



Winter 2004

Leaving Wildlife Out of National Wildlife Refuges: The Irony of Wyoming v. United States

Stanley Fields

Recommended Citation

Stanley Fields, *Leaving Wildlife Out of National Wildlife Refuges: The Irony of Wyoming v. United States*, 34 N.M. L. Rev. 217 (2004).

Available at: <https://digitalrepository.unm.edu/nmlr/vol34/iss1/10>

LEAVING WILDLIFE OUT OF NATIONAL WILDLIFE REFUGES: THE IRONY OF *WYOMING V. UNITED STATES*

STANLEY FIELDS*

I. INTRODUCTION

In *Wyoming v. United States*,¹ the state of Wyoming requested permission to vaccinate elk on the National Elk Refuge (NER), a part of the National Wildlife Refuge System (NWRS) located within Wyoming. The U.S. Fish and Wildlife Service (USFWS) subsequently rejected the request.² Upon appeal, the Tenth Circuit held that the Tenth Amendment does not reserve to the states a right to manage wildlife on federal lands, “regardless of the circumstances.”³ The court also held that, even though the USFWS had discretion to determine whether proposed activities on wildlife refuges were consistent with the goals of the National Wildlife Refuge System Improvement Act (NWRISA), this discretion was not unlimited.⁴

This note will first examine the *Wyoming* decision in the context of the Tenth Amendment and related state sovereignty doctrines. Second, this note will consider the expansion of federal authority over wildlife management as it pertains to Tenth Amendment jurisprudence and the NWRISA. Lastly, this note will examine the impact of the *Wyoming* decision on wildlife law and future cases in the Tenth Circuit.

This note concludes that the court’s ultimate interpretations and rulings in regard to the NWRISA provide confusion and inconsistency in the interpretation and application of the Act. Novel and cursorily dismissed ideas for resolving conflict over authority to manage wildlife are presented in an effort to provide alternative strategies for reducing this confusion and inconsistency, all while increasing fidelity to the purpose of the NWRISA and the National Wildlife Refuge System. These ideas are presented for consideration as possible alternatives to the *Wyoming* court’s resolution of the issues examined.

II. STATEMENT OF THE CASE

Brucellosis is caused by the bacteria *Brucella abortus* and can result in spontaneous abortion, arthritis, lameness, and/or sterility in hoofed animals.⁵ This disease has been documented to occur in cattle and elk in Wyoming.⁶ There is also evidence that brucellosis can be spread between species.⁷ In 1985, the state of

* Class of 2004, University of New Mexico School of Law. Many people were instrumental in the completion of this note: I thank Professor Sheryl Wolf for all of her time, effort, and suggestions; Samantha Adams and Professor Barbara Blumenfeld both supplied insightful suggestions that provided increased depth and refinement of this note.

1. 279 F.3d 1214 (10th Cir. 2002).

2. *Id.* at 1222 (Unless otherwise stated, all factual information is from *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002)).

3. “[T]he Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife, or more specifically vaccinate elk, on the NER, regardless of the circumstances.” *Id.* at 1227.

4. *Id.* at 1237–38.

5. *Id.* at 1218–19.

6. Robert B. Keiter & Peter H. Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem*, 28 LAND & WATER L. REV. 1, 17–19 (1993).

7. U.S. Dep’t of Agriculture, *Facts About Brucellosis*, available at <http://www.aphis.usda.gov/vs/nahps/brucellosis/> (last visited Oct. 8, 2003); Environment News Service, *Hundreds of Yellowstone Bison Killed for*

Wyoming began a brucellosis vaccination program on state lands.⁸ In the early 1990s, the state reported a seventy percent calving success rate for vaccinated animals compared with thirty percent for elk that had not been vaccinated.⁹

In November of 1997, approximately twelve years after the vaccine had been put to use, the state of Wyoming requested permission from the USFWS to vaccinate elk for brucellosis on the NER.¹⁰ The goal of the proposed action was to diminish the chances of spreading the disease from elk on the NER to elk and cattle off the refuge.¹¹ Since the USFWS failed to respond to the initial request, in January of 1998 the state then proposed to undertake the vaccination program at its own cost and to "indemnify and hold harmless" the USFWS for any claims arising from the program.¹² The USFWS did eventually respond by rejecting the state's request, claiming there was not enough information to find the vaccine "safe and effective."¹³ At the same time, the USFWS failed to supply evidence contradicting the state's claims concerning the safety and efficacy of the vaccine.¹⁴ Furthermore, the USFWS failed to propose any alternative plans to stem the spread of the disease.¹⁵ Wyoming then filed suit in federal district court under the Tenth Amendment and the NWRSA claiming that the USFWS had interfered with the state's right to manage wildlife within the state.¹⁶ Wyoming subsequently added a claim under the Administrative Procedure Act (APA) for review of the agency's decision to reject the state's request.¹⁷ The district court granted the motion of the United States to dismiss on all counts, and Wyoming subsequently filed an appeal.¹⁸

The Tenth Circuit affirmed in part and reversed in part.¹⁹ The court held that the Tenth Amendment does not reserve the right to manage wildlife to the states, "regardless of the circumstances,"²⁰ and that the NWRSA granted the USFWS authority to determine whether vaccination of elk on the NER conflicted with the goals of the NWRSA.²¹ Nonetheless, in regard to the state's APA claim, the Tenth

Roaming, available at <http://ens-news.com/ens/mar2003/2003-03-06-10.asp> (last visited Oct. 8, 2003) ("[E]lk can carry brucellosis and there are documented cases of transmission from elk to cattle."); *Wyoming*, 279 F.3d at 1220 ("transmit[ta]l [of] brucellosis from elk to cattle in confined conditions").

8. *Wyoming*, 279 F.3d at 1220.

9. *Id.*

10. *Id.* at 1221.

11. *Id.*

12. *Id.*

13. *Id.* at 1221-22.

14. *Id.* at 1240.

15. *Wyoming v. United States*, 61 F. Supp. 2d 1209, 1222-23 (D. Wyo. 1999) ("Only the poor, dumb creatures of the wild suffer as this disease spreads while the FWS dithers over whether Wyoming's vaccination program has imperfections. That Wyoming's program may not be perfect is not a sine qua non, but it at least is moving forward to do something about a serious, spreading wildlife disease. The Court is sorry that this patchwork of federal law gives the Secretary room to play out his stalling game *while doing nothing*." (emphasis added), *aff'd in part and rev'd in part*, 279 F.3d 1214 (10th Cir. 2002); *Wyoming*, 279 F.3d at 1241 ("[W]e are faced with a situation where the program, or *lack thereof*, by one sovereign allegedly impairs the meaningful accomplishment of another sovereign's responsibilities.") (emphasis added).

16. *Wyoming*, 279 F.3d at 1222-23.

17. *Id.* at 1222.

18. *Id.* at 1223-24.

19. *Id.* at 1241.

20. *Id.* at 1227.

21. *Id.* at 1235.

