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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

by

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INTRODUCTION

On June 4, 2013 the Utah Wildlife Board approved the Statewide Management Plan for Mountain Goat, a 5 year planning document governing mountain goat management activities by the Utah Division of Wildlife Resources ("DWR").[1] As part of the plan, the Wildlife Board approved the translocation[2] of 20 mountain goats into the La Sal Mountains.[3] The La Sals[4] are

[1] UTAH DIV. WILDLIFE RES., UTAH MOUNTAIN GOAT STATEWIDE MANAGEMENT PLAN, *available at* https://wildlife.utah.gov/hunting/biggame/pdf/mtn_goat_plan.pdf.

[2] "A translocation is the intentional release of animals to the wild in an attempt to establish, reestablish, or augment a population . . . ." Brad Griffith, J. Michael Scott, James W. Carpenter, & Christine Reed, SCI. Aug. 4, 1989, at 477.

[3] Dylan Brown, *in Utah land-use fight, 18 goats become unlikely stars*, ENV. & ENERGY NEWS, Sept. 3, 2014, *available at* http://www.eenews.net/stories/1060005159.

[4] The name "La Sal," meaning "Salt" in Spanish, refers to the disbelief by Spanish missionaries who, when they first saw the mountain peaks blanketed with snow during late August, concluded that the white they saw on the

largely comprised of federal lands owned and managed by the United States Forest Service ("the Forest Service") as the Manti-La Sal National Forrest.[5] Shortly thereafter, the Forest Service received a request from a concerned citizen group requesting that the agency perform a National Environmental Policy Act ("NEPA") analysis on the introduction.[6]

A second area of potential contention is the Deep Creek Mountains, a region on the western side of Utah.[7] Much of this area is managed by the Bureau of Land Management ("BLM") as the Deep Creek Wilderness Study Area, or WSA.[8] Whereas the Forest Service's polices are at least ambiguous, BLM policies explicitly prohibit the introduction of non-native species.[9]

These two federal agencies may act to control wildlife on federal property to the extent that Congress has so authorized agency intervention.[10] Therefore, the agencies may act to protect endangered species,[11] control or prohibit the importation of certain species determined to be

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peaks were "salt beds." SILVESTRE VÉLEZ DE ESCALANTE, THE DOMÍNGUEZ-ESCALANTE JOURNAL: THEIR EXPEDITION THROUGH COLORADO, UTAH, ARIZONA, AND NEW MEXICO IN 1776 25-26 (Ted J. Warner ed., Fray Angelico Chavez transl., University of Utah Press ed. 1995) (1776).

[5] U.S. Forest Serv., U.S. Dep't Agric., Welcome to the Manti-La Sal National Forest (last visited Mar. 12, 2014), http://www.fs.usda.gov/mantilasal.

[6] 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 Author).

[7] Bureau of Land Mgmt., *Deep Creek Mountains WSA*, BLM.gov (last visited Mar. 20, 2015), http://www.blm.gov/ut/st/en/fo/salt_lake/blm_special_areas/wilderness_study_areas/deep_creek_mountains.html.

[8] *Id.* ("The Deep Creek Mountains WSA consists of 68,910 acres in Tooele and Juab Counties and is managed by the Utah BLM West Desert District. Flanked on the east by the Great Salt Lake Desert and on the west by the Deep Creek Valley, this 32-mile long, 3 to 15 mile wide range is located in west central Utah, adjacent to the Utah-Nevada state line and approximately 55 miles south of Wendover, Utah. The Deep Creek Mountains are the highest landmark in all of western Utah.").

[9] *See* discussion *infra* Subsection III.B.iii.

[10] 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; 43 C.F.R. § 24.4(d). Both the Secretary of Agriculture and 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 [hereinafter FLPMA], 43 U.S.C. § 1732(b). However, even under these circumstances, "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.*

[11] Endangered Species Act of 1973, Pub. L. 93-205, 16 U.S.C. §§ 1531-44.

invasive,[12] and, in the case of the Forest Service, kill or otherwise remove wildlife that threaten the destruction of federal property.[13] 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.[14] To the extent Congress has granted unto the executive agencies this power, the authorization is limited, like the private right mentioned,[15] 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.[16] As the Supreme Court concluded in 1976, although Congress may preempt State authority on federal land, the State exercises plenary authority over wildlife unless Congress has *actually* done so.[17]

Through regulation and policy, however, the BLM and the Forest Service have created inroads on State authority in the context of wilderness areas, WSAs, and research natural areas

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[12] *See, e.g.*, Hawaii Tropical Forest Recovery Act, 16 U.S.C. § 4502a(a)(3)-(4) (2014) (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) (prohibiting a list of specific animal species and authorizing the Secretary of the Interior to enforce the Act). That the Lacey Act makes explicitly criminalizes the introduction of enumerated species further suggests the need for Congress to act

[13] 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." (Act of Congress Feb. 1, 1905).

[14] *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* Annotation, *Right to kill game in defense of property*, 21 A.L.R. 199 (1922). Although today this right is strictly limited in many States, *see, e.g.*, Utah Code Ann. §§ 23-16-2–4, the consensus in the early twentieth century favored the right of the landowner to protect his or her property, Annotation, *Right to kill game in defense of property*, 21 A.L.R. 199, 200 (1922) ("[A] statute forbidding, under penalty, the killing of elk [or other wildlife], does not apply to a killing which is reasonably necessary for the defense of persons or 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.* at 100.

Moreover, although the leading Supreme Court decision cast the State's claim to title as "lean[ing] upon a slender reed," *Missouri v. Holland*, 252 U.S. 416, 434 (1920), 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.*

[15] *Hunt,* 278 U.S. at 100.

[16] United States v. Hunt, 19 F.2d 634, 640-41 (D. Ariz. 1927).

[17] *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).

("RNAs") beyond those authorized statutorily.[18] The Organic Acts[19] and other land management statutes[20] of the various federal land management agencies also recognize and preserve State wildlife management authority—as that authority existed in 1976.[21] Despite the federal encroachment, the translocation power remains an essential element of State authority.[22] Because the Forest Service and BLM both lack Congressional authorization to preempt State law[23] as to the translocation of species on the public lands either agency manages,[24] however, the State may exercise that authority to introduce any animal, native or non-native,[25] on any BLM or Forest Service land where State has wildlife management authority.[26]

At heart, the dispute centers less in the wildlife management conflict[27] than the fundamental conflict between overlapping federal and State authority and the understanding of

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[18] DOI regulations; 36 C.F.R. § 251.23 (authorizing "[t]he Chief of the Forest Service [to] . . . . establish a series of research natural areas."). 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.

[19] An "organic act" or "organic statute" is a law that establishes an administrative agency or local government. Blacks Law Dictionary, 9th Ed. 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 (declaring that State Fish & Wildlife Agencies retain jurisdiction over wildlife in National Forests); 43 U.S.C. § 1732(b) (same, regarding BLM-managed land).

[20] *See, e.g*, the Wilderness Act of 1964. 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.").

[21] *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 . . . enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife.").

[22] *See infra* Subsection III.A.

[23] *See* discussion *infra* Subsection III.B.

[24] *See* 16 U.S.C. § 528; § 1133(d)(7); 43 U.S.C. § 1732(b).

[25] 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* Federal Laws and Regulations: Public Laws and Acts, National Invasive Species Information Center, U.S. Dep't of Agric. (Aug. 26, 2014), http://www.invasivespeciesinfo.gov/laws/publiclaws.shtml.

[26] *See Kleppe*, 426 U.S. at 545 (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.").

[27] In other words, should the areas be managed in the "natural" state in which they are in, or should the State manage wildlife for the purpose of increasing human recreational opportunities? For a summary of this debate among wildlife management professionals, *see* Christian Gamborg, Clare Palmer, & Peter Sandoe, *Ethics of Wildlife*

that authority by the States and federal government.[28] The resolution of this dispute is, therefore, much more important and fraught than a few goats in the mountains.[29] Utah—like most of the Western States—is home to very large tracts of federal land which are home to a large portion of the wildlife managed by the State.[30] To the extent that federal agencies like BLM and the Forest Service have the authority to unilaterally exclude mountain goats from the lands they manage, there is the justifiable concern that they 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.[31]

Part I compares and contrasts the history of public land management in the United States and with the related history of the management of public wildlife resources. Part II outlines the current dispute between BLM, the Forest Service and Utah DWR over the introduction of mountain goats onto state-land near federally-managed RNAs. Part III discusses whether the BLM or the Forest Service have legal authority to preempt or subordinate state wildlife

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Management and Conservation: What Should We Try to Protect?, 3 Nature Educ. Knowledge 8 (2012), *available at* http://www.nature.com/scitable/knowledge/library/ethics-of-wildlife-management-and-conservation-what-80060473 (characterizing the debate as between two approaches to wildlife management: wise use of versus preservation of nature).

[28] *See* discussion *infra* Subsection III.A-B.

[29] Wood, *supra* note 3.

[30] This is no small issue: over 1 million acres of designated wilderness managed either by the BLM or the Forest Service is located in Utah alone. *See* Designated Wilderness, Forest Service, BLM, http://www.utah.com/playgrounds/designated_wilderness.htm. Further, the BLM currently manages 87 WSAs within the state. *See* Bureau of Land Management, WSA Maps (May 17, 2011), *available at* http://www.blm.gov/ut/st/en/prog/blm_special_areas/wilderness_study_areas/WSA_Maps.html. Additionally, the federal agencies manage numerous other types of special land designations managed by the federal government, including National Conservation Areas, National Monuments, and RNAs. Bureau of Land Management, Recreation: Places (May 19, 2014), http://www.blm.gov/ut/st/en/prog/recreation_home/places.html. All this land adds up: in Utah, the BLM manages approximately 22,854,937 acres while the Forest Service manages an additional 8,207,415 acres. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, 12 (2012), http://www.fas.org/sgp/crs/misc/R42346.pdf.

[31] 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. WESTERN ASS'N OF FISH & WILDLIFE AGENCIES, WHITE PAPER: WILDLIFE MANAGEMENT SUBSIDIARY 3-7 (June 2011), *available at* http://www.wafwa.org/documents/commissioners/CommitteeDocuments.pdf (describing how federal overreach complicates State management of 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 authority to enjoin state translocation projects that release wildlife on federal lands or non-federal lands adjacent to federal lands. Part III additionally 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 NEPA is violated where the relevant federal land management agency fails to prevent a State-authorized wildlife translocation and subsequently fails to remove the species from federal lands. Part V briefly evaluates the limitations, or lack thereof, on the tools available to the States in undertaking wildlife management projects without obtaining prior federal approval. Part VI concludes by reaffirming State authority to manage wildlife in the absence of Congressional abrogation of that authority. Also, Part VI notes that apparently contrary Forest Service and BLM regulations either do not apply to the States, are contrary to governing statutes as applied to the States, or exceed statutory and regulatory authority as applied and concludes, therefore, that the federal government may not interfere with the State of Utah's mountain goat translocation plan.

I. BACKGROUND

By a quirk of history, the management of federal land itself is governed differently than the wildlife residing thereon.[32] 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

[32] *See* discussion *infra* Subsections I.A. and I.B.

land or the habitat of wildlife.[33] 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.[34] Even as this shift occurred, Congress was careful to preserve the status quo of state management with regards to wildlife management authority.[35] The management of wildlife remains, therefore, as it traditionally has: reserved to the States, even on federal lands.[36] Congress may exercise its plenary power over federal property to preempt State management.[37] Where Congress has not explicitly done so or has acted instead to reserve this power to the States,[38] State management authority of wildlife is limited 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.[39] Finally, the State is charged with managing wildlife as a public trust for all of its citizens.[40]

A. Land Management

[33] "While the several States therefore possess primary authority and responsibility for management of fish and resident wildlife . . . . [m]anagement of the habitat is a responsibility of the Federal Government." 43 C.F.R. § 24.4(d). *See also* 43 C.F.R. § 24.4(c) (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 (accord with the Forest Service).

[34] *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) (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). Given the prevailing assumption of State management of wildlife, the report makes no mention of wildlife management. *Id.*

[35] 43 U.S.C. § 1732(b) (2006) ("[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.").

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

[37] Kleppe v. New Mexico, 426 U.S. 529, 540-41 (1976) ("Although 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.").

[38] Congress has done so on numerous occasions. Most relevantly here, *see* 16 U.S.C. § 528; § 1133(d)(7); and 43 U.S.C. § 1732(b).

[39] *See, e.g.*, Hunt v. United States, 278 U.S. 96, 99 (1928); Utah Code Ann. § 23-13-3.

[40] Geer v. Connecticut, 161 U.S. 519, 529-30 (1896).

The contrasting approaches between wildlife and habitat (i.e. land) management are a product of history, tradition, and the underlying statutory schema superimposed upon the federal land management agencies by Congress.[41] The American schema of land management began as little more than a blanket policy of disposal.[42] In the American West, however, federal settlement programs never really "took off,"[43] allowing for a gradual federal policy shift towards retention and protection of existing federal property.[44]

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[41] "While the several States therefore possess primary authority and responsibility for management of fish and resident wildlife . . . . [m]anagement of the habitat is a responsibility of the Federal Government." 43 C.F.R. § 24.4(d). For a summary of the history and tradition behind State approaches to wildlife management, *see* discussion *infra* Subsection I.B.

[42] In fact, some of the earliest federal programs were directed at land disposal. For example, even prior to the creation of the federal Constitution, the Northwest Ordinance of 1787 established a procedure for what were then the "Western lands" held by the federal government. Robert Barrett, *History on an Equal Footing: Ownership of the Western Lands*, 68 U. COLO. L. REV. 761, 766 (1997)*; see also* An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, Art. V (1789), *reprinted in* 51 CLEV. ST. L. REV. 659, 663 (2004).

Even so, these programs were always controversial. For example, in 1828, Governor Ninian Edwards of Illinois "maintained that the Constitution gave the federal government no power to exercise control over the public lands in a state after its admission to the Union." PAUL WALLACE GATES & ROBERT W. SWENSON, PUBLIC LAND LAW REVIEW COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 9 (1968). Within thirty years, after various land grants and years of land sales, "virtually all the public lands were gone" in Illinois. *Id.* at 18.

[43] 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, DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE 7 (1875). 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. DEP'T 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, at 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.*

[44] 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 . . . will present a condition of affairs which will come home to many of you with force and power.
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> We want to protect our forests. . . . If the land is not fit for homesteads—and I assume that much of it is not, or it would have been taken up years ago; indeed it is admitted that it is not—what better use can we put it than to place it in a timber reservation?

30 Cong. Rec. 969 (1897) (statement of Rep. Thomas McRae). Arguably, this shift began, however, during the early 1870s with the creation of Yellowstone National Park in 1872. *Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage Was Set for BLM's "Organic Act*, U.S. BUREAU LAND MGMT., http://www.blm.gov/flpma/organic.htm (last visited Oct. 17, 2013). However, it was not until the passage of

The ultimate product of this effort, the Federal Land Policy and Management Act of 1976 ("FLPMA") embodied this shift.[45] Thus, since 1976 land policy sharply shifted toward retention of public lands and management for multiple uses, including recreation.[46] The Supreme Court, reviewing these changes in management policy and structure under the property clause of the United States Constitution[47] determined that Congress has sweeping authority to regulate the federal lands as it sees fit.[48] Congress has chosen to do so, however, by limiting agency authority to prevent public access to public lands to a small subset of particular reasons.[49]

B. Wildlife Management

In deference to longstanding state authority on the subject,[50] and perhaps due in part to the federal government's perceived inadequacy in managing the situation on the ground throughout its extensive land holdings,[51] the shift in land management policy did not entail a

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FLPMA in 1976 that "Congress expressly declared as policy that the remaining public domain lands would be retained in federal ownership unless disposal of a particular parcel served the national interest." *Id.*

[45] *See* 43 U.S.C. § 1701 (2006) ("Congressional Declaration of Policy"). Among other things, this Act created the Bureau of Land Management (BLM) and assigned to it the duty to manage most federal land. § 1731(a)-(b) (creating Bureau of Land Management and assigning it the duty to administer FLPMA).

[46] Arguably, this shift began as early as the early 1870s with the creation of Yellowstone National Park in 1872. *Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage Was Set for BLM's "Organic Act*, U.S. BUREAU LAND MGMT., http://www.blm.gov/flpma/organic.htm (last visited Oct. 17, 2013). However, it was not until the passage of FLPMA in 1976 that "Congress expressly declared as policy that the remaining public domain lands would be retained in federal ownership unless disposal of a particular parcel served the national interest." *Id.*

[47] U.S. CONST. art. IV § 3, cl. 2.

