

# State and Local Control of Federal Lands: New Developments in the Transfer of Federal Lands Movement

*By Martin Nie\* and Patrick Kelly\*\**

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 quickly spread to every western state but California.<sup>1</sup> The Transfer of Public Lands Act 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.<sup>2</sup> But when other western states and their attorneys general conveyed skepticism about the legal arguments being made by Utah,<sup>3</sup> 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 legislation that authorized the disposal of 3.3 million acres of federal land.<sup>4</sup> The backlash to the "land seizure movement" was swift (e.g., #keepitpublic) and Chaffetz's bill was widely condemned by a coalition of conservation, hunting, angling, and recreational interests.<sup>5</sup> The legislation was withdrawn a week after its introduction and it looked as though the transfer movement might be losing momentum given the unsuccessful attempts, at the federal and state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.<sup>6</sup>

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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. See, e.g., Juliet Eilperin, *Facing Backlash, Utah Rep. Jason Chaffetz Withdraws Bill to Transfer Federal Land to the States*, WASH. POST (Feb. 2, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/02/02/facing-backlash-utah-rep-jason-chaffetz-withdraws-bill-to-transfer-federal-land-to-the-states>; Brad Plumer, *After a Massive Backlash, a Republican Yanks his Bill to Sell off Public Lands*, VOX MEDIA (FEB. 2, 2017), <https://www.vox.com/energy-and-environment/2017/2/2/14479462/chaffetz-public-lands-backlash>.

6. See Eilperin, *supra* note 5.

But the story is far from finished and the threats to public lands are just as acute today as they were in 2012, when western states began demanding the imminent transfer of title of federal public lands to a state or introduced legislation calling for studies of a possible transfer.<sup>7</sup> These state-based efforts received considerable national attention.<sup>8</sup> But receiving less coverage, and discussed below, are a new spate of bills that do not transfer *ownership* of federal lands to the states or private interests, but rather give state and local governments *control* over federal lands and resources. In doing so, these bills radically alter the traditional paradigm of federal lands management, and the constitutional principle of federal preemption, by making federal law subservient to state authority.

To understand how far Congress is pushing the boundaries of state power, some background in federal public lands and “cooperative federalism” is needed. This context shows that in the past, Congress fashioned a pragmatic balance between the national interest in public lands and providing state and local governments an important role to play in their administration.

#### I. FEDERAL PUBLIC LANDS AND COOPERATIVE FEDERALISM

The history of federal public lands is one of national interests, not those of any particular state or county government. It was the federal government, not western states, that acquired these lands through “purchase or . . . conquest.”<sup>9</sup> After an early period of federal land sales and disposals, much of the public lands were retained in federal ownership, with federal land laws requiring that they be managed in the national interest and for “the benefit of present and future generations of Americans.”<sup>10</sup> As declared by the Supreme Court in 1911, “All the public lands of the nation are held in trust for the people of the whole country.”<sup>11</sup>

Since decisions to retain public lands in federal ownership were made, the federal government and generations of American taxpayers have financially invested in developing, managing, protecting, and restoring these lands.<sup>12</sup> These were substantial national investments. Nevertheless, states have long had a meaningful role in the management of federal public lands, a relationship characterized as “cooperative federalism.” This means that there is some shared

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7. See Ruple, *supra* note 1, at 6–9 (cataloging state legislation).

8. See *id.*

9. Johnson v. McIntosh, 21 U.S. 543, 587 (1823).

10. See Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENVTL. L. 797, 902–06 (2017) (reviewing the national interest provisions in federal land laws).

11. Light v. United States, 220 U.S. 523, 537 (1911) (citing United States v. Trinidad Coal & Coking Co., 137 U.S. 160, 170 (1890)).

12. See CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R43822, FEDERAL LAND MANAGEMENT AGENCIES: APPROPRIATIONS AND REVENUES (2014) (providing data on appropriations and showing the different mechanisms through which American taxpayers pay for federal lands management).

responsibility and jurisdictional authority between federal and state governments.<sup>13</sup>

Federal public land statutes often provide state and local governments with a privileged position in federal lands planning and management. For example, 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.<sup>14</sup> These provisions, in other words, 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.<sup>15</sup>

The laws governing the national forests and rangelands, as managed by the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM), also provide states with an opportunity to “coordinate” and “cooperate” in federal planning processes. For example, 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.”<sup>16</sup>

This meaningful opportunity is taken seriously by the USFS, and state, local, and tribal governments are currently engaged in forest planning processes throughout the country.<sup>17</sup> 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.<sup>18</sup> Furthermore, the regulations

13. See CAROL HARDY VINCENT & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44267, STATE MANAGEMENT OF FEDERAL LANDS: FREQUENTLY ASKED QUESTIONS 3 (2016); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 184 (2005).

