldom be induced by considerations from outside to take action against the opposition of interests dominant in the State [and] [j]ust as the waterpower monopolists and grazing interests formerly clamored for State control, well-knowing they could themselves control the States, so now the lumbermen will be found almost without exception against Federal and for State control, and for the same reason.⁵⁷

Pinchot believed that what saved the National Forest System and the USFS was "that both were free from State control" and that "[t]o scatter the control among the States would be to subdivide and distribute it among numerous comparatively weak and frequently changing hands."⁵⁸ "Time and again the Forests and the Service were saved in Congress by the support of the Central and Eastern States."⁵⁹ Pinchot concludes his assessment with a strong national-oriented narrative: "A variety of State jurisdictions over what is distinctly one problem, nation-wide in scope and in effect, in my judgment cannot but fail."⁶⁰

C. The Unifying Role of Public Lands

Pinchot and other progressives recognized the coalescing role of public lands in American history. As recounted by Professor and former Solicitor of Interior John Leshy, "The truth is that, over the nation's long history, the public lands have nearly always served to unify the country, not divide it."⁶¹ Leshy traces this development to the nation's beginning and the question of what to do about some colonies having fixed western boundaries, such as Maryland, while others had western land claims. The prevailing argument: "[T]hose western lands were being secured by the Revolutionary War sacrifices of lives and resources—or as they put it, the 'blood and treasure'—of *all* the states. Those lands should, therefore, be administered for the common benefit of the entire country. The only way to guarantee that was for the national government to take ownership and control of them."⁶²

It was, in essence, the "blood and treasure" of existing states that had been expended to acquire these lands from foreign governments and Indian tribes."⁶³ And it is this historical context in which to view the U.S. Constitution's Property Clause giving Congress the authority to "make all needful rules and regulations regarding" the public lands and other property "belonging to the United States."

Since the nation's first "blood and treasure" were devoted to public lands, generations of American taxpayers have financially invested in developing, managing, protecting, and restoring them. These were substantial national investments. Given this history, the question becomes how non-Western states and taxpayers would be justly compensated if our federal lands were to be transferred or privatized?

D. The Federal Trust Obligation to Indian Tribes

It was the federal government and not western states that acquired Western lands from foreign nations and Indian tribes through “purchase or conquest.”⁶⁴ This term, used by the Supreme Court in 1823, reminds us of how our federal land system traces back to aboriginal Indian title and America’s history of western settlement.

This history has important implications for federal-state relations because the federal government has a unique trust responsibility to protect the rights, assets, and property of Indian tribes.⁶⁵ This trust responsibility extends to protecting those off-reservation use rights that were reserved by tribes through treaties.⁶⁶ Hundreds of treaties precede the creation of federal land agencies, and many of them contain provisions that reserved rights on what is now federally managed land.⁶⁷ These off-reservation treaty rights often include hunting and fishing rights, gathering rights, water rights, grazing rights, and subsistence rights.⁶⁸ The trust responsibility to protect these rights is recognized by Congress, the executive branch, and the courts.⁶⁹

The federal government’s trust responsibility to tribes is too often missing from the debate over federalism and public lands and wildlife. For example, the land seizure movement essentially ignores the extent of tribal rights found on public lands—rights that must lawfully be protected by the federal, and not state, government. The proposed state-based roadless rule in Alaska provides an example. The Organized Village of Kake (a federally recognized tribal government) is opposed to Alaska’s state petition and the inadequate tribal consultation used to write it. A resolution in support of the 2001 Roadless Rule emphasizes the Tribe’s use of roadless areas on the Tongass “for millennia,” for subsistence purposes to spiritual practices and other customary uses.⁷⁰

Of course, federal and tribal government positions on public lands and wildlife management often diverge. The point, though, as discussed again in Part V(A), is that any proposal or action shifting management control to state governments should also be evaluated in terms of this federal trust responsibility and how the action may impact tribes.



The land seizure movement essentially ignores the extent of tribal rights found on public lands—rights that must lawfully be protected by the federal, and not state, government.

E. The Increasing Ecological Significance of Federal Public Lands

Roughly 28 percent of the U.S. and 47 percent of the American West is comprised of federal public lands.⁷¹ These lands make the West...the West. And as the American population increases, and more non-federal land in the region is developed and used for economic purposes, the remaining federal estate becomes increasingly significant for a wide range of uses and values, from providing recreational opportunities to protection of the nation’s wildlife and water.⁷²

Federal lands are increasingly significant to the conservation of the nation's biological diversity. The most recent comprehensive assessment focused on the distribution of ESA-status species, and those species defined by NatureServe as imperiled, shows that federal lands are critically important refuges for fish and wildlife.⁷³ For example, the USFS harbors about 23 percent of species with ESA-status, followed by the National Park Service (19%), USFWS (18%), and BLM (16%).⁷⁴ The assessment concludes that "[g]iven the current and projected pace of private land development, we can expect that federal lands will assume greater importance for the protection of our native species."⁷⁵

To put these percentages in context, consider the importance of national forest lands to fish and wildlife more broadly:

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.⁷⁶

Water provides another example of the ecological significance of public lands. The most compelling place to begin the story is Glacier National Park in Montana because its water can be considered the headwaters of the nation, flowing from the mountains of the "Crown of the Continent" to the Pacific, Atlantic and Hudson Bay watersheds.⁷⁷ The National Forests provide further illustration, as they provide the largest single source of water in the U.S.⁷⁸ Roughly 33 percent of the West's water is provided by the National Forests, with the number nearly 50 percent for California and the Pacific Northwest.⁷⁹

The very history of the National Forest System illuminates the significance of water, which transcends state boundaries. For example, the Weeks Act of 1911 is considered by historians to be "The Law That Nationalized the U.S. Forest Service."⁸⁰ The catalyst for the law's passage were destructive floods in eastern states, traced to poorly regulated industrial logging on private lands, and the inability of those states to afford the acquisition of these lands. As a result, and with the support of eastern states, the statute authorizes the Secretary of Agriculture to purchase "forested, cut-over, or denuded lands within the watersheds of navigable

streams” and it is responsible for bringing the National Forest System to the East—making the System truly national.⁸¹

Numbers and stories like these demonstrate why it is necessary to step back and look at two things: (1) the national significance of public land systems and, (2) the potential significance of any single unit in that system.

The National Wildlife Refuge System provides an example of the first. Though the Refuge System varies considerably, two of its core attributes are the protection of representative ecosystems found in the U.S. and sustaining migrating animals, both of which transcend state boundaries. The System gradually evolved so that Refuges are strategically placed in four national north-south flyways for migratory bird conservation. As explained by law professor and Refuge expert Robert Fischman, it was President Franklin Roosevelt’s effort to link refuges together to achieve national conservation purposes that led to the renaming of various “reservations,” “bird refuges,” and “migratory waterfowl refuges” to something more purposeful: National Wildlife Refuges.⁸²

The Tongass National Forest in southeast Alaska provides an example of one particular place having a substantial national interest. This is not just any national forest, but one that is exceptional and significant on a global level.⁸³ The northern portion of coastal British Columbia and southeast Alaska make up the largest temperate rainforest on Earth, with the Tongass representing roughly one third of the world’s rare coastal forest. Scarce old growth forests also explain the significance of this place, with the USFS managing most of the nation’s remaining old growth, and much of that is located in the roadless areas of the Tongass. The marine-influenced forest systems found on this rare island archipelago are driven by some of the most abundant wild salmon runs on the planet, which support one of the world’s most successful commercial salmon harvests. The list goes on, from the amount of carbon stored on the Tongass to the traditional and subsistence-based lifeways the forest supports. To borrow language from the Wild and Scenic Rivers Act, the Tongass is “outstandingly remarkable” and there is a corresponding duty to protect this special place in the national interest.

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F. What Constitutes the National Interest?

The national interest provisions excerpted in Appendix I are foundational principles of the federal public lands and wildlife conservation systems. These are national interlinked systems that transcend state boundaries and local economic interests. Of course, the definition of a national interest is dynamic and can be used to advance very different visions of the public interest in public lands. The agenda of “energy dominance,” for example, is framed by the Trump Administration as serving the national interest. So too is the President’s “Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals,” that “are vital to the Nation’s security and economic prosperity” (E.O. 13817).⁸⁴ This framing goes back to nineteenth-century



To recognize the national interest in public lands and wildlife is not to solve all of the challenges, competing uses, and tensions evident in their management. Neither is it code for no commodity production on public lands. But it does call into question actions that transfer the ownership or control of public lands and resources from the American public to more exclusive state, local and economic interests.

public land laws that were designed to economically develop and settle the American West, from the Homestead Acts to the General Mining Law of 1872. The point: our understanding of what constitutes the national interest has changed and will change again.

That the national interest can be defined so differently does not make it mere political rhetoric. It means that the concept must be critically examined and subject to scrutiny. Just as other broad concepts in public lands law, such as multiple use or non-impairment, should be subjected to reasoned analysis, so too should invocations of the national interest.

Some of the recommendations made in Part V, such as a new “national interest in public lands” executive order and the use of existing NEPA-based public land planning processes, provide frameworks in which this type of analysis can be done. Other laws, such as the National Historic Preservation Act, provide platforms whereby particular places are determined to be in the “nation’s heritage” following a structured process, analysis, and finding or determination. Such analysis may reveal that a law or policy is serving not a broad national interest, but rather an exclusive industry interest, with no or marginal benefits to present and future generations of Americans. To filter these questions through the lens of a national interest will be a valuable exercise that will promote better decisions.

To recognize the national interest in public lands and wildlife is not to solve all of the challenges, competing uses, and tensions evident in their management. Neither is it code for no commodity production on public lands. But it does call into question actions that transfer the ownership or control of public lands and resources from the American public to more exclusive state, local and economic interests. The bottom line is that federal land and wildlife agencies have an obligation to manage for present and future generations of the American public, and the states do not.

