THE PROBLEM WITH THE BUREAU OF LAND MANAGEMENT'S DELEGATION OF WILDLIFE MANAGEMENT IN WILDERNESS

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I. INTRODUCTION

"[I]n Wildness is the preservation of the world."[1] Early American preservationists, such as writers Henry David Thoreau and Walt Whitman and artists Albert Bierstadt, George Catlin, and Thomas Cole, recognized that mountains, prairies, and wilderness made America an exceptional country and inspired its people.[2] At a time when the United States was rapidly industrializing, these preservationists saw value in protecting land in its natural state.[3] In Europe, only the aristocracy had access to open space and the activities it provided,[4] whereas early generations of Americans gave our nation an endowment of public lands that encompass more than 28% of the country's landmass.[5] No other country has made a comparable contribution to land preservation.[6]

Wildlife is an essential part of wilderness. Etymologically, wilderness means "wild-deor-ness" or "the place of wild beasts."[7] The desire for better protection of American wildlife has motivated preservationists to seek protection for American wildernesses. For example, when a wilderness protection bill was presented to the Senate in 1957, Senator Richard L. Neuberger advocated for its passage by declaring that "wildlife, waterfowl, migratory fisheries, and similar resources require outdoor fastness and solitudes in which to survive, and . . . these must be safeguarded by some form of legislative shield."[8] The centrality of wildlife to wilderness was thus recognized by preservationists as well as lawmakers. To preserve and manage wilderness thus requires managing and preserving the wildlife living there.

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[1] Henry David Thoreau, *Walking,* ATLANTIC MONTHLY, June 1862, at 657, 665.

[2] Theodore Roosevelt IV, *Foreword* to DOUG SCOTT, THE ENDURING WILDERNESS, at ix (2004).

[3] *See id.* (explaining that early preservationists believed that wilderness "made America different and had a profound impact on its people").

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 2 (3d ed. 1982).

[8] 103 CONG. REC. S1906 (daily ed. Feb. 11, 1957) (statement of Sen. Richard L. Neuberger).

Despite the vital role wildlife plays in wilderness management, the Bureau of Land Management (BLM) has delegated the primary authority to manage wildlife in federally owned and protected wilderness to the states.[9] This is problematic. To see why, consider the following scenario. Over the past two years, the population of elk in the Bear Trap Canyon Wilderness[10] has continued to decrease. The declining population has led to reduced interest in guided hunting expeditions and decreased revenues for state and local hunting outfitters. As a consequence, hunting-related interest groups have lobbied state lawmakers to permit hunters to kill gray wolves in order to stabilize the elk population. Without researching other possible solutions, Montana Fish, Wildlife, and Parks (MFWP) issues thirty permits to hunt gray wolves in the wilderness area.[11] MFWP sells these permits to residents and nonresidents for several hundred dollars each. If the elk population subsequently stabilizes, the MFWP plans to issue additional permits to hunt elk for close to one thousand dollars each.

This scenario presents several potential violations of the Wilderness Act of 1964.[12] First, the MFWP issues the hunting permits for gray wolves without understanding the causes of the decrease in the population of elk or exploring less intrusive alternatives. Second, the MFWP plans to allow hunting of elk to commence as soon as the population stabilizes without assurance that the population can withstand continued hunting. Third, the MFWP's wildlife-management decision benefits hunting-related interests at the expense of preserving an essential feature of wilderness—its wildlife.

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[9] 43 C.F.R. § 24.4(d) (2012).

[10] This is the Bear Trap Canyon Unit of the Lee Metcalf Wilderness in Montana. *Bear Trap Canyon Wilderness Area*, BUREAU OF LAND MGMT. (last updated June 28, 2012), http://www.blm.gov/mt/st/en/fo/dillon_field_office/recreation/bear_trap.html. It is under the BLM's control. *Id.*

[11] Although this specific scenario is hypothetical, the situation is based on a similar incident. *See* Tony Davis, *Cougar Blamed in Deaths of 15 Southwestern Arizona Bighorns Is Shot Dead,* ARIZ. DAILY STAR, Sept. 3, 2009, at A14 (reporting that Arizona Game and Fish employees shot a mountain lion in a BLM wilderness as part of an effort to restore the bighorn sheep population).

[12] 16 U.S.C. §§ 1131–1136 (2006).

This Note contends that the BLM's policy of delegating wildlife management in federal wildernesses violates the Wilderness Act. When Congress initially set aside land for protection under the Wilderness Act, it required the federal agencies managing these lands "to preserve its wilderness character."[13] One quality of "wilderness character" is the natural state of the land.[14] Numerous studies have shown that hunting alters animal behavior, population structure, and species distribution.[15] As my scenario suggests, deference to the states can, and often does, lead to unnatural intervention with the native species, as states seek to maximize game-management opportunities.[16] Thus, delegating wildlife management to the states may hinder the BLM's ability to fulfill its mandate to preserve wilderness character.

To understand the critical nature of this issue, it is essential to understand the magnitude of federal land ownership and management by the BLM. As of February 2012, the federal government owned and administered between 635 and 640 million acres of land, or about 28% of the total land area of the United States.[17] The BLM administers 247.9 million acres of federal lands, more than any other agency.[18] As of September 2010, the BLM administered over 8.5 million acres of wilderness, representing approximately 8% of total wilderness acreage.[19]

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[13] *Id.* § 1133(b).

[14] *See* PETER LANDRES ET AL., KEEPING IT WILD: AN INTERAGENCY STRATEGY TO MONITOR TRENDS IN WILDERNESS CHARACTER ACROSS THE NATIONAL WILDERNESS PRESERVATION SYSTEM 7 (2008) (identifying "untrammeled," "natural," "undeveloped," and "solitude or a primitive and unconfined type of recreation" as the four qualities of wilderness character to be preserved by the agencies).

[15] *See, e.g.*, David N. Cole & Richard L. Knight, *Impacts of Recreation on Biodiversity in Wilderness*, *in* WILDERNESS AREAS: THEIR IMPACTS; PROCEEDINGS OF A SYMPOSIUM 33, 35–36 (1990) (discussing the impact of hunting on biodiversity in wilderness areas).

[16] *See* Dick Carter, *Maintaining Wildlife Naturalness in Wilderness,* 3 INT'L J. WILDERNESS 17, 17 (1997) (noting that most state-wildlife-management programs involve considerable human domination including predator control).

[17] ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 3 (2012).

[18] *Id.* at 10.

[19] ROSS W. GORTE, CONG. RESEARCH SERV., WILDERNESS: OVERVIEW AND STATISTICS 11 tbl.3 (2010).

Reformation of the BLM's wildlife-management policy is critical to protecting the natural state of American wilderness under its control. Further, such change is urgent. For example, Congress removed the Endangered Species Act's protections for Rocky Mountain gray wolves in Montana and Idaho in 2011.[20] As a result, the MFWP set a wolf-harvest quota of 220 for the 2011 hunting season.[21] During these wolf-hunting seasons, gray wolves in BLM wilderness areas are considered fair game.[22] In setting hunting quotas, the MFWP does not use scientific methods for collecting data;[23] instead, it manages the gray wolf population without regard to their top-down influence throughout the ecosystem.[24] If the BLM allows state agencies such as the MFWP to disrupt the natural state of wilderness by setting arbitrary harvest quotas, the harm to the wilderness character of these areas might be irreversible.

This Note first describes developments leading to the Wilderness Act, including the wilderness preservation movement and early wilderness regulations, and introduces the Wilderness Act and post-Wilderness Act legislation. In order to understand the framework under which the agencies operate, this Note then describes the management of public lands, including the history of federal land ownership, the regulations and policies promulgated

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[20] *See* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38, 150 (2011) (directing the Secretary of the Interior to reissue the 2009 final rule delisting the wolf in Montana and Idaho while shielding the reissued rule from judicial review).

[21] *FWP Commission Approves Wolf Hunt Season and Quotas*, MONT. FISH, WILDLIFE & PARKS (July 14, 2011), http://fwp.mt.gov/news/newsReleases/headlines/nr_3966.html.

[22] During the 2011 hunting season that ended February 15, 2012, 166 wolves were harvested or 75% of the quota. MONT. FISH, WILDLIFE & PARKS, 2011 MONTANA WOLF HUNTING SEASON REPORT 1 (2012), *available at* http://fwp.mt.gov/fwpDoc.html?id=54831. The harvest included 115 gray wolves or 69% of the state-wide harvest. *Id.* The majority of wolves (52%) were harvested from public lands. *Id.*

[23] *See* Jay S. Mallonee, *Hunting Wolves in Montana—Where Are the Data?*, 9 NATURE & SCI. 175, 179 (2011) (arguing that proposed quotas for public wolf hunts in Montana are arbitrary).