14. See Robert L. Fischman & Angela King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 129, 147–48 (2007) (providing an overview of certain savings clauses).

15. See *id.* at 145, 147, 149–61 (2007) (noting that these statutory disclaimers are often quite vague and were included as compromise measures to ensure passage of legislation). As a result, they note that: “Judicial interpretation of a savings clause may elevate or undermine the importance of state interests in federal natural resources programs. Largely, it is the interpretive approach used by a court that determines whether an ambiguous savings clause will compel special consideration not otherwise required under federal law.” *Id.* at 168.

16. 16 U.S.C. § 1604(a) (2012); 36 C.F.R. § 219.4(b)(1) (2018).

17. See, e.g., U.S. Dep’t of Agric., *Understanding Your Opportunities for Participating in the Forest Service Planning Process* (2016) (outlining the steps USFS has taken to incorporate the public’s important role in creating forest plans).

18. See 16 U.S.C. § 1604(a) (providing that, “as appropriate,” forest plans should be “coordinated with the land and resource management planning processes of State and local governments and other Federal agencies”); 36 C.F.R. § 219.4(b)(1) (requiring NFMA officials to coordinate with the “equivalent and related planning efforts” of tribes, agencies, and state and local governments). FLPMA also encourages 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 . . . .”

43 U.S.C. § 1712(c)(9) (2012).

state that coordination does not allow the USFS to “conform management to meet non-Forest Service objectives or policies.”<sup>19</sup>

Despite some county government claims to the contrary, 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.<sup>20</sup> To be clear, there is no veto authority granted to states or local governments.<sup>21</sup> Nonetheless, these planning processes provide state and local governments an opportunity to be fully engaged in the management of federal public lands.<sup>22</sup>

Important as they are, these cooperative federalism provisions are subject to the doctrine of federal preemption. Derived from the Supremacy Clause of the Constitution,<sup>23</sup> the doctrine holds that state law must yield to federal law where the two conflict.<sup>24</sup> Therefore, federal public land laws are also bounded by a larger national public interest for which Congress has required public lands be managed. These statutes obligate federal agencies to sustain and not impair federal lands and to manage them for the “American people,” in the “national interest,” and for “future generations.”<sup>25</sup> Recognition of a national interest is a cornerstone of public land law and management, and explains why we have nationally coordinated systems and networks of public lands.

Federalism, as it applies to public lands and the environment more broadly, is in a constant state of flux and dial-tuning. Incremental moves to increasing federal or state power are to be expected with shifts in control of the executive and legislative branches. Despite this shifting power dynamic, states have assumed greater authority in federal land management since the 1970s, irrespective of what party is in power in the executive and legislative branches. Consider, for example, the forestry provisions of the 2014 Farm Bill signed by President Obama.<sup>26</sup> It permits governors to request the designation and prioritization of landscape-scale areas to be treated by the USFS for insect and disease outbreaks.<sup>27</sup> The Farm Bill also permanently authorized “Good Neighbor

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19. 36 C.F.R. § 219.4(b)(3).

20. See Michael C. Blumm & James A. Fraser, “Coordinating” with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands, 38 PUB. LAND & RESOURCES L. REV. 1, 21–22, 24–27, 30 (2017).

21. See, e.g., 16 U.S.C. § 1604(a); 43 U.S.C. § 1712(c)(9).

22. See Michelle Bryan, *Cause for Rebellion? Examining How Federal Land Management Agencies and Local Governments Collaborate on Land Use Planning*, 6 J. ENERGY & ENVTL. L. 1, 7–12 (2015).

23. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”).

24. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (stating that “federal legislation necessarily overrides conflicting state laws under the Supremacy Clause”).

25. See Martin Nie, *supra* note 10, at 902–06.

26. Agricultural Act of 2014, Pub. L. No. 113-79, tit. VIII, sec. 8001-8306, 128 Stat. 649, 913–926.

27. *Id.* sec. 8204(b)(1), § 602, 128 Stat. 915 (codified as amended at 16 U.S.C. § 6591a).