III. The Promise and Peril of State Authority in Public Lands and Wildlife Management

Effective conservation requires strategies that are transboundary, interjurisdictional, and landscape-scale. This is especially so given the complex intermixed ownership patterns that characterize the Western U.S. This was a foundational principle of “ecosystem management,” and though the language is now different, an “all lands” approach is still smart conservation.

There is no shortage of innovative governance at the state level and states are rightfully regarded as “laboratories of democracy.” States regularly take action in the absence of federal environmental leadership. The most recent examples include state-based climate change litigation, states opposing proposed coal export terminals on the West Coast, states challenging the lifting of the federal coal leasing moratorium, California’s tailpipe pollution waiver, and the multi-state fight over federal offshore drilling: these and other examples of state leadership should moderate any knee-jerk opposition to empowering them under any condition.

But the failure of some states to adequately conserve lands, resources and wildlife is the flip-side of this story. After all, the passage of so many federal environmental laws in the 1960s and 1970s was in part due to the failure of state governments to protect the environment.⁸⁵ In the context of public lands and wildlife conservation, the differences between federal and state systems are stark, with considerable variation between the states.

Provided below are two examples showing what might happen if ownership or management authority was shifted from federal to state governments.

A. Federal Versus State “Public Lands”

There is a diversity of public land systems administered at the federal level, from the dominant use conservation statutes governing the National Park and Wildlife Refuge Systems to the multiple use frameworks of the USFS and BLM. The level of environmental protection varies within each system. As discussed above, and detailed in Appendix I, these are fundamentally *public lands* because they are owned by the American public and their governing statutes require them to be managed and conserved for present and future generations of American citizens and in the national interest.

The history of state land sales is but one reason to suspect that a transfer of federal lands to the states would lead to their eventual privatization.

State owned lands are far different. There are several types of land owned by states, including sovereign and offshore submerged lands (managed as public trust doctrine resources) and a variety of other state parks, natural areas, and other conservation designations that are typically more fragmented and smaller in size.⁸⁶ But the most dominant land category at the state level in the American West, and the most politically relevant to the land seizure movement, are state trust lands.⁸⁷

State trust lands were granted by the federal government to the states as part of their admission to statehood. States have a legal and fiduciary obligation to use these lands to generate revenue for designated trust beneficiaries, most often common schools and other state public institutions. The mandate for states to generate revenue for a more narrow range of interests explain why the land seizure movement is so enamored with state ownership and control of federal lands.

The problem is that state trust lands are not public lands as that term is commonly understood. The most authoritative resource on state trust lands makes clear that “[s]tate trust lands are publicly owned and managed, but they are not ‘public lands in the sense that we have grown accustomed to thinking about natural parks and forests. They are ... managed as trusts for clearly specified beneficiaries, principally the common schools.”⁸⁸ State land and natural resource agencies make this point perfectly clear, such as Arizona’s statement that “state trust lands are not ‘public lands,’ as are Federal lands under the management of the U.S. Forest Service or Bureau of Land Management. Federal ‘public lands’ are managed for the benefit and use of the public, while State Trust lands are managed for the benefit of 13 Trust beneficiaries, which include the public schools and prisons.”⁸⁹

The fact that trust lands are not public lands has significant management implications, from the ability of the public to access, hunt and recreate on trust lands to the prioritization of economic uses over environmental protection and the more limited opportunities for citizen participation and judicial review at the state level.⁹⁰

What happened to the substantial amounts of trust lands conveyed to the states by the federal government is another important part of this story. Most of the early states receiving granted lands quickly sold them. Western states that were subsequently granted trust lands provided restrictions on their sale, though others liquidated the majority of their lands. Nevada, for example, retains roughly 3,000 acres of its original 2.7 million acre grant.⁹¹ Idaho sold off 41.4 percent of its original state land holdings for development (1,760,783 acres out of 4,254,448 granted at statehood), most often to timber companies and livestock interests.⁹² And what about Utah, where the latest sagebrush rebellion is headquartered? Roughly half of the lands granted to the state have been sold into private ownership.⁹³ This history is but one reason to suspect that a transfer of federal lands to the states would lead to their eventual privatization.⁹⁴

B. Federal Versus State Wildlife Conservation

As discussed in the Introduction, the Department of Interior is planning to “better align” its legal obligations to conserve fish and wildlife on federal lands with the preferences and priorities of state governments. And on the legislative front, one of the most common proposals to reform the ESA is to narrow the role of federal wildlife agencies and to provide state governments more discretion, flexibility and authority. While a fuller accounting of state wildlife governance is provided in Part V(D), necessary now is to consider why the federal government became active in wildlife conservation in the first place and how state level wildlife protection laws differ from the ESA.

The best place to begin is with the Migratory Bird Treaty Act of 1918,⁹⁵ what can be considered the origin of modern federal wildlife law.⁹⁶ The Act ratified the Migratory Bird Treaty with Great Britain (on behalf of Canada) and imposes prohibitions on the taking, capturing, hunting, and killing of protected birds. At the time, wildlife was considered “owned” by the states and what was considered to be federal intrusion into exclusive state authority was central to the legislative history of the Act. Almost immediately after passage, states challenged the constitutionality of the law. In *Missouri v. Holland* (1920), the Supreme Court upheld the statute and explained the insufficiency of state protection. Said the Court:

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.**⁹⁷

Notwithstanding the initial opposition from the states, the MBTA eventually catalyzed what has become an elaborate conservation system for the conservation of migratory birds. This includes the federal prohibitions in the MBTA, the establishment of multi-state coordinating bodies known as Flyway Councils, and innovative federal and state (and private) streams of public funding for conserving waterfowl habitat.⁹⁸

Fast forward to 1973 and the enactment of the ESA. Like the MBTA, it was not “sufficient to rely upon the States” to conserve an increasing number of imperiled species. As the ESA declares, “[V]arious species of fish, wildlife and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; [and] these species ... are of esthetic, ecological, education, historical, recreational, and scientific value to the Nation and its people.”⁹⁹

Many species are now protected by the ESA because of the failure of the states to protect them.

There are currently 1,663 species listed as endangered or threatened in the U.S.¹⁰⁰ Of course, there are several reasons why species become federally protected. As co-trustees of fish and wildlife, federal and state governments share in the blame and accountability for the extinction crisis. That said, many species are now protected by the ESA because of the failure of the states to protect them. Some of the most iconic species were in fact listed in part because of the “inadequate regulatory mechanisms” in place at the state level.

With few exceptions, most states have relatively weak legislative programs designed to recover imperiled species. One recent study, for example, shows that “[s]tates generally fail to prohibit habitat impairment by private parties, lack permit programs to minimize incidental harms to species and spur habitat conservation, and do not restrict state agency actions that undermine species recovery.”¹⁰¹

Another comprehensive study concludes that “conservation laws in most states are inadequate to achieve the ESA’s conservation and recovery goals.”¹⁰² The contrast between federal and state laws are striking in this regard, as the following research findings make clear:

- State expenditures on the conservation of federally listed species make up roughly 5 percent of total ESA spending.
- Only 18 states cover all animals and plants covered the federal ESA, with 32 states providing less coverage.
- 23 states do not require that decisions about whether to provide protections to vulnerable species be based on best scientific data.
- 42 states have limited or no inter-agency consultation requirements.
- Only 14 states allow citizen petitions close the level provided in the federal ESA.
- 38 states fail to provide any authority for designation of critical habitat for listed species.
- 40 states do not consider habitat modification to be prohibited take.
- 49 states have limited restrictions or do not restrict private land use in any way.
- 48 states provide varying, limited, or no planning authority for the recovery and delisting of species.¹⁰³

Given the permissive and incomplete nature of most state endangered/imperiled species laws, both of these research teams conclude their assessments by making clear that the devolution of federal authority to states “is likely to undermine conservation and recovery efforts, lead to a greater number of species becoming imperiled, and result in fewer species recovered,”¹⁰⁴ and that “[t]here is no good reason to believe that state governments with smaller budgets and weaker laws will achieve greater conservation success than the federal program.”¹⁰⁵

IV. Cooperative Federalism in Public Lands and Wildlife Law

The background provided above helps explain why Congress has traditionally tried to reconcile national and state interests in public lands and wildlife through an approach referred to as “cooperative federalism.” Simplified, this means that while federal laws promote a national interest and mandates regarding the management of public lands and wildlife, they often carve out a role for state governments to play in effectuating the purposes of these laws or in informing their implementation.

Cooperative federalism is most well-known in the area of federal pollution control law, such as the Clean Air and Clean Water Acts, whereby states participate in the implementation of standards established by federal law. Federal monies are provided to states but they are contingent on the development of state regulations that meet federal requirements. These laws preempt less stringent state and local requirements, referred to as “floor preemption,” but do not prohibit the states from adopting requirements that are more stringent and protective than the federal government’s program (a presumption against “ceiling preemption”).

Regulatory schemes such as these are not as prevalent in federal public lands law because the Property Clause of the U.S. Constitution provides for more exclusive federal authority over federal lands and resources. Nonetheless, Congress has provided states multiple ways to participate in public lands and wildlife management. These are best viewed on a continuum, from laws providing no required state involvement to those providing more substantive opportunities.¹⁰⁶ Two examples demonstrate this range:

The Antiquities Act of 1906: The law provides no mention of, or required role for states to play in the presidential designation of national monuments, as the purpose of this law was to provide Presidents an expedited way to protect by proclamation “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”¹⁰⁷

The Wild and Scenic Rivers Act of 1968: This law could be placed towards the other end of the spectrum by providing for the protection of rivers either through congressional designation or by state nomination to the Secretary of Interior. The latter pathway requires a river to first be designated as wild or scenic by a state legislature, the state proposal is then reviewed and possibly approved by the Secretary of Interior, and then the designated

river is administered by a state agency.¹⁰⁸ Though less than 10% of river designations go the state proposal route,¹⁰⁹ the law provides states an opportunity to play a substantive role in the designation and management of wild and scenic rivers.