[24] The Montana agency's stated purpose for allowing wolf hunting is straightforward: "to ensure that the wolf stays off the federal endangered species list while pursuing a wolf population level below current numbers in response to impacts on game populations and livestock." MONT. FISH, WILDLIFE & PARKS, *supra* note 22, at 2.

by the BLM, the courts' role in agency review, cases regarding wildlife in wilderness, and subdelegation of agency authority. Next, this Note argues that the BLM's policy of delegating wildlife management to the states violates the Wilderness Act. This Note concludes by offering possible solutions to this problem.

II. BACKGROUND

In managing wilderness, the duties of federal agencies and the objectives of states often conflict. On one hand, Congress has declared its intent to preserve wilderness in its natural state "for the American people of present and future generations."[25] On the other hand, states face ever-increasing demands to derive revenue from resources within their borders.[26] When a federal agency cedes its authority to manage a critical aspect of wilderness, such as wildlife, it is unable to completely fulfill its duties under the Wilderness Act. To demonstrate the shortcomings of the BLM's policy of delegating wildlife management to the states, a review of the historical context and purpose of the Wilderness Act is necessary.

A. WILDERNESS ACT IN HISTORICAL CONTEXT

1. The Wilderness Preservation Movement. The founders of the wilderness preservation movement recognized "a fundamental human need for wilderness, not principally for recreational use or scientific study but for sustaining the American character shaped by our pioneer encounter with the wild frontier."[27] As Aldo Leopold, a founder of the Wilderness Society,[28] wrote in 1925, "[m]any of the attributes most distinctive of America and

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[25] 16 U.S.C. § 1131(a) (2006).

[26] *See* ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 2 (2012) (reporting that twenty-nine states projected budget shortfalls totaling $47 billion for fiscal year 2013).

[27] SCOTT, *supra* note 2, at 19.

[28] JAMES MORTON TURNER, THE PROMISE OF WILDERNESS: AMERICAN ENVIRONMENTAL POLITICS SINCE 1964, at 23–24 (2012). The Wilderness Society, one of the largest environmental organizations in the United States, is a nongovernmental organization that works to advance public lands protection. *Id.* at 23.

Americans are the impress of the wilderness and the life that accompanied it."[29] Leopold asked, "Shall this fundamental instrument for building citizens be allowed to disappear from America, simply because we lack the vision to see its value?"[30]

Wilderness conservation efforts began long before Aldo Leopold and others founded the Wilderness Society in 1935. In 1872, Congress established Yellowstone National Park, setting aside over two million acres in Wyoming and Montana.[31] Although many leaders of the movement placed great hope in the national park system as a means to preserve wilderness, they soon realized that the national parks combined the goals of protecting nature and promoting tourism.[32] In a letter to the National Park Service in 1939, a leader of the Federation of Western Outdoor Clubs wrote, "We have seen many of our favorite trails turned into roads and highways, our remote camp spots into auto camps and cabin grounds. . . . There were beautiful mountain flowers where those cabins, auto camps and roads now lie."[33]

As faith in the national parks system waned, preservationists focused their efforts on preserving wilderness independent of the national parks.[34] The movement for greater protection of wilderness areas began in the national forests. Through Aldo Leopold's endeavors, in 1924 the Forest Service established the Gila Wilderness in New Mexico, setting this land aside for preservation.[35] In 1926, the Forest Service designated "roadless areas" in the lake country of Superior National Forest in northern

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[29] Aldo Leopold, *Wilderness as a Form of Land Use*, 1 J. LAND & PUB. UTIL. ECON. 398, 401 (1925).

[30] Aldo Leopold, *The Last Stand of the Wilderness*, 31 AM. FORESTS & FOREST LIFE 599, 602 (1925).

[31] *See* Yellowstone National Park Act of 1872, ch. 24, § 1, 17 Stat. 32 (1872) (codified at 16 U.S.C. § 21 (2006)) (establishing the boundaries of Yellowstone National Park).

[32] SCOTT, *supra* note 2, at 24–25.

[33] *Id.* at 25.

[34] *See* Michael McCloskey, *What the Wilderness Act Accomplished in Protection of Roadless Areas Within the National Park System*, 10 J. ENVTL. L. & LITIG. 455, 459–60 (1995) (discussing preservationists' concerns over the permanence of wilderness within the national parks that lead to the passage of the Wilderness Act).

[35] *See id.* at 29, 54 (discussing the establishment of the Gila Wilderness Area and subsequent wilderness areas).

Minnesota.[36] While these were important steps toward the goal of wilderness preservation, the preservationists understood that regulation would be necessary to keep these lands protected.

2. Early Wilderness Regulations. After the success of the Gila Wilderness designation, preservationists began to press for more wilderness designations and stronger protections for these areas.[37] In response, the Chief of the Forest Service, William B. Greely, ordered a survey of undeveloped national forest areas that could potentially be designated as wilderness.[38] Shortly thereafter, the Forest Service promulgated Regulation L-20,[39] "the first nationwide policy for wilderness preservation."[40] Although the stated purpose of Regulation L-20 was to "maintain[ ] primitive conditions of environment, transportation, habitation, and subsistence, with a view to conserving the value of such areas for purposes of public education and recreation,"[41] the regulations did not prohibit the development of wilderness.

In 1939, the Secretary of Agriculture announced the U Regulations.[42] These regulations classified areas under the Forest Service's jurisdiction into four categories: wilderness areas (Regulation U-1), wild areas (Regulation U-2), recreation areas (Regulation U-3), and experimental and natural areas (Regulation U-4).[43] With exceptions for administrative needs and emergencies, the U Regulations banned roads and motorized transportation, commercial uses, motorboats, and the landing of aircraft in areas designated as wilderness.[44] The U Regulations further protected wilderness areas by elevating the decision to change the status of areas from district rangers to the Chief of the Forest Service and

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[36] GERALD W. WILLIAMS, THE FOREST SERVICE: FIGHTING FOR PUBLIC LANDS 421 (2007).

[37] *See* SCOTT, *supra* note 2, at 29 (noting that the idea of designating areas as wilderness "took hold, echoed by others within the Forest Service Staff").

[38] *Id.*

[39] FS Directive Reg. L-20, Experimental Forests and Ranges, Natural Areas and Primitive Areas (U.S.D.A. 1929).

[40] SCOTT, *supra* note 2, at 29.

[41] FS Directive Reg. L-20.

[42] Land Uses, 36 C.F.R pf. 251 (1939).

[43] *Id.* §§ 251.20–.23.

[44] *Id.* § 251.20.

the Secretary of Agriculture.[45] Moving the designation authority away from district rangers to key personnel within the Department of Agriculture helped ensure that Washington paid attention to these areas.[46]

3. The Wilderness Act. Although the regulations provided some stability for American wildernesses, preservationists knew regulations would be insufficient to permanently protect these wild places. After World War II, preservationists demanded congressional action to preserve wilderness.[47] Their demands intensified after a 1949 survey "concluded that before many years 'original wilderness . . . will have disappeared entirely."[48] Howard Zahniser, a leading wilderness advocate and the drafter of the Wilderness Act,[49] suggested that "statutory protection was necessary to stabilize the system" and prevent future administrative decisions that could decrease the amount of wilderness.[50] Zahniser, among others, feared that the federal government, influenced by commodity interest groups, would exclude too much land from protection as wilderness areas were reclassified.[51] Zahniser, in cooperation with the National Parks Association, the Sierra Club, the National Wildlife Federation, and the Wildlife Management Institute, prepared a draft bill.[52] These efforts culminated, after nine years of deliberation and the introduction of sixty-five different bills,[53] in the Wilderness Act of

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[45] *See* Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 73 (2010) (explaining that under the U Regulations, the Secretary of Agriculture designated wilderness areas of 100,000 acres or more and the Chief of the Forest Service designated "wild" areas consisting of 5,000 to 100,000 acres).

[46] *Id.* Today, the USDA Forest Service administers over 36 million acres of wilderness, or 33% of the nation's wilderness. GORTE, *supra* note 19, at 11 tbl.3.

[47] *See* Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 297 (1966) (noting multiple well-known activists' and groups' calls for the government to give the administrative wilderness system statutory status).

[48] *Id.* (quoting 52 THE LIVING WILDERNESS 29 (1955)) (internal quotation mark omitted).

[49] TURNER, *supra* note 28, at 17.

[50] McCloskey, *supra* note 47, at 297.

[51] *Id.*

[52] *Id.* at 298.

[53] *Id.*

1964.[54] Upon signing of the Wilderness Act, President Lyndon B. Johnson said, "If future generations are to remember us with gratitude rather than contempt, we must leave them something more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning."[55]

Through this Act, Congress declared a national policy "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[56] In the Act, Congress define wilderness in two ways. The first is as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[57] The second definition is more practical, specifying which uses are prohibited and allowed in wilderness:

> An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[58]

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[54] Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–1136 (2006)).