[48] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

[49] 43 U.S.C. § 1732(b) (2012).

[50] *Kleppe*, 426 U.S. at 545. 122 Cong. Rec. 34,373 (1976) ("Traditionally, the States have regulated fishing and hunting of resident species of wildlife. The BLM and the Forest Service . . . have focused on management of their habitat. This bill *does nothing to change that*.") (emphasis added). Indeed, the legislative history suggests that Congress was concerned not with the translocation or introduction of species, but rather with unregulated hunting of species whose numbers were much reduced. *Id.*; *see also infra* Subsection I.B.ii.

[51] PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION, 4 (1970). 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[] th[e]se 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.36.

commensurate shift in wildlife management authority.[52] Because the American legal doctrines upon which wildlife management are based are derived from Roman and English Law, a brief review of each follows.[53]

i. *History: Law of Capture, Early English and Roman Law*

Both Roman and English Law recognized ultimate state ownership and control of wildlife.[54] In ancient Rome, wildlife was considered res nullius or a "thing owned by no one."[55] Once captured, however, the person capturing became owner of the wild animal, even if it was taken on the land of another.[56] Even so, wild animals "belonged 'in common to all citizens of the State,'"[57] meaning that the State had the authority to regulate taking.[58]

In England, wildlife similarly belonged to the sovereign—first the king, and later parliament exercised exclusive authority to regulate hunting.[59] 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.[60] Historically, European aristocracy held a monopoly on hunting.[61] For example, both the king and parliament allowed wealthy nobles to hunt, but excluded the common people.[62]

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[52] This is most apparent within FLPMA itself. 43 U.S.C. § 1732 ("[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].").

[53] Geer v. Connecticut, 161 U.S. 519, 522-28 (1896).

[54] Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 677-84 (2005).

[55] *Id.* at 678.

[56] *Id.*

[57] Deborah G. Musiker, Tom France, Lisa A. Hallenbeck, *The Public Trust and* Parens Patriae *Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 Pub. Land L. Rev. 87, 92 (1995).

[58] Although the Roman State possessed this power, evidence suggests that it was rarely utilized. Blumm & Ritchie, *supra* note 54, at 678.

[59] In principle, the king and parliament managed wildlife for the common interest, Musiker, France, & Hallenbeck, *supra* note 57, at 92, but in practice, the allotment of hunting privileges heavily favored elites, Blumm & Ritchie, *supra* note 54, at 683-84.

[60] Blumm & Ritchie, *supra* note 54, at 686.

[61] English law "assign[ed] ownership of common property to the king . . . . result[ing] in the dispersion of privileges taken or allowed by royalty." *Id.* at 11. 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

ii. *American Experience from the Founding to the Early Modern Era*

Early American decisions reaffirmed the English and Roman law of capture,[63] but gradually expanded the right 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 also were no longer legally barred from hunting.[64] States inherited the king's authority after the Revolution,[65] but were charged by the United States Supreme Court to manage wildlife in trust for the people.[66]

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 which favors elites.[67] Initially, this difference led to the explosion of both opportunity and exploitation in America[68] and caused overharvesting of species: many to scarcity, and some even

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around the justifications for and enforcement of [this] noble monopoly." JOHN THEIBAULT, "HUNTING," EUROPE, 1450 TO 1789: ENCYCLOPEDIA OF THE EARLY MODERN WORLD (2004), *available at http://www.encyclopedia.com/topic/hunting.aspx.*

[62] *Id.* at 684.

[63] 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.").

[64] Carlos A. Peres, *Overexploitation*, *in* CONSERVATION BIOLOGY FOR ALL (2010) (Navjot S. Sodhi & Paul R. Ehrlich eds.).

[65] Musiker, France, & Hallenbeck, *supra* note 57, at 93. *See also* Martin v. Waddell's Lessee, 41 U.S. 367, 410-11 (1846).

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

[67] 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. ANDERS HALVERSON, AN ENTIRELY SYNTHETIC FISH: HOW RAINBOW TROUT BEGUILED AMERICA AND OVERRAN THE WORLD 74-75 (2010). 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.

[68] 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 Antelope and Elk—were down about 98 percent from their levels at the beginning of the nineteenth century. *Id.* at 206.

to extinction.[69] Public recognition of this dramatic decline in wildlife populations sparked the conservation movement.[70] Figures such as President Theodore Roosevelt and conservationist Aldo Leopold "envisioned a nation where all citizens had an opportunity to engage in conservation and hunting."[71]

President Roosevelt,[72] having grown concerned after witnessing firsthand the dramatic decline in North American "big game" species, founded the Boone and Crockett Club in January 1888.[73] The Club's first efforts were to promote the idea of a "fair chase" doctrine in hunting and the creation of wilderness preserves to protect "buffalo, antelope, mountain goats, elk, and deer."[74] To this end, the Club pursued federal legislation protecting wildlife in the National Park System—which explains to a large degree the greater control the National Park Service exercises in wildlife management and control as compared to other federal land management agencies.[75]

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[69] 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 MAGAZINE (May-June 2014), *available at* http://www.audubonmagazine.org/articles/birds/why-passenger-pigeon-went-extinct.

[70] *Id.* (noting that the modern conservation movement began in partial response to the extinction of the passenger pigeon).

[71] John Organ, et al., *The North American Model of Wildlife Conservation*, THE WILDLIFE SOCIETY AND THE BOONE AND CROCKETT CLUB Technical Review 12-04 (Dec. 2012) at 23 [hereinafter Technical Review].

[72] 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 68, at 80 ("[Robert Roosevelt], more than any other direct influence, turned Theodore Roosevelt into a conservationist as a teenager.").

[73] BRINKLEY, *supra* note 68, at 201-07.

[74] *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.

[75] *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.*, National Park Service, Sleeping Bear Dunes: Hunting, *available at* http://www.nps.gov/slbe/planyourvisit/hunting.htm (last visited May 6, 2015); National Park Service, Glen Canyon: Orange Cliffs, *available at* 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.").

The Club, which remains active today, pioneered the framework that has developed into the current wildlife management scheme in the United States.[76] This framework is known as the North American Model of Wildlife Conservation ("the Model").[77] 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.[78] Seven "pillars," compose the Model.[79] 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."[80] Three of these pillars are implicated in the mountain goat debate: Wildlife as a Public Trust Resource, Scientific Management,[81] and the Democracy of Hunting.[82]

1. 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.[83] Therefore, States manage wildlife on behalf of their citizens.[84]

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[76] For example, "[o]n a hunt . . . members were absolute equals." *Id.* at 204. This echoes the democratic principles enshrined by the North American Model of Wildlife Conservation. *See infra* Subsection I.B.ii.2.

[77] Valerius Geist, John Organ & Shane Mahoney, *Born in the Hands of Hunters: the North American Model of Wildlife Conservation*, THE WILDLIFE PROFESSIONAL 22, 25-27 (2010), *available at* http://www.odwc.state.ok.us/aboutodwc/Born%20in%20the%20Hands%20of%20Hunters[6].pdf. *But see* Michael P. Nelson, John A. Vucetich, Paul C. Paquet, & Joseph K. Bump, *An Inadequate Construct? North American Model:What's Flawed, What's Missing, What's Needed*, THE WILDLIFE PROFESSIONAL, Summer 2013, at 58, *available at* http://www.isleroyalewolf.org/sites/default/files/Nelson%20et%20al%202011-An%20Inadequate%20Construct.pdf (questioning the ethic and history behind the North American Model).

[78] These pillars 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. Geist, Organ, & Mahoney, *supra* note 77, at 27.

[79] *Id.*

[80] Technical Review, *supra* note 71, at viii.

[81] This includes insuring that any decisions are made based on actual science, rather than baseless supposition. UTAH DIV. WILDLIFE RES., supra note 1, at 5.

[82] Geist, *supra* note 77, at 27.

[83] Martin v. Waddell's Lessee, 41 U.S. 367, 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").

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 federal level,[85] State policymakers are better able to devote the resources necessary to manage recreational hunting and fishing within their own territories.[86] Such an approach requires management policy based on scientific data, rather than aesthetic or emotive judgments.[87] This means that "[s]cience [is the] basis for informed decision-making in wildlife management."[88] Through science, good management principles have been discovered that allow for the "management of diverse species . . . under highly complex circumstances."[89] Science, guides the

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[84] WESTERN ASS'N OF FISH & WILDLIFE AGENCIES, *supra* note 84, at 2-4; Geer v. Connecticut, 161 U.S. 519, 529-30 (1896).

[85] 16 U.S.C. § 1535(f) (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) ("[I]n 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.").

[86] Geist, Organ, & Mahoney, *supra* note 77, at 26.

[87] 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* https://www.msu.edu/~lutemich/site/publications_files/hdwm_lute_litreview.pdf (explaining in part that "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 138-40 (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. *United States v. Hunt*, 19 F.2d 634, 640 (D. Ariz. 1927).

[88] Geist, Organ, & Mahoney, *supra* note 77, at 27.

[89] *Id.*

range of management options that wildlife managers should choose from.[90] In modern days, it is typical for a policy making board, such as Utah's Wildlife Board, to then 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.[91] These decisions are made after holding numerous public meetings and considering public input.[92]

2. 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.[93] The basic premise of this final pillar is that every citizen is entitled to the freedom to hunt and fish.[94] 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."[95]

Today, drawing on that legacy, the United States takes an internationally-uncommon, democratic approach to hunting.[96] Its approach, based on the Model, recognizes the historical universal right of access to wildlife, which is considered a right of citizenship in our democratic

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[90] 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. Letter from Angelita S. Bulletts, Supervisor, Dixie National Forest on behalf of Dixie, Fishlake and Manti-La Sal National Forests, to Kevin Bunnell, Regional Supervisor, Utah Division of Wildlife Res. (May 3, 2013) ("[W]e support the Mountain Goat Statewide Plan and look forward to continuing to work with you.") (on file with Author). Letter from Nora Rasure, Regional Forester, Intermountain Region, U.S. Forest Service, to Gregory Sheehan, Executive Secretary, Utah Board of Wildlife (Aug. 21, 2013) ("The Forest Service does not support the proposal at this time . . . ."). One has to wonder what in the science changed between May and August 2013.

[91] *See, e.g.*, Utah Code Ann. §§ 23-14-2, -3.

[92] *See* Utah Code Ann. § 23-14-2.6; § Title 52 Chapter 4 Utah Code ("Open and Public Meetings Act").

[93] *Id.* Some believe that "the greatest historical meaning of the public trust is that certain interests . . . are so intrinsically important that their free availability marks a society as one of citizens rather than serfs." *Id.*

[94] The North American Model of Wildlife Conservation, Sportsmen, and the Boone and Crockett Club, The Boone and Crockett Club (March 2013), www.boone-crockett.org/conservation/conservation_NAM.asp?area=conservation.

[95] *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada*, THE WILDLIFE SOCIETY (Sept. 2010), Technical Review 10-01 at 23, *available at* http://www.fw.msu.edu/documents/ptd_10-1.pdf.

[96] THE WILDLIFE SOCIETY, *supra* note 8, at 23.

society according to the Boone and Crocket Club.[97] 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.[98] Such access "fosters individual stewardship and provides the funding necessary to properly manage wildlife resources in a sustainable manner."[99]

iii. *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"—or not.[100] Instead, the dispute is the *extent* of State or federal authority vis-à-vis the other.[101] 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,"[102] BLM may not intrude upon State activities that fall within the rubric of "wildlife management."[103] Under any reasonable definition of the phrase, wildlife translocation *is* "wildlife management."[104]

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[97] Boone and Crockett, *supra* note 7.

[98] *Id.*

[99] *Id.*

[100] *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, 1231-32 (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, but not that the vaccination of elk was *not* "wildlife management").

[101] 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." *Wyoming*, 279 F.3d at 1231-32.

[102] 43 U.S.C. § 1732(b) (2014).

[103] "[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." GREG YARROW, FACT SHEET 36, WILDLIFE & WILDLIFE MGMT. 2 (May 2009), *available at* https://www.clemson.edu/extension/natural_resources/wildlife/publications/pdfs/fs36_wildlife_and_wildlife_manag

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[105] a power as any and is central to wildlife management authority.[106] As such, Congress must act explicitly to remove this authority from the States in order to restrict State management authority.[107]

Rather than demonstrating the intent to restrict State authority to manage wildlife on federal land, Congress since *Missouri v. Holland* has repeatedly reaffirmed the principal role of State Fish and Wildlife agencies in the matter.[108] For example, during the debate leading to the

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ement.pdf (emphasis added). The Journal of Wildlife Management, for example, made the following statement about what constitutes "wildlife management" in its inaugural issue in 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.
>
> *Statement of Policy*, 1 J. OF WILDLIFE MGMT. 1, 1-2 (1937).

[104] 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." YARROW, *supra* note 103, at 2. Such introductions and translocations fit within the "wise use" approach to "wildlife management." Gamborg, Palmer, & Sandoe, *supra* note 27, at 8 ("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.").

[105] *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.").

[106] *See infra* Subsection III.A.

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

[108] Same as FN 83

enactment of the Multiple-Use Sustained Yield Act of 1960,[109] the Act was amended to include language making explicit that the Act *did not* affect the jurisdiction of the States.[110] 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.[111] Senator Humphrey read into the record a letter urging the Senate to adopt the amendment "as merely stating what has been everyone's intent."[112]

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,[113] consistently reaffirmed that federal agencies manage federal land, but State fish and wildlife agencies manage the wildlife located thereon.[114]

i. *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,[115] Congress may act to *explicitly* preempt State management authority through the Property,[116] Commerce,[117] Treaty,[118] and Necessary and Proper Clauses[119] of the United States

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[109] Codified at 16 U.S.C. §§ 528-31 (2014).

[110] 106 Cong. Rec. 12078, 12079 (Senate June 8, 1960).

[111] *Id.*

[112] *Id.* at 12,085 (S. Humphrey)

[113] Such an example is the National Wildlife Refuge System Improvement Act, at least as interpreted by the 10th Circuit Court of Appeals in *Wyoming v. United States*. 279 F.3d 1214, 1231-32 (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). *See also* 16 U.S.C. § 668dd(m).

[114] *See, e.g.*, 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), Federal Land Management Policy Act of 1976, 43 U.S.C. § 1172(b); Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1333(a); Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2909; Endangered Species Act, 16 U.S.C. § 1535; Sikes Act, 16 U.S.C. §§ 670a. For federal regulations espousing the same principle, *see* 43 C.F.R. § 24.3(b). *See also* Bureau of Land Mgmt., *About the Greater Sage Grouse*, (last visited Mar. 25, 2015), http://www.blm.gov/wo/st/en/prog/more/sagegrouse/conservation.print.html ("As the BLM and the USFS work on revising their land use plans, they are working in close coordination with state governments, *which manage all resident wildlife* . . . .") (emphasis added).

[115] 16 U.S.C. § 528; § 1133(d)(7); 43 U.S.C. § 1732(b).

[116] Kleppe v. New Mexico, 426 U.S. 529, 544 (1976); Hunt v. United States, 278 U.S. 96, 99 (1928).

Constitution. State control and authority, therefore, is the default even on federal property unless Congress declares otherwise.[120]

1. The Forest Service[121]

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.[122] 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.[123] Perhaps unsurprisingly then, the 1897 Act said nothing at all about State authority or jurisdiction—or even wildlife, for that matter[124]—nor did any member of Congress during debate on the bill.[125]

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[117] Hughes v. Oklahoma, 441 U.S. 322, 335-36 (1979).

[118] Missouri v. Holland, 252 U.S. 416, 434 (1920).

[119] United States v. Bd. of Comm'rs of Fremont Cnty., Wyo., 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).

[120] 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 v. New Mexico, 426 U.S. 529, 544 (1976).

[121] For a more comprehensive history of the administration of the National Forest System by USFS, *see* Hardt, *supra* note 51, at 351-69 (1994).

[122] 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, ch. 2, § 1, 30 Stat. 34, 35 (current version at 16 U.S.C. § 551 (2012)).

[123] Geer v. Connecticut, 161 U.S. 519, 529-30 (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 trust for the benefit of the people. . . . [T]he state . . . represents its people, and the ownership is that of the people in their united sovereignty."), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

[124] Sundry Appropriations Act of June 4, 1897, ch. 2, § 1, 30 Stat. 34, 35 (current version at 16 U.S.C. § 551 (2012)).

