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A Goat Too Far?: State Authority to Translocate Species On and Off (and Around) Federal Land

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A GOAT TOO FAR?: STATE AUTHORITY TO TRANSLOCATE SPECIES ON AND OFF (AND AROUND) FEDERAL LAND

Devin Kenney

INTRODUCTION

The Bureau of Land Management ("BLM") and United States Forest Service controls wildlife on federal property to the extent that Congress has so authorized agency intervention. Therefore, the agencies may act to protect endangered species, control or prohibit the importation of certain species determined to be invasive, and, in the case of the Forest Service, for reasons of public safety, administration, or compliance with provisions of applicable law. Federal Land Policy and Management Act, 43 U.S.C. § 1732(b) (2015) [hereinafter FLPMA]. Even under these circumstances, however, "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." Id. On the other hand, whereas the Forest Service's polices are at least ambiguous, BLM policies explicitly prohibit the introduction of non-native species. See infra Part I.C.i.2.

1 B.A., University of Utah, 2012; J.D., Michigan State University College of Law, 2015. I hardly know how to begin thanking all those to whom I owe so much. To paraphrase the immortal words of Laurence Sterne, however, "of all the several ways of beginning [to write] which are now in practice throughout the known world" the best is to "begin with writing the first sentence—and trusting to Almighty God for the second." Laurence Sterne, The Works of Laurence Sterne 242 (1849).

As I sit down to work, I realize that there are so many people to whom I owe thanks, so many more than I could ever hope to include in here. That said, I will do my best. I want to thank principally my Heavenly Father for giving me the opportunity to research and write this paper. I have been blessed with innumerable opportunities in my life and to Him I owe my all. Next, I must thank my wife Traci and kids, Lincoln and Quinn. Through the sleepless nights and days I spent working on this article, they have been my rocks. Without them, nothing I accomplish has any meaning.

I must also thank particularly Professor Noga Morag-Levine. She was a mentor throughout my law school career and a major guide in the writing of this paper. Without her input, I am not sure that this paper would have evolved beyond the hot mess it began as. Additionally, I must thank Mr. Martin Bushman and Greg Hansen of the Utah Attorney General's Office. They placed their trust in me and I hope that this—the end product of our collaboration—does not disappoint. Thank you!

2 For example, both the Forest Service and BLM are authorized to manage the habitat, but not the wildlife itself. 36 C.F.R. § 293.10 (2015); 43 C.F.R. § 24.4(d) (2015). Both the Secretary of Agriculture and Secretary of Interior are authorized to close certain areas to fishing and hunting “for reasons of public safety, administration, or compliance with provisions of applicable law.” Federal Land Policy and Management Act, 43 U.S.C. § 1732(b) (2015) [hereinafter FLPMA]. Even under these circumstances, however, “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.” Id. On the other hand, whereas the Forest Service’s polices are at least ambiguous, BLM policies explicitly prohibit the introduction of non-native species. See infra Part I.C.i.2.

3 See, e.g., Hawaii Tropical Forest Recovery Act, 16 U.S.C. § 4502a(a)(3)-(4) (2012) (authorizing the Forest Service to "protect indigenous plant and animal species and essential watersheds from non-native animals, plants, and pathogens [and] establish biological control agents for non-native species that threaten natural ecosystems."); Lacey Act, 18 U.S.C. § 42(a) (2012) (prohibiting a list of specific...
Service, kill or otherwise remove wildlife threatening the destruction of federal property. This last power, the power to protect managed land from destruction, is analogous to the private right of a landowner to destroy wildlife that threaten his or her private property. To the extent Congress has granted unto the executive agencies this power, the authorization is limited. Like the private right mentioned, the grant of power is limited to the specific terms identified in the authorization—for example, wildlife that destroy or threaten to destroy federal property—and may not be expanded beyond the specific statutory authorization. As the Supreme Court concluded in 1976, although Congress may preempt state authority on federal land, each state exercises plenary authority over wildlife unless Congress has actually done so.

Through regulation and policy, however, both the BLM and the Forest Service have created inroads on state authority in the context of wilderness areas, WSAs, and research natural areas (“RNAs”) beyond those authorized statutorily. The Organic Acts, and other land

animal species and authorizing the Secretary of the Interior to enforce the act). That the Lacey Act explicitly criminalizes the introduction of enumerated species further suggests the need for Congressional action. Id.

4 Hunt v. United States, 278 U.S. 96, 99-100 (1928). In this instance, the Department of Agriculture was acting pursuant to a Congressional mandate to “preserve the forest ... from destruction.” U. S. v. Hunt, 19 F.2d 634, 636 (D. Ariz. 1927), aff’d, 278 U.S. 96 (1928).

5 Compare Hunt, 278 U.S. at 100 (noting that the Secretary’s action was “necessary to protect the lands of the United States from serious injury”), with J.C. Vance, Right to Kill Game in Defense of Property, 21 A.L.R.2d 1366. Although today this right is strictly limited in many States, see, e.g., Utah Code Ann. § 23-16-2 (2015), the consensus in the early twentieth century favored the right of the landowner to protect his or her property. J.C. Vance, Right to Kill Game in Defense of Property, 21 A.L.R.2d 1366 (in which a statute prohibiting the killing of elk when done so to prevent destruction of property owned by the person doing the killing was unconstitutional and in violation of the provisions of the Montana Constitution guaranteeing to all persons the right ... to defend ... [their] property). At the time, courts were inclined to find that preventing a property owner from protecting his or her property infringed the person’s property right. Id.

Moreover, although Missouri v. Holland, 252 U.S. 416, 434 (1920) cast the state’s claim to title as “lean[ing] upon a slender reed,” the Supreme Court reaffirmed just four years after Holland and four years prior to Hunt that “[t]he wild animals within [a State’s] borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people.” Lacoste v. Dep’t of Conservation of State of La., 263 U.S. 545, 549 (1920). “Because of such ownership ... the state may regulate the taking....” Id.

6 Hunt, 278 U.S. at 100.

7 Hunt, 19 F.2d at 640-41.


9 See 43 C.F.R. § 24.4(d). The BLM’s organic act permits the Secretary of the Interior to restrict of hunting and fishing “for reasons of public safety, administration, or compliance with provisions of applicable law.” 43 U.S.C. § 1732(b). Except to the extent that BLM’s non-native species policy must rely upon these limited restrictions in order to be valid, these exceptions are not relevant here. See also 36 C.F.R. § 251.23 (authorizing “[t]he Chief of the Forest Service [to] ... establish a series of research natural areas”).
management statutes of the various federal land management agencies, also recognize and preserve state wildlife management authority—as that authority existed in 1976. Despite federal encroachment, the translocation power remains an essential element of state authority. Since the Forest Service and BLM lack Congressional authorization to preempt state law as to the translocation of species on the public lands either agency manages, a state may exercise that authority to introduce any animal, native or non-native, on any BLM or Forest Service land where the state has wildlife management authority.

At its heart, the power struggle centers less in the wildlife management conflict and more in the fundamental conflict and understanding of that conflict between overlapping federal and state government. The resolution of this dispute is, therefore, much more important and fraught than a few goats in the mountains. Most of the Western states are home to very large tracts of federal land, which are home to a large portion of the

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10 An "organic act" or "organic statute" is a law that establishes an administrative agency or local government. BLACKS LAW DICTIONARY 1634 (9th ed. 2014). In this context, it is an act of the United States Congress that creates an administrative agency to manage certain federal lands, or consolidates management authorities found in various statutory sections into a single act. For the relevant portion of the Organic Acts creating the Forest Service and BLM, see 16 U.S.C. § 528 (2012) (declaring that State Fish & Wildlife Agencies retain jurisdiction over wildlife in National Forests); 43 U.S.C. § 1732(b) (2012) (stating the same in regard to BLM-managed land).

11 See, e.g., The Wilderness Act of 1964, 16 U.S.C. § 1133(d)(7) (2012) (stating that "[n]othing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.").

12 See, e.g., 16 U.S.C. § 528 (2012) (stating that "[n]othing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests."); 43 U.S.C. § 1732(b) (2012) (stating that "[n]othing in this Act shall be construed as... enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife.").

13 See infra Part I.B.iii.

14 See infra Part I.C.i.


16 This holds true unless that particular animal species is considered invasive and controlled under a legitimate Congressional grant of authority regulating invasive species. For a list of such federal laws and regulations in addition to a brief summary of the relevant powers Congress delegated pursuant to each. See United States Dep't of Agric., Federal Laws and Regulations: Public Laws and Acts, NAT'L INVASIVE SPECIES INFO. CENTER (Aug. 26, 2014), http://www.invasivespeciesinfo.gov/laws/publiclaws.shtml.

17 See Kleppe v. New Mexico, 426 U.S. 529, 545 (1976) (explaining that in the absence of contrary federal law regarding wildlife on federal land, "the States have broad trustee and police powers over wild animals within their jurisdictions").


19 See infra Subsection III.

wildlife managed by the states.21 To the extent that federal agencies like BLM and the Forest Service have the authority to unilaterally exclude non-native game species from the lands they manage, there is the justifiable concern that these agencies might act to limit the state wildlife manager's authority to carry out its other management activities, impacting outdoor recreational opportunities and revenues generated from the utilization of those opportunities.22

Part I of this article compares and contrasts the history of public land management in the United States with the related history of the management of public wildlife resources. Part II discusses whether the BLM or the Forest Service have legal authority to preempt or subordinate state wildlife management decisions on transplanting and releasing native or non-native wildlife on their respective lands, including Wilderness Areas, WSAs, and RNAs, and considers more specifically whether the BLM or the Forest Service has the authority to enjoin state translocation projects that release wildlife on federal lands or non-federal lands adjacent to federal lands. Additionally, Part III considers whether the existing permitting and regulatory regime established by BLM and the Forest Service applies to the several States in the same fashion as it applies to private individuals.

Part IV evaluates the claim that the National Environmental Protection Act ("NEPA") is violated where the relevant federal land management agency fails to prevent state-authorized wildlife translocation, and subsequently fails to remove the species from federal lands. Part V briefly evaluates the limitations, or lack thereof, of the tools available to the States in undertaking wildlife management projects without obtaining

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21 This is no small issue. For example, in Utah alone over 1 million acres of land are designated wilderness managed either by the BLM or the Forest Service is located in Utah alone. See Utah Wilderness Study Areas, UTAH.COM, http://www.utah.com/playgrounds/designated_wilderness.htm (last visited Dec. 31, 2015) (In Utah over 1 million acres of land are managed by the BLM or the Forest Service); see also WSA Maps, BUREAU OF LAND MGMT., http://www.blm.gov/ut/st/en/prog/blm_special_areas/wilderness_study_areas/WSA_Maps.html (last visited Dec. 31, 2015) (the BLM manages 87 WSAs within Utah); Carol Hardy Vincent et al., Federal Land Ownership: Overview and Data, FEDERATION OF AMERICAN SCIENTISTS (Feb. 8, 2012), http://www.fas.org/spp/crs/misc/R42346.pdf (In Utah, the BLM manages approximately 22,854,937 acres, the Forest Service manages an additional 8,207,415 acres).

22 With such a large percentage of the state under federal land management authority, exercising management authority over habitat as a disguise for exercising management authority over wildlife would be a substantial infringement on state wildlife management authority and could substantially impair DWR's ability to effectively manage wildlife populations and serve Utah's citizens. Ernest R. Perkins et al., Western Association of Fish & Wildlife Agencies, White Paper: Wildlife Management Subsidiary, WAFWA (June 2011), http://www.wafwa.org/Documents%20and%20Settings/377Site%20Documents/Committees/Committees/Commissioners/CommitteeDocuments.pdf (describing how federal overreach complicates State management of wildlife).
prior federal approval. Part VI concludes by reaffirming state authority to manage wildlife in the absence of Congressional abrogation of that authority. Part VI also concludes that apparently Forest Service and BLM regulations do not apply to the states, are contrary to governing statutes as applied to the states, and exceed statutory and regulatory authority as applied.

I. BACKGROUND

By a quirk of history, the management of federal land itself is governed differently than the wildlife residing thereon.\textsuperscript{23} Federal agencies like the Forest Service and BLM, but also the U.S. Fish & Wildlife Service, National Park Service, and Department of Defense, manage the land, or the habitat, of wildlife.\textsuperscript{24} The federal government adopted this land management policy after nearly a century of relative disinterest by the States and private parties in the remaining federal lands.\textsuperscript{25} Even as this shift occurred, Congress was careful to preserve the status quo of state management with regard to wildlife management authority.\textsuperscript{26}

The management of wildlife remains, therefore, as it traditionally has; reserved to the states, even on federal lands.\textsuperscript{27} Congress may exercise its plenary power over federal property to preempt state management.\textsuperscript{28} Where Congress has not explicitly done so, or has acted instead to reserve this power to the states,\textsuperscript{29} state management authority of wildlife is limited

\textsuperscript{23} See infra Part I.A-B.
\textsuperscript{24} See 43 C.F.R. § 24.4(d) (2015) (stating that the states possess primary authority and responsibility for management of fish and wild life, whereas the Federal government manages the habitat); see also 43 C.F.R. § 24.4(c) (2015) (recognizing that although BLM is charged with the management of lands for fish and wildlife conservation, State fish and wildlife agencies exercise "the primary authority and responsibility . . . for management of fish and resident wildlife on such lands"); 36 C.F.R. § 293.10 (2015) (in accord with the Forest Service).
\textsuperscript{25} See, e.g., COMM'R OF THE GEN. LAND OFFICE, DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE 7 (1875) available at http://babel.hathitrust.org/cgi/pt?id=uuiug.30112101709688;page=root;view=image;size=100;seq=7 (describing disinterest by settlers in desert lands as having stymied the effectiveness of the available land grants in the then-existing States and Territories of the United States).
\textsuperscript{26} 43 U.S.C. § 1732(b) (2012) (stating that "[n]othing in this Act shall be construed as . . . enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife.").
\textsuperscript{27} Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002).
\textsuperscript{28} Kleppe v. New Mexico, 426 U.S. 529, 540-41 (1976) (stating that "[a]lthough the Property Clause does not authorize an exercise of a general control over public policy in a State, it does permit an exercise of the complete power which Congress has over particular public property entrusted to it. In our view, the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.").
only to the extent that the exercise of that authority conflicts with the
lawfully established authority of the respective federal agency established
by Congress and charged with managing that particular segment of federal
land or that particular activity. Finally, the state is charged with managing
wildlife as a public trust for all of its citizens.

