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## Unbecoming Adversaries: Natural Resources Federalism in Wyoming

Tara Righetti

Robert B. Keiter

Jason Robison

Temple Stoellinger

Sam Kalen

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## UNBECOMING ADVERSARIES: NATURAL RESOURCES FEDERALISM IN WYOMING

*Tara Righetti,\* Robert B. Keiter,\*\* Jason Robison,\*\*\*  
Temple Stoellinger\*\*\*\* & Sam Kalen\*\*\*\*\**

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\* Professor, University of Wyoming, College of Law. J.D., University of Colorado Law School (2007); B.A., University of Colorado, Boulder (2005). This Article is dedicated to the people of Wyoming for their support of the UW College of Law over the past century. We thank the many natural resource professors who preceded us at the law school and shaped this institution and its legacy. We count them among our guides, mentors, and friends: Frank Trelease, Joe Geraud, Peter Maxfield, George Gould, Mark Squillace, Larry MacDonnell, Deb Donahue, Reed Benson, Justice Lynne Boomgaarten, and Dennis Stickle. Any errors or omissions are our own.

\*\* Wallace Stegner Professor of Law & University Distinguished Professor, University of Utah, S.J. Quinney College of Law; Director, Wallace Stegner Center for Land, Resources, and the Environment. J.D., Northwestern University School of Law (1972); A.B., Washington University (1968). I am most grateful to Shannon Woulfe, my Behle Research Fellow, for her excellent assistance with my contribution to this project.

\*\*\* Professor, University of Wyoming, College of Law. S.J.D., Harvard Law School (2013); L.L.M., Harvard Law School (2009); J.D., University of Oregon School of Law (2006); B.S., University of Utah (2003).

\*\*\*\* Assistant Professor, University of Wyoming, Haub School of Environment and Natural Resources; Co-Director, Center for Law and Energy Resources in the Rockies, University of Wyoming, College of Law. J.D., University of Wyoming (2010); B.S., University of Wyoming (2004).

\*\*\*\*\* William T. Schwartz Distinguished Professor of Law, University of Wyoming, College of Law; Co-Director, Center for Law and Energy Resources in the Rockies, University of Wyoming, College of Law. J.D., Washington University (1984); B.A., Clark University (1980).

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“[T]he West is the native home of hope. When it fully learns that cooperation, not rugged individualism, is the pattern that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery.”<sup>1</sup>

## I. INTRODUCTION

The American West has long been defined by bountiful natural resources and scenic splendor. Both have been a wellspring of wealth creation and intense conflict. Indeed, the early history of the western United States was rife with resource conflicts, some of which resulted in violent confrontations between rival claimants and with the region’s Native inhabitants.<sup>2</sup> Since attaining statehood in 1890, Wyoming has continued to depend heavily on natural capital, much of which remains in federal ownership or subject to tribal claims. As a result, these sovereigns—state, tribes, and federal government—have frequently clashed, in Congress and court, over natural resource ownership and management, putting constitutional federalism principles to the test. Presented through

<sup>1</sup> WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 38 (1969).

<sup>2</sup> Illuminative sources include JOHN W. DAVIS, *THE WYOMING RANGE WAR: THE INFAMOUS INVASION OF JOHNSON COUNTY* (2012); RICHARD WHITE: *IT’S YOUR MISFORTUNE AND NONE OF MY OWN: A NEW HISTORY OF THE AMERICAN WEST* (1991); T.A. LARSON, *HISTORY OF WYOMING* (2d ed. 1990); PATRICIA LIMERICK, *A LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987); EDWARD H. SPICER: *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960* (1962); WALTER PRESCOTT WEBB, *THE GREAT PLAINS* (1931); Wayne Guard, *The Fence-Cutters*, in *THE SOUTHWESTERN HISTORICAL QUARTERLY* 51, no. 1 (1947).

a series of historic vignettes focused on public lands and associated resources, this Article endeavors to illuminate Wyoming's storied relationships with the federal government, which owns nearly half of the land in the state, and with sovereign Tribal Nations residing in the state on or adjacent to traditional homelands. These relationships have been both cooperative and adversarial, posing vital questions about what has been gained or lost by these contrasting approaches to federalism.

Any retrospective on the evolution of Wyoming's natural resources federalism must begin with a threshold acknowledgement of the distinct peoples, geography, and resources that have positioned Wyoming as a critical national player in federalism debates. That acknowledgement starts with Native peoples who traditionally inhabited or traveled across Wyoming's landscape. Such peoples include the Arapaho, Shoshone, Cheyenne, Crow, and Ute, among others. Present-day Wyoming encompasses the ancestral homeland of these peoples, and they remain deeply connected to these lands. They are its traditional stewards, as well as acknowledged sovereigns, with both rights and interests that cannot be ignored.

The arrival of Euro-American settlers, drawn by the area's natural resources and open lands, further shaped Wyoming's natural and legal landscapes.<sup>3</sup> Although fur traders traversed the area as early as the late-eighteenth century,<sup>4</sup> large-scale immigration did not begin in earnest until the mid-nineteenth century, abetted by federal military outposts. Following the Civil War and arrival of the railroads in the latter half of the 1860s, along with new mining and other industries, pioneers, speculators, and cowboys were drawn to the Wyoming Territory, which was established in 1868.<sup>5</sup> Not surprisingly, these original settlers clashed with the area's Native peoples, who were ultimately displaced onto reservation lands. These same settlers then proceeded in 1890 to establish the State of Wyoming, its laws and institutions, thereby shaping its culture and economy in ways that continue today.<sup>6</sup>

Natural resources federalism has also been shaped by Wyoming's physical geography. Picture the astounding profile cut by the Grand Tetons, the vast

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<sup>3</sup> See generally Phil Roberts et al., *WYOMING ALMANAC* (7th ed. 2014).

<sup>4</sup> Jim Hardee, *The Fur Trade in Wyoming*, WYOHISTORY.ORG (Nov. 8, 2014), [www.wyohistory.org/encyclopedia/fur-trade-wyoming](http://www.wyohistory.org/encyclopedia/fur-trade-wyoming) [<https://perma.cc/GP8S-KVSB>] (citing Brad Tennant, *Fame Over Misfortune: La Verendrye and the Opening of the Western Trade*, THE ROCKY MOUNTAIN FUR TRADE J., vol. 1, 107–16 (Pinedale, WY: The Museum of the Mountain Man, 2007)).

<sup>5</sup> An act to provide a temporary Government for the Territory of Wyoming, 15 Stat. 178 (1868) [hereinafter Wyoming Territory Act].

<sup>6</sup> WYO. CONST.; An act to provide for the admission of the State of Wyoming into the Union, and for other purposes, 26 Stat. 222 (1890). See also ROBERT B. KEITER, *THE WYOMING STATE CONSTITUTION* (2d ed. 2017).

endorheic basin of the Red Desert, the Green River's headwaters in the Wind River Range, and the undulating high plateau of interior grasslands and sagebrush sea. These places are home to rich, diverse ecosystems with iconic big game species such as elk, mule deer, bison, and moose, as well as charismatic predators such as eagles, grizzly bears, and wolves. They also harbor immense coal reserves and vast reservoirs of oil and natural gas, while an ever-present wind blows over them and an often-brilliant sun shines daily—resources critical to both Wyoming's energy legacy and its likely future.

Initially federal territory, land ownership in Wyoming grew increasingly fragmented as the state took shape.<sup>7</sup> Across its southern strip, a checkerboard ownership pattern extends twenty miles on either side of Interstate 80, the result of generous railroad grants that provided the Union Pacific with surface and mineral ownership in every other section. These lands contain rich coal beds, the Wamsutter natural gas field, the largest natural deposits of trona in the world, and abundant wind and solar resources. In the eastern part of the state, most of the land is private, having been homesteaded under the various nineteenth-century land disposition acts. Much of this private land overlays federally reserved subsurface minerals—including oil, gas, and coal—creating split estates<sup>8</sup> that have been the source of conflict and managerial challenges. Near the center of the State is the Wind River Reservation—home to the Eastern Shoshone and Northern Arapaho tribes—containing the mainstem and tributaries of the Wind River flowing from its eponymous mountain range. Nearly half of the State—thirty-million acres—remains federally owned and managed. The Bureau of Land Management (BLM) manages much of the lower-elevation basins, dominated by the sagebrush ecosystem, for multiple-use purposes. The northwest corner—regularly denominated the “Greater Yellowstone Ecosystem”—contains significant concentrations of federal land, including Yellowstone and Grand Teton national parks, expansive national forests, and several wilderness areas.

