

**Transferring Federal Lands to States:
Unanswered Questions and Implications for Wildlife**

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I want to thank the Wildlife Society for the invitation to join you today and to be able to provide a counterview to State Senator and CEO of American Lands Council Jennifer Fielder.

I am here with an agenda. I'm asking you—the Wildlife Society—to write and act upon a policy position statement that is urgent and significant to the future of wildlife habitat and conservation: to oppose the transfer of federal lands to the states or their sale to private interests.

Before proceeding, I want to summarize the current political context and review what is happening now and what is likely to happen next. I'll start with the politicians and corporate interests proposing the transfer of federal lands to the states. In places like Utah, this began as a litigation strategy to challenge the constitutionality of federal land ownership. The problem is that the legal arguments, just as they were made years ago, are again without merit.¹

Land transfer advocates next turned to Congress. This was a logical next step given how receptive the Republican Party has been to the idea of privatizing federal lands.² The result is recently proposed legislation that would either privatize federal lands or make it easier (and cost-free) to transfer them to the states.³ The political backlash is severe, with opposition from hunting, angling and recreational interests providing a new spirited energy to the debate.

The next move is to likely focus on the so-called “reform,” or more likely attempted repeal, of federal land law and by providing state and local governments control over the nation’s public lands. In other words, the strategy will be to give the states control of federal lands, wildlife and resources while leaving the associated economic costs to the federal government.

Unfortunately, there are a few key issues that are still missing from the debate and media coverage and the Wildlife Society can help bring these to the public's attention.

The National Interest in Federal Public Lands

The first is to more clearly explain why federal land—and the wildlife it supports—is in the *national* interest. This case has not been made sufficiently by today's defenders of our public lands heritage. It is time to do so again because it is not enough to explain the problems or risks of transferring or privatizing federal lands, but rather to make the affirmative case for why they are in the national interest.

How could the Wildlife Society do this? It could begin by reviewing some history, science, and law and then tell a story of wildlife conservation on federal lands.

To begin, consider the *nation's* history with federal public lands. It was the federal government, not Western states, which acquired these lands from foreign nations and Indian tribes through “purchase or conquest.”⁴ This term, used by the Supreme Court in 1823, reminds us of how our federal land system traces back to original Indian title and America's history of western settlement. After a period of federal land sales and disposals, much of this public land would eventually be retained in federal ownership, with multiple laws recognizing the national interest and broad public values associated with these lands.⁵

Since these retention decisions were made, the national government, and generations of American taxpayers, have financially invested in developing, managing, protecting, and restoring these lands. 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?

Second, consider the science demonstrating the national significance of federal lands to wildlife conservation.⁶ These lands are refuges of biodiversity and essential habitat for ESA listed and candidate species, and they will become even more important in the future because of development taking place on state and private lands.⁷

Federal lands are also critically important for our nation's big game, waterfowl and fish. The National Forest System provides an example, as it provides roughly 80 percent of the elk, mountain goat, and bighorn sheep habitat in the lower 48 states and over 200,000 miles of fish-bearing streams and rivers, many of which cross state lines.⁸

The Wildlife Society could synthesize this science and make it useable to political decision makers. Here, you may want to focus on scale and the transboundary and interstate nature of wildlife conservation, such as the role played by federal lands in securing wildlife migration.

Conserving wildlife and its habitat—just like providing clean water and air—must transcend state jurisdictions and necessitates federal action. That this long-recognized principle is now being called into question tells you just how politically radical and dysfunctional the politics has become.

