Fish & Wildlife Management on Federal Lands: Debunking State Supremacy

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Response to the Secretary of Interior’s Memorandum (Sept. 10, 2018) on State Fish and Wildlife Management Authority on Department of Interior Lands and Waters
Federal-State Conflicts

- NPS/FWS decisions to preempt Alaska’s hunting & predator control regulations
- Wolf control in federal wilderness
- Lead ammunition & condors on National Forests
- Mountain goats in the Manti-La Sal National Forest
Memorandum

To: Heads of Bureaus and Offices

From: Secretary

Subject: State Fish and Wildlife Management Authority on Department of the Interior Lands and Waters
“In 1983, the Department codified in the United States Code of Federal Regulations, 43 C.F.R. Part 24, establishing a policy that Federal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law. This 35 year-old rule is more relevant today than ever.”
“...Federal authority exists for specified purposes while State authority...remains the comprehensive backdrop..."
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“...must recognize the fundamental role of the States...”

From: Secretary

Subject: State Fish and Wildlife Management Authority on Department of the Interior Lands and Waters
On State Power & Authority

“...Federal authority exists for specified purposes while State authority...remains the comprehensive backdrop...

“...must recognize the fundamental role of the States...”

“The Department recognizes States as first-line authorities for fish and wildlife management...”
The Unanswered

“Comprehensive backdrop applicable in the absence of specific, overriding Federal law.”

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SEP 10 2018
The Unanswered

“Comprehensive backdrop applicable in the absence of specific, overriding Federal law.”

“...the fundamental role of the States....especially where States have primary authority and responsibility...”

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From: Secretary
Subject: State Fish and Wildlife Management Authority on Department of the Interior Lands and Waters
The Unanswered

“Comprehensive backdrop applicable \textit{in the absence} of specific, overriding Federal law.”

“...the fundamental role of the States....especially \textit{where States have primary authority and responsibility}...”

“The Department...hereby expresses its commitment to defer to the States in this regard \textit{except as otherwise required by Federal Law.”}
The Project

-To provide an authoritative review of the legal and policy context of wildlife management on federal land

-To provide a more common understanding between federal and state agencies
This Article reviews the authority of federal and state governments to manage wildlife on federal lands. It first describes the most common assertions made by state governments regarding state powers over wildlife and then analyzes the relevant powers and limitations of the United States Constitution and federal land laws, regulations, and policies. Wildlife-specific provisions applicable within the National Park System, National Wildlife Refuge System, National Forest System, Bureau of Land Management, the special case of Alaska, and the National Wilderness Preservation System are covered, as is the Endangered Species Act. We reviewed an extensive collection of cases of conflict between federal and state agencies in wildlife management on federal lands. These cases show how federal land laws, regulations,
Findings & Analysis

Myth
A widely held but false belief or idea

Debunk
Exposé the falseness or hollowness of (a myth, idea, or belief)
Findings & Analysis

- The constitutional questions regarding the authority to manage wildlife on federal lands are largely settled.

- The U.S. Constitution grants the federal government vast authority to manage its lands and wildlife resources, fulfill its treaty obligations, and control interstate commerce, even when the states object.

“We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding.”

Kleppe v. New Mexico (1976)
Under the Property Clause of the Constitution, Congress is given the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” In the exercise of power under the Property Clause, Congress may choose to preempt State management of fish and wildlife on Federal lands and, in circumstances where the exercise of power under the Commerce Clause is available, Congress may choose to establish restrictions on the taking of fish and wildlife whether or not the activity occurs on Federal lands, as well as to establish restrictions on possessing, transporting, importing, or exporting fish and wildlife. Finally, a third source of Federal constitutional authority for the management of fish and wildlife is the treaty making power. This authority was first recognized in the negotiation of a migratory bird treaty with Great Britain on behalf of Canada in 1916.
Findings & Analysis

The Federal Obligation

Federal land management agencies have statutory and regulatory obligations, and not just discretion, to manage and conserve fish and wildlife on federal lands, contrary to the myth that “the states manage wildlife, federal land agencies only manage wildlife habitat.”
The Habitat Myth
-No basis in federal land law

National Park System

“[To] promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”
The Habitat Myth
-No basis in federal land law

National Wildlife Refuge System

“[T]o 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.”

“In administering the system the Secretary shall- (A) provide for the conservation of fish, wildlife, and plants, and their habitat within the system; (B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans...” (1997 Improvement Act)
The Habitat Myth
-No basis in federal land law

National Forest System

“It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” (MUSYA 1960)

“[To] provide for a diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” (NFMA 1976)
The Habitat Myth

-No basis in federal land law

Public Lands Managed by BLM

“[T]he management of the public lands and their various resource values ...including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.” (FLPMA 1976)
“I reaffirm the authority of the States to exercise their broad trustee and police powers as stewards of the Nation’s fish and wildlife species on public lands and waters under the jurisdiction of the Department.”