A. Land Management

The contrasting approaches between wildlife and habitat management
(collectively referred to as land management) are a product of history,
tradition, and the underlying statutory schema superimposed upon the
federal land management agencies by Congress. The American schema of
land management began as little more than a blanket policy of disposal.
In the American West, however, federal settlement programs never really
"took off," allowing for a gradual federal policy shift towards retention
and protection of existing federal property.

30 See, e.g., Hunt v. United States, 278 U.S. 96, 99 (1928); UTAH CODE ANN. § 23-13-3 (West
2015).
32 43 C.F.R. § 24.4(d) (2015) (indicating the states possess primary authority and responsibility
for management of fish and wild life, whereas the Federal government manages the habitat); see infra
Part I.B (summarizing of the history and tradition behind State approaches to wildlife management).
33 See Robert Barrett, History on an Equal Footing: Ownership of the Western Lands, 68 U. COLO.
L. REV. 761 (1997); see also Ordinance of the Northwest Territory, 51 CLEV. ST. L. REV. 659, 663 (2004);
see Paul Wallace Gates & Robert W. Swenson, History of Public Land Law Development, PUBLIC LAND
LAW REVIEW COMM’N, (1968), available at http://content.lib.utah.edu/cdm/ref/collection/wwdl-
doc/id/5226.
34 Some thirteen years after the passage of the Homestead Act of 1862, which was intended to
facilitate the settlement of the West, the Commissioner of the General Land Office wrote that, “it may
be safely affirmed that, except in the immediate valleys of the mountain streams, where by dint of
individual effort water may be diverted for irrigating purposes, title to the public lands cannot be
honestly acquired under the homestead laws.” COMM’R OF THE GEN. LAND OFFICE, supra note 25.
Whereas much of the land East of the Mississippi was suitable for farming or agricultural production,
the arid, mountainous regions of the West proved much less attractive, leading the Secretary of the
Interior to describe this land in 1946 as “the land which nobody wanted very much, the land without
people.” U.S. DEPT OF INTERIOR, ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR 29
(1946). See also E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND
RESERVATION POLICIES, 1900-1950 3 (1951). This land was of such a quality that “[w]ithout water,
most of what remained could never be expected to furnish arable farms.” Id.
35 In 1897, during debate on what became the Forest Service Organic Act, Representative
McRae (D-Ark.) presciently declared:
"The purpose of [this Act] is the protection of our forests; and let me tell
you that in less than fifty years from today, unless a change is made, you will find
that the condition of the country which is today being denuded of its forests . . .
The ultimate product of this effort was the Federal Land Policy and Management Act of 1976 ("FLPMA"), which embodied this shift.36 Thus, since 1976, land policy has sharply shifted toward retention of public lands and management for multiple uses, including recreation.37 The Supreme Court, in reviewing these changes in management policy and structure under the property clause of the United States Constitution,38 determined that Congress has sweeping authority to regulate the federal lands as it sees fit.39 Congress has chosen to do so, however, by limiting agency authority so as to prevent public access to public lands for only a small subset of particular reasons.40

B. Wildlife Management

In deference to longstanding state authority on the subject,41 and perhaps due in part to the federal government's perceived inadequacy in managing the situation on the ground throughout its extensive land...
holdings, the shift in land management policy did not entail a commensurate shift in wildlife management authority. Since the American legal doctrines upon which wildlife management is based are derived from Roman and English Law, a brief review of each follows.

1. History: Law of Capture, Early English and Roman Law

Both Roman and English Law recognized ultimate state ownership and control of wildlife. In ancient Rome, wildlife was considered res nullius, or a “thing owned by no one.” Once captured, however, the person capturing became owner of the wild animal, even if it was taken on the land of another. Even so, wild animals “belonged ‘in common to all citizens of the state,’” meaning that the State had the authority to regulate taking.

In England, wildlife similarly belonged to the sovereign—first the king, and later parliament, who exercised exclusive authority to regulate hunting. In this environment, regulations were based on a “post-wilderness” conception of society and hunting privileges were disbursed for the purpose of maintaining feudal hierarchy. Historically, European aristocracy held a monopoly on hunting. For example, both the king and

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During the first one hundred years of the Nation’s existence, the federal government practiced what was, in effect, a “no-management policy” that “naturally led to multiple use of the federal lands as grazing, timber, and mineral interests each attempted to maximize their harvest of targeted resources.” Scott W. Hardt, Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship, 18 Harv. Envtl. L. Rev. 345, 352 (1994). This allowed “individual and corporate trespassers [to] effectively exploit[ ] these lands” with impunity; even as the General Land Office recognized the threatened destruction of public lands, it remained powerless to stop them because it had such few resources available. Id. at 352 n.37.

This is most apparent within FLPMA itself. 43 U.S.C. § 1732 (2012) (“[N]othing in this Act shall be construed as... enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife [on federal land].”).


46 Id. at 677.

47 Id. at 678.


49 Although the Roman State possessed this power, the Roman State rarely utilized it. Blumm & Ritchie, supra note 45, at 678.

50 In principle, the king and parliament managed wildlife for the common interest, but in practice, the allotment of hunting privileges heavily favored elites. Blumm & Ritchie, supra note 45, at 683-84.

51 Blumm & Ritchie, supra note 45, at 686.

52 In Europe generally, “kings and aristocrats... restrict[ed] hunting to a very narrow social stratum... [as a result] [m]ost of the social history of hunting revolves around the justifications for and
parliament allowed wealthy nobles to hunt, but excluded the common people from hunting.  

2. American Experience from the Founding to the Early Modern Era

Early American decisions reaffirmed the English and Roman law of capture, but gradually expanded the rights of the common people to hunt. When Europeans immigrated to North America, they found a seemingly inexhaustible supply of wildlife in the public commons available for taking, and they were also no longer legally barred from hunting. States inherited the king's authority after the Revolution, but were charged by the United States Supreme Court to manage wildlife in trust for the people.

One of the greatest contrasts between the English and American systems of wildlife management is that the American system relies upon local governing units—the states—to allocate wildlife resources, rather than a centralized management policy at the national level who favors elites. Initially, this difference led to the explosion of both opportunity and exploitation in America, thus causing an overharvesting of species—

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57 Blumm & Ritchie, supra note 45, at 684.

54 Pierson v. Post, 3 Cai. 175, 178 (N.Y. Sup. Ct. 1805) ("[M]ere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.").

55 See generally Carlos A. Peres, Overexploitation, CONSERVATION BIOLOGY FOR ALL 107, (Navjot S. Sodhi & Paul R. Ehrlich eds., 2010), https://conbio.org/images/content_publications/Chapter6.pdf (discussing the effects that early European settlers had on the overexploitation of wild species in North America).

56 Musiker, France, & Hallenbeck, supra note 48, at 93; see Martin v. Waddell's Lessee, 41 U.S. 367, 410-11 (1846) (explaining the way public land was to be treated following the Colonies' separation from England).

57 Martin, 41 U.S. at 432-433 (Thompson, J., dissenting) (requiring State to hold public lands in trust for the people such that there was a "common right of fishery" in the trust waters).

58 Note that the aristocratic system in England necessarily kept the eligible pool of hunters very small. With few members of society eligible, or indeed able, to hunt, the available wildlife resource was maintained for centuries. See generally ANDERS HALVERSON, AN ENTIRELY SYNTHETIC FISH: HOW RAINBOW TROUT BEGUILED AMERICA AND OVERRAN THE WORLD 74-75 (2010) (discussing how limits imposed on fishing by sportsman clubs benefited the rainbow trout). Given the very different constraints in the United States, American Fish & Wildlife agencies engage in very proactive management to maximize the available resource. This duty is carried out in trust for the people of the State.

59 Between 1800 and 1890 the population of:

- Buffalo dropped from 40 million to several thousand, or less;
- White-Tailed Deer dropped from 24 million to 500,000; and
- Wild Turkey dropped from 15 million to 30,000.

DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 205 (2009). The population of other key species—such as Pronghorn
many to scarcity, and some even to extinction.60 Public recognition of this
dramatic decline in wildlife populations sparked the conservation
movement.61 Figures like President Theodore Roosevelt and
conservationist Aldo Leopold "envisioned a nation where all citizens had
an opportunity to engage in conservation and hunting."62

President Roosevelt,63 having grown concerned after witnessing
firsthand the dramatic decline in North American "big game" species,
founded the Boone and Crockett Club in January 1888.64 The Club's first
efforts were to promote the idea of a "fair chase" doctrine in hunting, and
to create wilderness preserves to protect "buffalo, antelope, mountain
goats, elk, and deer."65 To this end, the Club pursued federal legislation
protecting wildlife in the National Park System, in part, explaining the
control the National Park Service exercises in wildlife management as
compared to other federal land management agencies.66

The Club, which remains active today, pioneered the framework that
has developed into the current wildlife management scheme in the United

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Antelope and Elk—fell about 98 percent from their levels at the beginning of the nineteenth century.  
Id. at 206.
60 Take, for example, the rapid extinguishment of the passenger pigeon between 1871 and 1914.  
During this period, the pigeon population plummeted from an estimated "hundreds of millions (or
even billions)" to one, and then none. Barry Yeoman, Why the Passenger Pigeon Went Extinct,  
AUDUBON MAG. (May-June 2014), available at  
61 Id. (noting that the modern conservation movement began in partial response to the extinction
of the passenger pigeon).
62 JOHN ORGAN ET AL., WILDLIFE SOCIETY & BOONE CROCKETT CLUB, TECHNICAL
REVIEW NO. 12-04, THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION 23 (2012),
Conservation.pdf [hereinafter TECHNICAL REVIEW].
63 Interestingly enough, President Roosevelt's uncle Robert was a prominent member of the
American Acclimatization Society—a group devoted to the translocation of "exotic species"—who
advocated on behalf of the introduction of Rainbow Trout into the waters of New York State. American
Acclimatization Society, N.Y. TIMES, Nov. 15, 1877. This doubly interesting because Robert Roosevelt
is credited as a key inspiration for young Theodore's interest in nature and conservation. BRINKLEY,
supra note 59, at 80 ("[Robert Roosevelt], more than any other direct influence, turned Theodore
Roosevelt into a conservationist as a teenager.").
64 BRINKLEY, supra note 59, at 201-07.
65 Id. at 201. "[A] man who wastefully destroys big game, whether for the market, or only for the
heads, has nothing of the true sportsman about him." Id. at 207.
66 Id. at 201, 205-06 (noting that the Club became "the most important lobbying group to
promote all national parks"). Note, however, that these enhanced restrictions apply almost exclusively
in the national parks rather than other lands, such as national monuments, also administered by the
National Park Service. See, e.g., Sleeping Bear Dunes: Hunting, NATIONAL PARK SERVICE,  
http://www.nps.gov/slbe/planyourvisit/hunting.htm (last visited May 6, 2015); Glen Canyon: Orange
Cliffs, NATIONAL PARK SERVICE, http://www.nps.gov/glca/planyourvisit/orange-cliffs.htm (last
visited May 6, 2015) ("Hunting is permitted in Glen Canyon, during hunting season, with proper
license only.").
States.\textsuperscript{67} This framework is known as the North American Model of Wildlife Conservation ("the Model").\textsuperscript{68} The Model groups and restates several wildlife conservation principles that U.S. jurisdictions have applied over the past century to develop successful programs for wildlife management.\textsuperscript{69} The Model is composed of seven "pillars," they are: (1) wildlife as a public trust resource, (2) the elimination of markets for game, (3) allocation of wildlife by law, (4) kill only for legitimate purpose, (5) wildlife as an international resource, (6) science-based wildlife policy, and (7) democracy of hunting.\textsuperscript{70} These seven pillars are used as a "means to understand, evaluate, and celebrate how conservation has been achieved in the U.S. and Canada, and to assess whether we are prepared to address challenges that lay ahead."\textsuperscript{71} Three of these pillars are implicated in the mountain goat debate: Wildlife as a Public Trust Resource, Scientific Management,\textsuperscript{72} and the Democracy of Hunting.\textsuperscript{73}

3. States Manage Wildlife as a Public Trust Resource According to Wildlife Policy Based on Science, Not Supposition or Emotion

At the most basic level, state authority to manage wildlife rests on this principle: wildlife cannot be privately owned.\textsuperscript{74} Therefore, States manage wildlife on behalf of their citizens.\textsuperscript{75} Although the United States Congress may have determined that certain wildlife management practices, such as the preservation of endangered species, is to be better managed at the

\textsuperscript{67} For example, "[o]n a hunt . . . members were absolute equals." \textsc{Brinkley, supra} note 59, at 204. This echoes the democratic principles enshrined by the North American Model of Wildlife Conservation. See infra Part I.B.ii.2.


\textsuperscript{69} See generally Geist et al., supra note 68, at 25-27.

\textsuperscript{70} Id.

\textsuperscript{71} Id. at viii.