Wyoming's unique cultural and physical landscape fostered dynamic federalism relationships that have oscillated between adversarial and cooperative. Too often, though, the State and its federal and tribal counterparts have found themselves in the role of unbecoming adversaries. As current and former natural resources faculty members at the University of Wyoming (UW) College of Law, we are privileged to offer a retrospective on this subject upon the law school's centennial. In 2021, the State is facing new and daunting challenges that are straining its core industries and budget, including economic changes associated with the COVID-19 global pandemic and rapidly transforming energy markets.

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<sup>7</sup> *National Geospatial Program: Small-Scale Data*, U.S. GEOLOGICAL SURV., [nationalmap.gov/small\\_scale/printable/images/pdf/fedlands/WY.pdf](https://nationalmap.gov/small_scale/printable/images/pdf/fedlands/WY.pdf) (last visited Apr. 7, 2021) [<https://perma.cc/MEC2-RKCC>].

<sup>8</sup> A split-estate refers to the scenario where the surface and mineral interests have been severed and are separately owned by different parties (federal, state, private, tribal, or corporate). *See, e.g.*, Tara Righetti, *Surface Access to Severed Federal Minerals*, 61 ROCKY MT. MIN. L. INST. 8-1 (2015).

Concurrently, the COVID-19 pandemic has accelerated tourism and recreation activity and brought remote worker-migrants to mountain towns, offering new sources of revenue while increasing impacts on infrastructure and parks. In these times, moreover, we cannot ignore climate-related changes or the need to make natural resources governance more inclusive and more just. It is our humble hope that this natural resource-focused evaluation of federal-state-tribal relations within Wyoming offers insights to inform and improve these relationships in the years ahead.

## II. PUBLIC LANDS

Wyoming's identity and economy have been shaped by the diverse federal public lands occupying nearly half of the state. Large portions of these lands are protected as national parks, wilderness areas, and wildlife refuges, and are managed primarily for nature conservation and recreation purposes. The National Park Service oversees the world-famous Yellowstone and Grand Teton National Parks as well as Devil's Tower National Monument. The U.S. Fish & Wildlife Service (FWS) administers seven national wildlife refuges in the state, which are devoted to wildlife conservation and related recreational activity. The U.S. Forest Service is responsible for fifteen national forest wilderness areas statewide, which are managed to safeguard their wilderness character and natural appearance.

Federal lands in Wyoming also sustain important private economic activity and a growing recreation-based economy. Situated in the Department of Agriculture, the U.S. Forest Service oversees non-wilderness national forest lands in the state under a multiple use-sustained yield mandate that requires the agency to balance the recreation, mineral, timber, range, wildlife, and water resources found on these lands. The BLM administers the rest of Wyoming's public lands under similar multiple use-sustained yield principles. These BLM lands are open to extractive activities, such as oil and gas production, mining, livestock grazing, and timber harvesting, along with recreational uses and wildlife habitat.

The ecological, commercial, and recreational values inherent in Wyoming's diverse federal lands have been a longstanding source of conflict between state, federal, and tribal entities. Tribal treaty rights as well as state and private inholdings have often complicated federal management efforts. Early federal preservation efforts removing public lands from private settlement or use along with early federal mineral withdrawals frequently prompted state and local opposition in an effort to protect private commercial activities. This trend continues. As federal policy has shifted over time to embrace ecological conservation policies, state and local opposition has increasingly focused on the economic impacts and access limitations resulting from federal agency decisions.

*A. Preserved Lands: Parks, Monuments, & Wilderness**1. National Parks**a. Yellowstone*

Wyoming's land preservation story begins in the early 1870s, nearly twenty years before statehood, when Congress decided to set aside Yellowstone National Park as a "public park or pleasuring ground for the benefit and enjoyment of the people."<sup>9</sup> A constellation of forces impelled Congress to act: reports from the Hayden and Washburn expeditions extolling the region's remarkable natural wonders and scientific research opportunities; concern that the region's wildlife and stunning scenery were at growing risk; and a lobbying effort by Northern Pacific Railroad executives who viewed the Yellowstone country as a prospective tourist market.<sup>10</sup> Carved from sparsely occupied federal territory, the new park attracted little opposition in Congress, which designated it a federal enclave subject to exclusive federal jurisdiction. To enforce the new legal prohibitions on hunting and mining, the federal government soon enlisted the United States Army to oversee the Park, much to the chagrin of recalcitrant local residents. As the world's first national park, Yellowstone established a new land preservation standard that has been emulated across the globe.

Established in 1872, Yellowstone National Park was originally designed to protect the region's unique geological features. To do so, Congress simply drew straight line boundaries around roughly two million acres of high elevation, mountainous land, giving little thought to the biological or ecological implications of its designation. Upon visiting Yellowstone in 1882, General Philip Sheridan observed that the Park inadequately protected its wildlife, prompting him to propose nearly doubling its size eastward and southward into Wyoming territory.<sup>11</sup> Although Sheridan's proposal met resistance, the Park was effectively expanded in 1891, when President Benjamin Harrison established the Yellowstone Timber Land Reserve east of the Park, and, a few years later, when the Teton Forest Reserve was added south of the Park.<sup>12</sup> Together, Yellowstone and the two forest reserves represented a significant national commitment to retaining these remote, mountainous lands in federal ownership, thus precluding further settlement on them.<sup>13</sup>

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<sup>9</sup> Yellowstone Organic Act, 16 U.S.C. §§ 21–22.

<sup>10</sup> ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 29–41 (4th ed. 2010).

<sup>11</sup> 1 AUBREY L. HAINES, THE YELLOWSTONE STORY 267–68 (1977).

<sup>12</sup> 2 AUBREY L. HAINES, THE YELLOWSTONE STORY 94–99 (1977).

<sup>13</sup> See ROBERT W. RIGHTER, CRUCIBLE FOR CONSERVATION: THE STRUGGLE FOR GRAND TETON NATIONAL PARK 20 (1982).

In 1916, following passage of the National Parks Organic Act,<sup>14</sup> the new National Park Service assumed management of Yellowstone. Park superintendent Horace Albright soon revived the park expansion idea, proposing a significant expansion toward the Jackson Hole country to protect the spectacular Teton mountain range and important wildlife habitat.<sup>15</sup> Local ranchers, who objected to any new roads in this wild country, as well as the Forest Service, whose lands were at risk, strongly opposed expansion, however. A furor erupted within Wyoming after writer Emerson Hough endorsed the expansion proposal, writing: “Give her Greater Yellowstone and she will inevitably become Greater Wyoming.”<sup>16</sup> When the Wyoming Legislature came out against the proposal, it was doomed. Though Albright’s idea failed, the episode introduced the phrase “Greater Yellowstone” to describe the region and laid the groundwork for the eventual establishment of Grand Teton National Park.

Over the years, Yellowstone National Park has assumed a leading role in the evolution of national park resource management policy, often sparking controversy with Wyoming and neighboring communities. Following the 1963 Leopold report,<sup>17</sup> which advocated restoring natural processes and allowing nature to take its course in national parks with minimal human manipulation, Yellowstone managers soon stopped feeding park bears, allowed remote wildfires to burn, and started promoting wolf restoration.<sup>18</sup> These changes in park resource management policy provoked opposition from Wyoming officials, highlighted by their powerful adverse reaction to the 1988 Yellowstone fires.<sup>19</sup> When park officials proposed closing Fishing Bridge campground to protect critical grizzly bear habitat, the town of Cody objected and, assisted by the Wyoming congressional delegation, blocked the proposal.<sup>20</sup> The State strenuously resisted federal efforts to reintroduce wolves to the Park,<sup>21</sup> while also arguing

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<sup>14</sup> Ch. 408, § 1, 39 Stat. 535 (Aug. 25, 1916) (codified at 54 U.S.C. §§ 100101–104909).

<sup>15</sup> RUNTE, *supra* note 10, at 110–12.

<sup>16</sup> 2 HAINES, *supra* note 12, at 322–23.

<sup>17</sup> A.S. Leopold et al., *Wildlife Management in the National Parks* (1963), reprinted in AMERICA’S NATIONAL PARKS: THE CRITICAL DOCUMENTS 237 (Lary M. Dilsaver ed., 1994).

<sup>18</sup> RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS 243–61 (1997).

<sup>19</sup> ROCKY BARKER, SCORCHED EARTH: HOW THE FIRES OF YELLOWSTONE CHANGED AMERICA 209–10 (2005).