A. Agency Organization, Decentralization and Cooperative Federalism

So decentralized are some federal land agencies that they have been criticized in the past for being “captured” by the local economic interests that they are supposed to be regulating.

As the examples in the Introduction illustrate, it is commonplace to critique federal management of public lands and wildlife as a “top-down,” “command and control,” and “centralized” approach performed by “out of touch Washington bureaucrats.” As the trope goes, such decisions are better made by those state and local interests that are closer to the land and resources.

The problem with this narrative is that it belies the degree of decentralization found within many federal agencies.¹¹⁰ Roughly 85 percent of federal employees do not work in Washington, D.C.¹¹¹ Federal land and wildlife agencies are typically structured in a way that disperses their offices and personnel across the country and many of these locally-based employees are delegated important decision making authority, rightfully subject to national-level review.

In fact, so decentralized are some federal land agencies that they have been criticized in the past for being “captured” by the local economic interests that they are supposed to be regulating. The BLM is the most commonly used example of agency capture, with many classic studies in public administration focused on how the old “grazing advisory boards” and other mechanisms for “home rule on the range” allowed the agency to be captured by their dominant state and local-based “clientele,” with a focus on livestock and mining.¹¹²

The USFS provides another classic and well-studied example of decentralization, even though the organization was structured in a way to mitigate against the forces of agency capture.¹¹³ The organization is divided into four levels: Headquarters in the Washington Office providing broad policy and direction to the agency, nine regional offices throughout the country allocating budgets to forests and coordinating activities, 154 national forests and 20 grasslands administered by forest supervisors, and more than 600 ranger districts that serve as the first point of contact with the agency.¹¹⁴

At each level of the USFS are delegated decision points in order to match the scale of the problem with the appropriate decision maker. For example, the Washington Office will work with the President’s Administration to develop a budget for congressional consideration, a regional forester is responsible for the designation of species of conservation concern which may cross administrative units, forest supervisors are the “responsible officials” for forest plan approval, and district rangers are the focal point for multiple use management decisions and the environmental analysis needed to make them.

The BLM provides another example, and one even more relevant in light of recent efforts to reorganize the Department of Interior and move BLM headquarters and most of its personnel to parts of the West, so that agency leadership and employees can be closer to state and local interests and conditions, such as providing “closer interaction with the grazing community located in the West.”¹¹⁵ One rationale for the move is that senior positions within BLM, who live in Washington, D.C., “have a disproportionate influence on agency decision making and policy setting,” so that “policy direction often comes from individuals who have very little interaction with the constituents, and the land itself, that are most impacted by BLM policies.”¹¹⁶

One of the curious things about this proposal is that roughly 97 percent of BLM employees are already “western based and are delegated substantial authority to make land use decisions.”¹¹⁷ As stated by the Public Lands Foundation, a BLM retirees organization, in opposition to the proposed move, “The perception that most BLM decisions are made in the Washington Office, far removed from local communities, local interests, and the States, is simply not based on the facts and should not be used to justify a move of the BLM [Headquarters] to the West.”¹¹⁸

The argument that the federal public land system is inherently rigid, top-down, and “one-size-fits-all” is also contradicted by the diversity found within these systems. Many National Parks and Wildlife Refuges, for example, are governed by place-based enabling statutes that detail how a particular unit must be managed, thus providing site-specific direction. There is a tension built into these federal systems, reflecting “the continual struggle to counteract the centrifugal, divergent push of establishment mandates with the centripetal, coordinating pull of systemic management.”¹¹⁹ National Monuments provide another example, with Presidents having the ability to draft site-specific management direction into their designations using the Antiquities Act. There are also national forests and rangelands that are managed pursuant to place-based legislation.¹²⁰ Furthermore, and discussed below in more detail, each forest and rangeland managed by the USFS and BLM is governed by a site-specific land and resource management plan. These and other examples challenge the critics’ clichés and rhetoric about an inflexible and “top-down” federal public land system.

Decentralized federal agencies, place-based laws and planning processes....These and other examples challenge the critics’ clichés and rhetoric about an inflexible and “top-down” federal public land system.

B. Cooperative Federalism in Public Lands and Wildlife Law

Three common cooperative federalism mechanisms are found in several public land and wildlife laws, as summarized below. Part V explains how these existing provisions and approaches can be used to promote more constructive federal-state relationships.

1. Savings Clauses

Statutory “savings clauses” disclaim a federal intention to completely displace a state law related to water, wildlife, or other resources so long as the state

law does not conflict or undermine federal prerogatives.¹²¹ For example, the savings clause in the National Wildlife Refuge System Improvement Act (1997) provides the following:

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 of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.¹²²

These provisions reserve or “save” some responsibility for the states, though exactly what power is being reserved is often far from clear and left to the courts to determine.¹²³

Savings clauses can be mistakenly interpreted to mean that Congress has reserved to a state the absolute right to manage a resource, such as wildlife on federal lands, completely free from federal intervention and the possibility of federal preemption. But the courts make clear that savings clauses cannot be read in isolation but must rather be understood in the context of the overall mandate and purposes of the public land or wildlife law in question. As stated by the Tenth Circuit Court of Appeals in *Wyoming v. United States* (2002), it would be “highly unlikely . . . that Congress would carefully craft the substantive provisions of the [Refuges 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.”¹²⁴

This court, like others, was mindful of the overall mission of the National Wildlife Refuge System, which 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*” (emphasis mine).¹²⁵

2. Cooperation and Coordination Provisions

Several federal public land and wildlife laws provide states with an opportunity to “cooperate” in management and “coordinate” with states in federal planning processes. For example, the ESA provides that federal agencies “shall cooperate to the maximum extent practicable with the States.”¹²⁶ Under Section 6 of the Act, federal agencies may also enter into cooperative agreements with any state that establishes and maintains an “adequate and active” program for the conservation of listed species.¹²⁷

USFS and BLM management provide two additional examples. The National Forest Management Act (NFMA) provides for the development of forest plans “coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.”¹²⁸

The provisions are limited insofar as they pertain to state engagement in forest and rangeland *planning* processes and they do not extend to USFS management across the board.¹²⁹ Furthermore, the regulations state that coordination does not allow the USFS to “conform management to meet non-Forest Service objectives or policies.”¹³⁰

The Federal Land Policy Management Act 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.¹³¹

The section goes on to explain that “[l]and 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*” (emphasis mine).¹³² These provisions provide state governors the opportunity to advise BLM of their positions on draft land use plans. BLM must consider this advice in so-called “consistency reviews.”¹³³

NEPA provides another opportunity for federal agencies to cooperate with state and local governments. It requires the federal agency conducting an Environmental Impact Statement (EIS) to provide early notification to, and solicit the views of, any state entity which may be significantly impacted.¹³⁴ Any disagreements about impacts between federal and state agencies must be enumerated within the EIS.¹³⁵ 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.”¹³⁶ This provides state governments with much greater access to the federal decision-making processes than the general public enjoys.

Some county governments and other political interests have either purposefully or mistakenly misinterpreted these provisions to mean local control of federal public lands. But in no way does such language mean that federal plans or decisions must be consistent with the plans and desires of state and local governments.¹³⁷ To be clear, there is no veto authority granted to states or local governments.¹³⁸ Nonetheless, these planning processes provide state and local governments privileged opportunities to be fully engaged in the management of federal public lands.¹³⁹

3. Revenue Sharing Programs

Though not typically considered in the context of cooperative federalism, several public land and wildlife laws include some type of revenue sharing

between federal and state governments. These fiscal policies provide incentives and/or disincentives for both economic use of public lands and/or conservation. The first payments date to 1908 and the USFS returning 25 percent of revenues from each national forest to the states as a way to compensate for the nontaxable status of federal lands. Over time, dozens of statutes created similar revenue-sharing programs such as the Mineral Leasing Act of 1920 (sharing half of federal revenue from leasing fossil fuels and other mineral resources with states), the more comprehensive Payments in Lieu of Taxes (PILT) program in 1976 (guaranteeing public land counties a minimum per-acre payment), and the Secure Rural Schools and Community Self Determination Act (SRS) in 2000 (designed to stabilize USFS payments to counties by decoupling them from commodity receipts).¹⁴⁰

Several federal revenue sharing programs, such as the Mineral Leasing Act of 1920, create problematic incentives to develop and overexploit public lands and resources because of the revenue that is generated and then shared with resource-dependent state and county governments.¹⁴¹ But other laws share revenue for conservation-oriented purposes. The most popular example is the Land and Water Conservation Fund (LCWF) Act of 1965. The law's "stateside program" provides matching and competitive grants to states (with most revenues derived from oil and gas leases on the Outer Continental Shelf) for state recreational planning, acquiring lands and waters, and developing outdoor recreational facilities.¹⁴² To be eligible for grants, a statewide outdoor recreational plan must be prepared and updated and approved by the Secretary of Interior, which is delegated to the National Park Service.

Two additional examples of revenue sharing, with incentives and strings attached, are in the context of wildlife management. Prior to 1937, many states regularly diverted game license revenue to general governmental purposes, other than fish and wildlife management.¹⁴³ The Pittman-Robertson Wildlife Restoration Act,¹⁴⁴ more commonly known as the Federal Aid in Wildlife Restoration Act, put an end to this practice.¹⁴⁵ The program put in place by the Act provides federal assistance to states for wildlife restoration projects and plans and hunter education.¹⁴⁶ 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.¹⁴⁷ 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 [the] State fish and game department."¹⁴⁸ 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 Dingell-Johnson Sport Fish Restoration Act,¹⁴⁹ also referred to as the Federal Aid in Fish Restoration Act, funds sport fish restoration through excise taxes on fishing equipment, motorboat/small engine fuel, and baits.¹⁵⁰

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.¹⁵¹ 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.”¹⁵²

C. The Politics and Double-Standards of Environmental Federalism

1. The Politics

There is no escaping the politics of federalism and so we should understand the dynamics of this debate and how it applies to public lands and wildlife. First is to acknowledge some of the baggage that comes along with the “state’s rights” agenda, an historical artifact based on race and one that continues to manifest itself in the American culture wars, from the flow of guns across state borders to the abortion debate.