[55] 150 CONG. REC. S9776 (daily ed. Sept. 28, 2004) (statement of Sen. Harry Reid) (quoting President Johnson during a commemoration of the fortieth anniversary of the Wilderness Act).

[56] 16 U.S.C. § 1131(a).

[57] *Id.* § 1131(c).

[58] *Id.*

The Act also declared that the agencies designated to administer wilderness were responsible for "preserving the wilderness character of the areas."[59] The agencies face a difficult task of complying with this mandate while at the same time allowing wilderness to "be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."[60] Congress, however, was agnostic toward wildlife management in the Act itself, stating, "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."[61]

4. Post-Wilderness Act Legislation. The Wilderness Act established a system of continuing review and recommendation for wilderness designations.[62] The Secretaries of Agriculture and Interior must review the suitability of designated areas for preservation as wilderness and report their findings to the President.[63] In turn, the Act requires the President to recommend wilderness designations to Congress.[64] This system has been effective at expanding wilderness areas. Congress protected over 9 million acres of federal lands when it passed the Act in 1964; and since then, the National Wilderness Preservation System[65] has been expanded by more than 100 million acres.[66] In fact, every president since Lyndon B. Johnson has signed bills protecting additional areas as wilderness.[67]

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[59] *Id.* § 1133(b).

[60] *Id.*

[61] *Id.* § 1133(d)(7).

[62] § 1132(b).

[63] *Id.* § 1132(b)(c).

[64] *Id.*

[65] This refers to the various areas of federal lands that Congress has designated as wilderness. *Id.* § 1131(a).

[66] Peter A. Appel, *Wilderness, the Courts, and the Effect of Politics on Judicial Decisionmaking*, 35 HARV. ENVTL. L. REV. 275, 290 (2011).

[67] *Id.*

B. MANAGEMENT OF PUBLIC LANDS

1. History of Federal Land Ownership. To understand the management of federal lands, it is important to understand how 28% of land in the United States came to be federally owned. The first federal lands were grants from the thirteen original states.[68] Between 1781 and 1867, the federal government acquired 1.84 billion acres of land and water through cession from foreign governments, acquisition of new territory, agreements, and purchases.[69] Throughout the latter half of the nineteenth century, Congress enacted numerous laws, including the Homestead Act of 1862 and the Desert Lands Entry Act of 1877, that disposed of federal lands to encourage settlement of the West.[70] The designation of Yellowstone as a national park in 1872 marked a shift in government ideology from disposition to reservation of federal lands.[71] Since 1872, Congress has enacted an array of public land laws, representing its widely varied philosophies regarding federal land ownership and use.

Although federal land is located within sovereign states, Congress has the authority to manage these lands. Congress derives its authority to make public land laws from the Property Clause in Article IV of the Constitution.[72] This Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[73] In *Kleppe v. New Mexico*, the Supreme Court declared that the Property Clause authorized Congress to exercise power of both proprietor and legislature over

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[68] Ryan M. Beaudoin, *Federal Ownership and Management of America's Public Lands Through Land Exchanges*, 4 GREAT PLAINS NAT. RESOURCES J. 229, 231–32 (2000).

[69] *Id.* at 232.

[70] GORTE ET AL., *supra* note 17, at 2.

[71] *See* Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis*, 39 NAT. RESOURCES J. 649, 650 (1999); *accord* PAUL J. CULHANE, PUBLIC LANDS POLITICS 43 (1981) (explaining that since the establishment of Yellowstone in 1872, the federal government has continued to create national parks "to protect areas of special scenic, geological, or historic significance").

[72] U.S. CONST. art. IV, § 3, cl. 2.

[73] *Id.*

public domains.[74] *Kleppe* upheld the Wild Free-Roaming Horses and Burros Act, which placed all unbranded and unclaimed horses and burros on public lands of the United States under federal authority and ownership.[75] While New Mexico claimed Congress could not regulate the wild animals because it never ceded jurisdiction over the land, the Court rejected this argument:

> Absent consent or cession a state undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.[76]

The *Kleppe* Court's interpretation of Congress's Property Clause power allows Congress to determine the extent of federal control over federal lands and leaves little room for judicial oversight.[77]

2. Wildlife and the Courts. Early Supreme Court cases indicated that the states rather than the federal government had authority over wildlife.[78] Since *Kleppe*, however, courts have upheld the federal government's authority to regulate and manage wildlife on federal lands. For example, in *Wyoming v. United States*, the State of Wyoming sued the federal government, challenging the refusal of the U.S. Fish and Wildlife Service (USFWS) to permit the state to vaccinate elk on the National Elk

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[74] 426 U.S. 529, 540 (1976).

[75] *Id.* at 531, 546.

[76] *Id.* at 543.

[77] RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW § 3.11(e) (5th ed. 2012). For an in-depth discussion of the nature of the Property Clause, see generally Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001).

[78] *See* Geer v. Connecticut, 161 U.S. 519, 533 (1896) (upholding a state law forbidding export of game from the state by explaining that the state owns wildlife in its sovereign capacity), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979); The Vessel Abby Dodge v. United States, 223 U.S. 166, 173, 175 (1912) (describing, in dicta, the "plainly . . . established" doctrine that the states have exclusive authority over the regulation of fish and wildlife within their territorial limits, and that applying the sponge-diving statute in state waters would result in "repugnancy to the Constitution").

Range.[79] The Tenth Circuit held that the Tenth Amendment did "not reserve to the State of Wyoming the right to manage wildlife" and "the 'complete power' that Congress has over public lands necessarily include[d] the power to regulate and protect the wildlife living there."[80] In *National Audubon Society v. Davis*, the Audubon Society sued California state officials for implementing a ballot proposition that banned the use of certain kinds of traps and poisons to capture or kill wildlife.[81] Following *Wyoming*, the court found that "Congress invoked federal power under the Property Clause when it enacted the [Improvement Act], and that the [Improvement Act] plainly vest[ed] the FWS with authority to administer the Act and manage the [National Wildlife Refuges]."[82] Under the Property Clause, Congress could preempt state action regarding the management of the National Wildlife Refuges because they are federal land; and Congress has done so through the Improvement Act.[83] Federal courts thus uphold the federal government's authority to regulate and manage wildlife on federal lands.

3. Bureau of Land Management Regulations. As the head of the Department of the Interior, the Secretary of the Interior is responsible for supervising "public business" concerning public lands as well as the BLM, the National Park Service, and the USFWS, among other subjects and agencies.[84] Unlike the Forest Service and the National Park Service, the nation's other major agencies managing public lands, the BLM did not have an "organic act"—an act that centralized its management authority into a single statute.[85] This changed with the passage of the Federal Land Policy and Management Act of 1976[86] (FLPMA).[87] That Act

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[79] 279 F.3d 1214, 1218 (10th Cir. 2002).

[80] *Id.* at 1227 (quoting *Kleppe*, 426 U.S. at 540–41).

[81] 307 F.3d 835, 844–45 (9th Cir. 2002).

[82] *Id.* at 854 (quoting *Wyoming*, 279 F.3d at 1228).

[83] *Id.*

[84] 43 U.S.C. § 1457 (2006).

[85] Roger Flynn, *Daybreak on the Land: The Federal Land Policy Management Act of 1976*, 29 VT. L. REV. 815, 817 (2005).

[86] 43 U.S.C. §§ 1701–1785 (2006). The FLPMA repealed much of the detailed legislation that applied to the BLM and replaced it with more general legislation that greatly enhanced the BLM's power. MARION CLAWSON, THE FEDERAL LANDS REVISITED 50 (1983).

directs the BLM to manage the lands under its control for "multiple use"—a term that the Supreme Court recently called "deceptively simple" because it obscures "the enormously complicated task of striking a balance among the many competing interests to which land can be put."[88] Nevertheless, the FLPMA represents a congressional attempt to balance a variety of competing interests such as scientific, recreation, conservation, and resource extraction.[89]

The FLPMA also requires the Secretary of the Interior to "promulgate rules and regulations to carry out the purposes of this Act."[90] Pursuant to this requirement, the Secretary promulgated rules governing the administration of the BLM's wilderness areas.[91] These regulations purport to clarify what the BLM allows and prohibits in wilderness areas and "how [the] BLM allows access to non-Federal lands located within BLM wilderness areas."[92] In 1985, the BLM issued its original regulations regarding the management of wilderness areas.[93]

Before the current Bureau of Land Management Regulations passed, the proposed regulations on wilderness management were published in the Federal Register on December 19, 1996, for public comment.[94] The BLM received nearly 1,600 letters or other comments related to the BLM's wildlife management policy.[95] Throughout the response section of the rule, the BLM explained that the states have complete authority over fish and wildlife in the wilderness it manages. For example, in one response, the BLM assured the public that the rule "does not alter the existing roles of Federal and State governments in managing wildlife on any public lands, including wilderness."[96] One comment criticized

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[87] Flynn, *supra* note 85, at 817.

