

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

2007

Savings Clauses and Trends in Natural Resources Federalism

Robert L. Fischman

Indiana University Maurer School of Law, rfischma@indiana.edu

Angela King

Indiana University Maurer School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Fischman, Robert L. and King, Angela, "Savings Clauses and Trends in Natural Resources Federalism" (2007). *Articles by Maurer Faculty*. Paper 198.

<http://www.repository.law.indiana.edu/facpub/198>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

SAVINGS CLAUSES AND TRENDS IN NATURAL RESOURCES FEDERALISM

ROBERT L. FISCHMAN* & ANGELA M. KING**

INTRODUCTION

Federalism is both ubiquitous and essential in natural resources law. Power-sharing arrangements are part of the organic legislation for all of the federal land systems except the national parks.¹ They are key elements in the exercise of regulatory authority as well. Because private land use control is the last outpost of near-exclusive state/local jurisdiction, the federal government needs state partners to achieve any federal objective where controlling soil disturbance is key. Even the traditional proprietary functions of natural resources law increasingly aspire to ecosystem management. Because ecosystems cross federal land boundaries, cooperative arrangements have become more central to public land law. Although less strong than land use control, pervasive state management of water and wildlife also means that state cooperation is vital for achieving most federal objectives regarding those resources. Land, water, and wildlife concerns encompass all of the great resource disputes that federal natural resources law seeks to resolve.

Federalism is to environmental law what scope of review is to administrative law: a pervasive, indispensable doctrine defined concisely in ways that give little insight into how it actually works. It takes five minutes to

* Professor, Indiana University School of Law—Bloomington. Thanks to Lloyd Dorsey, Rob Glicksman, Sid Shapiro, and Sandi Zellmer for helpful suggestions. Mark Rohr provided excellent research assistance. I am also grateful to Mark Squillace for inviting me to explore this subject for the University of Colorado Natural Resources Law Center's Twenty-Fifth Anniversary Conference. The Indiana University School of Law generously supported this work.

** J.D. Candidate, 2008, Indiana University School of Law—Bloomington.

¹ See National Forest Management Act, 16 U.S.C. § 1604(a) (2000) (requiring the Secretary of Agriculture to coordinate with the natural resources “planning processes of State and local governments”); Federal Land Policy Management Act, 43 U.S.C. § 1712(c) (9) (2000) (requiring the Bureau of Land Management to coordinate with state and local governments in the development of land use plans “to the extent consistent with the laws governing the administration of the public lands”); National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd(e)(1)(A)(iii) (2000) (requiring that federal long-range plans for wildlife refuges be consistent with state wildlife conservation plans “to the extent practicable”).

explain federalism but a lifetime to understand its dynamic on the ground. We begin with a case study illustrating the operation of cooperative federalism and proceed to a more abstract doctrinal analysis of statutory savings clauses. Fealty to subsidiarity and respect for states' interests are universally expressed values. In practice, however, the substantive preference of a state has as much to do with the weight federal agencies will afford it as does the legal or policy framework for a particular resource. Therefore, it is important to leaven the parsing of statutes and judicial opinions with a review of the trajectory of federal administrative initiatives involving state, tribal, and local partners.

Compared to pollution control, resource management federalism involves greater site-specific variation and more discretionary disparities.² This Article builds on prior work exploring federalism in natural resources law to understand how courts interpret the broad congressional directives on the states' role in resource management. Although commentary abounds on particular components of federalism policy, especially place-based collaboration, there exists little scholarship constructing a framework for understanding the kinds of federalism operating in natural resources law. This Article concentrates on the descriptive challenge of cataloging the federalism dynamic, particularly in public land management.

This Article begins, in Part I, with the controversy over managing elk in the Jackson Hole area of Wyoming. Few current disputes better illustrate the federalism dynamic in public land and wildlife management. The elk controversy shows how a statutory savings clause can provide a state with traction to advance its interests and demonstrates how the political winds of change can shift the balance of state-federal relations.

Part II reviews the distinctive kinds of federalism found in natural resources law and highlights how they differ from the pollution-control style of federalism. Part III focuses on the common statutory savings clauses that establish the broad scope of federal arrangements. It describes their roles in circumscribing federal agency authority and establishing a basis for cooperation between the federal and state governments. Part IV then analyzes the interpretive approaches courts may employ to make sense of the statutory savings language. Part V highlights recent trends that set the direction for policy innovations in natural resources federalism and muses on the future of federalism in natural resources law.

² See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 180-81 (2005).

I. FEDERALISM AT THE NATIONAL ELK REFUGE

Some of the largest concentrations of elk in North America occur in Jackson Hole, Wyoming.³ Jackson Hole is a valley of the upper Snake River approximately forty miles long and ten miles wide.⁴ Federal lands dominate the landscape: the Bridger-Teton National Forest, Caribou-Targhee National Forest, Grand Teton National Park (“GTNP”), Yellowstone National Park, the National Elk Refuge (“NER”), and the Gros Ventre Wilderness together constitute ninety-seven percent of the Jackson Hole area.⁵ In the private enclave of Jackson, Wyoming, the traditional dominance of the ranching economy has given way to tourism, which is dependent on the recreational resources of the surrounding public lands. Despite their relatively small area, the private lands of Jackson Hole have experienced a six-fold increase in year round population between 1960 and 2000. Tourism fuels over fifty-five percent of the jobs in Jackson Hole. From 1997 to 2001 expenditures by nonresident hunters alone generated over 250 jobs and four million dollars of personal income.⁶

The Jackson Hole elk herd’s size has averaged 14,600 over the past several years, but is currently closer to 13,000.⁷ Approximately 7,000 elk winter on the NER.⁸ In 2007, the Interior Department completed an Environmental Impact Statement (“EIS”) to decide how many elk (and bison) the NER and GTNP should support and what management tools ought to ensure the health of the herd.⁹ In particular, the EIS deals with the winter feeding of elk, which sustains the high populations but causes a host of ecological problems.¹⁰ This recent study caps nearly a century of intensive efforts to maintain elk, sometimes with the federal and state government agencies locking horns.¹¹ It responds both to court orders and

³ U.S. FISH & WILDLIFE SERV. & NAT’L PARK SERV., FINAL BISON AND ELK MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT 3 (2007) [hereinafter FEIS], *available at* <http://www.fws.gov/bisonandelkplan/Final%20Bison%20and%20Elk%20Management%20Plan%20and%20Environmental%20Impact%20Statement.htm>.

⁴ John Daugherty, *A Place Called Jackson Hole: A Historic Resource Study of Grand Teton National Park* (1999), *available at* http://www.nps.gov/history/history/online_books/grte2/hrs.htm.

⁵ *See* FEIS, *supra* note 3, at 177.

⁶ *Id.* at 177-78, 182.

⁷ *Id.* at iii.

⁸ *Id.* at 123.

⁹ *See generally id.* at 1-600 (providing a complete copy of the EIS).

¹⁰ *Id.* at 9-10.

¹¹ *Id.* at 6.

to significant revisions of refuge administration law and park management policies. The dispute over the size and management of the elk herd that winters in the NER specifically, and Jackson Hole generally, illustrates many of the conceptual points developed in the subsequent parts of this Article.

Elk herds summer in the high country of GTNP, southern Yellowstone National Park, and surrounding national forests. The herds migrate to winter habitat when temperatures decrease and snow accumulates in late fall. Settlement and development over the past 125 years deprived the herds of many migration routes and some of their historic winter range. Originally, elk herds passed through Jackson Hole on their way south to the Green River Basin or the Red Desert area of Wyoming.¹² But, ranched livestock consumed forage in the valley, while roads and fences disrupted migration paths. Unable to complete the journey to their historic winter habitat, elk began wintering in Jackson Hole.¹³ Therefore, one of the chief limiting factors on the elk population of the area is the confined winter range's carrying capacity.¹⁴

Wyoming has a distinctive tradition of augmenting the carrying capacity through winter feeding that began at Jackson Hole.¹⁵ As elk populations hit historic lows in the late 1800s and early 1900s, Jackson residents sought to protect them from "tusk hunters" and commercial hunting operations.¹⁶ At the same time, a series of severe winters, combined with the conversion of open range to ranching, resulted in conflicts with livestock operations and left substantial numbers of elk dead. Local citizens and organizations, as well as state and federal officials, began winter feeding in 1910-11 to reduce mortality rates and minimize the damage to ranchers' hay. In 1912, Congress provided money for the purchase of a winter range for the 20,000 elk wintering in the area. This area became the National Elk Refuge.¹⁷

¹² *Id.* at 121. See generally Christina M. Cromley, *Historic Elk Migrations Around Jackson Hole, Wyoming*, in BULLETIN SERIES NO. 104, YALE SCHOOL OF FORESTRY AND ENVIRONMENTAL STUDIES, DEVELOPING SUSTAINABLE MANAGEMENT POLICY FOR THE NATIONAL ELK REFUGE, WYOMING 53, 53 (Tim W. Clark, Denise Casey & Anders Halverson eds., 2000), available at <http://environment.yale.edu/documents/downloads/0-9/104Cromelk.pdf>.

¹³ Cromley, *supra* note 12, at 53; FEIS, *supra* note 3, at 121, 171.

¹⁴ FEIS, *supra* note 3, at 121.

¹⁵ Hal Herring, *Predator Hunters for the Environment*, HIGH COUNTRY NEWS, June 25, 2007.

¹⁶ FEIS, *supra* note 3, at 121.

¹⁷ *Id.* at 6, 123. The NER was the first unit of the system to be called a "refuge." ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 168 (2003).

Since its creation, NER management focused on elk and other game species. Although the elk provided the original rationale for creating the NER, the refuge is much more than just a feeding ground for elk. Two endangered species, the gray wolf and whooping crane, as well as a significant bison herd, occupy the refuge.¹⁸ Overall, the NER supports 178 bird species, 49 mammal species, 382 vascular plant species, and five fish species.¹⁹ But, elk out-compete other animals for both management attention and food. The herds degrade plant communities, contributing to biodiversity loss in the refuge.²⁰ For instance, elk over-browse woody vegetation, thereby reducing valuable habitat for trout and many bird species.²¹

The 1997 organic legislation for the refuge system added biological integrity, diversity, and environmental health to the list of management objectives²² and expanded the scope of concern from wildlife to include plants as well.²³ Yet, in 1998, approximately 8,500 elk wintered on the refuge. This is substantially larger than the natural carrying capacity of 5,500 elk, as estimated by pioneering wildlife biologist Olaus Murie.²⁴ Consequently, conservation groups became increasingly worried about concentrating too many elk in too small an area in Jackson Hole to the detriment of other species and with increased risk of disease to the elk.²⁵

¹⁸ See U.S. Fish & Wildlife Service, Threatened and Endangered Species on National Wildlife Refuges Database, http://www.fws.gov/refuges/databases/threatenedendangered/species/State_Display.cfm (last visited Nov. 5, 2007).