[125] For an explanation as to the original meaning of the amendment granting the authority to prevent "destruction" of forest reservations, *see* 30 Cong. Rec. 912 (1897) (statement of Sen. Stephen White) ("I might add that it would be a good thing to incorporate in this bill a provision for taking care of [forest] reservations [i.e. National Forests]. I have seen from my own doorstep during last year, for three weeks, fires raging within the limits of a forest reservation within which there was no Government official to do any good and from which everyone who could have protected the flaming forest was by law excluded."); *Id.* at 912-13 (statement of Sen. Richard Pettigrew) ("Under existing law these reservations are withdrawn from settlement, and yet no care is taken to preserve the timber therein. The consequence is that fires destroy more timber than all the settlers would consume."). *See also id.* at 913 (recommending the amendment that became modern 16 U.S.C. § 551); *id.* at 969 (statement of Rep. Thomas

a. Much Ado About RNAs

Seventy years later, in 1966, the Forest Service promulgated a regulation authorizing the creation of "Research Natural Areas" or RNAs[126] that relied upon the destruction-prevention provision of the original Organic Act.[127] As a brief review of the history of this rule makes clear, the original regulation was based on a statute enacted in 1897[128] that concerned only the authority to prevent forest fires and damage to the National Forest System.[129] According to this regulation, the Chief of the Forest Service may establishes 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."[130] Although the RNA program was codified in the Code of Federal Regulations in 1966,[131] the Forest Service created the first RNA in the mid-1920s.[132] This

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McRae) (expressing need to prevent total destruction of forests). From these statements, it appears that the term "destruction" was used to refer to forest fires. Impacts related to the presence of wildlife were not considered.

[126] This regulation, and USFS's implementing procedures authorized the imposition of strict control measures on these particular Forest Service lands. Forest Serv. Manual ch. 4060, § .03 ("Research Natural Areas may be used only for Research and Development, study, observation, monitoring, and those educational activities that do not modify the conditions for which the Research Natural Area was established."). On the other hand, the Forest Service Manual arguably binds only the Forest Service and has no power over the State. *See infra* Subsection I.C.iii (discussing the difference between legislative and interpretive rules).

[127] Experimental Areas and Research Natural Areas, 31 Fed. Reg. 5072, 5072 (Mar. 29, 1966) (to be codified at 36 C.F.R. § 251.23).

[128] Experimental Areas and Research Natural Areas, 31 Fed. Reg. 5072, 5072 (Mar. 29, 1966) (to be codified at 36 C.F.R. § 251.23).

[129] The Congressional record from the time makes this point very clear. *See* 30 Cong. Rec. 912 (1897) (statement of Sen. Stephen White) ("I might add that it would be a good thing to incorporate in this bill a provision for taking care of [forest] reservations [i.e. National Forests]. I have seen from my own doorstep during last year, for three weeks, fires raging within the limits of a forest reservation within which there was no Government official to do any good and from which everyone who could have protected the flaming forest was by law excluded."); *Id.* at 912-13 (statement of Sen. Richard Pettigrew) ("Under existing law these reservations are withdrawn from settlement, and yet no care is taken to preserve the timber therein. The consequence is that fires destroy more timber than all the settlers would consume."). *See also id.* at 913 (recommending the amendment that became modern 16 U.S.C. § 551); *id.* at 969 (statement of Rep. Thomas McRae) (expressing need to prevent total destruction of forests).

[130] *Compare* 36 C.F.R. § 251.23 (2014), *with* Experimental Areas and Research Natural Areas, 31 Fed. Reg. 5072, 5072 (Mar. 29, 1966) (to be codified at 36 C.F.R. § 251.23).

[131] 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.

[132] U.S. Forest Serv., U.S. Dep't Agric., *About RNAs: A Nationwide System* (last visited Mar. 12, 2014), http://www.fs.fed.us/rmrs/research-natural-areas/about/. This was 39 years prior to the promulgation of the regulation from which the Forest Service claims to derive its power to so designate National Forest Land.

regulation, promulgated first in 1966, remains entirely unchanged today,[133] although the Forest Service now justifies the restriction through a number of subsequent statutes as well.[134]

On its face, the RNA regulation declares that RNAs "will be retained in a virgin or unmodified condition."[135] When taken together with the Forest Service Manual, it becomes

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Experimental Areas and Research Natural Areas, 31 Fed. Reg. 5072, 5072 (Mar. 29, 1966) (to be codified at 36 C.F.R. § 251.23).

[133] *See* 36 C.F.R. § 251.23.

[134] This is important because a regulation may not convey greater authority to an agency than the statutory authority upon which the regulation rests. *See, e.g.* Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1173 (D.C. Cir. 2003) (finding Postal Service action ultra vires because Postal Service "exceeded its statutory authority"). Currently, the Forest Service considers the following statutes to provide authority for 36 C.F.R. § 251.23: 7 U.S.C. § 1011; 16 U.S.C. §§ 472, 479b, 518, 551, 678a, 1134, 3210; 43 U.S.C. §§ 1740, 1761–1771. Special Uses, 71 Fed. Reg. 16,614, 16,621 (Apr. 3, 2006). In order, these statutes authorize the Secretary of Agriculture:

- to "protect, improve, develop, and administer any property . . . as may be necessary to adapt it to its most beneficial use" (7 U.S.C. 1011(b));
- to "make dedications or grants, in his discretion, for any public purpose" (7 U.S.C. § 1011(d));
- the Secretary of Agriculture to "make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired by, or transferred to, the Secretary" (7 U.S.C. § 1011(f));
- to regulate National Forests (16 U.S.C. § 472);
- to issue permits "for skiing and other snow sports and recreational uses" (16 U.S.C. § 497b);
- to acquire lands encumbered by an easement or right-of-way held by the former owner of the land (16 U.S.C. § 518);
- to make regulations to prevent the destruction of national forests by "fire and depredations" and "such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction" (16 U.S.C. § 551);
- to allow mining in Norbeck Wildlife Preserve, South Dakota and to make regulations in furtherance of that mandate (16 U.S.C. § 678a);
- to give owners of private or State land surrounded by wilderness areas "adequate access" or exchange "federally owned land in the same State of approximately equal value" (16 U.S.C. § 1134);
- to provide access to owner of "nonfederally owned land" within the boundaries of the National Forest System (16 U.S.C. § 3210(a));
- to promulgate regulations "to carry out the purposes of [FLPMA]" within the National Forest System (43 U.S.C. § 1740);
- to grant or issue rights-of-way across public lands for a variety of purposes (43 U.S.C. § 1761-71).

As regards wildlife management authority, each of these statutory authorizations is limited either by 16 U.S.C. § 528 (land in the National Forest System) or § 1133(d)(7) (land designated as wilderness). To the extent, therefore, that the Forest Service disallows State management of wildlife pursuant to 36 C.F.R. § 251.23 the RNA regulation is ultra vires. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949).

[135] 36 C.F.R. § 251.23. 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 (10th Cir. 2014); Park Lake Res. LLC v. U.S. Dep't of Agric., 378

apparent that the Forest Service claims the authority to manage RNA-designated land to discourage non-native species and encourage native species.[136]

b. Permitting for use of National Forest land

Forest Service regulations designate most activities conducted on National Forest System land "special uses," with a few exceptions.[137] These regulations further require that a person obtain a permit before engaging in any "special use" on Forest Service land.[138] As regards 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."[139]

2. BLM[140]

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."[141] In Utah alone, BLM manages more than a third of the State.[142] 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.[143] Interestingly enough, however, BLM

F.3d 1132 (2004).. The Author is unaware of any attempt by the Forest Service to apply the rule to State fish & wildlife management agencies.

[136] At least, it would do so if the regulation were applied to the States. Forest Serv. Manual ch. 4060, § .03; § .02(3) ("The objectives of establishing [a] Research Natural Area [is] to: . . . [p]rotect against human-caused environmental disruptions.").

[137] 36 C.F.R. § 251.50 ("All uses of National Forest System lands, improvements, and resources, except those authorized by the regulations governing sharing use of roads (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens, mushrooms, and medicinal plants (part 223); and minerals (part 228) are designated 'special uses.'").

[138] *Id.*

[139] 16 U.S.C. § 1732(b).

[140] For a more comprehensive history of the administration of the public lands managed by BLM, *see* Hardt, *supra* note 51, at 369-71 (1994).

[141] Joseph M. Feller, *What is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 Idaho L. Rev. 555, 558 (1994).

[142] *Id.*

[143] *Id.*

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."[144] BLM also has responsibility under the Wilderness Act to designate lands that demonstrate "wilderness characteristics" as wilderness study areas or WSAs.[145]

As described above, the BLM's authorities to act are found in FLPMA[146] and the Wilderness Act, and those provisions reserve to the States the authority to manage wildlife.[147] 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.[148] These are the only activities prohibited under the Wilderness Act.[149] There is no specific provision restricting state wildlife management authority, and § 1133(d)(7) specifically reserves to the States jurisdiction over wildlife management.[150] Furthermore, section (c) provides that its restrictions are subject to exception "as specifically provided for" in section (d).[151] Such an exception suggests, therefore, that the uses described in subsection (d) of § 1133—including the reservation of wildlife management authority to the States—are general exceptions to the restrictions imposed by § 1133(c) and that the activities described in section (d) may be carried out or achieved through means otherwise prohibited in section (c).[152]

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[144] *Id.* at 558-59. In fact, the recreational value of these lands today exceeds the extractive value of the same land, dollar for dollar. *Id.* at 559.

[145] *Id.* at 559 n. 13. BLM no longer designates new WSAs, pursuant to the settlement agreement in the case of *Utah v. Norton*. Utah v. Norton, 2006 WL 2711798, *4-5 (D. Utah 2006), *aff'd* Utah v. U.S. Dep't Interior, 535 F.3d 1184 (10th Cir. 2008).

[146] 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.

[147] 16 U.S.C. § 1133(d)(7).

[148] § 1133(c).

[149] *Id.*

[150] § 1133(d)(7).

[151] § 1133(c).

[152] *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

Despite the limited authority granted by these statutes, the language of the BLM Manual "prohibit[s], to extent practicable and permitted by Federal law, the introduction of any non-native species into WSAs."[153] The Manual further concludes that "the BLM will remove, to the extent practicable and permitted by Federal law, any non-native fish or wildlife species from WSAs."[154] 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"[155] and feral horses and burros.[156] 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.[157]

ii. *The procedural requirements of the National Environmental Policy Act*

The requirements of NEPA are quite simple.[158] NEPA requires completion of an environmental impact statement (EIS) before any major federal action that may affect the environment is undertaken.[159] Although ordinarily a private or State actor need not complete an

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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).

[153] Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(vii)

[154] *Id.*

[155] § (D)(11)(e)(ii). October 21, 1976 was the effective date of FLPMA. *See* 43 U.S. Code § 1701(a)(3).

[156] § (D)(11)(b) ("[N]othing in this section applies to Wild Horses and Burros . . . .").

[157] *Id.*

[158] U.S. Envtl. Protection Agency, National Environmental Policy Act (NEPA) (last visited Mar. 24, 2015), http://www.epa.gov/compliance/nepa/.

[159] 42 U.S.C. § 4332(C).

EIS under NEPA,[160] 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.[161] 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.[162]

iii. *Judicial deference (or non-deference) to administrative decision making*[163]

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, U.S.A., Inc. v. Natural Resources Defense Council, Inc*. and its progeny.[164] According to *Chevron*, the process of review is divided into two steps.[165] 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 precise question at issue."[166] 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."[167] In that case, the court's

[160] This is because such a project is not, by its very nature, a "federal action." 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).

[161] 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).

[162] Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 519 (1978). The same holds true in the context of harms to wildlife: "[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 percent, 50 percent, or even 100 percent of" that species in the affected area. Robertson v. Methow Valley Citizen's Council, 490 U.S. 332, 551 (1989).

[163] 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*, __ WILLAMETTE ENVTL. L.J. __, __ (2015).

[164] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[165] *Id.* at 842-43.

[166] *Id.* at 842.

[167] *Id.*

construction of the statute is binding on the agency and limits the range of permissible interpretations of that statute.[168]

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.[169] In that case, rather, "the question . . . is whether the agency's answer is based on a *permissible* construction of the statute."[170] 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.[171] This is because an agency is justified to make "a binding interpretation of a statute it administers" by virtue of the fact that Congress delegated to it the authority to make law.[172]

However, not all agency rules or statements merit significant judicial deference.[173] 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

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[168] Note, *How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Reclassification*, 124 HARV. L. REV. 1016, 1016 (2011); *see also* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (emphasis in original) ("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.").

[169] *Chevron*, 467 U.S. at 843 (noting that "the court does not simply impose its own construction of the statute.").

[170] *Id.* (emphasis added).

[171] *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.").

[172] 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, et al., *supra* note 93, at 1189-90.

[173] 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).

that rule qualifies for an established exception.[174] Excluding emergency situations,[175] an agency may only promulgate a rule without notice-and-comment procedure if it is either an interpretive rule or general statement of policy.[176] 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.[177] 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.'"[178]

After *Christensen v. Harris County*, the Supreme Court made clear, in *United States v. Mead Corp.*, that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances."[179] In looking to those 'varying circumstances,' the Court looks to a number of factors including the formality and consistency of the agency's decision.[180] To whatever extent present, agency decisions also carry weight by virtue of the author's logic and persuasiveness.[181] *Mead* sets out a number of factors that lend a non-legislative rule imposed or created by an agency 'power to persuade,' such as the quality of the reasoning behind the decision and its consistency with the agency's earlier and later actions.[182]

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[174] 5 U.S.C. § 553(b). These exceptions are "narrowly construed and only reluctantly countenanced." N.J. Dep't of Envtl. Protection v. U.S. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

[175] § 553(b)(B).

[176] § 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." Amer. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).

[177] 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. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). *See also* 5 U.S.C. § 553(b)(B) (2006).

[178] *Christensen*, 529 U.S. at 587 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (internal citations omitted).

[179] *Id.* at 228 (majority); see *also id.* at 230 (limiting *Chevron* where agency decisions are not "the fruits of notice-and-comment rulemaking or formal adjudication").

[180] *Id.* at 228 (considering "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.").

[181] *Id.* at 235 ("Such a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.").

[182] 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

II. SETTING THE STAGE FOR THE CURRENT DISPUTE: A CASE STUDY IN WILDLIFE MANAGEMENT

On June 4, 2013 the Utah Wildlife Board approved the Statewide Management Plan for Mountain Goat, a 5 year planning document governing mountain goat management activities by the DWR.[183] As part of the plan, the Wildlife Board approved the translocation of 20 mountain goats into the La Sal Mountains.[184] The La Sals are largely comprised of federal lands owned and managed by the Forest Service as the Manti-La Sal National Forrest.[185] Within this range is Mount Peale Research Natural Area, established in 1988 to protect "ecosystem structure and function in representative alpine and subalpine habitats."[186]

While many people applauded the Wildlife Board's decision,[187] some believe the introduction of mountain goats to the La Sals threatens endemic plant and animal species,[188] such as the La Sal daisy and La Sal Pika, and ongoing research into climate change.[189] These individuals question, therefore, the appropriateness of introducing non-native species such as

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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 *Mead*. *Mead*, 533 U.S. at 228.

[183] UTAH DIV. WILDLIFE RES., *supra* note 1, at 2.

[184] *Id.* at 18; Brown, *supra* note 2.

[185] U.S. Forest Serv., U.S. Dep't Agric., Welcome to the Manti-La Sal National Forest (last visited Mar. 12, 2014), http://www.fs.usda.gov/mantilasal.

[186] U.S. Forest Serv., U.S. Dep't of Agric., *Rare Plants and Alpine Vegetation of the La Sal Mountains: Studies of a Unique Ecosystem Rising Above the Arid Colorado Plateau Desert* (last visited Mar. 12, 2015), http://www.fs.fed.us/wildflowers/Rare_Plants/conservation/success/LaSals_studies.shtml.

[187] Board meeting minutes available in audio format at http://wildlife.utah.gov/public_meetings/board_minutes/audio/13-06-04.mp3; public comment occurred between minutes 00:54:01 through 01:00:13; Byron Bateman with Sportsmen for Fish and Wildlife voiced his support for the plan.

[188] *See generally* Grand Canyon Trust letter, *supra* note 6.