Circuit reversed the district court's finding that the USFWS had unlimited discretion to determine whether proposed activities were contrary to the NWRSA.²²

III. BACKGROUND

The complexity of this case arises from the intersection of Tenth Amendment jurisprudence and the concept of federal preemption. The basis of state wildlife management authority has been couched in terms of sovereign authority and authority reserved under the Tenth Amendment.²³ The issue of federal preemption primarily depends upon whether the language of the NWRSA clearly and explicitly states Congress's intent to preempt applicable state law.²⁴ Further complicating the issue as to how the Tenth Amendment and state sovereignty claims should be addressed, the Tenth Amendment's power has waxed and waned throughout history and the judiciary has struggled to define and apply the Tenth Amendment consistently.²⁵

In this case, the Tenth Circuit was asked to examine three challenges to the authority claimed by the USFWS under the NWRSA: first, whether state authority to manage terrestrial wildlife on federal lands within the state's borders was a right retained under the Tenth Amendment;²⁶ second, whether the Congressional grant of authority to the agency under the NWRSA preempted state authority regarding wildlife management on federal wildlife refuges;²⁷ and finally, whether the NWRSA allowed judicial review of the agency's decision under the APA.²⁸ Review of state authority to manage wildlife has often been viewed in the context of the Tenth Amendment and related sovereign authority.²⁹ Thus, it is appropriate to undertake a thorough analysis of the basis for state wildlife management in the context of the Tenth Amendment and related jurisprudence.

A. *The Tenth Amendment*

The Tenth Amendment to the U.S. Constitution 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."³⁰ This amendment reserves authority to the states and to the people if authority has not been expressly reserved to the federal government or precluded from the states or people by the Constitution.³¹ At

22. *Id.* at 1237-39.

23. See generally *Hunt v. United States*, 278 U.S. 96 (1928); *Missouri v. Holland*, 252 U.S. 416 (1920); *Abby Dodge v. United States*, 223 U.S. 166 (1912); *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979); *McCready v. Virginia*, 94 U.S. 391 (1876); *N.M. State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir. 1969).

24. *Pac. Gas & Elec. Co. v. State Energy Res. Comm'n*, 461 U.S. 190, 203 (1983).

25. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-13 (3d ed. 2000) ("Vacillating attitudes regarding federalism and the importance of state sovereignty....").

26. *Wyoming*, 279 F.3d at 1222-24.

27. *Id.* at 1222-23.

28. *Id.* at 1223-24.

29. See generally *Hunt*, 278 U.S. 96; *Holland*, 252 U.S. 416; *Abby Dodge*, 223 U.S. 166; *Geer*, 161 U.S. 519, *overruled by Hughes*, 441 U.S. 322; *McCready*, 94 U.S. 391; *N.M. State Game Comm'n*, 410 F.2d 1197.

30. U.S. CONST. amend. X.

31. TRIBE, *supra* note 25, § 5-12 ("[The Tenth Amendment] serves as an instruction on how to read the Constitution's silences with respect to national governmental authority. On *that* subject, the Tenth Amendment indicates, *constitutional silence constitutes negation.*").

the same time, the Property Clause³² empowers the federal government to exercise control over federal property within a state,³³ and state authority does not extend to federal lands when state law is contrary to federal law or policy.³⁴ The Property Clause grants Congress "the power to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."³⁵ However, state authority is not preempted unless Congress has enacted legislation that overrides conflicting state law³⁶ by one of the delineated methods of preemption.³⁷

In *Wyoming*, the Tenth Amendment claim and Property Clause³⁸ and preemption issues are highly interrelated. The Tenth Amendment claim can be affected by how broadly the Property Clause is interpreted or by whether there is preemption by the NWRSA itself. For example, if the Property Clause is interpreted to grant Congress unlimited authority and discretion to manage federal lands (and the wildlife on those lands), then preemption under the NWRSA is unnecessary because the Tenth Amendment is inapplicable.³⁹ On the other hand, if the Property Clause is not interpreted to include such broad and implicit authority, then the NWRSA must expressly preempt state law in the wildlife management context.⁴⁰

The Tenth Amendment and state sovereignty did not fare particularly well during the period between the early twentieth century and 1976.⁴¹ During that span, the focus was largely on the ability of Congress to impose minimum wage and overtime pay standards on states.⁴² In the wildlife law context, the Supreme Court held that the Tenth Amendment must give way to the treaty power expressly granted to Congress in the Constitution⁴³ as well as the authority in both the Commerce⁴⁴ and

32. U.S. CONST. art. IV, § 3, cl. 2 ("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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.")

33. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

34. *Id.*

35. U.S. CONST. art. IV, § 3, cl. 2.

36. *Pac. Gas & Elec. Co.*, 461 U.S. at 203-04.

37. There are generally three ways that federal law can preempt state law. *Pac. Gas & Elec. Co.*, 461 U.S. at 203-04. First, Congress can use "explicit preemptive language." *Id.* at 203. Second, a "scheme of federal regulation [may be] so pervasive as to make reasonable the inference that Congress left no room to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose."

Id. at 204 (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). Finally, federal preemption of state law occurs when "compliance with both federal and state regulations is a physical impossibility," *id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1962)), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

38. U.S. CONST. art. IV, § 3, cl. 2.

39. See generally *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *superseded by* *Franklin v. City of Kettering*, 246 F.3d 531 (6th Cir. 2001); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Nat'l Mut. Ins. Co. of Dist. of Colo. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

40. See generally *Pac. Gas & Elec. Co.*, 461 U.S. at 203-04; *supra* note 37.

41. *TRIBE*, *supra* note 25, § 5-11.

42. See *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia*, 469 U.S. 528.

43. See *State of Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2,

Property Clauses.⁴⁵ Nevertheless, the Supreme Court has consistently relied upon the Tenth Amendment and related principles of sovereignty to substantiate state authority to regulate wildlife in their state, and that this authority existed prior to the United States.⁴⁶ More importantly, failing to recognize both the substantive authority of the Tenth Amendment and state sovereignty is inconsistent with recent Supreme Court decisions on the subject. For example, in *United States v. Lopez*⁴⁷ and *United States v. Morrison*,⁴⁸ the Supreme Court recognized that the Tenth Amendment and principles of federalism require earnest analysis to ensure that Congress does not exceed its limitations and intrude upon authority retained by states.⁴⁹

B. *The National Wildlife Refuge System Improvement Act (NWRISA)*

The NWRISA was enacted in 1997, and its purpose is “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”⁵⁰ The Act further states that “[n]othing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.”⁵¹

In *Wyoming*, the Tenth Circuit found these two sentences incongruent and held that the clause purporting to allow states to retain authority over wildlife on national wildlife refuges in the NWRISA could not be interpreted as such because it would destroy the goal “to administer a national network of lands.”⁵² Since the *Wyoming* court interpreted the phrase “to administer a national network of lands” as the *primary* goal of the Act, the court concluded that the clause reserving authority to the states should not be construed as it is written because to do so would undermine the purpose of the Act.⁵³

Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.”)

44. *Hughes v. Oklahoma*, 441 U.S. 322, 327 (1979).

45. *Kleppe v. New Mexico*, 426 U.S. 529, 540–41 (1976).

46. *See, e.g., Kleppe*, 426 U.S. at 543; *Abby Dodge*, 223 U.S. at 175–76; *Geer*, 161 U.S. at 534, *overruled by Hughes*, 441 U.S. 322; *Manchester v. Massachusetts*, 139 U.S. 240, 265–66 (1891); *McCready*, 94 U.S. at 394.

47. 514 U.S. 549, 583 (1995) (Kennedy and O'Connor, J.J., concurring) (“While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.”); *id.* at 592 (Thomas, J., concurring) (“Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers ‘herein granted’ by the rest of the Constitution.”).

48. 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”).

49. It is appropriate to note the breadth of Commerce Clause jurisdiction, the criminal law nature of the legislation under review in *Lopez* and *Morrison*, and that state dominance in the area of wildlife management is comparable to criminal law. Therefore, analysis of state authority over wildlife management in the context of the Property Clause should be similar.