\textsuperscript{73} Geist et al., supra note 68, at 27.

\textsuperscript{74} Martin v. Lessee of Waddell, 41 U.S. 367, 413-414 (1846) (finding that the State of New Jersey could not assign the rights to collect shellfish in a particular area to a single individual because the people exercised the "public and common right of fishery in navigable waters.").

federal level, state policymakers are better able to devote the resources necessary to manage recreational hunting and fishing within their own territories. Such an approach requires a management policy based on scientific data, rather than aesthetic or emotive judgments. This means that "[s]cience [is the] basis for informed decision-making in wildlife management."

Through science, good management principles have been discovered that allow for the "management of diverse species ... under highly complex circumstances." Science guides the range of management options that wildlife managers should choose from. In modern days, it is typical for a

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76 16 U.S.C. § 1535(f) (2006) (preempting State laws or regulations in conflict with Endangered Species Act). Even in the endangered species context, however, State expertise is crucial to facilitate the management goals of federal agencies. See, e.g., Interagency Policy Regarding the Role of State Agencies in ESA Activities, 59 Fed. Reg. 34,275, 34275 (July 1, 1994) ("In the exercise of their general governmental powers, States possess broad trustee and police powers over fish, wildlife and plants and their habitats within their borders. Unless preempted by Federal authority, States possess primary authority and responsibility for protection and management of fish, wildlife and plants and their habitats. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the [Endangered Species] Act.").

77 Geist et al., supra note 68, at 26.

78 Past experience has demonstrated that, where this is not the case, the unintended consequences can be devastating. For example, Gray Wolves were extirpated throughout the contiguous United States largely based on prejudice. See, e.g., MICHELLE LUTE, HUMAN DIMENSIONS OF WOLF MANAGEMENT IN MICHIGAN 2 (2013), available at http://www.michigandrnr.com/FTP/wildlife/NRCMaterials/Wolf%20Material/Human%20Dimensions%20of%20Wolf%20Management%20in%20Michigan.pdf ("Wolves were ... removed from human-dominated landscapes out of fear, [and] considered 'evil' and 'gluttonous.'"). Like many other wildlife management decisions taken with inadequate consideration, the results were both negative and unexpected. ALDO LEOPOLD, A SAND COUNTY ALMANAC (1989) ("In those days we had never heard of passing up a chance to kill a wolf.... I was young then, and full of trigger-itch; I thought that because fewer wolves meant more deer, that no wolves would mean hunters' paradise. But after seeing the green fire die, I sensed that neither the wolf nor the mountain agreed with such a view. Since then I have lived to see state after state extirpate its wolves. I have watched the face of many a newly wolfless mountain, and seen the south-facing slopes wrinkle with a maze of new deer trails. I have seen every edible bush and seedling browsed, first to anaemic desuetude, and then to death. I have seen every edible tree defoliated to the height of a saddlehorn. Such a mountain looks as if someone had given God a new pruning shears, and forbidden Him all other exercise. In the end the starved bones of the hoped-for deer herd, dead of its own too-much, bleach with the bones of the dead sage, or molder under the high-lined junipers.") Ironically, this very practice - the elimination of wolves - precipitated the Hunt decision which is now at the center of the State-federal management debate. See United States v. Hunt, 19 F.2d 634, 640 (D. Ariz. 1927).

79 Geist et al., supra note 68, at 27.

80 Id.

81 However, "a trend towards greater influence in conservation decision making by political appointees versus career managers profoundly threatens the goal of science-based management." Id. Like how the Forest Service reversed itself on the goat issue after facing pressure from the Grand Canyon Trust. See Letter from Angelita S. Bulletts, Supervisor, Dixie National Forest, to Kevin Bunnell, Reg'l Supervisor, Utah Div. of Wildlife Res. (May 3, 2013) (on file with author) ("We support
policy making board to choose which of those options they believe is in the best interest of the state, based on a range of concerns, such as economic impacts, social issues, and concerns for private property rights. These decisions are made after holding numerous public meetings and considering public input.

4. *A Democratic Approach to the Management of Wildlife Resources Through Hunting*

In many ways, this final principle is the most important because the very idea of the public trust presupposes public access to trust resources. The basic premise of this final pillar is that every citizen is entitled to the freedom to hunt and fish. As the Wildlife Society puts it, "[t]he opportunity for citizens in good standing to hunt in Canada and the U.S. is a hallmark of our democracy." The basic premise of this final pillar is that every citizen is entitled to the freedom to hunt and fish. As the Wildlife Society puts it, "[t]he opportunity for citizens in good standing to hunt in Canada and the U.S. is a hallmark of our democracy." Today, drawing on that legacy, the United States takes an internationally uncommon, democratic approach to hunting. Its approach, based on the Model, recognizes the historical universal right of access to wildlife, which, according to the Boone and Crockett Club, is considered a right of citizenship in our democratic society. Additionally, this approach recognizes the need to have democratic input into wildlife management decisions, as well as the states' duty to conserve wildlife so that citizens will have continuing access to it. Such access "fosters individual stewardship and provides the funding necessary to properly manage wildlife resources in a sustainable manner."
5. What is "Wildlife Management" and Just How Broad Is It?: The Industry Understanding and Traditional Management Authority

In no case challenging the limits of state and federal authority over wildlife management has either party challenged whether the activity in question constituted "wildlife management." Instead, the dispute has been over the extent of state or federal authority vis-à-vis the other. This does not mean that the meaning of wildlife management is unimportant. For example, because FLPMA preserves "the responsibility and authority of the States for management of fish and resident wildlife," BLM may not intrude upon state activities that fall within the rubric of "wildlife management." Under any reasonable definition of the phrase, wildlife translocation is "wildlife management."

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91 See, e.g., Mich. Conservation Clubs v. Lujan, 949 F.2d 202, 206-08 (6th Cir. 1991) (finding that because National Park Service may prohibit any wildlife management activity by the States that is not specifically authorized by the organic act of a particular park unit, the National Park Service could prohibit "trapping" within Pictured Rocks and Sleeping Bear National Lakeshores although "hunting" was authorized); Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002) (finding that language of the Act allowed the U.S. Fish & Wildlife Service to prohibit Wyoming officials from vaccinating elk on the National Elk Refuge, because the vaccination of elk was not "wildlife management.").

92 See Wyoming, 279 F.3d at 1226-27. Again, the dispute of the above cases was over the boundary between State and federal management authority; no parties disputed that the activities in which the States were engaged constituted "wildlife management."


94 Greg Yarrow, Fact Sheet 36, CLEMSON COOP. EXTENSION (May 2009), http://www.clemson.edu/extension/natural_resources/wildlife/publications/fs36_wildlife_and_wildlife_management.html ("[T]here common ideas are present in every definition of wildlife management, including: 1) efforts directed toward wild animal populations, 2) relationship of habitat to those wild animal populations, and 3) manipulations of habitats or populations that are done to meet some specified human goal."); Statement of Policy, 1 J. OF WILDLIFE MGMT. 1, 1-2 (1937). ("Management along sound biological lines means management according to the needs and capacities of the animals concerned, as related to the environmental complex in which they are managed. It does not include the sacrifice of any species for the benefit of others, though it may entail the reduction of competing forms where research shows this is necessary. It consists largely of enrichment of environment so that there shall be maximum production of the entire wildlife complex adapted to the managed areas. Wildlife management is not restricted to game management, though game management is recognized as an important branch of wildlife management. It embraces the practical ecology of all vertebrates and their plant and animal associates. While emphasis may often be placed on species of special economic importance, wildlife management along sound biological lines is also part of the greater movement for conservation of our entire native fauna and flora.").

95 Yarrow, supra note 94. (To translocate a species from one location to another cannot reasonably be defined as anything other than the "manipulation[] of habitats or populations ... done to meet some specified human goal."); Gamborg et al, supra note 18 ("The wise use approach aims to accommodate humanity's continuous use of wild nature as a resource for food, timber, and other raw materials, as well as for recreation. The idea of wise use appeals to our own best interests, or to the interests of humans over time, including future people (this approach is often called 'sustainable use'). The goal of management is to enhance and maintain nature's yield as a valuable resource for human beings.").
As a traditional power exerted by the States in exercising the authority to manage wildlife on federal lands, the States impliedly hold the translocation power to the extent Congress has neither implicitly, nor explicitly, restricted that authority. This is because the translocation power is as fundamental and ancient a power as any, and is central to wildlife management authority. As such, Congress must act explicitly to remove this authority from the states in order to restrict state management authority.

Rather than demonstrating the intent to restrict state authority to manage wildlife on federal land, since Missouri v. Holland, Congress has repeatedly reaffirmed the principal role of state Fish and Wildlife agencies in the matter. For example, during the debate leading to the enactment of the Multiple-Use Sustained Yield Act of 1960, the Act was amended to include language making explicit that the Act did not affect the jurisdiction of the states. The legislative history of the bill makes clear that the Senate agreed to an amendment introducing this language at the behest of the House even though "[it] felt that there was no need for this provision" because the Act was never intended to affect or alter state authority with respect to wildlife. Senator Humphrey read into the record a letter urging the Senate to adopt the amendment "as merely stating what has been everyone's intent."

C. Relevant Statutory Authority

Congress has spoken directly to the issue of state management of wildlife on a number of occasions and has, with few exceptions,

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96 See, e.g., Ether 2:2-3, Book of Mormon ("And they did also lay snares and catch fowls of the air; and they did also prepare a vessel, in which they did carry with them the fish of waters. And they did also carry with them . . . swarms of bees, and all manner of that which was upon the face of the land, seeds of every kind."); 1 Nephi 16:11, Book of Mormon ("[W]e did take seed of every kind that we might carry into the wilderness."); 1 Nephi 18:24, Book of Mormon ("And it came to pass that we did begin to till the earth, and we began to plant seeds; yea, we did put all our seeds into the earth, which we had brought from the land of Jerusalem. And it came to pass that they did grow exceedingly; wherefore, we were blessed in abundance.").

97 See infra Subsection III.A.

98 Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002).

99 Open and Public Meetings Act, tit. 52, ch. 4, Utah Code (West 2016).


101 106 Cong. Rec. 12078, 12079 (Senate June 8, 1960).

102 Id.

103 Id. at 12085 (S. Humphrey).

104 Wyoming v. U.S., 279 F.3d 1214, 1226-27 (10th Cir. 2002) (interpreting the National Wildlife Refuge System Improvement Act and finding that language of the Act allowed the U.S. Fish & Wildlife Service to prohibit Wyoming officials from vaccinating elk on the National Elk Refuge); see also 16 U.S.C. § 668dd(m) (2012).
consistently reaffirmed that federal agencies manage federal land, but state fish and wildlife agencies manage the wildlife located thereon.  

1. The Scope of the Authority of the Forest Service and Bureau of Land Management to Manage Wildlife in Utah

Despite overwhelming Congressional support for continued local management of wildlife by the States, Congress may act to explicitly preempt state management authority through the Property, Commerce, Treaty, and Necessary and Proper Clauses of the United States Constitution. State control and authority, therefore, is the default even on federal property unless Congress declares otherwise.

D. The Forest Service

When the Forest Service was created, pursuant to the Forest Service Organic Act in 1897, Congress could scarcely have imagined that one day their words would be used to justify limiting and restricting the authority of the several States to regulate hunting. Indeed, at the time the law was enacted, the leading U.S. Supreme Court opinion on the subject explicitly recognized state ownership and control of wildlife. Perhaps


110 United States v. Bd. of Comm’rs of Fremont Cnty., 145 F.2d 329, 330 (10th Cir. 1944) (holding that States have no authority to frustrate the disposition of federal lands as undertaken by Congress).

111 As late as 2013, 48 states claimed state ownership of wildlife within their borders. See Michael C. Blumm & Aurora Paulsen, The Public Trust in Wildlife, 2013 Utah L. Rev. 1437, 1462–64, n. 204 (2013). To the extent State law conflicts with federal statutes regulating federal lands, such law is preempted. Kleppe, 426 U.S. at 544.

112 For a more comprehensive history of the administration of the National Forest System by USFS, see Hardt, supra note 42, at 351-69.

113 The relevant section states, in part, that “[t]he Secretary . . . shall make provisions for the protection against destruction by fire and depredations upon the public forests . . . and he may make such rules and regulations and establish such service . . . to regulate their occupancy and use and to preserve the forests thereon from destruction.” Sundry Appropriations Act of June 4, 1897, 16 U.S.C. § 551 (2012).

114 Geer v. Connecticut, 161 U.S. 519, 529-31 (1896) (“[T]he power or control lodged in the state, resulting from . . . common ownership, is to be exercised, like all other powers of government, as a
unsurprisingly then, the 1897 Act said nothing at all about state authority or jurisdiction—or even wildlife for that matter—nor did any member of Congress during debate on the bill.

1. Much Ado About RNAs

Seventy years later, in 1966, the Forest Service promulgated a regulation authorizing the creation of RNAs, which relied upon the destruction-prevention provision of the original Organic Act. As the history of this rule makes clear, the original regulation was based on a statute enacted in 1897 that concerned only the authority to prevent forest fires and damage to the National Forest System. According to this regulation, the Chief of the Forest Service may establish a RNA “to illustrate adequately or typify for research or educational purposes, the important forest and range types in each forest region, as well as other plant communities that have special or unique characteristics of scientific interest and importance.” Although the RNA program was codified in the Code for the benefit of the people...
of Federal Regulations in 1966, the Forest Service created the first RNA in the mid-1920s. This regulation, promulgated first in 1966, remains entirely unchanged today, although the Forest Service now justifies the restriction through a number of subsequent statutes as well.

