

RESPONSE TO KISONAK’S “FISH AND WILDLIFE
MANAGEMENT ON FEDERAL LANDS: THE
AUTHORITIES AND RESPONSIBILITIES OF STATE
FISH AND WILDLIFE AGENCIES”

BY

MARTIN NIE,* KENNETH PITT,** CHRISTOPHER BARNS,*** JONATHAN
HABER,**** JULIE JOLY,***** & SANDRA ZELLMER*****

This Article responds to the central arguments and themes presented in Kisonak’s “Fish and Wildlife Management on Federal Lands: The Authorities and Responsibilities of State Fish and Wildlife Agencies.” None of the core findings and assertions made in our 2017 Article are seriously challenged by Kisonak, and neither is the debate over wildlife federalism advanced in any substantive way. Kisonak’s selective application of the public trust doctrine, emphasis on the North American Model of Wildlife Conservation, and misreading of key public land statutes and case law sows unnecessary confusion. The fact remains federal public land agencies have obligations, not just the discretion, to manage and conserve fish and wildlife on federal lands, and such a responsibility goes beyond providing habitat. The legal framework established by the U.S. Constitution and federal public land law provides states an important role to play in wildlife management and the most productive path forward is for them to work within this system as co-trustees of wildlife. On a positive note, we concur

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

**Kenneth Pitt is an Adjunct Instructor in the Natural Resource Department at Salish Kootenai College and a former General Attorney for the USDA-Office of the General Counsel.

***Christopher Barns is a wilderness consultant and former Wilderness Specialist, Bureau of Land Management (BLM) National Landscape Conservation System, and BLM Representative at the Arthur Carhart National Wilderness Training Center.

****Jonathan Haber is a wildlife planning and policy consultant and a former planning specialist for the United States Forest Service.

*****Julie Lurman Joly is a former Associate Professor of Resources Law and Policy at Alaska Fairbanks.

*****Sandra Zellmer is Professor, Natural Resources and Environmental Law Program, Alexander Blewett III School of Law, University of Montana.

with Kisonak about the crisis facing the nation's biological diversity and the need to act urgently. But an important part of the answer to this global and national crisis is found in the rule of law and by state and federal public land agencies embracing their obligations to conserve wildlife.

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I. INTRODUCTION

Do you want to perpetuate a myth? Then say it again. And again. And again.

Equating repetition with the truth and believing false information due to repeated exposure is known as the “illusory truth effect.”¹ To repeatedly use short, simple phrases and slogans with confidence can make for good politics, but it does nothing to solve real problems and conflicts related to the interjurisdictional complexities of wildlife management on federal public lands.

None of the core findings and assertions made in our Article are seriously challenged by Kisonak. Instead of working through the complexities involved in managing wildlife on federal public lands, his approach is to mischaracterize our work, evade our central findings and recommendations, and call upon a distorted view of the public trust doctrine (PTD) and an “inspirational” North American Model of Wildlife Conservation as a “motivating conceptual force for state, federal, and non-governmental conservation professionals.”²

Our response tracks the core assertions and big themes presented in Kisonak’s response, starting with the broad PTD and constitutional

¹ See Jonas De Keersmaecker et al., *Investigating the Robustness of the Illusory Truth Effect Across Individual Differences in Cognitive Ability, Need for Cognitive Closure, and Cognitive Style*, 46 PERSONALITY & SOC. PSYCH. BULL. 204, 204 (2020) (defining the illusory truth effect).

² Lane Kisonak, *Fish and Wildlife Management on Federal Lands: The Authorities and Responsibilities of State Fish and Wildlife Agencies*, 50 ENV’T L. 935, 946, 948 (2020).

context and finishing with the statute-specific claims he makes about the Wilderness Act³ and the National Wildlife Refuge System Administration Improvement Act.⁴ For brevity's sake we chose not to respond to every claim made in the response because we feel confident we adequately addressed those issues in our Article or because we fail to follow the logic of Kisonak's argument in places. We do, however, want to be clear at the outset that in no way do we discredit the role of the Association of Fish and Wildlife Agencies (AFWA) "as a convener and facilitator of state wildlife agencies."⁵ What we discredit are several recurring arguments made by AFWA regarding state primacy in managing wildlife on federal lands.

As a general matter, Kisonak claims we ignored the ambiguities in federal case law.⁶ This assertion is unfounded. Throughout our Article, we fairly, and at times tediously, addressed the nuances of these cases. Kisonak uses our treatment of *Hughes v. Oklahoma*⁷ for illustration, contending our "simplistic view does not engage with many of the real issues in play."⁸ But we deal fairly with the complexity of this important case.⁹ For arguments sake, we could have cherry-picked the Court's finding that unqualified claims of state "ownership" of wildlife were a "19th-century legal fiction."¹⁰ But we did not do so. Instead, we make clear the Court rejected claims of state ownership in ways that are "repugnant to the Commerce Clause"¹¹ and federal supremacy, while acknowledging the Court also recognized the "*legitimate state concerns* for conservation and protection of wild animals" and the states are not "powerless to protect and conserve wild animal life within their borders."¹²

This was our even-handed approach to all of the foundational federalism cases we reviewed. As we state in our conclusion:

A consistent pattern of primary federal authority emerges from these cases, but even where the Supreme Court corrected itself in overturning *Geer v. Connecticut*, it did so carefully and constructively, finding in favor of the federal government and interstate commerce but also recognizing

³ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2018).

⁴ National Wildlife Refuge System Administration Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee (2018).

⁵ Kisonak, *supra* note 2, at 937.

⁶ *See id.* at 961 (discussing the "regrettable ambiguity" that case law has created).

⁷ 441 U.S. 322 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)).

⁸ Kisonak, *supra* note 2, at 942.

⁹ *See* Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV'T L. 797, 834–35 (discussing the complexity of *Hughes*).

¹⁰ *Hughes*, 441 U.S. at 335 (quoting *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977)).

¹¹ *Id.* at 338.

¹² Nie et al., *supra* note 9, at 835, 908 (quoting *Hughes*, 441 U.S. at 338 (emphasis added)).

the “legitimate state concerns for conservation and protection of wild animals.”¹³

II. THE PUBLIC TRUST DOCTRINE APPLIED TO WILDLIFE

Our Article begins by laying out the most common claims and arguments made by state wildlife agencies and AFWA in the case studies we first investigated for the project.¹⁴ We found the PTD is most often invoked by states when declaring their management authority to regulate fish and wildlife resources.¹⁵ It is used, in other words, as a power play and a means to assert exclusive control over wildlife. We returned to the subject in our analysis and recommendations, first by reviewing the trust-like language found in federal public lands and wildlife law and federal regulations specifying fish and wildlife “are held in public trust by Federal and State governments for the benefit of present and future generations of Americans.”¹⁶ This is a complicated area of law, and we carefully work through the doctrine’s variations and possible applications, ending with what we believe is a constructive attempt to harmonize the multiple trust obligations found on federal lands (federal, state, and tribal).¹⁷ We believe that a “co-trustee” approach could help reframe what is too often an adversarial relationship between federal and state governments.¹⁸

What is AFWA’s response to our proposed sharing of trust duties and obligations in order to more effectively conserve interjurisdictional fish and wildlife populations? No thank you. Instead, Kisonak takes the liberty of redefining the very essence and legal foundation of the PTD.¹⁹ Not of concern are the substantive and procedural obligations that are inherent in any serious application of trust management of natural resources.²⁰ Instead, the doctrine is narrowly defined as providing “a

¹³ Nie et al., *supra* note 9, at 932 (quoting *Hughes*, 441 U.S. at 336).

¹⁴ See generally *id.* at 806.

¹⁵ *Id.* at 807.

¹⁶ 43 C.F.R. § 24.1(b) (2019); See also Nie et al., *supra* note 9, at 902 (“[M]any of these federal land laws include trust-like language pertaining to the national interest in federal lands.”).

¹⁷ Nie et al., *supra* note 9, at 804, 911.

¹⁸ *Id.* at 911.

¹⁹ See Kisonak, *supra* note 2, at 943 (citing Darren K. Cottriel, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1263 (1996) and Allen Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENV’T L. & POL’Y F. 57, 75–77 (2005) to define the PTD in the modern era as a right for private citizens to question agency actions or as the state’s exclusive fiduciary right and duty to protect the resources).