[88] Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 58 (2007).

[89] Utah v. Andrus, 486 F. Supp. 995, 1002 (D. Utah 1979).

[90] 43 U.S.C. § 1740.

[91] *See generally* Wilderness Management, 65 Fed. Reg. 78,358 (Dec. 14, 2000) (codified at 43 C.F.R. pts. 6300, 8560 (2012)).

[92] *Id.* at 78,358.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 78,359.

the fact that "the rule [did] not address fish and wildlife management activities or hunting, or recognize State management authority for fish and wildlife resources."[97] The BLM responded by acknowledging that the rule did not alter the existing roles and assured that the states would continue to have jurisdiction over fish and wildlife management.[98] When asked about the application of the regulation to state agencies, the BLM stated, "The rule [did] not distinguish between States and individuals. . . . State agencies may not use motor vehicles to track wildlife in BLM wilderness any more than individual hunters may, *even though States have primary responsibility for wildlife management*."[99] Such comments demonstrate the BLM has completely yielded wildlife management in wilderness to the states.[100]

Pursuant to the regulations, the BLM also produces manuals and handbooks, which provide the BLM's policy, procedures, and instructions to manage programs.[101] The handbooks are controlled by related manual sections, which set out the basic authority for performing tasks and specify who bears the ultimate responsibility for ensuring they are accomplished.[102] The manual entitled *Management of BLM Wilderness* contains a section that specifically addresses wildlife in the wilderness.[103] This manual suggests that the BLM should defer to the states on wildlife management issues. For example, the manual states as a general principle that "States have a primary and critical role in fish and wildlife management,"[104] and "[m]anagement activities will be

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[97] *Id*.

[98] *Id*.

[99] *Id*. at 78,364 (emphasis added).

[100] *See* 43 C.F.R. § 24.4(d) (2012) ("[T]he several States therefore possess primary authority and responsibility for management of fish and resident wildlife on Bureau of Land Management lands . . . .").

[101] *See, e.g.*, BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, BLM MANUAL 6340—MANAGEMENT OF BLM WILDERNESS AREAS 1 (2012) (outlining procedures to manage wilderness areas as mandated by Congress).

[102] *See, e.g.*, *id.* at 1–2 (setting out the tasks and division of responsibility for managing BLM wilderness).

[103] *Id*. at 56.

[104] *Id*.

guided by communication and cooperation with the State wildlife agencies."[105] The BLM's statements—both in response to public comments and its manuals and handbooks—reflect its general policy of deferring to the states regarding wildlife management.

4. Wilderness and the Courts. A number of cases arising under the Wilderness Act have raised questions about the scope of judicial review of administrative actions.[106] Largely, the courts have permitted review of agency action.[107] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[108] the Supreme Court provided a two-step framework for judicial review of an agency's interpretation of its regulatory statutes.[109] First, courts determine whether the statute is ambiguous.[110] If not, they "must give effect to the unambiguously expressed intent of Congress."[111] But if the statute is ambiguous, courts must defer to the agency if "the agency's answer is based on a permissible construction of the statute."[112] This framework is essential to understanding cases reviewing agency interpretations of the Wilderness Act.

Although limited in number, a few federal courts have addressed issues regarding wildlife-management policies in wilderness. *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Service*[113] typifies the courts' interpretation of the duties imposed upon the federal agencies by the Wilderness Act. That case focused on the USFWS's response to an unexpected decline in the population of bighorn sheep in the Kofa National Wildlife Refuge and Wilderness in Arizona. After completing an investigative report, it concluded that the most prominent factors causing the

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[105] *Id.* at 57.

[106] Margaret Shulenberger, Annotation, *Construction and Application of Wilderness Act (16 U.S.C.A. § 1131 et seq.) Providing for National Wilderness Preservation System*, 14 A.L.R. FED. 508, § 3 (1973).

[107] *See, e.g.*, Parker v. United States, 448 F.2d 793, 795 (10th Cir. 1971) (stating that although agencies are given wide discretion, "the agency is never judicially unapproachable when there is 'law to apply' ").

[108] 467 U.S. 837 (1984).

[109] *Id.* at 842–43.

[110] *Id.* at 842.

[111] *Id.* at 842–43.

[112] *Id.* at 843.

[113] 629 F.3d 1024 (9th Cir. 2010).

population decrease were "availability of water, predation, translocation, hunting, and human disturbance."[114] Despite finding that hunting contributed to the population decrease, the report recommended, without explanation, that hunting be continued in the area.[115] Based on the study's results, the USFWS built two water structures in the wilderness area.[116] Wilderness Watch sued alleging that the USFWS violated the Wilderness Act by building these structures.[117] The USFWS argued that it had determined that the structures were "necessary to meet the minimum requirements for conserving bighorn sheep."[118] The court disagreed, reversed the district's summary judgment in favor of USFWS, and remanded the case for consideration of whether the water structures were "*necessary* to meet the *minimum* requirements" of wilderness preservation under the Act.[119] The court did not order the structures removed, but it did note that if *any* of the other avenues that USFWS identified would allow the bighorn sheep population to recover, then the new structures were not necessary.[120] This was true even though the court recognized: "The Wilderness Act requires a delicate balancing between Congress' desire to maintain lands untouched by humans and Congress' recognition that such an idealistic view is subject to some practical limitations."[121]

The Ninth Circuit specifically addressed wildlife management in *Wilderness Society v. U.S. Fish & Wildlife Service*.[122] Tustumena Lake lies within the Kenai Wilderness in the State of Alaska.[123] The lake's ecosystem supports several species of fish, including sockeye salmon.[124] A commercial fishing fleet that

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[114] *Id.* at 1026, 1029.
[115] *Id.* at 1038.
[116] *Id.* at 1031.
[117] *Id.* at 1032.
[118] *Id.*
[119] *See id.* at 1040 (reversing and remanding with instructions).
[120] *Id.* at 1039.
[121] *Id.* at 1039–40.
[122] 353 F.3d 1051 (9th Cir. 2003), *amended in part on reh'g en banc*, 360 F.3d 1374 (9th Cir. 2004).
[123] *Id.* at 1056. This lake is the fifth largest freshwater lake in the state. *Id.*
[124] *Id.*

operated outside of the wilderness harvested the salmon during their annual run from the Gulf of Alaska.[125] The USFWS granted permits for a sockeye salmon enhancement project that annually introduced approximately six million hatchery-reared salmon eggs into Tustumena Lake.[126] The Wilderness Society sued claiming that the permit violated the Wilderness Act by offending its mandate to preserve the "natural conditions" of that area's "wilderness character" and "by sanctioning an impermissible 'commercial enterprise' within a designated wilderness area."[127] In reversing the district court, the Ninth Circuit concluded that the enhancement project was a "commercial enterprise" within the meaning of the Wilderness Act and thus was prohibited.[128] The proper test, the court held, for determining whether a given activity is a prohibited " 'commercial enterprise' turns on an assessment of the purpose and effect of the activity."[129] The court found that the primary purpose of the enhancement project was "to advance commercial interests of . . . fishermen by swelling the salmon runs from which they will eventually make their catch."[130] Based on this assessment, the Wilderness Society was entitled to a summary judgment as a matter of law because the USFWS's permit for the commercial enhancement program violated the Wilderness Act.[131] *Wilderness Watch* and *Wilderness Society* demonstrate that courts take the duties imposed on the agencies by the Wilderness Act seriously.

5. Subdelegation Cases. Although courts have not addressed the delegation of wildlife management specifically, they have addressed the subdelegation of congressionally granted authority in other contexts. In *U.S. Telecom Ass'n v. FCC*, the FCC delegated its authority to instruct which network elements would be made available to local carriers on an unbundled basis to state

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[125] *Id.*
[126] *Id.* at 1055.
[127] *Id.* (quoting 16 U.S.C. § 1133(c) (2006)).
[128] *Id.* at 1066–67.
[129] *Id.* at 1063.
[130] *Id.* at 1064.
[131] *Id.* at 1070.

commissions.[132] The FCC claimed that agencies had presumptive power to subdelegate to state commissions if the statute authorizing agency action did not preclude such power.[133] The D.C. Circuit held that while federal agencies may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not delegate that authority to outside entities absent *affirmative* evidence of authority to do so.[134] That the delegation of authority was to a state rather than private entity did not alter the court's analysis.[135] The court underscored that delegation to outside entities increases the risk that these parties would "not share the agency's national vision and perspective" and would "pursue goals inconsistent with those of the agency."[136]

In another subdelegation case, the D.C. Circuit considered a challenge to the D.C. Board of Education's divestment of control over the District's public schools to an Emergency Transitional Education Board of Trustees.[137] "Congress placed 'control' of the District's public schools in the Board of Education, giving it a wide range of powers, including determination of general educational policy, appointment of teachers, and selection and supervision of the Superintendent."[138] This delegation of authority over D.C. public schools was all-encompassing; thus, the Board of Education could not delegate "executive functions or policymaking authority to anyone but the Superintendent," its subordinate executive.[139] Any other delegation was inconsistent with Congress's grant of total executive and regulatory control to the school board, even though the statute expressly permitted the board to delegate its

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[132] 359 F.3d 554, 564 (D.C. Cir. 2004).