[189] U.S. Forest Serv., *supra* note 185.

mountain goats to areas like the La Sals that have been preserved in a natural or semi-natural state.[190]

The Forest Service initially supported the translocation project,[191] but ultimately withdrew its support days prior to the 2013 Wildlife Board meeting.[192] This change in support was, perhaps, a response to a NEPA request the Forest Service received from a concerned citizen group shortly before the decision on the introduction was to be made.[193] Regardless, DWR moved forward with the translocation and released goats on State-owned property adjacent to federal lands.[194] DWR's current population objective is 200 goats.[195]

DWR investigated translocating bighorn sheep to the La Sals,[196] but conflicts with domestic sheep and the potential for disease transmission between domestic and wild sheep eliminated that possibility.[197] Many areas in Utah are incompatible for bighorn sheep for similar reasons, and that niche can be filled by mountain goats because they utilize similar habitats and

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[190] *See generally* Grand Canyon Trust letter, *supra* note 6. For discussion of this point, *see infra* Subsection III.C.i-ii.

[191] Letter from Angelita S. Bulletts, Supervisor, Dixie National Forest on behalf of Dixie, Fishlake and Manti-La Sal National Forests, to Kevin Bunnell, Regional Supervisor, Utah Division of Wildlife Res. (May 3, 2013) ("[W]e support the Mountain Goat Statewide Plan and look forward to continuing to work with you.") (on file with Author)..

[192] Letter from Nora Rasure, Regional Forester, Intermountain Region, U.S. Forest Service, to Gregory Sheehan, Executive Secretary, Utah Board of Wildlife (Aug. 21, 2013) ("The Forest Service does not support the proposal at this time . . . .") (on file with the Author). the Forest Service later indicated that it had two concerns with the mountain goat introduction: first, that the introduction conflicted with the Forest Service's RNA policy and second, that the introduction could "possib[ly] impact[] Forest Service regional plants." 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 the Author). Mr. Rowley acknowledged, however, that the introduction was a "State decision and action." *Id.*

[193] Grand Canyon Trust letter, *supra* note 6, at 1. Indeed, it is fair to say that the group *demanded* that the agency perform such analysis. *Id.* at 4-5 ("The fact that there is state involvement in the management of exotic bovids does not excuse the Forest Service from its obligations under the NEPA. . . . There should be no question that NEPA applies to this project.").

[194] MOUNTAIN GOAT PHYSICAL IMPACTS IN THE LA SAL MOUNTAINS ALPINE AREA, INCLUDING THE MOUNT PEALE RESEARCH NATURAL AREA, WHITMAN COLLEGE 1 (Sept. 9, 2014) (on file with Author) [hereinafter MOUNTAIN GOAT STUDY].

[195] *Id.*

[196] Kristin Willis, *Goats introduced despite protest*, MOAB SUN NEWS (Oct. 2, 2013), *available at* http://www.moabsunnews.com/news/article_d1b4e5dc-2b97-11e3-af7c-001a4bcf6878.html.

[197] UTAH DIV. WILDLIFE RES., supra note 1, at 7.

are not as vulnerable to disease from domestic sheep as bighorns.[198] However, some believe mountain goats are not historically native to Utah, and question the appropriateness of introducing non-native species.[199] A group of individuals taking this position wrote a letter to the Forest Service threatening legal action if the agency refuses to conduct a full NEPA analysis with regards to the goats and maintains that the agency not only has the authority to require the State of Utah to obtain a permit, but the duty to require it.[200]

A second area of potential contention is the Deep Creek Mountains, a region on the western side of Utah.[201] Much of this area is managed by the BLM as the Deep Creek WSA.[202] Again, domestic sheep grazing, and the attendant concern for the possibility of diease transmission to wild sheep, has prevented DWR from re-introducing wild sheep to the area.[203] As described above, the BLM WSA Policy Manual explicitly prohibits the introduction of non-native big game species into the WSA, setting the stage for potential conflict in the event state and federal management agencies in the event that DWR and the Utah Wildlife Board determine that this area is appropriate for translocation.[204]

III. OF GOATS AND MEN

[198] *Id.* at 5-6.

[199] *See generally* Grand Canyon Trust letter, *supra* note 6. For discussion of this point, *see infra* Subsection III.C.i-ii.

[200] *Id.* Specifically, the Grand Canyon Trust maintains that Forest Service regulations impose a nondiscretionary duty on the Forest Service to require a permit for *any* use of Forest Service land. *See* 36 C.F.R. § 251.50; § 293.10.

[201] Bureau of Land Mgmt., *Deep Creek Mountains WSA*, BLM.gov (last visited Mar. 20, 2015), http://www.blm.gov/ut/st/en/fo/salt_lake/blm_special_areas/wilderness_study_areas/deep_creek_mountains.html.

[202] *Id.* ("The Deep Creek Mountains WSA consists of 68,910 acres in Tooele and Juab Counties and is managed by the Utah BLM West Desert District. Flanked on the east by the Great Salt Lake Desert and on the west by the Deep Creek Valley, this 32-mile long, 3 to 15 mile wide range is located in west central Utah, adjacent to the Utah-Nevada state line and approximately 55 miles south of Wendover, Utah. The Deep Creek Mountains are the highest landmark in all of western Utah.").

[203] Deep Creek Mountain Goat Plan Minutes, Oct. 14, 2014, at 1 (on file with Author).

[204] *See* discussion *infra* Subsection III.B.iii. For example, under Utah Code 23-14-21, DWR has consultation obligations with the landowner and local county government prior to transplanting big game.

Although the topic of wildlife translocation may appear to be of but 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.[205] Current federal regulations impose illogical, biologically nonsensical distinctions between species of non-native wildlife that are allowed and those that are not[206]—distinctions that have no basis in underlying statutory law.[207] Furthermore, the very term "native" is itself in question because, again, the federal land management agencies lack statutory authorization to regulate on this basis.[208] Not only do the Organic and enabling acts of these agencies not define "native," these Acts neither *reference* the term nor any concept commonly associated therewith.[209] 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.[210]

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.[211] This power was exercised throughout antiquity[212] and the modern era.[213] In English history, for example, several

[205]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. GORTE, *supra* note 30, 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/western-land-owned-by-the-federal-government.html?_r=0 (noting that "[t]he 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).

[206] *Compare* Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(vii), (f); *with* § (D)(10).

[207] *See, e.g.*, 43 U.S.C. § 1732(b).

[208] *See* discussion *supra* Subsection III.C.i.

[209] 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. *See* 18 U.S.C. § 42(a).

[210] *See* discussion *supra* Subsection III.C.ii.

[211] 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

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,[214] Common Pheasant,[215] and Fallow Deer.[216] During the late 19th and early 20th centuries, translocations of game species were very common throughout the English speaking world[217] by private,[218] federal,[219] and State actors.[220] In the case of game species, such as Common or Ring-Necked

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environment? *See* Jared Diamond, *Evolution, consequences and future of plant and animal domestication*, Nature, Aug. 8, 2002, at 700-07 (“”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.”).

[212] 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. Safari Club International, *Online Record Book: European Fallow Deer-North America Introduced* (2015), http://www.scirecordbook.org/european-fallow-deer-north-america-introduced/.

[213] *See generally* HALVERSON, *supra* note 67.

[214] Rabbit were introduced following the Roman invasion of Britain in the early first century AD. *Remains of Roman rabbit uncovered*, BBC News (13 Apr., 2005), http://news.bbc.co.uk/2/hi/uk_news/england/norfolk/4439339.stm. *See also* Nigel Cross, Food in Romano-Britain, resourcesforhistory.com (2006), http://resourcesforhistory.com/Roman_Food_in_Britain.htm.

[215] As were pheasants. *Id.*

[216] Fallow deer were reintroduced by the Normans during the 11th Century following an earlier, apparently failed, attempt by the Romans to create a self-propagating population of the deer in Britain. British Deer Soc’y, Fallow Deer (Dama dama), 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. *Id.*

[217] *See, e.g.* Dep’t of the Environment, Australian Government, *Feral Animals in Australia* (last visited Mar. 13, 2015), http://www.environment.gov.au/biodiversity/invasive-species/feral-animals-australia (Australia: rabbits, sheep, red fox); Elizabeth Kolbert, *The Big Kill,* The New Yorker, Dec. 22, 2014, *available at* http://www.newyorker.com/magazine/2014/12/22/big-kill (New Zealand: mammals); *History of grey squirrels in UK*, The Telegraph, 18 Mar., 2014, http://www.telegraph.co.uk/news/earth/wildlife/10705527/History-of-grey-squirrels-in-UK.html (United Kingdom: Grey Squirrels), United States (Rainbow Trout, Pheasant, Fallow Deer)

[218] *American Acclimatization Society*, *supra* note 72 (discussing wildlife released by the Society, including pheasants, starlings, sparrows, and salmon); *Ornithological and Piscatorial Acclimatizing Society*, Daily Alta California, Feb. 13, 1871, at 1, *available at* http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=DAC18710213.2.3#. *See also* HALVERSON, *supra* note 67, at 28-29 (discussing the role of private acclimatization societies in the translocation of game species throughout the world).

[219] *Id.* at 38.

[220] *See, e.g.*, COLORADO PARKS & WILDLIFE, COLORADO PARKS & WILDLIFE: MOOSE REINTRODUCTION 1 (Nov. 2013), *available at* https://cpw.state.co.us/Documents/WildlifeSpecies/Mammals/MooseReintroductionFactSheet.pdf (discussing the introduction of Moose in Colorado in 1978); Or. Dep’t Fish & Wildlife, Hunting in Oregon: Upland Bird Game Species (2014), http://www.dfw.state.or.us/resources/hunting/upland_bird/species/; Ark. Game & Fish Comm’n, History of Elk in Arkansas (2011), http://www.agfc.com/hunting/pages/huntingelkhistory.aspx (“In 1981, the Arkansas Game and Fish Commission, in cooperation with private citizens, initiated an[] elk restoration project in the Ozark Mountains of northwest Arkansas.”); State of Hawaii, Div. of Forestry & Wildlife, Game Mammal Hunting (2014), http://dlnr.hawaii.gov/recreation/hunting/mammal/.

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.[221]

Evidence suggests that mountain goat properly managed are a benign addition to ecosystems,[222] but the issue here is not whether or not the introduction is or was a good idea.[223] 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,[224] and that while Congress may act to curtail or limit this right,[225] they have 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.[226] Therefore, the State of Utah continues to introduce avowedly non-native "exotic" fish like Rainbow Trout.[227] These ongoing translocations, without opposition

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Mountain Goats, in particular, have proved popular with many State wildlife management agencies and have been introduced in a number of areas. Wendell Harmon, *Notes on Mountain Goats in the Black Hills*, 25 J. Mammalogy 149, 149 (1949); John W. Laundre, Final Report: The status, distribution and management of mountain goats in the Greater Yellowstone Ecosystem (1990) (noting that "[s]ince the 1920's state wildlife agencies in the northwestern U.S. have introduced goats into previously uninhabited regions"); *id.* at 5 ("Personnel of the Montana Department of Fish, Wildlife, and Parks introduced 55 goats into various ranges northwest of Yellowstone Park between 1947-59 and 72 goats into the Absaroka/Beartooth mountains between 1942 and 1958. Twelve goats were introduced by the Idaho Department of Fish and Game into the Palisades /Black Canyon area near Swan Valley, Idaho in 1969-71.") (citations omitted).

[221] HALVERSON, *supra* note 67, at 5.

[222] E-mail from Kerry Burns, Forest Wildlife Biologist, U.S. Forest Service, Black Hills National Forest, to Devin Kenney, Law Student, Mich. State Univ. Coll. of Law (Mar. 3, 2015, 12:21 PM CST) (on file with Author).

[223] Admittedly, some of the translocations discussed above have impacted local environments negatively. Kolbert, *supra* 217. On the other hand, other species have become such a part of their new environment that they are almost considered indigenous. *Remains of Roman rabbit uncovered*, *supra* note 214. 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.

[224] Diamond, *supra* note 211, at 700-07.

[225] 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, however, 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. Because 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.

[226] UTAH CODE ANN. § 23-15-2 (2014).

[227] Including within Manti-La Sal National Forest itself. *See* Utah Division of Wildlife Resources, *Great summer fishing at Cleveland Res*, Wildlife News, June 13, 2014, http://wildlife.utah.gov/wildlife-news/1436-great-summer-fishing-at-

by USFS, suggest State authority to maintain population of non-native species.[228] Because, as will be discussed,[229] BLM and the Forest Service lack the authority to limit this power as exercised by State fish and wildlife agencies,[230] there is no reason to distinguish between the maintenance of previously established populations of introduced species and the establishment of new ones.[231]

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.[232] Perhaps because there is no reasonable basis from which to dispute that States had the authority pre-1976 to maintain stocks of previously introduced species—such as Rainbow Trout—BLM draws a distinction between pre-1976 and post-1976 introduced species.[233] 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.[234] This authority included the introduction and translocation of species.[235] The Forest Service and BLM cannot

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cleveland-reservoir.html ("A treasure trove of excellent summer fishing waters are waiting for you on the Manti-La Sal National Forest in central Utah. . . . A total of 5,000 nine- to 10-inch rainbow trout are placed in Cleveland Reservoir in the spring and summer [by DWR].").

[228] *Id.*

[229] *See supra* Subsection III.B.

[230] 16 U.S.C. § 528; 43 U.S.C. § 1732(b). 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 the Author).

[231] *See* discussion notes 233-37 and accompanying text.

[232] 43 U.S.C. § 1732(b).

[233] Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(ii).

[234] Congress emphatically declared that FLPMA "does not authorize exclusions simply because hunting and fishing would interfere with resource-management goals." H. Conference Rep. No. 94-1724, at 60 (1976), *reprinted in* U.S.C.C.A.N. 6175, 6229. Speaking of an earlier statute, the Multiple-Use and Sustained Yield Act of 1960, one Senator read into the record a letter urging adoption of similar language on the grounds that preserved the intent of all parties not to interfere with State management authority. 106 Cong. Rec. 12078, 12,085 (S. Humphrey) (Senate June 8, 1960). The provision was adopted. *Id.* at 12079.

[235] *See, e.g.*, UTAH DIV. WILDLIFE RES., *supra* note 1, at 3 (noting that mountain goat were first introduced in Utah in 1967).

impose an extra-statutory distinction—one that BLM implicitly recognizes as invalid[236]—upon the States in derogation of existing State management authority.[237] Thus, despite federal precedent to the contrary,[238] the state ownership doctrine remains relevant because State law controls and this theory is dominant at the State level.[239]

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 in the State of Utah

Given the void of Congressional 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 State.[240] Therefore, even if mountain goats are not native, the State of Utah has the authority to manage the species on all Forest Service and BLM lands within the geographical boundaries of the State of Utah.[241] The Supreme Court has held that preemption must be specific in areas of traditional state authority.[242] In this case, not only is there no explicit *preemption*, there is an explicit *reservation* of authority to the States.[243]

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[236] Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(vii) ("The BLM will prohibit, *to extent practicable and permitted* by Federal law, the introduction of any non-native species into WSAs.") (emphasis added).

[237] *See* discussion *infra* Subsection III.B.

[238] That is, federal precedent *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, *Kleppe*, 426 U.S. at 543, 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. *Hughes*, 441 U.S. at 337-38.

[239] Blumm & Paulsen, *supra* note 120, at 1462-64 n. 204.

[240] 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); Geer v. Connecticut, 161 U.S. 519, 522-28 (1896). *See also* Fund for Animals, Inc. v. Thomas, 932 F. Supp. 368, 371 (D.D.C. 1996).

[241] UTAH CODE ANN. § 23-15-2 (2014).

[242] Kleppe v. New Mexico, 426 U.S. 529, 545 (1976).

[243] 16 U.S.C. § 528; 43 U.S.C. § 1732(b).

Some argue that the agency regulations at issue trump State law.[244] 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.[245] 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."[246] 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.[247] In contrast, the example cited by the Grand Canyon Trust, a National Park Service regulation was at issue.[248] In the National Park System, due to concerns over illegal poaching in Yellowstone and others,[249] the default is a ban on hunting in parks unless the organic act of the specific park in question allows hunting.[250] The Grand Canyon Trust is, therefore, seeking to compare inapposite concepts.

While it is true that as apples and oranges are both fruit growing on trees,[251] and both the lands managed within the National Park System and lands managed by BLM and Forest Service

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[244] Letter from Audrey Huang, Supervising Attorney, Clinical Legal Education Program, Colo. Law, to Nora Rasure, Regional Forester, U.S. Forest Serv. 5 (Dec. 24, 2014).