¹⁹ Noah Matson, *Biodiversity and Its Management on the National Elk Refuge, Wyoming*, in BULLETIN SERIES NO. 104, YALE SCHOOL OF FORESTRY AND ENVIRONMENTAL STUDIES, DEVELOPING SUSTAINABLE MANAGEMENT POLICY FOR THE NATIONAL ELK REFUGE, WYOMING 101, 101 (Tim W. Clark, Denise Casey & Anders Halverson eds., 2000), available at <http://environment.yale.edu/documents/downloads/0-9/104Matson.pdf>.

²⁰ Tim W. Clark, *Wildlife Resources: The Elk of Jackson Hole, Wyoming*, in BULLETIN SERIES NO. 104, YALE SCHOOL OF FORESTRY AND ENVIRONMENTAL STUDIES, DEVELOPING SUSTAINABLE MANAGEMENT POLICY FOR THE NATIONAL ELK REFUGE, WYOMING 171, 172 (Tim W. Clark, Denise Casey & Anders Halverson eds., 2000), available at <http://environment.yale.edu/documents/downloads/0-9/104Clark.pdf>.

²¹ Matson, *supra* note 19, at 109.

²² National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified at 16 U.S.C. § 668dd(a)(4)(B) (2000)).

²³ 16 U.S.C. § 668dd(a)(2), (a)(4)(N) (2000).

²⁴ See Anders Halverson, *The National Elk Refuge and the Jackson Hole Elk Herd: Management Appraisal and Recommendations*, in BULLETIN SERIES NO. 104, YALE SCHOOL OF FORESTRY AND ENVIRONMENTAL STUDIES, DEVELOPING SUSTAINABLE MANAGEMENT POLICY FOR THE NATIONAL ELK REFUGE, WYOMING 23, 28 (Tim W. Clark, Denise Casey & Anders Halverson eds., 2000), available at <http://environment.yale.edu/documents/downloads/0-9/104Halver.pdf>.

²⁵ Clark, *supra* note 20, at 171-72.

Although many states have emergency protocols in place to prevent the decimation of elk herds, no state has more than a couple of public feeding stations. In contrast, the state of Wyoming has built on the experience of Jackson Hole to create twenty-two other public feeding stations in the western part of the state, on Forest Service, Bureau of Land Management ("BLM"), state, and private lands.²⁶ Winter feeding maintains high herd populations, compensating for the decline in natural winter feeding habitat or providing food where little native winter range existed. Most importantly for ranchers, winter feeding reduces elk foraging of hay intended for livestock.²⁷

A high concentration of elk, however, creates problems of its own. It increases the risk of major disease outbreaks. Increased populations also cause more damage to vegetation on the feeding grounds, resulting in a reduction of wildlife dependent on healthy stands of shrubs and trees. Unusually low winter mortality requires hunting programs and reduces food for predators, scavengers, and detritivores. And, most notably for federalism law and policy, high levels of brucellosis in the elk and bison herds accompany the high density of the animals around winter feeding stations.²⁸

Brucellosis is a disease caused by a bacterial borne pathogen, *Brucella abortus*, that "infects the reproductive organs and lymphatic systems of ungulates."²⁹ Most commonly, the disease causes spontaneous abortion in females during the first pregnancy following infection. Brucellosis is usually spread by the consumption of infected tissue, or contaminated feed or water. Thirty percent of the wild elk in western Wyoming have brucellosis. The winter feeding grounds perpetuate the disease because herds are in close contact during the birthing period. Elk infect domestic cattle with brucellosis rarely under natural conditions, but concentration of herds raises the risk.³⁰

In 1985, the Wyoming Game and Fish Department ("WGFD") began vaccinating elk for brucellosis with "Strain 19."³¹ Strain 19 had previously been used as a means of controlling the disease in cattle, where it is seventy percent effective in preventing spontaneous abortions. Based on the state's vaccination program and test-and-removal procedures,³² the

²⁶ Herring, *supra* note 15.

²⁷ FEIS, *supra* note 3, at 6.

²⁸ *Id.* at 9.

²⁹ Wyoming v. United States, 279 F.3d 1214, 1218-19 (10th Cir. 2002).

³⁰ *Id.* at 1218-20.

³¹ *Id.* at 1220.

³² Test-and-removal involves the capture of adult female cattle for brucellosis testing. Those

United States Department of Agriculture (“USDA”) certified Wyoming’s cattle brucellosis-free.³³

In 1997, the Governor of Wyoming, fearing the loss of Wyoming’s brucellosis-free status for livestock—which would limit market access and increase costs to both ranchers and the state—requested “immediate assistance and response to deal with our mutual concern with the brucellosis issue in the State of Wyoming.”³⁴ While the Fish and Wildlife Service (“FWS”) promoted a multi-year efficacy study regarding Strain 19, the Governor urged immediate action to combat the issue at hand. The FWS responded that the state failed to demonstrate the effectiveness of Strain 19. Instead, the FWS claimed to be able to avoid the spread of the disease through feed-line management. More specifically, the FWS began replacing hay with alfalfa pellets and dispersed the feeding locations.³⁵

Wyoming, however, persisted in its efforts, eventually filing a lawsuit in 1998 challenging the FWS’s refusal to permit vaccinations.³⁶ The district court determined that the refuge system organic act failed to provide the state with “mutual rights to manage wildlife” on the NER.³⁷ Although Judge Brimmer sympathized with Wyoming’s plight,³⁸ he nonetheless found that Congress delegated to the Secretary of the Interior complete control over federal refuge lands.³⁹ The opinion held that the statutory savings clause⁴⁰ did not alter the Secretary’s complete authority.

animals testing positive are removed and transported to a USDA-approved slaughterhouse.
Id.

³³ *Id.*

³⁴ *Id.* at 1221.

³⁵ *Id.* at 1221-22.

³⁶ *See Wyoming v. United States*, 61 F. Supp. 2d 1209 (D. Wyo. 1999), *rev’d*, 279 F.3d 1214 (10th Cir. 2002).

³⁷ *Id.* at 1223.

³⁸ The intransigence of the Secretary trumps the well-intentioned efforts of the State to solve the brucellosis problem in elk. 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.

Id. at 1222-23.

³⁹ *Id.* at 1216, 1219, 1221.

⁴⁰ *See infra* notes 90-104 and accompanying text. A statutory savings clause affirms the continued existence of state power in a law granting authority to a federal agency.

Wyoming appealed, and, in 2002, an important decision in the litigation from the Tenth Circuit renewed interest in the legal attributes of cooperative federalism and in a fresh approach for elk management in Jackson Hole.⁴¹ The appeals court recognized that, under ordinary circumstances, deference to agency action is appropriate when “scientific and technical judgment within the scope of agency expertise” is at issue.⁴² But, the court found the cooperative federalism concerns reason to reduce deference. The court criticized what it perceived to be a federal indifference to Wyoming’s legitimate interests:

The problem is that after an extended period of time, the FWS still appears unable or unwilling to make any judgment regarding the biosafety and efficacy of Strain 19 as applied to free-ranging elk. But the law requires answers. For instance, the FWS has never explained why the State’s proposal would “stand as an obstacle to the accomplishment and execution” of federal objectives.⁴³

The court opined that the FWS’s failure to make a judgment regarding the effectiveness of Strain 19 after more than a decade, and the parties’ inability to reach common ground on the issue, did not satisfy the cooperation mandate in the refuge system organic act’s savings provisions. The legislative history indicated that the savings clause preserved the status quo, leaving difficult jurisdictional disputes for the courts to determine on a case-by-case basis.⁴⁴

The appeals court agreed with Judge Brimmer that the state’s claim of a right to manage wildlife would be inconsistent with the mission of the National Wildlife Refuge System (“NWRS”), which is to provide a network of refuges managed in a consistent, national system. After establishing that the FWS had the authority to make the decision, the appeals court turned to the question of whether the FWS correctly made the decision. The court interpreted the refuge organic act to suggest that cooperative federalism limits FWS decision-making and heightens the agency’s obligation to work with Wyoming to reach a management agreement. So, although the FWS had the authority to block state vaccination

⁴¹ See *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002).

⁴² *Id.* at 1240 (quoting *Sierra Club-Black Hills Group v. U. S. Forest Serv.*, 259 F.3d 1281, 1286 (10th Cir. 2001)).

⁴³ *Id.* (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)).

⁴⁴ *Id.* at 1233, 1238.

on the NER, it may not have properly exercised this authority. The Tenth Circuit remanded the factual determination of whether the decision was adequately supported by the administrative record to the district court.⁴⁵

Rather than continue to litigate the case, the Bush Administration settled by agreeing to conduct an initial environmental assessment on an interim vaccination program.⁴⁶ After the federal government issued a “finding of no significant impact,” elk vaccinations began in early 2003 and would continue until the federal government completed a more comprehensive analysis of elk and bison management in Jackson Hole.⁴⁷ Nonetheless, for reasons not directly related to the NER program, the U.S. Department of Agriculture revoked Wyoming’s brucellosis-free certification in 2004.⁴⁸

The federal government completed the comprehensive EIS and adopted a new elk management plan in 2007.⁴⁹ The WGFD served as a cooperating agency and partner on the EIS. The final EIS considered six alternatives. Under Alternative One, the “no action” alternative, “[f]ew changes would occur in managing the elk and bison herds;” therefore, the “high prevalence of brucellosis . . . would continue.”⁵⁰ Alternative Two would greatly reduce active management of the herds on refuge lands and phase out supplemental feeding over ten to fifteen years. Brucellosis prevalence would be reduced over time by more natural, dispersed winter densities. Alternative Three would actively manage the herds on refuge lands and reduce supplemental feeding over ten years, providing it only during the severest winters. Under this alternative, brucellosis would be reduced as the concentrations of the herds decreased and more effective techniques and vaccinations were developed. Alternative Four would adaptively manage both refuge and park lands, emphasizing the improvement of winter, summer, and transitional range.⁵¹ This alternative would allow WGFD to vaccinate the herds against brucellosis “as long as logistically feasible.”⁵² Alternative Five would heavily manage the herds on refuge

⁴⁵ *Id.* at 1234-35, 1240-41.

⁴⁶ Press Release, U.S. Dep’t of Justice, United States and Wyoming Settle Suit on Elk Vaccinations (July 31, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/July/02_enrd_442.htm.

⁴⁷ News Release, U.S. Fish & Wildlife Serv., Finding of No Significant Impact Released for Proposed Elk Vaccination Plan on National Elk Refuge, *available at* <http://www.fws.gov/mountain-prairie/pressrel/03-07.htm>.

⁴⁸ FEIS, *supra* note 3, at 185. Wyoming regained its certification in 2006. *Id.* at 187.

⁴⁹ *See id.* at 8.

⁵⁰ *Id.* at 39, 42.

⁵¹ *Id.* at 44, 46, 48.

