

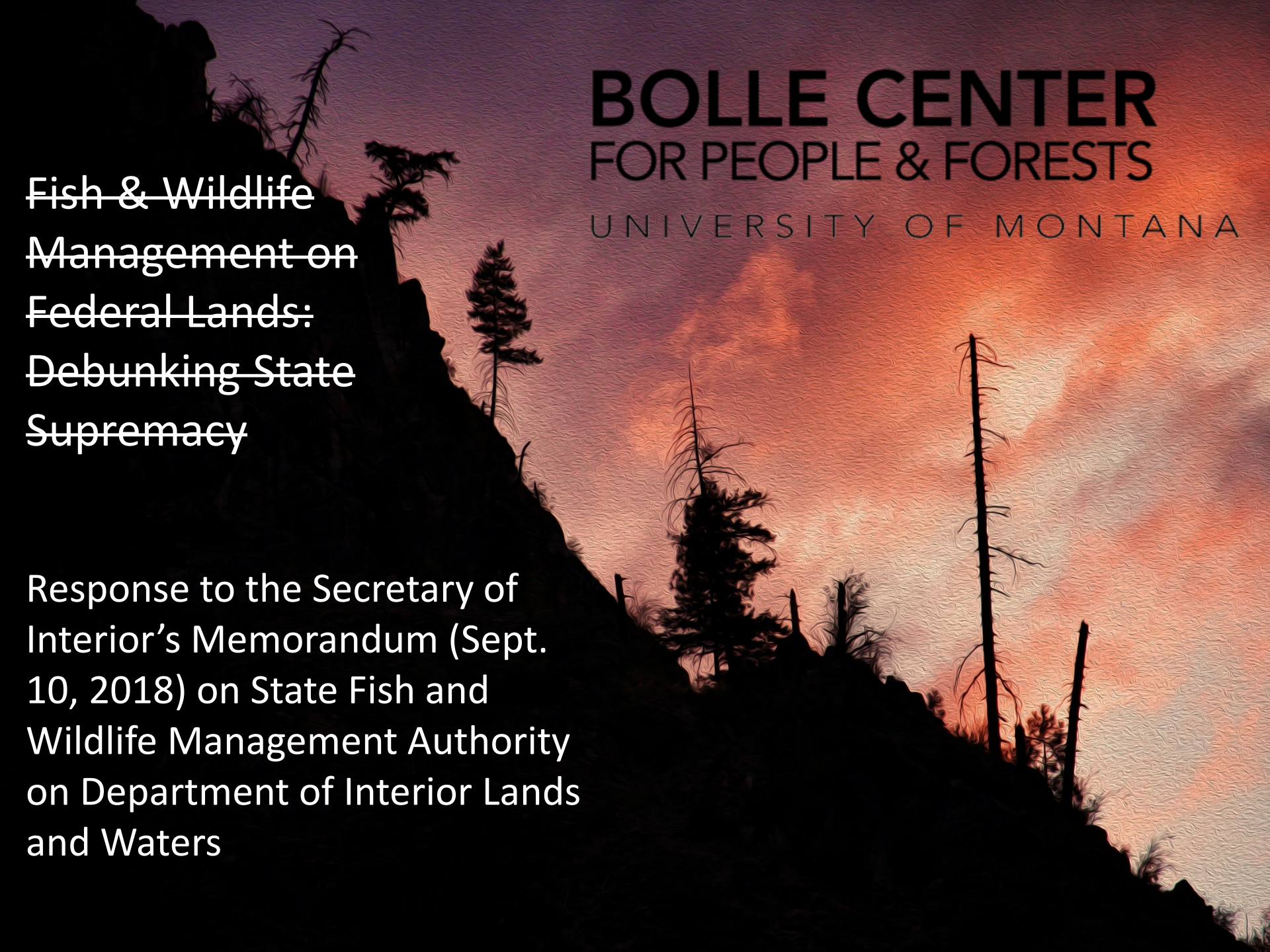


BOLLE CENTER
FOR PEOPLE & FORESTS
UNIVERSITY OF MONTANA

**Fish & Wildlife
Management on
Federal Lands:
Debunking State
Supremacy**

*Lewis & Clark Law School
October 4, 2018*

Martin Nie
Director, Bolle Center
Professor, Natural Resources Policy
University of Montana
W.A. Franke College of Forestry &
Conservation



