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## Owning the Right to Migrate: A Proposal for Migration Corridors in the Greater Yellowstone Ecosystem

Alyssa Florack-Hess

*S.J. Quinney College of Law*, [Alyssa.Florack-Hess@law.utah.edu](mailto:Alyssa.Florack-Hess@law.utah.edu)

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# OWNING THE RIGHT TO MIGRATE: A PROPOSAL FOR MIGRATION CORRIDORS IN THE GREATER YELLOWSTONE ECOSYSTEM

Alyssa Florack-Hess\*

## *Abstract*

*The Greater Yellowstone Ecosystem (GYE), one of the world's most treasured regions, consists of an interconnected patchwork of federal, state, and private lands. The GYE's elk, mule deer, and pronghorn antelope (pronghorn) rely on this vast range to complete their seasonal migrations, but development increasingly threatens this natural cycle. Moreover, the GYE's existing wildlife management framework fails to resolve the tension between wildlife and growth, leaving both wildlife and local communities vulnerable. After reviewing the scope of the GYE's ecological challenges, this Note proposes a new solution: a policy establishing affirmative easements across designated migration corridors in the GYE and granting ownership of the easements to the GYE's elk, mule deer, and pronghorn herds. This proposal builds on the Rights of Nature movement by granting property rights to ungulate herds and identifying new strategies to overcome traditional barriers to standing in environmental lawsuits. This Note concludes by arguing that such an innovative proposal is not only possible but critical to preserving these keystone species and the open landscapes they rely on.*

## INTRODUCTION: MIGRATION IN YELLOWSTONE

The Greater Yellowstone Ecosystem (GYE), one of the world's largest ecosystems, sits on 22.6 million acres of interconnected lands in Idaho, Montana, and Wyoming.<sup>1</sup> Many of the nation's largest and most famous wildlife species roam this region and, along with other natural features, support profitable tourism and recreation industries. Recently, new tracking technology has revealed how ungulates (hooved mammals like elk, pronghorn antelope (pronghorn), mule deer, and many other species) rely on the vast expanse of the GYE to migrate to survive the region's

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<sup>1</sup> ARTHUR MIDDLETON & LESLI ALLISON, BEYOND BOUNDARIES IN THE GREATER YELLOWSTONE ECOSYSTEM 1–2, 7 (2016), <https://westernlandowners.org/wp-content/uploads/2017/09/WLA-Beyond-Boundaries-Final-Report-No-Appendices.pdf> [<https://perma.cc/RE8J-QDCN>].

harsh seasons, with many herds traveling over a hundred miles between winter and summer ranges.<sup>2</sup>

Because land in this region, like much of the western United States, was historically divided by artificial gridlines rather than natural features,<sup>3</sup> these herds must cross a disjointed network of public and private land that fragments the complex ecosystem. Additionally, the ecosystem and its creatures face impending environmental degradation from the immense pressures of tourism and development. As subdivisions pop-up on former ranchland, the GYE is losing undeveloped land at a rate of nearly 276,000 acres per year,<sup>4</sup> an area more than six times the size of Washington, D.C.<sup>5</sup>

Land use planner Lee Nellis recently published an essay with four radical ideas to save the GYE, including a proposal to grant elk, mule deer, and pronghorn property rights in their migration corridors.<sup>6</sup> Nellis' essay accords with other experts, who recognize that "wildlife preservation is about land. It is a property problem that can and should be solved with a property-rights solution."<sup>7</sup>

This Note situates Nellis' suggestion within the Rights of Nature movement and examines the legal implications of implementing such a policy. Part I addresses the scope of the problem surrounding wildlife management in the GYE, discussing the GYE's unique value and difficult legal geography before briefly reviewing the current legal framework for wildlife management. Part II.A proposes a possible solution, outlining a policy to grant elk, mule deer, and pronghorn herds rights to affirmative easements to cross their migration corridors. Part II.B discusses changes to our legal framework that would result from implementing this policy. This Note concludes that such an innovative proposal is not only possible but critical to preserve these keystone species and the open landscapes they rely on.

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<sup>2</sup> See NAT'L GEOGRAPHIC, PROTECTING ELK MIGRATION IN THE GREATER YELLOWSTONE ECOSYSTEM 4, [https://media.nationalgeographic.org/assets/file/Case\\_Study\\_Arthur\\_Middleton.pdf](https://media.nationalgeographic.org/assets/file/Case_Study_Arthur_Middleton.pdf) [<https://perma.cc/Q8AX-DYQF>] (last visited June 12, 2022) (displaying a map of elk migrations of the Greater Yellowstone Ecosystem).

<sup>3</sup> See Karen Bradshaw, *Animal Property Rights*, 89 U. COLO. L. REV. 809, 860 (2018).

<sup>4</sup> Hallie Mahowald, Jessica Crowder & Lesli Allison, *Habitat Conservation Strategies for Migrating Wildlife*, W. LANDOWNERS ALL. 5 (2019), [https://www.nmcewl.org/uploads/1/1/8/8/118800338/habitat-conservation-strategies-for-migrating-wildlife.urg\\_final\\_10.30.2019.pdf](https://www.nmcewl.org/uploads/1/1/8/8/118800338/habitat-conservation-strategies-for-migrating-wildlife.urg_final_10.30.2019.pdf) [<https://perma.cc/4WFY-SR7F>].

<sup>5</sup> The District of Columbia is roughly 43,766 acres. David Whitehead, *DC's 43,766 Acres: 25% "Roads," 2% High-Rises*, GREATER GREATER WASH. (July 27, 2016), <https://ggwash.org/view/42387/dcs-43766-acres-25-roads-2-high-rises#:~:text=The%20District%20of%20Columbia%20spans%20over%2068%20square%20miles> [<https://perma.cc/Y4KH-UD72>].

<sup>6</sup> Lee Nellis, *Four Bold Ideas to Save Greater Yellowstone (And Certain to Make Some Squirms)*, MOUNTAIN J. (Mar. 15, 2021), <https://mountainjournal.org/four-bold-ideas-to-save-the-most-famous-wild-ecosystem-in-america> [<https://perma.cc/QL69-HWTJ>].

<sup>7</sup> Karen Bradshaw, *Humans as Animals*, 2021 UTAH L. REV. 185, 205 (2021).

## I. FAILED ECOSYSTEM MANAGEMENT IN THE GYE

A. *Sense of Place: Migration and Legal Geography in the GYE*

The GYE holds some of the natural world's most treasured and awe-inspiring lands.<sup>8</sup> The region's jeweled geothermal pools and soaring snow-capped mountains, however, are not necessarily its most memorable attractions. As a former guide in the GYE, I can testify that many visitors' most precious memories are those of wildlife. I think of the early mornings when our van lights caught the eyes of colossal elk grazing in the National Elk Refuge while the sun rose over the Teton Mountains behind them. Or when I watched quiet, snow-covered roads fill with a hundred stampeding bison, surrounding our vehicle and shaking the earth in their escape from an encroaching wolfpack. Yet, these incredible wildlife populations were not the primary factors in Congress' mind when it first decided to protect the region.

In 1872, Congress recognized Yellowstone as the world's first national park.<sup>9</sup> Although proponents intended to protect Yellowstone's hot springs, geothermal features, and beautiful landscapes rather than the park's wildlife,<sup>10</sup> the park designation incidentally took the first step towards safeguarding one of the world's largest protected ecosystems.<sup>11</sup> Over time, federal and state governments designated more and more public lands around Yellowstone,<sup>12</sup> and wildlife migration continued through the park and beyond.

Today, Yellowstone comprises only one-tenth of the GYE,<sup>13</sup> which also includes Grand Teton National Park, five national forests, three wildlife refuges,<sup>14</sup>

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<sup>8</sup> See, e.g., *Yellowstone Travel Guide: Why Go to Yellowstone*, U.S. NEWS & WORLD REP., [https://travel.usnews.com/Yellowstone\\_National\\_Park\\_WY/](https://travel.usnews.com/Yellowstone_National_Park_WY/) [<https://perma.cc/5W28-PKDV>] (last visited June 12, 2022) (“Multicolored pools swirl around hot springs; verdant forests weave past expansive meadows; and volatile geysers launch streams of steaming water toward the sky. With so much unspoiled natural beauty, it’s no wonder why everyone suspected John Colter (a scout for explorers Lewis and Clark) was embellishing when he first described Yellowstone’s geothermal curiosities in 1807. Nowadays, there’s no doubt that the park is indeed extraordinary.”).

<sup>9</sup> RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* 108, 350 (5th ed. 2014).

<sup>10</sup> *Id.* at 108. (“Yellowstone’s initial advocates were not concerned with wilderness; they acted to prevent private acquisition and exploitation of geysers, hot springs, waterfalls, and similar curiosities.”).

<sup>11</sup> See MIDDLETON & ALLISON, *supra* note 1, at 2 (“The Greater Yellowstone Coordinating Committee (GYCC), a federal entity, currently defines the GYE as a 22.6-million-acre area of ecologically interdependent lands, centered on the parks.”).

<sup>12</sup> See Robert B. Keiter, *The Greater Yellowstone Ecosystem Revisited: Law, Science, and the Pursuit of Ecosystem Management in an Iconic Landscape*, 91 U. COLO. L. REV. 1, 8–9 (2020).

<sup>13</sup> MIDDLETON & ALLISON, *supra* note 1, at 1.

<sup>14</sup> Keiter, *supra* note 12, at 8–9.

plentiful state lands,<sup>15</sup> and, critically, six million acres of private land.<sup>16</sup> This composition makes the GYE “one of the largest nearly intact temperate-zone ecosystems on Earth,”<sup>17</sup> and allows nearly all the major resident species present in the early 1800s to continue today.<sup>18</sup> Today, scholars, government officials and scientists emphasize that management efforts must consider ripple effects throughout the entire ecosystem; preeminent legal scholar on the Yellowstone region, Robert B. Keiter, describes the significance of this ecosystem-based approach to preserving the GYE: “During the past thirty years, the GYE idea has taken hold and provides a powerful, unifying image for a region largely defined by its abundant, relatively pristine public lands that are administered by several different federal agencies and central to community identity across the region.”<sup>19</sup>

Despite widespread understanding of this region as an integrated ecosystem, disjointed land ownership continues to cause ecological challenges. For instance, migrating ungulates, such as elk, mule deer, and pronghorn rely on this massive ecosystem for migration.<sup>20</sup> Migration is a “critical learned behavior” passed between generations as they adapt to the changing seasons and follow natural cycles of vegetation by moving to “lush high mountain country” in the summer and descending to low elevation grazing habitat in winter.<sup>21</sup> Although it forces herds to undergo immense stress, “cross[ing] mountains, ford[ing] rivers and brav[ing] alpine blizzards all while shepherding young calves and staving off wolves and grizzly bears . . . ,”<sup>22</sup> migration is essential to maintaining healthy herds.<sup>23</sup> In addition, because ungulates are central to the GYE’s ecology, the continued viability

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<sup>15</sup> *Id.* at 9, n. 13 (“The state of Wyoming also maintains twenty-two winter feedgrounds for elk in western Wyoming.”); Jacob Frank, *Yellowstone: Greater Yellowstone Ecosystem*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/nature/greater-yellowstone-ecosystem.htm> [<https://perma.cc/B6DT-DE8Y>] (last visited June 12, 2022).