⁵² *Id.* at 48.

lands and permit WGFD to vaccinate elk and bison. This alternative would provide supplemental feeding in all but the mildest winters, decreasing disease outbreaks by spreading out feed and changing feed locations. Alternative Six would adaptively manage the herds on refuge lands to improve winter grazing habitat and phase out supplemental feeding within five years. Brucellosis prevalence would decrease over time as concentrations decreased and new techniques and vaccines were developed.⁵³

The federal government chose Alternative Four in the 2007 elk management plan.⁵⁴ The new plan emphasizes four goals: habitat conservation, sustainable populations, numbers of elk and bison, and disease management.⁵⁵ These goals are to be implemented through a “structured framework, in collaboration with the [WGFD], of adaptive management criteria and actions for transitioning from intensive supplemental winter feeding.”⁵⁶ The EIS, however, neither describes the “structured framework” nor defines the criteria for winter feeding. Fundamental aspects of the plan include population management, vegetation restoration, continuous monitoring, and public education programs.⁵⁷ The state will achieve its objective of maintaining an elk herd of approximately 11,000 through the cooperation of the FWS, National Park Service (“NPS”), and WGFD. Although management actions will not be designed to facilitate vaccination, the WGFD is permitted to vaccinate the herds as long as logistically feasible. The plan does not promise to end supplemental feeding, but merely articulates a desire to move away from supplemental feeding during good winters.⁵⁸

The federal government chose the least definite alternative, which allows for the greatest flexibility in the coming years. This kind of adaptive management coincides with maximal discretion for the agency and is increasingly employed by federal decision makers.⁵⁹ In addition to illustrating

⁵³ *Id.* at 50, 52.

⁵⁴ U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION: NATIONAL ELK REFUGE, GRAND TETON NATIONAL PARK, FINAL BISON AND ELK MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT 4 (2007), *available at* <http://www.fws.gov/bisonandelkplan/ROD.pdf>.

⁵⁵ FEIS, *supra* note 3, at 41.

⁵⁶ *Id.* at 65.

⁵⁷ *Id.* at 48.

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., RECORD OF DECISION: ENVIRONMENTAL IMPACT STATEMENT FOR THE ATLANTIC RIM NATURAL GAS FIELD DEVELOPMENT PROJECT 3 (2007), *available at* <http://www.dble.us/press/2007/ROD.pdf>. The BLM's plan for natural gas development in the Atlantic Rim of Wyoming is another illustration of a federal agency choosing a highly discretionary “adaptive management”

the federalism dynamics of wildlife management in public land administration, the recent National Environmental Policy Act (“NEPA”) exercise also illustrates the difficulty of applying adaptive management to United States administrative procedures. With fewer subsequent opportunities to shape the large-scale strategy for elk, stakeholders understandably would like greater certainty at the time the Interior Department establishes a record of decision. However, adaptive management counsels continual reopening of tools and timetables. It also, though, offers a cloak of legitimacy for an agency seeking to dodge commitment to an objective.

Many federal wildlife biologists and environmental groups, led by the Greater Yellowstone Coalition, oppose any elk management plan that fails to set strict timetables for phasing out vaccination and clear criteria for the circumstances justifying supplemental winter feeding.⁶⁰ Without firm commitments to end winter feeding, they fear that the inertia of the current feeding practices will perpetuate the unhealthy, high concentrations of winter elk populations.⁶¹ They favored Alternative Six because it established a definite deadline of five years for terminating winter feeding.⁶²

All stakeholders in the elk management process claim healthy elk populations as their prime objective. The disagreement focuses on whether continued winter feeding with vaccination is the best way to achieve that end.⁶³ In his review of the brucellosis controversy fifteen years ago,

alternative. *Id.* The Interior Board of Land Appeals recently refused to stay the BLM decision against a challenge based, in part, on the “amorphous” content of the adaptive management alternative chosen. PUBLIC LAND NEWS BULLETIN #9 (2007) (reporting on Theodore Roosevelt Conservation Partnership, et al., IBLA 2007-2008 (2007)).

⁶⁰ GREATER YELLOWSTONE COALITION, RE: FINAL BISON AND ELK MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT (FEIS) 4-5 (2007) (on file with author).

⁶¹ Cory Hatch, *Refuge Plan Slashes Herd*, JACKSON HOLE NEWS & GUIDE, Feb. 7, 2007, available at http://www.greateryellowstone.org/press/article.php?article_id=1600 (quoting a spokesman for the Greater Yellowstone Coalition as stating “[y]ou have to wonder if the agencies intend to go forward with business as usual or if they intend to carefully phase out artificial feeding”).

⁶² *Id.*

⁶³ The decision agencies, however, failed to choose Alternative 6, which they rated as the best option for overall wildlife and plant protection on the NER. *See* FEIS, *supra* note 3, at 83. The Department of Agriculture’s Animal and Plant Health Inspection Service commented that Alternative 6 would provide for healthier elk. It found that the higher population levels of Alternative 4’s “unnatural concentration of animals” raises the risk of “disease persistence and spread.” Letter from John R. Clifford, Deputy Administrator, Veterinary Services, APHIS, to Ralph Morganweck, Regional Director, Mountain Prairie Region Fish & Wildlife Services (May 20, 2005), *reprinted in* FEIS, *supra* note 3, at 3-4, available at http://www.fws.gov/bisonandelkplan/Final%20EIS/Volume2/1_Intro_Cmt-1-5.pdf.

Professor Robert Keiter observed a divide in professional culture between range scientists and wildlife biologists.⁶⁴ While range scientists are comfortable with intensive management that includes vaccination and slaughter, wildlife biologists tend to favor populations that fluctuate wildly in response to natural conditions.⁶⁵ Keiter attributed the division to divergent professional views on the relationship between people and nature. Range scientists emphasize that science can and should be able to improve nature. Wildlife biologists, however, focus on park and wilderness settings as excellent opportunities to observe nature's ways, which provides valuable baseline scientific data.⁶⁶ The WGFD's position belies this simple dichotomy. Instead of backing the natural regulation policy usually favored by wildlife biologists, the WGFD has aligned with the livestock ranchers (and hunters/outfitters) to support intensive management of brucellosis through vaccination. This is partly a reflection of the political power the livestock and hunting sectors wield across Wyoming state government.⁶⁷ It is also related to the fiscal realities faced by WGFD, which derives much of its budget from hunting licenses: elk are prime, big-game in Wyoming. High elk populations translate into more revenue for WGFD. And, easily watchable or huntable elk sustain an important component of the Jackson Hole tourism economy.⁶⁸

While philosophically disposed to prefer natural variations in elk populations, the environmental groups also rely on scientists and the Animal Plant Health Inspection Service's findings that infectious diseases will be more likely to sweep through elk maintained by winter feeding.⁶⁹ The vaccinations do not eliminate brucellosis, and sometimes fail to contain

⁶⁴ Robert B. Keiter & Peter H. Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem*, 28 LAND & WATER L. REV. 1, 64-66 (1993).

⁶⁵ *Id.* at 65. This is also consistent with former NER Manager Barry Reiswig's observation that "[t]he wildlife professionals all felt that it was time to bite the bullet and phase out the feed grounds." Herring, *supra* note 15.

⁶⁶ Keiter & Froelicher, *supra* note 64, at 65.

⁶⁷ Todd Wilkinson, *Mismanagement, Ineptitude, and Ignorance? In Wyoming, Charges and Countercharges Fly over Elk*, NEW WEST NETWORK (May 24, 2006), available at http://www.newwest.net/index.php/main/article/in_wyoming_charges_and_countercharges_fly_over_elk/.

⁶⁸ WYO. GAME & FISH DEP'T, SHERIDAN REGION, A ROCKY MOUNTAIN ELK HABITAT CONSERVATION PLAN FOR THE WGFD SHERIDAN REGION (AND PORTIONS OF THE CODY REGION) 3 (2004), available at http://gf.state.wy.us/downloads/pdf/Elk_Conservation_Plan-V2.pdf.

⁶⁹ Whitney Royster, *USDA Wants Faster Elk-Feeding Phase Out*, STAR TRIBUNE (Aug. 9, 2005), available at <http://www.casperstartribune.net/articles/2005/08/09/news/wyoming/1de5bcf05e4d2648872570580004e4bf.txt>.

it.⁷⁰ Looming on the horizon is the spread of a devastating chronic wasting disease that may sweep through concentrated elk populations and decimate herds.⁷¹ For supporters of Alternative Six, Wyoming created the brucellosis problem through its aggressive winter feeding programs and should address the problem by removing the underlying cause rather than rely on a risky strategy of vaccination that neither eliminates elk brucellosis nor protects against other infectious risks and habitat degradation caused by crowding.

Many hunters remain concerned by the winter program's increased risk of chronic wasting disease. But, some hunting groups support winter feeding to maintain greater opportunities for bagging elk: Sportsmen for Fish and Wildlife ("SFW") staged a "Hay Day" in December 2006 to draw attention to its claim that the NER was underfeeding the wintering elk. SFW attracted publicity when it delivered sixty tons of unsolicited hay to the NER in a convoy with a police escort.⁷² The longtime NER Manager, Barry Reiswig, who thinks that protecting more acres of natural winter habitat is the lynchpin of elk conservation, candidly commented that:

Right now, we have millions of acres of public land with mule deer and antelope on it, but elk are barred from ever going there. Instead, they are kept on these postage stamps (the feed grounds), time bombs for disease. The stock growers are not economically powerful, but they have political power, and they have kept the fish and game from buying any more winter range.⁷³

II. THE DISTINCTIVE TYPES OF NATURAL RESOURCES FEDERALISM

How does the NER elk dispute map onto the legal structure of federalism? Although politics and policy drive elk management more than statutes and courts, the legal foundation of the state-federal relationship does shape the range of options. This and the following parts explore those legal underpinnings of federalism in action. Federalism in environmental law is most often associated with the model pervasive in pollution

⁷⁰ *Wyoming v. United States*, 279 F.3d 1214, 1220 (10th Cir. 2002).

⁷¹ See Wyo. Game & Fish Dep't, *Wyoming: CWD Found in New Hunt Area Near Ucross*, CHRONIC WASTING DISEASE ALLIANCE, Oct. 12, 2007, <http://www.cwd-info.org/index.php/fuseaction/news.detail/ID/5f4e8c5976693ee88d52a0c9451ed2ea>.

⁷² See Herring, *supra* note 15.

⁷³ *Id.*

control: state permitting and standard-setting overseen by the federal government to assure compliance with national minimum criteria. The programs under the Clean Air Act ("CAA")⁷⁴ and the Clean Water Act ("CWA")⁷⁵ illustrate this narrow model of cooperative federalism. Both programs involve state implementation of federal standards. Natural resources law, in contrast, employs a wider array of cooperative tools, including place-based collaboration, state favoritism in federal process, and federal deference to state process.

A. *Place-Based Collaboration*

Place-based collaboration tailors decision-making about the environment to a specific region. Rather than impose a uniform model for interaction, place-based collaborations grow from the particular circumstances of the locus and nature of a dispute. The chief strength of this approach is that it brings a wide range of stakeholders and regulatory jurisdictions together to engage in holistic management. Place-based collaborations are one of the most popular current approaches to cooperative federalism in natural resources law. Place-based collaboration softens the command-and-control requirements that typically bind parties in environmental law; instead, it employs more flexibility to create a watershed-, jurisdiction-, or habitat-specific approach. It also helps satisfy many of the criteria for ecosystem management. The clearest, and longest-term, recent trend in natural resources law has been reliance on more place-based collaborations. This is a bipartisan enthusiasm.