On its face, the RNA regulation declares that RNAs "will be retained in a virgin or unmodified condition." When taken together with the Forest Service Manual, it becomes apparent that the Forest Service claims the authority to manage RNA-designated land to discourage non-native species and encourage native species.

2. Permitting for Use of National Forest Land

Forest Service regulations designate most activities conducted on National Forest System land as "special uses," with a few exceptions. These regulations further require that a person obtain a permit before engaging in any "special use" on Forest Service land. With regard to permitting for hunting and fishing, FLPMA prohibits such a requirement because it provides that the Secretary of Agriculture may not "require Federal permits to hunt and fish on public lands or on lands in the National Forest System."

122 Whatever the merits of the RNA program, there is no explicit Congressional authorization to create such a program, nor has Congress provided direct authority to protect the research aspect of the RNA. Instead, 16 U.S.C. § 551 authorizes the Secretary of Agriculture to take action to prevent generalized destruction of National Forest lands. 16 U.S.C. § 551 (2012).


124 See 36 C.F.R. § 251.23 (2014) (Although there are few cases testing the RNA rule and restrictions, those that do exist are all private actors suing the federal government over the creation of RNAs.); see, e.g., Biodiversity Conservation Alliance v. Jiron, 762 F.3d 1036, 1073 (10th Cir. 2014); Park Lake Res., LLC v. U.S. Dep't of Agric., 378 F.3d 1132 (2004).

125 Forest Serv. Manual 4063.02(3) (2005) ("The objective[] of establishing [a] Research Natural Area [is] to: ... [p]rotect against human-caused environmental disruptions.").

126 36 C.F.R. § 251.50 (2016).

127 Id.

E. BLM

The BLM, created pursuant to Congressional authorization in FLPMA during the mid-1970s, "is the largest land manager, public or private, in the United States . . . manag[ing] approximately 177 million acres of generally arid or semi-arid public land in the far western states." The BLM's very existence is a byproduct of the fact that, for the longest time, the lands now managed by BLM were considered worthless for almost anything at all. Interestingly enough, however, BLM lands have turned out to be extraordinarily productive as BLM manages "more fish and wildlife habitat than any other agency" and lands that "constitute[] a major recreational resource for millions of Americans." BLM also has responsibility under the Wilderness Act to designate lands that demonstrate "wilderness characteristics" as wilderness study areas, or WSAs.

As described above, the BLM's authority to act is found in FLPMA and the Wilderness Act, which reserve state authority to manage wildlife. The Wilderness Act in § 1133(c) prohibits certain activities in designated wilderness areas, such as commercial enterprise, permanent or temporary roads, motor vehicles, motorized equipment, motorboats, mechanical transport, aircraft landing, installations, and structures. These are the only activities prohibited under the Wilderness Act. There is no specific provision restricting state wildlife management authority, and § 1133(d)(7) specifically reserves to the States jurisdiction over wildlife management. Furthermore, § (c) provides that its restrictions are subject to exception "as specifically provided for" in § (d). Such an exception suggests, therefore, that the uses described in subsection (d) of § 1133—including the

131 For a more comprehensive history of the administration of the public lands managed by BLM, see Hardt, supra note 42, at 369-71.
133 Id.
134 Id.
135 Id. at 558-59. In fact, the recreational value of these lands today exceeds the extractive value of the same land, dollar for dollar.
136 Id. at 559, 602 n.13; Utah v. Norton, No. 2:96-CV-0870, 2006 WL 2711798, *4-5 (D. Utah Sept. 20, 2006). (BLM no longer designates new WSAs, pursuant to the settlement agreement created in this case.)
137 The restrictions FLPMA places on BLM are the same as those on the Forest Service under the same Act. See discussion supra Subsection I.C.i.1.b.
139 § 1133(c).
140 Id.
141 § 1133(d)(7).
142 § 1133(c).
reservation of wildlife management authority to the states—are general exceptions to the restrictions imposed by § 1133(c), and that the activities described in § (d) may be carried out or achieved through means otherwise prohibited in § (c).

Despite the limited authority granted by these statutes, the language of the BLM Manual “prohibit[s], to the extent practicable and permitted by Federal law, the introduction of any non-native species into WSAs.” The Manual further concludes, “the BLM will remove, to the extent practicable and permitted by Federal law, any non-native fish or wildlife species from WSAs.” In addition, the Manual distinguishes between “prohibited” non-native species and “allowed” non-native species such as non-native fish “stocked before October 21, 1976” and feral horses and burros.

Thus, it would appear that the phrase “to the extent . . . permitted by Federal law” would indicate that the BLM recognizes that there are situations where they do not hold requisite statutory authority to undertake the actions described in their policy manual.

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143 See, e.g., § 1133(d) (“The following special provisions are hereby made[.]”); § 1133(d)(1) (allowing the Secretary of Agriculture to use aircraft for “the control of fire, insects, and diseases” and directing the Secretary to continue to allow aircraft and motorboats where “these uses have already become established”); § 1133(d)(5) (“Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”). Some of these exceptions allow for particular activities—such as the use of aircraft or motorboats—that are otherwise prohibited, while § 1133(d)(7) is a very broad grant of authority. Compare § 1133(d)(1) (“Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable.”), with § 1133(d)(7) (“Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests. Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.”). This suggests, at least, that § 1133(d)(7) was intended as an exception to the restrictions imposed in § 1133(c).


145 Id. at 1-42.

146 Id. at 1-41. October 21, 1976 was the effective date of FLPMA. See 43 U.S.C. § 1701(a)(3) (2012).

147 BUREAU OF LAND MGMT., supra note 144, at 1-38 (“[N]othing in this section applies to Wild Horses and Burros . . . .”)

148 Id.
1. The Procedural Requirements of the NEPA

The requirements of NEPA are quite simple. NEPA requires completion of an environmental impact statement (EIS) before any major federal action that may affect the environment is undertaken. Although ordinarily a private or state actor need not complete an EIS under NEPA, if a project is carried out by state or private actors utilizing federal monies, or is carried out through state/federal or federal/private partnership, an EIS might be required. NEPA is a procedural statute, not a results-based statute, so even in situations where an EIS is required the agency need not select the option that causes the least amount of harm.

2. Judicial Deference (or Non-Deference) to Administrative Decision Making

A federal agency's interpretation of its Organic Act is subject to a special kind of judicial deference as established by the Supreme Court in *Chevron, v. Nat'l Res. Def. Council*, and its progeny. According to *Chevron*, the process of review is divided into two steps. At step one, the court must determine, through the use of canons of statutory construction and legislative history, "whether Congress has directly spoken to the

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151 This is because such a project is not, by its very nature, a "federal action." See *Carolina Action v. Simon*, 389 F. Supp. 1244, 1245 (M.D. N.C. 1975) (finding that where there is no federal involvement, there is no federal action), aff'd 522 F.2d 295 (4th Cir. 1975).
152 *Sierra Club v. Hodel*, 848 F.3d 1068, 1089 (10th Cir. 1988) ("[T]he distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. The touchstone of major federal action, in the context of the case before us, is an agency's authority to influence significant nonfederal activity. This influence must be more than the power to give nonbinding advice to the nonfederal actor... Rather, the federal agency must possess actual power to control the nonfederal activity."); see also *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990).
153 *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 519 (1978). The same holds true in the context of harms to wildlife. *Roberts v. Methow Valley Citizen's Council*, 490 U.S. 332, 351 (1989). ("[I]t would not... violate] NEPA if the [federal agency], after complying with the Act's procedural requirements,... decided that the benefits [of a particular option] justified [that choice], notwithstanding the loss of 15%, 50%, or even 100% of that species in the affected area.")
154 For a more complete exposition of the same topic, see *Devin Kenney, Potemkin Villages of the West: How a Simple Payment to Compensate Local Governments Became an Uncontrollable Federal Subsidy*, 2 WILLAMETTE ENVTL. L.J. 21 (2015).
156 *Id.* at 842-43.
precise question at issue.\textsuperscript{157} If it has, the issue is resolved “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”\textsuperscript{158} In that case, the court’s construction of the statute is binding on the agency and limits the range of permissible interpretations of that statute.\textsuperscript{159}

However, even assuming Congress has not spoken to the precise question, or that the statute is otherwise ambiguous, at step two the court does not have unbridled discretion to impose the meaning it prefers on the statute.\textsuperscript{160} In that case, rather, “the question . . . is whether the agency’s answer is based on a permissible construction of the statute.”\textsuperscript{161} If the interpretation is permissible, the reviewing court must uphold the agency’s interpretation of the statute, whether that interpretation is the one the court itself would prefer—or not.\textsuperscript{162} This is because an agency is justified in making “a binding interpretation of a statute it administers” by virtue of the fact that Congress delegated to it the authority to make law.\textsuperscript{163}

However, not all agency rules or statements merit significant judicial deference.\textsuperscript{164} Pursuant to § 553 of the Administrative Procedure Act (APA), an agency is required to engage in the process of informal notice-and-comment rulemaking when it announces a new rule, unless that rule qualifies for an established exception.\textsuperscript{165} Excluding emergency situations,\textsuperscript{166}

\textsuperscript{157} Id. at 842.
\textsuperscript{158} Id.
\textsuperscript{159} How Chevron Step One Limits Permissibe Agency Interpretations: Brand X and the FCC’s Broadband Reclassification, 124 HARV. L. REV. 1016 (2011); see also United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (“Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed.”).
\textsuperscript{160} Chevron, 467 U.S. at 843 (noting that “the court does not simply impose its own construction of the statute.”).
\textsuperscript{161} Id. (emphasis added).
\textsuperscript{162} See, e.g., Claire R. Kelly & Patrick C. Reed, Once More Into the Breach: Reconciling Chevron Analysis and De Novo Judicial Review After United States v. Haggar Apparel Company, 49 AM. U. L. REV. 1167, 1170 (2000) (“Under the second step, the court assesses whether the agency’s interpretation is permissible and reasonable. When the agency’s interpretation is reasonable . . . step two requires the court to accept, or ‘defer to,’ a reasonable interpretation of an ambiguous statutory provision by the agency that administers the statute.”).
\textsuperscript{163} According to one author, “the justification for allowing an agency to make a binding interpretation of a statute it administers is that Congress delegated a portion of its law-making or legislative authority to the agency, and the agency’s resolution of silence or ambiguity through its interpretations represents an exercise of delegated legislative authority. Thus a threshold question under Chevron is whether the statute being interpreted is administered by an agency, as opposed to a statute creating a private right of action enforced by the courts.” Kelly & Reed, supra note 162, at 1189-90.
\textsuperscript{164} For example, “[a]n agency’s interpretation of a statute . . . is a question of law which is reviewed de novo.” Partridge v. Reich, 141 F.3d 920, 923 (9th Cir. 1998).
\textsuperscript{166} § 553(b)(B).
an agency may only promulgate a rule without notice-and-comment procedure if it is either an interpretive rule or general statement of policy.\footnote{§ 553(b)(A); One factor that a court considers "is whether a purported policy statement genuinely leaves the agency and its decision-makers free to exercise discretion." Am. Bus. Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).} Rules made pursuant to this exception—that is, decisions not reached through notice-and-comment proceedings or formal adjudication—are entitled to less deference, or no deference at all, by a court.\footnote{For example, when an agency "applies the policy [announced in a general statement of policy] in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974); see also § 553(b)(B).} On the other hand, the Court has noted that while such decisions and opinions do not command deference, they are, however, "entitled to respect... to the extent that those interpretations have the 'power to persuade.'"\footnote{Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (internal citations omitted).} After Christensen v. Harris County, the Supreme Court made clear, in \textit{U.S. v. Mead Corp.}, that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances."\footnote{Id. at 228 (considering "the degree of the agency's care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency's position.").} In looking to those "varying circumstances," the Court looks to a number of factors including the formality and consistency of the agency's decision.\footnote{Id. at 235 ("Such a ruling may surely claim the merit of its writer's thoroughness, logic and expertise, its fit with prior interpretations, and any other sources of weight.").} To whatever extent present, agency decisions also carry weight by virtue of the author's logic and persuasiveness.\footnote{Id. at 228; The full list of factors includes "[t]he thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining prior rights shall be at variance only where justified by good reason... This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies... We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). Presumably, the "factors which give [a decision or interpretation the] power to persuade" are those circumstances identified in \textit{Mead}.}
Although the topic of wildlife translocation may appear to be of parochial interest, the issue is, at least in the Western United States, of great import to the management of wildlife for public recreation—both in terms of hunting and wildlife viewing. Significant evidence suggests that if, for example, mountain goats themselves (Oreamnos americanus) are not native to the region, then at least the genus (Oreamnos) likely is. However, current federal regulations impose illogical, biologically nonsensical distinctions between species of non-native wildlife that are allowed and those that are not. These distinctions have no basis in underlying statutory law. Furthermore, the very term “native” is itself in question because, again, the federal land management agencies lack statutory authorization to regulate on this basis. Not only do the organic and enabling acts of these agencies fail to define “native,” these Acts neither refer to the term nor any concept commonly associated therewith.

A. The translocation authority is an inherent part of fish and wildlife management authority that states, as trustees of protected wildlife, must utilize to effectively manage wildlife populations within their respective jurisdictions. This authority encompasses both the translocation of native, and non-native, game and non-game species.

The translocation power is ancient, dating back thousands of years. This power was exercised throughout antiquity and the modern era. In

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174 Given that “47% of the [land contained in the] 11 coterminous western states” is federally owned, any restrictions on State management authority in the West is a major limit on State authority to govern its own affairs. Vincent et al., supra note 21, Summary. Compare this number—47%—with the 4% of federally-owned lands in Eastern United States. Id.; see also The Open West, Owned by the Federal Government, N.Y. TIMES, Mar. 23, 2012, http://www.nytimes.com/interactive/2012/03/23/us/westem-land-owned-by-the-federal-government.html?_r=0 (noting that “[the top states with the greatest percentage of federally owned land are all the Western states” and listing the top ten states with the greatest percentage of federally owned land).