<sup>20</sup> PAUL SCHULLERY, SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS 187–90 (1997).

<sup>21</sup> HANK FISCHER, WOLF WARS: THE REMARKABLE INSIDE STORY OF THE RESTORATION OF WOLVES TO YELLOWSTONE 104–05 (1995). In addition to resisting the reintroduction of wolves into Yellowstone National Park, Wyoming has both resisted their expansion into additional parts of the state and strongly advocated for their removal as listed endangered species. See Martha Williams, *Lessons from the Wolf Wars: Recovery v. Delisting Under the Endangered Species Act*, 27 FORDHAM ENV’T L. REV. 106, 136–42 (2015). Wyoming wolves were delisted from the endangered species list in 2017 following a decision by the D.C. Circuit upholding the delisting effort. Reinstatement of Removal of Federal Protections for Gray Wolves in Wyoming, 83 Fed. Reg. 20,284 (May 1, 2017).



to remove Yellowstone grizzly bears from the federal endangered species list.<sup>22</sup> When the Park sought to outlaw winter snowmobiling due to its environmental impacts, the State joined litigation seeking to block the proposal.<sup>23</sup> Moreover, as the Greater Yellowstone Ecosystem concept took hold, the State strongly opposed a federal interagency vision process responding to calls for managing the Park as part of the larger landscape.<sup>24</sup>

*b. Grand Teton*

Situated just south of Yellowstone, Grand Teton National Park was born amidst prolonged controversy, pitting state and local interests against the National Park Service and conservationists.<sup>25</sup> In 1916, as noted, when the Park Service expressed interest in expanding Yellowstone southward to the Tetons, local residents, supported by the Wyoming Legislature and the U.S. Forest Service, stopped the idea in its tracks. Soon thereafter, recognizing the need for further conservation, Wyoming congressman Frank Mondell introduced legislation to convert the scenic Teton range into a national park, but his bill ultimately failed due to opposition in Idaho.<sup>26</sup> This local opposition soon receded, however, as residents recognized the tourism potential of a national park designation and grew increasingly concerned that development pressures would alter the area's scenic splendor. In 1929, Wyoming Senator John Kendrick finally succeeded in passing congressional legislation to establish Grand Teton National Park.<sup>27</sup> Kendrick's bill, however, only covered the stunning Teton mountain range and nearby lakes, omitting the front country that was being converted into homesteads and ranches.

Yellowstone Superintendent Horace Albright, quite familiar with the Jackson Hole country, was well aware of the threat encroaching development posed to the foreground landscape. In fact, Albright had already enlisted philanthropist John D. Rockefeller, Jr., to surreptitiously purchase—through the Snake River Land Company—private acreage in the area with the intention of incorporating it into the Park. Rockefeller obliged and, over a fifteen-year time span, quietly acquired roughly 32,000 acres.<sup>28</sup> When Rockefeller's identity was revealed,

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<sup>22</sup> *Crow Indian Tribe v. United States*, 965 F.3d 662 (9th Cir. 2020).

<sup>23</sup> *Int'l Snowmobile Manuf. Ass'n v. Norton*, 304 F. Supp. 2d 1278 (D. Wyo. 2004); see MICHAEL J. YOCHIM, *YELLOWSTONE AND THE SNOWMOBILE: LOCKING HORNS OVER NATIONAL PARK USE* (2009).

<sup>24</sup> BARKER, *supra* note 19, at 227–28.

<sup>25</sup> See ROBERT W. RIGHTER, *CRUCIBLE FOR CONSERVATION: THE STRUGGLE FOR GRAND TETON NATIONAL PARK* (1982).

<sup>26</sup> 2 HAINES, *supra* note 12, at 322.

<sup>27</sup> *Id.* at 329–30.

<sup>28</sup> See RIGHTER, *supra* note 13, at 42–65 (detailing the Rockefeller land purchase effort).

however, a local uproar ensued, prompting public hearings over his involvement as well as the Park Service's complicity.<sup>29</sup> Nonetheless, Wyoming officials supported a 1934 national park bill, but it floundered due to several concerns including a Teton County tax reimbursement provision, elk management, livestock grazing, and the idea of incorporating man-made Jackson Lake into a national park.<sup>30</sup>

The park expansion plans persisted, however. With the matter at a standstill and Rockefeller growing impatient, President Franklin Roosevelt acted in 1943, invoking the Antiquities Act to establish a 221,000-acre Jackson Hole National Monument, which included Rockefeller's landholdings.<sup>31</sup> Roosevelt's action created a statewide backlash framed in state sovereignty terms.<sup>32</sup> Jackson Hole residents, led by rancher Cliff Hansen and others, loudly protested the President's action, gaining national attention with an illegal cattle drive—featuring popular actor Wallace Beery—across the newly protected lands.<sup>33</sup> At Wyoming's behest, Congress passed a bill abolishing the new monument, but Roosevelt promptly vetoed it.<sup>34</sup> The State of Wyoming then sued to abolish the Monument, asserting it failed to satisfy Antiquities Act standards. This too faltered when the Wyoming federal district court ruled the expansive new monument appropriately embraced "objects of historic and scientific interest."<sup>35</sup>

Following World War II, the park expansion effort was finally completed. With tourism activity mounting in the area and local opposition waning, Congress expanded Grand Teton National Park by incorporating the monument lands. Wyoming and Teton County extracted significant concessions in the 1950 legislation, however. The final bill included provisions compensating the County for lost tax revenue over the ensuing twenty years, permitting elk hunting inside the expanded park, protecting existing grazing privileges on park lands,<sup>36</sup> and, separately, exempting the State of Wyoming from the Antiquities Act.<sup>37</sup>

Today, the 310,000-acre Grand Teton National Park occupies a central role in Wyoming's identity. The Park supports a flourishing tourism industry in the Town of Jackson and serves as a magnet for wealthy Americans seeking an outdoors

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<sup>29</sup> *Id.* at 62–84.

<sup>30</sup> *Id.* at 86–94; JACKIE SKAGGS, CREATION OF GRAND TETON NATIONAL PARK (A THUMBNAILED HISTORY) (2000), [www.nps.gov/grte/planyourvisit/upload/creation.pdf](http://www.nps.gov/grte/planyourvisit/upload/creation.pdf) [<https://perma.cc/T8H3-SXAY>].

<sup>31</sup> Veto of a Bill Abolishing the Jackson Hole National Monument, President Franklin D. Roosevelt, Presidential Proclamation 2578 (March 15, 1943).

<sup>32</sup> T.A. LARSON, HISTORY OF WYOMING 498–99 (1965).

<sup>33</sup> RIGHTER, *supra* note 13, at 114–16, 142–43; SKAGGS, *supra* note 30.

<sup>34</sup> RIGHTER, *supra* note 13, at 117–19; SKAGGS, *supra* note 30.

<sup>35</sup> Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).

<sup>36</sup> 16 U.S.C. § 406d, § 673c.

<sup>37</sup> 16 U.S.C. § 431a.

lifestyle in the shadow of the Tetons, making the county the wealthiest per capita in the nation.<sup>38</sup> Shortly before his death in 2009, Cliff Hansen notably observed that he was glad to have lost the national park fight.<sup>39</sup>

## 2. Wilderness

The expansive national forest lands within Wyoming harbor fifteen congressionally designated wilderness areas covering more than three million acres.<sup>40</sup> Wyoming, however, has had an uneasy relationship with the concept of federally designated and protected wilderness. During the late 1950s, when the first wilderness bill surfaced in Congress, Wyoming Senator Joseph O'Mahoney sounded a note of caution. He not only feared a “lock up” of mineral and timber resources within wilderness areas, but firmly believed that Congress should have final wilderness designation authority.<sup>41</sup> His concerns eventually prevailed. In the Wilderness Act of 1964,<sup>42</sup> Congress vested itself with wilderness designation authority and allowed mineral development to continue in wilderness areas for another nineteen years.<sup>43</sup> The Act also created four “instant” wilderness areas in Wyoming's national forests: the Bridger, Teton, North Absaroka, and Washakie Wilderness areas—all of which the Forest Service already protected as administrative wilderness areas.<sup>44</sup> During the 1970s, Congress added three more Wyoming wilderness areas: the Fitzpatrick, Savage Run, and Absaroka-Beartooth.<sup>45</sup> Then in 1984, Congress passed the Wyoming Wilderness Act—one of twenty statewide wilderness bills enacted that year—and established eight more wilderness areas throughout the state.<sup>46</sup>

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<sup>38</sup> JUSTIN FARRELL, BILLIONAIRE WILDERNESS: THE ULTRA-WEALTHY AND THE REMAKING OF THE AMERICAN WEST 33–34 (2020) (noting Teton County is the wealthiest per capita in the nation).