Place-based collaborations, however, risk local capture and may frustrate coordinated management of public lands systems. Widely debated examples include the CALFED Bay-Delta program to manage fish and other resources in the Sacramento River Delta,⁷⁶ the board Congress created to operate the Valles Caldera National Preserve as a national forest unit,⁷⁷ and the cooperative agreement outsourcing much of the management of the National Bison Range to the Confederated Salish and Kootenai

⁷⁴ 42 U.S.C. § 7402 (2000).

⁷⁵ 33 U.S.C. § 1252 (2000).

⁷⁶ See Matt Jenkins, *Trouble in the Delta*, HIGH COUNTRY NEWS, Feb. 6, 2006, available at http://www.hcn.org/servlets/hcn.Article?article_id=16082.

⁷⁷ See 16 U.S.C. § 698v-5(a) (2000). For further information regarding the Valles Caldera Trust and its progress, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-98, VALLES CALDERA: TRUST HAS MADE SOME PROGRESS, BUT NEEDS TO DO MORE TO MEET STATUTORY GOALS (2005), available at <http://www.gao.gov/new.items/d0698.pdf>.

tribal governments.⁷⁸ The Endangered Species Act (“ESA”) habitat conservation planning program has spurred many controversial place-based management initiatives. For instance, the FWS issued an incidental take permit in 2005 endorsing a tri-state effort to manage the lower Colorado River’s aquatic habitat.⁷⁹ The NEPA EIS process may provide a vehicle for place-based collaboration, especially when the lead federal agency invites states to participate as cooperating agencies.⁸⁰ The Jackson Hole elk management case study, which embraced a multi-jurisdictional region, displays elements of place-based collaboration. But, even though the EIS covered a broad area and the WGFD worked closely with the Interior Department as a cooperating agency, the EIS foreswore evaluation of private land management, which has an important role to play in determining whether elk can migrate to natural winter habitat.⁸¹

B. *State Favoritism in Federal Process*

State favoritism in federal process is a coordinating tool that reserves an enhanced role for states in federal environmental decision-making. Although it does not guarantee that the state view will prevail,⁸² federal agency decision makers have a responsibility to at least document their consideration of the state’s view and to explain why it did not prevail. The state’s direct avenue to assert its interests is often not open to other stakeholders in the federal decision. The organic acts for the national forest, national wildlife refuge, and BLM land systems all employ this tool in their comprehensive planning mandates.⁸³ Moreover, as the *Wyoming* decision reflects, organic acts may even assure states special consideration

⁷⁸ See FISH & WILDLIFE SERV., U.S. DEP’T OF THE INTERIOR, FISCAL YEARS 2005-2006 ANNUAL FUNDING AGREEMENT BETWEEN THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION §§ 5-7 (2004), available at http://www.fws.gov/mountain-prairie/cskt-fws-negotiation/nbrca_afa_12104final.pdf. The National Bison Range was designated as part of the National Wildlife Refuge System in 1908. See 16 U.S.C. § 671 (2000).

⁷⁹ U.S. FISH & WILDLIFE SERV., 2 LOWER COLORADO RIVER MULTI-SPECIES CONSERVATION PROGRAM, FINAL HABITAT CONSERVATION PLAN (2004), available at <http://www.lcrmscp.gov/publications/VolumeII.pdf>.

⁸⁰ See 40 C.F.R. § 1501.6 (2006).

⁸¹ FEIS, *supra* note 3, at iii, 4, 8, 23.

⁸² See, e.g., Fischman, *supra* note 2, at 200 n.83.

⁸³ See 16 U.S.C. § 1604(a) (2000); 16 U.S.C. § 668dd(e)(1)(A)(iii) (2000); 43 U.S.C. § 1712(c) (2000).

in specific agency decisions that fall short of comprehensive planning, such as whether to vaccinate elk.⁸⁴

The Bush II Administration has been particularly enamored of state favoritism, as exemplified by the now-suspended roadless rule. The 2005 rule invited state governors to petition the Forest Service to promulgate special rules establishing management requirements for roadless areas within the state.⁸⁵ The rule bound the Forest Service to act on the state petition within a definite time frame, but reserved federal national forest management authority. The roadless rule's version of procedural favoritism was inspired by the Wild and Scenic Rivers Act,⁸⁶ which provides an alternative to congressional river designation where a governor applies to the Interior Secretary for administrative designation of rivers protected under state law.⁸⁷ Like the adaptive alternative selected by the Interior Department for elk management in 2007, the roadless rule failed to contain criteria indicating precisely how the federal agency would exercise its discretion in making substantive decisions. Without standards by which to review agency action, state favoritism may promote a version of cooperative federalism tantamount to political favoritism.

C. *Federal Deference to State Process*

Federal deference to state process is created when legislation specifies that, if adopted in accordance with certain procedures, a state policy, standard, or plan will be employed by the federal government in its own national decisions. Although procedural favoritism gives states a comparative advantage over other stakeholders in asserting interests in federal decision-making, this third category—federal deference—provides greater assurance that the federal government will actually comply with the state position. The best statutory example of this approach to cooperative federalism is the Coastal Zone Management Act's ("CZMA")

⁸⁴ See *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002).

⁸⁵ See Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at 36 C.F.R. §§ 294.10-294.13) [hereinafter Roadless Rule].

⁸⁶ 16 U.S.C. §§ 1271-1287 (2000).

⁸⁷ *Id.* § 1273(a)(ii). The Interior Secretary must find that the state-nominated river meets federal criteria established by law and regulation. *Id.* For a case study of this avenue for state favoritism, see Sally K. Fairfax et al., *Federalism and the Wild and Scenic Rivers Act: Now You See it, Now You Don't*, 59 WASH. L. REV. 417 (1984).

consistency criterion.⁸⁸ But, this approach also pops up in public land management. For example, federal public lands routinely embrace state hunting regulations as a default rule; even the FWS regards state-permitted takes as per se appropriate for national wildlife refuges.⁸⁹

Because federal deference to state process is the strongest restraint on federal activities, it has not been a particularly attractive tool for any administration recently. Even the outcome of the NER dispute, which largely extends the invitation for Wyoming to continue its program of elk management on federal lands, still reserves federal authority (and announces at least the intention) to modify and phase out the state approach.

III. STATUTORY SAVINGS CLAUSES

Describing the large-scale structure of natural resources federalism or summarizing recent trends in its implementation falls short of providing a fine-tuned understanding of the relationship between law and federalism policy. This Part introduces statutory savings clauses, which have long set the tone for integrating state concerns and procedures into federal programs. Such clauses provide key links for connecting federal law with state policies.

A statutory savings clause seeks to delimit the degree to which a federal agency should pursue national objectives at the expense of a state's different view. It provides a statement, and sometimes a mechanism, for incorporating state interests notwithstanding a statute that seeks to implement a uniform federal program. For instance, the *Wyoming* appeals court used the savings provision in the national wildlife refuge system organic act to set the stage for greater state involvement in NER elk management.⁹⁰

Savings clauses approach the protection of state (or tribal) prerogatives in a variety of ways. Some statutes have a single section that bundles together all of the savings promises while others have separate sections for each savings program. In general, however, it is useful to divide savings clauses (which may be sections or parts of sections) into two types: jurisdictional and cooperative. Savings clauses may lack a definite expression of their intended impact on the federalism issue or they may combine both jurisdictional and cooperative components.

⁸⁸ 16 U.S.C. § 1456(c) (2000).

⁸⁹ U.S. FISH & WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE MANUAL [hereinafter U.S. FISH AND WILDLIFE SERVICE MANUAL], pt. 603 § 1.3(B) (2006), available at <http://www.fws.gov/policy/603fw1.pdf>.

⁹⁰ *Wyoming v. United States*, 279 F.3d 1214, 1234 (10th Cir. 2002).

Jurisdictional savings clauses focus on the line separating federal from state power. All savings clauses implicitly address this separation, but the true jurisdictional clauses carve out distinct areas for either federal action or state authority. The jurisdictional savings clauses are particularly important in regulatory statutes and less prominent in public land management legislation.

The most famous example of a jurisdictional savings clause establishing the reach of a national regulatory program is the Federal Power Act's provision giving the Federal Power Commission (now the Federal Energy Regulatory Commission) a mandate to regulate interstate sale and transmission of electricity.⁹¹ The seminal 1945 Supreme Court decision in *Connecticut Light & Power Co.* limited the Commission's jurisdiction more narrowly than Congress's possible range of delegated Commerce Clause authority because of the savings clause's description of those aspects of the electric market for which federal regulation is "necessary in the public interest."⁹² This principal jurisdictional clause of the Act circumscribes the outer bounds of federal agency authority. Almost forty years later, the Supreme Court employed a similar approach in *Pacific Gas & Electric Co.*, reading the savings clauses of the organic authority for the Nuclear Regulatory Commission to allow state rules which limited the development of nuclear power in California.⁹³

An important subset of jurisdictional savings clauses carve out a specific area of state law that Congress preserves despite a preemptive statutory program. The most common type of state law savings clause affirms the continued availability of state common law causes of action notwithstanding federal regulation. For instance, the Federal Boat Safety Act preempts state "law or regulation" but the savings clause "does not relieve a person from liability at common law or under State law."⁹⁴ Although it is less common, some federal statutes save aspects of state regulation.⁹⁵ The Clean Water Act saves both statutory and common law rights under state law to seek enforcement of standards or other relief.⁹⁶

⁹¹ 16 U.S.C. § 792 (2000).

⁹² *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 517 (1945).

⁹³ *See Pac. Gas & Elec. Co. v. State Energy Res. Comm'n*, 461 U.S. 190, 207-08 (1983) (interpreting 42 U.S.C. §§ 2021(k) and 2018).

⁹⁴ 46 U.S.C. § 4306 (2000); 46 U.S.C. § 4311 (2000).

⁹⁵ *See, e.g.*, 33 U.S.C. § 2718(c) (2000) (Oil Pollution Act of 1990 saving authority of states to impose additional requirements and fines).

⁹⁶ 33 U.S.C. § 1365(e) (2000).

Cooperative savings clauses are particularly important in public resource management. They go beyond the sorting and separating of powers to describe how the two levels of government should work together. For instance, the Federal Land Policy Management Act (“FLPMA”) requires federal resource management plans to be “consistent with State and local plans to the maximum extent [the Interior Secretary] . . . finds consistent with Federal law and the purposes of this Act.”⁹⁷ Consistency review under FLPMA has a regulation of its own that describes a substantive test and procedure for determining when the BLM will accept the recommendations of a Governor on a plan.⁹⁸ This state favoritism finds expression in national forest and national wildlife refuge planning as well.⁹⁹

Unfortunately, many savings clauses appear agnostic when faced with real federalism disputes. The best example is the Wilderness Act’s provision on state water law: “Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.”¹⁰⁰ Such a clause can cause more litigation and controversy than it resolves, but it may be an essential element in the legislative compromise allowing passage of the law. Congress may use a savings clause as a means to preserve the status quo, leaving complex federalism disputes open for courts to sort out when the issues arise.¹⁰¹

Hybrid savings clauses combining features of jurisdiction and cooperation are common. For instance, the CWA’s “Wallop Amendment” states that:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.¹⁰²

⁹⁷ 43 U.S.C. § 1712(c)(9) (2000).