178 See supra Part I.C.i.. See 18 U.S.C. § 42(c) (2010). Neither the Forest Service nor BLM have any statutory mandate to protect native species from non-native or exotic species, except to the extent BLM enforces the Lacey Act as part of the Department of the Interior.

179 The rise of agriculture hastened the frequency of such introductions dramatically; after all, what is a crop plant or livestock, but a non-native, translocated species introduced for the benefit of man in a new environment? See Jared Diamond, Evolution, consequences and future of plant and animal
English history, for example, several species now considered endemic (or native) to the British Isles were, in fact, introduced as game species by early conquering powers. Such species include the European Rabbit,\textsuperscript{183} Common Pheasant,\textsuperscript{184} and Fallow Deer.\textsuperscript{185} During the late nineteenth and early twentieth centuries, the translocation of game species was very common throughout the English speaking world\textsuperscript{186} by private,\textsuperscript{187} federal,\textsuperscript{188} and state actors.\textsuperscript{189} In the case of game species, such as Common or Ring-

domestication, NATURE, (Aug. 8, 2002), http://www.nature.com/nature/journal/v418/n6898/full/nature01019.html ("Eventually, people transported some wild plants (such as wild cereals) from their natural habitats to more productive habitats and began intentional cultivation."); 1 Nephi 16:11 (Book of Mormon) ("[W]e did take seed of every kind that we might carry into the wilderness."); 1 Nephi 18:24 (Book of Mormon) ("And it came to pass that we did begin to till the earth, and we began to plant seeds; yea, we did put all our seeds into the earth, which we had brought from the land of Jerusalem. And it came to pass that they did grow exceedingly; wherefore, we were blessed in abundance.").

\textsuperscript{181} For example, the Romans or early Phoenicians are believed to have reintroduced Fallow Deer into Western Europe after the species, or a closely related species, died out after the last ice age. Online Record Book: European Fallow Deer-North America Introduced, SAFARI CLUB INT’L (2015), http://www.scirecordbook.org/european-fallow-deer-north-america-introduced/.

\textsuperscript{182} See generally HALVERSON, supra note 58.

\textsuperscript{183} Rabbit were introduced following the Roman invasion of Britain in the early first century AD. Remains of Roman rabbit uncovered, BBC NEWS (Apr. 13, 2005), http://news.bbc.co.uk/2/hi/uk_news/england/norfolk/4439339.stm; see Nigel Cross, Food in Romano-Britain, RESOURCES FOR HISTORY (2006), http://resourcesforhistory.com/Roman_Food_in_Britain.htm.

\textsuperscript{184} Cross, supra note 183.

\textsuperscript{185} Fallow deer were reintroduced by the Normans during the Eleventh Century following an earlier, apparently failed, attempt by the Romans to create a self-propagating population of the deer in Britain. Fallow Deer, BRIT. DEER SOCY (2015), http://www.bds.org.uk/fallow.html. Aristocratic hunters managed the deer population for centuries as a game species, while restricting hunting by the common people.


\textsuperscript{187} American Acclimatization Society, supra note 63 (discussing wildlife released by the Society, including pheasants, starlings, sparrows, and salmon); Ornithological and Piscatorial Acclimatizing Society, DAILY ALTA CAL., Feb. 13, 1871, at 1, available at http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=DAC18710213.2.3#; see HALVERSON, supra note 58, at 61 (discussing the role of private acclimatization societies in the translocation of game species throughout the world).

\textsuperscript{188} HALVERSON, supra note 58, at 38.

Necked Pheasant, Rainbow Trout, and various non-native cervids, they were introduced for much the same reason as in the instant case: increased recreational opportunities for sportsmen and women.\textsuperscript{190}

Evidence suggests that mountain goats, when properly managed, are a benign addition to ecosystems,\textsuperscript{191} but the issue here is not whether the introduction is or was a good idea.\textsuperscript{192} That issue is one of science and policy, and was addressed via the series of public meetings and decision by a politically-accountable policy making board. What is relevant is that humans have exercised the right to translocate species since before the beginning of recorded history,\textsuperscript{193} and while Congress may act to curtail or limit this right,\textsuperscript{194} it has not done so. This means that the authority remains with state fish and wildlife agencies to act within state law to introduce or translocate species.\textsuperscript{195} Because, as will be discussed,\textsuperscript{196} BLM and the Forest Service lack the authority to limit this power as exercised by state fish and wildlife agencies,\textsuperscript{197} there is no reason to distinguish between the

\textsuperscript{190} HALVERSON, \textit{supra} note 58, at 60.


\textsuperscript{192} Admittedly, some of the translocations discussed above have impacted local environments negatively. Kolbert, \textit{supra} note 186. On the other hand, other species have become such a part of their new environment that they are almost considered indigenous. \textit{Remains of Roman Rabbit Uncovered}, \textit{supra} note 183. In either instance, the distinction is irrelevant here because Congress simply has not chosen to regulate wildlife translocations undertaken by the States as part of the State duty to manage fish and wildlife.

\textsuperscript{193} Diamond, \textit{supra} note 180, at 700.

\textsuperscript{194} The author does not question the broad authorization given to USFS, for example, to prevent the “destruction” of national forest land. 16 U.S.C. § 551 (2012). This mandate is broad enough to justify the imposition of penalties against private persons and societies seeking to introduce or modify forest service land. 36 C.F.R. § 251.23 (2014). What is at issue, is that Congress directed the judiciary in the Forest Service Organic Act to construe the Act as not “affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests.” 16 U.S.C. § 528 (2012). Since Congress did not create the RNA program, see 36 C.F.R. § 251.23, it did not permit additional limitations being placed on State wildlife management authority pursuant to that designation. 16 U.S.C. § 528.


\textsuperscript{196} See infra Part II.B.

\textsuperscript{197} See 16 U.S.C. § 528; 43 U.S.C. § 1732(b) (2012). The Forest Service conceded as much when it acknowledged, however, that the introduction of mountain goats was a “State decision and action." Letter from Allen Rowley, Acting Supervisor, Manti-La Sal National Forest, to Kevin Albrecht, Chair, Regional Advisory Council Wildlife Board (July 30, 2014) (on file with author).
maintenance of previously established populations of introduced species and the establishment of new ones.\footnote{198}{See infra text accompanying notes 233-37.}

Moreover, the BLM and Forest Service are statutorily limited from “diminishing the responsibility and authority of the States for management of fish and resident wildlife” as that authority existed in 1976.\footnote{199}{43 U.S.C. § 1732(b) (2015).} Perhaps because there is no reasonable basis from which to dispute that States had the authority before 1976 to maintain stocks of previously introduced species—such as Rainbow Trout—BLM draws a distinction between pre-1976 and post-1976 introduced species.\footnote{200}{BUREAU OF LAND MGMT., supra note 144, at 1-41.} Prior to 1976, however, the States did not merely have the authority to restock trout, but instead had the authority to manage fish and wildlife under state law.\footnote{201}{Congress emphatically declared that FLPMA “does not authorize exclusions simply because hunting and fishing would interfere with resource-management goals.” H.R. REP. NO. 94-1724, at 60 (1976) (Conf. Rep.). Speaking of an earlier statute, the Multiple-Use and Sustained Yield Act of 1960, Senator Humphrey read into the record a letter urging adoption of similar language on grounds that preserved the intent of all parties not to interfere with State management authority. 106 CONG. REC. 12078, 12085 (1960). The provision was adopted. Id. at 12079.} This authority included the introduction and translocation of species.\footnote{202}{See, e.g., UTAH DIV. WILDLIFE RES., supra note 72, at 3 (noting that mountain goats were first introduced in Utah in 1967).} The Forest Service and BLM cannot impose an extra-statutory distinction—particularly one that BLM implicitly recognizes as invalid\footnote{203}{BUREAU OF LAND MGMT., supra note 144, at 1-41 (“The BLM will prohibit, to extent practicable and permitted by Federal law, the introduction of any non-native species into WSAs.”) (emphasis added).}—upon the States in derogation of existing state management authority.\footnote{204}{See discussion infra Part II.B.} Thus, despite federal precedent to the contrary,\footnote{205}{Rather, federal precedent that is apparently contrary. In the absence of contrary statutory authority, the Kleppe and Hughes default favors State law. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976); Hughes v. Oklahoma, 441 U.S. 322, 336, 337 (1979). Only where Congress has utilized federal power to abrogate State authority or State law otherwise conflicts with controlling federal law does federal precedent invalidate the State ownership doctrine. Hughes, 441 U.S. at 335-36. In Hughes, for example, the Supreme Court found an Oklahoma statute to discriminate against interstate commerce and thus to run afoul of the dormant commerce clause doctrine. Id. at 337-38.} the state ownership doctrine remains relevant because state law controls and this theory is dominant at the state level.\footnote{206}{Blumm & Ritchie, supra note 45, at 719.}
B. The Forest Service and BLM Lack the Authority to Regulate or Prevent the Introduction of Wildlife Species, Indigenous or Not, into the Lands They Administer

Given the void of Congressionally granted authority for the Forest Service or BLM to regulate introduced non-native species managed by the States, and the general reservation of wildlife management authority to the States, courts should err on the side of finding that authority remains with the States. Therefore, even if a species is deemed non-native—as are mountain goats in a current dispute between the Forest Service and the State of Utah—the State retains the authority to manage the species on all Forest Service and BLM lands. The Supreme Court has held that preemption must be specific in areas of traditional state authority. In this case, not only is there no explicit preemption, there is an explicit reservation of authority to the States.

Some argue that the agency regulations at issue trump state law. After all, the regulations at issue are very specific: the introduction of non-native species is expressly or implicitly prohibited under both the Forest Service and BLM versions. Courts have held, for example, that “[w]here the State’s law conflict with the... regulations of the National Park Service...the local laws must recede.” Though true—federal regulations promulgated under valid statutory authority, and according to proper procedure, may overcome State law—this argument does not apply here because Congress has not authorized either BLM or the Forest Service the authority to make regulations preempting State authority over fish and wildlife. This lack of authority vested in either the Forest Service or BLM contrasts with that given to the National Park Service. Due to

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209 Kleppe, 426 U.S. at 545.
214 Fund for Animals, Inc. v. Thomas, 932 F. Supp. 368, 371 (D.D.C. 1996) (“If Congress intends to exercise the undoubtedly plenary power of the federal government over hunting on federal lands in any respect, it has only to say so, ‘the game laws or other statute of [a] state to the contrary notwithstanding’... In the absence of such explicit statutory direction, however, the Forest Service has concluded that its assertion of a general regulatory power over the practice of game-baiting in the national forests... would be, if not ultra vires, well within its discretion to eschew.”) (emphasis added) (internal citations omitted).
concerns over illegal poaching in Yellowstone and other parks, the default is a ban on hunting in parks unless the organic act of the specific park in question allows hunting.

For this reason, while it is true that as apples and oranges are both fruit growing on trees, and both the lands managed within the National Park System and lands managed by the BLM and Forest Service are all federally managed lands, the similarities end there. For example, in the Voyageurs National Park, hunting was banned with the park's creation because it is a national park subject to the National Park Organic Act. In the case of BLM and the Forest Service, Congress included savings clauses in the organic acts of each, reserving the right of the States to manage fish and wildlife. Congress specifically reserved state wildlife management authority, and no BLM or Forest Service regulation can override that statutory reservation of authority.

C. To the extent the Forest Service's Research Natural Area regulation is applied to, and meant to apply to, restrict the management authority of the several States over wildlife in the National Forest, the application of the regulation is arbitrary and capricious or, alternatively, ultra vires.