Authority” that permits states to perform identified watershed restoration and forest management activities on national forest system lands.<sup>28</sup>

This dial-tuning is also happening in the context of the collaborative movement, which has reshaped the politics of public lands management.<sup>29</sup> Collaborative approaches, whether they exist informally or are embedded within a statutory framework, typically provide local interests a more powerful voice in public lands management. For example, the Collaborative Forest Landscape Restoration Program requires restoration projects on priority forest landscapes to be developed and implemented through a collaborative process.<sup>30</sup> As such, local interests play a significant role in facilitating the restoration of priority forest landscapes.<sup>31</sup> This Program is typical of most collaborative endeavors, as it attempts to gain the benefits of localized approaches while ensuring it is also subject to preexisting federal environmental law.<sup>32</sup>

In short, federal public land law already provides state and local governments an important position in federal lands management. Furthermore, opportunities for participation have gradually expanded under both Republican and Democratic leadership. A degree of fine-tuning and shifting powers—between federal and state governments—is an enduring theme in public lands management. But the recent public land bills described in the next part are of a different breed and order. They are far outside the mold of cooperative federalism and if enacted, would sacrifice the national interest in public lands.

## II. STATE & LOCAL CONTROL OF FEDERAL LANDS: CONGRESSIONAL BILLS IN THE 115<sup>TH</sup> CONGRESS

### *Federal Land Freedom Act*

Introduced by Representative Diane Black of Tennessee, the Federal Land Freedom Act (FLFA) seeks to “achieve domestic energy independence by empowering States to control the exploration, development and production of oil and gas on all available Federal land.”<sup>33</sup> The FLFA allows 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”

28. *Id.* sec. 8206(b), 128 Stat. 922 (codified at 16 U.S.C. § 2113a).

29. See, e.g., Martin Nie & Peter Metcalf, *National Forest Management: The Contested Use of Collaboration and Litigation*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10208, 10209–10 (2016).

30. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, tit. IV, sec. 4001, 4003(b)(2), 4003(b)(6), 4003(d)(2)(C), 123 Stat. 991, 1141–45 (2009) (codified at 16 U.S.C. §§ 7301, 7303).

31. See *id.* sec. 4001(2), 4003(b)(2)(A), 4003(b)(3)(H), 4003(b)(6)–(7), 128 Stat. 1141–43.

32. See *id.*

33. Federal Land Freedom Act, H.R. 3565, 115th Cong. (2017). Similar provisions are found in other legislative proposals granting states managerial control over development and regulation of oil and gas on federal land. See, e.g., Strengthening the Economy with Critical Untapped Resources to Expand American Energy Act of 2017, H.R. 4239, 115th Cong. (2017); Fracturing Regulations are Effective in State Hands Act of 2017, S. 334, 115th Cong. (2017).

submitted to the Secretaries of Interior or Agriculture.<sup>34</sup> The FLFA presumes that “the States have extensive and sufficient regulatory frameworks for permitting oil and natural gas development.”<sup>35</sup> Once approved, any action by a state to lease, permit, or regulate oil and gas exploration would be exempt from provisions in the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).<sup>36</sup> FLFA would effectively replace the federal environmental and leasing framework with an approved state regulatory program. Finally, in listing the grounds for revocation of a previously approved state program, the FLFA only explicitly mentions a “decrease in royalties” paid to the federal government as cause for terminating state authority.<sup>37</sup>

*Enhancing State Management of Federal Lands and Waters Act (currently a House discussion draft)*

A discussion draft at the time of writing, the Enhancing State Management of Federal Lands and Waters Act (ESMFLWA), currently has no identified author.<sup>38</sup> As its title suggests, the ESMFLWA seeks to “enhance State management of Federal lands and waters.”<sup>39</sup> This would be achieved primarily through the creation of “enhanced management regions,” akin to dominant use zones, that would allow interested states to submit for approval their own management programs to the Secretaries of Interior and Agriculture for “exclusive jurisdiction” over oil and gas leasing, permitting, and production on available federal land.<sup>40</sup> The ESMFLWA grants state oil and gas management programs express exemption from the ESA, NEPA, and the APA, with added exemptions from federal resource management plans and from a section of the National Historic Preservation Act.<sup>41</sup> Additionally, by amending the Outer Continental Shelf Lands Act, the ESMFLWA grants states the power to either approve or disapprove of federal offshore leasing blocks within their administrative boundaries.<sup>42</sup> It also includes a penalty provision for any state choosing to disapprove of or otherwise forego development of these resources (both onshore and offshore).<sup>43</sup> Termed a “lost production fee,” the federal government is entitled to recover any lost potential revenue from a state that opts out of or disapproves of a certain amount of oil and gas leases within its

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34. H.R. 3565 § 4(a).