50. 16 U.S.C. § 668dd(a)(2) (2000).

51. 16 U.S.C. § 668dd(m) (2000).

52. *Wyoming*, 279 F.3d at 1234.

53. *Id.* at 1234–35.

C. *The Administrative Procedure Act (APA)*

Under the APA, an agency's decision can be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁵⁴ Although deference to agency decisions is the standard,⁵⁵ there must be evidence that the agency considered the relevant information available to it at the time it made a decision.⁵⁶

In *Wyoming*, the Tenth Circuit primarily relied upon the NWRSA's requirement that the USFWS comply with state policies and objectives to the "extent practicable"⁵⁷ and the Act's legislative history to conclude that judicial review was appropriate.⁵⁸ After reviewing the agency's decision, the court found that the burden rested upon the USFWS to demonstrate that it had considered all relevant information available for review and based its decision on the information it had.⁵⁹ Since the state claimed that there was reliable evidence supporting the efficacy of the vaccination program, and that the USFWS did not address this evidence, Wyoming had met the minimum burden requiring review of the APA claim.⁶⁰

To summarize, Wyoming's claims presented the court with the opportunity to analyze state authority to manage wildlife on national wildlife refuges under the Tenth Amendment, Congressional intent to preempt state law under the NWRSA, and the authority of the judiciary to review agency decisions under the NWRSA and the APA. Analysis of these issues diverges because of their distinct historical contexts and development. The question regarding management of wildlife under the Tenth Amendment brings with it hundreds of years of judicial precedent, history, and tradition.⁶¹ The remaining two questions both rely on the NWRSA itself. There has not been as much precedent addressing the NWRSA issues presented to the court in *Wyoming* because the Act was enacted in 1997, which is relatively recent.

IV. RATIONALE

The rationale used by the *Wyoming* court to decide these three primary issues is presented for a more complete understanding of the case. If the court's rationale was not expressly stated, its implicit rationale is presented. The rationale used to decide the Tenth Amendment challenge is presented at the outset, then the preemption challenge, and, finally, the APA challenge under the NWRSA.

A. *The Tenth Amendment and the Property Clause*

Wyoming acknowledged that the Property Clause does not act as an automatic withdrawal of all federal land from state jurisdiction.⁶² The court stated that "[t]he

54. 5 U.S.C. § 706(2)(A) (2000).

55. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

56. *Id.* at 843.

57. 16 U.S.C. § 668dd(e)(1)(A)(iii) (2000).

58. *Wyoming*, 279 F.3d at 1237.

59. *Id.* at 1238 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

60. *Wyoming*, 279 F.3d at 1239.

61. See *supra* note 46.

62. *Wyoming*, 279 F.3d at 1226.

Property Clause simply empowers Congress to exercise jurisdiction over federal land within a State if Congress so chooses.”⁶³ The court also acknowledged the Supreme Court’s reasoning in *Kleppe v. New Mexico*,⁶⁴ where it stated, “the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.”⁶⁵ The Tenth Circuit then concluded that “the Tenth Amendment does not reserve to the state of Wyoming the right to manage wildlife, or more specifically to vaccinate elk, on the NER, regardless of the circumstances.”⁶⁶

The court did recognize, however, that “states have possessed ‘broad trustee and police powers over the...wildlife within their borders, including...wildlife found on Federal lands within a State.’”⁶⁷ Nevertheless, the court concluded that the authority exercised by states when managing wildlife on federal lands was not “constitutionally-based”;⁶⁸ therefore, it was not a constitutionally protected authority.⁶⁹ The *Wyoming* court did not expand its explanation of the rule but ultimately concluded that the Property Clause *implicitly* delegates to the United States the power to exclusively regulate and manage wildlife on federal lands.⁷⁰ This power is primarily based upon the Supreme Court’s holding in *Kleppe* that “the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding.”⁷¹

B. Preemption under the NWRSA

The authority of the USFWS under the NWRSA to exclude state management, “regardless of the circumstances,” depends upon the construction of the NWRSA itself.⁷² The court analyzed the text to determine whether the Act grants authority to the USFWS to essentially preempt all state management of wildlife on national wildlife refuges within the state of Wyoming. Specifically, the NWRSA must demonstrate that there was a “clear and manifest purpose of Congress” to supercede state law when enacting the legislation.⁷³

In reaching its conclusion that the NWRSA preempts state authority to manage wildlife on federal lands, the court relied upon a clause in the NWRSA stating that the “mission” of the NWRSA is “to administer a national network of lands.”⁷⁴ The court interpreted this portion of the Act as its primary purpose,⁷⁵ and that this purpose could only be met if the NWRSA were interpreted to “supercede” state

63. *Id.* at 1227.

64. 426 U.S. 529 (1976).

65. *Id.* at 540–41 (analyzing whether the federal government could preclude the state from capturing, removing, and selling protected animals from federal lands under the federal Wild Horses and Burros Act of 1971, 16 U.S.C. § 1331).

66. *Wyoming*, 279 F.3d at 1227.

67. *Id.* at 1226 (quoting 43 C.F.R. § 24.3).

68. *Id.*

69. *Id.* at 1227.

70. *Id.*

71. *Kleppe*, 426 U.S. at 546.

72. *Wyoming*, 279 F.3d at 1227.

73. *Id.* at 1231 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

74. *Id.* at 1234.

75. *Id.*

law.⁷⁶ Consequently, the court found that, in order for a federal agency to manage wildlife on the NER according to the NWRSA, it must be able to exclude state management authority “regardless of the circumstances.”⁷⁷

C. Review of the USFWS Decision under the APA

The court recognized that agency actions are subject to judicial review⁷⁸ unless “statutes preclude judicial review, or agency action is committed to agency discretion by law.”⁷⁹ The court maintained that “[j]udicial review of final agency action by an aggrieved person will not cut off unless there is persuasive reason to believe that such was the purpose of Congress.”⁸⁰

Upon reviewing the text of the NWRSA, the court found insufficient evidence to support a finding that Congress sought to preclude judicial review of agency decisions under the Act.⁸¹ This finding was based upon NWRSA language that states, “the Secretary shall ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located.”⁸² Since the court perceived this language to operate as a limitation on the Secretary,⁸³ the court ultimately concluded that there was not a grant of unlimited discretion prohibiting judicial review.⁸⁴

V. ANALYSIS AND IMPLICATIONS

Key issues raised in *Wyoming* will be analyzed separately: first, the Tenth Amendment analysis and state authority to manage wildlife,⁸⁵ second, issues regarding preemption,⁸⁶ and third, review under the APA.⁸⁷ Each analysis will discuss legal and applied background, the court’s decision, and possible implications.

A. The Tenth Amendment and State Authority to Manage Wildlife

The Tenth Amendment’s substantive power has oscillated throughout history and currently appears to be ascending.⁸⁸ For this reason, it is necessary that *Wyoming*’s Tenth Amendment claim be thoroughly analyzed. Thorough analysis will offer insight and guidance for the review of similar claims in the future and will afford proper legal analysis of state sovereignty claims under the Tenth Amendment.

76. *Id.*

77. *Id.* at 1234–35.

78. *Id.* at 1236.

79. *Id.* (quoting 5 U.S.C. § 701(a) (2000)).

80. *Id.* (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).

81. *Id.*

82. Nat’l Wildlife Sys. Improvement Act, 16 U.S.C. § 668dd(a)(4)(e) (2003).

83. *Wyoming*, 279 F.3d at 1236.