⁹⁸ See 43 C.F.R. § 1610.3-2(e) (2006).

⁹⁹ 16 U.S.C. § 1604(a) (2000); 16 U.S.C. § 668dd(e) (2000).

¹⁰⁰ 16 U.S.C. § 1133(d)(6) (2000).

¹⁰¹ See, e.g., *Wyoming v. United States*, 279 F.3d 1214, 1233 (10th Cir. 2002).

¹⁰² 33 U.S.C. § 1251(g) (2000).

The Wallop Amendment was a product of compromise meant to resolve the jurisdictional reach of the CWA. Disputes over the extent of jurisdiction exercised under the dredge or fill permitting program, and the resulting effect such jurisdiction would have on water development and agricultural uses, stalled reauthorization of the CWA from 1975 to 1977. To break the legislative log jam, Congress adopted the Wallop Amendment to alleviate concerns about infringements on state water rights.¹⁰³ Although the Amendment concludes with a cooperative savings clause, the jurisdictional issue has played the more important role in shaping the interpretation of the CWA and other regulatory statutes.

In contrast, public land legislation—because it focuses on particular federal tracts—tends to generate fewer jurisdictional disputes. For example, although the organic act for the refuge system contains a hybrid savings provision, the cooperative clause has played the more important role in interpretation. The refuge savings provision states:

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.¹⁰⁴

The refuge system savings provision illustrates the schizophrenic tone of many of these perplexing formulations. Although eschewing the split personality of some other clauses that neither affirm nor deny key propositions about the division of power, the second sentence of the provision does seem to contradict the facial meaning of the first sentence. If nothing in the organic act for national wildlife refuges truly affects state authority to regulate wildlife (first sentence), then why would the federal government be regulating hunting in ways that may be inconsistent with state law (second sentence)? Partly for this reason, the refuge savings provision can only be useful for its cooperative component. The *Wyoming* litigation bears this out.

¹⁰³ Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 847 (1989).

¹⁰⁴ 16 U.S.C. § 668dd(m) (2000).

The general, self-abnegating, contradictory, and puzzling savings clauses cry out for interpretation. State-federal conflicts have fueled judicial efforts to determine the meaning of these statutory provisions. The next Part describes the ways in which courts analyze the savings clauses.

IV. JUDICIAL INTERPRETATION OF SAVINGS CLAUSES

What should we make of these instructions to cooperate with states while fulfilling legislative missions circumscribed by “saved” state authorities affecting water, wildlife, fish, intra-state interests, or common law causes of action? Courts have been answering versions of this question since the New Deal.¹⁰⁵ Each decade, however, reaps a fresh harvest of slightly different savings clauses. Recent conflicts, including the NER elk dispute, have revived interest in the meaning of the congressional commands. The judicial interpretation of savings clauses shapes the future of federalism in natural resources law.

There is a continuum of interpretive approaches from almost vanishingly weak to relatively strong drivers of agency structure and procedure. To date, the vast majority of decisions fall on the weak side, creating a consensus in the judiciary that Congress does not mean to command or limit very much with savings clauses. Hints of change, however—particularly from the 2002 *Wyoming* decision—may indicate possible movement toward a stronger version of savings clauses. In order to see how courts understand savings clauses, it is useful to divide interpretations into two categories—weak and strong—each of which has three variations. A caveat is in order, however. Many court decisions, especially *Wyoming*, mix together several of the approaches. Parts of *Wyoming*, for instance, support at least three of the options described below.

This Part begins with the weakest interpretive option and moves toward the strongest extreme.

A. *Weak Interpretations*

The weak interpretations all share the characteristic of contributing nothing to the actual disposition of a case. General principles of statutory interpretation, preemption analysis, and administrative law subsume weak interpretation under the more broadly applied judicial rules of decision. Most opinions that have considered savings clauses fall into this category.

¹⁰⁵ See, e.g., *Conn. Light & Power Co. v. Fed. Power Comm’n*, 324 U.S. 515 (1945).

1. Hortatory

One can hardly read a savings clause without detecting a whiff of apple pie. A common, honest interpretation of the savings clause is that it is a mere exhortation of good politics: pay attention to local attitudes, particularly as reflected in state policy. In the natural resources context this translates roughly into an interpretation that Congress intended to instruct agencies to be good neighbors when they can. Because this weakest of interpretations does not force an agency to do or show anything, it provides almost no traction for judicial relief. A hortatory interpretation is most likely for a savings clause in an introductory section of a statute, laying out broad, ambitious, and conflicting goals.

An example of this approach can be found in *Riverside Irrigation District v. Andrews*.¹⁰⁶ In that case, various water districts challenged the decision of the U.S. Army Corps of Engineers (“Corps”) to require an individual permit application for the construction of a dam.¹⁰⁷ Because building the dam would require deposition of fill material into a navigable waterway, Section 404 of the CWA required a permit from the Corps.¹⁰⁸ The irrigation districts argued that the dam construction fell within one of the categories of nationwide permits that the Corps created in CWA regulations. The regulations included certain conditions that, if met, allow the nationwide permit to apply automatically. The Corps determined that the water districts did not satisfy the conditions and, therefore, were required to obtain an individual permit through a public hearing and notice process. Specifically, the Corps found that the discharge would “destroy” a species protected under the Endangered Species Act—the whooping crane. The Corps did not conclude that the fill activity itself would adversely affect the whooping crane’s habitat. Instead, the Corps determined that the reservoir created by the dam would result in the depletion of stream flow because of increased consumptive use, indirectly harming the whooping crane’s habitat downstream.¹⁰⁹

The water districts claimed that the Corps exceeded its authority in considering water quantity and indirect effects. The court, however, found that specific provisions of the CWA statute and regulations required consideration of all effects on the “aquatic environment” resulting from

¹⁰⁶ See *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

¹⁰⁷ *Id.* at 510.

¹⁰⁸ 33 U.S.C. § 1344 (2000).

¹⁰⁹ *Riverside Irrigation Dist.*, 758 F.2d at 510-12.

the fill, not just factors related to water quality. The water districts claimed that the Corps denial violated the CWA's Wallop Amendment by impairing the state's ability to allocate water within its jurisdiction. The court, citing *Connecticut Light & Power Co. v. Federal Power Commission*,¹¹⁰ held the Wallop Amendment to be "only a general policy statement" unable to invalidate the clear and specific grant of jurisdiction given to the Corps. In the absence of a jurisdictional limitation within the specific provisions authorizing the fill permit program, the court ruled for the Corps, despite the rhetoric of the savings clause.¹¹¹ The Supreme Court unequivocally endorsed this interpretation in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*.¹¹²

2. Confirmatory

The next step for a court looking for somewhat more content in a savings statement is to interpret it to mean that the ordinary principles of conflict preemption apply. In other words, Congress did not attempt to preempt the entire field. This interpretation is a bit stronger than a mere policy suggestion, but generally adds nothing to an understanding of the statute. In environmental law, there is scarcely any legislation that preempts an entire field, and the rare exceptions are clear about their scope. Hence, an interpretation where ordinary principles apply merely confirms what a court would do in the absence of a savings clause. Generally, Congress need not specify that any ordinary principles of statutory analysis apply; by definition, the ordinary ordinarily applies. The most fundamental canon of statutory interpretation on preemption assumes that the historic police powers of the states were not to be superseded by the federal act "unless that was the clear and manifest purpose of Congress."¹¹³ The confirmatory approach to savings clauses simply reads the statute to acquiesce to this ordinary assumption favoring state prerogatives. Still, there may be some justification for the belt-and-suspenders approach of making absolutely sure that courts and agencies understand the scope of delegated authority.

¹¹⁰ 324 U.S. 515, 536 (1945).

¹¹¹ *Riverside Irrigation Dist.*, 758 F.2d at 511-14.

¹¹² 511 U.S. 700, 719-21 (1994).

¹¹³ See, e.g., *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

A good example of this approach is *National Audubon Society v. Davis*, which held that the national wildlife refuge system's organic act preempts state regulation of trapping on federal lands within the system.¹¹⁴ The National Audubon Society, in an effort to protect birds from predation, challenged the application of "Proposition 4"—a popularly adopted California law which sought to protect the welfare of animals by banning the use of certain types of traps. The court characterized the dispute as one between "bird-lovers" and "fox-lovers," but more fundamentally the litigation amounted to a determination of the relative scope of state wildlife management on federal lands. The state prohibition on certain types of traps conflicted with federal refuge administration, which employed some of the state-banned, leg-hold traps. The court found this to be a situation of direct conflict and therefore preempted the state law.¹¹⁵

The court reasoned that the United States Constitution's Property Clause authorized Congress to delegate refuge management authority to the FWS. That delegated power did not contain any limitations with respect to traps. Therefore, supremacy trumped the state law. The court reached this result notwithstanding the Refuge Improvement Act's savings provision.¹¹⁶ *National Audubon Society v. Davis* read the provision to endorse the Tenth Circuit's interpretation of the statute "as reflecting Congress's intent for 'ordinary principles of conflict preemption to apply in cases such as this.'"¹¹⁷

3. Documentary

Beyond mere advice and ordinary principles of preemption, the next option for a court is to interpret a savings clause to require the agency to put something in the record showing consideration of state views. Like the confirmatory approach, this does not add much substance to the scope of review ordinarily applicable under the Administrative Procedure Act ("APA"). Given the importance of state favoritism as a widely used tool of natural resources federalism, this option attractively matches the literal terms of many savings clauses.

For example, in *Richardson v. Bureau of Land Management*, the governor of New Mexico challenged the adoption of a BLM Resource

¹¹⁴ Nat'l Audubon Soc'y v. Davis, 307 F.3d 835, 859 (9th Cir. 2002).

¹¹⁵ *Id.* at 842, 852, 854.

¹¹⁶ See 16 U.S.C. § 668dd(m) (2000).

¹¹⁷ *Nat'l Audubon Soc'y*, 307 F.3d at 854 (quoting *Wyoming*, 279 F.3d at 1234).

Management Plan Amendment (“RMPA”) dealing with oil and gas leasing on federal lands in southern New Mexico, including Otero Mesa.¹¹⁸ Although the litigation involved many statutory challenges, the important one for our purposes is the allegation that the BLM violated the FLPMA cooperative savings clause, because the RMPA conflicted with a State Water Plan, two state wildlife management plans relating to species recovery, the New Mexico Noxious Weed Management Act, and State Water Quality Control regulations.¹¹⁹ The court held that although FLPMA encouraged cooperation and commanded BLM to consider state plans, BLM retained deference to determine whether the state plans were consistent with federal goals. The court held that the judiciary should overturn a BLM decision only where there is a “clear, specific conflict between a federal land use plan and a specific state plan.”¹²⁰ In this case, the court held that the alleged conflicts were based on mere general statements, “likely” effects, and unspecified interference. Thus, all that FLPMA required of the BLM was to take the state plans into account and address differences of opinion in the administrative record. In other words, the savings clause “requires that BLM pay attention to the suggestions, concerns, and land use plans of a state,” but “BLM was entitled to decide that as a policy matter it preferred its own proposal, and the Court is not in a position to question that policy decision.”¹²¹ This interpretation of the savings clause restates the basic principles of administrative law under the APA.