²⁰ Douglas Quirke, distilling the work of Professor Mary Wood and PTD case law, summarizes several core substantive and procedural duties of trustees. Substantive obligations include a duty to protect trust resources from substantial impairment, to give public purposes priority over private purposes, to prevent waste and restore damaged resources, and to guard against privatizing trust resources at the expense of the public. The procedural duties include the utmost loyalty owed to the beneficiaries by the trustee, a

state's *exclusive* authority and duty to protect those resources as a fiduciary."²¹

Kisonak then takes issue with our rather non-controversial assertion that the courts and state governments have generally done little to fill in the details of trust management as it applies to fish and wildlife.²² "These [trust management] duties," he says, "are given life outside the courtroom by state fish and wildlife managers across the country, and agencies along with their partners have picked up a lot of the courts' slack in defining these duties."²³ No evidence is cited to support this claim, and the corresponding footnote includes no examples of a state agency defining—never mind performing—the duties that go along with public trust management.²⁴

Recent research makes us even more skeptical of the claim. Nie, Landres, and Bryan empirically investigated implementation of the PTD as applied to wildlife by thirteen state fish and wildlife agencies in the U.S. West.²⁵ In only two of the eighty-six decision-making documents they reviewed did they find a discernable application of public trust principles or the PTD to a management policy or decision made by a state wildlife agency.²⁶ Their research exposes a significant gap between the legal assertions made by western states about the PTD and the actual decisions that are made by state agencies. As their study concludes:

If the PTD serves as the "legal foundation" of state wildlife management then it ought to mean something in practice. It is time for state wildlife agencies to actually practice trust management or to stop invoking the PTD in courts of law. To the extent states suggest that the PTD is implied in their decision-making, that is not sufficient to meet their fact-finding obligations and leaves the PTD as mere guesswork. Granted, there are variations of the PTD and its application will depend on a state's common law and the management issue in question. But the PTD is not just political rhetoric nor should it be selectively used by states to assert jurisdictional primacy and unfettered control of wildlife vis-à-vis federal

legislative responsibility to adequately supervise administrative agencies, duties to act in good faith and with reasonable skill, a duty of managing trust resources with reasonable caution, and a responsibility for providing information to beneficiaries and an accurate accounting of trust resources. Douglas Quirke, *The Public Trust Doctrine: A Primer*, UNIV. OR. SCH. L. ENV'T & NAT. RES. L. CTR. 12–13 (2016) <https://perma.cc/KYX7-V5N6>; MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 189 (2014). See also MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 3–9 (2013) (explaining the role and duties of the trustees and beneficiaries in the application of the PTD).

²¹ Kisonak, *supra* note 2, at 943 (emphasis added).

²² *Id.* at 944; Nie et al., *supra* note 9, at 807.

²³ Kisonak, *supra* note 2, at 944.

²⁴ See *id.* at 944, 944 n.57 (describing only the differences between the PTD and financial trusts).

²⁵ Martin Nie, Nyssa Landres & Michelle Bryan, *The Public Trust in Wildlife: Closing the Implementation Gap in Thirteen Western States*, 50 ENV'T L. REP. 10909 (2020).

²⁶ *Id.* at 10913.

and tribal governments. Instead, the PTD comes with significant legal obligations, substantive and procedural. For states and their representatives to ask the judiciary to give the PTD “due force,” and to then not apply trust-based decision-making on the ground, is to invite future legal challenge.²⁷

It is within the context of the PTD Kisonak then takes issue with our Article’s criticism that “state endangered species acts and other protections are of comparatively lesser value and that gaps run through management of non-listed species.”²⁸ This argument, he says, “takes no heed of the shift in the landscape it purports to seek—that is, states increasingly take on affirmative conservation duties for non-game species” and a “casual scan of state fish and wildlife agency websites clearly demonstrates deep commitments to managing non-game species and the habitats upon which they depend.”²⁹ Of course, it is not a website that protects federally unlisted non-game species but rather state laws and regulations matched with adequate funds and devoted personnel. And the fact remains that, with few exceptions, most states have relatively weak legislative programs designed to protect and recover imperiled species.³⁰ One recent study, for example, shows “[s]tates generally fail to prohibit habitat impairment by private parties, lack permit programs to minimize incidental harms to species and spur habitat conservation, and do not restrict state agency actions that undermine species recovery.”³¹ Another comprehensive study concludes that “conservation laws in most states are inadequate to achieve the [Endangered Species Act’s]³² conservation and recovery goals.”³³

²⁷ *Id.* at 10919.

²⁸ Kisonak, *supra* note 2, at 944.

²⁹ *Id.* at 944–45.

³⁰ See Robert L. Fischman et al., *State Imperiled Species Legislation*, 48 ENV’T L. 81, 116–17 (2018) (finding that “state imperiled species legislation is weaker than the [Endangered Species Act]” and generally “reflect a more permissive attitude”).

³¹ *Id.* at 81.

³² Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

³³ Alejandro E. Camacho et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 ENV’T L. REP. 10837, 10837 (2017). The contrast between federal and state laws are striking in this regard, as the following research findings make clear:

- State expenditures on the conservation of federally listed species make up roughly five percent of total ESA spending;
 - Only 18 states cover all animals and plants covered the federal ESA, with 32 states providing less coverage;
 - 23 states do not require that decisions about whether to provide protections to vulnerable species be based on best scientific data;
 - 42 states have limited or no inter-agency consultation requirements;
 - Only 14 states allow citizen petitions close the level provided in the federal ESA;
 - 38 states fail to provide any authority for designation of critical habitat for listed species;
 - 40 states do not consider habitat modification to be prohibited take;
 - 49 states have limited restrictions or do not restrict private land use in any way;
- and

In the context of the PTD, we are puzzled yet possibly encouraged by Kisonak's use of *Center for Biological Diversity, Inc. v. FPL Group, Inc.*³⁴ and *In Re Steuart Transportation Co.*³⁵ In *Center for Biological Diversity, Inc.*, plaintiffs used the PTD as a way to protect thousands of birds and raptors that were being killed by the operation of outdated wind turbines by private businesses in California.³⁶ The decision made it clear citizens have the right to bring a cause of action to enforce the public trust in wildlife, and so we are heartened AFWA agrees with this important principle.³⁷ The case also helped clarify the complicated relationship between the public trust as derived from common and statutory law, thus working through the principles of the PTD and California Wildlife Code.³⁸ In doing so, both the trustee and beneficiary learned more about the contours and future applications of the PTD.

Kisonak's use of *In Re Steuart Transportation Co.* is even more confounding to us given his concern about the PTD being applied at both the federal and state level because of the confusion it would purportedly cause.³⁹ We are unsure, then, of why Kisonak would reference a case wherein the court upheld state *and* federal claims pertaining to damages for loss of migratory waterfowl, stating “[u]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources” and “[s]uch right does not derive from ownership of the resources but from a duty owing to the people.”⁴⁰ This case lends even more support to our review of the federal trust duty as it applies to federal public lands and wildlife management and our recommendation to embrace a model of “co-trusteeship” between federal, state, and tribal governments.⁴¹

III. THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION

As a “complement to the PTD universe,” Kisonak then argues we should have provided the North American Model of Wildlife Conservation (the Model) more consideration, “not as a source of legal authority drawing from any one precedent or statute, but as a motivating conceptual force for state, federal, and non-governmental

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- 48 states provide varying, limited, or no planning authority for the recovery and delisting of species.

Id. at 10838–10842.

³⁴ 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).

³⁵ 495 F. Supp. 38 (E.D. Va. 1980).

³⁶ *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 591–92, 595.

³⁷ *Id.* at 600–01.

³⁸ *Id.* at 599–601.

³⁹ Kisonak, *supra* note 2, at 944.

⁴⁰ *In Re Steuart Transp. Co.*, 495 F. Supp. at 40 (internal citations omitted).

