Frank Buono

Managing Wildlife in the Parks: The Legal Basis

Introduction

In 1916 Congress charged the new National Park Service (NPS) with a mission to conserve, among other things, the wildlife in the areas under NPS control.[1] The Interior secretary's authority to manage the wildlife within the boundaries of the parks is so central to the NPS mission that one could hardly imagine a National Park System without such authority. Though challenged in the court, primarily by the states, the secretary's authority over wildlife has withstood all assaults.

The 1916 Organic Act of the NPS was not the first time Congress addressed wildlife on federal lands, or wildlife generally. In 1872 Congress established a vast preserve from federal lands in the Wyoming and Montana territories—Yellowstone National Park. As a public park for the benefit and enjoyment of the people, the area was closed by law to the wanton destruction and market hunting of fish and game.[2] Twenty-two years later, Congress prohibited all hunting in Yellowstone.[3]

Congressional power over wildlife raised little concern when such regulation applied to remote federal lands in the United States territories. It was a different matter when Congress began to enact laws that governed wildlife on any, including nonfederal, lands, within the boundaries of the states.[4] The states were quick to contest such laws, convinced that the federal entry into the domain of wildlife management was constitutionally impermissible. The states rested their arguments on a theory of state ownership of wildlife.[5] In addition, the states, like the losing candidate for president in 1996, relied on a narrow reading of the Constitution's enumerated powers, and a broad interpretation of the Tenth Amendment.[6] However, the states' legal challenges to federal authority over wildlife resulted in confirming such authority. The courts so vigorously expanded the federal authority over wildlife that Congress has acted in the last three decades to maintain a role for state wildlife management on federal lands. This is particularly true on federal lands, park or non-park, where hunting is authorized. Yet, even on such lands, Congress protects the federal authority over wildlife.

Moreover, as a result of the states' legal challenges, the doctrine of state ownership of wildlife is now dead.[7] Nonetheless—as Supreme Court Justice Antonin Scalia said about another legal doctrine, the Lemon test—the state ownership doctrine, like some ghoul in a late-night horror movie, rises after being repeatedly

killed, and shuffles abroad through the halls of state fish and game agencies, occasionally frightening the more unwary NPS manager.

The Courts and Federal Authority Over Wildlife on Federal Lands

One of the first confrontations over the federal power to manage wildlife on federal lands involved the U.S. Forest Service. After carrying out a policy of eradicating predatory animals from the Grand Canyon Forest Reserve on the Kaibab Plateau in Arizona, the Forest Service created conditions ideal for an exploding, and then a starving, deer herd. It was a textbook example of an ecological disaster. The deer caused damage to the central resource for which the forest was reserved: timber. The Forest Service responded by turning its guns, recently aimed at coyotes and mountain lions, on the deer.

The state of Arizona arrested Forest Service employees who conducted the killing because they had not first obtained a permit from the Arizona authorities. The Supreme Court ruled that the Forest Service employees could kill the deer and did not need to obtain a permit or other permission from the state of Arizona. The reason was simple: the deer were destroying federal property, the forest reserve trees. The federal agency had the power to protect federal property and could do so without any interference from the state of Arizona.[8]

Four decades later a similar conflict arose, except this time in a national park context. The NPS conducted a study of deer within the Carlsbad Caverns National Park in New Mexico. The NPS officials were interested in the dietary habits of the animals. The only way to determine the diet was to kill a number of the deer and study the contents of their stomachs. Immediately, the state of New Mexico raised the permit question. Asserting state ownership of wildlife, New Mexico demanded that the NPS obtain a permit from the state prior to killing the deer. New Mexico drew a distinction between the Forest Service killing of deer on the Kaibab in the 1920s and the NPS killing in Carlsbad in the 1960s. The former killing served to protect Federal property. The latter killing, at Carlsbad, did not. Because of this, New Mexico said, the NPS needed the permission of the state. New Mexico prevailed in the District Court. However, before the United States Tenth Circuit Court of Appeals, New Mexico was defeated.[9] The Court found that:

> Clearly the Secretary [of the Interior] has broad statutory authority to promote and regulate the national parks to conserve the scenery and wildlife therein "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. Anything detrimental to this purpose is detrimental to the park. In addition to this broad authority, the Secretary is authorized "in his discretion" to destroy such animals "as may be detrimental" to the use of any park. 16 U.S.C. 3.... In the

management of the deer population within a national park the Secretary may make reasonable investigations ... to ascertain the number which the area will support without detriment to the general use of the park.[10]

The court went beyond the need for the federal agency to show injury to park lands and resources as a basis to kill wild animals. However, the court imputed that there needed to be a nexus between killing the deer and protecting the park from *potential* injury.