<sup>16</sup> MIDDLETON & ALLISON, *supra* note 1, at 6.

<sup>17</sup> Frank, *supra* note 15.

<sup>18</sup> Keiter, *supra* note 12, at 10 (these species include grizzly bears, wolves, elk, bison, pronghorn, big horn sheep, moose, deer, wolverine, cougars, lynx, beavers, bald eagles, sage grouse, trumpeter swans, and cutthroat trout). The protection of this wildlife habitat stands out from many other ecosystems, which were often destroyed as white settlers sought to conquer the American West in pursuit of Manifest Destiny. NASH, *supra* note 9, at 96–107.

<sup>19</sup> Keiter, *supra* note 12, at 7.

<sup>20</sup> *Id.* at 92.

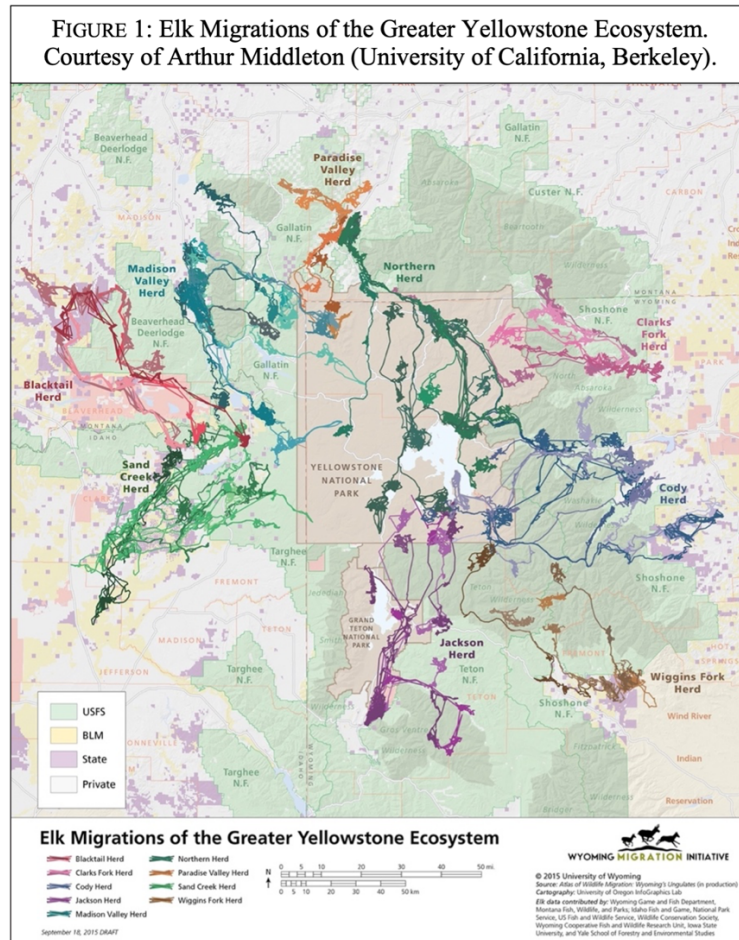
<sup>21</sup> *Id.* at 92. See also L. Steven Smutko & Nicole M. Gautier, *Collaborative Wildlife Migration Corridor Workshops*, U. WYO. RUCKELSHAUS INST. (2020), <https://westernlandowners.org/wp-content/uploads/2020/02/collaborative-wildlife-workshops-v9-print.pdf> [<https://perma.cc/BYG6-XDUV>].

<sup>22</sup> Nicky Ouellet, *The Secret Lives of Elk: Uncovering One of America’s Great Migrations*, BUGLE 106, 107 (Aug. 2016), <https://migrationinitiative.org/sites/migration.wygisc.org/files/public/migration.pdf> [<https://perma.cc/HC6M-DDYE>].

<sup>23</sup> MIDDLETON & ALLISON, *supra* note 1, at 6 (“[N]utritional studies are showing that migrants can grow fatter and more productive than their resident counterparts.”).

of migration corridors is essential to maintaining the wellbeing of the larger ecosystem<sup>24</sup> as well as the regional tourism and hunting industries.<sup>25</sup>

Ungulate migration, however, presents a special challenge to maintaining the GYE because expansive migration corridors often conflict with man-made boundaries when herds pass from Yellowstone National Park into neighboring lands subject to other forms of federal, state, and private ownership.<sup>26</sup> Figure 1 shows the complex and massive scale of migration routes for Yellowstone's elk.



<sup>24</sup> NAT'L GEOGRAPHIC, *supra* note 2, at 2 (“A healthy elk herd, one that is fat and productive, is a critical food source for other animals, such as grizzly bears, wolves, and mountain lions. Scavenging birds and mammals feed on elk carcasses, too. The herds grazing on natural grasses also contribute to ecosystem balance.”).

<sup>25</sup> Keiter, *supra* note 12, at 81 (“Elk, deer, pronghorn, and other ungulates have long inspired park visitors while also serving as a consumptive recreational resource for residents who prize hunting them.”).

<sup>26</sup> NAT'L GEOGRAPHIC, *supra* note 2, at 1. New tracking and GPS technology has allowed researchers to identify the vast network of migratory routes of many herds. *See id.*

As another example, one of the GYE's mule deer herds holds the record for the longest land animal migration in the Lower 48 states, spanning 150 miles over a "patchwork of private and public lands" from Wyoming's Red Desert to the Tetons Mountains.<sup>27</sup>

This disjointed patchwork of private and public lands causes friction in ungulates' natural migration cycle where land and resource development impedes and degrades migratory routes.<sup>28</sup> For example, governments impose zoning rules and divide property without regard for the animals that rely on hundreds of miles of ecologically interconnected lands.<sup>29</sup> Similarly, "many migration routes cross roads and highways, and wildlife-vehicle collisions present a significant threat to human safety and wildlife populations" alike.<sup>30</sup> In addition, private lands are "ecologically important because they [are] concentrated at lower elevations and along watercourses . . ."<sup>31</sup> In winter, herds can spend as much as 80% of their time on private ranch lands.<sup>32</sup> Both wildlife and humans pay the consequences for this blind application of property law.<sup>33</sup>

The legal geography of the GYE, while unique in its historic protections of natural spaces and wildlife, threatens those same species as development skyrockets and open land vanishes.<sup>34</sup> The understanding that the GYE is a holistic ecosystem is now "widely accepted," but "related ecosystem management principles have yet to be fully embraced by the responsible agencies."<sup>35</sup>

### *B. Existing Framework: Current Legal Rights and Management Strategies*

The legal rights of animals in the American legal system are very limited. In a few instances, the U.S. legal system has held that animals have limited private property rights or the right to protection from criminal acts.<sup>36</sup> Overall, however,

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<sup>27</sup> Ouellet, *supra* note 22, at 110.

<sup>28</sup> Smutko & Gautier, *supra* note 21, at 3.

<sup>29</sup> See, e.g., Keiter, *supra* note 12, at 9 for the visual depiction in Figure 1 of the contrast between the topographically defined GYE and the straight lines of state and reservation boundaries.

<sup>30</sup> Smutko & Gautier, *supra* note 21, at 3.

<sup>31</sup> Keiter, *supra* note 12, at 137.

<sup>32</sup> NAT'L GEOGRAPHIC, *supra* note 2, at 3.

<sup>33</sup> See *id.* ("When ranches go out of business, the land is often subdivided. Middleton's team found that human development (such as housing) and energy development (such as drilling for natural gas and windmill farms) on formerly undeveloped land were having an effect on the herd. Even on ranches that were still intact, structures such as high fences prevented elk from following their migration trail.").

<sup>34</sup> MIDDLETON & ALLISON, *supra* note 1, at 18.

<sup>35</sup> Keiter, *supra* note 12, at 2.

<sup>36</sup> See Bradshaw, *supra* note 7, at 195–96 (describing how most states allow pets to benefit from property left by their deceased owners); Nicole Pallotta, *Federal Judge Strikes Down 'Lake Erie Bill of Rights,'* ANIMAL LEGAL DEF. FUND (May 4, 2020), <https://aldf.org/article/federal-judge-strikes-down-lake-erie-bill-of-rights/#easy-footnote-2->

wildlife have no inherent right to protection when human actions threaten their survival.<sup>37</sup> The near eradication of many species demonstrates one consequence of this lack of protection.<sup>38</sup>

Without inherent legal rights, efforts to defend wildlife habitat or animals themselves rely on government management and voluntary conservation efforts. This section will examine the existing government wildlife management strategies at the state and federal level and describe the lack of any national policy focused on migration corridors. It will then analyze the value and shortcomings of conservation easements. Finally, this section will conclude that the existing legal framework fails to adequately protect the vast ranges that are vital to ungulate migration.

### *1. Federal & State Wildlife Management*

In American law, states are the “dominant regulatory authority over wildlife” and hold almost absolute control over wildlife management.<sup>39</sup> This framework reflects the “ownership doctrine,” a historical practice under which the English crown’s sovereign ownership over all American wildlife passed to state governments on the condition that states acquired a trust responsibility to manage

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26719 [<https://perma.cc/977L-QUYY>]; see also Rebecca F. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, MICH. STATE UNIV. COLL. L. LEGAL & HIST. ANIMAL CTR. (2022), <https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders> [<https://perma.cc/645R-LWTW>] (noting that 36 states allow animals to be included in domestic violence protection orders and that animals are increasingly represented as victims of criminal offenses).

<sup>37</sup> See ERIC T. FREYFOGLE, DALE D. GOBLE & TODD A. WILDERMUTH, *WILDLIFE LAW, A PRIMER* 19–20 (2d. ed. 2019). See also *id.* at 7–14 (discussing some of the aims of wildlife law to conserve wildlife and advance ethical considerations, but not addressing any inherent right of protection).

<sup>38</sup> See, e.g., Gabby Raymond, *Here’s Why the Endangered Species Act Was Created in the First Place*, TIMES (July 23, 2018, 7:06 PM), <https://time.com/5345913/endangered-species-act-history/> [<https://perma.cc/T5V9-SVAW>] (“Only two mammal species would go extinct every century from the 1500s to the 1900s, but the beginning of the 1900s saw that rate increase dramatically with 468 more animal species going extinct than in previous centuries.”); Jeff Tollefson, *Humans Are Driving One Million Species to Extinction*, 569 NATURE 171, 171 (May 9, 2019), <https://www.nature.com/articles/d41586-019-01448-4> [<https://perma.cc/JPR9-3BWC>] (finding that humans actions have led to increased rates of species extinction that are “tens to hundreds of times higher than the average across the past ten million years”).

