

THE 2009 COLORADO COLLEGE STATE OF THE ROCKIES REPORT CARD

By Phillip M. Kannan

I. Introduction

The issue of which level of government has authority to protect wildlife in the United States has a contentious history. This question is one of the many in the states' rights versus federal authority conflict. As the following discussion demonstrates, the trend has been from almost absolute state control, from 1789 through approximately 1920, to a regime today in which states and the federal government share this regulatory responsibility. The decline in state authority and the corresponding ascent of federal power resulted from an expanded role of the U.S. at the international level, a broader interpretation of Congress's authority under the interstate commerce clause of the Constitution,¹ a recognition that state laws alone would not protect adequately the national interest in wildlife, and a more aggressive management of federally owned land.

II. The Transition from Exclusive State Regulation to a Shared Regime for Protecting Wildlife

At the founding of the U.S., the regulation of the wildlife within a state was claimed by that state. This authority was based on a legal theory called the "state ownership doctrine" under which each state claimed ownership on behalf of its people of all wildlife within its boundaries. With ownership came the right to regulate.

The United States Supreme Court in 1896 recognized the state ownership doctrine in *Greer v. Connecticut*.² At issue in this case was a Connecticut law that prohibited the transportation of killed game from the state. In upholding this law, the Court stated, "The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it, - the people of that state."³ The Court held the state law did not restrict interstate commerce, and thus did not violate the interstate commerce clause of the Constitution, because by the very terms of the state law there could be no interstate commerce in Connecticut's game.⁴

In 1900 Congress was faced with plummeting populations of migratory birds; however, because of the *Greer* decision, Congress had only limited authority to provide protection. Congress's resolution of this dilemma of a great need but limited power was the Lacey Act.⁵ This law prohibits the interstate transportation of "any wild animals or birds" killed in violation of state law.⁶ This law recognizes and supports state laws rather than attempting to preempt them, and it makes interstate transportation a prerequisite for a violation and thus ensures that the law is a valid exercise of

Congress's interstate commerce power.

So strong was the state ownership doctrine in the early 1900's that two federal courts struck down the Migratory Bird Act of 1913, a federal statute which prohibited the hunting of migratory birds except in compliance with federal law.⁷ Under these cases, migratory animals merely passing through a state became the property of the state while they were within its borders. In reaction to these cases, in 1916 the U.S. entered into a treaty with England (on behalf of Canada) to protect birds that migrated between the U.S. and Canada, and Congress enacted the Migratory Bird Treaty Act to implement the requirements of the treaty.⁸ The Migratory Bird Treaty Act was challenged in court by Missouri which claimed that it was an unconstitutional invasion of Missouri's sovereign right.⁹ The Court characterized Missouri's theory as follows: "The State ... founds its claim of exclusive authority upon an assertion of title to migratory birds To put the claim of the State upon title is to lean upon a slender reed."¹⁰ In contrast to this slender reed, the Court held the national interest was great: "Here a national interest of very nearly the first magnitude is involved. It can be protected only by a national action in concert with that of another [national] power."¹¹ The Court wisely concluded that the Constitution did not compel it to tie the hands of the only power that could prevent the destruction of a valuable commercial resource, migratory birds.

The decline in the state ownership doctrine was paralleled by the ascent of federal interstate commerce power. For example, the Supreme Court interpreted that power to include the authority of the federal government to regulate wheat production even if the farmer only fed his crop to his own animals on his own farm.¹² Such interpretations of Congress's authority under the interstate commerce clause are the bases of modern laws that provide protection for the environment including wildlife. This includes the National Environmental Policy Act,¹³ the Clean Air Act,¹⁴ the Clean Water Act,¹⁵ the Resource Conservation and Recovery Act,¹⁶ the Comprehensive Environmental Response, Compensation, and Liability Act,¹⁷ and most importantly for wildlife the Endangered Species Act of 1973.¹⁸

The second fount of constitutional authority for federal regulation of wildlife is the property clause which states, "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹⁹ The Supreme Court has held that "[the] power over the public land thus entrusted to Congress is without

limitations.”²⁰

The property belonging to the U.S. includes national parks (over 80 million acres), national forests (191 million acres), national wildlife refuges (88 million acres), and the land managed by the Bureau of Land Management (BLM) (350 million acres). Wilderness areas may be designated on any of these four categories of federal land.²¹ National parks²² and wilderness areas²³ are managed under a preservationist approach which provides extensive protection for wildlife.²⁴ National forests²⁵ and BLM lands²⁶ are managed under a multiple use sustained yield approach. Wildlife refuges are managed under a compatible use approach which means that the Fish and Wildlife Service can allow any use of a wildlife refuge that is compatible with the purpose for which the refuge was established.²⁷