Third, consider federal land laws and their unmistakable emphasis on wildlife conservation and the protection of habitat. Of course, there are the dominant use laws governing the National Parks and Wildlife Refuges, but also the multiple use and wildlife diversity mandate given to the Forest Service and the array of legal tools available to the BLM. Federal land agencies have an obligation, not just the discretion, to conserve wildlife and its habitat. With few exceptions, states do not have the legislative framework or funding necessary to adequately conserve wildlife and its habitat on public lands, especially non-game.⁹

Following a review of history, science and law, TWS could provide a story with some history and contemporary relevance. My suggestion is to re-tell the story of the armed occupation of the Malheur National Wildlife Refuge. Of all places to occupy and protest federal lands, this was not it. Here we have a national wildlife refuge, part of a national network and system of lands, which is located along the international pacific flyway. The Refuge, moreover, was established to conserve migratory birds, a purpose that is according to the Supreme Court the very definition of a “national interest of very nearly the first magnitude.”¹⁰

Unanswered Questions

This story, along with the broader history, science, and the law, makes clear the national interest in federal lands. But that is not enough. Next, you must ask transfer advocates to answer all of the difficult questions, issues, choices and trade-offs that they have so conveniently avoided. Instead of answers, platitudes are offered about active management, forest health, access, multiple use, and the economic efficiency of state land management.

The problem is that the vague promises don't add up. In most cases it is still unclear whether transferred lands would be managed primarily as state “trust lands” or rather as state-owned non-trust multiple use public lands. Confusing as it sounds, this distinction is

an important one because state trust lands are not public lands as that term is commonly understood.¹¹ Transfer proponents exploit the public's confusion about these terms.

Simplified, state trust land managers have a fiduciary obligation to generate revenues for designated trust beneficiaries, most often common schools or other public institutions. In contrast, federal agencies are obligated by law to manage federal lands for a broader set of values in the national interest.¹² Congress also made clear that economic productivity—or “the greatest dollar return or the greatest unit output”—shall not be a determining factor in federal land management.¹³ Why did Congress do this? Because it recognized the multiple values associated with public lands that go beyond maximizing revenues, such as wildlife conservation and recreation.

Not explained by transfer advocates are the details of state trust management. What happens, for example, when the revenue-generating trust model conflicts with broader multiple use values, such as protecting habitat? What discretion will a state agency have in such a situation? Can it act on behalf of fish and wildlife without compensating the trust for lost revenue?

This evasiveness is just the tip of the iceberg, as land transfer advocates have failed to address any of the difficult choices and trade-offs that go along with managing real public lands.¹⁴ For instance, how would the states manage their obligations under the Endangered Species Act? Because Section 7 of the law would no longer be in effect, the obligations would shift to the “no-take” provision of Section 9, so how will the states handle and pay for this additional responsibility? What will state land use planning processes look like or will there be any at all? What will be the role of public participation? Will citizens have the ability to legally challenge state management and enforce the terms of the trust? What about best available science? Will transferred lands be subject to state ballot initiatives and balanced budget requirements? What becomes of tribal reserved rights and cultural resources found on federal land? What about abandoned mines and their associated clean-up costs? What happens to reserved water rights that are tied to federal lands? Will the pre-existing permittees operating on transferred lands have to pay more for their licenses and permits? What fees will be charged for hunting or recreational access?

These and other questions have not been answered because it is far easier to disparage, undermine, underfund, and *campaign* against federal land agencies than to actually *govern* and sort through the difficult choices that must be made in federal land management.

The Path Forward

So where does this leave us? To be clear, there are serious challenges related to federal lands management and contemporary conservation more generally. There are multiple values associated with these lands and a long history of disagreement about how to properly balance resource use and protection and national and local interests. Public land management in a democracy is messy. As I tell my students, get over it!

The solution is not to sell out our public lands legacy or to backslide on our foundational environmental and federal land laws, but rather to dig in and figure out how they can be more efficiently and effectively implemented.

For example, if the problem is one of economic inefficiency, as the American Lands Council and others proclaim,¹⁵ then let us explore ways for federal agencies to generate more income, such as higher royalties for oil and gas development, a new royalty for hard rock mining, and increased user and permit fees. As for effectiveness, we need to engage state, local and tribal governments, build partnerships, and more strategically approach things like NEPA, federal lands planning, fire management, and endangered species recovery.

This is the hard work of governing public lands and we need to get back to it. Thank you again for the opportunity to be here today and I look forward to talking about these issues this afternoon.

¹ Report of the Public Lands Subcommittee, Western Attorneys General Litigation Action Committee, Conference of Western Attorneys General (2016). *See also* Robert B. Keiter and John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement* (University of Utah, Stegner Center White Paper No. 2014-2).