<sup>39</sup> Jeremy Pelzer, *Hansen Fought Grand Teton Expansion, Then Became Supporter*, CASPER STAR TRIB. (Oct. 22, 2009), trib.com/news/state-and-regional/hansen-fought-grand-teton-expansion-then-became-supporter/article\_930e18f9-534f-5d39-b044-a9ec57a07c47.html [https://perma.cc/2QXR-VQQV].

<sup>40</sup> See *Acreage by State*, WILDERNESS CONNECT FOR PRACS., wilderness.net/practitioners/wilderness-areas/summary-reports/acreage-by-state.php (last visited Apr. 20, 2021) [https://perma.cc/5LVQ-MS82] (putting Wyoming wilderness acreage at 3,067,728 acres, covering about five percent of the State).

<sup>41</sup> MARK HARVEY, WILDERNESS FOREVER: HOWAD ZAHNISER AND THE PATH TO THE WILDERNESS ACT 212 (2007).

<sup>42</sup> 16 U.S.C. §§ 1131–1136.

<sup>43</sup> *Id.* §§ 1131(a), 1133(d)(3).

<sup>44</sup> *Id.* § 1132(a); Dee V. Benson, *The Wilderness Act of 1964: Where Do We Go From Here?*, 1975 BYU L. REV. 727, 757 (1975).

<sup>45</sup> Pub. L. No. 94-557, 90 Stat. 2633 (1976) (Fitzpatrick); Pub. L. No. 95-237, 92 Stat. 42 (1978) (Savage Run); Pub. L. No. 95-249, 92 Stat. 162 (1978) (Absaroka-Beartooth).

<sup>46</sup> Pub. L. No. 98-550, 98 Stat. 2807 (1984). These new wilderness areas were: Cloud Peak, Platte River, Huston Park, Encampment River, Popo Agie, Gros Ventre, Jedediah Smith, and

Congress enacted The Wyoming Wilderness Act of 1984 amidst a particularly contentious time. The Reagan administration, with Wyomingite James Watt serving as Secretary of the Interior, embarked upon an all-out energy development agenda on the public lands focused on the Rocky Mountain Overthrust Belt. Aware that the United States General Accounting Office had identified 1.7 million acres of existing or potential wilderness areas in Wyoming as likely valuable for oil and gas, Watt sought to open wilderness areas to mineral leasing, provoking strong opposition both locally and nationally.<sup>47</sup> Responding to a drilling proposal located in the Gros Ventre mountains, Wyoming Governor Ed Herschler observed that “we ought to leave it alone.”<sup>48</sup> After receiving 100 letters opposing leasing in the Washakie Wilderness Area, Congressman Dick Cheney, author of the Wyoming wilderness bill, commented:

There is a general feeling in my state that much as we would like the economic benefits from the energy resources in the Washakie, we’d like even more to save a few acres and declare them off limits—Yellowstone, the Grand Teton, and the wilderness areas around the parks, which account for less than eight percent of the state.<sup>49</sup>

The Act that eventually emerged created eight new wilderness areas, prohibited oil and gas leasing in established wilderness areas, opened—or “released”—three million acres of potential wilderness land to multiple use management, and prohibited buffer zones around wilderness areas.<sup>50</sup> Plainly a compromise, the Wyoming Wilderness Act was the only wilderness bill passed in 1984 “in which the final acreage [protected] was higher than the State delegation had wanted.”<sup>51</sup>

Since then, Congress has not designated any additional wilderness areas in Wyoming, and wilderness protection remains a highly contested issue. Under

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Winegar Hole, bringing the total of Wyoming wilderness acreage to more than three million acres. *Wilderness Areas of the United States*, WILDERNESS CONNECT, [umontana.maps.arcgis.com/apps/webappviewer/index.html?id=a415bca07f0a4bee9f0e894b0db5c3b6](http://umontana.maps.arcgis.com/apps/webappviewer/index.html?id=a415bca07f0a4bee9f0e894b0db5c3b6) (last visited Nov. 14, 2020) [<https://perma.cc/N36T-4C4M>].

<sup>47</sup> Lawrence J. Cwik, *Oil and Gas Leasing on Wilderness Lands: The Federal Land Policy and Management Act, the Wilderness Act, and the United States Department of the Interior, 1981-1983*, 14 ENVTL. L. 585, 589, 602–03, 606 (1984).

<sup>48</sup> *Id.* at 609.

<sup>49</sup> Philip Shabecoff, *Debate over Wilderness Area Leasing Intensifies*, N.Y. TIMES (Feb. 15, 1982), [www.nytimes.com/1982/02/15/us/debate-over-wilderness-area-leasing-intensifies.html](http://www.nytimes.com/1982/02/15/us/debate-over-wilderness-area-leasing-intensifies.html); see also William E. Schmidt, *U.S. Considers Land Preserves for Oil Drilling*, N.Y. TIMES (Aug. 30, 1981), [www.nytimes.com/1981/08/30/us/us-considers-land-preserves-for-oil-drilling.html](http://www.nytimes.com/1981/08/30/us/us-considers-land-preserves-for-oil-drilling.html) (“Opposition Comes From Wyoming: As part of the Forest Service study, more than 1,400 statements, letters and petition signatures have been put in the record, opposing leasing in the Washakie.”).

<sup>50</sup> Pub. L. No. 98-550 §§ 203, 401, 504, 98 Stat. 2807, 2810–2813.

<sup>51</sup> Dennis Morrow Roth, *The Wilderness Movement and the National Forests: 1980–1984*, NATIONAL FOREST SERVICE: FOREST SERVICE HISTORY SERIES 54 (1988).

the Federal Land Policy and Management Act,<sup>52</sup> the BLM identified forty-three Wilderness Study Areas (WSAs) on its lands in Wyoming, while three WSAs remain on national forests in the state, covering a total of 706,300 acres. These WSAs enjoy strong legal protection, requiring agency officials to maintain their wilderness character.<sup>53</sup> A recent Wyoming Public Lands Initiative—sponsored by the Wyoming County Commissioners Association—sought to bring citizens together county by county in a collaborative effort to resolve the status of these WSAs, but the effort has faltered without final recommendations.<sup>54</sup> Nevertheless, more than three million acres of national forest in the state are protected under the Forest Service’s roadless area rule, which prohibits new road construction or industrial activities on these lands.<sup>55</sup> Although Wyoming challenged the rule in federal court as creating *de facto* wilderness, the Tenth Circuit ruled otherwise.<sup>56</sup> Moreover, in 2009, responding to a diverse statewide coalition, Congress adopted the Wyoming Range Legacy Act,<sup>57</sup> which blocked further oil and gas leasing in this locally popular mountain range adjacent to the Pinedale Anticline oil and gas field. Thus, while formal wilderness protection has proven elusive during the past thirty-six years, most of Wyoming’s remaining wilderness-worthy lands are protected from industrial activity, evidence that preservation values have a substantial foothold in the state.

### 3. *Bear Lodge (“Devils Tower”) National Monument*<sup>58</sup>

In September 1906, President Theodore Roosevelt invoked the recently passed Antiquities Act to proclaim Devils Tower National Monument (Tower) in remote northeastern Wyoming as the nation’s first national monument.<sup>59</sup> Earlier,

<sup>52</sup> 43 U.S.C. § 1782(a).

<sup>53</sup> *Id.* § 1782(c) (imposing a non-impairment standard governing management of WSAs); *see also* State of Utah v. Andrus, 486 F. Supp. 995, 1003–05 (D. Utah 1979).

<sup>54</sup> Rebecca Worby, *Can Wyoming Learn from Utah’s Public Land Mistakes?*, 49(10) HIGH COUNTRY NEWS 5 (June 12, 2017); Angus Thuermer, Jr., *The Wyoming Public Lands Initiative Risks Collapse*, HIGH COUNTRY NEWS (Mar. 1, 2018), [www.hcn.org/articles/wilderness-tensions-mount-over-wilderness-study-areas-in-wyoming](https://www.hcn.org/articles/wilderness-tensions-mount-over-wilderness-study-areas-in-wyoming) [https://perma.cc/L397-6JXA].