84. *Id.*

85. *See infra* Part V.A.

86. *See infra* Part V.B.

87. *See infra* Part V.C.

88. *See supra* notes 24, 47–49.

With the recent waxing of state sovereignty,⁸⁹ *Wyoming* appears to have provided an excessively cursory examination of the state's Tenth Amendment claim. As the Supreme Court of the United States has stated,

The powers delegated by the...Constitution to the federal government are few and defined. Those which...remain in the State governments are numerous and indefinite....The powers reserved to the several States...extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.⁹⁰

Even though one may challenge the effectiveness of the dual system of sovereignty in restraining infringements by the U.S. government on state sovereignty, there is no question regarding the federal design to do so.⁹¹ The Supreme Court has repeatedly adhered to the axiom that states possess concurrent sovereignty that is conditioned only upon the Supremacy Clause itself.⁹² If the Constitution does not speak directly upon an issue, then the U.S. government still might preclude state authority in a certain field under the Supremacy Clause.⁹³ In situations where the Constitution does not specifically address an issue, the question ultimately becomes one of preemption. In other words, since the Constitution clearly does not expressly wrest wildlife management from the states, it must be determined whether the federal government enacted laws that do so.

The purpose of the Tenth Amendment is to protect the states and people from unconstitutional intrusions by the federal government.⁹⁴ To accomplish this goal, explicit preemptive language is generally required to demonstrate Congress's clear intent to preempt state law in an area the states have traditionally controlled.⁹⁵

Management of wildlife has been found by the Supreme Court to "remain under the exclusive control of the State."⁹⁶ The primary exceptions include enforcement of international treaties where the federal government has agreed with a foreign nation on the management of species transitorily within individual states,⁹⁷ when wildlife is in the stream of commerce,⁹⁸ when Congress explicitly preempts state management on federal lands under the Supremacy Clause,⁹⁹ where wildlife damages the property of the United States,¹⁰⁰ or where the federal government is

89. *Id.*

90. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *THE FEDERALIST* No. 45 at 292-93 (Clinton Rossiter ed., 1961)).

91. *Gregory*, 501 U.S. at 459.

92. *Id.* at 457 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)); *Kleppe*, 426 U.S. at 543.

93. *See, e.g., supra* note 37.

94. *TRIBE*, *supra* note 25, § 5-12.

95. *Gregory*, 501 U.S. at 460; *Pac. Gas & Elec. Co.*, 461 U.S. at 203; *Rice*, 331 U.S. at 230; *TRIBE*, *supra* note 25, § 6-31.

96. *McCready*, 94 U.S. at 395.

97. *Holland*, 252 U.S. at 434.

98. *Hughes*, 441 U.S. at 339 ("[W]hen a wild animal 'becomes an article of commerce...its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.'" (quoting *Geer*, 161 U.S. at 538)).

99. *Kleppe*, 426 U.S. at 543 ("[W]hen Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.").

100. *Hunt*, 278 U.S. at 100.

attempting to determine what animals “*may be detrimental* to the use of [a national] park.”¹⁰¹

There is a fundamental expectation that a regulation intended to preempt state law will clearly state this intention.¹⁰² As the Supreme Court explained in *California Coastal Commission v. Granite Rock Company*,¹⁰³ this expectation exists

because agencies normally address problems in a detailed manner and can speak through a variety of means....we can expect that they will make their intentions clear if they intend for their regulations to be exclusive....[I]f an agency does not speak to the question of preemption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to preempt.¹⁰⁴

Upon examining agency regulations promulgated under the Mining Act of 1872,¹⁰⁵ the Supreme Court went on to state that “[i]t is impossible to divine from... regulations, which expressly contemplate coincident compliance with state law as well as federal law, an intention to preempt all state regulation....”¹⁰⁶ In *Wyoming*, the problem is identical. The legislation at issue also “expressly contemplates coincident compliance with state law.” In fact, this is the requirement upon which the Tenth Circuit bases its finding for judicial review.¹⁰⁷

Even so, in order to truly assess the merits of the Tenth Amendment and state sovereignty claim, it is important to separate the Tenth Amendment issues from those issues surrounding preemption. The question of whether there is Tenth Amendment and state sovereign authority tends to become entangled with discussion of preemption.¹⁰⁸ Tenth Amendment and state sovereignty analysis consists of determining whether the U.S. Constitution preserved state authority to manage wildlife.

The Property Clause was cited by the *Wyoming* court as constitutionally granting the United States the authority to exclusively manage wildlife on federal lands within sovereign states.¹⁰⁹ This interpretation of the Property Clause has four primary difficulties. First, it fails to differentiate “the Power to dispose of and make all needful Rules and Regulations respecting the territory or other *property* belonging to the United States”¹¹⁰ from the presence of wild animals on such property. A familiar concept in wildlife law is that wild animals are not regarded as property and regulation of them can only occur through sovereign authority over the land on

101. *N.M. State Game Comm'n*, 410 F.2d at 1201.

102. *Gregory*, 501 U.S. at 460; *Pac. Gas & Elec. Co.*, 461 U.S. at 203; *Rice*, 331 U.S. at 230; *TRIBE*, *supra* note 25, § 6-31.

103. 480 U.S. 572 (1987).

104. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987) (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985)).

105. Mining Act, 30 U.S.C. § 26 (2003).

106. *Cal. Coastal Comm'n*, 480 U.S. at 584.

107. *See Wyoming*, 279 F.3d at 1237.

108. *See, e.g., TRIBE*, *supra* note 25, § 6-2 (providing a discussion of preemption and “reverse preemption” of state laws in the context of the Commerce Clause).

109. *Wyoming*, 279 F.3d at 1227.

110. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

which the animal is found at a particular time.¹¹¹ Therefore, there is a need for substantive analysis of states' rights when state authority is allegedly preempted. The need for substantive analysis is especially apparent in situations where the legal province targeted by a claim of preemption has long been dominated by the states.

The second difficulty arises when there is concurrent sovereignty over a particular property, which is often the case with federal lands.¹¹² It is common knowledge that the management of wildlife on federal lands is primarily undertaken by the state in which the federal property is located.¹¹³ This is not to say that the federal government could not and does not preempt state law as it pertains to federal property, but, in circumstances such as those in *Wyoming*, it must do so clearly and explicitly.¹¹⁴ In *Wyoming*, Tenth Amendment analysis concerns whether the state has a constitutional claim under the Tenth Amendment and related principles, not whether the NWRSA "clearly and manifestly" states an intention to preempt state wildlife management on the NER.¹¹⁵ In other words, the issue raised under the Tenth Amendment claim should be isolated from the issue concerning preemption under the NWRSA. This will help to ensure proper analysis of the Tenth Amendment claim. Therefore, focus should be on the source of the state's authority to manage wildlife (*i.e.*, from where the state's authority to manage wildlife ultimately emanates).

A third difficulty with the reasoning in *Wyoming* is that it equates Property Clause authority with management of wildlife on federal lands. *Wyoming* appears to have largely, and erroneously, relied upon Supreme Court dicta that stated, "the power over public land...entrusted to Congress is without limitations."¹¹⁶ If that were so, the authors of the Property Clause could have easily stated such without using additional qualifiers that denote limitations on the grant of this authority.¹¹⁷ Additionally, the Tenth Circuit's recognition of such impractical dicta as law all but ignores the Supreme Court's holding in *Kleppe* that "[a]bsent consent or cession a

111. See *Holland*, 252 U.S. at 434; *Geer*, 161 U.S. at 529, *overruled by Hughes*, 441 U.S. at 339; Criminal Jurisdiction of Utah over Non-Indians Hunting on the Uintah and Ouray Reservation in Violation of State Law, Dept. of the Interior Solicitor's Op. 78 101, 102 (1971).