⁴¹ Nie et al., *supra* note 9, at 911.

conservation professionals.”⁴² Our Article does in fact analyze the Model because of how frequently it was invoked by States and AFWA in the cases we first investigated as part of the project.⁴³ We then return to the Model and explain why we believe its use by AFWA and the States can be problematic because its narrow and hunting-centric view of conservation is commonly used to assert state primacy.⁴⁴

We challenge his claim the Model somehow has independent legal authority because it is referenced in state agency documents. That AFWA and state wildlife agencies use the Model for public relations or conceptual purposes does not mean it is codified, enforceable, or has independent legal authority.

We would have liked to avoid discussing the Model altogether because we view it as a rather incoherent, incomplete, and problematic accounting of American wildlife conservation—past, present, and future. To ignore the Model would be easy if it, as Kisonak says, was just an inspirational and “conceptual framework that allows wildlife professionals in a multidisciplinary setting to coordinate decision-making and implement programs coherently on the ground.”⁴⁵ But that is not at all how AFWA and others use the Model in practice. Take, for example, one of the recent cases referenced in Kisonak’s argument, *Utah Native Plant Society v. U.S. Forest Service*.⁴⁶ The case involves Utah’s introduction of non-native mountain goats on state lands in the La Sal Mountains adjacent to the Manti-La Sal National Forest.⁴⁷ As anticipated, the goats now inhabit a research natural area on National Forest lands, thus precipitating questions related to wildlife federalism.⁴⁸ AFWA bases its *amicus* brief on the Model to make the case for state primacy for wildlife management on federal lands.⁴⁹ The transplantation of mountain goats, says AFWA’s brief, “illustrates [the Model] at work.”⁵⁰ It further tells the court that “[u]ndergirding the Model is a version of cooperative federalism,”⁵¹ but its mistaken interpretation is that cooperative federalism means federal agencies must acquiesce to state interests in all but the narrowest cases of preemption.⁵² The bigger problem is the inaccuracy of the claim itself, as

⁴² Kisonak, *supra* note 2, at 946.

⁴³ Nie et al., *supra* note 9, at 811–12.

⁴⁴ *Id.* at 813.

⁴⁵ Kisonak, *supra* note 2, at 947.

⁴⁶ 923 F.3d 860 (10th Cir. 2019).

⁴⁷ *Id.* at 863.

⁴⁸ *Id.* at 864.

⁴⁹ Proposed Brief of the Association of Fish & Wildlife Agencies as Amicus Curiae in Support of Defendants-Appellees & Affirmations at 5–6, *Utah Native Plant Soc’y v. U.S. Forest Serv.*, 923 F.3d 860 (10th Cir. 2019) (No. 17-4074), 2017 WL 6462708, at *5–6.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 9.

⁵² *Id.* at 6, 9.

the Model includes no principle whatsoever regarding cooperative federalism,⁵³ which is one reason we are so critical of it.

This is not an anomalous use of the Model. Consider another case that focused on the question of whether or not the U.S. Fish and Wildlife Service needs a state permit and approval from New Mexico to release Mexican wolves onto federal lands in the State.⁵⁴ Once again, AFWA bases its argument for state supremacy on the premises of the Model, telling the court it “is rooted in constitutional principles,” with an emphasis on the Tenth Amendment.⁵⁵ Even more problematic is AFWA’s claim “federal and state management of listed and recovering species is governed by the [Model].”⁵⁶ This makes no sense of course because such species are governed by an actual law: the Endangered Species Act (ESA).

And lest we forget how the Model can be used to oppose tribal treaty hunting rights reserved on federal land, consider the Western Association of Fish and Wildlife (the Association) and Conservation’s *amicus* brief in *Herrera v. Wyoming*.⁵⁷ The case centers on the Crow Tribe’s treaty-based hunting rights on the Bighorn National Forest in Wyoming.⁵⁸ For the Tribe to assert these treaty rights, according to the Association, it would “undermine the two basic principles of the [Model]: that fish and wildlife belong to all Americans, and that they need to be managed in such a way that their populations will be sustained forever.”⁵⁹ The Association also references the Model to challenge a Tribal member’s “unlicensed hunting” and how it “indirectly undermines state wildlife management efforts—for all wildlife resources, not just game animals—by reducing a principal funding stream for state wildlife agencies.”⁶⁰ Fortunately, the Supreme Court rejected the arguments raised by Wyoming and the Association, and affirmed the Tribe’s treaty right to hunt in the National Forest.⁶¹

These three recent cases explain why we were forced to deal with the North American Model and why we continue to see it as problematic. It provides no principle or guidance about how to address the complicated tensions between federal, state, and tribal governments

⁵³ J.F. ORGAN ET AL., NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION 2 (Theodore A. Bookhout ed., 2012).

⁵⁴ N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior, 854 F.3d 1236, 1244 (10th Cir. 2017).

⁵⁵ Brief of the Association of Fish & Wildlife Agencies as Amicus Curiae in Support of Plaintiff-Appellee & Affirmation at 8, New Mexico Dep’t of Game & Fish v. U.S. Dep’t. Interior, 854 F. 3d 1236 (10th Cir. 2017) (No. 16-2202).

⁵⁶ *Id.* at 6.

⁵⁷ 139 S. Ct. 1686 (2019).

⁵⁸ *Id.* at 1691.

⁵⁹ Brief for Western Association of Fish & Wildlife Agencies & Conservation, Hunting, Fishing, & Outfitter and Guide Associations as Amici Curiae Supporting Respondent at 3–4, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (No. 17-532).

⁶⁰ *Id.* at 20.

⁶¹ *Herrera*, 139 S. Ct. at 1702–03.

in the management of wildlife on federal lands.⁶² In fact, the Model entirely fails to include a principle related to habitat, nor does it mention the role played by federal lands and federal environmental law in American wildlife conservation.⁶³

IV. STATE OWNERSHIP AND CONSTITUTIONAL LIMITATIONS

Kisonak asserts that Congress has exhibited an “increasing willingness . . . to exercise its constitutional authority, but it also shows a resolute and enduring intent to reserve authority for fish and resident wildlife management to the states.”⁶⁴ In support of this proposition, he cites two cases, one involving the Federal Land Policy and Management Act⁶⁵ (FLPMA) and one involving the National Forest Management Act⁶⁶ (NFMA). In the first, *Defenders of Wildlife v. Andrus*,⁶⁷ the D.C. Circuit was faced with a NEPA challenge to the Department of Interior’s (DOI) failure to stop Alaska from killing wolves on federal public lands.⁶⁸ The court held the DOI’s refusal to intervene in Alaska’s program was not a major federal action under NEPA; indeed, it was not an agency action under that statute at all.⁶⁹

The court noted that FLPMA “broadly and explicitly reaffirms” the “traditional division of authority over wildlife management.”⁷⁰ Kisonak’s reliance on dicta from *Defenders of Wildlife* to make his point sweeps far too broadly. The key takeaway from *Defenders* has far more to do with process and administrative procedure than either state or federal authority or responsibility over wildlife:

Of course an EIS need not be promulgated unless an agency’s planning ripens into a “recommendation or report on proposals for legislation (or) other major Federal actions significantly affecting the quality of the human environment.” Logically, then, if the agency decides not to act, and thus not to present a proposal to act, the agency never reaches a point at which it need prepare an impact statement [This] is simply to confirm that Congress did not expect agencies to prepare statements if there is to be no action. . . .

⁶² See ORGAN ET AL., *supra* note 53, at 2 (discussing the seven key properties of the Model, none of which address the relationships between federal, state, and tribal management of wildlife on federal lands).

⁶³ *Id.*

⁶⁴ Kisonak, *supra* note 2, at 948.

⁶⁵ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2012).

⁶⁶ National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2018) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

⁶⁷ 627 F.2d 1238 (D.C. Cir. 1980).

⁶⁸ *Id.* at 1241.

⁶⁹ *Id.* at 1245.

⁷⁰ *Id.* at 1248–49.