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~~Fish & Wildlife~~
~~Management on~~
~~Federal Lands:~~
~~Debunking State~~
~~Supremacy~~

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



THE SECRETARY OF THE INTERIOR
WASHINGTON

SEP 10 2018

Memorandum

To: Heads of Bureaus and Offices

From: Secretary 

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



Memorandum

To:

From:

Subject:

“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.”

ment of the Interior

On State Power & Authority

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

R

Memorandum

To: Heads of Bureaus and Offices

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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**...”

R

“...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**...”

R

“...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.**”



SEP 10 2018

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To: Heads of Bureaus and Offices

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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...**”

To: Heads of Bureaus and Offices

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Lands and Waters



The Unanswered

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

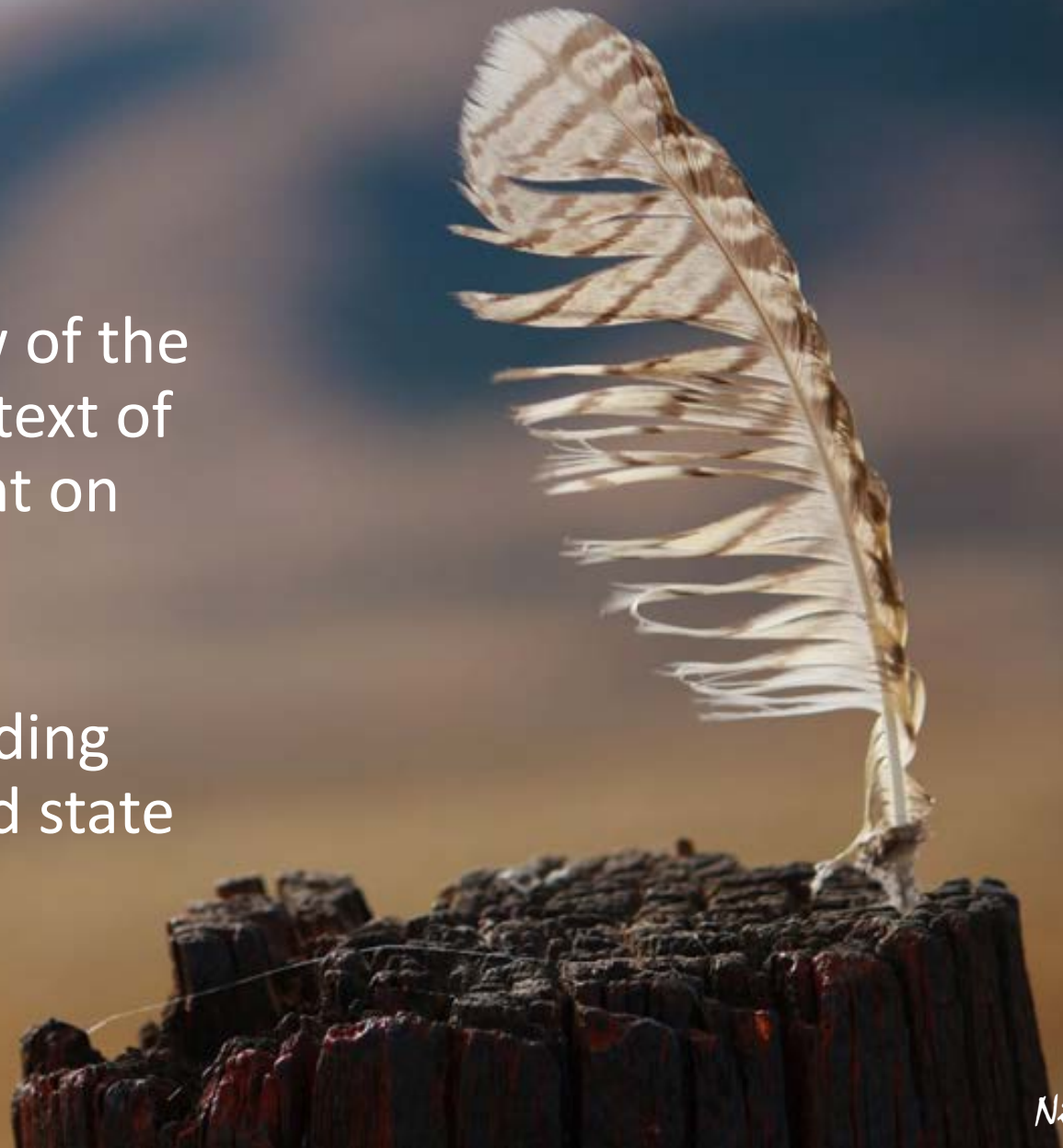
“...the fundamental role of the States....especially **where States have primary authority and responsibility...**”