[245] Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(vii), (f); Forest Serv. Manual ch. 4060, § .03.

[246] United States v. Brown, 431 F. Supp. 56, 59, 63 (D. Minn. 1976).

[247] 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.").

[248] Brown, 431 F. Supp. at 59, 63.

[249] 16 U.S.C. § 1 (identifying purpose of National Parks as to "conserve the scenery and natural and historic objects and wild life therein.").

[250] Nat. Rifle Ass'n v. Potter, 628 F. Supp. 903 (D.C. Cir. 1986).

[251] *See generally* James E. Barone, *Comparing apples and oranges: a randomized prospective study*, 321 British Med. J. 1569 (2000).

are all federally-managed land,[252] the similarities end there. For example, in the Voyageurs National Park, hunting was banned with the creation of the National Park because it is a National Park subject to the National Park Organic Act;[253] 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.[254] Congress specifically reserved state wildlife management authority, and no BLM or Forest Service regulation can override that statutory reservation of authority.[255]

i. 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 State of Utah 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[256]—but only to the extent that Congress did not statutorily foreclose that interpretation.[257] Although the question of the case might seem to be whether or not the State of Utah has authority to translocate "non-native" wildlife, the real issue is much broader.[258] As discussed above, there is no question that early Roman and English law allowed the translocation of game species of wildlife.[259] This power was coupled with the continuing authority to regulate

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[252] 16 U.S.C. § 1; 16 U.S.C. § 528; 43 U.S.C. § 1732(b).

[253] 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.

[254] 16 U.S.C. § 528; 43 U.S.C. § 1732(b).

[255] Nat. Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales, 468 F. 3d 826, 829 (D.C. Cir. 2006).

[256] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'") (citations omitted).

[257] *Id.* at 842.

[258] *See generally* Grand Canyon Trust letter, *supra* note 6; Huang, *supra* note 244.

[259] *See, e.g.*, British Deer Soc'y, *supra* note 216; Cross, *supra* note 214.

the taking of the species once introduced.[260] American wildlife law is but an outgrowth of the historical legal traditions of Roman and English law,[261] and translocations by state wildlife management agencies continue to be commonplace.[262]

In the Modern Era, both private[263] and state[264] actors continued—and continue—to exercise this common law authority,[265] to the extent not modified by state statute or preempted by federal statutory law.[266] In Utah, the state continues to hold translocation power.[267] Therefore, it should be seen that the translocation power is but one aspect of wildlife management authority.[268] 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.[269] In this case, not only has Congress spoken to and unambiguously[270] resolved the issue of whether it is the State or the Forest Service that manages wildlife, it has done so numerous times.[271] Therefore, regulatory decisions, whether by regulation

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[260] British Deer Soc'y, *supra* note 216 (discussing how Norman invaders introduced Fallow Deer and subsequently managed species for aristocratic use for centuries afterward).

[261] Geer v. Connecticut, 161 U.S. 519, 522-28 (1896).

[262] *See* discussion *supra* note 220 and accompanying text.

[263] *American Acclimatization Society*, *supra* note 72 (discussing wildlife released by the Society, including pheasants, starlings, sparrows, and salmon); *Ornithological and Piscatorial Acclimatizing Society*, Daily Alta California, Feb. 13, 1871, at 1, *available at* http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=DAC18710213.2.3#. *See also* HALVERSON, *supra* note 67, at 28-29 (discussing the role of private acclimatization societies in the translocation of game species throughout the world).

[264] Here meaning governmental. Both Federal and State agencies acted to introduce game species and other species deemed helpful in the United States. *See generally* HALVERSON, *supra* note 67 (discussing role of Federal and State agencies leading to the nationwide introduction of Rainbow Trout).

[265] *See, e.g.*, UTAH DIVISION WILDLIFE RES., *supra* note 1 (discussing State program stocking "exotic" trout in National Forest); COLORADO PARKS & WILDLIFE, *supra* note 220, at 1.

[266] Kleppe v. New Mexico, 426 U.S. 529, 545 (1976).

[267] As evidenced by the continual reintroduction game species like Rainbow Trout. *Great summer fishing at Cleveland Res*, *supra* note 227.

[268] *See* discussion *supra* Subsection III.A.

[269] *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).

[270] 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*, 467 U.S. at 842-43.

[271] 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* discussion, *supra* Subsection I.B.iii. These statutes do not, on their face allow for any exceptions. To

or policy, that exceed statutory authorization are ultra vires and unenforceable.[272] Neither the Forest Service nor BLM can (or may) amend statute through regulation, interpretive rule, or policy manual.[273]

ii. 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 management authority over wildlife management on Forest Service and BLM lands within their jurisdiction.[274] To the extent Congress acts to impose a legal regime, the federal government has absolute control over federal lands.[275] Where the government does not act, however, this authority is reserved to the States.[276]

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 threaten the destruction of federal property.[277] This authority dates back to

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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. Conference Rep. No. 94-1724, at 60 (1976), *reprinted in* U.S.C.C.A.N. 6175, 6229.

The provisions above are, however, far from the only instances where Congress has acted to reserve State authority to manage wildlife. *See also* Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1333(a); Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2909; Endangered Species Act, 16 U.S.C. § 1535; Sikes Act, 16 U.S.C. §§ 670a.

[272] *Chevron*, 467 U.S. at 842-43. In the Forest Service example, in particular, because Congress did not create the RNA program, *see* 36 C.F.R. § 251.23, 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.

[273] 5 U.S.C. § 553(b)(A)-(B). 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. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). *See also* Christensen v. Harris County, 529 U.S. 576, 587 (2000). Nor, indeed, can it change its own legislative rule reaffirming the statute through the creation of contrary interpretive rules and policy manuals.

[274] For examples of statutes, *see, e.g.*, 16 U.S.C. § 528; § 1133(d)(7); 43 U.S.C. § 1732(b). For examples of comparable regulations, *see* 36 C.F.R. § 293.10; 43 C.F.R. § 24.4(c).

[275] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

[276] *Id.* at 545; Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

[277] *Kleppe*, 426 U.S. at 545-46.

Hunt v. United States where the Supreme Court upheld the Forest Service's reduction of deer herds on federal lands in Arizona taken in response to the massive overpopulation of deer.[278] Although Congress has not acted to extend this authority to BLM,[279] the Supreme Court's reading of the Property Clause would certainly allow Congress to do so.[280] In the interim, however, *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."[281] 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."[282]

It is important to realize that at the time *Hunt* was decided, States were accorded broad control over and tacit ownership of wildlife, which had only recently been limited in a small degree.[283] As a counterpoint to this authority, however, the Court's decision in *Hunt* is entirely in accord with the then leading decisions on the authority of private landowners to protect their property from wildlife depredations.[284] The few courts having addressed the issue in detail had

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[278] Hunt v. United States, 278 U.S. 96, 99-101 (1928).

[279] FLPMA, BLM's Organic Act, has no comparable provision to that of 16 U.S.C. § 551 which directs "[t]he Secretary of Agriculture [to] make provisions for the protection against destruction by fire and depredations upon the public forests and national forests." *See* 43 U.S.C. § 1732(b).

[280] *Kleppe*, 426 U.S. at 537.

[281] United States v. Hunt, 19 F.2d 634, 640 (D. Ariz. 1927).

[282] *Hunt*, 19 F.2d at 641.

[283] 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 *Lacoste*, reaffirmed just four years later that States "owned" the wildlife within their borders. 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 *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." *Holland*, 252 U.S. at 434.

[284] 21 A.L.R. 199-200 (1922)

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.[285]

Thus, the holding of *Hunt* is (1) that Congress can authorize the Department of Agriculture to preempt State law[286] through regulation[287] and (2) that as it does so by destroying wildlife, the United States government acts just as any private landowner could do.[288] This does not mean that the federal government may control a species anytime it "feels" like doing so, much less to do so before putative damage has occurred.[289] 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 is damage, the Forest Service is authorized to do likewise according to the Congressional grant of authority taken pursuant to the Property Clause.[290]

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[285] *See, e.g.*, State v. Burk, 195 P. 16, 18 (1921 Wash.) ("[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).

More recent decisions have reached the same conclusion under similar circumstances. *See, e.g.*, State v. Vander Houwen, 177 P.3d 93, 94 (Wash. 2008); Cross v. State, 370 P.2d 371, 377 (Wyo. 1962); Cotton v. State, 17 So. 2d 590, 591 (Ala. Ct. App. 1944).

[286] In *Hunt*, the law in question was Arizona's prohibition on hunting deer outside of season. United States v. Hunt, 19 F.2d 634, 637 (D. Ariz. 1927). 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.").

[287] 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 also* Kleppe v. New Mexico, 426 U.S. at 539.

[288] *Hunt*, 278 U.S. at 100; UTAH DIV. WILDLIFE RES., supra note 1, 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").

[289] Note that the damage in *Hunt* was ongoing and pervasive. *Id.* Moreover, the Secretary had tried for some time to reach a compromise with the State before acting unilaterally. *United States v. Hunt*, 19 F.2d 634, 640 (D. Ariz. 1927)

[290] 21 A.L.R. 199-200 (1922); *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*. J.C. Vance, 93 A.L.R. 2d 1366 (1964).

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.[291] 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.[292] Although the record at the Supreme Court is scanty, the lower court decision made extensive findings as to the destruction caused in the Grand Canyon National Game Preserve by the massive overpopulation of deer.[293] A brief sampling of this record is illustrative:

> [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.[294]

Contrast this with the case at hand: preliminary survey research found that the primary—exclusive—damage to the La Sal alpine environment came through damage to "sensitive soil crusts" and "trampled vegetation" that ostensibly the introduction of the mountain goat

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[291] Huang, *supra* note 244, at 4.

[292] Although the private right is today limited by State law, formerly this right was considered to be very expansive. Annotation, *Right to kill game in defense of property*, 21 A.L.R. 199 (1922). *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.").

[293] *Id.* at 636-640.

[294] *Id.* at 636.

caused.[295] Besides the fact that neither this level of "damage" nor the number of animals—20 as compared to a herd of sufficient size to incur 10,000 mortalities in *a single year* from principally starvation—compares to that documented in the record in *Hunt*, the study is flawed because, in contrast to Utah's long experience and expertise gained managing mountain goats,[296] the study considers only one day in one year[297] and the survey did not begin until after the goats were introduced, eliminating the possibility of comparing the condition of the area before and after the introduction of the goats.[298] Furthermore, despite the participants' efforts, the results make it impossible to say what damage, if any, actually resulted from introduction of goat, and what "damage" already occurred through use of the habitat by other large grazing animals such as deer, elk, and livestock.[299]

The study even admits that (1) the hoof prints could not be identified conclusively as being mountain goat, only that they were assumed to be the hoof prints of mountain goats given the elevation,[300] and (2) that elk, deer, and livestock cause the same damage to the same environment in the same way.[301] And yet, no party seems to be calling for the removal of those

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[295] MOUNTAIN GOAT STUDY, *supra* note 194, at 4-5; WILD UTAH PROJECT, SPECIAL STATUS PLANT OCCURRENCES AND MOUNTAIN GOAT IMPACTS: 2014 SURVEY REPORT 2 (Nov. 2014) (on file with Author).

[296] Wood, *supra* note 3.

[297] One day that occurred a mere two weeks after the goats had arrived in the area! MOUNTAIN GOAT STUDY, *supra* note 194, at 1.

[298] *Id.* at 1-2. This is problematic because this means there is no "baseline data on percent cover of alpine vegetation for future comparisons." Laundre, *supra* note 220, at 15.

[299] MOUNTAIN GOAT STUDY, *supra* note 194, at 4.

[300] *Id.* at 5.

[301] *Id.* at 4. *See also* WILD UTAH PROJECT, *supra* note 295, at 1. Both studies—well, the one study and summary of that study featuring a map—raise the "straw man" hypothesis that the hoof prints might be those of deer or elk, but then dismiss the possibility because "any use by elk or deer . . . is cumulative." MOUNTAIN GOAT STUDY, *supra* note 194, at 4; *see also* WILD UTAH PROJECT, *supra* note 295, at 2. The Author is not sure, what *exactly*, this is supposed to mean except that it acknowledges that deer and elk, which are indisputably native species, cause "damage" to "sensitive soil crusts" just fine without the help of any mountain goat. Research into the Grand Canyon Trust's apparent animosity towards ungulate (hoofed) mammals is beyond the scope of this Article. Even so, "[t]his [apparent] lack of concern for demonstrated threats to wildlife and focus on hypothetical threats to a relatively small area of vegetation is puzzling." Vernon C. Bleich, *In My Opinion: Politics, Promises, and Illogical Legislation Confound Wildlife Conservation*, 33 Wildlife Soc'y Bulletin 66, 67-68 (2005).

species![302] In short, the premature conclusions drawn from insufficient research, the inconclusiveness of that "research," and the inability to tie the limited effects on the ground to the presence of mountain goats simply does not justify USFS action under the *Hunt* standard.[303]

Even if the above were not true, there is no suggestion that mountain goats have harmed or will harm the RNA in any sense exceeding the "damage" inflicted through the introduction of prior species, like rainbow trout; the Grand Canyon Trust's reliance on the Forest Service permit regulation borders, therefore, on the farcical.[304] Grand Canyon Trust asserts that permitting is necessary based on the *goats*' use of federal lands.[305] If its interpretation is correct, then *each goat* needs to obtain its own permit in order to live and graze in the Mount Peale RNA.[306] The flaw here is that the regulation was (and is) intended to apply to *human use and occupancy*, not the use or occupancy of land by wildlife.[307] In sum, this reading contorts an otherwise straightforward regulation beyond all recognition.[308]

iii. BLM's WSA regulation and the Forest Service's RNA regulation are *ultra vires* as applied to the State of Utah

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

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[302] *See generally* Grand Canyon Trust letter, *supra* note 6; Huang, *supra* note 244.

[303] 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.").

[304] Huang, *supra* note 244, at 9.

[305] *See generally* Grand Canyon Trust letter, *supra* note 6; Huang, *supra* note 244.

[306] After all, each goat uses the land the Forest Service manages separately. *Id.*

[307] Although this point seems rather obvious, animals are not people and are not subject to the same rights and legal duties as people. Alan Yuhas, *Chimpanzees are not people, New York court decides*, The Guardian, Dec. 4, 2014, http://www.newslocker.com/en-us/profession/animals_news/chimpanzees-are-not-people-new-york-court-decides/view/. Given that animals lack the right (and ability) to participate in the democratic process, it is fitting that they also lack the obligation to conform their behavior to the dictates emerging from that process.

To stretch the ridiculousness further, consider the possibility of the introduction of a non-native species of wildflower. Would each plant need to apply for and receive its own separate permit or could the plant "community" apply for a permit as a whole?

[308] Furthermore, as noted in Subsection III.A, DWR currently manages wildlife resources in Manti-La Sal National Forest and it does so, in part, by annually stocking thousands of "exotic" Rainbow Trout into the waters of the National Forest. *Great summer fishing at Cleveland Res*, *supra* note 227. Grand Canyon Trust does not appear to argue that DWR has any need to obtain a "special-use" permit from the Forest Service to continue doing so.

State. Taking the Forest Service example first, to the extent the RNA rule prohibits the State's management of mountain goat in the La Sal area, that regulation is ultra vires—none of the statutes cited give such authority to the Forest Service.[309] The Forest Service may have authority to implement RNA restrictions against private parties,[310] but not States because State authority to manage wildlife is reserved by the savings clause.[311] To the extent the RNA rule and the Forest Service Manual attempt to change what Congress has established, the rule and manual are acting outside the authority of the Forest Service and are thus ultra vires.[312]

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.[313] This statute, originally passed in 1897, concerned only authority to prevent forest fires and damage to the National Forest System.[314] This statute remained unchanged in 1966 except for update to reflect codification of US Statutes.[315] There is no reason to believe that the enacting Congress intended the Forest Service have or exercise this authority.[316]

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[309] *See* discussion note 134 and accompanying text.

[310] Whether it does or does not is entirely irrelevant here and is beyond the scope of this Article.

[311] 16 U.S.C. § 528 (2014).

[312] Where an administrative rule and a statute conflict, the statute always wins. *See, e.g.*, Nat. Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales, 468 F. 3d 826, 829 (D.C. Cir. 2006).