[133] *Id.* at 565.

[134] *See id.* (noting that cases distinguish between subdelegation to a subordinate and subdelegation to an outside party).

[135] *Id.* at 566.

[136] *Id.* at 565–66 (quoting Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)) (internal quotation marks omitted).

[137] Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 776 (D.C. Cir. 1998).

[138] *Id.*

[139] *Id.* at 783.

authority to the Superintendent.[140] The takeaway was unmistakable: Congress's authorization to delegate authority to an enumerated party does establish its intent to allow all delegations of authority to outside parties.

At least one district court has applied the reasoning of *U.S. Telecom Ass'n* to the wilderness context. In *High Country Citizens' Alliance v. Norton*, the National Park Service had delegated the determination and regulation of the proper peak and shoulder flows for the Black Canyon in Gunnison National Park to the Colorado Water Conservation Board.[141] Relying on *U.S. Telecom Ass'n*, the court concluded that the Wilderness Act prohibited the delegation.[142] Congress had entrusted the National Park Service with administering the wilderness area of the Gunnison National Park "in such a manner as will leave it unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of the area, and the preservation of its wilderness character."[143] This responsibility belonged to the National Park Service and thus could not be outsourced to other parties that might not share the agency's national goals or might pursue self-interested projects.[144]

By contrast, in *Fund for Animals v. Norton*, the court concluded the USFWS had not improperly abdicated its authority under the Migratory Bird Treaty Act (MBTA)[145] to manage the double-crested cormorant population to the state wildlife directors.[146] The court distinguished *U.S. Telecom Ass'n* because, unlike the federal agency in that case, the USFWS, had not delegated its congressionally delegated authority to prescribe when and how the

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[140] *Id.*

[141] 448 F. Supp. 2d 1235, 1246–47 (D. Colo. 2006).

[142] *Id.* at 1246.

[143] *Id.*

[144] *Id.*

[145] 16 U.S.C. §§ 703–712 (2006) (delegating to the Secretary of Interior the authority to determine when and to what extent to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of protected birds).

[146] 365 F. Supp. 2d 394, 410–11 (S.D.N.Y. 2005).

birds could be taken to an outside party.[147] Therefore, the delegation did not depart from the MBTA's language or intent.[148]

These cases demonstrate that courts will not allow federal agencies to divest their statutory authority to an outside entity absent affirmative evidence of congressional intent to permit such delegation.

III. ANALYSIS

The Bureau of Land Management's ongoing policy of deferring to the states on wildlife management in wilderness areas violates express provisions of the Wilderness Act. Courts have repeatedly upheld Congress's plenary authority to regulate and dispose of federal lands under the Property Clause.[149] While states have broad trustee power over wild animals within their jurisdictions, the Supremacy Clause ensures that these powers are only effective insofar as they are compatible with federal law.[150] The regulation and protection of wildlife on federal lands falls within Congress's plenary power under the Property Clause.[151]

Congress may delegate the power to manage federal lands to the executive branch.[152] Congress flexed its plenary power over

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[147] *See id.* at 410–11 (noting that USFWS required agencies seeking to initiate control activities to "first provide notice to the appropriate Regional Migratory Bird Permit Office and provide a detailed description of the proposed population control activity, including the location of the activity, a description of how the cormorant impacted public resources, and how many birds are likely to be taken").

[148] *Id.* at 410.

[149] *See, e.g.*, Nevada v. Watkins, 914 F.2d 1545, 1553 (9th Cir. 1990) (holding that the Property Clause grants sufficient power for Congress to designate a single site as a nuclear waste repository); Utah Div. of State Lands v. United States, 482 U.S. 193, 201 (1987) ("The Property Clause grants Congress plenary power to regulate and dispose of land within the Territories . . . ."); Organized Fisherman of Fla. v. Andrus, 488 F. Supp. 1351, 1355 (S.D. Fla. 1980) (denying a preliminary injunction to enjoin enforcement of National Park Service regulations that restricted certain fishing practices in a national park).

[150] *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 541–43 (1976) (holding that Congress has authority to act contrary to state law).

[151] *See id.* at 545–46 (holding that Congress may "protect wildlife on the public lands, state law notwithstanding").

[152] *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) (affirming Congress's authority to delegate power subject to procedural limitations); Sierra Club v. Hickel, 433 F.2d 24, 28 (9th Cir. 1970) (affirming the

federal lands by enacting the Wilderness Act.[153] Among other things, that Act stripped federal agencies of absolute discretion regarding the designation of federal lands for wilderness protection and the determination of the uses of such areas.[154] The Act did not set up a new agency to manage wilderness areas but rather provided that they would be managed by the agencies that managed the land prior to its inclusion in the National Wilderness Preservation System.[155] The Act required the agencies to administer wilderness areas so that they would be unimpaired for future use and enjoyment as wilderness[156] and made the agencies responsible for preserving their wilderness character.[157]

The BLM's ongoing policy of deferring to states on wildlife-management issues in wilderness, despite the Wilderness Act's mandate that it administer the land and preserve its wilderness character, is wrong for four reasons. First, it violates the express mandates of the Wilderness Act that require the BLM to administer the wilderness to preserve wilderness character. Second, it abrogates the federal government's primary authority under the Property Clause over wildlife on federal lands including wilderness. Third, it is inconsistent with lower-court precedent concluding that federal agencies may not delegate their authority to outside entities absent an affirmative showing of congressional intent to allow such delegation. Fourth, this delegation to the states leads to undesirable outcomes that Congress sought to avoid

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Secretary of Interior's authority to issue permits based on congressional authorization), *aff'd sub nom*. Sierra Club v. Morton, 405 U.S. 727 (1972); City of Denver v. Bergland, 517 F. Supp. 155, 178 (D. Colo. 1981) (affirming Congress's delegation of authority to the Forest Service to regulate right-of-ways in national forests), *aff'd in part, rev'd in part on other grounds*, 695 F.2d 465 (10th Cir. 1982).

[153] *See* Eugene R. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381, 387 (1981) (discussing several examples of Congress's exercise of its Property Clause power to determine the use of federal lands including its enactment of the Wilderness Act); 16 U.S.C. § 1131(b) (2006) (stating that wilderness areas shall be managed by the agency that had jurisdiction over the land prior to its designation as a wilderness area).

[154] *See* Parker v. United States, 309 F. Supp. 593, 597 (D. Colo. 1970) (discussing congressional intent behind the Wilderness Act), *aff'd*, 448 F.2d 793 (10th Cir. 1971).

[155] 16 U.S.C. § 1131(b).

[156] *Id*. § 1131(a).

[157] *Id*. § 1133(b).

by enacting the Wilderness Act. Therefore, the BLM should modify its regulations to more actively control wildlife management in wilderness to fulfill its mandates under the Wilderness Act and to comply with federal precedent.

A. THE BUREAU OF LAND MANAGEMENT'S POLICY OF DEFERRING TO THE STATES ON WILDLIFE MANAGEMENT VIOLATES THE EXPRESS PROVISIONS OF THE WILDERNESS ACT

1. The BLM's Policy Abdicates Its Duty To Manage Wildlife. The BLM's policy violates the Wilderness Act, which requires federal rather than state agencies to manage the wilderness.[158] The purpose of this provision was to clearly establish the federal agencies as managers and to assure that the Act "would not create a council, generate new administrative costs, or transfer land from one agency to another."[159] The BLM's policy therefore is not only inconsistent with federal precedent on impermissible delegations,[160] but it also violates Congress's basic mandate that the agency itself must manage the wilderness.

Second, this policy violates the Wilderness Act's mandate to administer the lands so they are left "unimpaired" for future generations.[161] Congress recognized that there is a "strong public interest in maintaining pristine wild areas unimpaired by man for future use and enjoyment."[162] Indisputably, wildlife is an integral part of what makes wilderness worth preserving.[163] If the BLM continues to delegate its responsibility to manage wildlife to state agencies that do not share this obligation to leave these lands unimpaired for future use, it cannot fulfill this mandate. For example, state agencies could irreparably disrupt the natural

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[158] *Id.* § 1131(b); *see supra* note 155 and accompanying text.

