

FROM THE PRESIDENT



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Boone and Crockett Club

The State and Federal Dance Over Wildlife Management

When America was founded, the states reserved for themselves under the U.S. Constitution total authority and control over the resident fish and wildlife within each of their sovereign

boundaries. Yet over the years there have been incremental movements of necessity and circumstance to federal authority over fish and wildlife. This has been driven in part by traditional hunting and angling license revenues dedicated primarily to the management of game species to the exclusion of non-game species. Finding the ideal point of cooperation between state and federal authority has been, and remains, a fragile balance as funding for wildlife management becomes more challenging, and as species have become threatened or in danger of extinction.

The Lacey Act of 1900 made interstate commerce in wildlife taken illegally in any state a federal crime. Today we have to purchase a Federal Duck Stamp in addition to a state license to hunt migratory waterfowl. Seasons and bag limits are negotiated through international treaties (Migratory Bird Treaty Act of 1918). The Endangered Species Act (ESA) of 1973 usurps state control over a variety of species once federal agencies (U.S. Fish and Wildlife Service or National Marine Fisheries Service) list them as endangered or threatened with extinction. Wolves were one of the first species so listed in 1974. Internationally, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) listings make illegal the export or import of listed species. Hunter-angler- and boater-supported federal excise taxes were first initiated in the late 1930s, i.e., Pittman-Robertson, Dingell-Johnson and Wallop-Breaux programs, to fund restoration, research and recreational land improvements through state conservation agencies. But distribution of the money is federally controlled and requires state management plans be approved in Washington before a state can receive funds.

A brief explanation of major federal actions to date will show how states' rights

in wildlife management have been compromised by circumstances, and how much control the federal government now maintains over a given state's wildlife and fish resources. The listing-delisting, relisting-delisting-relisting saga of gray wolves followed by the grizzly bear under the ESA could become a focal point for a national reconsideration of who is the best steward for a state's fish and wildlife species. Moreover, the whole premise of traditional conservation funding begs reconsideration as its sportsmen's funding base deteriorates and

crisscrossed the country and international borders; harvest rules varied by jurisdiction, if there were rules at all; and species were threatened with extinction. Unless all states, Canada, and Mexico cooperated to save the birds, no one state's rules could be effective. Only federal intervention could protect migratory wildlife; hence state sovereign control of migratory birds was removed to the federal government.

But the idea of managing birds nationally from Washington failed to prove effective. By 1952 a National Flyway Council was created with four regional Flyway Councils for the Atlantic, Mississippi, Central, and Pacific Flyways. These were composed of officials from each of the respective state agencies, and a U.S. Fish and Wildlife Service (USFWS) technical coordinator who served as the state-federal liaison in census taking, surveying, banding, and establishing seasons and harvest limits. One might say this was the first solid example of shared responsibility in wildlife conservation governance. In 1934 the Migratory Bird Hunting Stamp Act (a.k.a. the Duck Stamp Act) was passed, imposing the first

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its focus is limited primarily to huntable game species.

As noted earlier, Congress' first excursion into states' rights was the Lacey Act of 1900. Because the animals transported had to be taken in violation of state laws, it might be a hard argument that the Act usurped state authority, but rather reinforced it. The 1918 Migratory Bird Treaty Act is another story. It was without question the first real encroachment into state jurisdiction over wildlife. But it was absolutely essential if migratory waterfowl were to have a future. It ratified a federal treaty between the U.S. and Canada, which Mexico later joined in 1936. The Treaty was again later amended in 1986 as the North American Waterfowl Management Plan.

The federal treaty protected all migratory birds, both game birds and insect-eating birds, limited hunting seasons to 3½ months, none of which could occur during breeding season, and made it illegal to ship birds taken in violation of international rules from one country to another or within the U.S., from any state, territory or district to another. The reason for the law was simple: Birds seasonally

“user fee” of \$1.00 on hunters, the revenue from which was dedicated to purchasing and maintaining migratory waterfowl refuges. In 1989 the North American Wetland Conservation Act (NAWCA) established the North American Waterfowl Management Plan and the Tripartite Agreement. These identify and implement wetland habitat restoration projects in Canada, Mexico, and the United States, conserving wetlands for migratory birds to ensure their survival as a species. The program requires federal grant dollars to be equally matched by the private sector, which Ducks Unlimited and others heroically support. The historical evolution of managing migratory birds was the most practical and pragmatic approach conceivable, and it set the stage for a slowly evolving, state-federal responsibility in wildlife management that continues to be shared.