[313] Experimental Areas and Research Natural Areas, 31 Fed. Reg. 5072, 5072 (Mar. 29, 1966) (to be codified at 36 C.F.R. § 251.23). A brief review of the statutes claimed as authority for the regulation, shows that § 551 remains Forest Service's primary source of authority. *See* discussion *supra* Subsection I.C.i.1.a.

[314] The Congressional record from the time makes this point very clear. *See* 30 Cong. Rec. 912 (1897) (statement of Sen. Stephen White) ("I might add that it would be a good thing to incorporate in this bill a provision for taking care of [forest] reservations [i.e. National Forests]. I have seen from my own doorstep during last year, for three weeks, fires raging within the limits of a forest reservation within which there was no Government official to do any good and from which everyone who could have protected the flaming forest was by law excluded."); *Id.* at 912-13 (statement of Sen. Richard Pettigrew) ("Under existing law these reservations are withdrawn from settlement, and yet no care is taken to preserve the timber therein. The consequence is that fires destroy more timber than all the settlers would consume."). *See also id.* at 913 (recommending the amendment that became modern 16 U.S.C. § 551); *id.* at 969 (statement of Rep. Thomas McRae) (expressing need to prevent total destruction of forests).

[315] *Compare* Sundry Appropriations Act of June 4, 1897, ch. 2, § 1, 30 Stat. 34, 35, *with* 16 U.S.C. § 551 (2012)).

[316] Indeed, given that the leading Supreme Court decision of the era specifically recognized the States' near exclusive jurisdiction to regulate wildlife, any reference at all to the authority of State wildlife management would have been unnecessarily redundant. Geer v. Connecticut, 161 U.S. 519, 529-30 (1896).

Turning to the BLM, the policies it has adopted in regards 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.[317] 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.[318] These are the only activities prohibited under the Wilderness Act, none of which relate to a preference for native over non-native wildlife.[319] Neither does this provision restrict state management authority, because, again, § 1133(d)(7) specifically reserves to the States jurisdiction over wildlife management.[320] The structure of the Act would seem to suggest that the uses described in subsection (d) of § 1133are exceptions to the restrictions imposed by the rest of the chapter.[321] 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."[322] Finally, this section of the Manual is itself *ultra vires* with regards to the very administrative regulations that it purports to interpret[323] because, as the Department of the Interior recognized in 43 C.F.R.

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317 *Compare* Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(vii), (f) ("The BLM will prohibit, to extent practicable and permitted by Federal law, the introduction of any non-native species into WSAs. . . . the BLM will remove, to the extent practicable and permitted by Federal law, any non-native fish or wildlife species from WSAs."); *and* Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness (2006) F.12 ("Transplants . . . of terrestrial wildlife species in wilderness may be permitted if necessary . . . . Transplant projects require advance written approval by the Federal administering agency."); *with* 43 U.S.C. § 1732(b) (restricting BLM and the Forest Service to preempt State wildlife management authority only when necessary to prevent hunting or fishing "for reasons of public safety, administration, or compliance with provisions of applicable law"); *and* 16 U.S.C. § 1133(d)(7) (reserving management of wildlife to the States).

318 16 U.S.C. § 1133(c).

319 *Id.*

320 § 1133(d)(7).

321 *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.").

322 § 1133(d)(7).

323 Interpretive rules, by their very nature, must "interpret" something. Legislative rules "create law . . . incrementally imposing general, extra-statutory obligations . . . . [while i]nterpretative rules, merely clarify or

§ 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[324] wildlife."[325]

iv. 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 required by the APA[326] or are merely advisory without substantive effect as they are interpretive rules.[327] Although an agency may create a valid interpretive rule without utilizing the notice-and-comment process;[328] such a rule, however, while perhaps binding to some degree on the discretion of the agency in achieving its regulatory goals,[329] is binding on third-parties only to the extent that it does not conflict with the underlying statute[330] *and* has "power to persuade."[331] Because neither the Forest Service nor

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explain existing law or regulations." Alcarez v. Block, 746 F.2d 593, 613 (9th Cir. 1984). Interpretive rules are not binding authority in the same manner as legislative rules. 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).

[324] Neither FLPMA nor 43 C.F.R. § 24.4(c) define "resident wildlife." This leaves the definition to debate, as noted in Subsection III.C.i.

[325] 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." Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(vii), (f). A Manual is considered an interpretive rule under the APA. 5 U.S.C. § 553(b). FLPMA, however, "does not authorize exclusions simply because hunting and fishing would interfere with resource-management goals." H. Conference Rep. No. 94-1724, at 60 (1976), *reprinted in* U.S.C.C.A.N. 6175, 6229.

[326] Legislative rules must be created through the notice-and-comment rulemaking process. This is true unless the rule falls within certain enumerated exceptions. § 553(b). These exceptions are "narrowly construed and only reluctantly countenanced." N.J. Dep't of Envtl. Protection v. U.S. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

[327] § 553(b)(A). One factor that a court considers 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." Amer. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980). 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." *Pac. Gas & Elec. Co.*, 506 F.2d at 38.

[328] 5 U.S.C. § 553(b)(A)-(B). *See also Alcarez*, 746 F.2d at 613.

[329] Generally speaking, interpretive rules are binding to some degree on the discretion of the agency promulgating the rule. *Amer. Bus Ass'n*, 627 F.2d at 529.

[330] Any rule or regulation that conflicts with statutory authority is invalid. Nat. Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales, 468 F. 3d 826, 829 (D.C. Cir. 2006).

[331] 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.'" *Christensen*, 529 U.S. at 587 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Considering that BLMs decision to restrict non-native species has no basis in either FLPMA or the

BLM utilizes the notice-and-comment process when promulgating its manual, the BLM policies are interpretive rules.[332] They conflict with the underlying statue,[333] and as interpreted by the BLM could lead to absurd results[334] and, therefore, do not have the power to persuade.[335] They must fall either as invalid or as inapplicable against the State.[336]

v. The Forest Service cannot require the State to obtain a permit before using National Forest land 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 as against the State.[337] First, and most obvious, the permitting requirement is regulatory while the savings clause reserving to the State the right to manage fish and wildlife is statutory.[338] Second, FLPMA makes explicit that the Forest Service cannot "require Federal permits to hunt and fish on public lands or on lands in the National Forest System."[339] If the Forest Service cannot require sportsmen 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.[340] Furthermore, the same provision makes clear that FLPMA is not intended to "diminish[] the responsibility and authority of the States for

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Wilderness Act, and that it explicitly exempts *feral* horses and burros from this restriction, the Manual's "power to persuade" is quite limited. *Compare* Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(vii), (f); *with* § (D)(10).

[332] *Christensen*, 529 U.S. at 587; Alcarez v. Block, 746 F.2d 593, 613 (9th Cir. 1984).

[333] 43 U.S.C. § 1732(b).

[334] If BLM can make rules 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"? *See generally* Bureau of Land Mgmt. Manual, ch. 6330.

[335] *Christensen*, 529 U.S. at 587.

[336] Considering that the Forest Service has no authority, given the savings clause at 16 U.S.C. § 528, to restrict DWR'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. *Pac. Gas & Elec. Co.*, 506 F.2d at 38.

[337] *See* 16 U.S.C. § 528 (2012); 36 C.F.R. § 293.10.

[338] The "special use" permit requirement is a creation of Forest Service regulation. 36 C.F.R. § 251.50 (2014). The savings clause that preserves the State of Utah's authority to manage wildlife is statutory. 16 U.S.C. § 528 (2012).

[339] 43 U.S.C. § 1732(b).

[340] Such a reading would seem to be contrary to the very spirit of FLPMA. Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1250 (D.C. Cir. 1980) ("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.").

management of fish and resident wildlife."[341] Prior to the enactment of FLPMA, States conducted translocations without any type of federal permitting requirement.[342] To require a State to first obtain a federal permit before engaging in activity that clearly fall within the scope of the existing wildlife management authority, that authority would be "diminish[ed]."[343] Therefore, to the extent these mandates conflict,[344] the statutory duty must control.[345]

C. To the extent the agencies' regulations are relevant or not contrary to Congressional mandate as applied to the States, the introduction of mountain goats violates neither the statutory nor regulatory duties the regulations impose.

i. There is no statutorily—or even regulatorily—binding definition of native species, therefore, because mountain goats are native to Western North America, the goats should be regarded as a native species.

The relevant federal statutes do not utilize, much less define, the term "native species" in the context of land management authority.[346] Assuming, arguendo, that Congress did authorize BLM or the Forest Service to restrict the introduction of non-native species, such authority alone

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[341] § 1732(b).

[342] *See generally* HALVERSON, *supra* note 67 (describing the role of the States, private acclimatization societies, and federal government in the introduction and propagation of rainbow trout).

[343] § 1732(b).

[344] The Author would suggest that these requirements do not conflict, although clearly not all would agree. *See* Huang, *supra* note 244, at 9.

[345] 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 & Reproductive 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, 1143 (D. Or. 2007), *depublished by* 2011 WL 3205773 (D. Or. 2011) (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).

[346] 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. *See* 18 U.S.C. § 42(a). Because there is no statutory definition or geographic limitation as to what constitutes a "native" versus "non-native" species, however, mountain goats meet at least the minimal requirements to be considered native under some definitions and usages of the term. *See, e.g.*, "Native, adj.," *Oxford Dictionaries* (2015), http://www.oxforddictionaries.com/us/definition/american_english/native ("animal of indigenous origin or growth."); "Native, adj.," *Merriam-Webster Dictionary* (2015), http://www.merriam-webster.com/dictionary/native ("[G]rown, produced, or originating in a particular place or in the vicinity."). This is particularly true if, as will be discussed *infra* Subsection III.C.ii, mountain goats are considered at the *genus* (*Oreamnos*), rather than *species*, level. If considered as either a genus or as a single species, the introduction of mountain goats in the La Sals could be described as "[t]ransplanting [within] the historical range of the species." Bureau of Land Mgmt. Manual, ch. 6330, § (D)(11)(e)(v). *See* discussion *infra* SubsectionIII.C.ii.

does not answer the question.[347] Both agencies' regulations employ a definition of "native" drawn from Executive Order 13112,[348] hardly a reliable source of authority.[349] More fundamentally, mountain goat are native to North America,[350] and are rightfully considered "native to North America" and not a "non-native" or "introduced" species.[351]

ii. Mountain goat (*Oreamnos* spp.) are native to Utah, but were extirpated by humans in prehistoric times

Again, assuming *arguendo* that BLM and Forest Services' respective readings of their Organic Acts to favor native species is valid, fossil evidence proves that mountain goats of the *Oreamnos* genus were resident in Southeastern Utah less than 15,000 years ago.[352] This species, Harrington's mountain goat, became extinct 10,000 years ago during the great extinction of Pleistocene Megafauna in North America.[353] Because the beginning of the mass extinction correlates with the arrival of humans in North America, overhunting and habitat change due to human interference are posited as the most probable causes of the extinction.[354] Given the

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[347] As noted, that would be assuming a lot. For example, Congress expressly directed the Forest Service that nothing in the Forest Service Organic Act "shall be construed as 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). *See also* 43 U.S.C. § 1732(b).

[348] Exec. Order No. 13112, 3 C.F.R. 13112 (2000).

[349] "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). Given that no Act of Congress grants the President the Authority to define "invasive" or non-native species, to the extent that any party relies on the Order itself for authority, it "cannot properly be sustained as an exercise of the President's . . . power." *Id.*

[350] Although this point is not in dispute, it bears repeating here. National Geographic, *Mountain Goat: Oreamnos americanus* (2015), http://animals.nationalgeographic.com/animals/mammals/mountain-goat/.

[351] Referring to Northwestern North America, it is clear that mountain goat are "a species that occurs naturally within a region, either evolving there or arriving and becoming established without human assistance" and are, therefore, native. "Native Species," *Science Dictionary* (2009), http://www.webquest.hawaii.edu/kahihi/sciencedictionary/N/nativespecies.php.

[352] Jim I. Mead, et al., *Extinction of Harrington's mountain goat*, 83 PROCEEDINGS NAT'L ACAD. SCIS. 836, 838-39 (1986).

[353] *Id.* (noting that the disappearance of Harrington's mountain goat coincided with the disappearance of other North American mammalian megafauna such as Shasta ground sloths, *Smilodon*, and horse); *id.* at 839 ("All vanished at . . . a time when local plant communities were experiencing considerable turnover[], and also when Clovis big game hunters were active in the Southwest."); *id.* at 836 (finding that synchronous extinctions of disparate large mammal species not consistent with climate-caused extinction).

[354] *Id.*; *see also* Jim I. Mead & Mark C. Lawler, *Skull, Mandible, and Metapodials of the Extinct Harrington's Mountain Goat*, 14 J. VERTEBRATE PALEOBIOLOGY 562, 573 (1994) ("Analysis of the dung from the

explosion of modern human population in the mountain valleys of Utah, there is virtually no possibility that mountain goats could ever migrate from the ranges where they are located to colonize new areas of prime habitat.[355]

At this time, the fossil record appears to indicate that the Harrington's mountain goat was a separate species that became isolated from its common ancestor with *Oreamnos americanus* sometime near the end of the most recent ice age.[356] Despite this evidence, it is entirely possible that the current consensus may shift as more remains are discovered of Harrington's goat.[357] As of now, the primary differences noted between the two species are a minor difference in overall size (i.e. Harrington's mountain goat fossils are about 30% smaller than modern mountain goat).[358] Such differences in size are hardly remarkable among disparate populations of the same species isolated from one another.[359]

Colorado Plateau implies that this small mountain goat ate a wide variety of browse and graze plants—whatever and 'anything' that was available. *Oreamnos harringtoni* lived in a number of different plant communities . . . .[These] habitats would have varied between a 'mesic' riparian community . . . on north-facing slopes, to the arid slopes on eastern and south-facing slopes."); *id.* at 573-74 ("The changing plant communities of the Colorado Plateau [during the Holocene], although severe, do not seem to have been drastic enough to rid the region of the entire menu of edible plants for this small mountain goat. Although the carrying capacity of the plant community(ies) needed for *O. harringtoni* is not known, it would seem fairly safe to say that it should be living someplace on the Colorado Plateau today.").

[355] *See generally* UTAH DIV. WILDLIFE RES., supra note 1.

[356] Paula F. Campos, et al., *Molecular identification of the extinct mountain goat,* Oreamnos harringtoni (*Bovidae*), BOREAS—AN INT'L J. OF QUARTERNARY RESEARCH 18, 22 (Jan. 2010).

[357] Often there is considerable debate among taxonomists—scientists that classify life into species—between those seeking to discover new species and others that seek to consolidate the known lists of animal species. Size and minor morphological differences such as those that exist between know fossils of Harrington's mountain goat and extant mountain goat are of the type that might "simply reflect[] the normal variation among individuals of the same species." Understanding Evolution, *Lumping or splitting in the fossil record*, Evolution.Berkeley.org (Nov. 2013), http://evolution.berkeley.edu/evolibrary/news/131104_lumperssplitters (describing how certain physical differences between members of the same species might lead to the erroneous assumption that fossils found in different localities belonged to different species).

[358] Mead & Lawler, *supra* note 354, at 565 (distinguishing features of *Oreamnos harringtoni* from *Oreamnos americanus* are strong backward curve to horns, 1/3 smaller size, and prominent tendon attachment "on the anterior surface of metacarpal III"); *id.* at 570 (demonstrating similar appearance of two animals, including that Harrington's mountain goat was white in color like existing mountain goat); *id.* at 572 (discussing further differences between the species, including proportional differences in the jaws); Mead, et al., *supra* note 352, at 836 ("Compared to living mountain goats . . . Harrington's mountain goat was small, with a more robust mandible, a distinctive palate, and larger dung pellets.").

[359] GEORGE A. FELDHAMER, ET AL., MAMMALOGY: ADAPTATION, DIVERSITY, ECOLOGY 39-40 (4th ed., 2005).