[159] Amy Rashkin et al., *The Wilderness Act of 1964: A Practitioner's Guide*, 21 J. LAND RESOURCES & ENVTL. L. 219, 224 (2001).

[160] *See infra* Part III.C.

[161] 16 U.S.C. § 1131 (a) (outlining federal agency obligations to administer wilderness areas "in such a manner as will leave them unimpaired for future use and enjoyment as wilderness").

[162] High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 643 (9th Cir. 2004).

[163] *See* Carter, *supra* note 16, at 17 (arguing that maintaining naturalness and solitude should be the goal of wilderness management).

interactions between predator and prey species by instituting predator-control practices like permitting the hunting of gray wolves in the Bear Trap Canyon Wilderness.[164] By delegating such control, the BLM has failed in its duty to leave the wilderness unimpaired for future use.

Third, this policy violates the Wilderness Act's mandate to protect and manage the land "to preserve its natural conditions."[165] The distribution, numbers, and diversity of wildlife species serve as a measure of the naturalness of wilderness.[166] Most state wildlife-management programs allow "considerable human domination such as recreational-based non-native fish stocking, game production, introduction of non-native terrestrial species[,] . . . and predator control."[167] As the court recognized in *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Service,* "The Wilderness Act requires a delicate balancing between Congress' desire to maintain lands untouched by humans and Congress' recognition that such an idealistic view is subject to some practical limitations."[168] Under the current policy, a state agency has the authority to make wildlife-management decisions unilaterally, such as to allow continued hunting of a vulnerable species in the Bear Trap Canyon Wilderness, which could dramatically affect the natural conditions of the wilderness. By conferring such authority on the state agencies, the BLM is unable to undertake the balancing required by the Act and violates its mandate to protect and manage these lands to preserve their natural conditions.

Fourth, this policy violates the Wilderness Act's mandate that agencies preserve the land's "wilderness character."[169] This obligation is clearly the BLM's responsibility. Wildlife serves as a

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[164] *See supra* notes 10–11 and accompanying text.

[165] 16 U.S.C. § 1131(c) (defining wilderness, in part, as "an area of undeveloped Federal land retaining its primeval character and influence, . . . which is protected and managed so as to preserve its natural conditions").

[166] JOHN C. HENDEE ET AL., WILDERNESS MANAGEMENT 265 (2d ed. 1990).

[167] Carter, *supra* note 16, at 17.

[168] 629 F.3d 1024, 1039–40 (9th Cir. 2010).

[169] 16 U.S.C. § 1133(b) (designating federal land management agencies as, among other things, "responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes . . . to preserve its wilderness character").

monitor for wilderness character and quality because wildlife reflects ecological conditions and changes over time.[170] For example, in 2008 the Interagency Wilderness Character Monitoring Team developed a system for monitoring trends in wilderness character based on four qualities: wilderness must be untrammeled, natural, undeveloped, and have opportunities for solitude or primitive and unconfined type of recreation.[171] The team defined "untrammeled" to mean wilderness that is "unhindered and free from modern human control or manipulation."[172] "Natural" refers to whether "the indigenous species composition, structures, and functions of ecological systems in wilderness are protected and allowed to be on their own, without the planned intervention or the unintended effects of modern civilization."[173] The report prescribes monitoring trends in areas with untrammeled and natural qualities through wildlife indicators, such as the occurrence of actions that physically remove animals and the presence of nonnative animal species, respectively.[174] These guidelines clearly indicate the importance of wildlife, and thus its management, to the preservation of wilderness character. Predator control, such as the state agency's plan in the Bear Trap Canyon Wilderness hypothetical, would signal degradation in both the natural and untrammeled qualities of wilderness character. Because the state remains responsible for wildlife management, the BLM could not prevent or respond to such degradation to preserve wilderness character as required by the Act.

2. The BLM's Policy May Lead to Violations of the Ban on Commercial Enterprise in Wilderness. The Wilderness Act bans commercial enterprises in any wilderness area.[175] In *Wilderness*

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[170] HENDEE ET AL., *supra* note 166, at 265.

[171] LANDRES ET AL., *supra* note 14, at 1, 7.

[172] *Id.* at 7.

[173] *Id.* at 20.

[174] *See id.* at 41–51 (detailing the measurements for indicators to monitor the untrammeled and natural qualities of wilderness).

[175] *See* 16 U.S.C. § 1133(c) (2006) ("[T]here shall be no commercial enterprise . . . within any wilderness area designated by this [Act] . . . except as necessary to meet minimum requirements for the administration of the area for the purpose of this [Act] . . . .").

Society v. U.S. Fish & Wildlife Service, the Ninth Circuit concluded that a state-regulated and previously state-administered enhancement project was a "commercial enterprise" and thus prohibited within the designated wilderness.[176] The Ninth Circuit found that the plain meaning of "commercial enterprise," an undefined term in the Wilderness Act, is "a project or undertaking of or relating to commerce."[177] The court held that whether an activity within a designated wilderness area is a commercial enterprise "turns on an assessment of the purpose and effect of the activity."[178] In that case because the enhancement project's purpose was to improve the commercial interests of fishermen, the court concluded that it violated the Act's ban on commercial enterprise within the wilderness area.[179]

Applying the Ninth Circuit's plain meaning interpretation of "commercial enterprise" and its rule of decision to the predator-control practices in the Bear Trap Canyon Wilderness hypothetical,[180] a court could reasonably find that it serves the primary purpose of benefitting commercial outfitters by increasing the number of game animals outside the wilderness. The *Wilderness Society* court's interpretation of commercial enterprise, though broad in reach, was well-supported by the Wilderness Act itself.[181] The Act, according to the *Wilderness Society* court's analysis, clearly indicates a very low tolerance for exploitation of wilderness. In this hypothetical, the BLM's delegation of authority over wildlife on federal lands has resulted in the implementation of predator-control program that interferes with wilderness species populations. Importantly, this program has not been put into place to ensure that the wilderness remains

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[176] 353 F.3d 1051, 1055–56 (9th Cir. 2003), *amended on reh'g en banc*, 360 F.3d 1374 (9th Cir. 2004).

[177] *Id.* at 1061.

[178] *Id.* at 1063.

[179] *Id.* at 1064.

[180] *See supra* notes 10–11 and accompanying text.

[181] *See* 353 F.3d 1062 ("The language, purpose and structure of the Wilderness Act support the conclusion that Congress spoke clearly to preclude commercial enterprise in the designated wilderness, regardless of the form of commercial activity, and regardless of whether it is aimed at assisting the economy with minimal intrusion on wilderness values.").

unimpaired for future generations' enjoyment or to preserve its natural condition and wilderness character but rather to benefit hunting-related, commercial interests by increasing the number of game animals available for harvesting.[182]

Alternatively, a court could find that the predator-control program does not violate the commercial enterprise ban if it determines that the primary purpose of the program is recreation *within* the wilderness. Under such a conclusion, a court could hold that the predator-control program is permitted under the commercial services exception of the Wilderness Act.[183] If this exception were applicable, the court could still hold that the BLM violated the Act. The BLM would have been required to complete an analysis to determine that the number of predator-control permits was the minimum number necessary to realize their recreational purpose *before* the MFWP issued the permits.[184] Making such a determination prior to the MFWP issuing the permits would be difficult if not impossible given that the BLM has delegated primary authority of wildlife management to the states.[185] Thus, the delegation of such decisions likely leads to violations of the Wilderness Act's requirements.

B. THE FEDERAL GOVERNMENT HAS PRIMARY AUTHORITY OVER WILDLIFE IN WILDERNESS

The Wilderness Act has a savings clause that states its terms should not "be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests."[186] Notwithstanding the subsequent

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[182] *See supra* notes 10, 20 and accompanying text.

[183] *See* 16 U.S.C. § 1133(d)(5) (2006) ("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.").

[184] *See* High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 647 (9th Cir. 2004) (holding that an agency must make a finding of necessity and prove that the number of permits granted was no more than was necessary to achieve the goals of the Act).

[185] *See* 43 C.F.R. § 24.4(d) (2012) (noting the states possess primary authority over wildlife).

[186] 16 U.S.C. § 1133(d)(7). Based on the text of the original statute, this clause only applies to national forests, not the BLM's lands. However, application of this language has

application of this clause to the BLM's lands, the federal government had primary authority over wildlife on the BLM's lands under the Property Clause of the Constitution, which grants Congress plenary power to regulate lands owned by the federal government.[187] Congress exercised this power by passing the Wilderness Act, making the BLM and other agencies responsible for management and preservation of wilderness character. Even though the savings clause applies to the BLM's lands as well as the national forests, the clause simply indicated that the Act did not change the nature of the jurisdiction or responsibility of the states with respect to wildlife on federal lands. Therefore, the federal government's jurisdiction over wildlife on federal lands remains intact.