. . . [I]n no published opinion of which we have been made aware has a court held that there is “federal action” where an agency has done nothing more than fail to prevent the other party’s action from occurring.⁷¹

Since the case was handed down forty years ago, *Defenders of Wildlife* has been widely cited by many courts, including the D.C. Circuit itself, for the fundamental premise that NEPA is triggered only by proposals for major federal *actions*.⁷² The bottom line is far more modest than Kisonak believes, as quoted by many subsequent opinions: “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.”⁷³

Utah Native Plant Society v. U.S. Forest Service is the second case cited to support Kisonak’s view about Congress’s so-called “resolute and enduring intent to reserve authority for fish and resident wildlife management to the states.”⁷⁴ Much like *Defenders of Wildlife*, the Tenth Circuit analyzed the issues raised in *Utah Native Plant Society* primarily through the lens of agency action (or lack thereof).⁷⁵ It pointed to the U.S. Supreme Court’s landmark opinion in *Norton v. Southern Utah Wilderness Alliance*⁷⁶ to support its decision regarding the limits of judicial review to “protect agencies from undue judicial interference with their lawful discretion,” among other reasons, . . . “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.”⁷⁷ Accordingly, the court refused to force the Forest Service to prevent goats that had been introduced by Utah onto state lands from migrating onto federal lands or to take affirmative action to remove the goats once they did

⁷¹ *Id.* at 1243–44 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 350 n.2 (1979)).

⁷² *See, e.g., Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv.*, 674 F.3d 97, 102–03 (1st Cir. 2012) (holding that state’s conveyance of an easement to a private developer permitting road construction on property acquired by state with federal funds was not a “federal action” under NEPA, where federal officials were not advised of, and did not approve of, the grant, and USFWS had no enforceable duty to take enforcement action against the state); *Minn. Pesticide Info. & Educ., Inc. v. Espy*, 29 F.3d 442, 443 (8th Cir. 1994) (holding that Forest Service’s decision not to use herbicides to control vegetation was not a “major federal action” and did not trigger NEPA); *Macht v. Skinner*, 916 F.2d 13, 17 (D.C. Cir. 1990) (holding that without a federal funding commitment, the state-funded Light Rail Project cannot be a major federal action within the meaning of NEPA).

⁷³ *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 989 (N.D. Cal.), *aff’d sub nom.*, *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2014) (citing *Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv.*, 674 F.3d 97, 102–03 (1st Cir. 2012) (quoting *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980); *accord Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1123 (10th Cir. 2009)).

⁷⁴ 923 F.3d 860, 870 (10th Cir. 2019); Kisonak, *supra* note 2, at 948.

⁷⁵ Kisonak, *supra* note 2, at 948.

⁷⁶ 542 U.S. 55 (2004).

⁷⁷ *Utah Native Plant Soc’y*, 923 F.3d at 874 (citing *S. Utah Wilderness All.*, 542 U.S. at 64, 66).

take up residence on federal lands.⁷⁸ In short, it held that the Forest Service’s “wait and see” response to an environmental organization’s request to remove goats was neither a “final agency action” under NEPA nor a failure to take a discrete, required action subject to judicial review under the Administrative Procedure Act (APA).⁷⁹

There is nothing all that surprising about *Utah Native Plant Society*, as it is essentially another APA “failure to act” case. We cite several such cases in our Article, and we note “[o]ne of the most difficult contemporary questions concerns circumstances where federal agencies have refused to take action to protect wildlife on federal lands.”⁸⁰

The *Utah Native Plant Society* case is also limited in its reach because the initial action takes place on state land that is adjacent to federal public lands,⁸¹ an issue we acknowledge as being mostly untested and unresolved.⁸² While the court recognized the State of Utah’s broad trustee and police powers over wildlife within its borders,⁸³ it specifically stated that “[o]ur conclusions . . . say nothing about the [Forest Service]’s ability to manage the mountain goats consistent with federal policies and objectives once the goats enter the national forest”⁸⁴ The court stated:

Lest it become too comfortable with our analysis thus far, we remind the State of Utah . . . that the Supreme Court has “repeatedly observed that the power over the public lands . . . entrusted to Congress is without limitations.” And the power of the FS under the Organic Act to protect the habitat of national forests “does not admit of doubt.”⁸⁵

Because the court found final agency action lacking, the court did not resolve the deeper federalism issues lurking in the background of this case.⁸⁶

⁷⁸ *Id.* at 873–74.

⁷⁹ *Id.*; Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

⁸⁰ Nie et al., *supra* note 9, at 916.

⁸¹ *Utah Native Plant Soc’y*, 923 F.3d at 864.

⁸² Nie et al., *supra* note 9, at 825 (“Beyond the land itself, it is fair to ask how far federal authority over wildlife and other migratory resources ‘integral’ to the public lands goes when those resources are found outside of the boundaries of the public lands.”).

⁸³ *Utah Native Plant Soc’y*, 923 F.3d at 866.

⁸⁴ *Id.* at 871.

⁸⁵ *Id.* at 872 (citing *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Hunt v. United States*, 278 U.S. 96, 100 (1928)).

⁸⁶ In concurrence, Justice Eid emphasized that the court had no need to reach the merits regarding federal and state authority over wildlife:

I agree with the majority that the U.S. Forest Service’s (USFS) refusal to remove the mountain goats does not constitute final agency action because the USFS’s letter deferred agency action pending future research and data collection regarding the goats’ impact. . . . Accordingly, I would affirm the district court’s decision that final agency action is lacking in its entirety in this case, and thus would not reach the merits.

V. PREEMPTION AND ANTI-COMMANDEERING DOCTRINE

Kisonak relies on *Gregory v. Ashcroft*⁸⁷ to support the assertion “preemptive power in traditionally state-regulated areas is ‘extraordinary . . . in a federalist system’ and must be ‘exercise[d] lightly.’”⁸⁸ *Gregory v. Ashcroft* is almost entirely inapposite in the context of wildlife management on federal property. In *Gregory v. Ashcroft*, the Court eschewed congressional interference with a state’s decision to establish qualifications for judges, stating that authority of the states to determine qualifications of their own government officials “is an authority that lies at ‘the heart of representative government.’”⁸⁹ The power and responsibility of the State “to preserve the basic conception of a political community” applies “to persons holding state elective and important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.”⁹⁰ As such, federal interference would upset the constitutional balance of federal and state powers;⁹¹ therefore, in exercising its Commerce Clause powers, Congress must make its intention to upset that balance unmistakably clear.⁹² The law refuses to give “state-displacing weight” in such a state-centric area “to mere congressional *ambiguity*.”⁹³ In the end, the Court neatly sidestepped the thorny federalism issue by applying the plain statement rule to determine Congress did intend the Age Discrimination in Employment Act⁹⁴ to apply to state judges.⁹⁵ As Kisonak concedes, *Gregory v. Ashcroft*’s protective posture toward state authority turns heavily on the type of function in question: “[T]he ‘more sovereign’ the state law, the more deferential to state interests [a] preemption analysis should be.”⁹⁶

In contrast to functions that lie at “the heart of representative government,” when it comes to wildlife management, courts across the country have not been overly deferential to states and have not hesitated to preempt state law or state action that undermines congressional programs and purposes. The ESA is a prime example, but

Id. at 875 (Eid, J., concurring).

⁸⁷ 501 U.S. 452 (1990).

⁸⁸ Kisonak, *supra* note 2, at 949–50 (citing *Gregory*, 501 U.S. at 460).

⁸⁹ *Gregory*, 501 U.S. at 463 (internal citations omitted).

⁹⁰ *Id.* at 462 (internal citations omitted).

⁹¹ *Id.* at 460.

⁹² *Id.*

⁹³ *Id.* at 464.

⁹⁴ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2018).

⁹⁵ *Gregory*, 501 U.S. at 470.