112. See, *e.g.*, *TRIBE*, *supra* note 25, § 5-8 at 848-50 (discussing the intricacies of dual sovereignty over federal lands).

113. See, *e.g.*, Wyoming Game and Fish Dep't, 2002 Deer Hunting Season, *available at* <http://gf.state.wy.us/admin/regulations/chapter6/ch6deer.htm> (last visited Oct. 10, 2003) (defining hunting seasons and bag limits for federal and non-federal lands); N.M. Dep't of Game and Fish, 2003-2004 Hunting Proclamation, *available at* http://www.gmfsh.state.nm.us/PageMill_Images/Hunting/biggame03-04.pdf (last visited Apr. 8, 2003) (defining hunting seasons, bag limits, and fire arm and ammunition restrictions for federal and non-federal lands). From personal observation, it is indeed a rare occasion when a federal employee is seen on federal lands (*e.g.*, National Forest lands, Bureau of Land Management lands, etc.) during hunting season. On the other hand, it is quite common to observe many state game officials monitoring hunters and establishing roadblocks to determine harvest numbers and to ensure all hunters are properly licensed, attired, not intoxicated, etc. The hunting proclamations issued by states include federal lands. State management on these lands is logical because of the practicality and increased ease of regulatory application.

114. See *Gregory*, 501 U.S. at 460; *Pac. Gas & Elec. Co.*, 461 U.S. at 203; *Rice*, 331 U.S. at 230; *TRIBE*, *supra* note 25, § 6-31.

115. See generally *supra* note 37.

116. *Wyoming*, 279 F.3d at 1227 (quoting *Kleppe*, 426 U.S. at 529).

117. U.S. CONST. art. IV, § 3, cl. 2., which states, "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...." (emphasis added).

State undoubtedly retains jurisdiction over federal lands within its territory, but Congress...retains the power to enact legislation respecting those lands pursuant to the Property Clause."¹¹⁸ The *Wyoming* court has failed to recognize any jurisdiction by the state of Wyoming over wildlife on federal lands and is, therefore, squarely at odds with Supreme Court precedent.¹¹⁹

Finally, the Tenth Circuit relies heavily upon the Supreme Court's holding in *Kleppe* that "the Property Clause also gives Congress the power to protect wildlife on public lands, state law notwithstanding."¹²⁰ Difficulties here stem from the fact that the Supreme Court also recognized state authority to manage wildlife on federal lands absent preemption,¹²¹ something *Wyoming* did not do. Furthermore, *Kleppe* interpreted the Property Clause to grant a "power to *protect* wildlife on public lands,"¹²² not the authority to neglect wildlife and exclude a state from protecting wildlife on and off public lands. Indeed, the management of wildlife on the NER has been found "negligent,"¹²³ as even the Tenth Circuit recognized in *Wyoming*.¹²⁴

As the Supreme Court set out in *McCready v. State of Virginia*,¹²⁵ the regulation of wildlife is the province of the states.¹²⁶

In view of the clear distinction between state and national power on the subject, long settled...[the provisions of legislation aimed at regulating wildlife] must be construed as alone applicable to the subject within the authority of Congress to regulate, and, therefore, be held not to embrace that which was not within such power.¹²⁷

Given that wildlife management has long been the province of the states and is largely undertaken by states even on federal lands,¹²⁸ the authority to manage terrestrial game animals on federal lands presented a quandary entitled to more examination than given by the court in *Wyoming*.¹²⁹ While there are many new and aggressive pieces of legislation that delve into this state-dominated area,¹³⁰ the focus of this analysis concerns the state's Tenth Amendment claim, not preemption under the NWRSLA. With the deference and attention given to state authority by the

118. *Kleppe*, 426 U.S. at 543.

119. *Id.*

120. *Id.* at 546.

121. *Id.* at 543 ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress...retains the power to enact legislation respecting those lands pursuant to the Property Clause.").

122. *Id.* at 546 (emphasis added).

123. *Parker Land & Cattle Co., Inc. v. United States*, 796 F. Supp. 477, 484 (D. Wyo. 1992).

124. *Wyoming*, 279 F.3d at 1239.

125. 94 U.S. 391 (1876).

126. *Id.* at 395.

127. *Abby Dodge*, 223 U.S. at 175.

128. *See supra* notes 46, 113.

129. This becomes an even larger concern when these terrestrial game animals have high rates of disease and present threats to livestock and wild game outside of federal lands, as is the case here. Even so, this presents an additional issue, whether the states have the authority to protect their investments and their citizens from the negligence of federal activities on federal lands when the effects of these activities are likely to extend outside of federal lands.

130. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000); Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421h (2000); Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2000); Bald Eagle Protection Act, 16 U.S.C. §§ 668 et seq. (2000).

Supreme Court in wildlife cases,¹³¹ it appears incongruent for this court to dismiss *Wyoming*'s claim with hardly a discussion thereof. Even if the Tenth Circuit's decision regarding the Tenth Amendment (as a basis for state management of wildlife on federal lands within states) is consistent with Supreme Court precedent, its method of analysis is clearly not.

B. Preemption under the NWRSA

The court based its preemption analysis upon the language of the NWRSA itself.¹³² The *Wyoming* court's analysis and method of resolving apparently conflicting portions of the Act are problematic, not only for the inherent contradictions, but also because it undercuts the intent of the National Wildlife Refuge System itself.¹³³ Moreover, the implications of this interpretation of the NWRSA could be surprising and undesirable. Even so, there are extra-judicial remedies that may be employed to remedy any results that Congress did not intend.¹³⁴

The court concluded that the state was preempted from vaccinating elk on the NER largely because of its interpretation of the NWRSA's "mission."¹³⁵ Focusing on the court's parallel conclusion that the only way to achieve this purpose would be for the Act to exclude any exercise of authority by the states unless the agency communicates otherwise,¹³⁶ the court found that the Act must have been intended to preempt state authority.¹³⁷ This conclusion is inherently vulnerable in light of the fact that the Act also states that "[n]othing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System."¹³⁸ It does not necessarily follow that one of the provisions *must* be completely ignored in an effort to resolve apparently contradictory provisions; especially here, where the goal of the state action is the *improvement* of the health and safety of wildlife *inside* the refuge, as well as outside.

The court's interpretation in *Wyoming* is a prime example of form over substance.¹³⁹ Even if the court's conclusion is correct, adherence to the decision is contrary to the goal of the Act: providing refuge for wildlife. Specifically, by allowing the USFWS to negligently and injuriously manage the NER¹⁴⁰ because the

131. See generally *Hunt*, 278 U.S. 96; *Holland*, 252 U.S. 416; *Geer*, 161 U.S. 519, *overruled on other grounds by Hughes*, 441 U.S. 322; *McCready*, 94 U.S. 391.

132. *Wyoming*, 279 F.3d at 1218, 1227–28.

133. 16 U.S.C. § 668dd(a)(2) (2000) ("the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans").

134. See *infra* Part V.B.

135. *Wyoming*, 279 F.3d at 1228, 1233–34.

136. *Id.* at 1234.

137. *Id.*

138. 16 U.S.C. § 668dd(m) (2000).