Under the incorrect assumption that wildlife on federal lands falls under the states' jurisdiction, the BLM has promulgated regulations and policies that give authority of wildlife management in wilderness to the states.[188] States have argued that the BLM's policy is proper because the Tenth Amendment[189] reserves for the states the right to manage wildlife on federal land within the borders of the state.[190] Admittedly, the Supreme Court's jurisprudence regarding the role of the Tenth Amendment is all but clear.[191] A debate continues as to whether the Tenth Amendment serves to reserve certain rights to the states or

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been limited because this clause has been modified to apply to all federal lands subsequent wilderness legislation. *See, e.g.*, 43 U.S.C. § 1782(c) (2006) ("Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area . . . ." (citation omitted)).

[187] Kleppe v. New Mexico, 426 U.S. 529, 545–46 (1976).

[188] *See supra* notes 89–102 and accompanying text (discussing the Bureau's wildlife-management policy).

[189] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[190] *See, e.g.*, Wyoming v. United States, 279 F.3d 1214, 1226 (10th Cir. 2002) (noting that the state of Wyoming argued that the Tenth Amendment reserved to the state the right to manage wildlife on the National Elk Range within the state).

[191] *See* New York v. United States, 505 U.S. 144, 160 (1992) ("[T]he Court's jurisprudence in this area has traveled an unsteady path.").

whether it simply serves as a reminder.[192] Notwithstanding the assumption that the Tenth Amendment serves to reserve certain areas for the states, whether the Tenth Amendment applies to this issue first depends upon how broadly the courts interpret the Property Clause.[193] If the Court interprets the Property Clause to grant Congress unlimited authority and discretion to manage federal lands, then the Tenth Amendment would not limit Congress's authority to regulate under that Clause.[194] In *Kleppe v. New Mexico*, the Supreme Court stated that Congress's power over public land is unlimited.[195] The Court continued by stating that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."[196] Relying on *Kleppe* in *Wyoming v. United States*, the Tenth Circuit concluded that because the Property Clause provides Congress the power to regulate wildlife living on federal lands, "the Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife."[197] In *Wyoming*, the state had requested permission to vaccinate elk on the National Elk Refuge, a part of the National Wildlife Refuge.[198] The U.S. Fish and Wildlife Service rejected that request.[199] The court held that the Tenth Amendment does not reserve to the states the right to manage wildlife on federal lands, "regardless of the circumstances."[200] Applying the Tenth Circuit's reasoning, even if

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[192] *See* H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 851 (1999) (stating that the contemporary federalism debate "center[s] on whether and to what extent the Supreme Court must act to protect the states").

[193] *See New York*, 505 U.S. at 156 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . .").

[194] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–56 (1985) (holding Congress's power under the Commerce Clause to extend the Federal Labor Standards Act to state and local governments did not contravene the Tenth Amendment limit on Congress's power under the Commerce Clause).

[195] 426 U.S. 529, 539 (1976).

[196] *Id.* at 540–41.

[197] 279 F.3d 1214, 1227 (10th Cir. 2002).

[198] *Id.* at 1218.

[199] *Id.*

[200] *Id.* at 1227.

the savings clause applied to federal lands and was designed not to affect the jurisdiction of the states over wildlife in the wilderness within their borders, the jurisdiction over wildlife within wilderness rests with the federal government. Therefore, the BLM has based its wildlife management policy on an incorrect assumption that the states have jurisdiction over wildlife on federal lands.

C. THE BUREAU OF LAND MANAGEMENT'S POLICY OF DEFERRING WILDLIFE MANAGEMENT TO THE STATES IS INCONSISTENT WITH FEDERAL PRECEDENT ON SUBDELEGATION

Absent an affirmative showing of congressional authorization, federal agencies cannot subdelegate their authority to outside entities.[201] Because the Wilderness Act does not expressly allow subdelegation of wilderness management to outside entities, the BLM's policy of deferring wildlife management to the states is inconsistent with federal precedent.

In *U.S. Telecom Ass'n*, the D.C. Circuit held that while a federal agency may subdelegate its decision-making authority to its *subordinates*, agencies may not delegate to *outside entities*, whether private or sovereign, absent affirmative evidence of authority to do so.[202] The court reasoned that "when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making."[203] Despite such a clear ruling on the subject, the BLM continues to impermissibly delegate its wildlife-management

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[201] *See* U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004) (holding that a federal agency may not subdelegate its decision-making authority to private or sovereign entities absent affirmative evidence of authority to do so); Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 783–84 (D.C. Cir. 1998) (holding that the board could not delegate its power to an outside body); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1143–44 & n.41 (D.C. Cir. 1984) (discussing the harm to the principles of political accountability resulting from subdelegation of agency authority to private individuals); Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 18–20 (D.D.C. 1999) (stating that the National Park Service could not shift its responsibility to administer the Niobrara River to a private actor whose objectivity could be questioned on the grounds of conflict of interest).

[202] *U.S. Telecom Ass'n*, 359 F.3d at 565.

[203] *Id.*

responsibilities under the Wilderness Act to state agencies despite no affirmative evidence of authority to do so in the Act.

Similarly, in *Shook v. District of Columbia Financial Responsibility & Management Assistance Authority*, the D.C. Circuit court held that the D.C. Board of Education could not delegate executive functions or policy-making authority to anyone but the superintendent, its subordinate executive.[204] The court reasoned that any other delegation was inconsistent with the grant of overall authority to the Board of Education notwithstanding the statute's express authority to delegate to the superintendent.[205] Similarly, the Wilderness Act established a scheme where the federal-land-management agencies are responsible for administrating the nation's wilderness areas.[206] The BLM's delegation of the management of an essential aspect of wilderness—wildlife—to the states is inconsistent with the BLM's grant of overall authority to manage wilderness areas so as "to preserve its wilderness character."[207]

One court has already held that a federal agency's subdelegation of authority to a state agency violated the Wilderness Act. In *High Country Citizens' Alliance v. Norton*, the National Park Service (which, like the BLM, is a land-management agency under the supervision of the Department of the Interior) delegated the determination and attainment of the proper peak and shoulder flows for the Black Canyon in Gunnison National Park to the Colorado Water Conservation Board.[208] Citing the National Park Service's obligations to manage wilderness in a way that keeps it "unimpaired for future use and enjoyment" and preserved "its wilderness character," the court found its delegation impermissible.[209] Likewise, the BLM's delegation of wildlife management to the states impermissibly hinders its ability to comply with the Wilderness Act's

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[204] *Shook*, 132 F.3d at 782.

[205] *See id.* (stating that the statute "does not explicitly authorize the Board of Education to delegate to *anyone* but the Superintendent").

[206] *See supra* notes 155–57 and accompanying text.

[207] 16 U.S.C. § 1133(b) (2006).

[208] 448 F. Supp. 2d 1235, 1246–47 (D. Colo. 2006).

[209] *Id.* at 1246.

requirements to administer the area so as to not impair the land for future use and enjoyment as wilderness.

Occasionally, courts have concluded that delegations to state agencies are *not* improper. In those cases, however, the federal agency adequately restricts the state's scope of authority and often preserves for itself final decision-making authority. For example, in *Fund for Animals v. Norton*, the court concluded that the USFWS had not abdicated its authority or granted states free reign over management of the cormorant population.[210] Although it allowed state agencies to initiate control activities over migratory birds, they could not do so unilaterally. Instead, they had to first provide notice to the appropriate Regional Migratory Bird Permit Office along with detailed information about its *proposed* regulatory means of controlling the population, including an analysis of its necessity, its location, and its likely effectiveness.[211] In contrast to the USFWS's approach in *Norton*, the BLM imposes no strict pre-control requirements on the state agencies but rather follows a general policy of allowing them to manage wildlife in the wilderness. Thus, the BLM's delegation of authority continues to be improper under federal precedent.

In the subdelegation cases, the courts expressed concern that delegation of agency authority posed too great a risk that the objectives of the statutes would not be met. Delegation of authority with respect to wilderness is even more dangerous given that the purpose of the Wilderness Act is to preserve the land in its natural state: if a state agency is permitted to exploit wilderness, the harm might be irreversible. For example, if the BLM allows the MFWP to issue hunting permits for gray wolves, and the wolves are hunted to the point of extinction, it would be impossible to recover that particular facet of naturalness in the wilderness.

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[210] 365 F. Supp. 2d 394, 410–11 (S.D.N.Y. 2005).