The 1937 Pittman-Robertson Act was probably the largest piece of federal legislation that next forced state wildlife management to be shared (in part) with federal authority. The Act imposed an 11 percent excise tax on rifles, ammunition, bows and archery equipment, and 10 percent on handguns that

went into the U.S. Treasury. Those dedicated tax revenues were then distributed by the USFWS to the states for habitat restoration and recreational projects, utilizing a formula based on a state's land mass, and the number of state hunting and fishing licenses sold. The federal government funds 75 percent of project costs, but the states must first fund 25 percent of the cost. The real federal control results from the requirement that before any state can be eligible to participate in the Pittman-Robertson program, every five years each state is required to submit to the USFWS a comprehensive fish and wildlife management plan that details how they will manage their resident wildlife, and the federal government must approve each plan. Moreover, each state is assigned by the USFWS a federal aid coordinator who administers the funding, and beyond that, a joint task force composed of federal and state officials to arbitrate disputes.

These taxes are monies sportsmen are required to pay as an excise tax on their equipment. However, the USFWS must decide annually how much the states get back for programs that benefit their resident fish and wildlife based on the above referenced formulae. Even though these are dedicated funds by law, history demonstrated early on that not all of the monies sportsmen paid in made its way back to the states. For example, by 1945 an unfunded surplus existed of \$13.5 million, it took an act of Congress in 1955 to get the funds released to the states. Today the reverted and unfunded surpluses by

Congressional edict go into the USFWS's Migratory Bird Conservation Act fund, and the interest on the fund is put into the North American Wetlands and Conservation Fund.

Another section of the Pittman-Robertson Act, separate and apart from the dedicated revenues listed above, further provides for wildlife action grants to the states from USFWS for wildlife species of greatest need including non-game species such as song birds, small mammals, etc. These are sometimes referred to as "candidate species," a classification that comes before a threatened or endangered listing. Federal taxpayer money for these non-game species is essential because state wildlife management budgets are based primarily on hunting and fishing license fees, and sportsmen generally don't want their license dollars going for conservation of species they can't hunt. This attitude of sportsmen by necessity establishes a basis for broader federal oversight and authority over non-game species, which are most of the other species within nature's biota. This highlights the flaw in the basic funding assumption of the North American Model for Wildlife Conservation that sportsmen and others must immediately address or suffer further erosion of state responsibility. In the federal budget for FY 2011 submitted by the President, \$90 million is included for state wildlife action grants, which is discretionary and must be appropriated annually. These two separate revenue sources under Pittman-Robertson, dedicated and annually

appropriated, plus the funds states receive from the sale of fishing and hunting licenses, are the three primary funding sources state DNR agencies have to fund their operations.

A similar program of international scope that tangentially affected state sovereignty over management of its resident wildlife resulted from the 1975 U.S. ratification of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITIES). The idea behind CITIES was to prevent international trade through import-export controls, not state or federal species or habitat management programs based on sound science. International trade in threatened, endangered, or listed species as determined by the international body was either prohibited or subject to import and export permits. The world's spotted cats, bobcat, lynx, and river otters were listed in 1976, and that closed down the international sale of bobcat pelts. Bobcat pelts were a major export item for New Mexico trappers, and the states' bobcat population was viable, healthy, and neither threatened nor endangered. After seven years of costly litigation, the bobcat issue was resolved, but CITIES remains a continued threat to the doctrine of state sovereignty over its resident wildlife.

The Marine Mammal Protection Act of 1972 placed a moratorium on the taking of a host of marine mammals principally in Alaskan coastal areas and usurped management of these animals by the state of Alaska

Canada geese flying into the sun. The 1918 Migratory Bird Treaty Act protects all migratory birds, both game birds and insect-eating birds. The reason for the law was simple: Birds seasonally crisscrossed the country and international borders.



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and other host states. Species include the polar bear, walrus, seals, sea otters, sea lions, turtles, manatees, dugongs, and whales. A year earlier, the Wild Free-Roaming Horses and Burros Act of 1971 also removed state sovereignty over resident feral horses and burros within its borders. Unmanaged feral horses and burros are among the most significant threats to healthy wildlife and fish habitats in western states.

Under the ESA, once the U.S. Fish and Wildlife Service lists a species as endangered or threatened, they assume total control over that species to the exclusion of the states’ authority. The most current and controversial examples include the polar bear, grizzly bear, and gray wolf. That ESA authority, coupled with federal court mandates and edicts, pre-empts all state authority over listed species until the species is delisted, and thereafter managed by the state under plans approved and supervised by USFWS or National Marine Fisheries Service. Earlier ESA examples include the bald eagle, grizzly bear, and northern spotted owl. President Richard M. Nixon signed the current ESA into law 37 years ago, in 1973. What comes of the Act, however, when advocacy groups use the law and courts to force biologically recovered species such as grizzly bears and gray wolves, both of which have federal approved management plans (in some states), back under federal control?

