

FISH AND WILDLIFE MANAGEMENT ON FEDERAL LANDS

DEBUNKING STATE SUPREMACY

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Wildlife Management: Federal-State Conflicts

- National Park Service/U.S. Fish & Wildlife Service's decision to preempt Alaska's hunting & predator control regulations
- Wolf control in federal wilderness
- Lead ammunition & condors on National Forests



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 amongst federal and state agencies



Scope of Project

The Constitution & Wildlife

- The Property Clause
- The Treaty Clause
- The Commerce Clause (& Tenth Amendment)
- Federal Preemption (& Savings Clauses)

Federal Land Law & Wildlife

- The ESA
- National Park System
- National Wildlife Refuge System
- National Forest System
- Public lands managed by Bureau of Land Management
- Alaska
- National Wilderness Preservation System



The Research Team

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State Perspectives on Managing Wildlife on Federal Land

Common assertions made by states and AFWA

Examples

- States “own” wildlife and manage in as public trust resource
- States have supreme or “primary” authority to manage wildlife, even on federal land
- Federal agencies have narrow constitutional authority to manage wildlife
- Federal land laws (mostly) preserve state primacy over wildlife
- States manage wildlife according to the “North American Model of Wildlife Conservation”



State Perspectives on Managing Wildlife on Federal Land

Examples

Missouri challenge to the constitutionality of the Migratory Bird Treaty Act (1918)

Wyoming challenge to USFWS's refusal to permit elk vaccination on the National Elk Range (2002)

“The FWS’s apparent indifference to the State of Wyoming’s problem and the State’s insistence of a “sovereign right” to manage wildlife on the NER do little to promote ‘cooperative federalism.’”



Findings & Analysis

The Constitutional Context

- 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.



Findings & Analysis

The Constitutional Context

Example: **The Property Clause**

“The Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const. art. IV, § 3, cl. 2.



Findings & Analysis

Example: The Property Clause

Hunt v. United States (1928): Supreme Court holding that the Property Clause included the power to thin overpopulated herds of deer on federal lands in order to protect forest resources, even if the federal action was contrary to state law.



Findings & Analysis

Kleppe v. New Mexico (1976)

“[T]he States have broad trustee and police powers over wild animals within their jurisdictions . . . , those powers exist only ‘in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.’”

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



Findings & Analysis

On State Ownership of Wildlife

The common claim that “states own wildlife” —full stop— is incomplete, misleading and needlessly deepens divisions between federal and state governments.

- Wrong: states asserting ownership as a basis to challenge federal authority over wildlife on federal lands.
- State assertions of wildlife ownership are subordinate to the federal government’s statutory and trust obligations over federal lands and their integral resources, including wildlife.



Findings & Analysis

On State Ownership of Wildlife

-Subject to U.S. Constitution (e.g., Commerce Clause)

-The rule “makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wildlife animals underlying the 19th-century legal fiction of state ownership.”

Hughes v. Oklahoma (1979)



Findings & Analysis

A more constructive framing:

- To recognize that state *and* federal governments have trust responsibilities for wildlife conservation on federal lands (“co-trusteeship”)
- The public trust in federal lands and wildlife
 - Frequently referenced by courts
 - Acknowledged in Interior Policy (43 CFR §24.1(b))
 - National in scope
 - Goes beyond game species
 - Must be more explicitly considered in federal decision making processes



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.”



Findings & Analysis

The Habitat Myth

-History

Leads to:

- Fragmented approaches to wildlife conservation
- Unproductive battles over agency turf
- Abdication of federal responsibility



Findings & Analysis

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.”



Findings & Analysis

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)



Findings & Analysis

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)



Findings & Analysis

The Habitat Myth

National Forest System

Diversity Regulations

“Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native species in the plan area.” (1982)

“This section adopts a complementary ecosystem and species-specific approach to maintaining the diversity of plant and animal communities and the persistence of native species in the plan area.” (2012)



Findings & Analysis

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)

Findings & Analysis

Special note on BLM:

-“Primary” language used in Interior Policy (43 C.F.R. Part 24)

The problem?

- Policy not subject to rulemaking
- Causes unnecessary confusion for federal and state agencies
- Not true—FLPMA doesn't do this

Congress in the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) directed that non-wilderness BLM lands be managed by the Secretary under principles of multiple use and sustained yield, and for both wilderness and non-wilderness lands explicitly recognized and reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands.



Findings & Analysis

But what about “savings clauses”?

-Congressional acknowledgement of state responsibilities for wildlife

National Forest System

“Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests.”
(MUSYA 1960)



FLPMA's Savings Clause

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



Findings & Analysis

But what about “savings clauses”?

- They don't diminish federal government's constitutional and statutory authority to manage federal land and wildlife

- They are subject to federal preemption/Supremacy Clause of U.S. Constitution



Findings & Analysis

Wilderness management is especially problematic

By federal law, Wilderness areas are to be:

- untrammeled
- natural
- undeveloped
- without commercial enterprise

Exceptions only to benefit other wilderness values
(or to satisfy a valid existing right)



Findings & Analysis

Federal Acquiescence

- There is a problematic tendency for federal agencies to reflexively acquiesce to state interests and demands that are counter to federal law and regulation.
- Mixed signals sent to state agencies
- Most apparent in the context of managing wilderness areas



Moving Forward

State Wildlife Governance

- Institutional bias for fish & game (perceptions of)
- Need increased and more secure funding for non-game species at state-level
- The North American Model of Wildlife Conservation
 - To draw distinctions between federal-state priorities, not to build bridges
 - No principle focused on federal land
 - No principle focused on intergovernmental cooperation



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