<sup>55</sup> 36 C.F.R. pt. 294 (2020); ANN RIDDLE & ADAM VANN, CONGRESSIONAL RESEARCH SERVICE, FOREST SERVICE INVENTORIED ROADLESS AREAS 23 (2020).

<sup>56</sup> Wyoming v. U.S. Dep’t of Agric., 661 F.3d 1209 (10th Cir. 2011).

<sup>57</sup> Pub. L. No. 111-11, 123 Stat. 994 (2009) (included as part of the Omnibus Public Land Management Act of 2009). *See* FLORENCE R. SHEPARD & SUSAN L. MARSH, SAVING WYOMING’S HOBACK: THE GRASSROOTS MOVEMENT THAT STOPPED NATURAL GAS DEVELOPMENT (2016).

<sup>58</sup> Although Devils Tower National Monument is the official name applied to the tower, there have been numerous requests from tribal leaders to restore the name Bear Lodge. The State of Wyoming has consistently opposed those requests, *see, infra* note 66.

<sup>59</sup> Presidential Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906). A second national monument, Shoshone Caverns National Monument, was proclaimed by President William Howard Taft in 1909, but was delisted by Congress and turned over for local management following efforts by State and local advocates. *See* PHIL ROBERTS, CODY’S CAVE: NATIONAL MONUMENTS AND THE POLITICS OF PUBLIC LANDS IN THE 20TH CENTURY WEST (2012).

in 1892, at the urging of Wyoming Senator Francis Warren, federal officials had protected this remarkable 867-foot vertical rock formation by withdrawing it from settlement and designating it as a temporary forest reserve.<sup>60</sup> In 1916, the Park Service assumed responsibility for the ten-year old monument. Recognizing the Tower's unique tourism potential, local residents worked with the Park Service to secure federal funding for the road and bridge improvements needed to make the area more accessible. By the 1930s, the Tower had become a national tourist attraction, while also drawing early interest from climbers, who made the first ascent in 1937.<sup>61</sup> Since the end of World War II, visitation to the Tower has increased steadily and now supports several local businesses. Climbers too have flocked to the Tower, provoking controversy with Native communities with ties to the region.

In fact, long before this corner of Wyoming was settled, the Sioux and other Native peoples regularly visited the towering rock formation to practice their sacred rituals, including the Sun Dance.<sup>62</sup> Under the Fort Laramie Treaty of 1868, the Sioux Nations reserved the land surrounding the Tower, however, that agreement proved short-lived. As settlers flooded the region, the federal government soon reneged on the treaty and opened the area for settlement.<sup>63</sup> In 1876, Colonel Richard Dodge named Devils Tower, but he unfortunately misinterpreted its Indigenous name and conferred the Tower with a name Native peoples find offensive.<sup>64</sup> Although the Park Service recognized this error in 1995,<sup>65</sup> the State of Wyoming—concerned a name change to “Bear Lodge National Monument” might negatively affect regional tourism—has resisted any name change, even introducing congressional legislation to prevent it.<sup>66</sup>

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<sup>60</sup> RAY H. MATTISON, *FIRST 50 YEARS OF DETO*, NATIONAL PARK SERVICE 4 (1955), [www.nps.gov/deto/learn/historyculture/upload/First-50-Years-of-DETO-Ray-Mattison.pdf](http://www.nps.gov/deto/learn/historyculture/upload/First-50-Years-of-DETO-Ray-Mattison.pdf) [https://perma.cc/C8RJ-SQH7].

<sup>61</sup> *Id.* Actually, local residents first reached the summit in 1893 via a 350-foot ladder constructed for a celebratory Fourth of July event. *Id.* at 5–6.

<sup>62</sup> Joel Brady, “*Land Is Itself A Sacred, Living Being*”: *Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153, 165 (2000) (suggesting the Lakota have viewed the tower as a sacred site for 10,000–12,000 years (quoting Candy Hamilton, *One Man’s Rock Is Another’s Holy Site*, CHRISTIAN SCI. MONITOR 4 (June 12, 1996))); *Indian Religious Freedom at Devil’s Tower National Monument*, INDIAN L. RES. CTR., [indianlaw.org/projects/past\\_projects/cheyenne\\_river](http://indianlaw.org/projects/past_projects/cheyenne_river) (last visited Nov. 3, 2020) [https://perma.cc/9WJY-SQSH].

<sup>63</sup> MATTISON, *supra* note 60, at 3.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> NATIONAL PARK SERVICE, *FINAL CLIMBING MANAGEMENT PLAN/FINDING OF NO SIGNIFICANT IMPACT: DEVILS TOWER NATIONAL MONUMENT* 14 (Feb. 1995), [www.nps.gov/deto/planyourvisit/upload/DETO-FCMP-1995-accessible.pdf](http://www.nps.gov/deto/planyourvisit/upload/DETO-FCMP-1995-accessible.pdf) [https://perma.cc/YG99-2CSA].

<sup>66</sup> Dan Cepeda, *Debate Simmers Over Name of Devils Tower Monument in Wyoming*, CASPER STAR TRIB. (Oct. 7, 2016), [trib.com/news/state-and-regional/debate-simmers-over-name-of-devils-tower-monument-in-wyoming/article\\_a7864143-ea97-5560-a94c-addd66e4c533.html](http://trib.com/news/state-and-regional/debate-simmers-over-name-of-devils-tower-monument-in-wyoming/article_a7864143-ea97-5560-a94c-addd66e4c533.html) [https://

Meanwhile, as the Tower attracted more and more rock climbers, conflict emerged between them and Native peoples, who found their presence offensive during times when they practiced sacred rituals at the base of the monument. Litigation ensued pitting the climbers and local businesses against Tribal members and the Park Service.<sup>67</sup> An eventual settlement established a voluntary no-climbing policy during the month of June.<sup>68</sup> This uneasy truce has not notably disrupted visitation or local economic activity, but it has left Tribal religious practitioners at the mercy of the climbing community. Although the Tower endures as an important protected natural landmark, the region's Indigenous populace remains at odds with the State and others over the monument's name and proper management.

#### 4. *Refuges & Rivers*

Federal legal protection extends to two other important elements of Wyoming's natural heritage: wildlife refuges and rivers. The state boasts seven national wildlife refuges, the National Elk Refuge (Refuge) in Jackson being the most prominent and one of the earliest, having been established in 1912.<sup>69</sup> As we shall see, the Refuge is also the most contentious, as reflected in litigation between the State and federal officials over vaccinating elk for disease control purposes.<sup>70</sup> Under the 1968 Wild and Scenic Rivers Act,<sup>71</sup> Wyoming also boasts two protected river segments: 20.5 miles of the Clarks Fork,<sup>72</sup> and 413.5 miles of the Snake River Headwaters.<sup>73</sup> Although Wyoming's congressional delegation, fearing accompanying federal limitations, opposed the original Wild and Scenic Rivers legislation,<sup>74</sup> both river segments were subsequently added to the system

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perma.cc/6D6J-T4X8]; Nick Reynolds, *Lummis Bill Would Block Devils Tower Name Change*, CASPER STAR TRIB. (Mar. 26, 2021), trib.com/news/state-and-regional/lummis-bill-would-block-devils-tower-name-change/article\_2164cba3-82c0-5697-8e14-9ee99adacda6.html [https://perma.cc/452N-7S4U].

<sup>67</sup> Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999).

<sup>68</sup> ROBERT B. KEITER, TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA 130–32 (2013).

<sup>69</sup> See 16 U.S.C. § 673. See generally BRUCE L. SMITH ET AL., IMPERFECT PASTURE: A CENTURY OF CHANGE AT THE NATIONAL ELK REFUGE IN JACKSON HOLE, WYOMING (2004) (reviewing the history of the National Elk Refuge). The additional national wildlife refuges include: Bamforth National Wildlife Refuge, Cokeville Meadows National Wildlife Refuge, Hutton Lake National Wildlife Refuge, Mortenson Lake National Wildlife Refuge, Pathfinder National Wildlife Refuge, and Seedskaadee National Wildlife Refuge.

<sup>70</sup> See *infra* Section IV.A. Litigation pursued by conservation groups to stop the Elk Refuge's artificial winter feeding program has also involved the State, which intervened on behalf of the Refuge because it also maintains controversial elk winter feed grounds across western Wyoming. *Defenders of Wildlife v. Salazar*, 651 F.3d 112 (D.C. Cir. 2011).

<sup>71</sup> Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271–1287).

<sup>72</sup> Pub. L. No. 101-628, 104 Stat. 4509 (1990) (codified at 16 U.S.C. § 1274(a)(116)).