Advocacy groups such as the Defenders of Wildlife, Humane Society of the United States, etc., have used unwarranted litigation tactics under the guise of ESA to force a

repeated relisting of species that have been delisted, which has increased the tension between the states and federal government. Look at the following sequence of events to see the yo-yo effect this litigation has caused the states of Michigan and Minnesota and federal government for just the Western Great Lakes gray wolf species alone. The Northern Rocky Mountain wolves in Montana, Wyoming, and Idaho have followed a similar delisting, relisting pattern driven by litigation.

To add insult to injury, under both the ESA Citizen Suit Provision of the law, and the Equal Access to Justice Act, these plaintiff-advocates for the wolves can claim recovery of their legal bills! For example, in the 2005 Oregon case listed above, the Defenders of Wildlife collected \$272,710 in legal fees and costs. The Human Society of the United States collected \$280,000 in legal fees and costs in the September 2009 case cited above. In just the last six years alone, \$1.2 million has been collected by wolf advocacy groups as reimbursement for their legal fees from our American taxpayers. Total legal fees collected on all species—wolves, plovers, turtles, caribou, wolverines, right whales, jaguars, sage grouse, etc.—by advocacy groups under ESA since 1973 is estimated by one source at \$4.7 billion! Even if these advocacy groups lose a case, they still win, because their whole objective is to disrupt state management authority of wolves and other species based on sound biology and scientific facts.

This sequence of events being caused

SAGA OF THE WESTERN GREAT LAKES GRAY WOLF ESA STATUS

1974	Gray wolf listed as endangered in lower 48 states
2004	Delisting proposed by Department of Interior (DOI)
January, 2005	Oregon Court nullifies delisting proposal
August, 2005	Vermont court nullifies delisting proposal
March, 2006	Delisting proposed again by DOI
February, 2008	Delisting proposal finalized by DOI
September, 2008	Federal court nullifies delisting, and relists wolves
January, 2009	Delisting proposed again by DOI
January, 2009	White House directs DOI to withdraw proposed delisting regulation
March, 2009	White House approves DOI to proceed with delisting
September, 2009	Federal court orders relisting

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under the egis of ESA is not only elevating the friction between state and federal wildlife management authorities, it is also putting wildlife management squarely in the hands of federal judges totally unprepared to appreciate or understand the science behind sound management decisions. ESA is squarely in the political crosshairs of the whole issue of states' sovereign management authority over their resident wildlife. Historically in instances like this, it's taken a crisis to make it so hot, and politicians will be forced to amend the law, putting states back in charge of their resident wildlife.

The fundamental principle that a state has sovereignty over resident fish and wildlife within its borders was affirmed by the U.S. Supreme Court in *Geer vs. Connecticut* in 1896. Subsequent federal actions have eroded that right, thus creating a constant balancing act in state-federal relations. For an intriguing, complete detailed history of this relationship, read *Managing American Wildlife* by Dian Olson Belanger, published in 2002 during the centennial of the Association of Fish and Wildlife Agencies. For the contrasting federal view of the relationship, read *The Evolution of National Wildlife Law* by Michael J. Bean (1997).

It would be hard to argue that states alone are capable of conserving migratory species; there must be some form of interstate and international coordination. It would also be hard to argue that states alone are capable of preventing the extinction of native species. But the federal government is incapable, without state cooperation, of recovering those species to abundances that no longer cause them to be threatened or in danger of extinction. The need for adequate and sustainable funding for the management of all species and the voices of sportsmen are an integral part of this dialogue between states and the federal government. The real issue is finding the balance point between the respective roles of states and federal agencies in harmonizing fish and wildlife management for the optimal long-term benefit of species, and those who use and enjoy them. ■

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE HUMANE SOCIETY OF THE
UNITED STATES, HELP OUR WOLVES LIVE,
ANIMAL PROTECTION INSTITUTE, and
FRIENDS OF ANIMALS AND THEIR
ENVIRONMENT,

Plaintiffs,

vs.

DIRK KEMPTHORNE,
Secretary of the Interior,
U.S. DEPARTMENT OF THE INTERIOR, and
U.S. FISH AND WILDLIFE SERVICE,

Defendants,

and

SAFARI CLUB INTERNATIONAL, SAFARI
CLUB INTERNATIONAL
FOUNDATION, and
NATIONAL RIFLE ASSOCIATION,

Defendant-Intervenor,

and

SPORTSMENS' ALLIANCE
AND BEAR HUNTERS'

Civil Action No. 1