⁹⁶ Kisonak, *supra* note 2, at 950 (citing Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 560 (2007)).

it is certainly not the only one.⁹⁷ In *Kleppe v. New Mexico*,⁹⁸ the Supreme Court held the Wild Free-Roaming Horses and Burros Act⁹⁹ overrides New Mexico Estray Law insofar as that law attempts to regulate federally protected animals.¹⁰⁰ It stated, “[n]o doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers.”¹⁰¹ Despite the states’ acknowledged interests in wildlife management, federal law was not “an impermissible intrusion upon state sovereignty,” and, in the end, state law was displaced by federal law.¹⁰²

VI. REGULATION OF ACTIVITY ON STATE LAND NEAR OR WITHIN FEDERAL LAND

We do not disagree that, “[f]or wildlife residing both on state and federal land, one of the most urgent jurisdictional issues is what laws apply to those species and populations.”¹⁰³ We do disagree, however, about the placement of the thumb on the scale of laws to apply. In short, where Congress authorizes federal involvement, there is no question that federal law applies.¹⁰⁴

Kisonak selectively cites a few circuit court cases from our original article, including *Minnesota v. Block*.¹⁰⁵ In *Block*, the court upheld federal regulation of motorboats and other activities on state-owned

⁹⁷ See *Strahan v. Coxe*, 127 F.3d 155, 167–68 (1st Cir. 1997) (distinguishing *Gregory v. Ashcroft* and finding state regulation of commercial fishing preempted when it harms federally protected fish species), *cert. denied*, 525 U.S. 830 (1998). See also *Palila v. Haw. Dept. of Land & Nat. Res.*, 852 F.2d 1106, 1110 (9th Cir. 1988) (ordering the state to remove state-maintained sheep because the sheep destroyed the habitat of a protected bird species); *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 859 (9th Cir. 2002), *amended*, 312 F.3d 416, 418 (9th Cir. 2002) (holding that a California statute banning the use of steel-jawed leghold animal traps was preempted by the ESA and other federal laws); *Sierra Club v. Von Kolnitz*, No. 2:16-CV-03815-DCN, 2017 WL 3480777, at *7 (D.S.C. Aug. 14, 2017) (ordering the removal of state-constructed sea walls that impeded sea turtle recovery despite the states’ interest in preventing beach erosion); *Strahan v. Sec’y, Mass. Exec. Office of Energy & Env’t Affairs*, No. 19-CV-10639-IT, 2020 WL 2079302, at *14 (D. Mass. Apr. 30, 2020) (requiring Massachusetts to receive a federal permit or to cease licensing vertical buoy ropes in coastal waters due to adverse effects on whales and other protected species).

⁹⁸ 426 U.S. 529 (1976).

⁹⁹ Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2018).

¹⁰⁰ *Kleppe*, 426 U.S. at 545.

¹⁰¹ *Id.* at 545 (citing *Missouri v. Holland*, 252 U.S. 416, 434 (1920)).

¹⁰² *Id.*

¹⁰³ Kisonak, *supra* note 2, at 951.

¹⁰⁴ See *id.* at 948 (noting that when there is “tension between the Supremacy and Property Clauses on one hand, and the Tenth Amendment on the other,” federal law often prevails, and does so when “Congress expresses its clear and manifest intent for this to occur”).

¹⁰⁵ 660 F.2d 1240 (8th Cir. 1981). See Kisonak, *supra* note 2, at 952 (citing *Block*, 660 F.2d at 11259, which held “restrictions on the use of motorboats and snowmobiles applied to private persons, not states *per se*”).

property. The State of Minnesota argued the application of federal motorized use restrictions to land and waters under state jurisdiction violated the Tenth Amendment, but the court soundly rejected that position.¹⁰⁶ As Kisonak acknowledges, one reason was the restrictions did not regulate “States as States” by directly impairing the state’s ability to “structure integral operations in areas of traditional functions,” but instead regulated “private conduct both on and off federal land, as necessary to protect that federal land.”¹⁰⁷ The court also noted the statute in question “permits the state to exercise its traditional jurisdiction” over private motorized uses, but added an important caveat—“*as long as state regulation is not less strict than federal regulation.*”¹⁰⁸ The court was similarly unpersuaded by the State’s argument the federal restrictions “interfere with its traditional role of regulating the waterways within the boundary waters.”¹⁰⁹ Rather, the state’s authority over navigable waters and other public resources like wildlife “must yield to any valid exercise of federal power.”¹¹⁰

Cherry-picking a case here and there from a multitude of venues can yield just about any result one may want but does not constitute bedrock legal principals. For example, Kisonak faults our article for failing to mention *United States v. Grant*,¹¹¹ where a district court held the federal government lacked authority to bring charges for arson on state land adjacent to a national forest when the fire in question did not actually spread to federal lands.¹¹² However, the statute relied upon by the federal prosecutor in *Grant* foreclosed federal prosecution, as it was narrowly crafted to apply only to fires set “upon the public domain or upon any lands owned or leased by or under the partial, concurrent, or exclusive jurisdiction of the United States.”¹¹³ The court noted that Congress knew how to prohibit “unattended and unextinguished” fires “in *or near*” federal lands when it wanted, and it did not do so in that

¹⁰⁶ *Block*, 660 F.2d at 1251.

¹⁰⁷ *Id.* at 1252 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 274 (1981) (internal citations omitted)).

¹⁰⁸ *Id.* at 1253 (emphasis added).

¹⁰⁹ *Id.* at 1252.

¹¹⁰ *Id.* See *United States v. Ahrendt*, No. 14-PO-149 (JRT), 2015 WL 6445184, at *4 (D. Minn. Oct. 21, 2015) (citing *Block* and rejecting defendant’s argument, under 16 U.S.C. § 668dd, that state law, which allegedly gave him riparian rights to trap minnows, should protect him from a conviction for illegally trapping within federal Waterfowl Production Areas, because “even if a conflict existed between state riparian rights law and federal law, federal law would govern”). See also Nie et al., *supra* note 9, at 824–25 (citing additional cases which “authorize[] federal regulation of activities of the federal boundaries where necessary to protect the public lands and resources”).

¹¹¹ 318 F. Supp. 2d 1042 (D. Mont. 2004). See Kisonak, *supra* note 2, at 953 (citing *Grant*, 318 F. Supp. 2d at 1045–46).

¹¹² *Grant*, 318 F. Supp. 2d at 1046.

¹¹³ *Id.* at 1043 (citing 18 U.S.C. § 1855 (2018)).

particular statute.¹¹⁴ The court simply held, as it must, “[i]n the absence of even a minimal proprietary interest, and no expression of intent by either Congress or the Montana legislature for the federal government to exercise legislative power over these lands, the federal government does not have ‘partial, concurrent or exclusive jurisdiction’ over them.”¹¹⁵ Even if one lone district court opinion carried the weight AFWA seems to think it should, *Grant* does not in fact support AFWA’s assertion that “[f]or wildlife management activity that may affect federal property, the case law shows no general federal claim on primary jurisdiction.”¹¹⁶

VII. PARENS PATRIAE, POLICE POWERS, AND NATURAL RESOURCE INTERESTS

Kisonak acknowledges state standing as *parens patriae* was key to obtaining relief in *Massachusetts v. Environmental Protection Agency* (*Mass. v. EPA*),¹¹⁷ where a group of states sought to compel the federal government to regulate greenhouse gases.¹¹⁸ From this, Kisonak extrapolates that the “affirmative powers and duties of a state-as-trustee are as wide as the Constitution allows.”¹¹⁹ To bolster his position, Kisonak cites a 1973 district court case, *Maine v. M/V Tamano*,¹²⁰ where the state of Maine asserted its *parens patriae* status to recover damages to coastal waters and marine life from an oil spill.¹²¹

Many cases, including *Mass. v. EPA* and *M/V Tamano*, reference the state’s *parens patriae* interests not as a substantive matter but rather as grounds for supporting standing or intervention in a case.¹²² Indeed, the doctrine of *parens patriae* is “a species of prudential standing,” which does not create a boundless opportunity for governments to seek recovery for alleged wrongs against them or their residents.¹²³ In *Maine v. M/V Tamano*, the court refused to dismiss

¹¹⁴ *Id.* at 1044 (citing the statute at issue in *United States v. Alford*, 274 U.S. 264 (1927), 18 U.S.C. § 1856).

¹¹⁵ *Id.* at 1046.

¹¹⁶ Kisonak, *supra* note 2, at 953.

¹¹⁷ 549 U.S. 497, 519 (2007).

¹¹⁸ Kisonak, *supra* note 2, at 954.

¹¹⁹ *Id.* at 955.

¹²⁰ 357 F. Supp. 1097 (D. Me. 1973).

¹²¹ *Id.* at 1099.

¹²² See *Am. Rivers v. Fed. Energy Regulatory Comm’n*, 187 F.3d 1007, 1026 (9th Cir. 1999), opinion *amended* and *superseded* on denial of *reh’g*, 201 F.3d 1186 (9th Cir. 1999) (Oregon Department of Fish and Wildlife had *parens patriae* standing to challenge determinations by the Federal Energy Regulatory Commission (FERC) that FERC was not required to include fishways in reissued hydropower license).