B. *Strong Interpretations*

Strong interpretations add something to the judicial analysis that might influence the outcome of a dispute. A strong interpretation means that a savings clause adds a factor into litigation that would otherwise be absent or less important. Strong interpretations are scarce in the reported decisions, and all but one of the versions described below remain hypothetical options for a court seeking to promote state deference to greater effect. The three approaches described below, however, map out the territory for courts seeking greater traction from savings provisions.

¹¹⁸ *Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1107 (D.N.M. 2006). The controversy over oil and gas development on the Otero Mesa is discussed at length in Part V.A.

¹¹⁹ *Id.* at 1119; see 43 U.S.C. § 1712(c) (2000).

¹²⁰ *Richardson*, 459 F. Supp. 2d at 1120.

¹²¹ *Id.* at 1119-22.

1. Interpretive

Savings clauses can be read to resolve ambiguities in a statute in favor of state interests. Where Congress did not precisely address the issue, the interpretive rule would put a finger on the scale in favor of deference to the state. Of course, there are almost always other factors—such as legislative history and textual analysis—to consider in understanding the meaning of a statute. Therefore, this principle of interpretation may not be dispositive, but it would be in play.

Although there do not appear to be any judicial opinions employing the interpretive approach in resolving disputes over savings clauses, the approach is analogous to the *Chevron* principle of administrative law. In *Chevron U.S.A. v. Natural Resources Defense Council*, the Court decided that where a statute does not precisely address a question at issue, the judiciary should interpret the legislation in a way that defers to the consistent judgment of the implementing agency.¹²² The Court considered some of the most complicated and stringent sections of the 1977 amendments to the Clean Air Act, specifically the non-attainment zone provisions requiring permits for any new or modified major stationary source. The controversy centered on whether EPA could enable states to characterize a “major stationary source” using a plant-wide definition. The agency interpreted the statute to embrace the “bubble” approach to regulation, which allows polluters to trade off among the various individual vents and stacks within a facility. Environmentalists criticized the bubble approach for undermining the statute’s effort to single out non-attainment areas for stricter regulation. The Court unanimously held that the judiciary should give deference to the consistent judgment of the implementing agency when Congress did not clearly convey their intent in the legislation.¹²³

As applied in the federalism context, the interpretive approach would fill lacunae and imprecisely anticipated circumstances by deferring to state decisions. Just as the *Chevron* rule is justified by the preeminent role that agencies play in making policy, the interpretive approach to finding meaning in savings clauses would be justified by the default and traditional dominance of state interests in controlling land, water, and wildlife.

¹²² *Chevron, U.S.A. v. Natural Res. Def. Counsel*, 467 U.S. 837, 843 (1984).

¹²³ *Id.* at 840, 843, 864; see Jody Freeman, *The Story of Chevron: Environmental Law and Administrative Discretion*, in ENVIRONMENTAL LAW STORIES 171-99 (Richard J. Lazarus & Oliver A. Houck eds., 2005). Only six justices participated in the decision. Justice Marshall did not participate at all due to illness; Justice Rehnquist was not present at Conference because he did not attend argument; and Justice O'Connor recused herself due to a conflict of interest. Freeman, *supra*, at 196.

The Supreme Court's interpretation of the McCarran Amendment's federalism-minded authorization for the United States to be "joined as a defendant" in state general stream adjudications is an example that approaches the strong interpretive approach. In both *Colorado River Water Conservation District v. United States* and *Arizona v. San Carlos Apache Tribe*, the Court resolved issues not precisely addressed by the Amendment in a manner that fulfills the "underlying policy," which required constructions favoring states over the United States (as trustee for tribes).¹²⁴ Professor Benson has accurately characterized these holdings as elevating policy above text.¹²⁵

Another example involving federal administration of water law comes from an interpretation of the savings clause in the 1902 Reclamation Act, which presents an easy case for strong construction because it is less discretionary than most of the more recent savings clauses discussed in this chapter. Section 8 of the Reclamation Act states that:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with [state water laws.] . . . [T]he Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.¹²⁶

In *California v. United States*, the Court interpreted this savings clause as an example of "cooperative federalism" even though that term was not in the legal argot of 1902.¹²⁷ In a ringing endorsement of deference to states Justice Rehnquist, speaking for the majority, derived the principles of federalism not solely from the Constitution and relevant statutes, but also from the lived experience of national development through manifest destiny. As part of the Central Valley Project, the U.S. Bureau of Reclamation applied to California for water appropriation permits in order to impound a reservoir behind the New Melones Dam. The state agency in charge of water permits granted the Bureau's application but subject to twenty-five conditions. The most contentious condition prohibited full impoundment

¹²⁴ *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 570 (1983).

¹²⁵ Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 272 (2006).

¹²⁶ 43 U.S.C. § 383 (2000).

¹²⁷ *California v. United States*, 438 U.S. 645, 650 (1978).

until the United States could show firm commitments (e.g. through a specific plan) for the use of the water. The federal government challenged the state's power to impose the conditions and the Court ruled for California. Limiting the dicta of earlier cases interpreting the Reclamation Act, the Court held that the United States must follow state conditions unless an explicit statutory provision conflicts with them. Absent an expressly inconsistent provision in the statute, the savings clause compels the federal government to accept the judgment of states in implementing reclamation policy.¹²⁸

2. Scrutinizing

The most intriguing kind of strong interpretation triggers a heightened scope of review where federalism disputes lead to challenges of agency action. Like the interpretive approach, the scrutinizing approach understands a savings clause as bending ordinary principles of administrative and procedural law. This category raises the bar considerably for an agency to justify its actions in light of a disagreement about resource management with a state. The scrutinizing approach may be thought of as a kind of *State Farm* analysis requiring better reasoning than courts normally demand from an agency because of a special circumstance.¹²⁹ In *State Farm*, the Court remanded a Department of Transportation revocation of a rule requiring passive restraints in automobiles. The Court rejected the Reagan Administration's argument that the Court should review deregulation under the same permissive standard used when reviewing a decision not to regulate in the first place. Indeed, a majority held that the agency faced greater scrutiny for reversal of a prior position than it would in promulgation of an original rule.¹³⁰ While in *State Farm* the special circumstance justifying more judicial scrutiny of a record was the reversal of a regulation, in the federalism context the special circumstance would be a savings clause with a bite.

Although the Tenth Circuit's decision in the NER elk management dispute contains statements that employ the hortatory and confirmatory

¹²⁸ *Id.* at 647-52, 676-78.

¹²⁹ *See* *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

¹³⁰ *Id.* at 41-42 (stating "[r]evocation constitutes a reversal of the agency's former views as to the proper course. . . . [A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

approaches to interpreting savings clauses, they do not explain the outcome of the case as well as the scrutinizing approach.¹³¹ As discussed in Part II, *Wyoming* applied the refuge organic act's savings provision in deciding that the United States has the authority to block state vaccination of elk on the NER but must use the authority consistent with the cooperation clause.¹³² In *Wyoming*, the court used the scrutinizing approach to place an unusually heavy burden of proof on the FWS to show the inefficacy of the vaccination program advocated by the state. In sending the case back to the district court to make a finding of whether the administrative record sufficiently justified the FWS refusal of Wyoming's request, the Tenth Circuit strongly hinted that the record would fail the application of the scrutinizing test it established.¹³³

Judge Baldock, writing for the *Wyoming* court, viewed the legal claims of both the federal and state governments as overreaching. The state made sovereignty claims and asserted concurrent, if not exclusive, authority over wildlife management on the NER. The FWS asserted unlimited discretion under refuge organic act to manage wildlife on the NER. According to the court, the state claimed that the FWS acted outside its statutory authority in refusing to permit the state to vaccinate because of Tenth Amendment constraints. The court, however, held that the Constitution, not a federal statute, determines whether the Tenth Amendment reserved a power to the states.¹³⁴ Although the court recognized that states historically had the power to manage wildlife on federal lands within the state, this resulted from congressional acquiescence, not from the Constitution. The Property Clause empowered Congress to exercise jurisdiction over federal lands within a state, and the National Wildlife Refuge System Improvement Act ("NWRISA") did just that for refuges. Whether the state was able to manage wildlife on federal lands within the state depended upon the extent to which Congress exercised its Property Clause power in enacting NWRISA. Although the court agreed that the first sentence of the savings provision¹³⁵ seemed to give the state sweeping authority in the management of wildlife, the act taken as a whole did not support the state's assertion of power. The court cited the second sentence of the savings

¹³¹ See *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002).

¹³² See *id.* at 1234-35.

¹³³ See *id.* at 1241.

¹³⁴ *Id.* at 1226.

¹³⁵ "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." 16 U.S.C. § 668dd(m) (2000).

provision,¹³⁶ the savings clause's legislative history, and the overall mission of the NWRs to deny the state's sovereign claim. The second sentence of the savings clause directs the FWS to act consistent with state laws, regulations, and management plans only "to the extent practicable."¹³⁷

The court held that the FWS did have the authority to block state vaccination on the NER but that the FWS may not have properly exercised that authority. The statutory savings clause and other statements in the legislation calling for cooperation demand a clearly justified explanation for the federal government's denial of Wyoming's request.¹³⁸ The court recognized that, under ordinary circumstances, deference to agency action is appropriate when "scientific and technical judgments within the scope of agency expertise" is at issue.¹³⁹ But, the court found the cooperative federalism concerns reason to reduce deference. This approach reverses the general rule that the burden is placed on the party proposing to conduct an action on federal land to show that the action will be consistent with relevant standards.

While affirming that the FWS had the authority to block state vaccination on the refuge, the court insisted that the decision must be reached through real cooperation:

The FWS's apparent indifference to the State of Wyoming's problem and the State's insistence of a "sovereign right" to manage wildlife on the NER do little to promote "cooperative federalism." Given the [refuge organic act]'s repeated calls for a "cooperative federalism," we find inexcusable the parties' unwillingness in this case to even attempt to amicably resolve the brucellosis controversy or find any common ground on which to commence fruitful negotiations.¹⁴⁰

A related, but not congruent, example of heightening the scope of review comes from *Wilderness Society v. Tyrrel*.¹⁴¹ In that decision, the court

¹³⁶ "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." 16 U.S.C. § 668dd(m). See *supra* discussion Part III.

¹³⁷ *Wyoming*, 279 F.3d at 1232.

¹³⁸ *Id.* at 1240-41.

¹³⁹ *Id.* at 1240 (quoting *Sierra Club-Black Hills Group v. U.S. Forest Serv.*, 259 F.3d 1281, 1286 (10th Cir. 2001)).

¹⁴⁰ *Id.* at 1240.