<sup>39</sup> Dean Lueck, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 NAT. RES. J. 625, 633 (1995). See also *id.* at 634 (“Today, the federal government, concurrently with the states, regulates the taking of certain species, manages wildlife on federal land, conducts animal damage programs, enforces international treaties and environmental legislation relating to wildlife, regulates wildlife commerce, and operates wildlife research programs. The Fish and Wildlife Service within the Department of the Interior is the primary federal agency involved in wildlife issues.”).



wildlife within their borders for the benefit of the people.<sup>40</sup> The federal government can only infringe on this extensive state power when Congress exercises one of its enumerated powers.<sup>41</sup> State governments, as the primary trustees and effective owners of their resident wildlife,<sup>42</sup> manage wildlife by operating state agencies for fish and wildlife, establishing wildlife refuges and other protected habitats, issuing hunting and fishing licenses, and operating conservation programs for threatened species and ecosystems.<sup>43</sup> State wildlife management policies also sometimes acknowledge the negative impact of wildlife on private landowners through voluntary compensation programs.<sup>44</sup>

The federal government supplements this system, primarily by conserving habitat on public lands and enforcing statutes like the Endangered Species Act (ESA), the Lacey Act, the Migratory Bird Treaty Act, and the Bald & Golden Eagle Protection Act.<sup>45</sup> Modern efforts to establish new federally-owned public lands, however, often face stiff opposition.<sup>46</sup> Similarly, the value of federal ESA actions to protect wildlife are limited because the ESA only allows the government to take action to protect species once their populations become threatened or endangered.<sup>47</sup> Federal programs, sponsored by agencies like the U.S. Department of Agriculture

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<sup>40</sup> See FREYFOGLE et al., *supra* note 37, at 23–27 (tracing the historic connections from the English crown to modern public trust doctrine).

<sup>41</sup> See, e.g., *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920) (upholding the federal government’s power to protect migratory birds under the treaty power); *Kleppe v. New Mexico*, 426 U.S. 529, 535–40 (1976) (upholding federal regulation of wild horses on federal land under the Property Clause).

<sup>42</sup> FREYFOGLE et al., *supra* note 37, at 19 (“Animals are owned by the state with special trustee-like duties to manage them for the good of all people.”).

<sup>43</sup> See David Favre, *American Wildlife Law – An Introduction*, MICH. STATE UNIV. COLL. L. LEGAL & HIST. ANIMAL CTR. (2003), <https://www.animallaw.info/article/american-wildlife-law-introduction> [<https://perma.cc/55BV-BVRT>]; see also FREYFOGLE et al., *supra* note 37, *passim*.

<sup>44</sup> FREYFOGLE et al., *supra* note 37, at 62 (noting that these programs often require the landowner to follow fairly strict requirements about who can collect and when, and what steps they must take to access funding, making it difficult for landowners to receive compensation in a timely manner).

<sup>45</sup> See Challie Facemire & Karen Bradshaw, *Biodiversity Loss, Viewed Through the Lens of Mismatched Property Rights*, 14 INT’L J. COMMONS 650, 653 (2020); Bradshaw, *supra* note 3, at 827 (“The Endangered Species Act also permits agencies to designate private lands as critical habitat for endangered species, which requires landowners to evaluate the effect of their land uses on the endangered species and, sometimes, curb activity in the interest of animals.”); FREYFOGLE et al., *supra* note 37, at 180–205.

<sup>46</sup> See, e.g., Margaret Walls, *Public Land Conflicts and Controversies: The Designation of National Monuments in the Western United States*, 14 REV. ENV’T ECON. & POL’Y 352 (2020).

<sup>47</sup> See 16 U.S.C. § 1533; see also FREYFOGLE et al., *supra* note 37, at 235 (“The Endangered Species Act is largely triggered by the listing of a species as either endangered or threatened.”).

(USDA), also provide funding and technical assistance for private landowners that take actions benefiting wildlife.<sup>48</sup>

## 2. *Historic Lack of Migration Corridor-Policy*

Historically, the British common law doctrine of *fera naturae* granted wildlife the right to pass over private land.<sup>49</sup> In the United States, however, many states accord landowners the right to kill animals that damage their property<sup>50</sup> and otherwise exclude wildlife from using developed land as habitat.<sup>51</sup> While government bodies are beginning to recognize the importance of migration corridors to wildlife and their ecosystems, the right to kill or exclude “trespassing” animals widely remains, and there is currently no substantial uniform policy to protect migration corridors.<sup>52</sup>

Recently, the USDA recognized the need for substantial policy on migration corridors and, on May 20, 2022, announced a brand-new habitat leasing program to conserve land for big game migrations on private property in the Wyoming portions

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<sup>48</sup> See, e.g., Smutko & Gautier, *supra* note 21, at 7–8 (describing programs offered by the U.S. Fish and Wildlife Service and established by the Farm Bill). There are also conservation programs that provide funds to purchase outright for conservation purposes. Keiter, *supra* note 12, at 144 (“The Land and Water Conservation Act makes federal funds available to purchase privately owned lands for wildlife and recreation purposes. These funds have been used to secure key parcels across the GYE, including lands at a bottleneck point on a migration route in the High Divide region west of Yellowstone National Park.”).

<sup>49</sup> Bradshaw, *supra* note 3, at 823.

<sup>50</sup> Lueck, *supra* note 39, at 658. These policies do not extend to species protected by the Endangered Species Act. FREYFOGLE et al., *supra* note 37, at 235–36.

<sup>51</sup> Facemire & Bradshaw, *supra* note 45, at 651.

<sup>52</sup> See NAT’L GEOGRAPHIC, *supra* note 2, at 3 (“In 2016, the Wyoming Game and Fish Commission, which oversees wildlife management in the state of Wyoming, instructed land and wildlife managers in the state to minimize development and disturbance in migration corridors. In 2018, the U.S. Secretary of the Interior signed an order directing more resources toward protecting the migration routes of elk and other big game in the West.”). Notably, both the Trump and Biden administrations have indicated that the protection of migration corridors is an important policy goal. Smutko & Gautier, *supra* note 21, at 10; Brian Yablonski, *A Strong Start for America the Beautiful*, PERC (May 19, 2021), <https://www.perc.org/2021/05/19/a-strong-start-for-america-the-beautiful/> [<https://perma.cc/8TJM-UC6Z>]. The House of Representatives similarly passed the Wildlife Corridors Conservation Act in July of 2021, although the Senate has not held a vote on this legislation, likely leaving it dead in the water. *Landmark Legislation to Protect Wildlife Corridors Passes U.S. House of Representatives*, WILDLANDS NETWORK (July 2, 2021), <https://wildlandsnetwork.org/news/legislation-to-protect-wildlife-corridors-passes> [<https://perma.cc/53YB-WBEU>] [hereinafter *Landmark Legislation*].

of the GYE.<sup>53</sup> While this program is similar in many ways to the policy proposed in Part II, as of August 2022, it has not yet been tested or implemented, and its efficacy remains unknown. In addition, this new partnership contains a few key differences from the proposed program discussed in Part II.A.

### 3. *Value and Shortcomings of Conservation Easements*

In addition to these management strategies, governments and private parties can protect migration routes by implementing targeted conservation easements.<sup>54</sup> In exchange for direct monetary benefits, tax benefits, or a combination of the two, landowners sell or donate conservation easements on their properties to land trusts or governmental agencies.<sup>55</sup> By doing so, landowners place some permanent restrictions on land development, which can help to protect migration routes.<sup>56</sup> For example, a conservation easement might prohibit a property owner from building large structural barriers or operating a horseback riding business during migration periods. In addition to protecting migration routes, conservation easements can provide other benefits. When located next to public land, as is often the case, conservation easements also effectively extend public land, protecting critical wildlife habitat and supporting local economies.<sup>57</sup> Similarly, conservation easements protect essential community resources like water<sup>58</sup> and provide their grantors financial stability.<sup>59</sup>

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<sup>53</sup> *Western Landowners Applaud USDA and Wyoming for Launch of Habitat Lease Partnership Around Yellowstone*, W. LANDOWNERS ALL. (May 20, 2022), <https://westernlandowners.org/western-landowners-applaud-usda-and-wyoming-for-launch-of-habitat-lease-partnership-around-yellowstone/> [https://perma.cc/S32X-28NP] [hereinafter *Western Landowners Applaud USDA*].

<sup>54</sup> *E.g.*, Nicole Korfanta, Benjamin Rashford, Amy Pocewicz, Eric Schacht, Bo Alley & James Luchsinger, *Wyoming Conservation Easements: Lands, Services, and Economic Benefits*, RUCKELSHAUS INST. 2 (2018), [https://www.uwyo.edu/haub/\\_files/\\_docs/ruckelshaus/open-spaces/2018-wyoming-conservation-easements.pdf](https://www.uwyo.edu/haub/_files/_docs/ruckelshaus/open-spaces/2018-wyoming-conservation-easements.pdf) [https://perma.cc/D8ZK-ATWD] (estimating that conservation easements protected 650,000 acres in Wyoming and 2.1 million acres in Montana).

<sup>55</sup> To receive federal tax benefits for a conservation easement, I.R.C. § 170(h)(3) requires the grantee be a “qualified organization.”

<sup>56</sup> *E.g.*, Korfanta et al., *supra* note 54, at 1, 10.

<sup>57</sup> *Id.* at 6–9 (noting that in Wyoming, “[m]ost conservation easements (94 percent) are adjacent to public lands.”). “In Colorado, for example, conservation easements are estimated to generate \$4 to \$12 of public benefit for each dollar invested by the state.” *Id.* at 2.

<sup>58</sup> *Id.* at 9–14 (discussing ecosystem services and benefits of conservation easements to water quality).

<sup>59</sup> Smutko & Gautier, *supra* note 21, at 9.

Conservation easements have inherent limits as a wildlife management strategy, however.<sup>60</sup> First, their existing physical range is limited. Scholars suggest that conservation easements protect only 10% of private land in the GYE.<sup>61</sup> This area covers just 15% of suspected mule deer migration corridors, 11% of suspected pronghorn migration corridors, and 5% of suspected elk migration corridors in Wyoming.<sup>62</sup> Second, they are difficult to enforce, particularly when their holders are insincere or underfunded.<sup>63</sup> Third, they are purely voluntary, making it possible for a single resistant landowner to undermine efforts to protect a larger ecosystem.<sup>64</sup> Finally, landowners beholden to conservation easements sometimes retain development and use rights that negatively impact wildlife.<sup>65</sup> In effect, conservation easements are not a cure-all conservation remedy but a system in need of serious reform.<sup>66</sup>

The Path of the Pronghorn, the nation's first formally recognized migration corridor, provides a great example of the simultaneous success and shortcomings of conservation easements.<sup>67</sup> On one hand, this massive effort to use conservation easements to extend habitat protections over a large and critical range stands as a model of successful collaboration between federal and state government agencies, private landowner interests, and conservation groups.<sup>68</sup> The corridor developed

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<sup>60</sup> See generally K. King Burnett, John D. Leshy & Nancy A. McLaughlin, *Building Better Conservation Easements for America the Beautiful*, HARV. ENV'T. L. REV. ONLINE (Sept. 15, 2021), <https://harvardelr.com/2021/09/15/building-better-conservation-easements-for-america-the-beautiful/> [<https://perma.cc/B8WD-YUYR>].