35. *Id.* § 2.

36. *Id.* § 4(d).

37. *Id.* § 4(e)(2).

38. H.R. Subcomm. on Energy and Mineral Res., 115th Cong., Discussion Draft of Enhancing State Management of Federal Lands and Waters Act (2018).

39. *Id.*

40. *Id.* §§ 44(a)(2)–(3), 44(b) (amending the Mineral Leasing Act, 30 U.S.C. § 181 et seq. (2018)).

41. *Id.* § 44(d)–(e).

42. *Id.* § 2002(a)(i)(1) (amending the Outer Continental Shelf Lands Act, 43 U.S.C. 1344 (2018)).

43. H.R. Subcomm. on Energy and Mineral Res. § 2002(a)(i)(4)–(5).

boundaries (including offshore administrative boundaries).<sup>44</sup> Far from the traditional multiple-use framework, this would not only incentivize and favor significantly expanded oil and gas development on federal lands, it would effectively penalize states that opt for other values and uses.<sup>45</sup>

#### *National Monument Creation and Protection Act*

Introduced by Representative Rob Bishop of Utah, the National Monument Creation and Protection Act (CAP Act), sets new restrictions and limitations on presidential authority to designate national monuments under the Antiquities Act.<sup>46</sup> In addition to narrowing the list of objects eligible for protection and reducing the allowable size of a national monument, the CAP Act grants considerable new authority to state and county governments in the designation process.<sup>47</sup> Any national monument between 10,000 and 85,000 acres in size must be approved by the “elected governing body of each county,” by the “legislature of each State,” as well as by the governor of each state “within whose boundaries the national monument will be located.”<sup>48</sup> Furthermore, any owner of “non-federally owned property within the exterior boundaries” of a proposed national monument must provide “express written consent” before designation can occur.<sup>49</sup> This could hypothetically give a single private land owner the unprecedented power to veto a presidential proclamation involving federal lands.<sup>50</sup>

#### *Grand Staircase-Escalante Enhancement Act*

Introduced by Representative Chris Stewart of Utah, the Grand Staircase-Escalante Enhancement Act (GSEEA) seeks to provide “greater conservation, recreation, economic development and local management of Federal lands in Garfield and Kane Counties, Utah.”<sup>51</sup> Among other provisions, the GSEEA creates a seven-member “Management Council” made up primarily of local and state officials.<sup>52</sup> The Council is charged with developing and implementing management plans on three federally-owned national monuments and one national park in the state of Utah.<sup>53</sup> The GSEEA stipulates that only one of the Council members can be an employee of the federal government and that federal land managers “shall adhere to the management plans created by the

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44. *Id.* § 44(g).

45. *See id.*

46. National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (2017).

47. *Id.* §§ 2, 2(e), 2(h).

48. *Id.* § 2(h)(3). The CAP Act limits the maximum allowable acreage for a national monument to 85,000 and also codifies presidential authority to reduce the size of any national monument (given state and county approval). *See id.* §§ 2(h), 2(j).

49. H.R. 3990 § 2(k).

50. *See id.*

51. Grand Staircase-Escalante Enhancement Act, H.R. 4558, 115th Cong. (2017).

52. *Id.* § 10.

53. *Id.*

Management Council.”<sup>54</sup> With no veto power and with the overwhelming majority of members representing state and local interests, the sole federal representative on the Council would have a significantly reduced level of input and authority regarding management of the federally-owned lands within the newly established park and preserve. Finally, the GSEEA further reduces input from the federal government by precluding its sole representative from serving as Council Chair.<sup>55</sup>