An agency's interpretation of the statute that it administers may be entitled to significant deference, but only to the extent that Congress did not statutorily foreclose that interpretation. Although the narrow issue might seem to be whether or not the States have default authority to translocate "non-native" wildlife, the real issue is much broader. As discussed above, there is no question that early Roman and English law allowed the translocation of game species of wildlife. This power was

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215 54 U.S.C. § 100101(a) (2014) (identifying purpose of National Parks as to "conserve the scenery and natural and historic objects and wildlife therein.").
219 This is because Congress has spoken to, and resolved, the issue as required under the Kleppe framework. Nat. Rifle Ass'n, 628 F. Supp. at 903.
221 See Nat. Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales, 468 F. 3d 826, 829 (D.C. Cir. 2006).
223 Id. at 842.
224 See generally Letter from Mary H. O'Brien, Utah Forests Program Director, Grand Canyon Trust, to Nora Rasure, Regional Forester, Intermountain Regional Office, United States Forest Service, and Allen Rowley, Supervisor, Manti-La Sal National Forest 1 (Sept. 17, 2013) [hereinafter "Grand Canyon Trust letter"] (on file with the author); Huang, supra note 211.
225 See, e.g., Fallow Deer, supra note 185; Cross, supra note 183.
coupled with the continuing authority to regulate the taking of the species once introduced.\textsuperscript{226} American wildlife law is but an outgrowth of the historical legal traditions of Roman and English law,\textsuperscript{227} and translocations by state wildlife management agencies continue to be commonplace.\textsuperscript{228}

In the Modern Era, both private\textsuperscript{229} and state\textsuperscript{230} actors continued—and continue—to exercise this common law authority,\textsuperscript{231} to the extent it is not modified by state statute or preempted by federal statutory law.\textsuperscript{232} For example, in Utah, the state continues to hold translocation power.\textsuperscript{233} Therefore, it should be seen that the translocation power is but one aspect of wildlife management authority.\textsuperscript{234} As the Supreme Court concluded in 1976, although Congress may preempt this authority on federal land, the State exercises authority over wildlife unless Congress has explicitly declared otherwise.\textsuperscript{235} In this case, not only has Congress spoken to, and unambiguously\textsuperscript{236} resolved, the issue of whether it is the state or the Forest Service that manages wildlife, it has done so numerous times.\textsuperscript{237} Therefore,

\textsuperscript{226} Fallow Deer, supra note 185 (discussing how Norman invaders introduced Fallow Deer and for centuries afterward managed the species for aristocratic use).
\textsuperscript{228} See supra text accompanying note 189.
\textsuperscript{229} American Acclimatization Society, supra note 68 (discussing wildlife released by the Society, including pheasants, starlings, sparrows, and salmon); Ornithological and Piscatorial Acclimatizing Society, DAILY ALTA CAL. (Feb. 13, 1871), http://cdn.ucr.edu/cgi-bin/cdnc?a=d&d=DAC18710213.2.3#; see also HALVERSON, supra note 58, at 28-29 (discussing the role of private acclimatization societies in the translocation of game species throughout the world).
\textsuperscript{230} Here, meaning governmental actors. Both Federal and State agencies have acted to introduce game species and other species deemed helpful in the United States. See generally HALVERSON, supra note 58 (discussing role of Federal and State agencies leading to the nationwide introduction of Rainbow Trout).
\textsuperscript{231} See, e.g., Great Summer Fishing at Cleveland Reservoir, UTAH.GOV (June 13, 2014), http://wildlife.utah.gov/wildlife-news/1436-great-summer-fishing-at-cleveland-reservoir.html (discussing state program stocking trout in National Forest); COLORADO PARKS & WILDLIFE, supra note 189, at 1 (discussing moose reintroduction).
\textsuperscript{232} Kleppe v. New Mexico, 426 U.S. 529, 545 (1976).
\textsuperscript{233} As evidenced by the continual reintroduction of game species like Rainbow Trout. Great Summer Fishing, supra note 231, at 1.
\textsuperscript{234} See supra Part II.A.
\textsuperscript{235} Kleppe, 426 U.S. at 539; see also Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Lacoste v. Dep't of Conservation of State of La., 263 U.S. 545, 549 (1920).
\textsuperscript{236} There is no need to proceed to Chevron step two because the statute is not ambiguous. Congress plainly did not delegate to the Forest Service the authority that the Grand Canyon Trust believes that it has. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
\textsuperscript{237} Most relevant here are the Multiple-Use and Sustained Yield Act of 1960, 16 U.S.C. § 528, the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(7), and the Federal Land Management Policy Act of 1976, 43 U.S.C. § 1172(b). See, supra Subsection I.B.iii. These statutes do not, on their face allow for any exceptions. To the extent BLM and the Forest Service are authorized to make exceptions to state authority, as allowed in FLPMA under certain exigent circumstances—such as to protect human safety—Congress has emphatically declared that the statutory authority of the Forest Service—and BLM—"does not authorize exclusions simply because hunting and fishing would interfere with resource-management goals." H. CONF. REP. NO. 94-1724, at 60 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6229.
regulatory decisions, whether by regulation or policy, that exceed statutory authorization are *ultra vires* and unenforceable. Neither the Forest Service nor BLM can (or may) amend a statute through regulation, interpretive rule, or policy manual.

D. As there is no documented destruction of federal property, the Forest Service's authority under the Property Clause to prevent destruction is not yet available.

Federal regulations and statutes acknowledge that each state has primary authority over wildlife management on Forest Service and BLM lands within their jurisdiction. To the extent Congress acts to impose a legal regime, the federal government has absolute control over federal lands. Where the government does not act, however, this authority is reserved to the States.

On the other hand, the Forest Service has the well-established authority to limit state wildlife management activity—or at least to act in conflict with such activity—where state-managed wildlife threatens the destruction of federal property. This authority dates back to *Hunt v. United States*, where, in response to the massive overpopulation of deer, the Supreme Court upheld the Forest Service's reduction of deer herds on federal lands in Arizona. Although Congress has not acted to extend this authority to BLM, the Supreme Court's reading of the Property Clause


In the Forest Service example, in particular, because Congress did not create the RNA program, see 36 C.F.R. § 251.23 (1966), it cannot be rationally presumed that Congress acquiesced to additional limitations being placed on state wildlife management authority pursuant to that designation. 16 U.S.C. § 528 (1960).

For examples of comparable regulations, see 36 C.F.R. § 293.10 (1973); 43 C.F.R. § 24.4(c) (1971). For examples of comparable regulations, see 36 C.F.R. § 293.10 (1973); 43 C.F.R. § 24.4(c) (1971).
would certainly allow Congress to do so.\textsuperscript{246} In the interim, however, \textit{Hunt} and its progeny merely stand for the proposition that to the extent a federal agency—such as the Forest Service or BLM—is charged with protecting federal lands or properties from “destruction,” the agency may act through its agents to “do whatever is necessary . . . upon its own property to protect it.”\textsuperscript{247} Actions taken pursuant to this authority—the authority to prevent imminent, certain destruction—may be taken “without any regard to the game laws of the state.”\textsuperscript{248}

It is important to realize that at the time \textit{Hunt} was decided, States were accorded broad control over, and tacit ownership of, wildlife, which had only recently been limited to a small degree.\textsuperscript{249} As a counterpoint to this authority, however, the Court’s decision in \textit{Hunt} is entirely in accord with the then-leading decisions on the authority of private landowners to protect their property from wildlife depredations.\textsuperscript{250} The few courts having addressed the issue in detail had concluded that in situations where, as here, wild animals were caught destroying private property, a person had a right to kill the offending wildlife in defense of that property.\textsuperscript{251}

\textsuperscript{246} Kleppe, 426 U.S. at 537.
\textsuperscript{247} United States v. Hunt, 19 F.2d 634, 640 (D. Ariz. 1927).
\textsuperscript{248} Id. at 641.
\textsuperscript{249} Missouri v. Holland, 252 U.S. 416, 434 (1920) (“No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.”). Confusingly, the Supreme Court in \textit{Lacoste}, reaffirmed just four years later that states “owned” the wildlife within their borders. \textit{Lacoste} v. Dep’t of Conservation of State of La., 263 U.S. 545, 549 (1920) (holding that state owns wildlife to the extent ownership is possible and is responsible, therefore, for the management thereof). The discrepancy here may arise from the fact that \textit{Holland} concerned solely the regulation of migratory birds which, as noted by the Court, are very mobile: “The whole foundation of the State’s rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.” \textit{Holland}, 252 U.S. at 434.

\textsuperscript{250} Right to kill game in defense of person or property, 21 A.L.R. 199-200 (1922).
\textsuperscript{251} See, e.g., State v. Burk, 195 P. 16, 18 (Wash. 1921) (“[I]t may be justly said that one who kills an elk in defense of himself or his property, if such killing was reasonably necessary for such purpose, is not guilty of violating the law.”); State v. Ward, 152 N.W. 501, 502 (Iowa 1915) (“It will be noted that the deer was killed, not only while upon the defendant’s premises, but while he was actually engaged in the destruction of the defendant’s property. Giving the testimony the fullest credence, the deer was one of great voracity. He was capable of doing, and was threatening to do, great injury to defendant’s property. By way of analogy we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer.”); Aldrich v. Wright, 53 N.H. 398, 404 (1873).

Thus, the holding of Hunt is: (1) that Congress can authorize the Department of Agriculture to preempt state law through regulation and (2) that as it does so by destroying wildlife, the United States government acts just as any private landowner could do. This does not mean that the federal government may control a species anytime it “feels” like doing so, and it especially cannot do so before putative damage has occurred. Just as a private landowner in 1928 could not simply kill or destroy wild animals straying onto his or her property, but could do so if there was damage, the Forest Service is authorized to do likewise according to the Congressional grant of authority taken pursuant to the Property Clause.

Some have, and do, read Hunt to say much more than this, believing that federal land management agencies may engage in preemptive steps to prevent “destruction” by disallowing the introduction of non-native species, or by removing them once introduced. Such a reading is in error, failing to fundamentally understand the distinction between a Hunt-like scenario and the use of the authority they purport to derive from the decision. A brief sampling of this record is illustrative:

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252 In Hunt, the law in question was Arizona’s prohibition on hunting deer outside of season. Hunt, 19 F.2d at 637 (the Secretary of Agriculture’s authority preempted that law to the extent necessary to prevent destruction of federal property.); id. at 640-41 (“[W]e think there can be no doubt of the right of the government of the United States to do whatever is necessary for it to do upon its own property to protect it from the depredations complained of, including the killing or removal of whatever number of the deer as may be necessary, without any regard to the game laws of the state of Arizona.”).

253 Hunt v. United States, 278 U.S. 96, 100 (1928) (“The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress.”); see Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

254 Hunt, 19 F.2d 634, 641 (D. Ariz. 1927); UTAH DIV. WILDLIFE RES., supra note 72, at 5 (acknowledging that “[i]f mountain goat use is demonstrated to be excessive, the Division must work cooperatively with the Forest Service to manage goat populations to acceptable numbers”).

255 Note that the damage in Hunt was ongoing and pervasive. See Hunt, 278 U.S. at 100. Moreover, the Secretary had tried for some time to reach a compromise with the State before acting unilaterally. Hunt, 19 F.2d at 640.

256 Annotation, Right to Kill Game in Defense of Person or Property, supra note 250, at 199-200; Hunt, 19 F.2d at 640. Today, the private right to destroy nuisance wildlife is governed by statutory law under principles that differ from those prevailing in 1928, when the Supreme Court decided Hunt.

257 Huang, supra note 211, at 4.

258 Although the private right is today limited by State law, formerly this right was considered to be very expansive. Right to kill game in defense of property, supra note 250, at 199. Hunt, of course, recognized that State law could not limit the Secretary’s authority to prevent the destruction of federal property. Hunt, 19 F.2d at 640 (The United States, “[b]eing owner of the land, it, as a necessary consequence, owns every tree, without regard to age or size, and all growth of every character constituting part and parcel of the land. As such owner, the government is legally and justly entitled to protect the entire property of every kind and character, and by means and methods of its own selection exercised through its own agents.”).
[D]eer have increased in number so rapidly within the past three years that on certain parts of the lands there is no longer sufficient forage available for their subsistence. . . . [T]hey have committed great injury and damage to the said lands of the complainant by overbrowsing and killing the young tree growth, and the shrubs, bushes, and other forage plants upon which they principally subsist, all of which are of great value. . . . [S]ince November, 1924, about 10,000 of them have died because of the fact that there was insufficient forage available for their sustenance, a large part of such loss by death having fallen on the fawns born during the summer of 1924, there now remaining only about 10 per cent. of such 1924 fawns.259

Thus, although the record at the Supreme Court is scanty, the lower court decision makes clear that it was the extensive findings of destruction actually caused in the Grand Canyon National Game Preserve by the massive overpopulation of deer that justified the Forest Service’s removal program.260

E. BLM’s WSA Regulation and the Forest Service’s RNA Regulation Are Ultra Vires as Applied to the Several States

Both the BLM and Forest Service Manuals prohibiting the transplant of “non-native” species are non-binding because in neither instance does the language of the Manual control the state. Taking the Forest Service example first, to the extent the RNA rule prohibits the state’s management of non-native species within RNAs, that regulation is ultra vires—none of the statutes cited give such authority to the Forest Service.261 The Forest Service may have authority to implement RNA restrictions against private parties,262 but not the States because state authority to manage wildlife is reserved by the savings clause.263 To the extent the RNA rule and the Forest Service Manual attempt to change what Congress has established,

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259 Hunt, 19 F.2d at 636.
260 See generally id. at 636-640.
261 See supra text accompanying note 134.
262 Whether it does or does not is entirely irrelevant here and is beyond the scope of this Article.
the rule and manual are acting outside the authority of the Forest Service and are thus *ultra vires*.264

As a brief review of the RNA rule history makes clear the original regulation, which remains unchanged since promulgation, was based on 16 U.S.C. § 551.265 This statute, originally passed in 1897, concerned only authority to prevent forest fires and damage to the National Forest System.266 This statute remained unchanged in 1966 except for updates to reflect codification of U.S. statutes.267 There is no reason to believe that the enacting Congress intended the Forest Service to have or exercise this authority.268

Turning to the BLM, the policies it has adopted with regard to state fish and wildlife agencies' management authority in wilderness areas are a direct contradiction of the limits placed on BLM by FLPMA and the Wilderness Act.269 The only uses of wilderness areas that are prohibited are: commercial enterprise, permanent or temporary roads, motor vehicles,
motorized equipment, motorboats, mechanical transport, aircraft landing, installations, and structures.\textsuperscript{270} These are the only activities prohibited under the Wilderness Act, none of which relate to a preference for native over non-native wildlife.\textsuperscript{271} This provision also does not restrict state management authority because, again, § 1133(d)(7) specifically reserves to the States jurisdiction over wildlife management.\textsuperscript{272} The structure of the Act would seem to suggest that the uses described in subsection (d) of § 1133 are exceptions to the restrictions imposed by the rest of the chapter.\textsuperscript{273} Therefore, a state may engage in the activities prohibited in § 1133(c) if necessary to “the jurisdiction or responsibilities” of that state “with respect to fish and wildlife.”\textsuperscript{274} Finally, this section of the Manual is itself ultra vires with regard to the very administrative regulations that it purports to interpret\textsuperscript{275} because, as the Department of the Interior recognized in 43 C.F.R. § 24.4(c)—the regulation concerning BLM’s authority to manage wildlife in wilderness areas—the States have “the primary authority and responsibility . . . for the management of fish and resident\textsuperscript{276} wildlife.”\textsuperscript{277}