<sup>73</sup> Pub. L. No. 111-11, 123 Stat. 1147 (2009) (codified at 16 U.S.C. § 1274(a)(206)).

<sup>74</sup> TIM PALMER, WILD AND SCENIC RIVERS OF AMERICA 26 (1993).

with state approval after proponents demonstrated that their protection would not affect development opportunities or nearby private landowners.<sup>75</sup> While these legally protected wildlife refuges and river corridors extend the federal presence in Wyoming, they also further enrich the State's preservation legacy.

In sum, federal land preservation has a lengthy, important, and often contentious history in Wyoming. Roughly 8.8 million acres, or about thirty percent of federal lands in the State, enjoy some form of federal legal protection limiting their use. These lands—long recognized for their scenic, recreation, and wildlife values—are now also being managed as ecological entities connected to the surrounding landscape. In addition, Wyoming has long promoted these protected lands for tourism, which has become a vital sector of the State's economy, particularly in the Greater Yellowstone area. Yet, despite their shared interests in these federally preserved lands, federal-state conflicts over resource management priorities and practices as well as jurisdictional authority still persist.<sup>76</sup>

## B. Multiple Use Lands

### 1. National Forests

Wyoming boasts the nation's first national forest: the 1.2-million-acre Yellowstone Timber Land Reserve, now known as the Shoshone National Forest. Established in 1891 by presidential decree soon after statehood,<sup>77</sup> the Reserve was initially well received in Wyoming. As more forest reserves were created, however, residents began to resent the limitations imposed on livestock grazing and other uses. Congress soon responded with legislation first defining forest reserve purposes,<sup>78</sup> then creating the U.S. Forest Service to oversee them,<sup>79</sup> and finally removing the President's authority to create them.<sup>80</sup> By then, several

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<sup>75</sup> Whitney Royster, *Bill Leaves Out Some Waters*, CASPER STAR TRIB. (May 23, 2007), trib.com/news/state-and-regional/bill-leaves-out-some-waters/article\_4416a7b8-3700-5da0-b97f-21e2cdc08101.html [https://perma.cc/3CEV-63JX].

<sup>76</sup> See Nat'l Parks Conservation Ass'n v. U.S. Dep't of the Interior, 2017 WL 11368118 (D. Wyo. 2017), *aff'd* \_\_\_F.3d \_\_\_ (10th Cir. 2021) (affirming the State's jurisdiction over state and private inholdings within Grand Teton National Park, opening the door for state-sanctioned bison, wolf and possibly grizzly bear hunting on these lands); see also 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, 46–48 (2020).

<sup>77</sup> John Clayton, *Yellowstone Park, Arnold Hague and the Birth of National Forests*, WYOHISTORY.ORG (May 26, 2017), www.wyohistory.org/encyclopedia/yellowstone-park-arnold-hague-and-birth-national-forests [https://perma.cc/2UA3-AAL9]. See also *supra* note 12 and accompanying text.

<sup>78</sup> Organic Act of 1897, Sundry Civil Bill, ch. 2, § 1, 30 Stat. 34 (1897) (codified as 16 U.S.C. §§ 475–482).

<sup>79</sup> CHARLES F. WILKINSON, LAND AND RESOURCES PLANNING IN THE NATIONAL FORESTS 18 (1987).

<sup>80</sup> 34 Stat. 1269–71 (1907); see CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 126 (1992).



additional forest reserves had been established within Wyoming, which have since been consolidated into four principal national forests: the Shoshone, Bridger-Teton, Big Horn, and Medicine Bow. Westerners originally resented the new Forest Service's restrictive management policies and challenged its authority on state sovereignty grounds. In 1911, however, the United States Supreme Court upheld the federal government's right to reserve and regulate these new forest lands.<sup>81</sup>

Since then, national forest management policy has evolved considerably, prompting controversy in Wyoming and elsewhere. Until World War II, the Forest Service engaged in largely custodial management of its lands under multiple use principles.<sup>82</sup> This changed radically following World War II, when the agency prioritized timber production to meet burgeoning housing demands. A storm soon erupted in Wyoming and elsewhere over the agency's clearcutting practices.<sup>83</sup> Supported by Wyoming and other western states, Congress responded in 1976 by passing the National Forest Management Act,<sup>84</sup> which limited clearcutting and imposed other environmental requirements. Controversy over excessive logging persisted, however, until the federal courts eventually halted all logging in the Pacific Northwest to protect the diminutive northern spotted owl,<sup>85</sup> ending the era of timber dominance. Wyoming mills began closing and have remained closed.<sup>86</sup> During the 1980s, controversy surfaced over oil and gas activity on the Bridger-Teton and other forests. Congress reacted by giving the Forest Service veto power over leasing decisions,<sup>87</sup> while the federal courts imposed rigorous pre-leasing environmental review requirements on the agency.<sup>88</sup> Then, in 2009, responding to a diverse coalition of Wyoming citizens, Congress adopted the Wyoming Range Legacy Act,<sup>89</sup> effectively ending oil and gas activity on these scenic national forest lands. Today, wildlife and recreation have assumed greater

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<sup>81</sup> *Light v. United States*, 220 U.S. 523 (1911); *see also* *United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>82</sup> In 1960, Congress confirmed the Forest Service's *de facto* multiple use management policy with passage of the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528–531.

<sup>83</sup> *See* *Isaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975).

<sup>84</sup> 16 U.S.C. § 1604.

<sup>85</sup> *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991).

<sup>86</sup> CHELSEA P. MCIVER ET AL., U.S. FOREST SERVICE, WYOMING'S FOREST PRODUCTS INDUSTRY AND TIMBER HARVEST 13 (2010) (noting that between 1976 and 2010, the number of active mills in Wyoming declined from fifty to twelve mills). *See also* UNIV. WYO. RUCKELSHAUS INST., GOVERNOR'S TASK FORCE OF FORESTS, FINAL REPORT 2 (2015).

<sup>87</sup> Federal Onshore Oil and Gas Leasing Reform Act, 30 U.S.C. § 226(h).

<sup>88</sup> *See* *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988).

<sup>89</sup> Pub. L. No. 111-11, 123 Stat. 994 (2009); *see* FLORENCE R. SHEPARD & SUSAN L. MARSH, SAVING WYOMING'S HOBACK: THE GRASSROOTS MOVEMENT THAT STOPPED NATURAL GAS DEVELOPMENT (2016).

importance in Wyoming's national forests,<sup>90</sup> while wilderness protection is an ongoing flashpoint for controversy.

## 2. *BLM Lands*

The Bureau of Land Management is Wyoming's largest landowner, responsible for the federal public lands beyond its forests, parks, refuges, and monuments. The BLM manages eighteen million acres of public land in Wyoming, including more than half a million acres as wilderness study areas and forty-three million acres of subsurface minerals.<sup>91</sup> Most of the BLM's lands are open for livestock grazing, supporting nearly two million active animal unit months (AUMs) of use.<sup>92</sup> They are also available for mineral development, regularly leased and administered by the BLM for extraction of coal and fluid minerals, including significant mineral deposits underlying private surface lands.<sup>93</sup> Moreover, the BLM public lands include world class fishing in blue-ribbon rivers, diverse wildlife, and congressionally designated scenic and historic national trails including portions of the Mormon Pioneer, Oregon, California, Pony Express, and Continental Divide trails.<sup>94</sup>

### a. *Grazing*

During Wyoming's territorial days, the unenclosed federal lands were open to settlement and used as public rangelands, representing a "free and unregulated" commons available to "all people who had cattle they wished to graze."<sup>95</sup> The open-access rangelands were short lived, however. Overstocking was common,<sup>96</sup> creating economic and ecological pressures that prompted cattle ranchers to form informal grazing associations and to erect fenced enclosures that effectively

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<sup>90</sup> Keiter, *supra* note 76, at 103–04.

<sup>91</sup> *BLM Wyoming*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., [www.blm.gov/wyoming](http://www.blm.gov/wyoming) (last visited Apr. 7, 2021) [<https://perma.cc/98SE-UC9L>].

<sup>92</sup> *Wyoming Rangeland Management and Grazing*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., [www.blm.gov/programs/natural-resources/rangeland-and-grazing/rangeland-health/wyoming](http://www.blm.gov/programs/natural-resources/rangeland-and-grazing/rangeland-health/wyoming) (last visited Apr. 20, 2021) [<https://perma.cc/A42T-TJR2>].