#### *Greater Sage-Grouse Protection and Recovery Act*

Introduced by Senator Jim Risch of Idaho, the Greater Sage-Grouse Protection and Recovery Act (GSGPRA) seeks to provide for the “protection and recovery” of the greater sage grouse by “facilitating State recovery plans.”<sup>56</sup> In seeking to implement and “demonstrate the efficacy of State management plans,” the GSGPRA requires that federal resource management plans are “consistent” with state sage-grouse management plans for a period of five years.<sup>57</sup> During this period, the federal government is prohibited from any alteration of these plans that would render them “inconsistent with State management.”<sup>58</sup> This prohibition would retroactively apply to any federal action or plan with respect to sage-grouse management going back to June 1, 2014.<sup>59</sup> Furthermore, if there is disagreement about whether or not a federal resource management plan is consistent with state plans, the governor of the affected state is given full authority to make the final determination.<sup>60</sup> During the five-year window stipulated by the GSGPRA, states shall have full management authority over sage-grouse on federal lands and essentially hold veto power over any provisions in federal resource management plans that conflict with state-drafted and approved conservation plans.<sup>61</sup>

#### *Native Species Protection Act*

Introduced by Senator Mike Lee of Utah, the relatively short Native Species Protection Act (NSPA) seeks to “clarify that noncommercial species found entirely within the borders of a single State are not in interstate commerce or subject to regulation under the Endangered Species Act of 1973.”<sup>62</sup> Following closely on the heels of a recent affirmation of congressional power to regulate

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54. *Id.* §§ 10(d), 11.

55. *Id.* § 10(h).

56. Greater Sage-Grouse Protection and Recovery Act, S. 273, 115th Cong. (2017).

57. *Id.* §§ 2, 4(b)(1).

58. *Id.* § 4(b)(1).

59. *Id.* § 4(b)(2).

60. *Id.* § 4(b)(3).

61. S. 273 § 4(b). In addition to granting primacy to state conservation plans, the GSGPRA also prohibits the U.S. Fish & Wildlife Service from listing the sage-grouse as threatened or endangered under the ESA until September of 2027. *See id.* § 4(a).

62. Native Species Protection Act, S. 1863, 115th Cong. (2017).



intrastate species under the ESA,<sup>63</sup> NSPA legislatively reverses the decision by declaring that “intrastate species shall not be . . . considered to be in interstate commerce,” thereby exempting intrastate species from the ESA.<sup>64</sup> Through this exemption, the NSPA relinquishes federal authority and empowers the states to either protect, or not protect, threatened and endangered species.<sup>65</sup> This would include wildlife species that inhabit both state and federal land.<sup>66</sup>

*Sportsmen’s Heritage and Recreational Enhancement Act*

Introduced by Representative Jeff Duncan of South Carolina, the Sportsmen’s Heritage and Recreational Enhancement Act (SHARE) is a sweeping bill, with multiple disparate provisions, most designed to increase opportunities and access for hunters, anglers, and recreational shooters on federal public lands.<sup>67</sup> The SHARE does so by significantly limiting the discretionary powers of federal land agencies to manage public lands for the purposes set forth in their governing laws and regulations. For example, the SHARE would limit a federal agency’s ability to regulate the use of lead ammunition and fishing tackle on federal lands.<sup>68</sup> Further, by explicitly establishing that opportunities for “recreational fishing, hunting, and shooting and the conservation of fish and wildlife . . . shall constitute measures necessary to meet the *minimum requirements* for the administration of wilderness areas” and by reaffirming that the provisions of the Wilderness Act are supplemental to the underlying federal land unit, federal agencies have less discretion to manage federally-designated wilderness areas as instructed by Congress in the Wilderness Act.<sup>69</sup> Additionally,

63. *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F. 3d 990, 1005–08 (10th Cir. 2017).

64. S. 1863 § 2(b). The ESA regulatory powers, like other federal environmental laws, are grounded in the Commerce Clause. 852 F. 3d at 1006. *See* U.S. CONST. art. I, § 8 cl. 3.

65. *See* S. 1863 § 2(b).

66. *Id.* § 2(a)–(b).

67. Sportsmen’s Heritage and Recreational Enhancement Act, H.R. 3668, 115th Cong. (2017).

68. *Id.* § 103.