139. See, e.g., *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13 (1993) (holding that the Establishment Clause does not act as an absolute bar to placing a public employee in a "sectarian" school because it would "exalt form over substance").

140. *Wyoming v. United States*, 61 F. Supp. 2d 1209, 1222–23 (D. Wyo. 1999), *aff'd in part and rev'd in part*, 279 F.3d 1214 (2002) (The court characterized the agency's actions as "playing out a stalling game."); *Parker Land & Cattle Co.*, 796 F. Supp. at 486 (The court characterized the agency's management of the NER as "negligent" and "unreasonable.").

NWRSLA allows them to preempt state action,¹⁴¹ the elk are exposed to an increased risk of disease and subsequent sterility, lameness, or death. Since the main purpose of the NER is to provide a healthy environment for elk,¹⁴² the *primary* purpose of the NER becomes *secondary* under the *Wyoming* decision.

Since states are the primary managers of wildlife,¹⁴³ it only seems logical that states should have the authority to manage terrestrial game animals so that their populations are healthy, outbreaks of disease are prevented,¹⁴⁴ and wildlife is managed in such a way as to protect animal populations. This is especially true in instances on federal land where the federal government has failed to manage wildlife in order to achieve these goals.¹⁴⁵ In essence, the problem in *Wyoming* can be easily characterized as one of disease and health management, not simply as an issue of land or wildlife management. As such, it becomes absurd to conclude that a relatively small parcel of land can be permitted to exempt itself from a disease prevention program and expect that the program will be effective.¹⁴⁶

Another possible unintended implication under the *Wyoming* decision is that *any* state wildlife management action *can* be precluded from taking place on national wildlife refuges if the USFWS decides that it should not occur.¹⁴⁷ Thus, state action that is beneficial to wildlife, as was the case in *Wyoming*, can be proscribed under the NWRSLA. As stated before, this is contrary to the purpose of the National Wildlife Refuge System itself and leads to the possibility of absurd results.¹⁴⁸ For example, if a highway traverses a national wildlife refuge, the federal government has the authority to exclude the patrol of state veterinary emergency response teams. This situation is oxymoronic because the purpose of the emergency response team would be to assist animals and animal populations in mortal danger. State action,

141. *Wyoming*, 279 F.3d at 1234.

142. 16 U.S.C. § 668dd(a)(2) (2000).

143. *See supra* note 113.

144. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (“Inspection laws, quarantine laws, health laws of every description....No direct general power over these objects has been granted to Congress.”).

145. *See Parker Land & Cattle Co.*, 796 F. Supp. at 484; *Wyoming*, 279 F.3d at 1239.

146. The threat of smaller, isolated areas that inadequately control and remedy the spread of infectious diseases has been justification to allow an authority responsible for the whole population to step in and manage the area for the good of the larger population at risk. This is exemplified in the Public Health Service, Department of Health, and Human Services Regulations, titled “Measure in the Event of Inadequate Local Control,” which pertain to much more mobile human populations. 42 C.F.R. § 70.2 (2002)

Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases *from such State or possession to any other State or possession*, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

Id. (emphasis added). In this case, there is a wildlife population consisting of organisms that enter and exit a national wildlife refuge (the logical result is entrance into areas for which state authorities are responsible) as they will. National management of wildlife populations modeled after 42 C.F.R. § 70.2 (2002) is not reasonable because terrestrial wildlife is not nearly as mobile as human populations that can travel by plane, train, and automobile, and because of additional problems associated with application. In the *Wyoming* case, the state would be the larger authority when compared with the NER for purposes of the health and disease control analysis. This is inherently obvious due to the fact that the NER is enclosed within the state.

147. *See, e.g., Wyoming*, 279 F.3d 1214.

148. *Id.*

such as implementing veterinary emergency response teams, would be especially valuable and effective in situations where the federal government did not provide similar services to save or protect these animals. Further confounding the intent of legislation like the NWRSA, the only reason the state is precluded from assisting these animals is that they happen to be injured while passing through federal property. Precluding the state from performing these actions is an absurd result; a result that is not persuasive in light of the fundamental goals of legislation that attempts to bring about increased numbers and the improved health of organisms for which wildlife refuges are established.

Essentially, *Wyoming* muddles the goal of the NWRSA. The goal of this legislation was not to have the federal government regulate and care for various parcels of land, as the court contends, but to manage these parcels of land for a particular purpose: to create areas for wildlife to find refuge.¹⁴⁹ The only reason authority to manage these lands was consolidated within the federal government was “for the conservation of fish and wildlife, including species that are threatened with extinction.”¹⁵⁰

The court in *Wyoming* based its finding of preemption largely on the implication that the mission of the Act was “to administer a national network of lands.”¹⁵¹ This is especially awkward because this phrase is taken entirely out of context. The entire provision reads, “The mission of the System is to administer a national network of lands and waters *for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats* within the United States for the benefit of present and future generations of Americans.”¹⁵²

From the language of the Act, it is obvious that the administration of a “national network of lands and waters” is only a method of achieving the *primary* goal of the NWRSA, “the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats....”¹⁵³ Since *this* is Congress’s primary goal in enacting the NWRSA, the *Wyoming* court appears to have based its finding of preemption on an incorrect interpretation of the Act’s purpose.

Oddly enough, the incorrect basis for the court’s finding of preemption allowed preclusion of state action that undertakes to promote the purpose of the NWRSA by improving the refuge environment for wildlife. It seems axiomatic that actions promoting the purpose of the NWRSA should be undertaken, and those that are contrary prohibited. If so, Congress would have intended the federal government to adopt or permit enforcement of state laws and policies that afford better “refuge” for wildlife, not to forego improvements merely because a state happened to be the entity proactively undertaking such action. The paramount purpose of the NWRSA is not simply to ensure exclusive federal management over national refuge lands, but

149. 16 U.S.C. § 668dd(a)(1) (2000) (“For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas....”).

150. *Id.*

151. *Wyoming*, 279 F.3d at 1234.

152. 16 U.S.C. § 668dd(a)(2) (2000) (emphasis added).

153. *Id.*

involves managing the overall environment and health of animal populations on these lands. The court's holding omits consideration of this possibility.

On another front, perhaps Congress could adopt an amendment to the NWRSA that would allow states to intervene in instances such as the one faced in Wyoming. Multiple courts found the management of the NER to be much less than satisfactory.¹⁵⁴ Courts should not be required to openly reprimand federal agencies and, at the same time, have no remedies available to rectify situations where federal agencies are "unable or unwilling" to do anything.¹⁵⁵

C. Review under the APA

The court's analysis of the state's APA claim is sound in form, but, in finding that judicial review was not precluded, it relied upon statements and implications it disregarded under the preemption analysis to hold the NWRSA "undoubtedly places limits on the agency's discretion."¹⁵⁶ The Tenth Circuit then ruled that the APA claim had been improperly dismissed, and the court ultimately relied upon the Act's requirements to coordinate, interact, and cooperate with state wildlife agencies¹⁵⁷ to find legislative intent to limit the authority granted to the agency and allow judicial review.¹⁵⁸ Thus, it is ironic that the court relied upon the Act's protection of state authority to find limitation that justifies judicial review,¹⁵⁹ while at the same time disregarding these constraints¹⁶⁰ under the preemption analysis.¹⁶¹ Disregarding and applying the same provisions in various contexts injects unpredictability into the interpretation of the NWRSA. In other words, confusion is created when one tries to determine which provisions will be regarded and disregarded in varying contexts.