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“I reaffirm the authority of the States to exercise their broad trustee and police powers as stewards of the Nation’s fish and wildlife species on public lands and waters under the jurisdiction of the Department.”

“The 50 State governments...serve as trustees for fish and wildlife species resident in the respective States.”

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“The 50 State governments...serve as trustees for fish and wildlife species resident in the respective States.”

“State governments effectively function as trustees of fish and wildlife resources...”
-The common claim that “states own wildlife”—as basis to challenge federal authority—a “legal fiction.”

-Do States really manage wildlife as a public trust?
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-Do States really manage wildlife as a public trust?

-State & federal governments have trust responsibilities

-In federal land laws
The Public Trust in Federal Lands & Wildlife

**NEPA:*** The federal government’s responsibility to use all practicable means to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”
The Public Trust in Federal Lands & Wildlife

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The Wilderness Act: Congress secured “for the American people of present and future generations the benefits of an enduring resource of wilderness.”
The Public Trust in Federal Lands & Wildlife

NPS Organic Act: conservation....“in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”
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NWR Improvement Act: “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.”
The Public Trust in Federal Lands & Wildlife

**MUSYA:** to manage multiple uses in a combination “that will best meet the needs of the American people . . . without impairment of the productivity of the land.”
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**NFMA:** “the public interest” and serving “the national interest” in the renewable resources program.
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**NFMA:** “the public interest” and serving “the national interest” in the renewable resources program.

**FLPMA:** recognizes “the national interest” in public lands and requires multiple-use management to “meet the present and future needs of the American people” as well as “long-term needs of future generations,” and to do so “without permanent impairment of the productivity of the land and the quality of the environment.”
“The Secretary... reaffirms that fish and wildlife must be maintained for their ecological, cultural, educational, historical, aesthetic, scientific, recreational, economic, and social values to the people of the United States, and that these resources are held in public trust by the Federal and State governments for the benefit of present and future generations of Americans.”

36 C.F.R. §24.1(b)
“The 50 State governments have extensive capacities and competencies to exercise their responsibilities to serve as trustees for fish and wildlife species resident in the respective States.”

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“The 50 State governments have extensive capacities and competencies to exercise their responsibilities to serve as trustees for fish and wildlife species resident in the respective States.”

State fish and wildlife agencies provide “citizens with the opportunity to enjoy those fish and wildlife species through regulated hunting, fishing, and trapping.”

“State governments have consistency 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...”
State Wildlife Governance

- State institutional biases for fish & game
- The user-pay, user-benefit model of state wildlife funding
- The hunting-centric North American Model of Wildlife Conservation
- Often leads to mistrust, conflict & litigation
“Yet what is hidden from most Americans is another impending fish and wildlife crisis. For every game species that is thriving, hundreds of nongame species are in decline. Unlike the conservation finance system that was created for game and sport fish, there is no comparable funding mechanism to manage the majority of fish and wildlife under state stewardship. As a result, thousands of species of birds, frogs, turtles and even the iconic monarch butterfly are slipping through the cracks and could become endangered in the future.”
“...the effective stewardship of fish and wildlife requires the cooperation of the various States and the Federal Government.”

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Interior to “encourage a good neighbor policy with the States.”

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“Within 45 days of this Memorandum, all Bureaus and Offices complete a review of all regulations, policies, and guidance that pertains to the conservation and management of fish and wildlife species on lands and water under the jurisdiction that are more restrictive than otherwise applicable State provisions...”

“Within 90 days, each Bureau and Office referenced provide the Deputy Secretary a report containing detailed recommendations for the respective Bureau or Office to better align its regulations, policies, and guidance with State provisions.”
- Cooperation ≠ unlawful deference to state interests

-A problematic tendency for federal agencies to reflexively acquiesce to state positions that are counter to federal law and regulation.
Moving Forward

-To work constructively within the carefully crafted legal framework provided by the U.S. Constitution and federal land law rather than against it

-By embracing the conservation obligations that are inherent in federal lands and wildlife trust management
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-To better utilize existing opportunities in federal land law for intergovernmental cooperation

-Cooperation as a mutual and reciprocal process—a two way street

-States to participate in existing federal processes

-Federal agencies provided new opportunities to participate at state-level
Supplemental information (and FAQs) available @ www.cfc.umt.edu/bolle/federal-lands-wildlife