*Just as reports of Mark Twain’s demise proved premature, so too was the demise of the state ownership doctrine in the wake of the Hughes decision. State statutes and constitutional provisions continued to assert state ownership of wildlife post-Hughes, and state courts consistently interpreted Hughes to be limited to situations involving federal-state conflicts. Thus, the state ownership doctrine lives on in the twenty-first century in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat.*³⁰

Moreover, every state has general police power under which the state can enact laws to protect public health and welfare.³¹ This power is broad, but not unlimited.³²



© Russell Leonard '12

In *Kleppe v. New Mexico* the Court stated that “the complete power that Congress has over public lands necessarily includes the power to regulate and protect wildlife living there.”²⁸ Because of this broad power to protect wildlife the Court upheld the Wild Free-Roaming Horses and Burros Act which protected these animals from capture, branding, harassment, and killing.²⁹ New Mexico’s claim that it had authority to impound all horses, mules, or asses found running at large was rejected.

III. The Current Balance of Power between State and Federal Governments

The state ownership doctrine may be of no effect against the federal government, but it is not completely void. Two commentators have summarized its status as follows:

Thus, in the U.S. there is a sharing of authority to protect wildlife. The federal government can use its authority under the interstate commerce clause and the property clause to enact laws protecting wildlife; any state law in conflict with such federal laws will be void. States can use their claim to ownership of wildlife and their police power to enact laws to protect wildlife to the extent their laws are not inconsistent with federal law. Thus, there is an opportunity to coordinate state and federal laws to better protect wildlife; however, there is a challenge to avoid duplication, tension, and inefficiency that multiple-level government and shared authority can cause.

The following section discusses federal laws that provide some protection for wildlife. Other articles in this report will focus on laws of the Rockies states that seek this same goal.

IV. Federal Laws Protecting Wildlife

One can argue that every federal environmental law protects wildlife to some degree. Consider the Clean Air Act which establishes national ambient air quality standards for pollutants that cause chronic health effects³³ and technology standards for hazardous air pollutants.³⁴ This law has improved the quality of the air wildlife breathes. It has reduced the pollution from the atmosphere that falls into rivers and lakes and upon the plants, and thus, has improved the water they drink and the food they eat. Such laws indirectly protect wildlife.

There is a spectrum of federal laws that protect wildlife. It starts on the low end with laws such as the Clean Air Act that work indirectly to protect wildlife and moves to the high end with laws such as the Endangered Species Act that specifically prohibit harming, harassing, wounding, and killing of listed species and the modification of their critical habitat if the modification harms a critical function such as feeding or breeding. The following is a brief description of the laws that fall along this spectrum.

A. Protecting Wildlife under Wildlife-Focused Laws

There are a few narrowly focused laws that provide almost complete protection for the small set of targeted wildlife. Two of the most important of these are the Eagle Protection Act³⁵ and the Wild Free-Roaming Horses and Burros Act.³⁶

The Eagle Protection Act prohibits all persons from knowingly taking, possessing, or selling an eagle or eagle part. There are limited exceptions for Native Americans' religious purposes, for scientific purposes, and for exhibitions provided a permit has been issued by the Department of Interior.

The Wild Free-Roaming Horses and Burros Act protects these animals on federal and private lands. If federal agents determine there is an overpopulation on a particular federal property, the federal agency is to remove the excess or have them adopted; only as a last resort can the excess population be killed (humanely). If the animals stray onto private land, they cannot be killed; the only exception is that a federal agent can do so.

The Endangered Species Act affords protection to two *classes* of species, namely endangered and threatened species. No person is allowed to take a listed species without an incidental take permit. Taking is defined broadly to include harassing and habitat modification as well as killing. Federal agencies are prohibited from taking actions that are likely to jeopardize the continued existence of listed species or modify their critical habitat. They must also utilize their authority to conserve listed species, that is, to restore their numbers so as to remove them from the lists.³⁷ Thus, one can conclude that although this law applies only to a small number of animal species,

it provides extensive protection to them.