In the Carlsbad Caverns case, New Mexico raised a formidable-sounding argument. New Mexico asserted that the United States did not hold exclusive jurisdiction over the Federal lands within the park. (This was, and remains, true. The state of New Mexico has not ceded any part of its exclusive authority to the United States, under the Cession Clause of the Constitution.[11]) New Mexico asserted that since the state owns the wildlife and has not shared its powers over state property with the United States, the NPS must be required to obtain a permit from the state.

The argument appears formidable and confuses NPS managers even to this day. However, in the Carlsbad Caverns case, the federal court dismissed the jurisdiction argument. The court said that "in protecting the park property, it is immaterial that the United States does not have exclusive jurisdiction over the lands within Carlsbad Caverns National Park."

Undeterred by the 1969 defeat, New Mexico again raised the issue of authority over animals on federal lands in connection with a 1971 federal law. That year Congress enacted the Wild Free-roaming Horses and Burros Act.[12] This law protects wild horses and burros on Bureau of Land Management (BLM) and National Forest lands. The animals in question were non-migratory, non-game animals. The animals occupied lands that possessed no special designation and were (in the case of BLM) unreserved public lands. New Mexico was convinced that these factors would support the contention that New Mexico, and not the United States, was the regulator of the animals under the estray laws of New Mexico. Unlike the situations in the court decisions of *Hunt* and *Udall* discussed above, the U.S. did not assert that the protection of federal property from injury formed the basis for federal management of horses and burros.

In response to New Mexico's suit, the Supreme Court in the case of *Kleppe vs. New Mexico* (1976) enunciated the broadest possible interpretation of the Constitution's Property Clause[13] to date. The court found that the Congress need not enact laws regarding animals on federal lands simply to cure or prevent injury to federal lands by those animals. The court found that when the animals were on federal lands that the animals were subject to federal management and regulation as an object in themselves under the Property Clause. The court came close to, and then stepped back from, asserting a federal ownership over animals on federal

lands. The court said: "It is far from clear that ... Congress cannot assert a property interest in regulated horses and burros that is superior to that of the State."

Next the *Kleppe* court turned to the state's jurisdiction argument. New Mexico had again argued, as it did in 1969, that the United States was a mere proprietor of public lands, no more or no less than any other land owner. New Mexico argued that it did not cede any jurisdiction to the United States over unreserved public domain lands in the state.

The court demolished the state's jurisdiction argument, stating that New Mexico confused "Congress' derivative legislative powers ... with its [Congress'] powers under the Property Clause." "While Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession," the court continued, *"the presence or absence of... jurisdiction has nothing to do with Congress' power under the Property Clause"* (emphasis added).

Under the Property Clause, Congress exercises the power both of an owner and of a legislature over federal lands. That power is complete. The *Kleppe* court stated that "the complete power that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."

Ten years later, in a subsequent minor case, *United States v. Moore* (1986), the NPS prevented the state of West Virginia from spraying a biological pesticide to kill black flies on the waters of the New River within the New River Gorge National River. West Virginia asserted both ownership of the wildlife within the state, and then cited the lack of cession of jurisdiction to the United States as reasons why the NPS could not interfere with the state's actions. The U.S. District Court for the Southern District of West Virginia found the arguments "unpersuasive" and ruled against West Virginia.

The NPS sought to protect the black flies in New River Gorge as a necessary part of the ecosystem and therefore as an end in themselves. The *Moore* decision found support in *Kleppe. Kleppe* removed the need to show actual or potential injury to federal lands to support federal management authority over wildlife on federal lands. *Kleppe* made clear that Congress could enact laws protecting wild animals on federal lands as an end in themselves. The decision in *Moore* found that the Organic Act of the NPS was just such a law and that its protective mantle extended even to gnats.

Congressional Action to Maintain a State Role

After the court defeat in *Moore,* West Virginia turned to its senior senator, Robert Byrd, who included language in legislation to authorize the spraying in the New River. This is one example of congressional counterbalancing of federal court decisions that have supported federal agency powers over animals on federal lands. Congress has acted several times to prevent a total federal assumption of authority over wild ani-

mals on federal lands.

A most notable example is the Federal Land Policy and Management Act (FLPMA), the Organic Act of the BLM.[14] In that law, Congress made clear that the secretary, through the BLM, was not to supplant the traditional authority of the states in regulating the taking of wild animals. FLPMA says that "nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the states for management of fish and resident wildlife." However, FLPMA makes clear that the secretaries of Interior and Agriculture have the authority to close all or parts of the public lands or national forests to hunting and fishing. Such a decision does not require the consent of the state.

Existing and Potential Future Conflicts with States in "Hunting Parks"

Congress has designated over 50 areas in the National Park System where hunting is authorized. In those parks, such as the Mojave National Preserve, where the enabling act provides for hunting under state law, Congress has made clear that the NPS may limit where and when hunting may occur on federal lands for public safety, administration of the area, or other reasons. Further, the NPS may do so without the consent of the state of California.[15] The power to close all or part of a federal area to hunting is a Property Clause power, and Congress may authorize such actions without regard to whether the state of California has ceded some or any of its jurisdiction to the United States.