[211] *Id.*

D. THE BUREAU OF LAND MANAGEMENT'S POLICY INEVITABLY LEADS TO A TRAGEDY OF THE COMMONS AND AN UNACCEPTABLE LACK OF ACCOUNTABILITY

Congress enacted the Wilderness Act "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition."[212] Under the policy of permitting states to manage the wildlife in wilderness areas, the BLM cannot avoid the negative externalities that Congress sought to address with the Act. This policy creates two prudential problems: first, it effectively negates Congress's concerted efforts to avoid a tragedy of the commons in America's wilderness; and second, it simultaneously creates a political accountability problem.

Because states managing wildlife in wilderness areas have no legal obligations under the Wilderness Act to preserve the land's wilderness character, conditions are ripe for a tragedy of the commons.[213] A tragedy of the commons arises when users of a resource overexploit it, thereby imposing mutual negative externalities upon one another.[214] There are two potential solutions to a tragedy of the commons: (1) government regulation or (2) privatization.[215] Wilderness, an open-access natural resource, will likely be exploited without regulation or privatization.[216] Amid warnings that America's wilderness would not remain unspoiled for many years to come,[217] Congress chose to

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[212] 16 U.S.C. § 1131(a) (2006).

[213] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (theorizing that open access to a natural resource leads to inevitable overexploitation of the resource).

[214] Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 77 (2006)

[215] *See, e.g.*, Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 535 (2007) (recognizing that the wisdom of neoclassical welfare economics has determined that the solution to overexploitation is either regulation or privatization).

[216] Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 HARV. ENVTL. L. REV. 503, 506 (2008).

[217] *See supra* note 48 and accompanying text.

avert this looming tragedy through regulation, passing the Wilderness Act and Federal Land Management Protection Act (among many others).

Cognizant that wilderness is a national treasure rather than a local windfall, Congress explicitly authorized federal agencies to manage and preserve its wilderness character. By permitting states—which bear none of the burdens of preservation under the Wilderness Act—to control the wildlife on federal lands within their borders, the BLM policy effectively negates Congress's well-considered[218] management decisions. Under these circumstances, a tragedy of the commons may not be far off. To see why, consider again the regulatory scheme permitting the hunting of Rocky Mountain gray wolves, a species removed from the Endangered Species List in 2011.[219]

A major reason underlying the state's issuance of wolf-hunting permits is to reduce the wolf population, and thus, "impact[ ] on game populations and livestock."[220] Gray wolves pose a threat to state-based interests. Based on these interests, the state agency may reasonably conclude that the wolf-harvest quota should be increased. Even if doing so leads to the extinction of gray wolves, the benefits to state interests may exceed the costs. Where wildlife management is under state control, there is substantial risk that the state's management decisions will be driven by state-based interest at the expense of the national interest in wilderness preservation.

Congress acted to minimize these externalities; its reasoned solution was to make federal agencies responsible for wilderness preservation. Wildlife is an essential part of wilderness. By deferring wildlife management to state officials, the BLM places all U.S. citizens at risk of seeing our nation's wildernesses lost to the tragedy of the commons.

Aside from the natural tendency to exploit natural resources absent regulation or privatization, the BLM's deferential policy

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[218] *See supra* note 53 and accompanying text (noting that Congress spent nine years and considered sixty-five draft bills before enacting the Wilderness Act).

[219] *See supra* notes 20–23 and accompanying text.

[220] MONT. FISH, WILDLIFE & PARKS, *supra* note 22, at 2.

creates accountability issues. Courts have noted that when the parties bearing the statutory obligations and management responsibilities are distinct, an accountability issue arises.[221] While federal lands are owned by all U.S. citizens,[222] state officials managing wildlife in federal wilderness areas cannot be held politically accountable by out-of-state citizens. And at the same time, they have every incentive to act in ways that further the interest of in-state citizens. Thus, along with increasing the risk of a tragedy of the commons, the BLM's current, hands-off approach to wildlife management concomitantly removes the accountability to U.S. citizens who lack access to the political process in distant states.

E. ADDRESSING THE PROBLEM

The BLM's deferral to the states could be addressed in one of four ways. First, the BLM could continue deferring wildlife management to the states. Second, without changing its policy, the BLM's wilderness managers could be less deferential to the demands of the states and special interest groups on a daily basis. Third, Congress could respond to these policies by more specifically defining the roles of the BLM and the states in wildlife management. Fourth, the BLM could revise its regulations to affirmatively take control over wildlife in wilderness and set wildlife policies that accord with the mandates of the Wilderness Act.

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[221] *See* U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004) (reasoning that delegation may lead to blurred lines of accountability, negating an important check on government power).

[222] Although the topic is outside of the scope of this Note, many legal scholars and environmental advocates have lobbied for the recognition of a "public trust in wildlife" following logically from the common law public trust doctrine. For an in-depth discussion of this topic, see generally Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23 (2000); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine To Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989); Deborah G. Musiker et al., *The Public Trust and* Parens Patriae *Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87 (1995); Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605 (2004).

First, for all of the reasons discussed in this Note, it is unacceptable for the BLM to continue its current policy. Second, while the BLM could take a more active role in wildlife management, this change would be insufficient for the Bureau to fully comply with the Wilderness Act. It is essential that the agency take complete responsibility for fulfilling the Act's mandates. Third, Congress may have its own response to how wildlife is currently managed in wilderness.[223] Congress could specify the roles of the BLM and the states in wildlife management by either clarifying its intention to make the agency solely responsible or by expressly permitting subdelegation to state agencies. Congressional action of this nature, however, is unlikely because Congress has already stated that the agencies are responsible for the preservation of wilderness character in the text of the Wilderness Act.

I propose that the BLM modify its regulations and policies regarding wildlife management to bring them in compliance with the Wilderness Act.[224] To solve the problems recognized in this Note, the regulations should make the BLM ultimately responsible for wildlife in the wilderness. In order to preserve wilderness character, the BLM should effect new policies that focus on

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[223] Congress could enact legislation that changes the relationship between the agencies and states regarding wildlife management. For example, on February 27, 2012, Congressman Jeff Miller introduced the Sportsmen's Heritage Act of 2012, H.R. 4089, 112th Cong. (2012). Among other things, this bill seeks to open more federal lands to hunting and changes the analysis required for wilderness-hunting prohibitions. *See id.* § 104(d)(1) (providing that wilderness lands managed by the BLM "shall be open to recreational fishing, hunting, and shooting unless the managing Federal agency acts to close lands to such activity," and requiring that such a decision be "determined by the head of the agency necessary and reasonable and supported by facts and evidence"). The House approved the bill 274–146, but it stalled in the Senate. *See* 158 Cong. Rec. H1896 (daily ed. Apr. 17, 2012) (recording the passage of the bill in the House of Representatives); 158 CONG. REC. S6890 (daily ed. Nov. 26, 2012) (recording the vitiation of the vote on the passage of the bill in the Senate).

[224] Because the federal budget cuts (often referred to as "the Sequester") mandated by the Budget Control Act of 2011, which became effective on March 1, 2013, have exacerbated typical agency budget concerns, it is improbable that the BLM will take such steps on its own. 2 U.S.C. § 901a (Supp. V 2011), *amended by* Pub. L. No. 112-240, § 901(c)(1), 126 Stat. 2313, 2370 (2012). As an alternative, an individual or organization with standing to sue could seek an injunction that would require the BLM to modify its regulation to state that the BLM has primary authority over wildlife in the wilderness areas.

protecting the natural state of wilderness—which includes the wildlife living there. While the policy could allow cooperation with state agencies, the BLM should make the final decisions regarding wildlife and create wildlife-management policy governing all managers.

IV. CONCLUSION

"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."[225] As Aldo Leopold, a founder of the Wilderness Society,[226] illustrated with his observations, wildlife is a fundamental part of wilderness, and wildlife management is integral to wilderness management. When the BLM delegates wildlife management in wilderness to the states, the risk is too great that the state will not share the BLM's national vision and perspective, and will pursue goals inconsistent with those of the agency and the underlying statutory scheme.[227] There is a strong public interest in preserving the remaining wildlife on these lands. The delegation to state agencies with no duty to preserve often leads to overuse and exploitation of public resources such as wildlife. Because the BLM is under a duty to preserve the natural state of the wilderness, the BLM could avoid the negative externalities associated with its policy by modifying its regulations to take control of wildlife management in the wilderness. Absent such a change, the BLM will be unable to fulfill its duties under the Wilderness Act.

Lindsay Sain Jones

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[225] ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 130 (1949).

[226] TURNER, *supra* note 28, at 23–24.

[227] *See* High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235, 1246 (D. Colo. 2006) (reasoning that a delegation to a state agency was impermissible because the Wilderness Act required the National Park Service to administer the wilderness area "in such a manner as will leave it unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of the area, and the preservation of its wilderness character").