<sup>61</sup> Keiter, *supra* note 12, at 148 (estimating that 750,000 acres or 11% of private land in the GYE is protected by conservation easements); Korfanta et al., *supra* note 54, at 2 (estimating that conservation easements covered 650,000 acres in Wyoming and 2.1 million acres in Montana).

<sup>62</sup> Korfanta et al., *supra* note 54, at 6.

<sup>63</sup> See Nancy A. McLaughlin, *Tax Incentives for Conservation Easement Donations: Learning from the U.S. Experience*, TAX ENV'T 219, 224–25 (2018) (discussing the “abusive conservation easement donation transactions involving wildly exaggerated easement appraisals and developers who received ‘huge’ tax deductions for donating easements encumbering golf courses or steep slopes, floodplains, and other undevelopable land”); see also *id.* at 240–41 (citing the problems caused by a lack of funding or political will to enforce easements and minimal oversight).

<sup>64</sup> *Id.* at 240–43. See also Lee Nellis, *Has ‘Collaborative Conservation’ Reached Its Limits?*, MOUNTAIN J. (Oct. 5, 2020), <https://mountainjournal.org/the-failures-and-limits-of-collaborative-conservation> [<https://perma.cc/VPY4-PW4X>] (“[C]onservation easements could not fit better into the [Narrative of Domination]. An easement is a commodity . . . . And while donating or selling an easement may be incentivized by the tax code, it is *voluntary*, an individual or family decision, not a mandate. Nothing about the prevailing dominion of property rights is challenged.”).

<sup>65</sup> Burnett et al., *supra* note 60 (“[T]ax deductions are claimed for easements that provide little or no public conservation benefits.”).

<sup>66</sup> See *id. passim* (discussing possible reforms to conservation easements).

<sup>67</sup> McLaughlin, *supra* note 63, at 240–43.

<sup>68</sup> *Id.* at 241.

when federal agencies, like the Bureau of Land Management (BLM), National Forest Service (NFS), and National Park Service (NPS), and state agencies took action to safeguard portions of the route on their lands, while conservation groups collaborated with government officials to obtain conservation easements on key parcels of private property.<sup>69</sup>

At the same time, the Path of the Pronghorn struggles to implement its stated goals. For instance, one landowner who wanted to build a cabin on a conservation easement-protected parcel negotiated with the land trust that was supposed to enforce the easement to allow its extinguishment in exchange for his establishment of a larger conservation easement on a different parcel.<sup>70</sup> Investigative reporting and public pressure eventually forced the landowner to maintain the original easement and destroy his partially constructed cabin,<sup>71</sup> but the near loss of this critical parcel demonstrates weaknesses in the legal framework governing conservation easements.

#### 4. *Need for New Policy to Protect the GYE's Migration Corridors*

Overall, the existing mix of government policy and private conservation initiatives is insufficient to counteract the increasing development pressure in the GYE. Wildlife and private ranchers both have struggled to maintain their ways of life in a changing GYE as an unprecedented number of tourists and new resident “Zoomers” enter the region and spur development.<sup>72</sup> As development needs rise, open lands become “increasingly vulnerable.”<sup>73</sup> Many of these lands are owned by “farmers and ranchers [who] don’t want to sell to developers, but [who] have few other options as making a living in agriculture becomes more difficult.”<sup>74</sup> The American West is losing nearly 276,000 acres of undeveloped open land per year,<sup>75</sup> and Wyoming alone “lost an estimated 2.8 million acres (4,300 square miles) of open space between 2001 and 2011,”<sup>76</sup> an area larger than Yellowstone National

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<sup>69</sup> Keiter, *supra* note 12, at 95.

<sup>70</sup> McLaughlin, *supra* note 63, at 241–42.

<sup>71</sup> *Id.*

<sup>72</sup> Luther Propst, Dennis Glick & Randy Carpenter, *In the Bull's Eye: A Human Swarm Is Overwhelming the Yellowstone Region*, MOUNTAIN J. (July 20, 2021), <https://mountainjournal.org/yellowstone-wildlife-and-wildlands-being-overwhelmed-by-new-human-swarm> [<https://perma.cc/5MET-VJC5>] (“In short, the challenges we were facing before the pandemic—wildlife habitat fragmentation and loss of winter range, declining water quality, disappearance of affordable housing, longer commutes, more wildlife-vehicle collisions, growing income inequality, increased impact of unmanaged recreation on the backcountry, a growing disconnect between the number of visitors and the facilities to serve them—are rapidly getting worse.”).

<sup>73</sup> Catherine E. Semcer & Jack Smith, *Montana's Wildlife Depends on Private Sector Partners*, PERC (Oct. 19, 2021), <https://www.perc.org/2021/10/19/montanas-wildlife-depends-on-private-sector-partners/> [<https://perma.cc/SK55-RNQC>].

<sup>74</sup> *Id.*

<sup>75</sup> Mahowald et al., *supra* note 4, at 5.

<sup>76</sup> Korfanta et al., *supra* note 54, at 2.

Park. The development of open space undermines the survival of wildlife species<sup>77</sup> and destroys the landscape that binds the region culturally.<sup>78</sup> Like many other ecosystems, the GYE faces irreversible damage as new human pressures destabilize wildlife health, environmental quality, and residents' livelihoods.

## II. PROPOSAL FOR ESTABLISHING MIGRATION CORRIDOR EASEMENTS

### A. *Defining the Proposed Property Right*

To provide an alternative approach to wildlife management, this Note proposes a collaborative state-based program called the Migration Corridor Easements (MCE) program. The MCE program would create express affirmative easements over established migratory routes and grant ownership rights over these easements to the elk, pronghorn, and mule deer herds of the GYE themselves.<sup>79</sup>

This program could function as a voluntary program relying on landowner participation (like current conservation easements) or through condemnation. Both approaches would have significant advantages and disadvantages. A voluntary program would likely enjoy much broader support from local communities but could result in an incomplete system missing key parcels of land.<sup>80</sup> In contrast, a program that utilizes the government's authority to condemn land through eminent domain would ensure protection for an entire migratory route<sup>81</sup> but would likely face steep opposition from politicians and local communities that could threaten any chance of passing such a program into law.<sup>82</sup>

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<sup>77</sup> See NAT'L GEOGRAPHIC, *supra* note 2, at 3 ("When ranches go out of business, the land is often subdivided. Middleton's team found that human development (such as housing) and energy development (such as drilling for natural gas and windmill farms) on formerly undeveloped land were having an effect on the herd. Even on ranches that were still intact, structures such as high fences prevented elk from following their migration trail. Middleton's research showed that the loss of open land can keep elk from the best food sources.").

<sup>78</sup> See MIDDLETON & ALLISON, *supra* note 1, at 20 ("In these discussions, landowners cited a need for outreach to help the public understand that they care about wildlife and open space."); see also *id.* at 3 ("[R]anchers, scientists and environmental organizations came together in the common interest of keeping their working landscape intact and healthy.").

<sup>79</sup> This legal framework would function similarly to subsets of conservation easements such as agricultural or historical easements. For the sake of avoiding confusion, this Note will not refer to such easements as "conservation easements."

<sup>80</sup> See *infra* Part II.A.3 for a discussion of landowner motivations and political interests in the GYE.

<sup>81</sup> The controversy surrounding the Path of the Pronghorn, discussed *supra* Part I.B.3, demonstrates the public and biological interest in maintaining complete migratory pathways.

<sup>82</sup> Nellis, *supra* note 64 ("I have learned this from more than 40 years' experience watching rural Westerners refuse to regulate land use in any but the mildest ways . . ."). See also Mahowald et al., *supra* note 4, at 5 (Efforts to protect migration corridors are "often met with resistance from rural stakeholders . . . largely due to the fact that these efforts are frequently designed without input from local communities . . . who are often deeply familiar with local ecosystems and most impacted by land management decisions").

Weighing the potential advantages and disadvantages of these options is beyond the scope of this Note. This Note also does not attempt to assess the many technical details that would need to be researched and clarified before the MCE program became law. Instead, this Note merely outlines the proposed program in order to provide a rough sketch of an alternative solution to the problems facing the GYE. The following subsections establish the basic features of the proposed MCE program, describe its key limitations, and discuss the importance of crafting a policy that benefits landowners.

### *1. Basic Features of the Proposed MCE Program*

The proposed MCE program would have four key components. First, Congress would establish a uniform set of guidelines and source of funding for states to acquire perpetual easements over migration corridors on behalf of elk, mule deer, and pronghorn in the GYE. Precedent interpreting the Commerce<sup>83</sup> and Property<sup>84</sup> Clauses suggests that Congress has the necessary authority to establish this kind of national program.<sup>85</sup> Funding to pay landowners for these easements could come from relevant federal departments, land acquisition under the Endangered Species Act,<sup>86</sup> and potentially the Wildlife Movement Grant Program.<sup>87</sup> This uniform policy would establish minimum deed terms, guidelines describing the parties required to assist in drafting and amending the deeds, and oversight requirements.<sup>88</sup>

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<sup>83</sup> U.S. CONST. art I, § 8, cl. 3 (“Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”).

<sup>84</sup> U.S. CONST. art IV, § 3, cl. 2 (“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

<sup>85</sup> For discussion of the Commerce Clause, see Bradshaw, *supra* note 3, at 826 (“Congress has wielded its Commerce Clause authority to enact a number of statutes allowing agencies to purchase and manage land on behalf of animals.”); FREYFOGLE et al., *supra* note 37, at 100–02. Courts have consistently interpreted the Property Clause as providing broad authority for federal regulation, even on private lands. *See, e.g.*, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (affirming federal authority under the Property Clause to regulate private and state-owned property to protect the wilderness purpose of the Boundary Waters Canoe Area); *Camfield v. United States*, 167 U.S. 524 (1897) (affirming federal authority to regulate fencing on private property to protect neighboring federal land under the Unlawful Inclosures Act pursuant to the Property Clause). For further discussion of the Property Clause, see also Bradshaw, *supra* note 3, at 825 (“[T]he Supreme Court has repeatedly held that the Property Clause affords Congress the authority to govern wildlife on federal lands.”); FREYFOGLE et al., *supra* note 37, at 98–100.

<sup>86</sup> *See* 16 U.S.C. § 1534.

<sup>87</sup> This grant program is part of the pending legislation for the Wildlife Corridors Conservation Act. *See Landmark Legislation*, *supra* note 52.