“The Department...hereby expresses its commitment to defer to the States in this regard **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



DEBUNKING STATE SUPREMACY

BY

MARTIN NIE,* CHRISTOPHER BARNES,** JONATHAN HABER,*** JULIE JOLY,****
KENNETH PITT***** & SANDRA ZELLMER*****

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,

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*** Jonathan Haber is a wildlife planning and policy consultant and a former planning specialist for the United States Forest Service.

**** Julie Lurman Joly is former Associate Professor of Resources Law and Policy at Alaska-Fairbanks.

***** Kenneth Pitt is Adjunct Instructor in the Natural Resource Department at Salish Kootenai College and formerly a General Attorney for the USDA-Office of the General Counsel.

***** Sandra B. Zellmer is Robert B. Daugherty Professor of Law, University of Nebraska-Lincoln.

The Pro
-To provide
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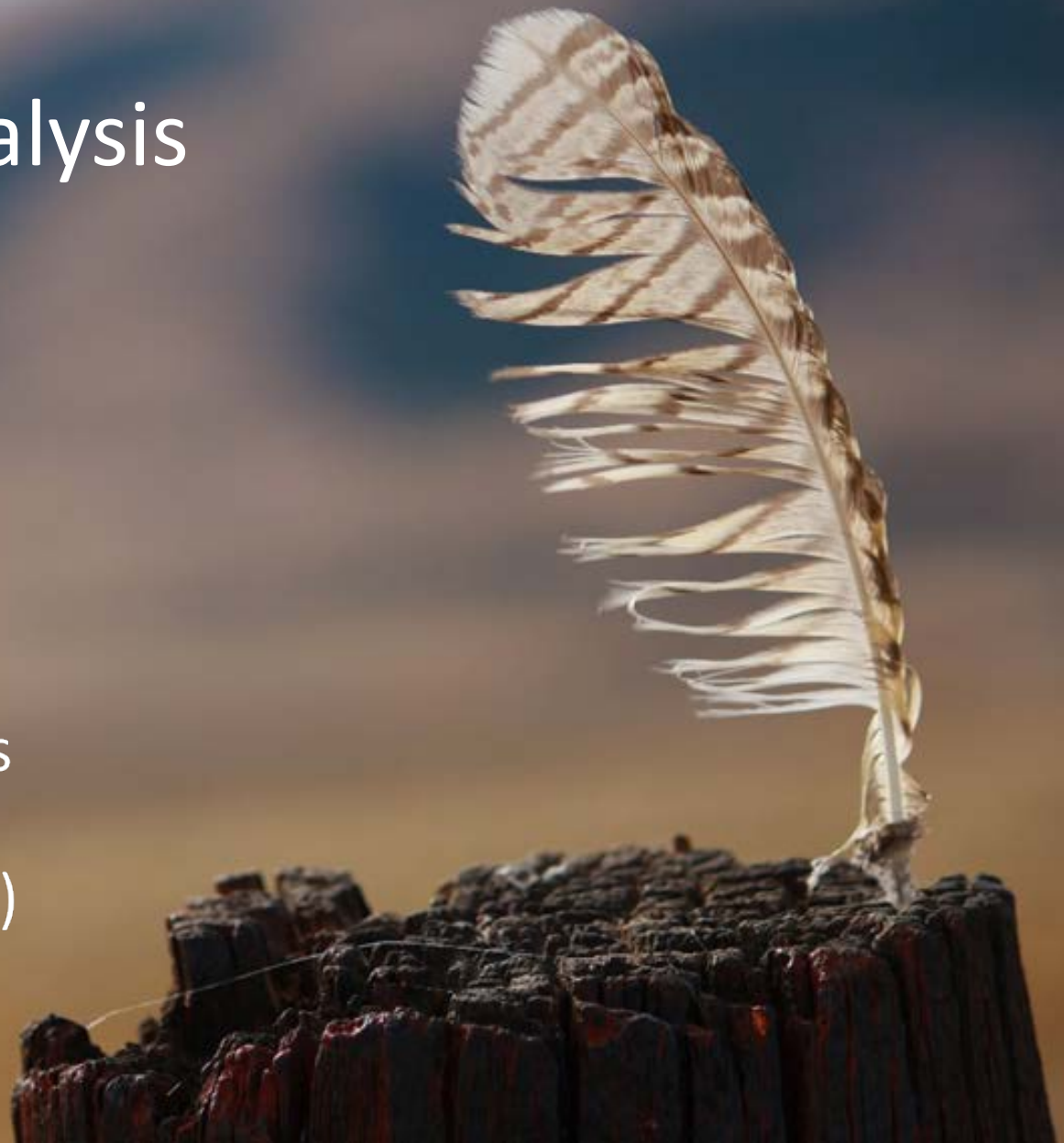
Findings & Analysis