Federalism is about drawing boundaries, and drawing boundaries is inherently political. Political scientists have studied “conflict expansion and containment” strategies for decades.¹⁵³ As summarized by Sarah Pralle, “The process of categorizing policy problems—as local, regional, national, global, or the like—is important because these categories help to define who has a legitimate voice in a conflict, who does not, where alliances will be drawn, how solutions are formulated, and how institutions are structured.”¹⁵⁴

This helps explain the strategies behind some of the most famous conservation campaigns in American history, such as “nationalizing” the debate over old-growth forests in the Pacific Northwest, roadless area management, wolf conservation, the protection of the Tongass National Forest, and the fight over Alaska writ large. More recent is the campaign against the land seizure movement, with the strategy focused on educating the American public about “your public lands” and why “this land is our land.”¹⁵⁵

On the other hand are efforts to reframe issues as being local, thereby containing “the scope of conflict” by limiting the number and diversity of perspectives involved in the dispute. Political opposition to the BLM’s Planning 2.0 Initiative provides a good example of this, with claims that the Rule would disempower local constituencies and open the door “to allow radical environmental groups to insert their agenda into critical Resource Management Plans.”¹⁵⁶

The recommendations offered in Part V provide ways to navigate this political context. While the history, law and ecology of public lands and wildlife conservation compel a national-level approach, there are ways to moderate the political extremes and scale up or down depending on the issue involved.

Though California lost this case in court, it exposed the “situational federalism” (i.e., double-standards) used by the Administration to promote states’ rights, unless that state wants to ensure that public lands remain public.

2. The Double-Standards

The examples provided in the Introduction illustrate how federalism can be used to achieve very different purposes. Though variations exist, the most apparent difference is using federalism:

- (a) To deregulate federal environmental protection and to prioritize extractive use over conservation purposes.
- (b) To achieve national conservation purposes through coordinated federal and state programs and actions.

This distinction can be used as an initial filter to evaluate proposed legislation and executive actions with federalism implications. The starting question must be focused on the ultimate goal of the federalism provision and the larger context in which it is offered. For example, though the Trump Administration has promoted much of its public lands and wildlife agenda as a way to “put the states back in charge,” it has simultaneously taken actions preventing blue states from advancing their own climate and clean energy goals.¹⁵⁷

In another case, the Trump Administration forcefully asserted the Supremacy Clause of the U.S. Constitution as a way to challenge a state law (SB 50) designed to “discourage conveyances that transfer ownership of federal public lands in California from the federal government.”¹⁵⁸ The law did so by providing the State the right of first refusal so that its Land Commission had the ability to purchase federal land scheduled for sale. Though California lost this case in court,¹⁵⁹ it exposed the “situational federalism” (i.e., double-standards) used by the Administration to promote states’ rights, unless that state wants to ensure that public lands remain public.

The filter described above is most apparent in the Administration’s prioritization of fossil fuel development and the goal of “American energy dominance” (see Secretarial Order No. 3351, Strengthening the Department of Interior’s Energy Portfolio; Secretarial Order No. 3349, American Energy Independence, and Executive Order 13795, Implementing an America-First Offshore Energy Strategy). None of these Executive Orders include federalism provisions or empower states in any new way because the overall goal is to “identify agency actions that unnecessarily burden the development or utilization of the Nation’s energy resources and support action to appropriately and lawfully suspend, revise, or rescind such agency actions as soon as practicable.”¹⁶⁰

These executive actions can be contrasted to using federalism to achieve larger national conservation purposes. Most environmental, public lands, and wildlife laws are of this order, providing states a range of opportunities, but ones similarly circumscribed by the overall purpose of the statute, such as protecting rivers (Wild and Scenic Rivers Act) and biological diversity (ESA) to providing recreational opportunities (Land and Water Conservation Fund Act).

V. RECOMMENDATIONS

It is time to reclaim the national interest in federal public lands and wildlife conservation. Going back to first principles and the system's progressive-era roots is the path to be taken after the Trump Administration's exploitation of public lands and "states' rights." Upon this foundation are a number of feasible and constructive approaches to improve federal-state relations. Congress and the next Presidential Administration can help ensure that they are used in the future.

A. To issue a new "National Interest in Federal Public Lands" Executive Order

President Clinton issued an Executive Order on "Federalism" (13132) in 1999.¹⁶¹ The purpose of the E.O. is "to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies."¹⁶² The E.O. is routinely considered by federal agencies in rulemaking processes as they determine whether or not a rule has "federalism implications." The E.O. provides a list of "fundamental federalism principles" that recognize the important role states are to play in the American constitutional system, followed by a list of "federalism policymaking criteria." One of these criteria is "strict adherence to constitutional principles" and that "[a]gencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action."¹⁶³ Another is that "[n]ational action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance."¹⁶⁴

Organizations on both sides of the political spectrum recommend possible changes to Clinton's E.O. on federalism.¹⁶⁵ While more inclusive changes to the E.O. may be warranted, a more immediate and necessary action is to write a new Order specifically focused on securing the national interest in federal public lands. A new Order would comport with two of the policymaking criteria of E.O. 13132, as federal management of public lands "strictly adheres" to constitutional principles and statutory authority and clearly necessitate "national action(s)" for problems of "national significance." This is perhaps why federal land agencies so routinely perform their "federalism reviews" without much fuss.

The E.O would require federal land management agencies to determine whether proposed rules and major agency actions would have a “substantial effect” on the national interest in public lands.

A new “National Interest in Public Lands” Order could be symbolically and substantively meaningful. The next President could use the Order’s signing ceremony as an educational opportunity to celebrate the national interest, the unifying role of public lands, and the system’s progressive roots. The Order would begin, as do the public land statutes found in Appendix I, by prioritizing the national interest in public lands. A short description of the nation’s history with these lands would be followed by a review of those constitutional provisions granting the federal government vast authority to manage public lands.

More substantively, the E.O would require federal land management agencies to determine whether proposed rules and major agency actions would have a “substantial effect” on the national interest in public lands. This will provide a counter-balance to the state-centric “federalism reviews” already being done by federal agencies, as discussed above. To be most substantive, and enforceable, the E.O. would make clear its specific statutory foundation, using the national interest provisions excerpted in Appendix 1, and then require federal agencies to adopt regulations and policies that translate the goals of the Order into more measurable objectives that will be implemented.¹⁶⁶

As discussed in Part II(F), analyzing the national interest in public lands and wildlife will not solve all of the competing uses and tensions in their management. But the proposed E.O. would bring a much needed level of scrutiny to those actions that transfer power, control and representation from the American public to more exclusive state, local and economic interests.

Under the E.O., an agency would have to step back and change its analytical lens, zooming out and taking a national-level look at a proposed action. The conservation of USFS-managed roadless areas provides an example of why the Order is necessary and how it might work in practice. As reviewed in the Introduction, Idaho and Colorado already have state-based roadless rules and now Alaska and Utah are proposing to essentially opt-out of the 2001 national-level roadless rule for state-based approaches. What the proposed E.O. would do in this case is require the USFS to first assess the impact of these proposals on the national interest, performing the same sort of analysis it did in promulgating the national-level roadless rule in 2001.

The 2001 Roadless Rule is exemplary in how it analyzed a decision through a national lens, from the national-level budget implications of unmaintained roads to the disproportionate importance of roadless areas to the nation’s watersheds and wildlife. The need for a national-level decision was a central consideration by the USFS in 2001:

At the national level, Forest Service officials have the responsibility to consider the “whole picture” regarding the management of the National Forest System, including inventoried roadless areas. Local land management planning efforts may not always recognize the national significance of inventoried roadless areas and the

values they represent in an increasingly developed landscape. If management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced through road construction and certain forms of timber harvest. Added together, the nation-wide results of these reductions could be a substantial loss of quality and quantity of roadless area values and characteristics over time.

The last remaining USFS roadless areas—roughly 2 percent of the land base in the continental U.S.—were placed in a national-level ecological context showing why they are so important in an increasingly developed and fragmented national landscape.

The federal government's trust responsibility to Native Nations, as it applies to public lands and wildlife, should also be included as part of the new E.O. As explained above, management of federal public lands comes with the obligation to protect the reserved use rights, sacred land, and cultural resources found within these systems. The language used in the E.O. should align with existing executive and secretarial orders pertaining to the federal trust responsibility (Secretarial Order No. 3335), sacred lands (E.O. 13007) and consultation and coordination with tribal governments (E.O. 13175, 13647, Secretarial Orders 3342, 3317). The new national interest in public lands E.O would simply make clear that any proposal or action must also be evaluated in terms of this federal trust responsibility and how the action may impact tribes.

B. To more constructively use the cooperative federalism and collaboration provisions currently provided in federal public land and wildlife laws; to plan at the landscape-level; and to use existing authority to establish national advisory committees.

1. To Use Existing Provisions Related to Public Participation, Cooperation, Coordination and Collaboration

Planning is a core principle for most federal land systems and most decisions and activities taking place on a piece of public land must be consistent with the governing land use plan. Plans are the vehicle taking broad statutory mandates and applying them to particular places, which can serve as a meshing of national objectives and state and local realities. Public land laws already provide state and local governments ample opportunity to meaningfully participate in federal lands planning. The cooperation and coordination provisions described in Part IV(B)(2), along with NEPA, provide states a privileged position in these planning processes and they can facilitate more constructive federal-state relations.

To work as intended, state and local governments need to change their understanding and expectations of these processes. As one study recommends, states should “participate as credible experts who do not make unrealistic demands or engage in political grandstanding.”¹⁶⁷ Federal agencies are put in untenable positions when state and local governments come to the table with a misunderstanding of what cooperation and coordination means.