The Migratory Bird Treaty Act makes it unlawful for any person "to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported ... any migratory bird" without a federal license.³⁸ The set of wildlife protected is broader than that of the Endangered Species Act; however, licenses to take migratory birds are much more available than incidental take permits under the Endangered Species Act.

B. Protecting Wildlife by Protecting Wetlands

Wetlands are among the most productive of all ecosystems; the Environmental Protection Agency (EPA) has stated that more than one-third of threatened species and endangered species live only in wetlands, and half use wetlands at some point of their lives.³⁹ Protecting wetlands will protect those species and the other wildlife that depend on wetlands.

The Clean Water Act prohibits the discharge of dredged or fill material into navigable waters, including wetlands, without a permit.⁴⁰ The Corps of Engineers and EPA are prohibited from issuing a permit to fill wetlands if there is a practicable alternative.⁴¹ Thus, the Corps and EPA must select the alternative that will cause the least harm to wetlands if it is practicable.

C. Protecting Wildlife under Limited-Use Land Laws

Laws establishing the National Park System, National Wildlife Refuge System, and federal land managed under the Wilderness Protection Act are the most important laws that protect wildlife by protecting their habitat. Hunting is banned in national parks unless the law creating a particular national park specifically allowed it.⁴² Hunting is permitted in a wildlife refuge if the Fish and Wildlife Service has determined that it is compatible with the purposes of the refuge.

D. Protecting Wildlife under Multiple-Use Land Laws

The two most important multiple use laws are the National Forest Management Act (NFMA) and the Federal Land Policy and Management Act (FLPMA). Federal lands managed under these acts are to be administered for five different purposes: outdoor recreation, range, timber, watershed, and wildlife and fish purposes. Thus, these statutes allow the federal agencies to manage the lands under their control to protect wildlife. Until recently the Forest Service interpreted one provision of the NFMA⁴³ as requiring it "to maintain viable populations of existing native and desirable non-native vertebrate species."⁴⁴

NFMA and FLPMA do not require that every

acre be managed for every purpose.⁴⁵ Moreover, the managers have great flexibility in deciding how much protection to provide for wildlife. Because these laws “breathe discretion at every pore,”⁴⁶ courts will not determine the balance that should be struck between the competing purposes for a particular federal property.⁴⁷ In one remarkable example of the deference courts give to agency decisions regarding how the agency uses the land it manages, the court upheld the Forest Service’s decision to allocate 100% of forage to livestock and none to wildlife.⁴⁸

E. Protecting Wildlife under Environmental Impact Assessment Laws

The National Environmental Policy Act (NEPA)⁴⁹ requires that an environmental impact statement (EIS) be prepared on all major federal actions significantly affecting the quality of the environment. Each EIS must include a reasonable set of alternatives to the proposed action;⁵⁰ however, there is no requirement that the agency select the alternative that causes minimal harm to the environment.⁵¹ The Supreme Court specifically has held that NEPA does not require the agency to select the alternative that minimizes the harm to wildlife:

*“[I]t would not have violated NEPA if the Forest Service, after complying with the Act’s procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd.”*⁵²

NEPA can help protect wildlife by making the decision-maker aware of the impact of the proposed federal action on wildlife, and thus enable him/her to weigh wildlife protection against other interests. Also, because the EIS is made available to the public, individuals and environmental groups can bring political pressure on the decision-maker to choose an alternative that reduces the harm to wildlife. If the EIS is inadequate or the decision-maker failed to give sufficient consideration to an alternative that reduced harm to wildlife, a party with standing can seek judicial review of the agency’s final decision.⁵³

F. Protecting Wildlife under Broad Environmental Laws

A law that reduces pollution or requires the cleanup of hazardous sites will improve the environment. That, in turn, will benefit wildlife directly or indirectly. Thus, such laws can be considered as wildlife protection measures at the far end of the spectrum.⁵⁴

V. Conclusions

Wildlife can be protected by laws that focus

on wildlife itself and by laws that preserve habitat. This article provides an overview of the major federal command-and-control laws of each type. It is unfortunate that there is no one law, The Wildlife Protection Act, which integrates and coordinates the scattered, incomplete, and at times overlapping approaches that exist now.

In addition to the command-and-control laws there are other federal programs that benefit wildlife. These are often based on incentives; examples include purchasing wildlife conservation easements and payments to farmers to take land out of production. A truly integrated approach to wildlife protection would include those laws as well as the command-and-control laws.

¹ U.S. Const., art. I, § 8 (“The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes ...”).