¹²³ *Serv. Emps. Int’l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001). See *Massachusetts v. Env’t Prot. Agency*, 549 U.S. 497, 540 n.1 (2007) (Roberts, C.J., dissenting) (describing the “requirements for *parens patriae* standing” as “prudential”); *Gov’t of Manitoba v. Bernhardt*, 923 F.3d 173, 183 (D.C. Cir. 2019) (finding that, despite Missouri’s undeniable interest in managing water, Missouri did not

Maine's lawsuit to recover damages from an oil spill, holding the state had sufficiently asserted injury to its interest at the pre-trial pleading stage.¹²⁴ The court stated Maine's sovereign interest in its coastal waters and marine life allowed it to maintain a *parens patriae* action for damages on behalf of its citizens.¹²⁵ The case stands for the modest proposition a state has standing to seek damages when it sues as *parens patriae*.¹²⁶

In sum, the doctrine of *parens patriae* flows from the concept the sovereign must protect its citizenry when individual members of the citizenry are not able to protect themselves.¹²⁷ Thus, a state may have *parens patriae* standing when the claims are "so diffuse as to invade the citizenry's collective interests."¹²⁸ The doctrine does not create substantive rights;¹²⁹ much less does it authorize states to reach "as wide as the Constitution allows" in wildlife management or any other matter.¹³⁰

VIII. WILDLIFE AND THE WILDERNESS ACT

Kisonak makes two fundamental errors regarding the management of wildlife in federally designated wilderness areas. The first is his mistaken interpretation of the Wilderness Act. He writes, "[t]he Act creates a mandate to keep lands designated as wilderness 'untrammeled by man' and manage them to remain . . . unmarked by humans."¹³¹ The word "unmarked" appears nowhere in the statute, so it is unclear if he thinks "unmarked" is synonymous with "untrammeled" or somehow encapsulates the direction in the Act that an area protected as wilderness is "undeveloped . . . retaining its primeval character and influence, without permanent improvements" and "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."¹³²

Kisonak glosses over a core mandate of the Wilderness Act: these areas should be managed "as an area where the earth and its community of life are untrammeled by man."¹³³ Our Article devotes

have standing in its quasi-sovereign *parens patriae* capacity to sue the Federal Bureau of Reclamation for approving a water transfer project because the matter fell "within the sovereignty of the Federal Government" and the federal government represents the same interest of the same citizens).

¹²⁴ *M/V Tamano*, 357 F. Supp. at 1102.

¹²⁵ *Id.* at 1100.

¹²⁶ *Id.* at 1101.

¹²⁷ *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

¹²⁸ Katherine Mims Crocker, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2070 (2011).

¹²⁹ *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 337 n.5 (1st Cir. 2000).

¹³⁰ Kisonak, *supra* note 2, at 955.

¹³¹ *Id.* at 962.

¹³² Wilderness Act, 16 U.S.C. § 1131(c) (2018).

¹³³ *Id.*

considerable time to this mandate because it is at the core of so many wildlife-related management conflicts.¹³⁴ Many actions sought and taken by state wildlife agencies involve manipulations of wilderness, such as introducing or transplanting species, killing predators, and altering habitat.¹³⁵ These examples of trammeling are generally not permitted in wilderness.¹³⁶ Kisonak's misunderstanding of the Wilderness Act's mandate continues a trend and is similarly reflected in the AFWA 2006 Agreement we reference in our Article as it similarly omits any mention of this important quality in analyzing action alternatives in wilderness.¹³⁷

Kisonak makes a similar error in his partial list of prohibited developments in Wilderness. He includes "permanent roads, motor vehicles, and motorized equipment,"¹³⁸ but omits, among other prohibitions, structures and installations.¹³⁹ Of course, many actions which state wildlife agencies desire to undertake, such as constructing wildlife guzzlers, involve prohibited uses in wilderness.¹⁴⁰ In this omission, he has done slightly better than the AFWA 2006 Agreement, which omits all of the prohibited developments when analyzing the effects of proposed actions.¹⁴¹

We are perplexed that Kisonak fails to point out these prohibitions are not absolute. Perhaps it is because determining exceptions is a task completed by federal public land agencies. Among the exceptions for some of the prohibited uses is "as necessary to meet minimum requirements for the administration of the area for the purpose of this [Act]."¹⁴² As we detail,¹⁴³ the purpose of the Wilderness Act is to preserve each area's wilderness character,¹⁴⁴ and the responsibility to do so rests solely with the federal agency administering the area.¹⁴⁵ Congress gave state wildlife agencies neither the responsibility nor the authority to preserve an area's wilderness character.

Another basic error involves Kisonak's misinterpretation of the Wilderness Act's savings clause. The provision, in its entirety, states: "Nothing in this [Act] shall be construed as affecting the jurisdiction or

¹³⁴ Nie et al., *supra* note 9, at 881–82.

¹³⁵ See *id.* at 894 n.749 (listing activities the USFS, BLM, and AFWA may or may not take pursuant to a 1986 agreement).

¹³⁶ See *id.* at 894–97 (discussing the contours of the agreement noted *supra* note 135).

¹³⁷ *Id.* at 895–97; U.S. FOREST SERV. ET AL., POLICIES AND GUIDELINES FOR FISH AND WILDLIFE MANAGEMENT IN NATIONAL FOREST AND BUREAU OF LAND MANAGEMENT WILDERNESS 16–17 (2006), <https://perma.cc/M8MK-WDCY> [hereinafter AFWA 2006 AGREEMENT].

¹³⁸ Kisonak, *supra* note 2, at 962.

¹³⁹ Wilderness Act, 16 U.S.C. § 1133(c) (2018).

¹⁴⁰ See Nie et al., *supra* note 9, at 922–24 (discussing the installation of a water catchment, or "guzzler," in the Kofa Wilderness).

¹⁴¹ AFWA 2006 AGREEMENT, *supra* note 137, at 17.

¹⁴² 16 U.S.C. § 1133(c).

¹⁴³ Nie et al., *supra* note 9, at 885.

¹⁴⁴ 16 U.S.C. § 1131(a).

¹⁴⁵ *Id.* § 1133(b).

responsibilities of the several States with respect to wildlife and fish in the national forests.”¹⁴⁶ Kisonak confidently asserts that this “may be the clearest-written reservation of management authority in any federal natural resources statute.”¹⁴⁷ But this once again misses the mark.

The Wilderness Act’s savings clause, like others, cannot be understood outside of the law’s purpose and management framework. In general, such provisions demonstrate Congress’s desire to acknowledge some level of state responsibility over wildlife management, but in no way should these clauses be interpreted to diminish the federal government’s vast constitutional and statutory authority to manage its own lands and resources, even when objected to by a state. Though *Wyoming v. United States*¹⁴⁸ focused on the savings clause provided in the National Wildlife Refuge System Improvement Act, the Tenth Circuit’s logic applies to savings clauses more broadly.¹⁴⁹ The *Wyoming v. United States* court found it “highly unlikely . . . that Congress would carefully craft the substantive provisions of the [Improvement Act] to grant authority to the [Fish and Wildlife Service] to manage the [refuge] and promulgate regulations thereunder and then essentially nullify those provisions and regulations with a single sentence.”¹⁵⁰

The proscriptions for wildlife management in federal Wilderness are more stringent than on other federal lands.¹⁵¹ In short, state wildlife agencies generally may manage non-federally listed fish and wildlife in federal wilderness areas right up to the point that management impinges upon the requirements of the Wilderness Act to preserve the area’s wilderness character. At that point, it is the federal agency’s responsibility to determine if the proposed State action crosses this threshold.¹⁵² If it does, the State action cannot be permitted.¹⁵³

In the context of wilderness management, and elsewhere, Kisonak mischaracterizes our position on the use of Memoranda of Understanding (MOUs), informal state-federal consultations, and

¹⁴⁶ *Id.* § 1133(d)(7).

¹⁴⁷ Kisonak, *supra* note 2, at 962.

¹⁴⁸ 279 F.3d 1214 (10th Cir. 2002).

¹⁴⁹ *See id.* at 1235 (quoting *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 872 (2000) (“To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially as the Court has put it before, to destroy itself.”) (internal quotations omitted)); Nie et al., *supra* note 9, at 856.