Although direct evidence of Harrington's mountain goat in the La Sal's is not available—at this time—the La Sal's are within the expected range of the species and contain habitat similar to that in areas where Harrington's mountain goat remains have been found:[360]

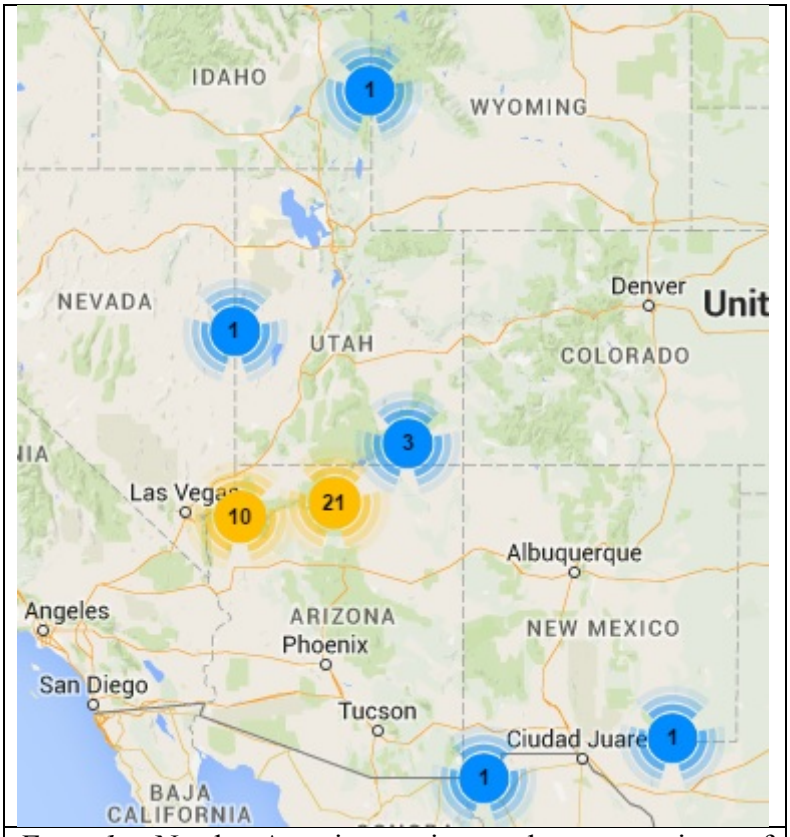

Fig. 1: North American sites where remains of Harrington's mountain goat (*Oreamnos harringtoni*) have been discovered[361]

[360] Mead & Lawler, *supra* note 354, at 563-65 (featuring map of "possible extent of *Oreamnos harringtoni*" which includes the La Sal area of Eastern Utah); *id.* at 572 (describing Harrington's mountain goat as a "a mountain goat well-adapted to the steep canyon country of the Colorado Plateau"); *id.* at 573 ("*O. harringtoni* lived in suitable habitats in the Great Basin, throughout the Colorado Plateau, and presumedly southward along the mountainous corridor at the Arizona-New Mexico border. . . .").

[361] Map of current locations wherein fossils of *Oreamnos harringtoni* fossils have been found, FAUNMAP/MIOMAP AT BERKELEYMAPPER, http://miomap.berkeley.edu/search.php (select "Database" box and choose "MIOMAP & FAUNMAP"; enter "Oreamnos" in "Genus" box; enter "harringtoni" in "Species" box; click search tab; follow "Map these localities" hyperlink).

Fig. 2: Map of Utah with Mount Peale (the site of Mount Peale RNA) marked.[362]

There is, therefore, good reason to believe that the Harrington's mountain goat once lived in the La Sal area[363] and that the native plant life evolved in the presence of an ungulate very similar to modern mountain goat suggesting that the introduction of mountain goat will have a negligible impact on native species in the La Sal range.[364] In fact, given that Harrington's mountain goat were likely extirpated in part due to human influence, the introduction of mountain goats is more

[362] Map of Utah with Mt. Peale marked, GOOGLE MAPS, http:// https://www.google.com/maps (enter "Mount Peale, Utah" in "Search" box).

[363] Mead & Lawler, *supra* note 354, at 563-65 (featuring map of "possible extent of *Oreamnos harringtoni*" which includes the La Sal area of Eastern Utah); *id.* at 572 (describing Harrington's mountain goat as a "mountain goat well-adapted to the steep canyon country of the Colorado Plateau"); *id.* at 573 ("*O. harringtoni* lived in suitable habitats in the Great Basin, throughout the Colorado Plateau, and presumedly southward along the mountainous corridor at the Arizona-New Mexico border. . . .").

[364] Jim I. Mead, Mary Kay O'Rourke, & Theresa M. Foppe, *Dung and Diet of the Extinct Harrington's Mountain Goat* (Oreamnos harringtoni), 67 J. MAMMALOGY 284, 288-89 (1986) (reporting the discovery of the pollen of numerous species of flowering plants in Harrington's mountain goat dung such as Gramineae (grasses), cf. Leptodactylon (leptodactylon), Artemisia (sagebrush), Phlox (phlox), Juniperus, Eriogonum (wild buckwheat), and cf. Lesquerella (bladder pod)[,] . . . Leptodactylon, Phlox, Caryophyllaceae (pink family), Cercocarpus (mountain mahogany), Eriogonum, cf. Saxifraga (saxifrage), and cf. Lesquerella); *id.* at 291 ("Large pollen concentrations are contained in dung pellets when animals eat flowers. If forage did not include flowers or if it occurs when few plants are flowering, then far lower pollen concentrations would be expected.").

an act of *restoration* than introduction, restoring the probable natural balance that once existed in the area.[365]

iii. Mountain goats (*Oreamnos americanus*) are a reasonable proxy species for extinct Harrington's mountain goat (*Oreamnos harringtoni*) and bighorn sheep (*Ovis canadensis*).

As noted, Harrington's mountain goats lived in and utilized the same habitats as modern mountain goat[366] and shared a very similar diet.[367]

Bighorn sheep cannot be introduced into either Mount Peale or Deep Creek because of the possibility of transmission of disease between domestic sheep and wild flocks.[368] Bighorn sheep are very susceptible to diseases borne by domestic sheep.[369] In the interest of filling an

[365] Mead & Lawler, *supra* note 354, at 563-65

[366] *Id.*

[367] Much like modern mountain goat, Harrington's mountain goat apparently ate whatever was available without strong preferences for one type of food over another. *Id.* at 573 ("Analysis of the dung from the Colorado Plateau implies that this small mountain goat ate a wide variety of browse and graze plants—whatever and 'anything' that was available. *Oreamnos harringtoni* lived in a number of different plant communities . . . .[These] habitats would have varied between a 'mesic' riparian community . . . on north-facing slopes, to the arid slopes on eastern and south-facing slopes."); *id.* at 573-74 ("The changing plant communities of the Colorado Plateau [during the Holocene], although severe, do not seem to have been drastic enough to rid the region of the entire menu of edible plants for this small mountain goat. Although the carrying capacity of the plant community(ies) needed for *O. harringtoni* is not known, it would seem fairly safe to say that it should be living someplace on the Colorado Plateau today."). *See also* Mead, O'Rourke, & Foppe, *supra* note 364, at 290; *id.* at 291 ("[T]he extinct mountain goat consumed a diet which averaged 25% grasses and 75% herbs and shrubs.") (citations omitted)..

Compare, for example, the feeding habits of mountain goat in the South Dakota Badlands, where goats are unquestionably "exotic." Harmon, *supra* note 220, at 149 (noting winter diet of introduced mountain goats in South Dakota Badlands as: "Moss and lichens, 60 percent; bearberry (Arctostaphylos uva-ursi), 20 percent; pinetwigs and needles (Pinus ponderosa) 10 percent; miscellaneous, including ferns, grasses, currant (Ribes sp.), juniper (Juniperus sp.), serviceberry (Amelanchier sp.), rose (Rosa sp.), willow (Salix sp.), and erigeron (Erigeron sp.), 10 percent").

[368] UTAH DIV. WILDLIFE RES., *supra* note 1, at 7.

[369] *Id.*; *see also* Wildlife Management Institute, *Federal Agreement on Bighorns Draws Ire of Western States* (2014), http://wildlifemanagementinstitute.org/index.php?option=com_content&view=article&id=318:bighorn-agreement ("Bighorn populations were locally extirpated in much of the West in the mid-20th century with anecdotal connections being made to the increase in domestic sheep grazing in adjacent areas. . . . . [E]fforts to reestablish stable populations have been hampered by periodic die-offs, and research began pointing to disease as a leading factor in the deaths. It's estimated that the current bighorn population in the United States is less than 10 percent of what it was before settlement of the West. Because bighorn sheep and domestic sheep are so closely related, bighorns are thought to be highly susceptible to bacteria carried by domestic sheep, but to which domestic sheep tend to be resistant. Research has isolated specific strains of respiratory bacteria including mycoplasma and pasteurella . . . carried by domestic sheep that cause pneumonia and death in bighorn sheep.").

open biological niche, therefore, introducing mountain goats, which are not susceptible to the same diseases as bighorn sheep, is a biologically sound approach.[370]

iv. The introduction of mountain goats into the Mount Peale RNA does not constitute a "human-caused environmental disruption" because there is no evidence that the introduction of goats has disrupted or will disrupt any of the species the protection of which is the purpose of the RNA

1. The presence of mountain goats likely does not threaten the continued existence of the La Sal Pika as evidenced by that fact that pika and mountain goat coexist without conflict in much of their home range

La Sal Pika is a sub- rather than full species of American Pika.[371] American Pika and mountain goats coexist without competition in the majority of the range of both animals.[372] The two species coevolved—that is, they evolved in close proximity to one another.[373] They consume similar foods but live very different lifestyles[374]—lifestyles that do not conflict with one another.[375] Although mountain goats and Pika theoretically consume the same grasses and

[370] UTAH DIV. WILDLIFE RES., *supra* note 1, at 4-5. Conflicts with other wildlife species should be something that is analyzed by the Wildlife Board—not the federal government. The federal government's role is limited to that of a land manager, not a wildlife manager. 122 Cong. Rec. 34,373 (1976) ("Traditionally, the States have regulated fishing and hunting of resident species of wildlife. The BLM and the Forest Service . . . have focused on management of their habitat. This bill *does nothing to change that*.").

[371] If, indeed, it is even that: some authorities do not even recognize the La Sal Pika as even being a separate subspecies at all. *See, e.g.*, David J. Hafner & Andrew T. Smith, *Revision of the subspecies of the American pika,* Ochotona princeps (*Lagomorpha: Ochotonidae*), 91 J. MAMMALOGY 401, 401 (2010).

[372] E-mail from Ruth Milner, Wildlife Biologist, Washington State Dep't of Fish & Wildlife, to Devin Kenney, Law Student, Mich. State Univ. Coll. of Law (Mar. 6, 2015, 12:48 PM PST) (noting generally that American Pika and mountain goat do not compete with one another for food or habitat) (on file with Author) [hereinafter Milner E-mail].

[373] Pika and goat "evolved together and although their occurrences may overlap, they occupy different niches; neither exhibit populations that appear to be above carrying capacity, so there is no reason to think one species may be out-competing and negatively impacting the other." *Id.*

[374] *Id.* (noting that although Pika and goat both consumes "forbes [sic] and grasses," each species inhabits very different areas within same overall alpine habitat); *see also id.* ("Goats also feed on shrubby materials like heathers and huckleberry which are much more abundant in meadows.").

[375] *Id.* (Question: "Do pika and mountain goat coexist on the same mountains . . . ?" Answer: Yes, both are alpine species, pika specialize on rocky, scree type habitat, goats are found in those slopes, but are much broader in the types of habitats they use. Walking in scree habitat is difficult, so goats may move through those habitats but it's unlikely that they spend the majority of their time there because conditions are more favorable on other substrates.").

forbs[376] as food, pika live almost exclusively in talus slopes[377] while mountain goats prefer mountain valleys and meadows where forage is more plentiful.[378] Furthermore, while pika practice "haying"—gathering grass and forbs[379] which they store overwinter to consume[380]—mountain goats, on the other hand, practice altitudinal migration in search of more plentiful food during tough winter months.[381] In sum, there is no evidence that the presence of goats in pika habitat presents a threat to the continued existence of the pika—or vice versa.[382]

To the extent there is a native species with which mountain goats might conflict, that species is bighorn sheep.[383] Even were there sheep in the La Sal area—which there are not following the extirpation of sheep due to overhunting and the introduction of disease—significant enough differences exist between the diet, lifestyle, and habitat of the species to conclude that a small number of goats would do no harm to bighorn sheep populations.[384] This

[376] According to the U.S. Department of Agriculture a forb is a "[v]ascular plant without significant woody tissue above or at the ground . . . . [which] may be annual, biennial, or perennial but always lack significant thickening by secondary woody growth and have perennating buds borne at or below the ground surface." U.S. DEP'T OF AGRIC., NAT. RES. CONSERVATION SCI., GROWTH HABITS CODES AND DEFINITIONS, *available at* https://plants.usda.gov/growth_habits_def.html.

[377] Nancy J. Huntly, Andrew T. Smith, & Barbara L. Ivins, *Foraging Behavior of the Pika* (Ochotona princeps), *with comparisons of Grazing versus Haying*, 67 J. Mammalogy 139, 139 (1986).

[378] Milner E-mail, *supra* note 372.

[379] Huntly, Smith & Ivins, *supra* note 377, at 143.

[380] *Id.* at 140 ("Pikas are therefore of particular interest as foragers because they both graze plants directly and gather and store vegetation (hay) in caches (haypiles) among the rocks. . . .[H]aying contributes primarily to winter survival and successful initiation of reproduction in early spring.").

[381] Clifford G. Rice, *Seasonal Altitudinal Movements of Mountain Goats*, 72 J. WILDLIFE MGMT. 1706, 1710 (2008).

[382] Milner E-mail, *supra* note 372.

[383] Laundre, *supra* note 220, at 2. *See generally* Thomas A. Lemke, *Origin, expansion, and status of mountain goats in Yellowstone National Park*, 32 WILDLIFE SOC'Y BULLETIN 532 (2004).

[384] *Id.* at 40-41 ("Data indicate food habits of sympatric sheep and goats diverge, especially in winter. Habitat use by both species also overlap but again, in sympatry, some separation seems evident. The differences in winter food and habitat use goats and sheep results mainly from differing wintering patterns. Sheep will often travel to traditional winter ranges well apart from summer ranges; goats more often concentrate their winter movements within or near their summer range. Indications are such movements are typical for sheep in Yellowstone Park. The result is a reduction in completion during the most critical time of the year. In the mountains north of Yellowstone, there is no evidence sheep populations have decreased as a result of increasing numbers of goats. Consequently, under the low population scenario, it is predicted goats will have little to no impact on sheep . . . ."); UTAH DIV. WILDLIFE RES., *supra* note 1, at 6-7.

point is moot, however, because there are *no bighorn sheep* in the La Sal region.[385] The risk of conflict between translocated mountain goats and other wildlife populations was considered by the Wildlife Board and they determined that they were confident the conflicts would be negligible.[386]

2. Even the study that the critics of the introduction program cited acknowledges that deer and elk cause the same damage that mountain goats might cause in the RNA

Mountain goat impacts noted in the study were commensurate with deer or elk impacts.[387] The Study relied upon by the Grand Canyon Trust was unable to differentiate between deer and elk grazing and hoof impacts and those cause by mountain goats.[388] This is important, because elk and deer were not introduced to the area.[389] Given that the RNA designation is meant to preserve the natural balance of the protected area, RNAs are not created, therefore, to preserve pristine habitat ungrazed by any animal.[390] Nor are Forest Plans violated when mountain goats tread upon and consume RNA vegetation—even protected or sensitive

[385] *Id.* at 7.

[386] Deep Creek Mountain Goat Plan Minutes, Oct. 14, 2014, at 1 (on file with Author).

[387] MOUNTAIN GOAT STUDY, *supra* note 194, at 4.

[388] *Id.*

[389] UTAH DIV. OF WILDLIFE, SOUTHEASTERN UTAH'S MAMMALS 29-30, *available at* http://wildlife.utah.gov/pdf/mammal.pdf (describing as indigenous to the La Sal Mountains, wapiti [elk] and mule deer).

[390] Even if this were the goal, it goal would be impossible anyway, given existing grazing allotments within the National Forest. Thus, it is perhaps ironic that the Grand Canyon Trust is so concerned over the presence of a mere 200-300 mountain goats when domestic sheep, which are present in the area, are known to cause far more damage. *See* Bleich, *supra* note 301, at 67-68. *See also* MARY O'BRIEN, THE TROUBLE WITH A FOCUS ON KILLING ROCKY MOUNTAIN GOATS AND SELLING HUNTING TAGS, GRAND CANYON TRUST (2013), at 11 (map of existing grazing allotments in National Forest); *id.* at 13 (acknowledging that La Sal range is used for cattle and sheep grazing, among other uses); Barb Smith, *Alpine Vegetation Impact Assessment*, Canyonlands Natural History Ass'n, http://www.cnha.org/discoverypool.cfm?mode=detail&id=1219425572826 (noting that "feral and pack goats have been known to use area [sic]").