<sup>88</sup> In many ways, these guidelines could mirror the federal policy for conservation easements established in I.R.C. § 170(h) and could incorporate many of the changes

Second, prompted by this funding, key states like Wyoming, Idaho, and Montana would use local knowledge and scientific expertise to identify key migration corridors and either purchase or condemn relevant private lands to create easements.<sup>89</sup> States would then grant legal ownership of these easements to ungulates. While a strictly federal program would have the advantage of ensuring uniform policy,<sup>90</sup> state participation is essential because of their primary role in wildlife management and property law enforcement. Furthermore, the inclusion of states as key figures would help to avoid the political conflict and distaste for top-down regulation that often leads private landowners to resist environmental policies.<sup>91</sup>

Third, federal and state governments would create similar affirmative easements controlling key migratory pathways on their own lands. This would ensure that development and resource extraction on government lands would not interfere with elk, mule deer, and pronghorn migrations. For instance, the policy could require the construction of wildlife overpasses in key migratory areas.<sup>92</sup>

Fourth, while the MCEs would be owned by the herds themselves, thus giving a tangible property right to wildlife, this policy would designate an organization or entity to enforce the herds' property interests and serve as a guardian.<sup>93</sup> This designated guardian would also have the responsibility to determine what kinds of land use restrictions would be necessary to support the MCEs, assist in drafting the MCEs, and oversee MCE enforcement and amendments.

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recommended by scholars to make these regulations more effective. *See, e.g.*, Burnett et al., *supra* note 60; *see also* McLaughlin, *supra* note 63, at 244.

<sup>89</sup> As discussed *supra* Part II.A, this Note does not select between the strategies of voluntary participation and condemnation.

<sup>90</sup> Keiter, *supra* note 12, *passim*.

<sup>91</sup> *See Working Across the Rural-Urban Divide: Messaging for Large Carnivore Conflict Reduction*, W. LANDOWNERS ALL. (July 22, 2021), <https://westernlandowners.org/wp-content/uploads/2021/06/Working-Across-the-Rural-Urban-Divide-Messaging-for-Conflict-Reduction-v.F.063021.pdf?eType=EmailBlastContent&eId=dbe58aba-cea7-49dd-a94d-9896b7d061db> [<https://perma.cc/6M74-DBZK>] (explaining that the wildlife/migration “[c]orridor is sensitive because it makes [rural audiences] think of lines being drawn on a map across their property. For a lot of people it makes them fearful that some kind of regulation will be imposed on their land from a top-down approach and that they will not have a say in how it is implemented. As a result, landowners should be included early in discussions of corridor conservation”).

<sup>92</sup> For an example of the value and cost of building a wildlife overpass on key migratory pathways, see Theresa Machermer, *Animals Are Using Utah's Largest Wildlife Overpass Earlier than Expected*, SMITHSONIAN MAG. (Nov. 30, 2020), <https://www.smithsonianmag.com/smart-news/animals-are-using-utahs-largest-wildlife-overpass-earlier-expected-180976420/> [<https://perma.cc/X42K-YPPT>].

<sup>93</sup> *See infra* Part II.B.2 for a discussion of this guardian organization and the associated legal standing issues.



## 2. Key Limitations of the Proposed MCE Program

The MCE program's likelihood of success is improved by four key limitations: (1) the finite property rights associated with easements; (2) the exclusive grant of legal rights to the elk, mule deer, and pronghorn of the GYE; (3) the narrow physical scope of the easements; and (4) the use of statutory language compatible with other legitimate legal rights and interests.

The first limitation, in contrast to other proposals to give wildlife complete title to land,<sup>94</sup> would separate the overlapping interests of ungulates and landowners into two distinct property rights and transfer only a limited set of rights to wildlife.<sup>95</sup> The fee simple ownership of the land would remain with the current landowner (whether that be the government or private owner), while the herds would receive the limited right to use and pass over the land during seasonal migrations.<sup>96</sup> In this way, the narrow grant of rights limits negative impacts on landowners and eliminates concerns about the ability of wildlife to own other property rights<sup>97</sup> or about granting complete legal personhood to wildlife.<sup>98</sup>

Second, the MCE program would only apply to the wild elk, pronghorn, and mule deer herds identified by researchers within the GYE. This limit increases the likelihood of political viability and successful implementation. In addition, tailoring the scope of the MCE program to these three regional species has other practical

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<sup>94</sup> Bradshaw, *supra* note 3, at 833 (proposing the establishment of a trust of complete land ownership in which each animal would retain a "loose ownership interest").

<sup>95</sup> *Cf.* Lueck, *supra* note 39, at 627 (proposing that ownership of a plot of land that can be used both for agriculture and wildlife habitat be divided between a farmer and a hunting club of game agency).

<sup>96</sup> The "bundle of sticks" of property rights can be divided in ownership, allowing different values in land to be owned by different interests: "An understanding of divided ownership begins by realizing that assets have many valued attributes . . . . For instance, a plot of land can be used for agriculture or wildlife habitat, or perhaps both. Ownership of both the agricultural and wildlife attributes of the land need not be vested in a single party." *Id.*

<sup>97</sup> *See* Bradshaw, *supra* note 3, at 839, 842 (discussing issues that could arise if wildlife were considered as having mineral or hunting rights).

<sup>98</sup> *See Animals' Legal Status*, ANIMAL LEGAL DEF. FUND (last visited Oct. 29, 2021), [https://aldf.org/issue/animals-legal-status/#\\_ftnref1](https://aldf.org/issue/animals-legal-status/#_ftnref1) [https://perma.cc/Q9FW-TGX4] ("Animals can have a hybrid status where they are recognized as both property and persons under the law. However, as long as they are still classified as property they will not be 'full persons' – one end of the property/personhood continuum that grants the strongest legal recognition of interests. Because 'animals' are a diverse group, with varied capacities, and different societal uses, legal personhood would look different for different species of animals, based on what they need to thrive.").

benefits; these species are a critical source of revenue for tourism and hunting,<sup>99</sup> have well-studied migration routes,<sup>100</sup> and are critical to ecosystem functions.<sup>101</sup>

Third, modern tracking collars have made it possible to pinpoint migratory routes,<sup>102</sup> and easements would be limited in scope to these established areas of prior use.<sup>103</sup> This limitation builds on the legal precedent of justifying the establishment of an easement due to prior use and necessity.<sup>104</sup>

Fourth, a policy establishing MCEs would include language indicating that MCEs will be created and enforced to the maximum extent compatible with other legitimate legal rights and interests.<sup>105</sup>

These limitations critically focus the scope and impact of the MCE program to increase the political and practical viability of such a novel policy.

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<sup>99</sup> See, e.g., Dep't of Interior, Secretarial Order 3362, Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors (Feb. 2018), [https://www.doi.gov/sites/doi.gov/files/uploads/so\\_3362\\_migration.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so_3362_migration.pdf) [https://perma.cc/BN3B-3L2K] (“[H]unters and tourists travel to Western States from across our Nation and beyond to pursue and enjoy this wildlife.”).

<sup>100</sup> See, e.g., MATTHEW KAUFMANN, HOLLY COPELAND, JODIE BERG, SCOTT BERGEN, ERIC COLE, MATTHEW CUZZOCREO, SARAH DEWEY, JULIEN FATTEBERT, JEFF GAGNON, EMILY GELZER ET AL., UNGULATE MIGRATIONS OF THE WESTERN UNITED STATES, VOLUME 1: SCIENTIFIC INVESTIGATIONS REPORT 2020 (2020), <https://pubs.usgs.gov/sir/2020/5101/sir20205101.pdf> [https://perma.cc/6WML-78HS].

<sup>101</sup> Heather L. Reynolds & Keith Clay, *Migratory Species and Ecological Processes*, 41 ENV'T L. 371, 378–79, 389–90 (2011).

<sup>102</sup> See NAT'L GEOGRAPHIC, *supra* note 2.

<sup>103</sup> The location of migration corridors may shift in response to climate change or other external factors. Thus, while the MCE program would initially be limited in scope to established areas of prior use, a successful program would allow for easements to be amended, added, and removed as needed to best reflect actual wildlife use.

<sup>104</sup> *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002). For a brief summary of the framework for easements implied from prior existing use, see James Buchwalter, John Kimpflen & Jeffrey J. Shampo, *Required Elements for Easement by Implication, Generally*, 28A C.J.S. Easements § 85 (May 2022).

<sup>105</sup> Similar language appears in other environmental statutes. See, e.g., ALASKA STAT. § 41.17.910 (“The Department of Fish and Game and the commissioner shall work cooperatively with private forest landowners and timber owners to protect, maintain, and enhance wildlife habitat to the maximum extent practicable, consistent with the interests of the owners in the use of their timber resources.”); 16 U.S.C. § 543(c) (“Subject to valid existing rights, all mining claims located within the Scenic Area shall be subject to such reasonable regulations as the Secretary may prescribe to assure that mining will, to the maximum extent practicable, be consistent with protection of the scenic, scientific, cultural, and other resources of the area.”); 16 U.S.C. § 1387(f)(6)(C) (“Take reduction teams shall, to the maximum extent practicable, consist of an equitable balance among representatives of resource user interests and nonuser interests.”).

### 3. *Crafting Successful Policy for Landowners*

Like many traditional wildlife management systems, the MCE program necessarily restricts landowners' rights. But it also provides an opportunity to design a wildlife program that truly benefits all parties. This proposal requires ranchers and wildlife to share the land, making community cooperation both difficult to attain and essential to the program's success.<sup>106</sup> While the MCE program would create inherent benefits by protecting the wildlife and open spaces that attract millions of visitors to the west every year,<sup>107</sup> policymakers should carefully craft the MCE program to benefit and adequately compensate landowners.

As a facial issue, the inherent goal of the MCE program to prevent some development will likely be met with great opposition from ranchers and developers.<sup>108</sup> The proposal also stands to create immense economic costs that would likely prompt fiery resistance in the absence of careful planning. While private landowners may benefit from wildlife that may reside on or pass over their land,<sup>109</sup> wildlife may also cause injury by competing for grazing, spreading brucellosis to livestock, damaging fields and fences, and increasing livestock predation.<sup>110</sup> Simply put, “[w]orking lands create major public benefits at the cost of private landowners,”<sup>111</sup> and these costs would likely increase if elk, mule deer, and

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<sup>106</sup> McLaughlin, *supra* note 63, 240–42 (discussing the importance of collaboration between government entities and private landowners to the success of conservation easements).

<sup>107</sup> *Cf.* MIDDLETON & ALLISON, *supra* note 1, at 6 (reviewing research that suggests migrations sustain “biodiversity, tourism, hunting, and related business around the ecosystem”).

<sup>108</sup> *Cf.* Bradshaw, *supra* note 3, at 844 (discussing objections to a similar proposal for animal property rights). As discussed at the start of Part II.A, a policy to establish MCEs that relies on condemnation rather than voluntary participation would likely face steep resistance and be highly unlikely to achieve support from critical legislators in the area.

<sup>109</sup> These benefits are both philosophical (such as the ethical value of acting as a steward to preserve open landscapes and natural places) as well as financial (such as the revenue from selling hunting licenses or being able to harvest animals themselves). *See, e.g., Wetland Economic Benefits for Landowners: Nature Tourism*, TEX. A&M AGRILIFE EXTENSION, <https://valuewetlands.tamu.edu/land-use-goals-and-resources/nature-tourism/> [<https://perma.cc/9K26-PV3W>] (last visited July 24, 2022) (describing how nature tourism, such as hunting and bird watching, diversifies and increases landowners' incomes).