69. *See id.* § 403(e)(1)–(2) (emphasis added). Though on its surface this section appears to simply reaffirm the management of wilderness areas pursuant to the Wilderness Act, it in fact significantly erodes this Act’s protective power and the broad discretionary power agencies had pursuant to it. The Wilderness Act was passed “[i]n 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 . . . leaving no lands designated for preservation and protection in their natural condition.” 16 U.S.C. § 1331(a) (2012). The Wilderness Act defined a “wilderness” area as “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.” *Id.* § 1131(c). While wilderness areas were “devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historic use,” except for limited reasons—including to meet the “*minimum requirements for administration of the area for the purposes*” of the Wilderness Act—“no commercial enterprise and no permanent road” are allowed to be built in wilderness areas. *Id.* § 1133(b)–(c) (2012) (emphasis added). By explicitly establishing that the provision of fishing, hunting, and shooting opportunities “shall constitute measures necessary to meet the *minimum requirements* for the administration of wilderness,” SHARE opens the door to management of wilderness areas that does not necessarily seek to preserve the “natural conditions” of these areas. *See* 16 U.S.C. § 1331(a); H.R. 3668, § 403(e)(1) (emphasis added). In

Title VIII of the SHARE precludes the Secretary of the Interior, effectively the National Park Service, from restricting recreational or commercial fishing access in certain state or territorial waters unless approved by a state fish and wildlife management agency.<sup>70</sup> These provisions, and others, are predicated on power shifting and an unprecedented savings clause related to state authority over wildlife management on federal lands: “Nothing in this Act shall be construed as interfering with, diminishing, or conflicting with the authority, jurisdiction, or responsibility of any State to exercise primary management, control, or regulation of fish and wildlife under State law on land or water within the State, including on Federal land administered by the Bureau of Land Management or the Forest Service.”<sup>71</sup>

### III. IMPLICATIONS FOR FEDERAL LANDS MANAGEMENT

The shift in strategy—from States demanding ownership of federal lands to giving states unchecked control over their management—is a significant political development posing a greater threat and risk to federal public lands. The Property Clause of the Constitution gives Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>72</sup> This Clause has provided some comfort to advocates of federal public lands, as it is only Congress, not state legislatures, that has the authority to transfer ownership of federal land to states.<sup>73</sup> In other words, advocates understood that state efforts to claim ownership of federal lands, without congressional sanction, will run afoul of the Constitution, as such efforts have done in the past.<sup>74</sup> But the Property Clause, and Congress’s plenary power over federal lands, also 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.”<sup>75</sup> The strategy turns a legal conflict into a political one and the proposed legislation described above indicates how far some members of Congress are willing to go in this regard.

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other words, so long as these actions can be tied to recreational fishing, hunting, or shooting or to the “conservation of fish and wildlife” they will be consistent with the “minimum requirements” of the Wilderness act. See H.R. 3668, § 403(e)(1). This could involve the construction of temporary roads, logging operations, and the alteration of riparian areas, up to and including impoundments or dam construction.

70. H.R. 3668 § 801(a).

71. *Id.* § 1901.

72. U.S. CONST. art. IV, § 3, cl. 2.

73. See Vincent & Wyatt, *supra* note 13, at 3 (reviewing Congress’s plenary authority over federal lands under the Property Clause of the Constitution).

74. See *id.*; see also Robert B. Keiter & John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement* (2014); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980); Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 154–58, 167–68, 171 (2011).

75. Vincent & Wyatt, *supra* note 13, at 5.

The legislation described above is a radical departure from how federalism is normally employed in federal public land law. Some of the legislation turns the constitutional principle of federal preemption on its head: in most cases the bills make federal law subservient to state authority. The CAP Act is a case in point: it requires the consent of all affected counties within a state before a national monument can be designated, thus negating the Antiquities Act and the purpose of establishing *national* monuments.<sup>76</sup> Similarly, the GSEEA requires federal land managers to adhere to the plans created by a state- and county-dominated Management Council.<sup>77</sup> Another example is the FLFA, as it precludes federal agencies from rejecting a state's leasing, permitting, and regulatory program, even if it provides insufficient protection to resources and is inconsistent with federal public land laws governing BLM and USFS lands.<sup>78</sup>

Another novel legislative approach is to statutorily limit the constitutional underpinnings of federal environmental law. The NSPA does this, for example, by exempting noncommercial intrastate species from the ESA because such species are not considered in "interstate commerce."<sup>79</sup> The NSPA places these species outside the scope of the ESA, which is based in the Commerce Clause, and therefore outside the scope of regulation.<sup>80</sup>

The proposed legislation essentially gives state and local interests unfettered control over federal public lands and resources, without incurring any of the economic costs that would be associated with a transfer of title. The failure of so many state transfer bills was due in large part to the financial costs that would come along with ownership.<sup>81</sup> But shifting the issue from ownership to control of federal lands is a far less financially risky proposition for the states.