The cooperation and coordination clauses found in public land laws do not provide state and local governments veto power over federal agencies who have statutory obligations to make decisions in the national interest. They are not conformance clauses nor in any way do they turn the constitutional principle of federal supremacy upside down, to make federal law subservient to state, local and county governments. Instead, they offer state and local governments the opportunity to participate in federal planning processes to the extent consistent with federal laws and national purposes.

Federal agencies must also embrace opportunities for cooperation and coordination and not view them as pro-forma exercises and procedural obstacles to be checked-off. Federal agencies need to engage state and local governments as early as possible and collaboratively address those issues that are interjurisdictional in nature, from fire, noxious weeds, and water management to planning for wildlife connectivity.

In addition to the cooperation and coordination provisions reviewed in Part IV(B) are more recent codified opportunities for “collaboration,” provided in statute and regulation. The Collaborative Forest Landscape Restoration Act of 2009 provides an example.¹⁶⁸ The program developed under the statute funds landscape-level forest restoration projects that are screened and recommended by a federal advisory committee.¹⁶⁹ To be eligible, restoration projects must be at least 50,000 acres and be done at scales to improve wildfire management, reduce management costs, restore ecosystem functions, and facilitate the use of biomass and small-diameter trees. Such projects must comply with existing environmental laws and be developed and implemented through a collaborative process.

The CFLRA provides a contrast to the USFS’s new emphasis on “shared stewardship” and the use of “Good Neighbor Authority.” The latter is designed to “expand limited federal capacity to implement and plan forest, rangeland, and watershed restoration projects by facilitating partnerships with state agencies,” which includes the authority for states to perform restoration work and administer timber sales on federal land.¹⁷⁰ The USFS promotes the program as building “collaborative capacity” and “working with States to *co-manage* risk across broad landscapes” (emphasis mine).¹⁷¹ The problem, however, is that the good neighbor authority law(s) do not actually require collaboration.¹⁷² While it is too soon in the program’s history to provide a fair evaluation, the example amplifies the point that increasing state authority does not necessarily lead to more local input and collaboration.

A common argument made in favor of public lands devolution is that it promotes more local engagement and public participation on matters

affecting those living closest to these lands and resources. This is the logic and language used in the introductory examples. But the Administration's efforts to devolve public land and wildlife management coincides with actions that eliminate opportunities for the citizens of those states to participate in these processes.¹⁷³

One example is the effort to exclude an increasing number of USFS actions from NEPA, which provides a foundation for informed public participation.¹⁷⁴ Writing in opposition to the proposed regulations are the State Attorneys General of California, Colorado, Illinois, New York, and Vermont, whom emphasize the national significance of the national forests within their states, such as serving as the headwaters of major river systems and providing other values that transcend state boundaries. For them, "Safeguarding adequate NEPA review and ensuring full public disclosure of environmental impacts for Forest Service projects is of paramount importance to the States' interests."¹⁷⁵

Another example is the streamlining and fast-tracking of oil and gas leasing on BLM lands. As summarized by an Idaho district court, the intended result was "to dramatically reduce and even eliminate public participation" in order to alleviate what the agency characterized as "unnecessary impediments and burdens" to oil and gas leasing.¹⁷⁶ Other examples, such as terminating national advisory committees represented with state and local interests, are provided in Part V(B)(3).

All of these Executive actions are aimed at narrowing the public part of public lands management. The remedy is to take advantage of the full suite of public participation, cooperation, coordination, and collaboration provisions provided in law and regulation.

2. To Plan at a Landscape-Level

To plan at a landscape-level, across administrative and ownership boundaries, has been recommended by ecologists and policy specialists for decades. The reasoning is obvious, with the most intuitive example focused on the transboundary movement of grizzly bears in the Greater Yellowstone Ecosystem, a place consisting of three states and roughly 2,500 miles of federal, state, and tribal administrative boundaries.¹⁷⁷ Newer work in environmental and adaptive governance similarly focuses on the "scalar mismatches" between political institutions and ecological processes.¹⁷⁸ As discussed below, planning and managing at larger landscape-levels also facilitates rethinking the binary and traditional tension between federal and state governments.

This was the missed opportunity of the BLM's 2.0 Planning initiative, with political opposition focused on the Rule's "landscape-scale" approach to planning. In contrast, the USFS managed to put into place an "all lands" approach to planning a short time before Congress repealed the BLM's Rule. The USFS's 2012 Planning Rule "ensure(s) planning takes place in the context of the larger landscape by taking an 'all-lands approach,'" which means that

The Trump Administration's efforts to devolve public land and wildlife management coincides with actions that eliminate opportunities for the citizens of those states to participate in these processes.

The challenge of wildlife connectivity is exhibit A in making the case for federal and state governments to work collaboratively, across boundaries.

analysis “can extend beyond the national forest and grassland boundary.”¹⁷⁹ The Rule does not provide the USFS any new authority over non-federal lands, but rather uses NFMA’s coordination provision to more constructively engage state and local partners in more strategic forest planning.¹⁸⁰ Part of this approach includes a requirement that forest plans assess a forest’s “distinctive roles and contributions within the broader landscape.”¹⁸¹ The USFS views this requirement as a “unifying concept,” helping place a particular national forest in its national, regional and local context.¹⁸²

The Flathead National Forest in Montana provides an example of how this approach can help drive the development of a unit’s desired conditions. As described in the forest plan, the Flathead is “uniquely positioned in the heart of the Crown of the Continent Ecosystem,” and the location, “one of the largest wild areas in the lower 48 states, enhances its importance as a connector of habitats and core populations of associated wildlife,” and the forest “harbors one of the most intact assemblages of medium to large carnivores in the contiguous United States.”¹⁸³

Another recently completed forest plan, the Francis Marion in South Carolina, provides another example showing a forest’s distinctive roles and contributions at regional and local levels. At a regional level, “the forest’s natural habitats represent some of the last and best examples of native ecosystems in the Southeast.”¹⁸⁴ And at a more local level, the forest helps sustain “traditional ways of life” and “offers one of the largest and most consolidated, contiguous areas of publicly owned land available for hunting and fishing in the state.”¹⁸⁵ As shown by the Francis Marion, requiring a forest to provide this context does not mean the plan will be insensitive to state and local concerns and economies, but rather facilitate a more contextual understanding of a place and its importance to the nation.

There are several other examples of landscape-level approaches to conservation, some of them initiated and supported by state governments. The Western Governors’ Association work on “protecting wildlife migration corridors and crucial habitat in the West” provides one such example.¹⁸⁶ The challenge of wildlife connectivity is exhibit A in making the case for federal and state governments to work collaboratively, across boundaries. There are several opportunities to do more in this area,¹⁸⁷ such as the landscape-scale and collaborative-based “Wildlife Corridors Conservation Act of 2019,” which builds on several other actions taken by states across the country.¹⁸⁸

The Wildlife Corridors Conservation Act (S. 1499, 116th Cong.) exemplifies how cooperative federalism could be practiced in the future. Its core purpose is to conserve native biodiversity, done in part by protecting and establishing new wildlife corridors on federal and non-federal lands to facilitate the movement of species. Hastening the bill is the 2019 global assessment report on biodiversity and ecosystem services, which makes clear the worldwide threat to biodiversity and what governments can do about it.¹⁸⁹ The legislation addresses the U.S.’s role in this global crisis with an innovative multi-scaled approach that is rooted in

intergovernmental cooperation and coordination—between federal, state and tribal governments.

Federal authority to establish “national wildlife corridors” on federal public lands, by statute or rulemaking, is preserved by the bill. So too are the traditional jurisdictional powers of state and tribal governments, which are reserved in the bill’s savings clause. Because wildlife movement transcends federal boundaries, the bill also provides a wildlife movement federal grant program to use on non-federal land and water. Created is a “nested” governance structure consisting of a “national coordination committee” and “regional wildlife movement councils,” all of them having federal, state and tribal governmental representation, along with wider opportunities for public participation.

This proposed legislation showcases how new forms of innovative governance can move us beyond the “uncooperative federalism” of the past. The bill does three things worth emulating in future legislation: (1) It makes wildlife conservation a national objective, (2) it respects the constitutional and statutory powers held by federal, state and tribal governments, and (3) it strategically applies the innovation, science, land use authority, and problem-solving that happens at each level of governance.

3. To Use National Advisory Committees

Another recommendation is for federal agencies to use national advisory committees in accordance with the Federal Advisory Committee Act (FACA).¹⁹⁰ The purpose of these committees is to provide federal agencies with official advice and recommendations and they provide state and local governments important opportunities to provide their expertise and communicate their interests to federal decision makers. Of course, the purpose of these committees is not to undermine federal environmental laws, but to work within their statutory and regulatory parameters—as a way to more effectively and efficiently implement laws and regulations.

Fairly-balanced collaborative-based FACA-Committees force participants to provide collective advice and recommendations, after taking multiple perspectives into account. These committees—with participation from state, tribal and national interests—provide federal agencies an important mechanism for conflict resolution, problem-solving and trouble-shooting. Their charters can also include a duty to help reconcile potential conflicts between federal and state governments in the management of public lands and wildlife.

A recent national advisory committee used by the USFS illustrates the potential of this approach.¹⁹¹ Its purpose was to provide the USFS advice and recommendations on implementation of the 2012 Planning Rule, which serves as the basis of forest planning throughout the National Forest System. The Committee’s informal motto was to “learn locally but advise nationally.” One of its official duties was to “[o]ffer recommendations on how to foster an effective ongoing collaborative framework to ensure engagement of

Federal, State, local and Tribal governments; private organizations and affected interests; the scientific community; and other stakeholders.”¹⁹²

Members serving on the Committee represented a broad array of interests, from national environmental organizations to state, local and tribal governments. Notwithstanding such diversity, the Committee found resolution on dozens of issues that had challenged the USFS for years. The Committee’s last action was to submit to the Secretary of Agriculture and Chief of the USFS a final set of 66 formal recommendations, all framed in the context of the “shared stewardship” of National Forests. The FACA-Committee was not re-chartered in 2018 because of the fiscal constraints of the USFS, a topic discussed below.