¹⁵⁰ *Wyoming v. United States*, 279 F.3d at 1234–35.

¹⁵¹ *Compare, e.g.*, Wilderness Act, 16 U.S.C. § 1133(e) (generally proscribing commercial enterprise; roads, either temporary or permanent; motor vehicles, equipment, and boats; landing aircraft; other mechanical transport; and structures and installations) *with* NWRSIA, 16 U.S.C. § 668dd(d)(1) (2012) (generally permitting the Secretary of the Interior to authorize any use of a Wildlife Refuge so long as the uses are compatible with the purposes of the National Wildlife Refuge Systems Implementation Act).

¹⁵² *See* 16 U.S.C. § 1133(d)(7) (“nothing in this [act] shall be construed as affecting the jurisdiction or responsibilities of the several states with respect to wildlife and fish in the national forests”); Nie et al., *supra* note 9, at 853.

¹⁵³ Nie et al., *supra* note 9, at 853.

conflict resolution more generally. We are obviously not opposed to the use of MOUs as a general policy matter. But they should be used as a way to more effectively and efficiently implement federal laws and regulations, not as a mechanism to subvert or undermine them. We are very careful in our critique of *selected* MOUs in the context of wilderness management and sufficiently explain their substantive and procedural deficiencies.¹⁵⁴ We conclude by very reasonably cautioning that federal agencies should expect scrutiny when assigning blanket authorities to states using MOUs and that they cannot be used to relinquish federal authorities without recognizing that such decisions may constitute actions triggering federal procedures required by NEPA and other statutes.¹⁵⁵

IX. NATIONAL WILDLIFE REFUGES

We agree with Kisonak's acknowledgement that constitutional doctrine notwithstanding, it is "necessary to examine federal statutes, regulations, and guidance to determine what affirmative duties bind the federal government"¹⁵⁶ But far from uncovering "fatal flaws" in our case against state primacy for wildlife management on federal public lands,¹⁵⁷ the point about examining specific provisions of federal law to understand the duties and authorities of the federal government underscores our case. The National Wildlife Refuge System Administration Improvement Act (NWRISA), emphasized in Kisonak's rebuttal, provides a case in point.

Kisonak's claim that we summarily dismissed the NWRISA savings clause is a red herring.¹⁵⁸ The fact is that Kisonak does not, and indeed cannot, gainsay our conclusions drawn from the provisions of NWRISA. Kisonak asserts that, "[w]hile *Wyoming* created regrettable ambiguity around the NWRISA's savings clause at 16 U.S.C. § 668dd(m), the structure of the statute and the processes giving rise to FWS's regulations and policy show that state management of wildlife on refuges remains a primary component of that particular federal-state relationship."¹⁵⁹ Ultimately, Kisonak is unable to squarely address our conclusions regarding NWRISA's savings clauses, regardless of his spurious characterization of the *Wyoming v. United States* court's decision as "ambiguous."¹⁶⁰ There is nothing ambiguous about the court's holding: "To the extent that state law conflicts with or undermines statutory requirements or federal objectives, it is

¹⁵⁴ *Id.* at 888–91.

¹⁵⁵ *See id.* at 919.

¹⁵⁶ Kisonak, *supra* note 2, at 956.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 957.

¹⁵⁹ *Id.* at 961.

¹⁶⁰ *Id.*

preempted.”¹⁶¹ Any other understanding of the law would mean that Congress’ extensive and carefully crafted law could be disregarded and supplanted by any whim of a state.¹⁶²

If the point needed further clarification, the Tenth Circuit did not hesitate to provide it:

The first sentence of the saving clause does *not* deny the FWS, *where at odds with the State*, the authority to make a binding decision bearing upon the “biological integrity, diversity, and environmental health of the System.” Such a construction of the saving clause would be inconsistent with the NWRSA’s “mission . . . to administer a *national network of lands*.” If we construed the NWRSA to grant the State of Wyoming the sweeping power it claims, the State would be free to manage and regulate the NER in a manner the FWS deemed incompatible with the NER’s purpose.¹⁶³

Throughout this section of the opinion, the court emphasizes the essential nature of the national wildlife refuge system as a *national network*.¹⁶⁴ In fact, that word “network” occurs multiple times in the opinion, sometimes citing the statute itself and other times as a *sua sponte* observation about congressional purpose.¹⁶⁵ One particular invocation by the district court stands out: “Congress undoubtedly envisioned a *nationwide, cohesively administered network* of lands and waters where wildlife would be managed and conserved under the direction of the Secretary.”¹⁶⁶ The Tenth Circuit, again citing the district court opinion, stated that the desire for a “nationwide, cohesively administered network” left no room for Wyoming’s position that, “Congress intended to curtail the Secretary’s power or leave any residual power to the States.”¹⁶⁷ Given its unequivocal call for a nationwide network of wildlife conservation lands, the Tenth Circuit could not help but conclude that “Congress undoubtedly intended a preeminent federal role for the FWS in the care and management of the [National Wildlife Refuge System].”¹⁶⁸

Kisonak, while using language intended to obscure the point, is forced to agree the “consistency of federal regulation with state law is

¹⁶¹ Nie et al., *supra* note 9, at 856. *See also* Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002) (discussing preemption of state laws by Congress under the Constitution’s supremacy clause).

¹⁶² *See* Wyoming v. United States, 279 F.3d at 1234–35 (discussing the Supreme Court’s reluctance to give “broad effect” to savings clauses when doing so would conflict with Congress’ regulatory schemes).

¹⁶³ *Id.* at 1234 (emphasis added) (internal citations omitted).

¹⁶⁴ *Id.* at 1223, 1228, 1233, 1234. *See also id.* at 1233 (stating that wildlife refuges “cannot fulfill the mission set forth in [the NWRSA] unless they are consistently directed and managed as a national system”) (quoting H.R. REP. NO. 105–106, at 8 (1997)).

¹⁶⁵ *Id.* at 1223, 1228, 1233–34.

¹⁶⁶ *Id.* at 1223 (emphasis added).

¹⁶⁷ *Id.* at 1223–24.

¹⁶⁸ *Id.* at 1234.

‘not mandated at the expense of the other requirements of the statute.’¹⁶⁹ It is true, as the *Wyoming v. United States* court states, Congress did not choose complete preemption of state wildlife authority when drafting the NWRSA.¹⁷⁰ However, Congress did choose to implement “ordinary principles of conflict preemption.”¹⁷¹ The court’s own language is crystal clear on this point: “[F]ederal management and regulation of federal wildlife refuges preempts state management and regulation of such refuges to the extent the two actually conflict, or where state management and regulation stand as an obstacle to the accomplishment of the full purposes and objectives of the Federal Government.”¹⁷²

Kisonak’s Administrative Procedure Act (APA) argument, though somewhat obtuse, seems to proceed along two lines. First, he suggests that the *Wyoming v. United States* court is some kind of “consolation prize [to whom is unclear] in the form of a ruling that refuge management is not exempt from the Administrative Procedure Act. . . .”¹⁷³ Second, he seems to assert that *Wyoming v. United States* provides an avenue for a state to circumvent the requirements of the NWRSA through the APA.¹⁷⁴ The first suggestion is difficult if not impossible to understand, while the second assertion is patently incorrect.

In *Wyoming v. United States*, the court merely reached the unremarkable conclusion that APA review is available to ensure that agency action comports with the authority and obligations provided in the NWRSA.¹⁷⁵ Since the APA was enacted in 1946, courts have been authorized to review whether agency action is arbitrary and capricious or beyond the bounds of the law.¹⁷⁶ Indeed, we never suggested otherwise.

Kisonak’s recitation of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*¹⁷⁷ is apropos of almost nothing related to the NWRSA issues at hand, but it is useful on two points. First, the Supreme Court followed a line of precedent establishing that ambiguous federal statutes should be read, if possible, to avoid “significant constitutional and federalism questions.”¹⁷⁸ Second, federal agencies’ interpretations of ambiguous federal statutes will be given

¹⁶⁹ Kisonak, *supra* note 2, at 957–58 (quoting Nie et al., *supra* note 9, at 855).

¹⁷⁰ 279 F.3d at 1234.