<sup>93</sup> *BLM Wyoming Oil and Gas*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., [www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/wyoming](http://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/wyoming) (last visited Apr. 7, 2021) [<https://perma.cc/3FAS-32FP>].

<sup>94</sup> *National Scenic and Historic Trails*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., [www.blm.gov/programs/national-conservation-lands/national-scenic-and-historic-trails](http://www.blm.gov/programs/national-conservation-lands/national-scenic-and-historic-trails) (last visited Apr. 7, 2021) [<https://perma.cc/6MZB-8WKB>].

<sup>95</sup> George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management, II, The Commons and the Taylor Grazing Act*, 13 ENV'T L. 1, 4, 5 (1982); John S. Harbison, *Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459, 467 (1992); Buford v. Houtz, 133 U.S. 320, 327–28 (1890).

<sup>96</sup> Coggins & Lindberg-Johnson, *supra* note 95, at 25; Read v. Buckner, 514 F. Supp. 281, 282 (D. Mont. 1981) (providing some history of the open range).

privatized portions of the common range.<sup>97</sup> These monopoly-like arrangements<sup>98</sup> often resulted in “violent and sanguinary” confrontations,<sup>99</sup> and lacked any legal legitimacy.<sup>100</sup> Noting that the federal and state governments were not a party to these arrangements, and sensitive to the settlement pressures created by post-Civil War migration,<sup>101</sup> state courts in Wyoming and elsewhere invalidated them and upheld the custom of open and unrestricted access.<sup>102</sup> In 1885, Congress further reinforced this open range policy with passage of the Unlawful Inclosures Act, which prohibited enclosing public lands by fencing or otherwise.<sup>103</sup> In *Camfield v. United States*, the United States Supreme Court upheld the Act against a constitutional challenge, characterizing the United States as “proprietor” of the public lands vested with “the police power of the several states.”<sup>104</sup> The Court concluded that the federal government would be “recreant” to allow fences placed on private land to “monopolize” the lands and “drive intending settlers from the market.”<sup>105</sup> It also cautioned against “plac[ing] the public domain of the United States completely at the mercy of state legislation.”<sup>106</sup>

Eventually, the federal government assumed a more active role overseeing the public rangelands. Reflecting a growing preference for settlers and home builders, or as Theodore Roosevelt said the “homestead man,”<sup>107</sup> grazing policy transitioned from range to ranch by favoring landowners over transitory cattle grazers. In 1906, the new Forest Service implemented a permitting and fee system for livestock grazing in the national forests,<sup>108</sup> which the United States Supreme Court upheld against a constitutional attack.<sup>109</sup> Then, amidst the 1930s Great Depression and Dust Bowl, Congress passed the Taylor Grazing Act of 1934,<sup>110</sup> ending the era

<sup>97</sup> Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENV'T L. 721, 742–43 (2005).

<sup>98</sup> *Healy v. Smith*, 83 P. 583 (Wyo. 1906); Gary D. Libecap, *Government Policies on Property Rights in Land*, 60 AGRIC. HIST. 32, 41–45 (1986).

<sup>99</sup> Harbison, *supra* note 95, at 482–83; WILKINSON, *supra* note 80, at 86–87.

<sup>100</sup> *Healy*, 83 P. 583; Libecap, *supra* note 98, at 41–45.

<sup>101</sup> *Pub. Land Council v. Babbitt*, 529 U.S. 728, 731 (2000).

<sup>102</sup> *Buford v. Houtz*, 133 U.S. 320 (1890); *W. Wyo. Land & Live Stock Co. v. Bagley*, 279 F. 632 (8th Cir. 1922); *Healy*, 83 P. at 587 (noting that the government was not party to customs or arrangements giving the prior and better right to first occupants).

<sup>103</sup> Unlawful Enclosures Act of 1885, 43 U.S.C. §§ 1061–1066 (1885); WILKINSON, *supra* note 80, at 87.

<sup>104</sup> *Camfield v. United States*, 167 U.S. 518, 524, 525 (1897).

<sup>105</sup> *Id.* at 524.

<sup>106</sup> *Id.* at 526.

<sup>107</sup> Karen R. Merrill, *Whose Home on the Range?*, 27 W. HIST. Q. 433 (1996).

<sup>108</sup> LIMERICK, *supra* note 2, at 300.

<sup>109</sup> *Light v. United States*, 220 U.S. 523 (1911); *see also* *United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>110</sup> Pub. L. No. 73-482, 48 Stat. 1269 (1934).

of free and unregulated grazing on public lands.<sup>111</sup> Congress designed the Act to “stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range.”<sup>112</sup> It divided the public lands into grazing districts and established a leasing and permitting system for individual tracts deemed “chiefly valuable for grazing and raising forage crops,” giving priority to livestock owners who also owned adjoining property.<sup>113</sup> Although some Wyoming ranchers originally opposed the Act’s leasing provisions,<sup>114</sup> the State hosted the country’s first official grazing district: the Wyoming Grazing District Number 1, also known as the Ten Sleep District, which was organized in Basin, Wyoming and later moved to Worland.<sup>115</sup>

Despite the Taylor Grazing Act, rangeland conditions continued to deteriorate across Wyoming and other western states.<sup>116</sup> In 1946, Congress created the BLM to replace the General Land Office and Grazing Service and vested it with authority over the nation’s undesignated public lands. The BLM, however, proved unable to stop the downward trend in range conditions due in part to the influence ranching interests retained over the public range.<sup>117</sup> During the 1970s, concurrent with the ascendancy of new conservation and environmental values, Congress passed the Federal Land Management and Policy Act,<sup>118</sup> followed by the Public Rangelands Improvement Act,<sup>119</sup> giving BLM additional regulatory authority over livestock grazing to “improve the condition of public rangelands so that they become as productive as feasible.”<sup>120</sup> Western states and ranchers reacted angrily to these changes, launching the Sagebrush Rebellion, which sought, unsuccessfully, to assert state ownership of the federal public lands.<sup>121</sup> Other

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<sup>111</sup> WILKINSON, *supra* note 80, at 93.

<sup>112</sup> Pub. L. No. 73-482, 48 Stat. 1269 (1934); see *Public Lands Council v. Babbitt*, 529 U.S. 728, 733 (2000).

<sup>113</sup> 43 U.S.C. § 315.

<sup>114</sup> Russel L. Tanner, *Leasing the Public Range: The Taylor Grazing Act and the BLM*, WYOHistory.org, [www.wyohistory.org/encyclopedia/leasing-public-range-taylor-grazing-act-and-blm](http://www.wyohistory.org/encyclopedia/leasing-public-range-taylor-grazing-act-and-blm) (last visited Feb. 26, 2021) [<https://perma.cc/AAX8-PD7G>].

<sup>115</sup> THE PUBLIC LANDS FOUNDATION, *HISTORICAL RECORD OF THE OFFICES, MANAGERS AND ORGANIZATIONS OF THE U.S. BUREAU OF LAND MANAGEMENT, GRAZING SERVICE, GENERAL LAND OFFICE AND O&C REVESTED LANDS ADMINISTRATION: 1934-2012* (2012), [www.publicland.org/plf-archives/35\\_archives/documents/doc\\_1400\\_hist\\_record.pdf](http://www.publicland.org/plf-archives/35_archives/documents/doc_1400_hist_record.pdf) [<https://perma.cc/S2A4-ZSCF>].

<sup>116</sup> Debra Donahue, *Trampling the Public Trust*, 37 B.C. ENV’T AFFAIRS L. REV. 257 (2010).

<sup>117</sup> See Donahue, *supra* note 97, at 755–59.

<sup>118</sup> Pub. L. No. 94-529, 90 Stat. 2744 (1976) (codified at 43 U.S.C. §§ 1701–1784).

<sup>119</sup> Pub. L. No. 95-514, 92 Stat. 1803 (1978) (codified at 43 U.S.C. §§ 1901–1908).

<sup>120</sup> 43 U.S.C. § 1901.