<sup>110</sup> MIDDLETON & ALLISON, *supra* note 1, at 3. Brucellosis is a disease that can trigger spontaneous abortion in cattle, and while it originated in cattle populations, many livestock owners are concerned about the spread of the disease from elk and bison populations back to cattle. *Id.* at 17; Keiter, *supra* note 12, at 70–72.

<sup>111</sup> MIDDLETON & ALLISON, *supra* note 1, at 15. Note that some conservationists critique the mentality that landowners should be paid for creating these benefits, instead arguing that all landowners should manage their land “in the interest of the community” without pay. *See* ERIC. T. FREYFOGLE, *THE LAND WE SHARE* 224–27 (2003) (quoting Aldo Leopold).

pronghorn receive the protected right to freely pass over private lands subject to MCEs.

The MCE program, however, is tailored to be successful for and gain the support of private landowners. The policy's funding structure ensures that the government will reimburse private landowners for their participation, either with grants and tax benefits for voluntary participation or just compensation for Fifth Amendment takings.<sup>112</sup> As previously noted, Western landowning communities are likely to resist any form of taking through eminent domain, threatening the MCE program's political viability.<sup>113</sup> Still, the likelihood of success for a conservation partnership depends on "conservation add[ing] to landowners' income instead of taking from it,"<sup>114</sup> and the MCE program provides a new source of funding to support farmers and ranchers as they face immense pressure to sell to developers.<sup>115</sup> The director of the Western Landowners Alliance, an organization representing over 8 million acres of working lands,<sup>116</sup> describes this problem: "The majority of wildlife in this country depend on private lands for survival, but if these private lands are not economically viable, they'll continue to disappear, taking the wildlife with them."<sup>117</sup> This proposal seeks to compensate landowners for the costs they are already incurring<sup>118</sup> and those costs that may increase as wildlife populations rebound.<sup>119</sup> Whatever shape this funding takes,<sup>120</sup> a properly crafted policy would avoid much of the potential political controversy and create a cooperative and successful management strategy.

Furthermore, rural western communities often share a general resistance to the heavy hand of government,<sup>121</sup> but a state-based program that relies on local expertise would avoid the worst of this controversy. Additionally, many of these complex

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<sup>112</sup> U.S. CONST. amend. V.

<sup>113</sup> See *supra* note 82 and accompanying text.

<sup>114</sup> Semcer & Smith, *supra* note 73; see also Keiter, *supra* note 12, at 154 (noting that "incentive-based approaches have proven particularly effective in securing landowner cooperation . . .").

<sup>115</sup> See Mahowald et al., *supra* note 4, at 5.

<sup>116</sup> *Our Story*, W. LANDOWNERS ALL., <https://westernlandowners.org/our-story/> [<https://perma.cc/GR9U-Q3ER>] (last visited June 12, 2022).

<sup>117</sup> Lesli Allison, *It's Time for Outdoor Recreationists to Not Just Be Takers*, MOUNTAIN J. (Aug. 25, 2020), <https://mountainjournal.org/outdoor-recreation-and-conservation-are-not-the-same-thing> [<https://perma.cc/P3G5-ZPP8>].

<sup>118</sup> See Mahowald et al., *supra* note 4, at 9.

<sup>119</sup> Cf. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 481 (1972) (suggesting that trust funds should be established to compensate impacted humans for the liabilities of nature as legal persons).

<sup>120</sup> Possibilities include an increased initial "just compensation" under the initial taking of the easement under the 5th Amendment, see U.S. CONST. amend. V, automatic access to funding for maintenance and grazing rights, increased share of hunting fees from big game, or a flexible payment that increases as the wildlife populations and their related impacts increase.

<sup>121</sup> Nellis, *supra* note 64 ("I have learned this from more than 40 years' experience watching rural Westerners refuse to regulate land use in any but the mildest ways . . .").

conservation issues have existed for decades, and local communities and researchers are already working together to create innovative strategies to resolve them. For instance, workshops with local stakeholders have led to inventive recommendations, such as removing miles of barbed wire fencing along migration corridors,<sup>122</sup> utilizing local leadership and collaborative conservation rather than top-down regulation.<sup>123</sup> The immobilizing effect of political polarization common in the U.S. today is also lessened by shared values between ranchers, researchers, nonprofits, and government actors to keep landscapes intact and protect open space from development.<sup>124</sup>

Despite the challenge of landowner resistance, the intentional design of the MCE program and these recent successes demonstrate that the policy can earnestly benefit private landowners and attain their critical support.

#### 4. Key Differences from USDA's Habitat Leasing Partnership

On May 20, 2022, the USDA announced a new habitat leasing program to conserve migration corridors near the GYE.<sup>125</sup> There are several similarities between this program and the MCE program: both are innovative efforts to protect migration corridors on private land in the GYE, recognize the development pressures on private landowners, and compensate private landowners for additional costs incurred from wildlife.<sup>126</sup> There are, however, key differences between the programs. First, the MCE program establishes permanent easements rather than temporary leases. While some landowners have indicated a strong preference for temporary restrictions,<sup>127</sup> research shows that establishing a system to conserve land in

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<sup>122</sup> McLaughlin, *supra* note 63, at 241 (describing volunteer efforts to remove miles of barbed wire fencing along a migration corridor). *See also* Mahowald et al., *supra* note 4, at 12 (recommending providing alternative forage opportunities); MIDDLETON & ALLISON, *supra* note 1, at 17 (recommending increasing investment in vaccine research for disease); Keiter, *supra* note 12, at 152 (discussing the High Divide Collaborative, which included “federal land management agencies, land trusts, conservation groups, and private landowners [making] a science-based, collaborative effort” to protect “key migratory and linkage corridors while also addressing affected ranchers’ economic and other concerns”).

<sup>123</sup> *E.g.*, Mahowald et al., *supra* note 4, *passim*.

<sup>124</sup> *See* MIDDLETON & ALLISON, *supra* note 1, at 11.

<sup>125</sup> *Western Landowners Applaud USDA*, *supra* note 53.

<sup>126</sup> Robert Bonnie, Under Sec’y, U.S. Dep’t of Agric., Keynote Address at the University of Wyoming Yellowstone National Park 150th Anniversary Symposium: The Importance of Working Lands to Yellowstone in the 21st Century (May 20, 2022).

<sup>127</sup> At the Yellowstone Symposium in May 2022, Wyoming state legislator and rancher Albert Sommers stated that he and many ranchers would prefer temporary solutions. Ruckelshaus Institute, Coordinating Large Landscape Conservation Across the Greater Yellowstone Ecosystem – Panel 3 – YNP 150th Symposium Day 1, VIMEO (June 1, 2022), <https://vimeo.com/showcase/9571468/video/716070146>. *See also* *150th Anniversary of Yellowstone Symposium*, HAUB SCH. ENV’T & NAT. RES. U. WYO. COLL. L., <https://www.uwyo.edu/haub/ruckelshaus-institute/forums/ynp-150th-symposium/index.html> [<https://perma.cc/85CR-DCTN>] (last visited July 24, 2022).

perpetuity provides important benefits, including a lower final price tag and an increase in public faith in the program.<sup>128</sup> Second, the habitat leases in USDA's program will be held by the federal government, whereas the easements in the MCE program are held by the wildlife themselves. The following section elaborates on the value of this change to the fundamental framework of wildlife management.<sup>129</sup> Third, while there are plans to expand the USDA's new program, it is currently limited to Wyoming.<sup>130</sup> In contrast, the MCE program takes an ecosystem-based approach, working with all three states in the GYE region. Fourth, USDA's program is designed to expand to other regions, whereas the MCE program is limited to the GYE and the prior migration paths of three ungulates species that are vital to the local economy and ecosystem functions.<sup>131</sup>

While the USDA's new program is an exciting step towards innovative federal action to protect migratory corridors, there are distinct benefits to the MCE program. The policies could work in tandem to confront the immense challenges facing the GYE and keep this massive ecosystem intact.

### *B. MCE Program's Necessary Changes to the Legal Framework*

The MCE program outlined in Part II.A requires several revolutionary shifts in the legal framework for wildlife management by incorporating principles from the Rights of Nature movement, eliminating barriers to standing, and opening the door to similar programs.

#### *1. Framework for the Solution: The Rights of Nature*

First, the MCE program would critically alter the American legal system by shifting from an understanding of wildlife as property to an understanding aligned with the Rights of Nature movement.

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<sup>128</sup> Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L., PROP. & SOC'Y 108, 112, n.9 (2015) ("The conservation community has generally disfavored term easements because term easements offer only temporary land protection and, even if they are repeatedly renewed, can cost far more in the long run than perpetual easements."). See also *id.* at 124 ("These provisions help to ensure that, in the unlikely event of extinguishment, the public's investment in conservation will not be lost."). In order to qualify for federal tax benefits for donating a conservation easement, the applicable statute, I.R.C. § 170(h)(2)(C), requires that the easement be held in perpetuity except in cases where the conservation purpose has become impossible or practical. See also *Belk v. Comm'r*, 774 F.3d 221 (4th Cir. 2014) (holding that allowing a landowner to move a conservation easement's restriction from one parcel of land to another violated the perpetuity requirement and thus was ineligible for a charitable deduction under federal law).

<sup>129</sup> See *infra* Part II.B.1.

<sup>130</sup> United States Department of Agriculture under-Secretary Robert Bonnie indicated there are also hopes to expand this program beyond the GYE to other areas. Bonnie, *supra* note 126.

<sup>131</sup> See *supra* Part II.A.2.

As the planet grapples with climate change, biodiversity loss, and other environmental crises, there is a growing movement toward legally recognizing the Rights of Nature.<sup>132</sup> Rather than viewing the natural world as property to be used for human benefit, proponents of this legal doctrine contend that humans are members of a larger community where all natural bodies have inherent rights that limit the rights of humans to harm them.<sup>133</sup> As some have argued, “[w]e must no longer view the natural world as a mere warehouse of commodities for humans to exploit, but rather a remarkable community to which we belong and to whom we owe responsibilities.”<sup>134</sup> Rights of Nature, as a legal doctrine, may well be “our last and best hope to save the planet.”<sup>135</sup>

The idea that humans are one part of a larger community of natural beings has existed in indigenous communities for generations,<sup>136</sup> but the first American legal scholar to analyze it was Christopher Stone.<sup>137</sup> His seminal 1972 article, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, responded to a decision by the U.S. Court of Appeals for the Ninth Circuit to dismiss a lawsuit brought by the Sierra Club to prevent the construction of a ski resort in the Sierra Nevada mountains.<sup>138</sup> The Ninth Circuit reasoned that because the Sierra Club had not been injured by the proposed project, it lacked standing to bring the case, per Article III of the U.S. Constitution.<sup>139</sup> In response, Stone proposed that “we give legal rights to forests, oceans, rivers and other so-called ‘natural objects’ in the

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<sup>132</sup> Lidia Cano Pecharroman, *Rights of Nature: Rivers that Can Stand in Court*, 7 RES. 1, 10 (2018) (“History has proven that law often lags behind social change . . . the rights of nature are here to stay. As the planet strives to achieve a more sustainable way of living, the rights of nature will offer a legal tool to regulate our relationship with nature from a different and more harmonious perspective.”). See also *Rights of Nature: Timeline*, CMTY. ENV’T LEGAL DEF. FUND, <https://celdf.org/advancing-community-rights/rights-of-nature/rights-nature-timeline/> [<https://perma.cc/E9R7-ZP9G>] (last visited July 24, 2022) (showing the increase in Rights of Nature policies over recent decades).