² 161 U.S. 519 (1896).

³ *Id.* at 529.

⁴ This might be a circular argument, but it was a central part of wildlife law until 1979 when Greer was overruled in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

⁵ 16 U.S.C. § 3372.

⁶ 16 U.S.C. § 3372(a) (“It is unlawful for any person ... to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce ... wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law ...”).

⁷ *United States v. Shauver*, 214 F.154 (E.D. Ark. 1914) and *United States v. McCullagh*, 221 F. Supp. 288 (D. Kan. 1915).

⁸ 16 U.S.C. §§ 703-711.

⁹ *Missouri v. Holland*, 252 U.S. 416 (1920).

¹⁰ *Id.* at 434.

¹¹ *Id.* at 435.

¹² *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹³ 42 U.S.C. §§ 4321-4370f.

¹⁴ 42 U.S.C. §§ 7401-7642.

¹⁵ 33 U.S.C. §§ 1251-1270.

¹⁶ 42 U.S.C. §§ 6901-6992k.

¹⁷ 42 U.S.C. §§ 9601-9675.

¹⁸ 16 U.S.C. §§ 1531-1543.

¹⁹ U.S. Const., art. IV, § 3, cl. 2.

²⁰ *Kleppe v. New Mexico*, 426 U.S. 529, 540-541 (1976) quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940).

²¹ 16 U.S.C. § 1131.

²² 16 U.S.C. §§ 1-18.

²³ 16 U.S.C. §§ 1131-1136.

²⁴ 16 U.S.C. § 1131(c) (stating the purpose of wilderness areas is to preserve their “primeval character and influence” and natural condition with motorized equipment, permanent roads, and commercial activity generally prohibited).

²⁵ See National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1614 and Multiple Use, Sustained Yield Act, 16 U.S.C. § 531(a).

²⁶ See Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784.

²⁷ 16 U.S.C. §§ 668dd-668ee.

²⁸ *Kleppe v. New Mexico*, 426 U.S. 529, 547 (1976).

²⁹ 16 U.S.C. §§ 1331-1340.

³⁰ Michael C. Blumm and Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 *Envl. L.* 673, 706 (2005).

³¹ *Id.* at 713.

³² See generally Andrew Cook, *Commerce Clause and Privileges and Immunities Clause: Eighth Circuit Court of Appeals Upholds North Dakota’s Nonresident Hunting Regulations, Reaffirming States’ Rights to Regulate Wildlife Resources within Their Borders*, 83 *N. Dak. L. Rev.* 1029, 1034 (2007).

³³ 42 U.S.C. §§ 7408-7409.

³⁴ 42 U.S.C. § 7412.

³⁵ 16 U.S.C. §§ 668-668d.

³⁶ 16 U.S.C. §§ 1331-1340.

³⁷ See Phillip M. Kannan, *The Endangered Species Act of 1973: An Overview in The 2006 State of the Rockies Report Card* at 59.

³⁸ 16 U.S.C. § 703.

³⁹ *America’s Wetlands: Our Vital Link between Land and Water*, published by the Environmental Protection Agency.

⁴⁰ 33 U.S.C. § 1344.

⁴¹ See Section 404(b)(1) Guidelines. Available at <http://www.usace.army.mil/cw/cecwo/reg/40cfr230.pdf>. See also Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency, *The Determination of Mitigation under the Clean Water Act § 404(b)(1) Guidelines*.

⁴² *National Rifle Association v. Potter*, 628 F. Supp. 903 (D.D.C. 1986) and *Fund for Animals v. Mainella*, 294 F. Supp.2d 46 (D.D.C. 2003).

⁴³ 16 U.S.C. § 1604(g)(3)(B).

⁴⁴ 36 C.F.R. § 219.19. For a discussion of this obligation, see *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754 (9th Cir. 1996).

⁴⁵ *Wind River Multiple-Use Advocates v. Espy*, 835 F. Supp. 1362 (D. Wyo. 1993).

⁴⁶ *Perkins v. Bergland*, 608 F.2d 803, 806-807 (9th Cir. 1979).

⁴⁷ *Id.* at 807.

⁴⁸ *Forest Guardians v. United States Forest Service*, 329 F.3d 1089 (9th Cir. 2003).

⁴⁹ 42 U.S.C. §§ 4321-4370d.

⁵⁰ See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

⁵¹ *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

⁵² *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

⁵³ *Id.*