¹⁴¹ 701 F. Supp. 1473, 1488-89 (E.D. Cal. 1988), *rev'd*, 918 F.2d 813 (9th Cir. 1990).

enjoined a Forest Service timber sale based on a violation of one of the savings clauses in the Wild and Scenic Rivers Act. The clause requires an agency administering a segment of the wild and scenic rivers system to “cooperate with” state water pollution control agencies to diminish pollution.¹⁴² The California Department of Fish and Game, California Department of Conservation, and an official from a regional water quality control board all raised concerns about the effects of the proposed timber sale on water quality. The Forest Service EIS dutifully included these critical comments, but the agency ultimately dismissed them. Instead, the Forest Service chose to rely on “best management practices” to reduce pollution from logging.¹⁴³ The resulting record of decision did not say anything other than acknowledge lack of proof that the best management practices would actually succeed in protecting water quality. This is reminiscent of the FWS’s position in *Wyoming* that the state failed to prove the efficacy of the brucellosis vaccine. *Tyrrel* found the record showed Forest Service *consultation*, but not *cooperation*, with the state.¹⁴⁴ The key distinction for the court was the necessity for the Forest Service to carry a heavier burden to show why the state’s concerns were misplaced and why the state’s approach would not be the better option.¹⁴⁵ Although the court of appeals overturned aspects of the district court decision, it did not upset the scrutinizing interpretation of the savings clause.¹⁴⁶

3. Structural

If courts were to further strengthen the state’s position in applying a savings clause, they might adopt a structural interpretation. This would require the agency to have some framework in place for cooperative management. An example of such a framework is the BLM rule describing state consistency,¹⁴⁷ which was partly at issue in the Otero Mesa case.¹⁴⁸ The test of the structure’s adequacy would be whether there exists real sharing of authority in a manner described by the savings clause. This

¹⁴² 16 U.S.C. § 1283(c) (1998).

¹⁴³ *Wilderness Soc’y*, 701 F. Supp. at 1489.

¹⁴⁴ *Id.* at 1476, 1488-91.

¹⁴⁵ *Id.* at 1489.

¹⁴⁶ *Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 820 (9th Cir. 1990); *Wilderness Soc’y v. Tyrrel*, 53 F.3d 341 (9th Cir. 1995).

¹⁴⁷ *See* 43 C.F.R. § 1610.3-2 (2006).

¹⁴⁸ *Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102 (2006). *See supra* notes 118-121 and accompanying text.

interpretation is absent from the case reporters in part because the savings clauses are so vague and enigmatic. A court employing a structural interpretation of a savings clause would have to overcome thirty years of precedent hostile to judicial imposition of administrative requirements that go beyond what the Administrative Procedure Act compels. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* ended the effort of the D.C. Circuit to impose additional administrative procedures where needed to fulfill the overarching goals of statutes.¹⁴⁹ The structural approach would revive the activist, pre-1978 tradition in the name of federalism.

A structural approach would move beyond the reactive federalism of simply responding to a state request and toward constructive federalism, where partners together create a management regime. Place-based collaboration, such as management of the Valles Caldera, employs constructive federalism through a structure for cooperation. Importantly, though, the structure comes not from a savings clause, but from a detailed statutory blueprint. In the end, a savings clause likely cannot serve as a firm enough foundation for true structural federalism.

Judge Brimmer's decisions overturning the Clinton Administration's rules protecting roadless areas in the national forests and prohibiting snowmobile recreation in Yellowstone National Park, however, do approach structural federalism by closely scrutinizing how agencies treat states in the NEPA process.¹⁵⁰ In preparing environmental impact statements under NEPA, federal agencies follow the Council on Environmental Quality regulations, which establish a framework for the analysis. The regulations allow federal agencies preparing an EIS to select a state agency affected by a proposed action or possessing special expertise to participate as a "cooperating agency."¹⁵¹ Cooperating agencies take on special projects in their area of expertise and work with the lead federal agency in conducting the analysis.¹⁵² In the snowmobile case, Judge Brimmer found that the lead agencies did not sufficiently involve the cooperating state agencies in the development of alternatives and did not delegate any meaningful duties to them.¹⁵³ In

¹⁴⁹ See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978).

¹⁵⁰ See *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1221 (D. Wyo. 2004), *vacated*, 414 F.3d 1207 (10th Cir. 2005).

¹⁵¹ 40 C.F.R. § 1508.5 (2006).

¹⁵² 40 C.F.R. § 1501.6 (2006).

¹⁵³ *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1262 (D. Wyo. 2004); see Record of Decision, Winter Use Plans for the Yellowstone and Grand Teton National Parks and John D. Rockefeller Jr., Memorial Parkway, 65 Fed. Reg. 80,908, 80,916, 80,920 (Dec.

the roadless rule case, Judge Brimmer found that the lead agency did not sufficiently justify denying cooperating agency status to Wyoming.¹⁵⁴ Both decisions evince a deeper level of scrutiny of federal interaction with states in the NEPA process and suggest a greater obligation to cooperate with states than the statute or Council on Environmental Quality regulations expressly provide.

C. Conclusion

The abstract and broad language of savings clauses, especially cooperative provisions, allow courts as well as agencies to see in them a mirror of their own conceptions of cooperative federalism. Although courts mostly continue to interpret the savings clauses using one of the three weak approaches, recent cases illustrate the attraction of stronger interpretations. The three strong approaches give states an advantage in court that they would not otherwise get. In particular, the *Wyoming* opinion on vaccinating elk and the Brimmer decisions on the roadless rule and the snowmobile ban in Yellowstone, show courts using statutory and regulatory hooks of federalism to prompt federal reconsideration of state interests in public land management. In the NER elk case, the court helped prompt a comprehensive review in order to facilitate federal management more responsive to state objectives. Is this the future of natural resources law federalism? The next Part sets out to answer that question.

V. PREDICTING THE FUTURE OF NATURAL RESOURCES LAW FEDERALISM

Enlisting state and local interests to support federal aims has been official policy at least since the New Deal, especially in watersheds (basins).¹⁵⁵ It has never been, however, a doctrine of legal purity. The political power driving federal natural resources policy prefers rhetorical allegiance to state interests rather than binding commitments. Administrations and Congress have always picked and chosen compliant states for deference and pushed aside states seeking competing objectives from resource management.

22, 2000) (stating that state agencies were designated as cooperating agencies).

¹⁵⁴ *Wyoming*, 277 F. Supp. 2d at 1221.

¹⁵⁵ *Symposium on Cooperative Federalism*, 23 IOWA L. REV. 455 (1938); W. Brooke Graves, *Influence of Congressional Legislation on Legislation in the States*, 23 IOWA L. REV. 519, 536-37 (1938).

In order to predict the future, one must first identify a trajectory based on recent trends. This Part first discusses those trends, with special focus on the Bush II Administration's approach to pragmatic federalism through "cooperative conservation."¹⁵⁶ It then ruminates on the future of cooperative federalism in natural resources law.

A. *Recent Trends*

On the surface, it can be difficult to discern any trends in natural resources federalism because of its seeming contradictions. For instance, compare the Bush II Administration's response to Wyoming's concerns about brucellosis and elk populations in Jackson Hole¹⁵⁷ with its response to New Mexico's concerns about the adverse effects of oil and gas development on wildlife on the Otero Mesa.¹⁵⁸ Despite its "cooperative conservation" theme, the Bush II Administration denied New Mexico's proposal to restrict development on the Otero Mesa.¹⁵⁹ The FLPMA state favoritism provision requires the BLM to coordinate with state and local governments in the development of land use plans "to the extent consistent with the laws governing the administration of the public lands."¹⁶⁰ In 1998, BLM proposed drilling in a two million acre portion of the Chihuahuan Desert. This included the 1.2 million acres of fragile grassland known as Otero Mesa.¹⁶¹ Otero Mesa is North America's largest and wildest Chihuahuan Desert grassland remaining on public lands.¹⁶² Governor Richardson requested a "consistency review" of the BLM plan. Richardson argued that the BLM plan conflicted with New Mexico law and state resource management plans. He wanted to close 1.5 million acres to leasing and reserve 640,000 acres as National Conservation Areas. The BLM rejected this proposal on the grounds that it was inconsistent with the agency's fluid mineral policy and executive orders directing agencies to expedite energy-related projects on federal lands.¹⁶³ The BLM plan instead opened all but 124,000 acres to

¹⁵⁶ Exec. Order No. 13,352, Facilitation of Cooperative Conservation, 69 Fed. Reg. 52,989 (Aug. 26, 2004).

¹⁵⁷ See *supra* notes 29-73 and accompanying text.

¹⁵⁸ See *supra* notes 119-121 and accompanying text.

¹⁵⁹ Richardson v. Bureau of Land Mgmt., 459 F. Supp. 2d 1102, 1109 (D.N.M. 2006).

¹⁶⁰ 43 U.S.C. § 1712(c)(9) (2000).

¹⁶¹ ENVIRONMENTAL WORKING GROUP, WHO OWNS THE WEST? OIL AND GAS LEASES IN AMERICA'S WEST § 7 (2007), available at http://www.ewg.org/oil_and_gas/printerfriendly.php.

¹⁶² Keith G. Bauerle, *Reaping the Whirlwind: Federal Oil and Gas Development on Private Lands in the Rocky Mountain West*, 83 DENV. U. L. REV. 1083, 1091 (2006).

¹⁶³ *Richardson*, 459 F. Supp. 2d at 1119.

development—including 36,000 acres of fragile grassland, four Wilderness Study Areas, and six existing and eight proposed Areas of Critical Environmental Concern.¹⁶⁴

The disparate treatment of states reflects a judgment about politics and the priority of energy resource development. The Bush II Administration likely denied states their preferences with as much frequency as the Clinton Administration. This is absolutely consistent with a long tradition of selective use of federalism in natural resources policy. Like all administrations, the Bush II Administration found other state wildlife initiatives—such as brucellosis vaccination on the National Elk Refuge—more palatable to its centralized policy agenda. Although the two-term, recent era of the Bush II Administration does not depart from historical patterns of pragmatic federalism, it does display three distinctive attributes: strong federalism rhetoric, innovative use of federalism tools, and a recession of national interest in many environmental concerns.

The Bush II Administration hyped up the rhetoric of federalism with great discipline and consistency. Interior Secretary Norton's motto of "the Four C's—Communication, Consultation, and Cooperation all in the service of Conservation"—became something of an incantation necessary to legitimize agency action within the department.¹⁶⁵ This rhetoric matured in the 2004 Executive Order promoting "cooperative conservation."¹⁶⁶ Both the Norton and presidential versions of cooperative conservation are considerably broader than federalism because they embrace direct federal partnerships with landowners, businesses, and non-governmental organizations. Federalism historically embraces the relationships between the United States and tribes, states, or local government units.¹⁶⁷ The federalism discourse, including its suggestions of devolution,

¹⁶⁴ Press Release, U.S. Dep't of the Interior, Bureau of Land Mgmt., BLM Issues Plan for Limited, Environmentally Sensitive Oil and Gas Development in Otero and Sierra Counties (Jan. 24, 2005), available at http://www.nm.blm.gov/news_releases/NR_2005/012105-Otero-NR.pdf. The BLM contends that the adopted plan is already sufficiently restrictive. The BLM regulates and monitors development, and less than one tenth of one percent of the total land area is open to maximum surface disturbance. The plan also includes reclamation requirements which must be satisfied before new development activities may begin. *Id.*

¹⁶⁵ *E.g.*, Gail Norton, Secretary of the Interior, Address at the National Press Club (Feb. 20, 2002), available at <http://www.doi.gov/news/020225.html>.

¹⁶⁶ Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004).