Myth

A widely held but false belief or idea

Debunk

Expose 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)

43 C.F.R. §24.3(a)

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)



THE SECRETARY OF THE INTERIOR

“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.”

Memorandum

To: Heads of Bureaus and Offices

From: Secretary 

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



THE SECRETARY OF THE INTERIOR

“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.”


From:

Secretary

A handwritten signature in blue ink, appearing to be "Z. K. DeLoach", written over the printed name "Secretary".

Subject:

State Fish and Wildlife Management Authority on Department of the Interior
Lands and Waters



THE SECRETARY OF THE INTERIOR

“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.”


“State governments effectively function as **trustees** of fish and wildlife resources...”

LANDS AND WATERS



-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?



-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?

-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.”

The Public Trust in Federal Lands & Wildlife

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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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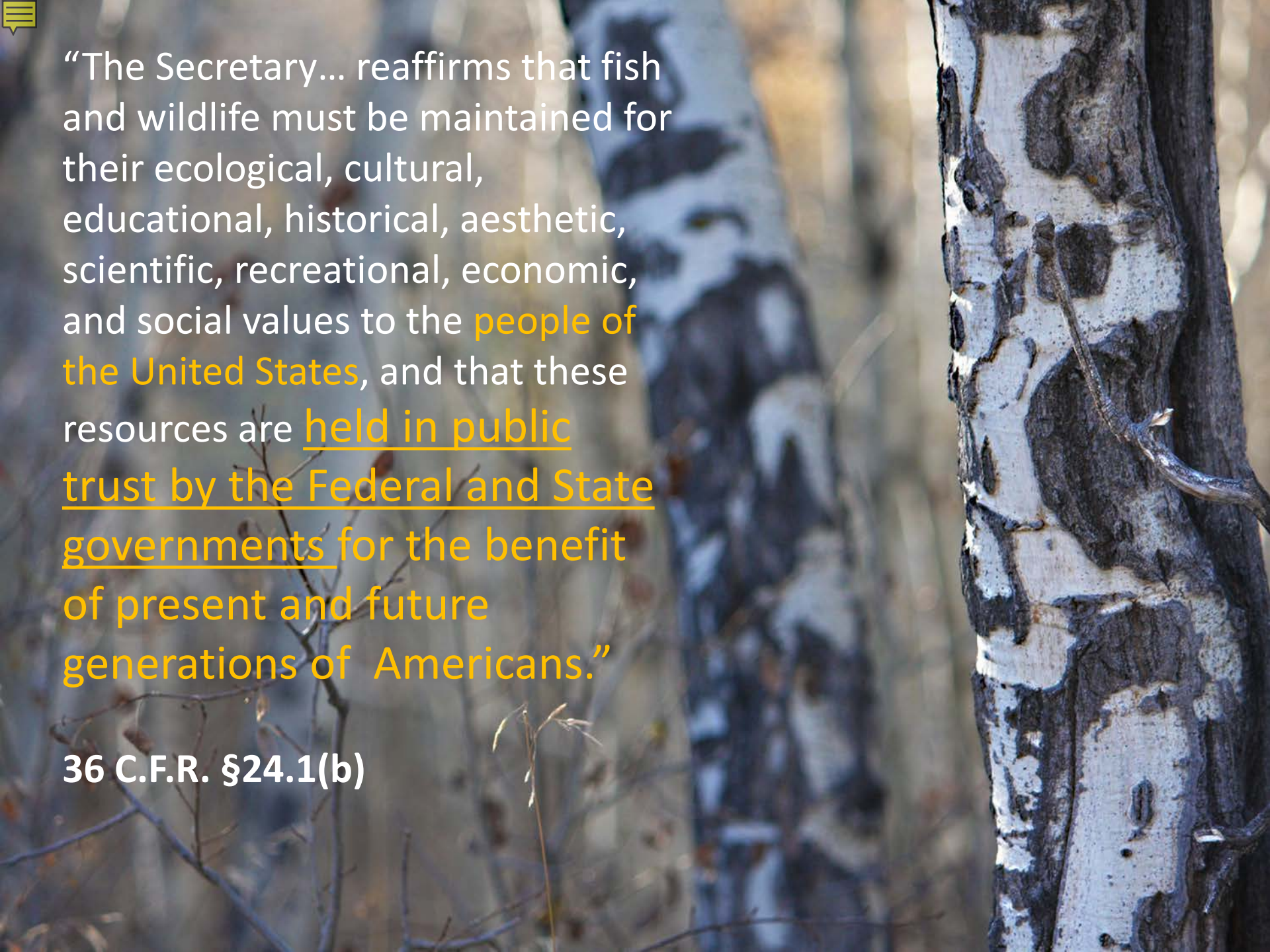
NFMA: “the public interest” and serving “the national interest” in the renewable resources program.

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.”


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 SECRETARY OF THE INTERIOR

“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 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...”