¹⁷¹ *Id.* See Nie et al., *supra* note 9, at 860 (stating that savings clauses “merely indicate[] that ordinary principles of preemption govern”) (citing Cal. Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 593–94 (1987)).

¹⁷² *Wyoming v. United States*, 279 F.3d at 1234 (emphasis added).

¹⁷³ Kisonak, *supra* note 2, at 958.

¹⁷⁴ *Id.*

¹⁷⁵ *Wyoming v. United States*, 279 F.3d at 1236–38.

¹⁷⁶ Administrative Procedure Act, 5 U.S.C. § 706 (2018).

¹⁷⁷ Kisonak, *supra* note 2, at 958 (citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corp. of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001)).

¹⁷⁸ *SWANCC*, 531 U.S. at 174.

little or no judicial deference if those interpretations are issued in the form of informal guidance rather than notice-and-comment rulemaking.¹⁷⁹ The latter point is especially true when the agency in question, there the Corps of Engineers, pushes the envelope, constitutionally, beyond what Congress likely intended.¹⁸⁰ Through a preamble in a federal register notice, the Corps attempted to include isolated wetlands within the Clean Water Act's definition of "navigable waters" based solely on their use by migratory birds.¹⁸¹ Although the Clean Water Act strives to protect the biological integrity of the nation's navigable waters, the Corps' interpretation of "navigable waters" to include potholes occasionally used by birds stretched the statutory purpose—and its language—too far, particularly when that interpretation appeared in a mere preamble.¹⁸²

Kisonak faults our Article for failing to discuss Coordination Areas within the Refuge System.¹⁸³ We perhaps should have quickly done so but decided to remain focused on the core laws governing federal public lands and to be most attentive to where the major conflicts and controversies arise. It is also difficult to cover the complicated legal taxonomy that is the National Wildlife Refuge System, and there are few questions related to federalism in Coordination Areas because they "are the most extreme example of [FWS] deference to state wildlife programs."¹⁸⁴ In any case, the relevance of such areas to the issue of state versus federal primacy on federally managed federal public lands, including wildlife refuges, is unclear. Coordination Areas present a unique federal-state relationship, where certain areas are made available to a state "by cooperative agreement between the U.S. Fish and Wildlife Service and a State agency having control over wildlife resources pursuant to section 4 of the Fish and Wildlife Coordination Act . . . or by long-term leases or agreements pursuant to title III of the Bankhead-Jones Farm Tenant Act."¹⁸⁵ The form of the relationship varies widely.¹⁸⁶

¹⁷⁹ See *id.* at 164 n.1, 172–73. See also Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 410 (2007) (stating that a guidance document "raises significant reliance concerns" and that "courts will rarely hold an agency to the terms of such a document").

¹⁸⁰ *SWANCC*, 531 U.S. at 172–73.

¹⁸¹ *Id.* at 171–72, 184–85 n.12 (Stevens, J., dissenting).

¹⁸² *Id.* at 163–64, 184–85 n.12 (Stevens, J., dissenting).

¹⁸³ Kisonak, *supra* note 2, at 961.

¹⁸⁴ ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 88 (2003).

¹⁸⁵ 50 C.F.R. § 25.12(a) (2019) (citing 16 U.S.C. § 664 (2018) and 7 U.S.C. §§ 1010–1013 (2018)).

¹⁸⁶ See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 199 (2005) (noting that "broad delegations of management authority on refuge system lands to states have been common for some time as 'coordination areas,'" and that "[w]hile states and tribes generally gain power and funding through the place-based refuge management agreements, the federal government may also seek some control it might not otherwise have.").

The majority of the wildlife Coordination Areas were established during the 1950s when there was no specific legal mechanism for federal agencies to utilize to enter into cooperative agreements with the states.¹⁸⁷ Since then, “most federal agencies have received the authority to enter into cooperative agreements.”¹⁸⁸ In signing a cooperative agreement (or, in some cases, a lease or a memorandum of understanding) for a coordination area within a wildlife refuge, the FWS is not permitted to agree to or acquiesce in actions that would be counter to the purposes of the refuge, regardless of how those actions are characterized by the state.¹⁸⁹ In any event, Coordination Areas comprise a small percentage of overall refuge lands,¹⁹⁰ and “no new Coordination Areas have been established in more than 25 years.”¹⁹¹

X. CONCLUSION

We are in full agreement with Kisonak that “[i]mpacts from the worldwide and decades-long loss in biodiversity are already clear in the United States, and will only grow.”¹⁹² Our call for urgency was emphasized in the subsequently released intergovernmental *Global Assessment Report on Biodiversity and Ecosystem Services* in 2019.¹⁹³ An estimated one million species at risk of extinction,¹⁹⁴ much of it due to habitat loss and degradation,¹⁹⁵ should serve as a wake-up call for all “co-trustees” of wildlife in the U.S. and beyond. Several of the proposed solutions to this global problem similarly align with the findings and recommendations made in our Article, including “strengthening environmental laws and policies and their implementation and the rule of law more generally.”¹⁹⁶ Held up in this regard as examples to follow

¹⁸⁷ *Coordination Areas*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/VP9N-WK4P> (last updated Oct. 15, 2015).

¹⁸⁸ *Id.*

¹⁸⁹ *Compare* Delaware Audubon Soc., Inc. v. Sec’y of U.S. Dep’t of Interior, 612 F. Supp. 2d 442, 450 (D. Del. 2009) (holding that FWS violated National Wildlife Refuge System Administration Act by allowing cooperative farming to take place at a national wildlife refuge without first conducting a written compatibility determination), *with* Ctr. for Food Safety v. Salazar, 898 F. Supp. 2d 130, 152 (D.D.C. 2012) (holding that FWS’s farming compatibility determinations complied with National Wildlife Refuge System Administration Act).

¹⁹⁰ *Statistical Data Tables for Fish & Wildlife Service Lands*, FISH & WILDLIFE SERV., <https://perma.cc/7THC-PABB> (last updated Sept. 30, 2017).

¹⁹¹ U.S. FISH & WILDLIFE SERV., *supra* note 187.

¹⁹² Kisonak, *supra* note 2, at 966.

¹⁹³ INTERGOVERNMENTAL SCI.-POL’Y PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV., THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM (2019).

¹⁹⁴ *Id.* at 12.

¹⁹⁵ *See generally* INTERGOVERNMENTAL SCI.-POL’Y PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV., *supra* note 193 and accompanying text. *See also* *Losing Their Homes Because of the Growing Needs of Humans*, WORLD WIDE FUND FOR NATURE, <https://perma.cc/9Z6R-MJ8W> (last visited Oct. 10, 2020).

¹⁹⁶ INTERGOVERNMENTAL SCI.-POL’Y PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV., *supra* note 193, at 17.

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are the ESA and protected area designations,¹⁹⁷ both of which are emphasized in our Article for obvious reasons. This global assessment also recommends “taking pre-emptive and precautionary actions in regulatory and management institutions” and the promotion of “integration across sectors and jurisdictions,” all framed in the context of needing “transformative change” and governance to deal with the scope and scale of the biodiversity challenge.¹⁹⁸ In our view, federal laws and regulations pertaining to public lands and wildlife conservation are among the so-called “levers” available to generate this “transformative change.”¹⁹⁹ Unfortunately, myths about unrestrained state authority over fish and wildlife management on federal lands impede the use of these levers and wildlife conservation suffers as a result.

¹⁹⁷ See INTERGOVERNMENTAL SCI.-POL'Y PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV., THE GLOBAL ASSESSMENT ON BIODIVERSITY AND ECOSYSTEM: CH. 5 DRAFT 109, 113 (2019) (discussing the ESA’s ability to “stem the decline of individual species [and] also achieve their recovery to health population levels.”); see INTERGOVERNMENTAL SCI.-POL'Y PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV., THE GLOBAL ASSESSMENT ON BIODIVERSITY AND ECOSYSTEM: CH. 6 DRAFT 57–58 (2019) (discussing the performance of protected areas in “halting biodiversity loss and securing ecosystem services into the future”).

¹⁹⁸ INTERGOVERNMENTAL SCI.-POL'Y PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV., *supra* note 193, at 17.

¹⁹⁹ *Id.*