¹⁶⁷ *But see* Robert D. Comer, *Cooperative Conservation: The Federalism Underpinnings to Public Involvement in the Management of Public Lands*, 75 U. COLO. L. REV. 1133, 1135 (2004) (using "the term 'cooperative federalism' to identify the constitutional authority for cooperative conservation, or the sharing of federal authority with nonfederal entities in the management of public lands").

downsizing, and outsourcing, provides a flavor of the policies favored by the Administration.

The Bush II Administration has pushed some innovation of federalism tools. The 2005 roadless rule, while not without precedent, nonetheless established a high-profile template for managing federal conservation systems in accordance with principles that vary by state preference.¹⁶⁸ Instead of the promulgation of a single, uniform national standard, the Bush rule allowed localized decision-making through the state petition process. If the Agriculture Secretary accepted a state petition, the USDA and the state were to cooperate in a state-specific rulemaking subject to public review and NEPA analysis. If the state failed to submit a petition or the USDA rejected a petition, the management plans of each forest would govern the roadless areas.¹⁶⁹ Another example of novel federalism is a 2006 FWS policy for managing the national wildlife refuge system that extends to certain state actions the umbrella immunity of “refuge management activities,” a category exempt from both the compatibility and appropriateness analyses that are otherwise necessary before approving an activity on a refuge.¹⁷⁰ By addressing the issue in a memorandum of understanding between a state wildlife agency and a FWS regional office, a document that is not subject to any particular public oversight or participation, state game management may be deputized as national wildlife refuge management. Programs such as predator control, or even hunting rules, may circumvent the public hearing and environmental analysis otherwise used to vet activities to ensure they fulfill the proper national objectives. Both examples employ state favoritism without establishing criteria for adopting the state position. They also involve purely administrative initiatives, eschewing legislative reform.

The third distinctive trend arises from what a water lawyer might call the “reliction” of national interest in many environmental concerns.¹⁷¹ As federal leadership recedes, states may enter to fill the void. States have a newfound assertiveness in regulating the environmental impacts of public land mineral development—especially the effects of drilling on split

¹⁶⁸ See *supra* notes 150-54 and accompanying text.

¹⁶⁹ Dan Berman, *Roadless Rule's Repeal Spurs a New Round of Battles*, GREENWIRE, May 6, 2005, available at http://www.redlodgeclearinghouse.org/news/05_06_05_roadlessfull.html.

¹⁷⁰ U.S. FISH AND WILDLIFE SERVICE MANUAL, *supra* note 89, pt. 603 § 1.2(B).

¹⁷¹ “Reliction” is the exposure of the bed of a waterbody due to the slow retreat of water. 6 WATERS & WATER RIGHTS 1288 (Robert E. Beck ed., 1991). For a discussion of diminished federal leadership on the environment, see Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006).

estates and wildlife—as the federal government has tilted toward favoring production as a preeminent goal.¹⁷² More well-known are the state and multi-state initiatives to reduce emissions of greenhouse gases such as carbon dioxide.¹⁷³ It is important to note, however, that federalism is not a zero-sum game. States may aggressively assert control over even those aspects of natural resources management for which the federal government retains an active engagement. Most statutes preempt only certain or weaker kinds of state rules, not the entire field. Conversely, recession of federal leadership does not necessarily mean that states will expand their interest. The simultaneous retreat from noise control in the 1970s reflected decisions at both the state and national levels that the issues did not merit close attention.¹⁷⁴

B. *Predictions for Cooperative Federalism*

A uniformitarian approach to predicting the future of federalism assumes that the trends discussed above would continue into the foreseeable future. This stands in contrast to catastrophism, which postulates that disruptive changes fundamentally reorient the course of the future. The concept of uniformitarianism was promoted in the 18th century by James Hutton, the founder of modern geological science.¹⁷⁵ Uniformitarianism in geology postulates that the Earth's history can be understood by studying the geologic processes at work today. The principle that the geologic past operated under the same laws and conditions as are currently observed helped displace biblical flood theories.¹⁷⁶ The future of federalism under uniformitarianism would mean:

- 1) continued proliferation of diverse but weak federal invitations for state participation in natural resources decision-making;

¹⁷² *E.g.*, *Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1115-16 (D.N.M. 2006).

¹⁷³ *See, e.g.*, Nadia Zakir, *Emissions Trading Initiatives*, BUS. L. TODAY (Aug. 2007), available at <http://www.abanet.org/buslaw/blt/2007-07-08/zakir.shtml>; Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54 (2005); Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1 (2005).

¹⁷⁴ *See* Sidney A. Shapiro, *Lessons From a Public Policy Failure: EPA and Noise Abatement*, 19 ECOLOGY L.Q. 1 (1992).

¹⁷⁵ Stephen J. Gould, *Is Uniformitarianism Necessary*, 263 AM. J. OF SCI. 223, 223-28 (1965), available at <http://www.ajsonline.org/cgi/reprint/263/3/223>.

¹⁷⁶ *Id.* at 223.

- 2) steady rise in state sophistication and assertiveness on natural resources issues; and
- 3) more frequent treatment of tribes as states for cooperative federalism purposes.

Looming over such a prediction of steady movement in the current direction, however, is the prospect of abrupt shifts in natural resources law to adapt to climate change. Already resource managers face daunting challenges from sea level rise, asynchronous modification of migratory habitat, and warming of the high latitudes.¹⁷⁷ The next few decades promise more significant disruptions to business-as-usual in natural resources law. The phenomenon of climate change may well upset the uniformitarian assumptions. Catastrophism would then be a better guide to predicting the future of cooperative federalism, but there is little certainty in what that would mean. It seems clear that the next president, whoever s/he is, will respond to climate change with more assertiveness than prior administrations. Most commentators stress that adaptation will require larger spatial and longer temporal scales for resource management.¹⁷⁸ This suggests that the federal government may assert a more dominant role in natural resources law simply because larger scales demand more cross-boundary thinking. On the other hand, coordination, through such vehicles as watershed or ecosystem management, requires closer cooperation with tribal, state, and local jurisdictions that control land use, water consumption, and wildlife conservation.

Although the imperatives of climate change may necessarily prompt more cooperative federalism, the history of prognostication counsels caution when projecting an imminent golden era of good feelings. For decades, commentators have cited place-based collaborations as the flourishing future of resource management.¹⁷⁹ While the tools for such efforts have certainly

¹⁷⁷ See RICHARD ALLEY ET AL., CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS (2007); J.T. HOUGHTON ET AL., CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS (2001), available at http://www.grida.no/climate/ipcc_tar/wg1/pdf/WG1_TAR-FRONT.PDF; W. Carter Johnson et al., *Vulnerability of Northern Prairie Wetlands to Climate Change*, 55 *BIOSCIENCE* 863 (2005); Camille Parmesan, *Ecological and Evolutionary Responses to Recent Climate Change*, 37 *ANN. REV. OF ECOLOGY, EVOLUTION, & SYSTEMATICS* 637 (2006), available at http://cns.utexas.edu/communications/File/AnnRev_CCimpacts2006.pdf.

¹⁷⁸ Fred Bosselman, *What Lawmakers Can Learn from Large-Scale Ecology*, 17 *J. LAND USE & ENVTL. L.* 207, 325 (2002); Vicky J. Meretsky et al., *New Directions in Conservation for the National Wildlife Refuge System*, 56 *BIOSCIENCE* 135 (2006).

¹⁷⁹ See, e.g., Charles F. Wilkinson, *A View Toward the Future: Lessons from Tahoe and*

improved in the past quarter century, they have not significantly altered the national direction of natural resources law. Increasingly, skeptics like Professor Glicksman have documented ways in which cooperative federalism has faltered.¹⁸⁰

The prediction for which we have the most confidence is that money will continue to drive federalism efforts. Money is an engine for intergovernmental relations in two respects. First, as a matter of equity, the federal government owes an obligation to state and local governments that carry disproportionate burdens of public land policy. The perpetual negotiations over payments in lieu of taxes, and especially funding for local schools, indicate how much respect the federal government has for outstanding promises to sustain communities that miss out on property tax revenue due to federal resource management policy. It is unrealistic to expect local communities to cooperate with federal objectives without federal appropriation of a fair return to those jurisdictions that face special burdens because of United States tax immunity.

Second, and more pervasively, money is the key inducement for states to cooperate with federal policy priorities. Whether conservation grants for wildlife conservation plans, appropriations for pollution abatement programs, or specific earmarks for place-based collaborations—such as the CALFED project¹⁸¹ in the Sacramento River Delta—money greases the skids for participation, compromise, and concluding negotiations in program development. When the federal government promises significant funding for implementation, a cooperative effort is far more likely than when the government offers little more than recognition.

Federalism's asymmetry is an important attribute of its fascination and complexity in natural resources law. Federal and state legal activity may act in tandem, in opposition, or independently of each other.¹⁸² Increased federal involvement in, for example, oil and gas development does not necessarily displace state law—it may in fact prompt increased local regulation.¹⁸³ Also, states are not miniature versions of the federal gov

the Truckee, in NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS (L.J. MacDonnell & S.F. Bates eds., 1993).

¹⁸⁰ See Glicksman, *supra* note 171.

¹⁸¹ See CALFED BAY DELTA PROGRAM, CALFED PROJECT PERFORMANCE INFORMATION PROGRAM YEARS 1-8, DRAFT (2007), available at http://calwater.ca.gov/content/Documents/library/ProgramPerformanceTracking/2007/CALFED_Project_Information_Yr_1_8.pdf.

¹⁸² Fischman, *supra* note 2, at 185-86.

¹⁸³ See, e.g., WYO. STAT. ANN. § 30-5-402 (2007) (increasing the state supervision of the terms negotiated between miners and surface owners to protect surface values in reaction

ernment. The inherent, sovereign police powers that undergird state regulation of land, water, and wildlife differ significantly from the constitutional powers of Congress to regulate interstate commerce and make rules to manage federal property. Moreover, Congress does not act independently from states. Congress, especially the Senate, itself comprises state delegations. Particularly in public land management, affected state congressional delegations have an enormous influence on federal programs focused on particular land units. These essential differences establish the comparative advantages that promise continued potential for improved resource management through cooperation. Shifts in politics are not likely to dramatically change this fundamental differentiation. Although natural resources federalism is cloaked in rhetoric, its vital center remains rooted in law.

CONCLUSION

Savings clauses link the federalism proclaimed in statutes with the actual cooperation observed in resource management. Judicial interpretation of a savings clause may elevate or undermine the importance of state interests in federal natural resources programs. Largely, it is the interpretive approach used by a court that determines whether an ambiguous savings clause will compel special consideration not otherwise required under federal law.

Although the judiciary places the interpretive fulcrum establishing how much leverage states can expect in federal decision-making, administrative policies have and will play the dominant role in shaping cooperative federalism. Administrative initiatives directly addressing state-federal relations will continue to spur innovation and variation over time. History teaches, however, that substantive federal natural resources policy plays a more central role in determining the level of cooperation with states than does the federalism rhetoric. State-supported winter elk feeding and vaccination at the National Elk Refuge will therefore continue until the federal government decides that broad environmental concerns or disease risks demand a new course of action. When that happens, cooperative federalism and savings clauses will shape the process more than the outcome.