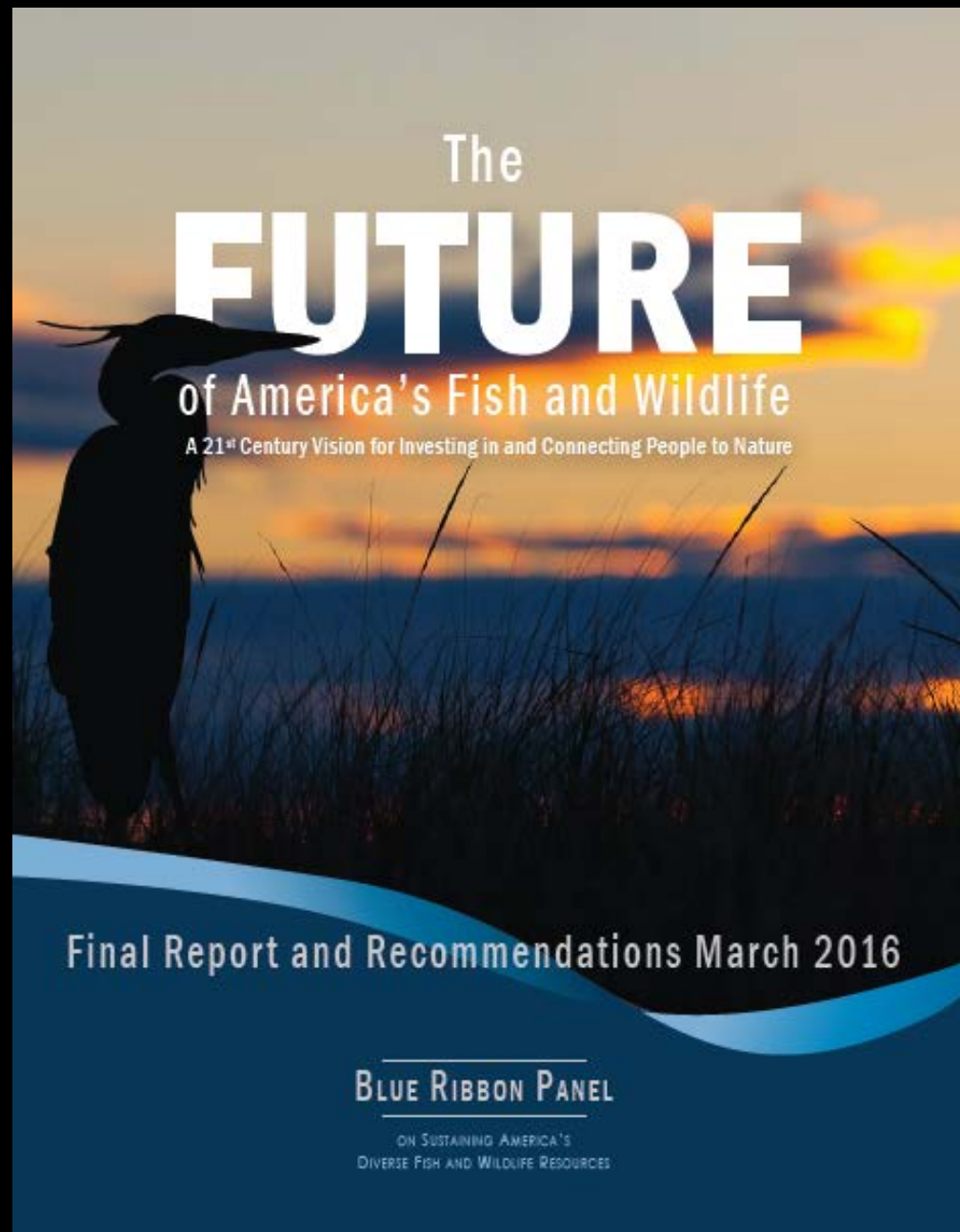
State Wildlife Governance

- 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



Nie

“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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“...the effective stewardship of fish and wildlife requires the **cooperation** of the various States and the Federal Government.”

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.

Idaho for Wildlife's Predator Hunting Contest And Fur Rendezvous



**Salmon, Idaho
January 1st thru 4th, 2015**



**2 Person Teams
Categories**



Wolves
1st Prize
\$1,000.00
(Most Wolves)

Coyotes
1st Prize
\$1,000.00
(Most Coyotes)

YOUTH CATEGORIES

Ages: 10-13	1st Prize	.223 w/scope
Ages: 14-17	1st Prize	.243 w/scope

REGISTRATION

Jan. 1st @ Steel & Ranch, starting at 6:00pm.
All teams must sign in and attend rules meeting!

ENTRY FEE

No entry fee but your generous donations will be appreciated

Licensed Fur Buyers On Site

to pay \$\$\$\$ for your furs (whole or skinned)

Contact: contest@idahoforwildlife.com

For more information: www.idahoforwildlife.com

100% of the excess cash contributions will be given back
to the Salmon Valley local and various charities:

Calvary Food Bank

\$1,000.00 College Scholarship

Lemhi After School Program



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



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

- 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

The background of the slide is a photograph of a forest silhouette against a sunset sky. The sky is a mix of orange, red, and purple, with some clouds. The foreground shows the dark silhouettes of several trees, including a tall, thin, bare tree on the right and several fuller evergreen trees on the left and center. The overall mood is serene and natural.

BOLLE CENTER FOR PEOPLE & FORESTS UNIVERSITY OF MONTANA

Supplemental
information (and FAQs)
available @
[www.cfc.umt.edu/bolle/
federal-lands-wildlife](http://www.cfc.umt.edu/bolle/federal-lands-wildlife)