F. Agency Manuals Are Interpretive Rules That, Although Entitled to Some Deference, Cannot Be Enforced Judicially Against the State

The Forest Service and BLM Manuals are either invalid as a legislative rule because they were created without notice-and-comment rulemaking as

\textsuperscript{270} 16 U.S.C. § 1133(c).
\textsuperscript{271} Id.
\textsuperscript{272} 16 U.S.C. § 1133(d)(7).
\textsuperscript{273} See id. § 1133(d) (“The following special provisions are hereby made[,]”); see also 16 U.S.C. § 1133(d)(1) (allowing the Secretary of Agriculture to use aircraft for “the control of fire, insects, and diseases” and directing the Secretary to continue to allow aircraft and motorboats where “these uses have already become established”); 16 U.S.C. § 1133(d)(5) (“Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”).
\textsuperscript{274} 43 U.S.C. § 1133(d)(7).
\textsuperscript{275} Alcarez v. Block, 746 F.2d 593, 613 (9th Cir. 1984) (noting that interpretive rules, by their very nature, must "interpret" something. Legislative rules “create law . . . incrementally imposing general, extra-statutory obligations . . . [while] interpretative rules, merely clarify or explain existing law or regulations.”); see Christensen v. Harris County, 529 U.S. 576, 587 (2000); Pac. Gas & Elec. Co. v. Fed. Power Comm’n, 506 F.2d 33, 38 (D.C. Cir. 1974) (providing that interpretive rules are not binding authority in the same manner as legislative rules).
\textsuperscript{276} Neither FLPMA nor 43 C.F.R. § 24.4(c) define “resident wildlife.” This leaves the definition to debate, as noted in supra Part III.C.i.
\textsuperscript{277} BUREAU OF LAND MGMT., supra note 144, at 1-41-42. To be fair, the BLM Manual does seem to acknowledge this—or at least hedge its bet—by noting that it will only act "to extent practicable and permitted by Federal law." 5 U.S.C. § 553(b) (considering manuals interpretive rules under the APA). H.R. REP. NO. 94-1724, at 60 (1976), reprinted in 1976 U.S.C.C.A.N. 6228, 6231 (FLPMA, however, “does not authorize exclusions simply because hunting and fishing would interfere with resource-management goals.”).
required by the APA, or are merely advisory without substantive effect because they are interpretive rules. An agency may create a valid interpretive rule without utilizing the notice-and-comment process. Such a rule, however, while perhaps binding to some degree on the discretion of the agency in achieving its regulatory goals, is binding on third parties only to the extent that it does not conflict with the underlying statute, and that it has the “power to persuade.” Since neither the Forest Service nor the BLM utilizes the notice-and-comment process when promulgating its manual, the BLM policies are interpretive rules. The BLM policies conflict with the underlying statute and, as interpreted by the BLM, could lead to absurd results. Therefore, they do not have the power to persuade. They must fall either as invalid or as inapplicable against the States.

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278 N.J. Dep’t of Envtl. Prot. v. United States Envtl. Prot. Agency, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (Legislative rules must be created through the notice-and-comment rulemaking process. This is true unless the rule falls within certain enumerated exceptions of § 553(b). These exceptions are “narrowly construed and only reluctantly countenanced.”).

279 5 U.S.C. § 553(b)(A); see Amer. Bus. Ass’n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980) (providing that one factor courts consider in deciding whether a rule is interpretive or legislative “is whether a purported policy statement genuinely leaves the agency and its decision-makers free to exercise discretion.”); see also Pac. Gas & Elec. Co., 506 F.2d at 38 (holding that if the rule is a mere “statement of policy,” the agency “must be prepared to support the policy just as if the policy statement had never been issued.”).

280 5 U.S.C. § 553(b)(A)-(B); see Alcarez, 746 F.2d at 613.

281 See generally Am. Bus. Ass’n, 627 F.2d at 529 (suggesting that rules are binding to some degree on the discretion of the agency promulgating the rule).

282 See generally Nat’l Family Planning & Reprod. Health Ass’n Inc. v. Gonzales, 468 F.3d 826, 829 (D.C. Cir. 2006) (stating that any rule or regulation that conflicts with statutory authority is invalid).

283 See generally Christensen v. Harris Cnty. 529 U.S. 576, 587 (2000) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (asserting that the agency’s interpretation of the statute “contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law... are ‘entitled to respect’. . . but only to the extent they have the ‘power to persuade.’”).


285 See generally BUREAU OF LAND MGMT., supra note 144. If BLM can make sure to prohibit the introduction of what they consider non-natives in order to protect their property, then what other limits could they place on wildlife management? Could BLM, for example, prohibit hunting immediately after rainfall because of potential “vegetation destruction”?

286 Christensen, 529 U.S. at 587; Alcarez, 746 F.2d at 613.

287 See generally 16 U.S.C. §528 (2012); Pac. Gas & Elec. Co. v. Fed. Power Comm’n, 506 F.2d 33, 38 (D.C. Cir. 1974) (considering that the Forest Service has no authority, given the savings clause of 16 U.S.C. §528, to restrict the Division of Wildlife Resource’s wildlife management authority on any National Forest land in the State of Utah, the persuasive power of either the manual or the regulation is likely to be very low).
G. The Forest Service Cannot Require a State to Obtain a Permit Before Using National Forestland to Carry Out Fish and Wildlife Management Activities

Although Forest Service regulations ordinarily require the use of a special-use permit, this regulation cannot be applied against the several States.289 First, and most obvious, the permitting requirement is regulatory while the savings clause reserving to the States the right to manage fish and wildlife is statutory.290 Second, FLPMA explicitly states that the Forest Service cannot “require Federal permits to hunt and fish on public lands or on lands in the National Forest System.”291 If the Forest Service cannot require sportsmen to obtain permits to fish or hunt, then by extension it cannot require state officials to submit to the permitting requirement in order to manage the fish and wildlife to be fished or hunted.292 Furthermore, the same provision makes clear that FLPMA is not intended to “diminish[] the responsibility and authority of the States for management of fish and resident wildlife.”293 Prior to the enactment of FLPMA, States conducted translocations without any type of federal permitting requirement.294 To require a state to first obtain a federal permit before engaging in activity that clearly falls within the scope of the existing wildlife management authority, that authority would be “diminish[ed].”295 Therefore, to the extent these mandates conflict,296 the statutory duty must control.297

292 Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1250 (D.C. Cir. 1980) (noting that such a reading would seem contrary to the very spirit of FLPMA as “A state wildlife-management agency which must seek federal approval for each program it initiations can hardly be said to have ‘responsibility and authority’ for its own affairs.”).
293 43 U.S.C. § 1732(b).
294 See generally HALVERSON, supra note 58 (describing the role of the states, private acclimatization societies, and federal government in the introduction and propagation of rainbow trout).
296 See Huang, supra note 211, at 9 (suggesting that these requirements do not conflict, although clearly not all would agree).
297 There is no question that a statutory mandate overrules a regulatory one where there is a conflict, because “a valid statute always prevails over a conflicting regulation.” Nat. Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales, 468 F.3d 826, 829 (D.C. Cir. 2006). But see Friends of Columbia Gorge v. Elicker, 598 F. Supp. 2d 1136, 1153 (D. Or. 2007) [hereinafter Friends 1], depublished by 2011 WL 3205773 (D. Or. 2011) [hereinafter Friends II] (finding that the Forest Service special use regulation required Oregon Department of Fish & Wildlife to obtain special use permit to introduce mountain goats in Scenic Area).
H. Taking as an example, the current controversy over the introduction of mountain goats in the Western United States, to the extent the agencies' regulations are relevant or not contrary to Congressional mandate as applied to the States, the introduction of non-native game species violates neither the statutory nor regulatory duties the regulations impose.

History has shown that properly managed mountain goat populations, even if established by translocation, do not cause habitat destruction. For example, a population in Cascades National Park, commonly considered to be the poster-child of poor mountain goat management, is very different because the goat population is not managed by the state Fish & Wildlife agency. In fact, the National Park Service prohibits their hunting. Without hunting or a natural predator, goat populations boomed in the Park and they predictably caused damage. Again, this situation is unique and dissimilar to most States since hunting is generally prohibited in National Parks, whereas it is permitted in BLM and Forest Service lands. Hunting is a goal of most Fish and Wildlife Agencies that have introduced the goats: for example, the Utah Division of Wildlife Resources in their Mountain Goat Management Plan contemplated that hunting may begin in the event that the populations reach a level where a harvest is sustainable. Indeed, the establishment of new goat populations furthers the Division's goal "to expand both hunting and viewing opportunities for mountain goats while ensuring their long-term viability in Utah."

On the other hand, there is no other location where the introduction of mountain goats resulted in the deterioration of the existing floral communities and habitats. In Yellowstone National Park, for example, a study performed to determine whether mountain goats were causing damage found that mountain goats were responsible for no to very little damage in the Park, and no action was either recommended or taken in

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298 See, e.g., Laundre, supra note 189, at 41 ("Impacts on the ecosystem—Surveys of goat range in Glacier National Park, Montana and Mt. Baldy, Idaho with high densities of goats indicate little physical damage and percent cover of grass and forbs comparable to similar habitat in Yellowstone Park. Based on these surveys, goat densities in both Parks, even at high population estimates, would likely not be high enough to significantly impact the physical or floral components of the Parks.").

299 Id. at 1 ("The impact of goats is compounded in Olympic Park because goats are protected from human hunting and therefore occur in higher densities than in exploited populations.").

300 Id.

301 Id.


303 UTAH DIV. WILDLIFE RES., supra note 72, at 8. Indeed, some of those in opposition to the further introduction of goats believe mountain goat introduction "is just about creating more hunting opportunities." Brett Prettyman, Utah Board OKs Mountain Goat Introduction Plan, SALT LAKE TRIB. (June 10, 2013), http://www.sltrib.com/sltrib/news/56411324-78/utah-mountain-goats-plan.html.csp.

304 Laundre, supra note 189, at 1.
342 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. [VOL. 8 NO. 2

response to the perceived "threat."305 In South Dakota, mountain goats escaped into the wild during the early years of the twentieth century in what is now a federal wilderness area, and have since flourished.306 There, no damage has been reported after almost one hundred years of use by the goats.307 Finally, mountain goats are present in other areas demarcated "Wilderness Areas," and in these areas they are managed by the affected states in conjunction with federal input without negative habitat impacts.308

III. AND NOW FOR MORE OF THE SAME, WITH A SLIGHT TWIST: OR, WHY NEPA IS IRRELEVANT TO WILDLIFE TRANSLOCATIONS DONE WITHOUT FEDERAL CONSENT, APPROVAL, OR SUPPORT

At the most obvious level, this much is clear: federal inaction is not action.309 For this reason, the Forest Service, quite reasonably, disclaimed authority over the introduction of mountain goats in Utah, noting that the introduction was a "State action" that it did not have the authority to prevent.310 "NEPA refers only to decisions which the agency anticipates will lead to actions . . . [t]hat is, only when an agency reaches the point in deliberations when it is ready to propose a course of action need it produce an impact statement."311 In the instance that the action considered is a private or state action, only "[w]here an agency initiates federal action by

305 Id. at 25 ("Of all the faunal species in the Parks, increasing mountain goat populations would most likely affect bighorn sheep. Goats and sheep have similar niches along several resource axes and co-occur over much of their respective ranges. Mountain goats and bighorn sheep could compete for these resources through either interference or resource competition."); see id. at 41-42 (finding that, despite expectations, at low population levels the presence of goats had no impact on bighorn sheep); see also id. at 48 (recommending the Park Service to take no action to reduce mountain goat numbers).

306 Harmon, supra note 189, at 149.

307 E-mail from Kerry Burns, supra note 191 ("Mountain goats have been in that Black Elk Wilderness since the 1920s (I think) -before it was designated wilderness. I am not aware of any research study done in the Black Elk Wilderness to determine effects of goats on vegetation. Goat numbers are small, and we haven’t seen problems with vegetation. We do have some sensitive plant species and one ESA listed plant in the Wilderness and those are monitored for condition. I have not seen any effects or limitations tied to mtn goats.").

308 UTAH DIV. WILDLIFE RES., supra note 72, at 16.

309 Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1239-40 (D.C. Cir. 1980) (finding that the refusal of a federal agency to prevent a state wildlife management agency from acting does not constitute reviewable action); State of Alaska v. Andrus, 591 F.2d 537, 537 (9th Cir. 1979) ("[T]he nonexercise of power by an executive-branch officer does not call for compliance with NEPA . . . ."); Biderman v. Morton, 497 F.2d 1141, 1145 (2d Cir. 1974) (affirming district court dismissal alleging NEPA violation on the grounds that "in alleging only federal inaction, the complaint failed to state a claim under NEPA").

310 Letter from Allen Rowley, Acting Forest Supervisor, Manti-La Sal Nat’l Forest, to Kevin Albrecht, Chair, Reg’l Advisory Council, Wildlife Board (July 30, 2013) (on file with the Author).