Such interpretation allows for some portions of the Act to be disregarded, while other portions may be interpreted in ways that do not reflect the text of the legislation. Specifically, by interpreting provisions that require the agency to coordinate, interact, and cooperate with states¹⁶² to allow judicial review,¹⁶³ and at the same time disregarding an entire provision of the Act¹⁶⁴ to find implied preemption,¹⁶⁵ there is unpredictability in the interpretation and application of the NWRSA. Courts should attempt to reconcile differences in interpretations before concluding with one that disregards significant portions of a piece of legislation such that only a portion of

154. *Wyoming*, 279 F.3d at 1239; *Wyoming v. United States*, 61 F. Supp.2d 1209, 1222-23 (D. Wyo. 1999), *aff'd in part and rev'd in part*, 279 F.3d 1214 (2002); *Parker Land & Cattle Co.*, 796 F. Supp. at 484.

155. *Wyoming*, 279 F.3d at 1240.

156. *Id.* at 1237.

157. 16 U.S.C. § 668dd(a)(4)(e) (2000).

158. *Wyoming*, 279 F.3d at 1237.

159. *Id.*

160. *Id.* at 1234.

161. While courts may approach certain questions differently and the standards of review may not be the same (between determining whether judicial review of agency decisions is permitted within an Act and whether preemption is intended under the same Act), practically speaking, when the very same provisions are disregarded in one context and held inviolable in another, an atmosphere of uncertainty is created.

162. 16 U.S.C. § 668dd(a)(4)(E) (2000).

163. *Wyoming*, 279 F.3d at 1237.

164. 16 U.S.C. § 668dd(m) (2000).

165. *Wyoming*, 279 F.3d at 1234.

a sentence is used to determine its goal.¹⁶⁶ Section 668dd(m)¹⁶⁷ of the NWRSA should be interpreted in such a way as to give effect to its language, especially in light of giving substantial effect to subsection 668dd(a)(4)(e).¹⁶⁸

In this case, section 668dd(m) does not need to be disregarded. This section can be interpreted to allow states to act in the best interest of the wildlife for which a federal wildlife refuge has been established. At the same time, the Act can give effect to the federal administration of lands requirement through imposition of minimum management requirements.

Under the proposed and aforementioned interpretation, the traditional status of states as wildlife managers would be upheld, and the states could manage populations of wildlife on national wildlife refuges to ensure their continued health and existence through consistent wildlife management. Under this scenario, states would be free to engage in more stringent management standards than required under the NWRSA. This would both ensure that the federal government can “administer a national network of lands”¹⁶⁹ and that it can provide “for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”¹⁷⁰ Since the latter goal may be achieved by more assertive undertakings, states would logically be welcome to do so under the spirit and language of the NWRSA. This interpretation would also give force and recognition to the Act where it states that “[n]othing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in *any area within the System.*”¹⁷¹

D. Problems Presented by Wyoming to Wildlife Management under the Tenth Amendment and State Sovereignty

States have historically been, and continue to be, the entities with primary responsibility of managing wildlife.¹⁷² The few exceptions have arisen mainly out of treaties and out of both the Property and Supremacy Clauses.¹⁷³ Nonetheless,

166. *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (“[I]n expounding a statute, we [are] not...guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987))).

167. 16 U.S.C. § 668dd(m) (2000).

State Authority: Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.

Id.

168. 16 U.S.C. § 668dd(a)(4)(E) (2000) (“In administering the System, the Secretary shall—ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located.”).

169. *Wyoming*, 279 F.3d at 1234 (quoting 16 U.S.C. § 668dd(a)(2) (2000)).

170. 16 U.S.C. § 668dd(a)(2) (2000).

171. 16 U.S.C. § 668dd(m) (2000) (emphasis added).

172. 43 C.F.R. § 24.3 (2002); *Abby Dodge*, 223 U.S. 166; *Geer*, 161 U.S. 519, *overruled on other grounds by Hughes*, 441 U.S. 322; *McCready*, 94 U.S. 391; *Gibbons*, 22 U.S. 1.

173. 43 C.F.R. § 24.3 (2002).

there is sound justification for state dominance in this arena. If disease spreads through Wyoming's elk and cattle herds, the citizens of Wyoming are likely to hold state officials accountable for any negligent management.¹⁷⁴ After all, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."¹⁷⁵ The Supreme Court of the United States has extended the "accountability doctrine" to preclude the federal government from directing state "officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."¹⁷⁶ It reasonably follows that the federal government would not be able to preclude "the meaningful accomplishment of [a state's] responsibilities" to its citizens.¹⁷⁷ In both circumstances the federal government is directing state government to act (or refrain from acting) such that any negative impacts are likely to be attributed to state officers.

If Congress truly intended to preempt state action that prevents the spread of disease through wild game and domesticated animals, then, at the very least, it should make a clear statement to that effect.¹⁷⁸ Since animals are not considered a *part* of the land due to their ability to come and go and because the federal government does not *own* wildlife,¹⁷⁹ it is difficult to rationalize the ability of Congress to preempt state authority on the basis of the Property Clause alone. Federal ownership of a certain parcel of land within a state does not necessarily equate to the federal government having exclusive control over wildlife that just happens to be on that piece of property at a particular point in time.¹⁸⁰ Eventually, these animals leave federal lands and may spread disease, causing the federal government's negligence to be instrumental in expanding the scope and damage of outbreak.¹⁸¹ The results could leave the state's fish and wildlife agency to explain why hunters fill their bag limits at the lowest rates they have experienced; or the state may be left to explain to conservation organizations why their members are no longer able to view and photograph healthy wildlife; or the state's agricultural department could be left to explain why all of the dairies in the state are closed, cattle are being slaughtered to stem the spread of disease, and prices for cheese, milk, steak, and hamburger have risen to the highest levels ever experienced.

States also have an inherent responsibility to protect the health and welfare of their citizens.¹⁸² A state must have some recourse rapidly available when a federal agency endangers the public health and safety of citizens in a particular state or group of states. For instance, suppose the federal government was experimenting with bats on federal land by attaching incendiary devices to the hapless creatures,

174. See, e.g., *New York v. United States*, 505 U.S. 144 (1992).

175. *Id.* at 169.

176. *Printz v. United States*, 521 U.S. 898, 935 (1997).

177. *Wyoming*, 279 F.3d at 1241.

178. See *Gregory*, 501 U.S. at 460; *Pac. Gas & Elec. Co.*, 461 U.S. at 203; *Rice*, 331 U.S. at 230; *TRIBE*, *supra* note 25, § 6-31.

179. See *supra* note 111.

180. *Id.*

181. *Wyoming*, 279 F.3d at 1219.