This recommendation runs counter to President Trump’s Executive Order (13875) that federal agencies “terminate at least one-third of its current committees” established under FACA.¹⁹³ Other than the number being completely arbitrary, the E.O. will have substantial negative implications for the state, local and rural community interests that are so well represented on these committees. Yet another E.O. proving the point that “putting states back in charge” has absolutely nothing to do with enhancing public participation, fostering collaboration, or engaging rural communities.

C. To provide federal agencies the funding necessary to fulfill public land and wildlife conservation mandates

Lawmakers routinely critique the “mismanagement” of public lands by federal land agencies while at the same time decreasing their budgets and not adequately investing in their missions and mandates.

In 1947, one of the most astute observers of public land politics, Bernard DeVoto, explained the multiple strategies used by what he called the “landgrabbers,” whose goal was to challenge the notion of federal land ownership and control in order to liquidate the public resources of the West.¹⁹⁴ “There are many ways to skin a cat,” said DeVoto, and he detailed how the skinning knife would be used on the USFS as an example: “The idea was to bring it into disrepute, undermine public confidence in it by every imaginable kind of accusation and propaganda, cut down its authority, and get out of its hands the power to regulate” such things as grazing on federal lands.¹⁹⁵

How best to erode confidence in a federal agency? To decrease the agency’s funding to the point it cannot effectively and efficiently perform its duties and meet its legal obligations. And the solution to this politically manufactured problem? To transfer ownership and control of national public lands and resources to the states.

DeVoto’s observation is more relevant today than it was in 1947. Lawmakers routinely critique the “mismanagement” of public lands by federal land agencies while at the same time decreasing their budgets and not adequately investing in their missions and mandates. The trends in funding are alarming and across-the-board. A recent comprehensive review of federal spending on natural resources, environment and recreation, using the Office of Management and Budget’s (OMB) breakdown of the federal budget, shows

that spending in this area “has represented a smaller and smaller share of total federal spending.”¹⁹⁶ To fully grasp this decline, we must first understand the relatively small percentage of the federal budget actually going to these budget “functions” and “subfunctions:” they account for less than 1 percent of all federal outlays—roughly \$40 billion of a \$4 trillion budget.¹⁹⁷

Making matters worse is President Trump’s Executive Order (13711) directing federal agencies to repeal two regulations for every new regulation promulgated. The Order includes a “cost-offset” requirement meaning that the incremental costs associated with new regulations shall be offset by the “elimination of existing costs associated with at least two prior regulations.”¹⁹⁸ Now, federal agencies will not only be challenged by insufficient funding to meet their legal mandates but will be forced to make an awful choice: whether to spend decreasing funds on new regulations designed to address new problems or to repeal existing regulations, even if they continue to be necessary to meet their statutory mission.

What makes this situation even more problematic is the increasing use and pressures placed on public lands. The NPS is a well-known case in point, with recreational visitation reaching all-time highs and appropriations for the Park System remaining flat.¹⁹⁹ But funding for the USFS provides an example that is more relevant to federal-state relations. An increasing percentage of the agency’s budget goes to wildfire suppression and related management costs. For example, in 1995, 16 percent of the agency’s annual appropriated budget went to fire. But by 2017, more than 50 percent was dedicated to wildfire.²⁰⁰ Along with this trend was a corresponding 39 percent reduction in all non-fire personnel since 1995.²⁰¹ This shift in resources “has reduced the Forest Service’s ability to sustain staffing in vital non-fire program areas, which negatively impacts the Forest Service’s ability to deliver work on the ground, including forest restoration and management, recreation, research, watershed protection, land conservation and other activities.”²⁰²

One of the most drastic implications of the agency’s budget is on its ability to plan. A 64 percent reduction in funding for land management planning, between 2001 and 2015, means the agency has fewer resources to actually use on the cooperation and coordination provisions found in NFMA and NEPA, to the detriment of federal-state relations. As discussed above, this was one reason why the agency’s national advisory committee, which was successfully resolving conflicts between federal and state interests, was not re-chartered in 2018.

Congress provided a “wildfire funding fix” and a new budget mechanism for suppression funding in 2018.²⁰³ While it is too soon to assess the impact of this legislation, some lawmakers and critics of the USFS have exploited the agency’s funding situation and use it as way to make the case for either state ownership or greater control of national forests. Those in the land seizure movement routinely use this narrative: that the “mismanagement” of our national forests by an inept and inefficient USFS necessitates their take-over by the states. Of course, there is another solution to this problem:



The drastic reduction in funding for planning means the USFS has fewer resources to actually use on the cooperation and coordination provisions found in NFMA and NEPA, to the detriment of federal-state relations.

to provide federal agencies the funding necessary to fulfill their public lands and wildlife conservation mandates.

D. To provide federal incentives to enhance conservation laws, public participation and administrative capacity at the state level.

Federal inducements and incentives are a common method used to promote cooperative federalism. They are a critical predictor of success and as one study summarizes, “While the legal structure of cooperative federalism is very important, it is the funding for it that most controls the extent of participation by states.”²⁰⁴ As reviewed above, several public land and wildlife laws share revenue with state governments for conservation-oriented purposes, such as the Land and Water Conservation Fund Act and the Pittman-Robertson Wildlife Restoration Act. Key to the success of these programs are the legal requirements to receive federal funds, such as the Pittman-Robertson’s predicate that states must use federal excise taxes for wildlife management and not for other purposes.

Federal inducements can also be used to achieve national goals and objectives through coordinated state-based actions. An example of this is the State Wildlife Grants Program created by Congress in 2000 and broadened shortly thereafter.²⁰⁵ The program provides federal funding to states for work designed to protect wildlife species before they become imperiled and federally protected. In order to receive funding, each state must develop a “state wildlife action plan” (SWAP), with the legislation requiring eight elements to be included in each strategy, such as intergovernmental coordination and broad public participation. Though reviews of this Program are mixed,²⁰⁶ the law demonstrates one approach to bridging national and state interests in wildlife conservation.

Federal decision makers should build on the design of these programs and use federal funding and other inducements as a way to incentivize state conservation of public lands and wildlife. Provided below is an example of how this might be done in the context of state wildlife management.

Part III reviews the stark differences between federal and state systems of public lands and wildlife management. Shown, for example, is that most states have relatively weak statutes for protecting and recovering imperiled species. Inadequate laws are compounded by the funding dilemma faced by state wildlife agencies. Hunting, fishing, and trapping-derived revenue “comprise between 60 and 90 percent of the typical state fish and wildlife agency budget.”²⁰⁷ 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.²⁰⁸ This funding mechanism serves to reinforce complaints that state wildlife agencies prioritize the conservation of species that “pay the bills.” Related to the nongame funding issue is the common use of politically appointed wildlife commissions

Federal decision makers should build on the design of these programs and use federal funding and other inducements as a way to incentivize state conservation of public lands and wildlife.

and boards at the state-level. As a result of state law determining their membership composition, several states have commissions that fail to represent the full diversity of values and interests regarding wildlife.²⁰⁹ Instead, they are often dominated by hunting, outfitting and industry-oriented interests.

This context of state wildlife management—inadequate statutes, fish and game-derived revenue and spending, and the use of non-representative state wildlife commissions—helps explain some of the concerns about providing states more authority and control over wildlife on federal lands. The mistrust of state management manifests itself in some high-profile wildlife conflicts and litigation, such as predator hunting on national preserves and wildlife refuges in Alaska and concerns about the hunting of wolves and grizzly bears after they are delisted from the ESA. The latter is indicative of what is often the sharpest of edge separating federal from state management of wildlife: full federal protection one day followed by a state-administered harvest season the next.

The Secretary of Interior's "Memorandum on State Fish and Wildlife Management Authority" also needs to be understood in this context. It orders Interior offices and bureaus to "better align" their regulations, policies, and guidance pertaining to wildlife with state preferences. Declared in the Memo are the "extensive capacities and competencies" of state governments "to serve as trustees for fish and wildlife species resident in the respective States," and that "[s]tate governments have consistently demonstrated their commitment to sustaining fish and wildlife resources in perpetuity...[and]...have taken extensive measures to protect and conserve rare fish and wildlife species..."²¹⁰

What the Memo fails to recognize are the institutional and financial biases at the state level leading to a prioritization of species that can be hunted, fished and trapped. While the Secretary's Memo extols the capacity of state wildlife agencies, there is a broad bipartisan recognition that the situation is more dire. As the "Blue Ribbon Panel on Sustaining America's Diverse Fish and Wildlife Resources" makes clear, "For every game species that is thriving, hundreds of nongame species are in decline."²¹¹ The Report goes on: "The States are entrusted with ensuring the health of our nation's fish and wildlife. Today, most are not able to meet this immense and important challenge because our conservation funding system is outdated and insufficient to conserve the majority of species under their care."²¹²

This background provides an example of how federal funding for future wildlife conservation could be tied to making institutional changes in state wildlife governance. For example, increased funding for nongame species would be contingent on the states making changes to their imperiled species laws or state wildlife commissions. The goal here is to better harmonize federal and state laws so that both governments can serve as accountable co-trustees of wildlife. Some of the concerns about increasing state authority could be mitigated if the edge between federal and state control was

The goal is to better harmonize federal and state laws so that both governments can serve as accountable co-trustees of wildlife. Some of the concerns about increasing state authority could be mitigated if the edge between federal and state control was softened.

softened. And one way to do that is to provide parallel and more predictable streams of revenue: the first, a funding stream to states for non-game species management and the second, more funding for federal land agencies to advance the habitat needs of those species.