311 Andrus, 627 F.2d at 1243.
publishing a proposal and then holding hearings . . . , [does] the statute . . . appear to require an impact statement."\footnote{Id. at 1244.}

Since the Forest Service has done nothing more than "not stop" the state of Utah from introducing goats on state-owned land, "there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement."\footnote{Id.} In sum, there is no federal action "where an agency has done nothing more than fail to prevent the other party’s action from occurring."\footnote{Id. at 1245 (noting that in all instances where “major federal action[s]” have been found, the action taken was overt rather than "wholly passive").} Where at least one federal agency or another has not acted to regulate or otherwise facilitate private or state action, private or state action taken without the use of federal monies is not federal action.\footnote{Id. at 1246 (“No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so.”).}

Therefore, although a host of minimal actions, such as “federal license[s], permits, leases, loans, grants, insurance, contracts, contract extensions and modifications, conveyances, assistance authorizations, approvals of right-of-ways, or filings . . . may require preparation of an impact statement,” the agency need neither prepare an impact statement nor take further action under NEPA where the agency has done nothing, approved nothing.\footnote{See id. at 1245 (noting that in all instances where “major federal action[s]” have been found, the action taken was overt rather than "wholly passive").} To require otherwise would be to impose an unreasonable administrative burden on the agency.\footnote{Id. at 1246 (“No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so.”).}

In a situation markedly similar to the ongoing controversy in Utah, the U.S. District Court for the District of Oregon found that the Forest Service violated NEPA when it did not conduct an EIS before approving the introduction of mountain goats into a National Scenic Area,\footnote{The Columbia River National Scenic Area Act, which is not at issue in Utah, requires considerable federal intervention in the wildlife management role of the states: the statute created a commission with federal representation that had to approve wildlife management plans for the area. There has to be a consistency review for some areas of the Scenic Area. Thus there had to be federal action to approve the introduction. See 16 U.S.C. § 544 (1994). In the Manti-La Sal National Forest, no such commission exists and no such federal approval is required.} the Columbia River Gorge.\footnote{Friends I, 598 F. Supp. 2d 1136, 1155 (D. Or. 2007), depublished by Friends II, 2011 WL 3205773 (D. Or. 2011).} The court concluded that the National Forest “special use” permit requirement applied to the state\footnote{Id. at 1141 (explaining that ODFW worked with the Forest Service to develop an introduction plan for mountain goat in the Columbia River Gorge Scenic Area); id. (“On April 15, 2005, Forest Service finalized a Memorandum of Understanding with ODFW describing the cooperative efforts Forest Service and ODFW would take to establish a viable population of Rocky Mountain goats in the Scenic Area.”).} and, therefore, determined that the Forest Service’s decision to not require the
Department of Fish & Wildlife (ODFW) to obtain a permit constituted a federal action. 321 This case is distinguishable, however, because the Forest Service worked closely with the state of Oregon and approved the Reintroduction Plan created by the ODFW. 322 Moreover, although Friends I holds that the Forest Service's failure to produce an EIS violated NEPA because it was required to approve or disapprove the ODFW's Mountain Goat Reintroduction plan as a "special use" of the National Forest, 323 there is considerable reason to question the value of this holding. 324

321 Id. at 1153 (finding that special use requirement was binding on the State; USFS's failure to require such approval was a "major federal action").

322 Id. at 1152 ("[T]he Memorandum reflects the Forest Service assisted and cooperated in developing the Reintroduction Plan. In addition, the Reintroduction Plan itself defines the project as a cooperative effort between ODFW and Forest Service and indicates that Forest Service will monitor vegetation and track the goats.").

323 Id. at 1153.

324 First, the decision has been unpublished because of the limited precedential value of the ruling given the fact-specific circumstances that produced the decision. Friends II, 2011 WL 3205773 at *1-2. Second, the decision is that of a district court in a different circuit (the Ninth) from the circuit at issue in the Utah controversy (the Tenth), meaning that, at best, the decision is of minimal persuasive authority. Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.").

Third, the decisions of the Ninth Circuit are generally regarded with some skepticism outside the circuit, given the Supreme Court's perceived hostility towards that circuit. See, e.g., Carol J. Williams, U.S. Supreme Court Again Rejects Most Decisions by the U.S. 9th Circuit Court of Appeals, L.A. TIMES (July 18, 2001), http://articles.latimes.com/2011/jul/18/local/la-me-ninth-circuit-scorecard-20110718 ("It was another bruising year for the liberal judges of the U.S. 9th Circuit Court of Appeals as the Supreme Court overturned the majority of their decisions, at times sharply criticizing their legal reasoning . . . In their reversals, the justices often expressed impatience with what they see as stubborn refusal by the lower court to follow Supreme Court precedent."); William Peacock, Ninth Battling to Regain Spot as Most Reversed Circuit, FINDLAW BLOG (June 11, 2013, 6:03 AM), http://blogs.findlaw.com/ninth_circuit/2013/06/ninth-battling-to-regain-spot-as-most-reversed-circuit.html ("Let's play a word association game. What are the first things you think of when you hear 'Ninth Circuit'? Liberal. Western. Reversals. The Ninth's reputation precedes it . . ."); Robert Barnes, Supreme Court Reversals Deliver a Dressing-Down to the Liberal 9th Circuit, WASH. POST (Jan. 31, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/30/AR2011013113951.html ("In five straight cases, the court has rejected the work of the San Francisco-based court without a single affirmative vote from a justice . . . judicial disregard is inherent in the opinion[s] of the Court of Appeals for the 9th Circuit."). Fourth, the district court failed to discuss USFS's statutory obligation to allow the State Fish & Wildlife Department to manage wildlife in the National Forest. See Friends I, 598 F. Supp. 2d at 1152-1154; 16 U.S.C. § 528 (1960). Fifth, the court relied exclusively upon the regulations themselves without analyzing USFS's authority to make those regulations. See Friends I, 598 F. Supp. 2d at 1152-1154. As noted above, the application of this regulation to the State seems to conflict with USFS's duty under the savings clause. Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales, 468 F.3d 826, 829 (D.C. Cir. 2006).

Sixth, the decision—even if good law in all other respects—seems to conflict with NEPA precedent like Andrus to the extent that it finds USFS's failure to act under the special use regulation to be a "major federal action" requiring an EIS. See Friends I, 598 F. Supp. 2d at 1153-1154; Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1239-40 (D.C. Cir. 1980) (finding no major federal action where federal agency merely fails to prevent State from managing wildlife without consultation or approval of
IV. (DO WITH THEM) AS YOU LIKE IT: ANALYZING THE AVAILABLE TOOLS, TECHNIQUES, AND METHODS OF WILDLIFE CONTROL

The starting point of this discussion is, again, that to the extent that they are not preempted by federal authority, state fish and wildlife agencies may employ any means available in the exercise of its authority over wildlife management. There are instances in which Congress has issued specific statutory directives to regulate hunting on federal lands. For example, hunting in Alaskan National Parks and federal refuges is regulated pursuant to a statutory mandate explicitly authorizing some amount of hunting; the Alaska National Interest Lands Conservation Act. This law allows for significant state regulation of hunting on federal lands; however, the National Park Service is now considering taking a more active role in the direct regulation of these hunting practices. Among the proposals put forth by the National Park Service is a codification of the current temporary ban on certain practices deemed by the National Park Service to disturb or alter the natural ecosystem. Specifically, the National Park Service has come out against hunting techniques and management

agency; see also Friends I, 598 F. Supp. 2d at 1250 (§ 1732(b) of FLPMS "arguably permits ('may'), but certainly does not require ('shall'), the Secretary to supersede a state program, and even when he does so, it must be after consulting state authorities. We are simply unable to read this cautious and limited permission to intervene in an area of state responsibility and authority as imposing such supervisory duties on the Secretary that each state action he fails to prevent becomes a 'Federal action.' A state wildlife-management agency which must seek federal approval for each program it initiates can hardly be said to have 'responsibility and authority' for its own affairs."). The burden imposed on the Forest Service by the Multiple-Use and Sustained Yield Act of 1960, codified at 16 U.S.C. § 528 is substantially similar to § 1732(b) of FLPMA and accordingly, would be analyzed in a similar fashion. Compare 43 U.S.C. § 1732 (1988), with 16 U.S.C. § 528 (1960).

Finally, the court itself distinguished the case before it in Oregon, at least in part, from the situation at issue in Utah. Friends I, 598 F. Supp. 2d at 1154. In Friends I, the Forest Service relied on an internal memorandum which opined that "where a state alone proposed introduction of a species and the proposed introduction was consistent with the governing forest plan.... NEPA documentation is unnecessary." Id. Distinguishing the Oregon case from this hypothetical, the district court found that "a great deal of federal-state cooperation is mandated by the Scenic Area Act.... Moreover, the parties dispute whether the Reintroduction Plan as proposed is consistent with the Scenic Area Plan." Id. That Act, the Scenic Area Act, is not at issue in Utah. This case is one of the sources of authority the Grand Canyon Trust relies upon in its letter. Letter from Mary O'Brien to Nora Rasure and Allen Rowley, supra note 224, at 5.


practices designed to alter the natural balance between predator and prey for the purpose of increasing game for human hunters.\textsuperscript{329} This case is an example of explicit federal authority to regulate hunting. Even in this instance, however, the National Park Service took action only after extensive consultation with the state.\textsuperscript{330}

The Forest Service and BLM are acting under no such sweeping federal authorization as the National Park Service.\textsuperscript{331} Instead, their authority over the management of wildlife is constrained by both FLPMA and the Wilderness Act.\textsuperscript{332} As discussed, the Wilderness Act prohibits only commercial enterprise, permanent or temporary roads, motor vehicles, motorized equipment, motorboats, mechanical transport, aircraft landing, installations, and structures in wilderness areas.\textsuperscript{333} This provision does not restrict the exercise of state management authority because, again, § 1133(d)(7) specifically reserves to the States jurisdiction over wildlife management.\textsuperscript{334} Furthermore, the structure of the Act would seem to suggest that the uses described in subsection (d) of § 1133 are exceptions to the restrictions imposed by the rest of the chapter.\textsuperscript{335} Therefore, a state may engage in the activities prohibited in § 1133(c) if necessary to exercise “the jurisdiction or responsibilities” of that state “with respect to fish and wildlife.”\textsuperscript{336}

The only statutory exception to state wildlife management authority in FLPMA is the authorization of the Secretary of the Interior or Agriculture to close public lands or National Forest System lands to hunting or fishing “for reasons of public safety, administration, or compliance with provisions

\textsuperscript{329} Id.

\textsuperscript{330} Id. Even here, the Park Service could, if it so chose, decline to exercise this authority in favor of state management. See Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1239–40 (D.C. Cir. 1980).


\textsuperscript{333} § 1133(c).

\textsuperscript{334} § 1133(d)(7).

\textsuperscript{335} See § 1133(d) (“The following special provisions are hereby made[.]”); § 1133(d)(1) (allowing the Secretary of Agriculture to use aircraft for “the control of fire, insects, and diseases” and directing the Secretary to continue to allow aircraft and motorboats where “these uses have already become established”); § 1133(d)(5) (“Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”).

\textsuperscript{336} § 1133(d)(7); 43 C.F.R. § 24.4(d) (The Department of Interior acknowledged as much when it stated that “the several States therefore possess primary authority and responsibility for fish and resident wildlife on Bureau of Land Management Lands.”). How could a state exercise “primary authority” if that authority were continually subject to potential restriction at the hands of BLM? See Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1250 (D.C. Cir. 1980).
A GOAT TOO FAR?

of applicable law." What FLPMA does not allow the Department of the Interior or Agriculture to do is second-guess the wildlife management decisions of the States. A crucial part of those decisions concern, of course, the methods employed by the several States to achieve those goals. Barring the imminent destruction of federal land, which the Forest Service is authorized to prevent, there does not appear to be any federal restriction on the means or methods used to accomplish "the responsibility and authority of the States for management of fish and resident wildlife." Any regulation, rule, or policy statement otherwise is without basis in statute and is, therefore, unenforceable against the State.

V. CONCLUSION

Each of the several States has the authority to introduce non-native game species and to manage species on BLM and Forest Service lands, including Forest Service RNAs and BLM WSAs, in line with the statutory and regulatory mission of the respective States' Fish and Wildlife agencies. Although Congress has broad power to regulate the use, protection, and management of public lands held by the United States, in the absence of Congressional mandates otherwise, the several States, in reality, hold primary wildlife management authority on federal land. The Organic Acts and land management statutes of the various federal land management agencies recognize and reserve state wildlife management authority in the majority of circumstances.

338 § 1732(b).
339 Andrus, 627 F.2d at 1250 ("A state wildlife-management agency which must seek federal approval for each program it initiates can hardly be said to have 'responsibility and authority' for its own affairs."); see also Perkins et al., supra note 22, at 2-4.
341 § 1732(b).
342 See discussion supra Subsection III.B.iii-v.
344 Kleppe v. New Mexico, 426 U.S. 529, 545 (1976); Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002).
346 16 U.S.C. § 1133(d)(7) ("Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.").
347 See, e.g., 16 U.S.C. § 528 ("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."); 43 U.S.C. § 1732(b) ("Nothing in this Act shall be construed as . . . diminishing the responsibility and authority of the States for management of fish and resident wildlife.").
State authority to manage wildlife, therefore, remains not only relevant, but is the primary actor managing wildlife on all BLM and Forest Service-managed lands, including wilderness areas, WSAs, and RNAs. The translocation power is as much a part of wildlife management as is the regulation of hunting and fishing and has been exercised at least into antiquity. Since the Forest Service and BLM both lack explicit Congressional authorization to preempt state law as to the translocation of species on the public lands either agency manages, a state may exercise that authority to introduce any animal, native or non-native, on any federal land where the state has wildlife management authority. Pursuant to that authority, a state may exercise its plenary authority to regulate and manage that species—and any other species the management of which is not otherwise preempted by federal law—in any manner that the state sees fit.

348 See 43 U.S.C. § 1732(b); 36 C.F.R. § 293.10; 43 C.F.R. § 24.4(c).
349 See discussion supra Subsection I.B.iii.
353 See Kleppe v. New Mexico, 426 U.S. 529, 545 (1976) (explaining that in the absence of contrary federal law regarding wildlife on federal land, "the States have broad trustee and police powers over wild animals within their jurisdictions.").
354 See discussion supra Part IV.