Sheep and domestic goat grazing are ongoing uses of the Manti-La Sal National Forest. Dixie, Fishlake, and Manti-La Sal National Forests; Utah; Initiation of Forest Plan Assessment Process, 79 Fed. Reg. 48721, 48721-22 (Aug. 18, 2014). In the past, these areas were grazed more intensively by domestic sheep and goats than they are currently. Dean, *So. Tent Mtn (UT)*, SummitPost.org (Aug. 23, 2009), http://www.summitpost.org/so-tent-mtn-ut/178234. Furthermore, the Grand Canyon Trust's apparent distaste for the use of the area by native deer and elk is a little odd. WILD UTAH PROJECT, *supra* note 295, at 1 (deploring the "damage" caused by elk and deer in the RNA).

vegetation.[391] Additionally, the wallow areas identified in the Study were in areas devoid of vegetation.[392] Indeed, the study fails to demonstrate or suggest how 20 mountain goats are disproportionately or disparately impacting the RNA in some way different than the much larger populations of deer and elk.[393] The study also fails to consider sheep and cattle grazing in the same area[394] and uncovered no evidence even demonstrating that goats damaged any of the four sensitive plant species at issue.[395] Finally, even the map included with the study shows that goats barely used the RNA.[396]

3. Mountain goat have been introduced elsewhere in Utah, and the country, without causing "environmental disruption" as long as they are managed properly

History has shown that properly managed mountain goat populations, even if established by translocation, do not cause the habitat destruction that some opponents to La Sal population may fear.[397] 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

[391] In contrast to the position of Grand Canyon Trust, Huang, *supra* note 244, at 7-8, although the Forest Plan indicates USFS's intent to protect native plant communities, the Plan does not require that the Forest Service take any particular action to ensure that these plants are protected, *see* Friends of Columbia Gorge v. Elicker, 598 F. Supp. 2d 1136, 1156-57 (D. Or. 2007) [hereinafter *Friends I*], *depublished by* 2011 WL 3205773 (D. Or. 2011) [hereinafter *Friends II*]. Therefore, it is not true that USFS's failure to remove the goats is violative of the Forest Plan. Huang, *supra* note 244, at 6-8.

[392] MOUNTAIN GOAT STUDY, *supra* note 194, at 5.

[393] Instead, the Study relies on casting aspersions such as: recorded hoofprints "may be old," suspected damage "might be cumulative," and deer and elk foraging was not "knowingly recorded." *Id.* at 4-5. The Grand Canyon Trust's inability to demonstrate such damage is indicative of the fact that no apparent damage to the RNA has taken place as a result of the goat introduction.

[394] In fact, no mention at all is made of damage caused by grazing domestic goats or sheep. *See generally* MOUNTAIN GOAT STUDY, *supra* note 194. To be fair, the other document does note that "[t]his small mountain range has already incurred increased levels of browsing and grazing impacts from elk, deer, and cattle." WILD UTAH PROJECT, *supra* note 295, 1.

[395] Both studies dwell, extensively, on the subject of these plants, but neither actually indicates that any damage has occurred to the plants. *Id.* at 3; WILD UTAH PROJECT, *supra* note 295, at 2. One might be tempted to think that the Grand Canyon Trust "doth protest too much." WILLIAM SHAKESPEARE, HAMLET, Act 3, Sc. 2 line 218 (1602)

[396] WILD UTAH PROJECT, *supra* note 295, at 3.

[397] *See, e.g.*, Laundre, *supra* note 220, at 40-41 ("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.") (citations omitted).

population is not managed by the State Fish & Wildlife agency.[398] In fact, the National Park Service prohibits their hunting.[399] Without hunting or a natural predator, goat populations boomed in the Park and they predictably caused damage.[400] Again, this situation is unique and dissimilar to Utah since hunting is generally *prohibited* in National Parks, whereas it is permitted in BLM and Forest Service lands.[401] Hunting of the La Sal population is a goal of Utah DWR in their Mountain Goat Management Plan, and would be considered by the Wildlife Board in the event that the population reached a level where it could sustain a harvest.[402]

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[403] found that mountain goats were responsible for no to very little damage in the Park and no action was either recommended or taken in response to the perceived "threat."[404] In South Dakota, where 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,[405] no damage is reported after almost 100 years of use by goats.[406] Finally mountain goats are present in other

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[398] *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.").

[399] *Id.*

[400] *Id.*

[401] Nat. Rifle Ass'n v. Potter, 628 F. Supp. 903 (D.C. Cir. 1986).

[402] Deep Creek Mountain Goat Plan Minutes, Oct. 14, 2014, at 1 (on file with Author).

[403] Laundre, *supra* note 220, at 1.

[404] *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.") (citation omitted); *id.* at 40-41 (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).

[405] Harmon, *supra* note 220, at 149.

[406] Burns E-mail, *supra* note 222 ("Mountain goats have been in that [sic] 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.").

Wilderness Areas in the State of Utah and managed by State in conjunction with federal input without negative habitat impacts.[407]

IV. 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.[408] For this reason, the Forest Service, quite reasonably, disclaimed authority over the introduction of mountain goats in the La Sals, noting that the introduction was a "State action" that it did not have the authority to prevent.[409] "NEPA only refers 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."[410] In the instance that the action considered is a private or State action, only "[w]here an agency initiates federal action by publishing a proposal and then holding hearings . . . , [does] the statute . . . appear to require an impact statement."[411]

Because 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."[412] In sum, there is no federal action "where an

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[407] UTAH DIV. WILDLIFE RES., *supra* note 1, at 16.

[408] 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 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. 11974) (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").

[409] 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 the Author).

[410] *Andrus*, 627 F.2d at 1243.

[411] *Id.* at 1244.

[412] *Id.* at 1244.

agency has done nothing more than fail to prevent the other party's action from occurring."[413] 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.[414] 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.[415] To require otherwise would be to impose an unreasonable administrative burden on the agency.[416]

In a situation markedly similar to the 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,[417] the Columbia River Gorge.[418] The court concluded that the National Forest "special use" permit requirement applied to the State[419] and, therefore, determined that the Forest Service's decision not to require ODFW obtain a permit constituted a federal action.[420] This case is distinguishable,

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[413] *Id.* at 1244.

[414] *See also 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").

[415] *Id.* at 1245.

[416] *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.").

[417] 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. §§ 544-544e. In the Manti-La Sal National Forest, no such commission exists and no such federal approval is required.

[418] Friends of Columbia Gorge v. Elicker, 598 F. Supp. 2d 1136, 1155 (D. Or. 2007) [hereinafter *Friends I*], *depublished by* 2011 WL 3205773 (D. Or. 2011) [hereinafter *Friends II*].

[419] *Id.* at 1141 (explaining that Oregon Department of Fish & Wildlife worked with the Forest Service to develop 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.").

[420] *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").

however, because the Forest Service worked closely with the State of Oregon and approved the Reintroduction Plan created by the Department of Fish & Wildlife (ODFW).[421] 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 Oregon Department of Fish & Wildlife's Mountain Goat Reintroduction plan as a "special use" of the National Forest,[422] there is considerable reason to question the value of this holding.[423]

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[421] *Id.*at 1152 ("[T]he Memorandum reflects 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 Forest Service will monitor vegetation and track the goats.").

[422] *Id.* at 1153.

[423] First, the decision has been unpublished and was 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 that 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 ("Lets 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/AR2011013003951.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. *Friends I*, 598 F. Supp. 2d at 1152-54; 16 U.S.C. § 528. Fifth, the court relied exclusively upon the regulations themselves without analyzing USFS's authority to make those regulations. *Id.* at 1152-54. As noted above, the application of this regulation to the State seems to conflict with USFS's duty under the savings clause. Nat. 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 of Columbia Gorge*, 598 F. Supp. 2d at 1153-54; *Andrus*, 627 F.2d at 1239-40 (finding no major federal action where federal agency merely fails to prevent State from managing wildlife without consultation or approval of agency). *See also id.* at 1250 (§ 1732(b) of FLPMA "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.").

Moreover, *Andrus* and *Friends I* are distinguishable from this case because both involved the actions of State wildlife managers on federal lands.[424] Here, goats were introduced on *State* land adjacent to the National Forest.[425] Contrary to the unfounded assertion of the Grand Canyon Trust, there is a very weighty "question" as to how the introduction of an animal by State wildlife officials on State land is a federal action.[426] Ironically, the fact that the Forest Service pulled out its support of the project—after receiving Grand Canyon Trust's communiqué—removed the only possibility that federal action could be found.[427] Remember, federal opposition to State action *is not* federal action.[428]

Finally, it is not clear why the possibility of increased recreation should cause DWR's decision to become a federal action[429]—after all, even in an RNA, recreational users are allowed.[430]

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(b), *with* 16 U.S.C. § 528.

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. Grand Canyon Trust letter, *supra* note 6, at 5.

[424] Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1240 (D.C. Cir. 1980); *Friends I*, 598 F. Supp. 2d at 1141.

[425] Brown, *supra* note 3.

[426] Grand Canyon Trust letter, *supra* note 6, at 5.

[427] *Friends I*, 598 F. Supp. 2d at 1141.

[428] *Andrus*, 627 F.2d at 1239-41, 1250.

[429] Grand Canyon Trust letter, *supra* note 6, at 3 ("The stated purposes for this introduction are hunting and viewing, which are recreational activities that will involve additional impacts in this high elevation, roadless alpine area."). The Grand Canyon Trust, despite its apparent delusions of grandeur, does not own, manage, control, or otherwise administer the Mount Peale RNA. Regardless of whether its members happen to want to exclude other users of the area, the uses contemplated—hunting and wildlife viewing—are not prohibited. Indeed, to the extent that the Forest Service is authorized to close an area to recreation "for reasons of public safety, administration, or compliance with provisions of applicable law" after consulting with the DWR. 43 U.S.C. § 1732(b).

[430] And anyway, recreational use is both ongoing and extensive. Smith, *supra* note 390 ("Recreation, mainly from trampling effects, has been well documented as an impact on alpine soils and vegetation . . . . With increasing recreation use, and also increasing requests for outfitter/guide and special event permits, a need to access the extent of impacts on the La Sal Mountains, especially in the Mt. Peale Research Natural Area (RNA) has been

V. (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 not preempted by federal authority, DWR may employ any means available in the exercise of its authority over wildlife management.[431] There are instances where Congress has issued specific statutory directives 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.[432] 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.[433] 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.[434] Specifically, the National Park Service has come out against hunting techniques and management practices designed to alter the natural balance between predator and prey for the purpose of increasing game for human hunters.[435] This case is an example of explicit

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identified."); Rocky Mountain Research Station, U.S. Forest Serv., Mount Peale RNA 1, *available at* http://perceval.bio.nau.edu/mpcer_old/RMRS/RNAs/Utah/Mount%20Peale%20RNA.pdf ("The Middle Group rises very prominently southeast of the recreational "boomtown" of Moab. Hence, the RNA and adjacent lands are receiving increasing year-round hiking and skiing use."). To the extent this is an issue, this is the problem of the Forest Service, not the State of Utah or DWR. Besides, it seems counter-intuitive, frankly, to suggest that recreational *walkers* ought to be banned—what exactly do the members of the Grand Canyon Trust consider themselves? *See generally* Grand Canyon Trust letter, *supra* note 6; Huang, *supra* note 244.

[431] 16 U.S.C. § 528; Kleppe v. New Mexico, 426 U.S. 529, 545 (1976). Of course, DWR must do so in compliance with Utah law. *See* Utah Code Ann. § 23-14-1. Under Utah law, DWR is required to consult with the landowner, local government, and the public process (RAC and Wildlife Board) before taking action. *Id.*

[432] Alaska National Interest Lands Conservation Act of 1980, Pub. L. 96-487, 94 Stat. 2371, December 2, 1980 at 16 U.S.C. §§ 410hh-3233, 43 U.S.C. §§ 1602-1784.

[433] National Park Serv., Alaska Reg. Off., *Regulations* (last visited Mar. 19, 2015), http://www.nps.gov/akso/management/regulations.cfm.

[434] Alaska; Hunting and Trapping in National Preserves, 79 Fed. Reg. 52,595, 52,595-96 (Sept. 4, 2014).

[435] *Id.*

federal authority to regulate hunting—even here, however, the National Park Service took action only after extensive consultation with the State.[436]

The Forest Service and BLM are acting under no such sweeping federal authorization as the National Park Service.[437] Instead, their authority over the management of wildlife is constrained by both FLPMA and the Wilderness Act.[438] 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.[439] 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.[440] Furthermore, the structure of the Act would seem to suggest that the uses described in subsection (d) of § 1133are exceptions to the restrictions imposed by the rest of the chapter.[441] 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."[442]

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

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436 *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).

437 16 U.S.C. § 1 (identifying purpose of National Parks to "conserve the scenery and natural and historic objects and wild life therein"); National Rifle Ass'n v. Potter, 628 F. Supp. 903 (D.D.C. 1986).

438 16 U.S.C. § 1133(d)(7); 43 U.S.C. § 1732(b).

439 16 U.S.C. § 1133(c).

440 § 1133(d)(7).

441 *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.").

442 § 1133(d)(7). 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." 43 C.F.R. § 24.4(d). How could a State exercise "primary authority" if that authority were continually subject to potential restriction at the hands of BLM? *Andrus*, 627 F.2d at 1250.

compliance with provisions of applicable law."[443] What FLPMA does not allow the Department of the Interior or Agriculture to do is second-guess the wildlife management decisions of the States.[444] A crucial part of those decisions concern, of course, the methods employed by the several States to achieve those goals.[445] Barring the imminent destruction of federal land, which the Forest Service is authorized to prevent,[446] 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."[447] Any regulation, rule, or policy statement otherwise is without basis in statute and is, therefore, unenforceable against the State.[448]

VI. CONCLUSION

The State of Utah—or any other of the "several States" for that matter—has authority to introduce mountain goat 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 DWR.[449] 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.[450] The Organic Acts[451] and land management statutes[452] of the various federal land management

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[443] 16 U.S.C. § 1732(b). FLPMA, however, "does not authorize exclusions simply because hunting and fishing would interfere with resource-management goals." H. Conference Rep. No. 94-1724, at 60 (1976), *reprinted in* U.S.C.C.A.N. 6175, 6229.

[444] § 1732(b).

[445] *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* WESTERN ASS'N OF FISH & WILDLIFE AGENCIES, *supra* note 84, at 2-4.

[446] *See* Hunt v. United States, 278 U.S. 96, 99-100 (1928).

[447] § 1732(b).

[448] *See* discussion *supra* Subsection III.B.iii-v.

[449] Utah Code Ann. § 23-14-1.

[450] Kleppe v. New Mexico, 426 U.S. 529, 545 (1976); Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002).

[451] For the relevant portion of the Organic Acts creating the Forest Service and BLM, *see* 16 U.S.C. § 528 (declaring that State Fish & Wildlife Agencies retain jurisdiction over wildlife in National Forests); 43 U.S.C. § 1732(b) (same, regarding BLM-managed land).

agencies recognize and reserve State wildlife management authority in the majority of circumstances.[453]

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.[454] The translocation power is as much a part of wildlife management as the regulation of hunting and fishing and has been exercised at least as far back into antiquity.[455] Because the Forest Service and BLM both lack explicit Congressional authorization to preempt[456] State law as to the translocation of species on the public lands either agency manages,[457] the State may exercise that authority to introduce any animal, native or non-native,[458] on any federal land where State has wildlife management authority.[459]

Add: as it existed in 1976

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[452] Such as the Wilderness Act of 1964. 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.").

[453] *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.").

[454] 43 U.S.C. § 1732(b); 36 C.F.R. § 293.10; 43 C.F.R. § 24.4(c).

[455] *See* discussion *supra* Subsection I.B.iii.

[456] *See generally* "The hierarchy of legislative enactments – State versus federal legislation – Preemption of state law," 2 Sutherland Statutory Construction § 36:9 (7th ed.)

[457] *See* 16 U.S.C. § 528; § 1133(d)(7); 43 U.S.C. § 1732(b).

[458] 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* Federal Laws and Regulations: Public Laws and Acts, National Invasive Species Information Center, U.S. Dep't of Agric. (Aug. 26, 2014), http://www.invasivespeciesinfo.gov/laws/publiclaws.shtml.

[459] *See Kleppe*, 426 U.S. at 545 (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.").