182. *Gibbons*, 22 U.S. at 205; see also *Wyoming*, 279 F.3d at 1241.

such that when they were motionless for a certain period of time the device would detonate.¹⁸³ Now suppose the federal government's new comrades in arms regularly left the federal lands while foraging or to migrate, resulting in the destruction and endangerment of people and property outside of federal lands. The state should not be required to stand by helpless to protect its citizens because the Property Clause allows the federal government to do as it pleases on federal lands, "regardless of the circumstances" and regardless of the effects outside of the federal land. As the Supreme Court has stated,

[the] immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the [federal] government: all which can be most advantageously exercised by the States themselves. *Inspection laws, quarantine laws, health laws of every description...* are component parts of this mass. *No direct general power over these objects is granted to Congress*; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.¹⁸⁴

In *Wyoming*, the problem begins with a local elk population that travels in and out of federal lands.¹⁸⁵ The state manages the elk population in and out of federal land through the promulgation of hunting regulations and additional programs to monitor and maintain the health of the herd.¹⁸⁶ The USFWS makes the decision not to adopt prudent methods to stem the spread of a disease affecting ungulates on the NER because they happen to be on this federal land at a certain point in time.¹⁸⁷ In this instance, it is difficult to discern the overriding national purpose in preempting state management of local elk populations. Furthermore, there is no power that is clearly incidental to the preemption of state management over terrestrial game animals not in danger of extinction.¹⁸⁸ In fact, the district court has repeatedly found the federal

183. *A Batty Idea for Firebombing Tokyo*, in WILLIAM B. BREUER, TOP SECRET TALES OF WORLD WAR II at 123 (2000) (The actual experimentation and use of napalm incendiary devices on bats resulted in the escape of some bats and accidental destruction of U.S. buildings.).

184. *Gibbons*, 22 U.S. at 203-04 (emphasis added).

185. *Wyoming*, 279 F.3d at 1219.

186. *Id.* at 1220; Wyoming Game and Fish Dep't, 2002 Deer Hunting Season, available at <http://gf.state.wy.us/admin/regulations/chapter6/ch6deer.htm> (last updated Apr. 22, 2003) (defining hunting seasons and bag limits for federal and non-federal lands).

187. *Wyoming*, 61 F. Supp. 2d at 1222-23, *aff'd in part and rev'd in part*, 279 F.3d 1214 (10th Cir. 2002); *Wyoming*, 279 F.3d at 1239.

188. *See Gibbons*, 22 U.S. at 203-04. A finding of preemption is especially problematic in this case, where the statute is, at best, unclear about congressional intent to preempt state management through the Property Clause. *Wyoming*, 279 F.3d at 1240 ("If the executive and legislative branches of our Government will not act to resolve the brucellosis controversy in the State of Wyoming in what little time remains, the judicial branch may have to."); *id.* at 1233 ("The main legislative theory seems to be on the order of 'let's just muddle through as best we can and let the courts handle the hard cases.'") (quoting George Cameron Coggins & Michael E. Ward, *The Law of Wildlife Management on Federal Public Lands*, 60 OR. L. REV. 59, 84-85 (1981)); *Wyoming*, 61 F. Supp.2d at 1223 ("this patchwork of federal law").

actions at the NER to be counterproductive to elk management.¹⁸⁹ Unfortunately, this does not seem to be an isolated incident of federal agencies apparently contradicting legislation, and themselves, to the detriment of the species involved.¹⁹⁰

The federal government has in the past been required to demonstrate injury or the possibility of injury by wildlife in order to violate state law pertaining to wildlife management on federal lands.¹⁹¹ The Eighth Circuit has recently held that the federal government can regulate activity outside of federal property in order to reduce any negative impacts on federal lands that emanate from outside of the federal lands.¹⁹² Under this line of reasoning, when the federal government conducts, or fails to regulate, activities that are equally detrimental to state lands and their purposes,¹⁹³ it is reasonable to conclude that the state should also have the authority to regulate the activities causing negative impacts.¹⁹⁴

VI. CONCLUSION

It is troubling that the court chose to interpret the NWRSLA as preempting state law that addresses areas that federal law does not, especially when the intent to preempt is clearly questionable.¹⁹⁵ Perhaps it would be better if Congress specifically and completely preempted state authority or decided to forfeit altogether wildlife management authority gained by the federal government since the early twentieth century. These are both all or nothing approaches for either the federal or state governments to assume exclusive control, and since there appears to be a more effective method of wildlife management in concurrent jurisdiction situations, those options may not be the best available. For example, the NWRSLA framework can be interpreted to provide minimum management requirements for state agencies, reminiscent of other federal environmental legislation.¹⁹⁶ Under that interpretation,

189. *Wyoming*, 61 F. Supp.2d at 1222–23 (characterizing the agency's actions as "playing out a stalling game"); *Parker Land & Cattle Co.*, 796 F. Supp. at 486, 488 (characterizing the agency's management of the NER as "negligent" and "unreasonable").

190. See, e.g., National Wildlife Federation, *The Best & Worst for Wildlife*, available at <http://nwf.org/bestandworst/> (last visited Oct. 9, 2003). For example,

[t]he big cat's [Florida Panther] power, stealth and cunning are proving no match for the apathy of the federal agencies mandated to protect it. Fewer than 100 Florida panthers remain in the wild, yet throughout the past year, the U.S. Fish and Wildlife Service consistently refused to protect the very habitat it deemed essential to the recovery of the federally endangered cat. In the past decade, the agency has approved the destruction of more than 6,000 acres of panther habitat. Development plans for tens of thousands of additional acres appear to be headed for similar rubber stamping, making way for golf courses, vacation homes and shopping centers... edging out this sensitive creature.

Id.

191. See *N.M. State Game Comm'n*, 410 F.2d at 1201; *Hunt*, 278 U.S. at 100.

192. *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1999).

193. These activities may also affect federal lands just as negatively, and, since these lands are public, it is logical that the state may also have a duty to ensure that these federal public lands within the state are not being negatively impacted without justification.

194. Of course, such interpretation would not extend to activities that are minimally detrimental or activities concerning legitimate national interests, such as national defense. Here we are limited to discussing the environmental impacts on areas set aside for preservation of some sort. Examples of some activities that have been found to have detrimental effects on such reservations are the use of off-road vehicles and watercraft in waterfowl refuges. See *Block*, 660 F.2d 1240.

195. *Wyoming*, 279 F.3d at 1218.

196. See, e.g., Clean Water Act, 33 U.S.C. § 1342 (2002); Clean Air Act, 42 U.S.C. § 7407 (2002).

if particular states were unable or unwilling to implement the NWRSA, then the federal government would do so.

At least for the purpose of wildlife management on national wildlife refuges, it appears the term “dual sovereignty” could be replaced with the term “dueling sovereignties.” No quarrel can be had with the *Wyoming* court’s conclusion that cooperation is integral in this field and, in this case, there was far too little, if any.¹⁹⁷ This is a case where the court gives great latitude and deference to the agency’s interpretation of the Act. If the agency’s interpretation, preemption of all state wildlife management on national wildlife refuges, is truly the situation intended by Congress, then “dual sovereignty” in the context of wildlife management is not present. This then creates additional tension with the NWRSA’s requirements that stipulate federal compliance and consistency with state law, because state law in this area would be null.

The *Wyoming* court states that “[i]f the executive and legislative branches of our Government will not act to resolve the brucellosis controversy in the State of Wyoming in what little time remains, the judicial branch may have to.”¹⁹⁸ However, the entity acting most affirmatively to resolve this problem is clearly the state of Wyoming. This is likely due to the state’s constituents having a large stake in the outcome of the brucellosis problem in Wyoming. Nevertheless, the court perceives the legislation it reviewed to be unclear and contradictory but has decided to bind itself tightly with the agency and its interpretation. All the while the court acknowledges the agency’s apparent shortcomings in wielding its awesome and exclusive powers over wildlife management on national wildlife refuges.¹⁹⁹ And, all the while, “the poor, dumb creatures of the wild suffer as this disease spreads while the [US]FWS dithers....”²⁰⁰

197. *Wyoming*, 279 F.3d at 1218.

198. *Id.* at 1240.

199. *Id.* at 1241.

200. *Wyoming*, 61 F. Supp. 2d at 1222.