² The 2012 national Republican platform, for example, asks Congress to “reconsider whether parts of the federal government’s enormous landholdings...could be better used for ranching, mining, or forestry through private ownership” and that “the enduring truth is that people best protect what they own.” (p. 18).

³ *See e.g.*, Disposal of Excess Federal Lands Act of 2017 (H.R. 621, 115th Cong.). *See also* the House Budget Committee’s 2015 resolution, and an amendment from Senator Ted Cruz (R-TX) that would require states made up of more than 50% federal lands to transfer “excess” lands to states or sell them off at auction. More recently in 2017, the House passed a rule that will allow it to consider federal land transfers budget-neutral and cost-free, meaning that federal lands could be potentially transferred to states without off-setting the spending cost. For a review see Congressional Research Service, *State Management of Federal Lands: Frequently Asked Questions* (2015).

⁴ *Johnson v. M’Intosh*, 21 U.S. 543 (1823)

⁵ *See e.g.*, *One Third of the Nation’s Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (Washington, D.C.: 1970).

This Report, which preceded passage of the Federal Land Policy Management Act of 1976 (43 U.S.C. §1701), explains in detail why public lands are a “national heritage and national asset that belong to all of us.” P. 33. Similar “national interest” language and provisions are found throughout federal land and resource laws.

⁶ *See e.g.*, Bruce A. Stein, Cameron Scott, and Nancy Benton, *Federal Lands and Endangered Species: The Role of Military and Other Federal Lands in the Sustaining Biodiversity*, 58(4) *BioScience* 339 (2008).

⁷ Stein and colleagues conclude that “[g]iven the current and projected pace of private land development, we can expect that federal lands will assume greater importance to the protection of our native species.” P. 346. *See also* The Disappearing West, available at <https://www.disappearingwest.org/> and U.S. Forest Serv., *Future of America’s Forests and Rangelands: Forest Service 2010 Resources Planning Act Assessment*, Gen. Tech. Rep. WO-87 (2012). Included in the assessment is a review of how development pressure on nonpublic lands is affecting “the ability of those public lands to sustain important ecosystem services and biodiversity.” P. 11.

⁸ U.S. Forest Service, *Biological Assessment of the USDA National Forest System Land Management Planning Rule for Federally Listed Endangered and Threatened Species; Species Proposed for Federal Listing; Species that are Candidates for Federal Listing on National Forest System Lands* 17-18 (2011) (“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.”)

⁹ Funding for non-game at the state level is a long-standing challenge. See “Teaming with Wildlife” and the Blue Ribbon Panel on Sustaining America’s Diverse Fish and Wildlife Resources, available at <http://teaming.com/blue-ribbon-panel-sustaining-americas-diverse-fish-wildlife-resources>. Also consider in this context the significant sources of funds that go from the national government to the states to manage fish and wildlife. See the Federal Aid in Wildlife Restoration Act of 1937 (the Pittman-Robertson Act), at 16 U.S.C. §§669-669k and the Federal Aid in Fisheries Restoration Act (Dingell-Johnson Act) at 16 U.S.C. §§777-77I.

¹⁰ *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (upholding the constitutionality of the Migratory Bird Treaty Act and explaining why it is not sufficient to rely upon the states and why national action is necessary).

¹¹ 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.” Jon A. Souder and Sally K. Fairfax, *State Trust Lands: History, Management, and Sustainable Use* (1996), at 285.

¹² See FLPMA national interest language at 43 U.S.C. §1701(a)(2) and MUSYA at 16 U.S.C. §531(a)

¹³ 16 U.S.C. §531(a); 43 U.S.C. §1702(c)

¹⁴ See Robert B. Keiter and John C. Ruple, *The Transfer of Public Lands Movement: Taking the “Public” Out of Public Lands* (University of Utah, Stegner Center White Paper No. 2015-01, 2015).

¹⁵ See e.g., American Lands Council, *Public Lands: Better Access, Better Health, Better Productivity*, available at http://www.americanlandscouncil.org/get_the_facts (contrasting federal and state land management in terms of revenue and expenses per acre).