The most likely flash point for conflict is not over a state attempting to allow hunting in an area of a park that the NPS has closed to hunting. Instead, conflict most likely surrounds state "game management" practices. The NPS interprets the Organic Act mission "to conserve wildlife" in a series of policy documents. Those policy documents lay out the methods by which the NPS manages the federally protected wild animals of the parks—methods often at odds with state fish and game practices. NPS law and policies, for example, prescribe the removal of pernicious non-native species, and dangerous and destructive animals (see 16 U.S.C. 3), and prohibit the introduction of non-native animals. NPS policies specifically forbid the "artificial manipulation of habitat to increase the numbers of a harvested species above natural levels, except where directed by Congress."[16]

Many state fish and game agencies seek to introduce non-native fish to natural lakes in a park, or exotic pheasants for upland game bird hunting. State fish and game agencies may seek to reduce natural predator populations in a game management area, or perhaps establish a herd of African antelope on federal lands in a park. All such actions would conflict with the policies by which the NPS carries out its Organic Act mission regarding wildlife. Even if the park

were under "proprietary federal jurisdiction," the state action would conflict with the NPS' interpretation of the Organic Act responsibility, and the NPS would (it is to be hoped) seek to enjoin the state.

Conclusion

The jurisdiction that the United States holds over federal lands is "immaterial" to the power of Congress to legislate with regard to the lands and the animals on the lands. The United States may own lands and have no share of the state's jurisdiction over the lands. Yet, in such cases, where the U.S. jurisdiction is "proprietary," the United States owns the lands not just as a mere proprietor but as a "sovereign." The authority of federal agencies to carry out federal laws that govern federal lands and the animals on the lands does not rest upon the level of jurisdiction ceded by the state to the United States, but instead upon federal ownership of the lands. Were it otherwise, we would be fifty nations, rather than one, and federal land management decisions would be at the mercy of each state.

The federal courts have consistently upheld the power of the Congress to enact laws that govern wildlife. The courts have found that the federal power over wildlife rests upon at least three enumerated powers in the United States Constitution: the Treaty Power, the Interstate Commerce Clause, and the Property Clause.

The NPS Organic Act of August 25, 1916, is a federal wildlife law and one example of Congress' power under the Property Clause. In carrying out the powers enumerated by the Constitution, the Congress may enact laws, and federal agencies discharge such laws, free from any interference by the states.[17] Federal land management is subject to the laws of the state only where Congress has clearly and unambiguously so provided.[18] "The general constitutional principle is that by virtue of the Supremacy Clause, states cannot regulate Federal agency activities."[19]

We need not ignite a federal–state war over wildlife. The federal government long ago won the war to manage wild animals on federal lands, parks, and unreserved public domain lands. The NPS and the states should work as harmoniously as possible, particularly in a park where Congress has authorized hunting under state law. However, the NPS need not feign that it possesses no authority or responsibility over the wild animals within park boundaries. This path is misinformed and could result in the loss of one of the characteristic features that distinguishes the lands in the National Park System from all others.

Endnotes

1. The Act of August 25, 1916 at 16 U.S.C. 1 *et seq.* states that the NPS "shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and by such measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and

historic objects and the *wild life* therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations" (emphasis added).

2. 16 U.S.C. 21 and 22.
3. 16 U.S.C. 26.
4. For example, the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703-711).
5. A principle upheld by the Supreme Court in the case of *Geer v. Connecticut* (1896).
6. The Tenth Amendment states "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."
7. The Supreme Court declared the doctrine of the state ownership of wildlife to be a "nineteenth century legal fiction" in the 1977 case of *Douglas v. Seacoast Products, Inc.* and also in *Hughes v. Oklahoma* (1979).
8. *Hunt v. United States* (1928).
9. *New Mexico v. Udall* (1969).
10. *Ibid.*
11. Article I, Section 8.
12. 16 U.S.C. 1331-1340.
13. Article IV, Section 3. "The 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...."
14. 43 U.S.C. 1701 *et seq.*
15. 16 U.S.C. 410aaa-46(b).
16. *NPS Management Policies*, Chapter 4, Page 7.
17. State laws govern federal agency actions or the management of federal lands only where Congress had waived sovereign immunity. In such cases, state laws govern federal agencies, no matter what jurisdiction the United States holds, including exclusive jurisdiction.
18. Official Opinion of Attorney General, June 23, 1980.
19. Opinion of San Francisco Department of the Interior Field Solicitor Ralph Mihan, December 26, 1991.

Frank Buono, Joshua Tree National Park, 74485 National Park Drive, Twentynine Palms, California 92277