FISH AND WILDLIFE MANAGEMENT ON FEDERAL LANDS: DEBUNKING STATE SUPREMACY

BRIEFING PAPER
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BACKGROUND: Conflicts between federal and state governments in the management of wildlife on federal lands have intensified in recent years. Examples: Decisions by National Park Service (NPS) and Fish and Wildlife Service (FWS) to preempt Alaska's hunting regulations that are in conflict with National Park and Refuge laws (and subsequent use of Congressional Review Act), predator killing contests on lands managed by the U.S. Forest Service (USFS) and Bureau of Land Management (BLM), and wolf control in federally designated wilderness areas.

Observing increasing conflict and confusion about the authority and responsibility to manage wildlife on federal lands and wilderness, the Bolle Center for People and Forests at the University of Montana has produced an authoritative review of the legal and policy context of wildlife management on federal lands with the objective of providing a more common understanding amongst federal and state agencies.

Martin Nie, Director of the Bolle Center and Professor of Natural Resources Policy (W.A. Franke College of Forestry and Conservation, University of Montana) assembled a research team consisting of two additional academics (*Sandra B. Zellmer*, Professor of Law, University of Nebraska-Lincoln and *Julie Joly*, former Associate Professor of Resources Law and Policy at University of Alaska Fairbanks) and three consultants having decades of experience on federal public lands and wildlife management, working for the U.S. Department of Agriculture's Office of the General Counsel (*Kenneth Pitt*), USFS (*Jonathan Haber*, a former planning specialist), and U.S. Department of Interior's BLM (*Christopher Barns*, a former wilderness specialist at the Arthur Carhart National Wilderness Training Center).

PUBLICATION: The Article is forthcoming at *Environmental Law*, Vol. 47, no. 4 (2017). The draft article is available online at http://www.cfc.umt.edu/bolle/. We made a draft publically available prior to publication to receive constructive feedback, criticism and suggestions. Please send to martin.nie@umontana.edu.

SCOPE OF WORK: The Article first reviews the most common assertions made by state governments regarding authority over wildlife on federal lands. State "ownership" of wildlife and the wildlife trust, state wildlife governance and funding, the North American Model of Wildlife Conservation, and the views of the Association of Fish and Wildlife Agencies (AFWA) are covered insofar as they pertain to intergovernmental conflict.

The U.S. Constitution & Wildlife: The Article provides a comprehensive examination of the authority of federal agencies to manage wildlife on federal lands, with a review of the U.S. Constitution's Property Clause, Treaty Clause, Commerce Clause, Tenth Amendment, and the doctrine of federal preemption under the Supremacy Clause.

Federal Land Law & Wildlife: The federal land laws, regulations, and policies of most significance to the management of wildlife on federal lands are reviewed. Provisions governing the management of endangered and threatened species, the National Park System, National Wildlife Refuge System, National Forest System, public lands administered by the Bureau of Land Management, the special case of Alaska, and the National Wilderness Preservation System are covered in detail.

FINDINGS & RECOMMENDATIONS

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. Meanwhile, the courts also recognize the "legitimate state concerns for conservation and protection of wild animals." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The common claim that "states own wildlife"—full stop—is incomplete, misleading and needlessly deepens divisions between federal and state governments. The claim is especially dubious when states assert 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.

A more constructive framing is to recognize that both federal and state governments have trust responsibilities for wildlife conservation ("co-trusteeship"). This federal trust responsibility is national in scope, not focused on the same game species that states tend to promote, and must be more explicitly considered in federal decision making processes.

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 myth is not only wrong from a legal standpoint but it leads to fragmented approaches to wildlife conservation, unproductive battles over agency turf, and an abdication of federal responsibility over wildlife conservation.

Federal acquiescence to state political interests is most apparent in the context of managing federally designated wilderness areas, where there is an unambiguous affirmative obligation to preserve wilderness character, including fish and wildlife species in wilderness areas.

There is a problematic tendency for federal agencies to reflexively acquiesce to state interests and demands that are counter to federal law and regulation. This inconsistent application of federal law and regulation sends mixed signals to state agencies about federal authority and obligations to manage wildlife on federal lands.

Significant opportunities already exist in federal land laws for constructive intergovernmental cooperation in wildlife management. Unfortunately, many of these processes are not used to their full potential and states sometimes use them solely as a way of challenging federal authority rather than a means of solving common problems.

Savings Clauses found in federal land laws demonstrate Congress's desire to acknowledge some level of state responsibility over wildlife management on federal lands. But in no way should these clauses be interpreted to diminish the federal government's vast constitutional and statutory authority to manage its own lands and resources. Intergovernmental cooperation provisions found in federal land laws do not require federal agencies to follow state preferences nor do they permit federal agencies to relinquish their statutory obligations, even in the face of state dissent.

The most productive way to proceed in the future is by working more constructively within the carefully crafted legal framework provided by the U.S. Constitution and federal land law rather than against it, and by embracing the conservation obligations that are inherent in federal lands and wildlife trust management. More specifically, our recommendations include:

- The Dept. of Interior's Policy on Federal-State Relations (43 C.F.R. Part 24) causes unnecessary conflict and confusion regarding who possesses "primary authority" to manage wildlife on federal lands and it should be corrected using APA rulemaking.

- Cooperation must be a mutual and reciprocal process, meaning that state agencies need to constructively participate in existing federal processes, and federal agencies should be provided meaningful opportunities to participate in, and influence, state decision making affecting federal lands and wildlife.

- Conflicts between federal and state governments, and the resulting litigation, are driven in part by the way wildlife is managed and funded at the state level, with a focus on hunting and fishing and the revenue it generates. Increased and more secure funding for non-game species management would build capacity at the state level and help harmonize federal-state responsibilities over wildlife on federal lands.

- State adherence to the North American Model of Wildlife Conservation can needlessly deepen conflict between federal and state governments. If the Model continues to serve as a basis for making state decisions, it should at the very least include a principle related to the significant role played by federal lands in wildlife conservation.

- There is currently a lack of clarity regarding when states must obtain federal approval of state actions to manage wildlife on federal lands. When decisions regarding the authority to manage wildlife on federal lands are being made through the use of memorandums of understanding (MOU) with states and the Association of Fish and Wildlife Agencies (AFWA), any assignment of blanket authority should be scrutinized, especially in the context of managing wildlife in federally designated wilderness areas. MOUs cannot be used to subvert the federal government's constitutional authorities and statutory obligations to manage and conserve wildlife on federal lands.