<sup>133</sup> Anna V. Smith, *The Klamath River Now Has the Legal Rights of a Person*, HIGH CNTY. NEWS (Sept. 24, 2019), <https://www.hcn.org/issues/51.18/tribal-affairs-the-klamath-river-now-has-the-legal-rights-of-a-person> [<https://perma.cc/2QFT-8636>].

<sup>134</sup> *Id.*

<sup>135</sup> Katie Surma, *Does Nature Have Rights? A Burgeoning Legal Movement Says Rivers, Forests, and Wildlife Have Standing, Too*, INSIDE CLIMATE NEWS (Sept. 19, 2021), [https://insideclimatenews.org/news/19092021/rights-of-nature-legal-movement/?utm\\_source=ActiveCampaign&utm\\_medium=email&utm\\_content=Top+news%3A&utm\\_campaign=ATF+Daily](https://insideclimatenews.org/news/19092021/rights-of-nature-legal-movement/?utm_source=ActiveCampaign&utm_medium=email&utm_content=Top+news%3A&utm_campaign=ATF+Daily) [<https://perma.cc/W3KX-VQKS>] (quoting Chuck O’Neal, president of the nonprofit Speak Up Wekiva).

<sup>136</sup> Pecharroman, *supra* note 132, at 6 (“[I]t would not be fair to talk about the legal doctrine of the Rights of Nature without mentioning the traditions and knowledge on this issue that indigenous populations have passed onto generations. The paradigm that embraces and understands nature as a being with rights has been part of many indigenous populations’ worldviews for hundreds of years.”).

<sup>137</sup> Stone, *supra* note 119.

<sup>138</sup> *Id.*

<sup>139</sup> *Sierra Club v. Hickel*, 433 F.2d 24, 28–33 (1970).

environment.”<sup>140</sup> Although the Supreme Court later affirmed the Ninth Circuit’s dismissal, Justice William O. Douglas dissented, citing Stone’s argument for granting rights to natural entities.<sup>141</sup>

In the intervening decades, many scholars, governments, and organizations have continued to advocate for the Rights of Nature.<sup>142</sup> These advocates “assert[] that nature and natural features have inherent value independent of human needs, and should accordingly be entitled to their own legal rights.”<sup>143</sup> In support of their positions, they cite both philosophical and pragmatic concerns with a traditional anthropocentric worldview.<sup>144</sup>

While the ramifications of such an idea may appear facially “unthinkable,” advocates remark that the expansion of rights to women and people of color was similarly unimaginable at points in U.S. history, and argue that this legal change simply reflects contemporary values.<sup>145</sup> Aldo Leopold, the famous 20th-century conservationist and forester,<sup>146</sup> made the same comparison when he wrote about Odysseus, who “returned from the wars in Troy” and hanged a dozen slave-girls of his households suspected of “misbehavior during his absence.”<sup>147</sup> Recognizing the horrifying distance between modern values and legal traditions, he reasoned that for Odysseus, this hanging “involved no question of propriety” because the girls were merely disposable property.<sup>148</sup> Leopold advocated for society to shift from viewing the natural world as property that should be owned to viewing it “as a community to which we belong.”<sup>149</sup> Leopold’s analysis of the need for legal reform amid changing cultural values laid the groundwork for a similar philosophical movement in the Rights of Nature.

In addition to this changing conception of property based on contemporaneous values, the legal treatment of corporations provides legal precedent for granting

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<sup>140</sup> Stone, *supra* note 119, at 456. Stone argued that this grant of rights would also include the legal ability to seek redress through a guardian or conservator. *Id.* at 464.

<sup>141</sup> *Sierra Club v. Morton*, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting).

<sup>142</sup> See, e.g., Pecharroman, *supra* note 132, at 10 (“[T]he rights of nature will offer a legal tool to regulate our relationship with nature from a different and more harmonious perspective.”); *id.* at 3–8 (listing examples of Rights of Nature legislation, jurisprudence, and political declarations); Erin Ryan, Holly Curry & Henry Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 *CARDOZO L. REV.* 2447, 2521–38 (2021) (reviewing efforts to implement Rights of Nature in the United States).

<sup>143</sup> Ryan et al., *supra* note 142, at 2500.

<sup>144</sup> *Id.*

<sup>145</sup> See Stone, *supra* note 119, at 453–56; Pecharroman, *supra* note 132, at 2.

<sup>146</sup> Aldo Leopold, ALDO LEOPOLD FOUND., <https://www.aldoleopold.org/about/aldo-leopold/> [<https://perma.cc/CSK3-6WYW>] (last visited June 12, 2022).

<sup>147</sup> ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 190 (2020 ed.).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at xxii. Leopold called this new relationship the “land ethic.” *Id.* at 190.



rights to nontraditional “persons.”<sup>150</sup> The idea of corporate personhood dates back to ancient Roman law and derives from the metaphorical understanding that an entity that can sue, face liability, and own property must be a kind of “person.”<sup>151</sup> Just as the United States Supreme Court turned this analogical reasoning into a structured legal doctrine,<sup>152</sup> Rights of Nature advocates argue for changes in the legal framework recognizing the rights of natural entities.

While still new and often unchallenged in courts, there is a growing body of law supporting Rights of Nature ideas.<sup>153</sup> In 2014, the New Zealand government and members of indigenous Māori tribes reached a settlement that affirmed the legal personhood of the Whanganui River.<sup>154</sup> Ecuador amended its Constitution in 2008 to include the Rights of Nature, and other statutes and ordinances in Bolivia, Mexico City, and Brazil’s municipalities contain similar provisions.<sup>155</sup> While most applications of the doctrine have focused on inanimate natural bodies or the environment in general,<sup>156</sup> in 2020, Pakistan’s highest court ruled on a case about the treatment of a zoo elephant and held that animals have legal rights “without any hesitation.”<sup>157</sup>

In the United States, similar efforts have had mixed success. In 2019, the Yurok tribe granted legal personhood to the Klamath River in hopes of restoring the surrounding ecosystem and its salmon population.<sup>158</sup> Elsewhere in the country, there are over thirty local laws recognizing the Rights of Nature, but very few have been tested in court.<sup>159</sup> In 2021 the White Earth Band of Ojibwe in Minnesota declared that manoomin, a wild rice, had the right to access freshwater and brought the first suit enforcing this Rights of Nature approach in tribal court to stop the construction

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<sup>150</sup> See Stone, *supra* note 119, at 451–53, 464 (“It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems.”); Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENV’T L. 49, 62–70 (2018); *Sierra Club v. Morton*, 405 U.S. 727, 742–43 (1972) (Douglas, J., dissenting). While this comparison is compelling, it is important to note that these other inanimate, nonhuman bodies are often given rights to protect the interests of the people invested in them.

<sup>151</sup> Gordon, *supra* note 150, at 63

<sup>152</sup> See *id.* at 66–70.

<sup>153</sup> See *Rights of Nature: Timeline*, *supra* note 132.

<sup>154</sup> Pecharroman, *supra* note 132, at 7.

<sup>155</sup> *Id.* at 4–5.

<sup>156</sup> See *Rights of Nature: Timeline*, *supra* note 132 (showing only a single time that an animal was the basis of a Rights of Nature claim).

<sup>157</sup> Nicole Pallotta, *Islamabad High Court Holds that Animals Have Legal Rights*, ANIMAL LEGAL DEF. FUND (Oct. 2, 2020), <https://aldf.org/article/islamabad-high-court-holds-that-animals-have-legal-rights/> [<https://perma.cc/UJ39-LGHU>].

<sup>158</sup> See Smith, *supra* note 133.

<sup>159</sup> Surma, *supra* note 135. Note that Orange County FL, which amended its charter with a Rights of Nature provision after a referendum in November 2020, is scheduled to go to court to enforce this provision in November 2021. *Id.*

of the Enbridge Line 3 oil pipeline.<sup>160</sup> In two other recent cases, however, judges dismissed efforts to establish legal personhood for the Colorado River<sup>161</sup> and the Lake Erie ecosystem.<sup>162</sup> Given the failure of the modern legal system to adequately protect the natural ecosystems that humanity relies upon throughout the world,<sup>163</sup> it seems likely that advocates will continue to test these legal principles.<sup>164</sup> The MCE program aims to do just that in the American legal system.

The MCE program would give life to the Rights of Nature doctrine. By considering and protecting wildlife interests in complex environmental and property disputes, the MCE program inherently recognizes the value of protecting animals and fills the gap in the current legal system that has left so many natural entities vulnerable to humanity's destruction.

## 2. *Constitutional Standing to Enforce MCEs*

By introducing the principles of the Rights of Nature, the MCE program would also make an important legal change by granting wildlife standing to bring lawsuits to enforce their right to migrate. Because this change would conflict with much of modern Constitutional standing doctrine,<sup>165</sup> judicial action would be necessary to enforce the policy, even if Congress explicitly extended standing to ungulate herds in the national policy creating the MCE program. Courts require three elements to establish standing under Article III of the Constitution: injury, causation, and redressability.<sup>166</sup> Courts often reject cases where environmental organizations or

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<sup>160</sup> *See id.*

<sup>161</sup> *See* Pecharroman, *supra* note 132, at 8 (describing a case brought by an environmental organization in 2017); *see also* Colo. River Ecosystem v. Colo., No. 1:17-cv-02316, 2017 WL 4284548 (D. Colo. Sept. 25, 2017).

<sup>162</sup> Pallotta, *supra* note 36. The opinion held that the municipal legislation was preempted by state law and was impermissibly vague under the Fourteenth Amendment. *Id.* *See also* Drewes Farms P'ship v. City of Toledo, 441 F.Supp.3d 551 (N.D. Ohio 2020).

<sup>163</sup> *See supra* note 38 and accompanying text.