The ESA provides another way to use federal policy inducements to strengthen state wildlife statutes and administrative capacity. Several ESA programs provide states significant roles to play in the administration of the Act, such as Candidate Conservation Agreements (with Assurances) and Special 4(d) Rules for threatened species management. One of the factors to be considered in making listing and delisting decisions is “the inadequacy of existing regulatory mechanisms.”²¹³ This means that state laws and regulations pertaining to wildlife, or the lack thereof, are assessed when making listing determinations. Weak, speculative, voluntary, unenforceable state wildlife laws and regulations may be found inadequate by the Services or the courts in reviewing listing decisions.²¹⁴ A remedy for this, and another potential way to bridge federal and state wildlife conservation, is to clarify in ESA regulations and policy what constitutes an adequate regulatory mechanism and what states must do to receive future funding and implementation authority.

CONCLUSION

On April 26, 2019, President Trump explained to the public his rationale for his Executive Order on reviewing previous designations of national monuments using the Antiquities Act:

*Today, I am signing a new executive order to end another egregious abuse of federal power, to give that power back to the states and to the people, where it belongs. The previous administration used a 100-year old law known as the Antiquities Act to unilaterally put millions of acres of land and water under strict federal control—have you heard about that? Eliminating the ability of the people who actually live in those states to decide how best to use that land. Today, we are putting the states back in charge. It's a big thing.*²¹⁵

Standing beside the President that day was the Governor of Utah and members of Utah's congressional delegation, including Representative Rob Bishop and Senators Orrin Hatch and Mike Lee. The President gave special recognition to Senator Hatch for his unrelenting efforts to have the President issue the Order and to Senator Lee for his “never-ending prodding” to influence the President's decision.²¹⁶ Thank you, said the President, “I'm very proud to be doing it in honor of you guys.”²¹⁷

Usually, there is little value in parsing the language of the President during a public spectacle such as this. But the symbolism of April 26th is nonetheless remarkable because of the delegation's history of trying to devolve and privatize federal public lands. Senator Lee, for example, has likened federal public lands to the “royal forests of medieval England” and has proposed a “new Homestead Act” that would enable state and local governments to petition the federal government to use federal public lands to “help alleviate the growing affordable housing crisis facing so many working Utahns?”²¹⁸ This is the right thing to do according to the Senator because “millions and millions of acres of land in Utah sit untouched.”²¹⁹

It is the totality of this scene on April 26th, and the totality of actions taken by the Trump Administration to devolve public lands and wildlife conservation to state management that is so disconcerting. That a President, Democrat or Republican, would use federalism in an inconsistent fashion to advance a larger political agenda is not surprising. The realpolitik is that “states' rights” is mostly used as a means to an end. Such is the case here. The difference, though, is in the scope and degree of actions being taken by the Trump Administration and members of Congress to divest the American public of its land and resources. The actions referenced in this Report are but one part of a much broader deregulatory agenda, meaning that

actions to devolve control to the states is happening at the same time that dozens of federal environmental protections are being rescinded and public participation opportunities eliminated or reduced.

The Administration's actions in this regard could severely damage future federal-state relations. The states' rights agenda has been pushed so aggressively, and coupled so often with environmental deregulation, that even the most moderate political interests may begin to question any effort, however reasonable, to cooperate and partner with the states in the future. That would be a mistake because states have an important role to play in the management of federal public lands and wildlife and their future conservation will require even greater collaboration.

Going back to first principles, progressive roots, and the national interest in our public land and wildlife conservation systems can help unify a divided nation. To reclaim the national interest will not resolve the tensions baked into public lands and wildlife law and management. But it will provide a more historically and legally accurate, ecologically-grounded, coalescing, and constructive counter-narrative than is being offered by the land seizure movement and the politicians that support it. It is not enough to be opposed to the transfer of ownership or control from the federal government to the states. Instead, a more affirmative case for why the federal public land and wildlife conservation systems are in the national interest is necessary. This Report takes a modest step in that direction.

Appendix 1.

National Interest Provisions in Selected Federal Public Land and Wildlife Laws

FEDERAL LAWS	SELECTED PROVISIONS
1897 Organic Act (U.S. Forest Service)	No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber <i>for the use and necessities of citizens of the United States</i> ; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. (16 U.S.C. §475)
The Antiquities Act (1906)	The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be <i>national monuments</i> ... (16 U.S.C. §431)
The National Park Service Organic Act (1916) (and Related Provisions)	The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the <i>National Park System</i> by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 1970 declarations.—Congress declares that— (A) the National Park System, which began with establishment of Yellowstone National Park in 1872, has since grown to include <i>superlative natural, historic, and recreation areas in every major region of the United States and its territories and possessions</i>; (B) these areas, though distinct in character, are united through their interrelated purposes and resources into one National Park System as <i>cumulative expressions of a single national heritage</i>; (C) <i>individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one System preserved and managed for the benefit and inspiration of all the people of the United States...</i>" 1978 reaffirmation. Congress reaffirms, declares, and directs that the promotion and regulation of the various System units shall be consistent with and founded in the purpose established by subsection (a), to the <i>common benefit of all the people of the United States</i>. The authorization of activities shall be construed and the protection, management, and administration of the System units shall be conducted in light of the <i>high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established</i>, except as directly and specifically provided by Congress. (54 U.S.C. §100101)

Bald and Golden Eagle Protection Act (1940, amended 1962)	"Whereas the Continental Congress in 1782 adopted the bald eagle as the <i>national symbol</i>; and Whereas the bald eagle thus became the <i>symbolic representation of a new nation under a new government in a new world</i>; and Whereas by that Act of Congress and by tradition and custom during the life of this Nation, the bald eagle is no longer a mere bird of biological interest but a <i>symbol of the American ideals of freedom</i>; and Whereas the bald eagle is now threatened with extinction..." (Pub. L. No. 567, 54 Stat. 250, 1940) (An Act For the protection of the Bald Eagle).
Multiple Use Sustained Yield Act (1960)	"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 <i>American people</i>... (16 U.S.C. §§ 529, 531(a))
Wilderness Act (1964)	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 <i>to secure for the American people of present and future generations the benefits of an enduring resource of wilderness</i>. For this purpose there is hereby established a <i>National Wilderness Preservation System</i> to be composed of federally owned areas designated by Congress as "wilderness areas," and these <i>shall be administered for the use and enjoyment of the American people</i> in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act. (16 U.S.C. §1131(a)).
Land and Water Conservation Fund Act (1965)	PURPOSES.—The purposes of this Act are to assist in preserving, developing, and assuring accessibility to <i>all citizens of the United States of America of present and future generations and visitors who are lawfully present within the boundaries of the United States of America</i> such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and <i>to strengthen the health and vitality of the citizens of the United States</i> by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas. Pub. L. No. 88-578, §1(b)

National Historic Preservation Act (1966)	The Congress finds and declares that: (1) <i>the spirit and direction of the Nation are founded upon and reflected in its historic heritage;</i> (2) <i>the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;</i> (3) historic properties significant to the <i>Nation's heritage</i> are being lost or substantially altered, often inadvertently, with increasing frequency; (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for <i>future generations of Americans;</i> (5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the <i>rich heritage of our Nation;</i> (6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of federal and federally assisted projects and will assist economic growth and development; and (7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities. (Section 1 of Pub. L. No. 89-665, as amended by Pub. L. No. 96-515).
Wild and Scenic Rivers Act (1968)	"It is hereby declared to be the policy of the United States that certain <i>selected rivers of the Nation</i> which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other <i>vital national conservation purposes.</i>" (16 U.S.C. §1271)

National Environmental Policy Act (1970)	"The purposes of this Act are: To declare a <i>national policy</i> which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the <i>ecological systems and natural resources important to the Nation</i>; and to establish a Council on Environmental Quality." (42 U.S.C. §4321) "[T]o create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and <i>future generations of Americans</i>." (42 U.S.C. §4331) "[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that <i>the Nation may—</i> (1) <i>fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;</i> (2) <i>assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;</i> (4) <i>preserve important historic, cultural, and natural aspects of our national heritage...</i>" (16 U.S.C. §4331).
Wild Free-Roaming Horses and Burros Act (1971)	"Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; <i>that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people;</i> and that <i>these horses and burros are fast disappearing from the American scene</i>. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. §1331.
Endangered Species Act (1973)	The Congress finds and declares that— (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; (3) these species of fish, wildlife, and plants are of <i>esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;</i> (4) <i>the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction...</i> (5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain <i>conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.</i> (16 U.S.C. § 1531(a))

National Forest Management Act (1976)	The Congress finds that— (1) the management of the <i>Nation's renewable resources</i> is highly complex and the uses, demand for, and supply of the various resources are subject to change over time; (2) the <i>public interest</i> is served by the Forest Service, Department of Agriculture, in cooperation with other agencies, assessing the <i>Nation's renewable resources</i>, and developing and preparing a <i>national renewable resource program</i>, which is periodically reviewed and updated; (3) <i>to serve the national interest</i>, the renewable resource program must be based on a comprehensive assessment of present and anticipated uses... (6) the Forest Service, by virtue of its statutory authority for management of the National Forest System, research and cooperative programs, and its role as an agency in the Department of Agriculture, <i>has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity...</i>(16 U.S.C. §1600)
Federal Land Policy Management Act (1976)	The Congress declares that it is the policy of the United States that— (1) <i>the public lands be retained in Federal ownership</i>, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest; (2) <i>the national interest</i> will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts. (43 U.S.C. § 1701(a)). The public lands be managed in a manner which recognizes the <i>Nation's need for domestic sources of minerals, food, timber, and fiber</i> from the public lands...(43 U.S.C. §1701(a)). The term “multiple use” means the management of the public lands and their various resource values so that they are utilized in the combination that will <i>best meet the present and future needs of the American people</i>; making the most judicious use of the land for some or all of these resources or related services <i>over areas large enough</i> to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions...43 U.S.C. §1702(c)
Alaska National Interest Lands Conservation Act (1980)	In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain <i>nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values</i>, the units described in the following titles are hereby established. It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the <i>citizens of Alaska and the Nation...</i> This Act provides sufficient protection for <i>the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska</i>, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people... 16 U.S.C. §3101