Some of the bills, like those focused on oil and gas development and the GSEEA, make clear the connection between local control and economic development on federal lands.<sup>82</sup> Other bills use the language of federalism as a means to reframe the debate, shielding what is a massive deregulatory scheme to unburden federal lands from the protection of federal environmental law. The SHARE, for example, focuses more on providing increased hunting and fishing access on public lands than on conservation, and it advances this goal in part by reducing the applicability of certain federal environmental laws.<sup>83</sup> Furthermore, buried deep in the SHARE is a savings clause that does not preserve the status

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76. See H.R. 3990 § 2(h) (2017).

77. H.R. 4558 § 11.

78. See H.R. 3565 § 4(d).

79. S. 1863 § 2(b)(1).

80. See 852 F. 3d at 1006.

81. See Ruple, *supra* note 1, at 46–53 (reviewing the estimated economic costs associated with a transfer of federal lands); Hillary M. Hoffman, *The Flawed Law and Economics of Federal Land Seizure Statutes*, 30 NAT. RESOURCES & ENV'T, Fall 2015.

82. See H.R. 3565; H.R. 4558.

83. See H.R. 3668 § 403(c)(2) (exempting federal actions that support and facilitate recreational fishing, hunting, and shooting opportunities from NEPA analysis). In other words, the potential manipulation of species and their habitat in order to support hunting and fishing will not be subject to careful evaluation regarding environmental impacts, regardless of scale and intensity. See *id.*

quo, as do most savings clauses, but rather creates a new broad authority for state wildlife agencies who could now manage for a narrower set of values and interests on public lands.<sup>84</sup>

Shifting control of public lands to state and local interests will have a significant impact on how they are managed and protected. Federal public land and wildlife laws are more conservation-oriented than those generally found at the state level. Consider, for example, the contrast between federal public lands and state trust lands. As reviewed above, federal land agencies are obligated by law to manage federal lands for a broad set of values in the national interest, while state trust land managers have a more limited fiduciary obligation to generate revenues for designated trust beneficiaries, most often common schools or other public institutions.<sup>85</sup> Another example is the protection afforded to threatened and endangered species at the federal and state levels. Most state laws are far weaker than the ESA and much more limited in application, such as not covering critical habitat, not requiring the use of best available science or interagency consultation, or not allowing citizen suit enforcement.<sup>86</sup>

Shifting control to the states will also diminish the influence the American public has on its federal land. Exempting state programs from the NEPA and the APA, as the FLFA aims to do, makes it more difficult to participate in, and possibly challenge, the decisions being made with respect to federal land.<sup>87</sup> Consequently, if the legislation passes, the democratic character of public lands would be undermined and American citizens and taxpayers, who invest in these lands and resources, would have a diminished voice in how they are managed.

Unlike the federal public land laws discussed above, the proposed legislation generally fails to recognize the national interest in federal public lands. Only one of the bills—the GSEEA— even acknowledges any national interest at all.<sup>88</sup> It references “the unique and nationally-important historic, natural, scenic, and natural resources” of the designated lands included in the GSEEA.<sup>89</sup> But it fails to explain how a locally-dominated Management Council, with merely one federal representative, can adequately serve the national interest.

#### CONCLUSION

State and local governments are provided with a variety of opportunities to constructively engage in federal lands decision making. These opportunities have expanded, under Republican and Democratic leadership, since the last Sagebrush

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84. See H.R. 3668 § 1901.

85. See JON A. SOUDER and SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT, and SUSTAINABLE USE* 285 (1996) (“State 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.”).

86. See Alejandro E. Camacho et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10837, 10838, 10840–41 (2017).

87. See H.R. 3565 § 4(d).

88. See H.R. 4558 §§ 4(c)(1), 7(b)(1), 8(b)(1), 9(b)(1).

89. *Id.*

Rebellion started in the 1970s. But none of these measures will satisfy those interests advocating for even more unrestrained state and local control of federal lands. Instead of seeking ownership of federal lands, encumbered as they are with environmental protections and financial obligations, the transfer movement is now focused on shifting control of their management. The result would largely be the same, as there is little practical difference between transferring ownership and simply ceding to state and local governments all decision making authority. In each scenario, the national interest in public lands is surrendered.