

Federal Powers & Responsibilities to Conserve Wildlife on Federal Lands

*Wildlife for All: Re-Envisioning State Wildlife
Governance, Albuquerque, NM
August 14-15, 2018*

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

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
- Mountain goats in the Manti-La Sal National Forest



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



Instagram #usinterior

The Article

-“Fish & Wildlife
Management on Federal
Lands: Debunking State
Supremacy,”
Environmental Law, Vol.
47 (2017)

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



Nie

The Research Team

Three academics

- Martin Nie: Director of Bolle Center, University of Montana
- Sandra Zellmer, Prof. Law, University of Montana
- Julie Joly, former Associate Prof., University Alaska Fairbanks

Three Consultants

- Jonathan Haber, USFS planning specialist (retired)
- Christopher Barns, wilderness specialist, BLM/Carhart Center (retired)
- Kenneth Pitt, USDA Office of General Counsel (retired)

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”

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 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.

“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)

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.
- “Legal Fiction:” When states assert ownership as a basis to challenge federal authority over wildlife on federal lands. (Hughes v. Oklahoma, 1979)
- 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

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
 - In Federal Land Laws
 - Acknowledged in Interior Policy (43 CFR §24.1(b))



K.D. Swan

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

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 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

NPS Organic Act: conservation....“in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

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.”

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.

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 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 Public Trust in Federal Lands & Wildlife

Interior Policy (43 CFR §24.1(b))

“The Secretary of the Interior 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.”

The Public Trust in Federal Lands & Wildlife

- Public trust embedded in federal land law and policy
- Frequently referenced by courts
- National in scope
- Goes beyond game species
- Should be more explicitly considered in federal decision making procedures & 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



Instagram #usinterior

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

-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

Federal Acquiescence

- 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

**Idaho for Wildlife's
Predator Hunting Contest
And Fur Rendezvous** 

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

 **2 Person Teams** 

Categories

<u>Wolves</u>	<u>Coyotes</u>
1st Prize	1st Prize
\$1,000.00	\$1,000.00
(Most Wolves)	(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

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

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 at sunset. The sky is a mix of orange, red, and purple, with some clouds. In the foreground, the dark silhouettes of several evergreen trees are visible against the bright sky. The trees are of various sizes and are scattered across the lower half of the image.

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)

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

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

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

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

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)

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



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.