National Wildlife Refuge System Improvement Act (1997)	The mission of the System is to administer a <i>national network</i> 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 <i>present and future generations of Americans</i>. In administering the System, the Secretary shall— (A) provide for the conservation of fish, wildlife, and plants, and their habitats within the System; (B) <i>ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;</i> (C) plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System, <i>to contribute to the conservation of the ecosystems of the United States</i>, to complement efforts of States and other Federal agencies to conserve fish and wildlife and their habitats, and to increase support for the System and participation from conservation partners and the public... (H) recognize compatible wildlife-dependent recreational uses as the priority general public uses of the System through which the <i>American public can develop an appreciation for fish and wildlife</i>; ...(16 U.S.C. §668dd).
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NOTES

- 1 See John C. Ruple, "The Transfer of Public Lands Movement: The Battle to Take "Back" Lands that Were Never Theirs," 29 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 1, 3, 6-8 (2018).
- 2 H.B. 148 § 5(1)(b), 2012 Gen. Sess. (Utah 2012) (enacted).
- 3 See Peter Michael et al., Conference of W. Attorneys G., Report of the Public Lands Subcommittee Western Attorneys General Litigation Action Committee 1-3, 16-17, 21, 47 (2016).
- 4 Disposal of Excess Federal Lands Act of 2017, H.R. 621, 115th Cong. (2017).
- 5 Martin Nie and Patrick Kelly, "State and Local Control of Federal Lands: New Developments in the Transfer of Federal Lands Movement," 45 ECOLOGY LAW CURRENTS 187-199 (2018).
- 6 Federal Land Freedom Act, H.R. 3565, § 4(a), 115th Cong. (2017)
- 7 National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (2017).
- 8 Native Species Protection Act, S. 1863, 115th Cong. (2017)
- 9 Scott Streater, "Bernhardt Names Pendley as Acting BLM Chief," E&E NEWS PM (July 29, 2019). Pendley's views are articulated in his article, "The Federal Government Should Follow the Constitution and Sell Its Western Lands," National Review (Jan. 19, 2016).
- 10 Bundy v. Nevada, Case No. A-18-779718-C (8th D.C., Clark County, NV, 2019).
- 11 *Id.*, at 6.
- 12 Executive Order 13792 (Apr. 26, 2017), Review of Designations Under the Antiquities Act. 82 Fed. Reg. 20429 (May 1, 2017).
- 13 Executive Order on National Monuments, transcript and video on C-SPAN, <https://www.c-span.org/video/?427579-1/president-trump-orders-national-monument-designations-review>
- 14 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001)
- 15 Kristina Alexander & Ross W. Gorte, Cong. Research Serv., RL30647, NATIONAL FOREST SYSTEM (NFS) ROADLESS AREA INITIATIVES (2011).
- 16 Kirsten Ronholt, Where the Wild Things Were: A Chance to Keep Alaska's Challenge of the Roadless Rule out of the Supreme Court, 29 Alaska Law Review. 237, 242 (2012).
- 17 Organized Village of Kake v. Dep't of Agric., 776 F. Supp. 2d 960 (D. Alaska 2011); Alaska v. U.S. Dep't of Agric., 932 F. Supp. 2d 30 (D. D.C. 2013).
- 18 Special Areas; State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636-42,637 (July 16, 2004).
- 19 The State Petitioning Rule was found in violation of the processes required by National Environmental Policy Act and the Endangered Species Act. See *California v. U.S. Dep't of Agric.*, 575 F.3d 999, 1007 (9th Cir. 2009). Despite this setback, the state petitioning process proceeded under the APA, at 5 U.S.C. §553(e). See 71 Fed. Reg. 58,577 (Oct. 4, 2006).
- 20 Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61, 456 (Oct. 16, 2008).
- 21 Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado. 77 Fed. Reg. 39,576, 39,578 (July 3, 2012).
- 22 83 Fed. Reg. 44,252 (Aug. 30, 2018).
- 23 *Id.*, at 44253.
- 24 Governor Bill Walker, Administrative Order No. 299 (Sept. 6, 2018).
- 25 84 Fed. Reg. 55,522, 55,523 (Oct. 17, 2019)
- 26 *Id.*, at 55,524
- 27 <https://publiclands.utah.gov/current-projects/roadless-rule/>
- 28 81 Fed. Reg. 9674, 9679 (Feb. 25, 2016)
- 29 *Id.*
- 30 *Id.*, at 9675.
- 31 House Committee on Natural Resources, BLM's Planning 2.0 Rule, <https://republicans-naturalresources.house.gov/issues/issue/?IssueID=118696>
- 32 Statement of Wyoming Representative Liz Cheney, Congressional Record (Feb. 7, 2017).
- 33 Pub. L. No. 115-12 (2017)
- 34 Memorandum from Ryan Zinke, Secretary of Interior, to Acting Director, Bureau of Land Management (Mar. 27, 2017), https://www.eenews.net/assets/2017/04/18/document_pm_01.pdf
- 35 The Secretary of Interior, Memorandum on State Fish and Wildlife Management Authority on Department of the Interior Lands and Waters (Sept. 10, 2018)
- 36 *Id.*
- 37 Letter to Deputy Secretary David Bernhardt, from Doug Vincent-Lang, Acting Commissioner, Alaska Department of Fish and Game (Jan. 2, 2019).
- 38 80 Fed. Reg. 64,325 (Oct. 23, 2015)

- 39 81 Fed. Reg. 52,247 (Aug. 5, 2016)
- 40 Pub. L. No. 115-20; 81 Fed. Reg. 52,247 (Aug. 5, 2016)
- 41 Memorandum from Acting Assistant Secretary for Fish and Wildlife and Parks, U.S. Dept. of Interior, to Acting Direct, National Park Service (July 14, 2017).
- 42 83 Fed. Reg. 23,621, 23,622 (May 22, 2018).
- 43 [Author Names Redacted], Sage-Grouse Conservation: Background and Issues (Washington, D.C.: Congressional Research Service, 2016).
- 44 USFWS Press Release, Historic Conservation Campaign Protects Greater Sage-Grouse (Sept. 22, 2015), <https://www.fws.gov/news/ShowNews.cfm?ID=F5B7455D-0824-997C-47667F8ABBFBA86>
- 45 Secretary of Interior Order No. 3353, Greater Sage-Grouse Conservation and Cooperation with Western States (June 7, 2017).
- 46 Scott Streater, "Interior Panel Echoed Industry Wish List in Revising Plans, E&E News PM (Aug. 17, 2017)
- 47 See e.g., Martin Nie, Christopher Barns, Jonathan Haber, Julie Joly, Kenneth Pitt, Sandra Zellmer, "Fish and Wildlife Management on Federal Lands: Debunking State Supremacy," 47 ENVIRONMENTAL LAW 797 (2017)
- 48 U.S. Const. art. IV, §3, cl. 2.
- 49 United States v. San Francisco, 310 U.S. 16, 29 (1940)
- 50 Kleppe v. New Mexico, 426 U.S. 529, 542-543 (1976).
- 51 Carol Hardy Vincent & Alexandra M. Wyatt, State Management of Federal Lands: Frequently Asked Questions (Washington, D.C.: Congressional Research Service, 2016), at 5.
- 52 California Coastal Commission v. Granite Rock, 480 U.S. 572, 587 (1987)
- 53 People v. Rinehart, 1 Cal. 5th 652, 377 P.3d 818 (2016) and Bohmker v. Oregon (9th Cir., 2018), WL 4344338.
- 54 Not addressed here is how the public trust doctrine applies to federal public lands. Nie et al., "Fish and Wildlife Management Authority on Federal Lands," at 902-906, reviews the trust-like language and principles embedded in federal public land and wildlife statutes and the related case law.
- 55 Wild and Scenic Rivers Act, 16 U.S.C. §1271)
- 56 National Park Service Organic Act of 1916, 1970 Congressional Declarations, 54 U.S.C. §100101
- 57 Gifford Pinchot, "National or State Control of Forest Devastation," *Journal of Forestry* (Feb. 1920), 107-108.
- 58 *Id.*, at 108-109.
- 59 *Id.*, at 108.
- 60 *Id.*, at 109
- 61 John D. Leshy, *Debunking Creation Myths About America's Public Lands: 2018 Wallace Stegner Lecture* (Salt Lake City: The University of Utah Press, 2018), at 3.
- 62 *Id.*, at 5.
- 63 *Id.*, at 7.
- 64 Johnson v. M'Intosh, 21 U.S. 543 (1823)
- 65 "Though sovereign, Indian tribes are not foreign nations, but rather distinct political communities 'that may more correctly perhaps be denominated domestic, dependent nations,' whose 'relations to the United States resemble that of a ward to his guardian.'" 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. RESOURCES J. 585, 595 (2008) (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (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." *Id.* (citing Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 UTAH L. REV. 1471, 1503-04 (1994)).
- 66 *Id.*
- 67 *Id.* at 585-86, 596 (discussing reserved treaty rights of Native Nations on federal lands and approaches for protecting such rights).
- 68 *Id.* at 597.
- 69 See Exec. Order 13,175, 3 C.F.R. § 304 (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."); Order No. 3335, Sally Jewel, Sec'y of the Interior, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries § 3 (Aug. 20, 2014) (providing background on the trust responsibility including a review of relevant statutes and case law). USFS "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) (2016); see also U.S. FOREST SERV. HANDBOOK § 1509.13(11) (2016) (discussing consultation with Indian tribes); Joint Secretarial Order No. 3206, Sec'y of the Interior & Sec'y of Commerce, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act § 1 (June 5, 1997), <https://perma.cc/U45L-UWXF> ("This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes.").

- 70 Organized Village of Kake, Resolution No. 2018-24: Continued Tribal Support for Application of National Roadless Rule on the Tongass National Forest (Oct. 7, 2018).
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