<sup>164</sup> *See* Pecharroman, *supra* note 132, at 10–11. For instance, a new legal development occurred in October 2021 when a federal magistrate judge granted “interested persons” status to a group of hippos that descended from hippos illegally imported to Colombia by Pablo Escobar so that two wildlife experts could be deposed in a “lawsuit against the Colombian government over whether to kill or sterilize the hippos.” John Seewer, *US Judge: Pablo Escobar's Cocaine Hippos Legally 'People,'* AP NEWS (Oct. 25, 2021), <https://apnews.com/article/hippos-animals-personhood-pablo-escobar-e89daf05efb37efd3d35e6dabce56726> [<https://perma.cc/Z46W-GLDK>]. Attorneys for the Animal Legal Defense Fund believe it is the first time that an animal has been granted legal personhood in the United States, but the legal impacts of this decision are limited as the case is under the Colombian courts. *Id.*

<sup>165</sup> This discussion focuses on the issue of Constitutional standing, but to bring a lawsuit in a court of law, a party must also have statutory standing, or must be within the “zone of interests” explicitly protected by a statute. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

<sup>166</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

citizens sue on behalf of the environment because they lack injury and redressability.<sup>167</sup>

Plaintiffs must always satisfy the requirement to show individual injury, even when Congress expressly creates citizen suit provisions for general grievances.<sup>168</sup> Because the environment is fundamentally a shared set of resources, this requirement makes it difficult to show individualized harm.<sup>169</sup> After all, “environment” is an amorphous term for the collection of wildlife, plants, air, weather, and physical spaces that no one specifically owns but that everyone can enjoy, making it nearly impossible to analyze environmental degradation, or harm to wildlife, as a personal harm that the courts can remedy in their most traditional role. In addition, as discussed in Part I.B, wildlife have no inherent right to protection, and courts have historically followed a black and white rule that animals do not have standing.<sup>170</sup>

The proposed program to create MCEs would overcome these traditional barriers to standing by allowing elk, pronghorn, and mule deer to own the right to migrate. This legal change would enact Stone’s proposal to “make the natural object, through its guardian, a jural entity competent to gather up these fragmented and otherwise unrepresented damage claims, and press them before the court even where, for legal or practical reasons, they are not going to be pressed by traditional class action plaintiffs.”<sup>171</sup> For example, if subdivisions began to block herds’ migration corridors, the herds’ guardians could sue the relevant developers and point to specific instances of direct injury.<sup>172</sup> Like any other property rights-holder, the herds could assert their own property interests and fight unlawful land uses.<sup>173</sup>

Similarly, the MCE program makes it easier to establish redressability. In legal systems where the Rights of Nature are defined broadly and ambiguously, enforcement has proven challenging,<sup>174</sup> even when courts do not require a plaintiff to demonstrate redressability. In contrast, the limited scope of easements to merely

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<sup>167</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>168</sup> *Lujan*, 504 U.S. at 573–74.

<sup>169</sup> *Id.*

<sup>170</sup> See, e.g., *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004); *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49–50 (D. Mass. 1993). However, one recent case in the Ninth Circuit granting standing to a crested macaque suggests some courts may be open to overcoming the barriers of traditional standing. *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018).

<sup>171</sup> Stone, *supra* note 119, at 475 (emphasis omitted).

<sup>172</sup> *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 684–90 (1973) (holding that environmental harms constitute a sufficient injury to create standing). See also *Bradshaw*, *supra* note 3, at 827 (“Congress has also authorized agencies to pursue tort claims for damage to animals and animal habitats under the public trust doctrine.”).

<sup>173</sup> *Bradshaw*, *supra* note 3, at 834.

<sup>174</sup> *Pecharroman*, *supra* note 132, at 9.

cross over traditional migration corridors in the MCE program would improve courts' ability to redress these issues.<sup>175</sup>

This change in the legal framework would allow courts to address the harms created by proposed developments on land beholden to ungulate-owned easements. Rather than relying on federal or state agencies with changing budgets and priorities to enforce conservation programs,<sup>176</sup> ungulate guardians could take affirmative action to clear migration corridors and reconnect key arteries of the artificially divided GYE. Affirmative enforcement would benefit wildlife as well as society at large by decreasing wildlife-vehicle collisions, increasing revenue from hunting permits as wildlife populations rise, and supporting a healthier, fuller ecosystem for tourism.

An expected objection to the MCE program is that it grants standing to creatures that cannot speak or stand in a courtroom.<sup>177</sup> Yet, as Stone succinctly notes: "Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them . . . ."<sup>178</sup> Yet, unlike a corporation led by a board or a child with parents, there is no obvious designated group of humans to represent the interests of wildlife. In the absence of an obvious representative, opinions differ about who is best suited to serve as the designated legal guardians for natural entities. Laws recognizing the rights of nature in other countries have called on a variety of actors to serve as guardians, including indigenous communities,<sup>179</sup> local citizens,<sup>180</sup> government officials, or a combination of these parties.<sup>181</sup> Stone called for a "friend of a natural object" to apply to the court to become a guardian.<sup>182</sup> Alternatively, wildlife scholar Karen Bradshaw advocates for a group of human trustees who owe a fiduciary duty to wildlife<sup>183</sup> and who are overseen by "animal experts."<sup>184</sup>

Many of these parties offer valuable input, but any effort to assert the rights of nature in the GYE must also include private landowners. Efforts to protect migration corridors are "often met with resistance from rural stakeholders . . . largely due to

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<sup>175</sup> Compare the redressability of this limited property right to the ambiguous right to "exist" and "flourish" in proposed to protect the Colorado River. *See id.* at 8.

<sup>176</sup> *See Bradshaw, supra* note 3, at 814, 842.

<sup>177</sup> *See Stone, supra* note 119, at 464.

<sup>178</sup> *Id.*

<sup>179</sup> *See Smith, supra* note 133 (noting that the Yurok resolution establishing legal personhood for the Klamath river drew inspiration from the UN Declaration on the Rights of Indigenous People).

<sup>180</sup> *See Pallotta, supra* note 36, at n.3.

<sup>181</sup> *See Pecharroman, supra* note 132, at 7 (describing New Zealand's approach to have a river represented by two guardians: one from the indigenous Maori tribe and one from the Crown); *see also id.* at 8 (noting a Colombian court appointed two representatives for a river from the local community and government).

<sup>182</sup> Stone, *supra* note 119, at 464.

<sup>183</sup> Bradshaw, *supra* note 3, at 830, 839 (arguing that the precedent on trust law and fiduciary duty would help to avoid mismanagement and hold human actors responsible).

<sup>184</sup> *Id.* at 840.

the fact that these efforts are frequently designed without input from local communities . . . who are often deeply familiar with local ecosystems and most impacted by land management decisions.”<sup>185</sup> As discussed in Part II.A.3, collaboration is essential to conservation efforts in the GYE. Thus, effective legal representation for the GYE’s elk, pronghorn, and mule deer herds should include many of these diverse interests.

While this Note does not fully investigate the guardianship question, the best policy would explicitly prescribe the manner of appointment and membership qualifications for the guardian entity, and require the inclusion of diverse parties such as scientific experts, indigenous groups or tribes, government officials from state and federal agencies, and local interested parties (representing both landowners<sup>186</sup> and environmental or conservation groups).

### 3. *Subsequent Expansions: Concerns and Suggestions*

Establishing a program based on the Rights of Nature doctrine will likely generate legal disputes over further expansions of animal rights. Bradshaw acknowledges that “[e]ven many animal lovers are hesitant to accept social shifts that would criminalize eating a burger or swatting a mosquito.”<sup>187</sup> The proposed MCE program has several characteristics that suggest it is narrow enough to avoid such criticisms.<sup>188</sup> At the same time, this Note acknowledges that the proposed policy opens the door to granting rights to natural bodies, a doctrine that could extend far beyond three species of ungulates.

For example, this proposal is distinct from broader calls to recognize the Rights of Nature.<sup>189</sup> Rather than granting entire ecosystems the expansive right to “flourish,”<sup>190</sup> this proposal is restricted to wild elk, pronghorn, and mule deer in

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<sup>185</sup> Mahowald et al., *supra* note 4, at 5.

<sup>186</sup> While this idea may seem far-fetched in light of the current political polarization across the United States, rural groups of landowners have expressed interest in this kind of collaborative council structure. *See, e.g., id.* at 7, 16 (“Landowners have suggested adding positions at NRCS for biologists dedicated to private lands as a way to improve their access to experts who will include wildlife needs in the conservation planning process. Partner biologists in the region are needed to enhance the local knowledge of wildlife habitat requirements and more efficiently monitor ecological responses to conservation practices. Improved capacity for shared partnerships in the region would increase landowner outreach, promote collaborative wildlife conservation efforts and provide a centralized location for technical and financial assistance information.”).

<sup>187</sup> Bradshaw, *supra* note 3, at 816.

<sup>188</sup> *See* discussion *supra* Part II.A.2.

<sup>189</sup> *See* Pecharroman, *supra* note 132, at 8 (describing the recent Colorado case attempting to establish the river ecosystem’s river to “exist, flourish, and regenerate”); *see also* CMTY. ENV’T LEGAL DEF. FUND, *supra* note 132 (showing the repeated use of this ambiguous phrase); *see also* Smith, *supra* note 133 (establishing broad protection of the “right to a healthy climate”).

<sup>190</sup> *See id.*

currently identified herds in the GYE and only grants rights in the form of express easements to use established migration corridors.<sup>191</sup> Like limited grants of rights to corporations,<sup>192</sup> this proposal avoids potential issues of extending the Constitution's substantive due process and equal protection provisions to animals.<sup>193</sup> By expanding the rights of three particular species to live in a single region, this proposal limits the immediate impact of opening the door to Rights of Nature ideas. Still, critics will likely argue that once the nation's courts apply some Rights of Nature ideas, the floodgates will burst open. But the limitations described in Part II.A.2 narrow the policy's immediate impact. Additionally, a federal or state legislature would need to codify any other expansions of Rights of Nature principles.

Nonetheless, the proposed MCE program lays the legal groundwork for other expansions of property rights to wildlife in order to protect other critical habitats. Future conservationists could foreseeably use this policy as the basis for other species to claim ownership over their winter and summer ranges, to protect other migratory ungulates in the GYE like bison and moose, and eventually to protect migratory animal territories outside the GYE, even in waterways or airspace. Efforts to pass such policies would have to confront the inherent issue of how far the legal doctrine could stretch.

Despite the ramifications of this proposal, efforts to protect the environment and recognize Rights of Nature are already shifting modern culture, and the United States may be ready for such a change. As Pecharroman states, “[h]istory has proven that law often lags behind social change . . . [and] the rights of nature are here to stay.”<sup>194</sup>

#### CONCLUSION

Current efforts to protect the unique and valued wildlife of the GYE are inadequate to address the urgent environmental and economic issues fragmenting this critical habitat. Building on the Rights of Nature doctrine, this proposal to grant express affirmative easements over established migration corridors to the elk, pronghorn, and mule deer herds of the GYE provides an alternative solution. By according these species a legal right to protect their migration corridors, the United States would become a global conservation leader that recognizes the “worth and dignity” of these beings in their own right.<sup>195</sup>

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<sup>191</sup> See discussion *supra* Part II.A.2.

<sup>192</sup> Pecharroman, *supra* note 132, at 3.

<sup>193</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV.

<sup>194</sup> Pecharroman, *supra* note 132, at 10–11. See also Bradshaw, *supra* note 3, at 843–44, n.67 (describing bipartisan support for animals and animal rights).

<sup>195</sup> Stone, *supra* note 119, at 458.