<sup>121</sup> John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980); R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* (1993).

legislation, including the National Environmental Policy Act (NEPA) and the Endangered Species Act, injected environmental requirements into public land management, soon prompting more active BLM oversight as well as litigation over rangeland conditions.<sup>122</sup>

Range conditions on BLM lands continued to deteriorate, however, increasing tensions between western states, ranching interests, and federal land managers. During the 1990s, the Clinton administration released rangeland reform regulations that injected ecological standards into the BLM's range management and created Resource Advisory Councils that broke the stranglehold relationship ranchers had enjoyed with the BLM.<sup>123</sup> Wyoming-based litigation challenging the new regulations was rebuffed by the United States Supreme Court,<sup>124</sup> which sustained the regulations, thus giving the BLM greater authority over livestock grazing practices. Since then, a Bush administration effort to loosen the regulations was blocked by the federal courts,<sup>125</sup> while conservation groups and ranching organizations have filed numerous lawsuits over the BLM's range management policies,<sup>126</sup> emblematic of ongoing conflicts between grazing permittees, federal land managers, and environmental advocates.<sup>127</sup> Meanwhile, livestock numbers on Wyoming's public lands and elsewhere have declined significantly over the years.<sup>128</sup> Today, although ranching constitutes less than three percent of the state's

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<sup>122</sup> Nat. Res. Def. Council, Inc. v. Morton, 388 F. Supp. 829, 834 (D.D.C. 1974); Nat. Res. Def. Council v. Hodel, 618 F. Supp. 848 (D. Nev. 1985); Nat. Res. Def. Council v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985), *aff'd* 819 F.2d 927 (9th Cir. 1987); *see also* WILKINSON, *supra* note 80, at 98; George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENV'T L. 535, 554 (1982).

<sup>123</sup> 43 U.S.C. § 1739; 43 C.F.R. § 4180.2 (2020) (rangeland health standards); *id.* § 1784 (resource advisory councils).

<sup>124</sup> Pub. Lands Council v. Babbitt, 529 U.S. 728 (2000), *aff'g* 167 F.3d 1287 (10th Cir. 1999), *affirming in part and reversing in part*, Pub. Lands Council v. U.S. Dep't of the Interior Secretary, 929 F. Supp. 1436 (D. Wyo. 1996).

<sup>125</sup> Western Watersheds Project v. Kraayenbrink, 632 F.3d 472 (9th Cir. 2011), *aff'g in part and remanding in part* 538 F. Supp. 2d 1302 (D. Idaho 2008).

<sup>126</sup> *See, e.g.*, Western Watersheds Project v. Bureau of Land Mgmt., 721 F.3d 1264 (10th Cir. 2013); Western Watersheds Project v. Bennett, 392 F. Supp. 2d 1217 (D. Idaho 2005); Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001).

<sup>127</sup> Western Watersheds Project v. Bernhardt, 468 F. Supp. 3d 29 (D.D.C. 2020); *see, e.g.*, *BLM Announces Outcome-Based Grazing Projects for 2018*, U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MGMT. (Mar. 23, 2018), [www.blm.gov/press-release/blm-announces-outcome-based-grazing-projects-2018](https://www.blm.gov/press-release/blm-announces-outcome-based-grazing-projects-2018) [<https://perma.cc/U9LS-PK42>].

<sup>128</sup> CONG. RES. SERV., STATISTICS ON LIVESTOCK GRAZING ON FEDERAL LANDS: FY 2002 TO FY 2016 at 9 (2017) (noting that livestock forage consumption on BLM lands—measured by Animal Units Months (AUMs)—declined by “about 52.2% from the 1954 level of 18.2 million AUMs”); *see also* Robert Beschta et al., *Adapting to Climate Change on Western Public Lands: Addressing the Ecological Effects of Domestic, Wild, and Feral Ungulates*, 51 ENVTL. MGMT. 474, 478 (fig. 2) (2013) (showing a notable decline in BLM grazing from 1950–2010).

economy,<sup>129</sup> the ranching community continues to exert considerable influence over BLM range management decisions and over Wyoming politics.<sup>130</sup>

*b. Minerals*

Wyoming is blessed with rich mineral resources. In open pit coal mines, grasslands peel back to reveal coal seams thicker than most buildings in the state are tall. More than a thousand feet underground, hundreds of miles of tunnels and conveyor belts carry trona to the surface to be processed and exported worldwide. Pumpjacks rise and lower in the oil and natural gas fields, as they have for more than a century near Casper, and super-triple drilling rigs drive horizontal wells in unconventional fields near Pinedale and Cheyenne. As a result of this abundance, Wyoming today produces more natural gas from federal leases than any other state and is the largest coal producer and net energy supplier in the United States.<sup>131</sup> Crossing property lines and political boundaries, development of these resources yields tremendous wealth, yet also significantly impacts local communities, wildlife, and the environment.

Exploration of Wyoming's mineral resources began as early as 1863 when an unnamed explorer found tar seeps and oil springs along the Popo Agie River.<sup>132</sup> Over the next forty years, prospectors discovered oil and filed claims in the Salt Creek Field under the mining laws, which declared mineral deposits in unappropriated federal lands "free and open to exploration and purchase."<sup>133</sup> The first "boom" occurred when the Petroleum Maatschappij Salt Creek Company drilled the Big Dutch No. 1 into the Salt Creek Dome near Midwest, Wyoming in October 1908.<sup>134</sup> Producing 600 barrels of oil per day, the "headline-making"<sup>135</sup> well

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<sup>129</sup> Debra Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENV'T L. 721, 730 (2005) (stating that "all agricultural activities [in Wyoming and Idaho] contribute only two to three percent of the states' gross products"). See also Mark N. Salvo, *The Declining Importance of Public Lands Ranching in the West*, 19 PUB. L. & RES. L. REV. 103, 107 (1998) (describing the agricultural sector in western state economies).

<sup>130</sup> SAM WESTERN, PUSHED OFF THE MOUNTAIN, SOLD DOWN THE RIVER: WYOMING'S SEARCH FOR ITS SOUL 10–11 (2002); DEBRA DONAHUE, THE WESTERN RANGE REVISITED 288 (2000).

<sup>131</sup> *Wyoming: State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN., [www.eia.gov/state/analysis.php?sid=WY](http://www.eia.gov/state/analysis.php?sid=WY) (last visited Nov. 19, 2020) [<https://perma.cc/4LGJ-GJ5D>].

<sup>132</sup> PHIL ROBERTS, THE OIL BUSINESS IN WYOMING, WYOHISTORY.ORG, [www.wyohistory.org/encyclopedia/oil-business-wyoming](http://www.wyohistory.org/encyclopedia/oil-business-wyoming) (last visited Nov. 19, 2020) [<https://perma.cc/V8YF-S9LR>].

<sup>133</sup> 30 U.S.C. § 22.

<sup>134</sup> CARROLL H. WEGEMAN, THE SALT CREEK OIL FIELD: WYOMING, U.S. GEOLOGICAL SURV. & U.S. DEP'T OF THE INTERIOR (1918), [pubs.usgs.gov/bul/0670/report.pdf](https://pubs.usgs.gov/bul/0670/report.pdf) [<https://perma.cc/ASJ9-2QFF>].

<sup>135</sup> *First Wyoming Oil Wells: Petroleum Pioneers*, AM. OIL AND GAS HIST. SOC'Y, [www.aoghs.org/petroleum-pioneers/first-wyoming-oil-well/#:~:text=Discovered%20in%201908%2C%20Wyoming's%20giant,more%20remains%20in%20the%20ground](http://www.aoghs.org/petroleum-pioneers/first-wyoming-oil-well/#:~:text=Discovered%20in%201908%2C%20Wyoming's%20giant,more%20remains%20in%20the%20ground) (last visited Nov. 19, 2020) [<https://perma.cc/R4CX-RY5U>].

spurred a flurry of exploration. The result was “international corporate struggles, bitter claim disputes, unbelievable fraud, and wild political machinations” such that one business historian argued that “duplicity was the handmaiden of enterprise.”<sup>136</sup> The glut of private claims also raised concerns over energy security. The chief of the United States Geologic Survey wrote that “the government will be required to repurchase the very oil . . . that it has [previously] practically given away.”<sup>137</sup> To stop the privatization and exhaustion of valuable public resources, in 1909 President Taft issued an executive order withdrawing lands in the Salt Creek Field and additional land in California from further private entry.<sup>138</sup> “By a stroke of the pen, President Taft had put many millions of acres of federal land off-limits to the application of mining laws that gave industry free-reign.”<sup>139</sup>

Western interests perceived the withdrawal of land from private mineral entry as unconstitutional federal overreach.<sup>140</sup> As contemporary law professor, William E. Colby, wrote, the “lawyers of the West” almost universally agreed the order was invalid.<sup>141</sup> Doubting the validity of presidential withdrawals, oil operators remained on existing claims and asserted new claims after the presidential order. The federal government filed a bill of equity against the Midwest Company for oil extracted pursuant to one such claim. Although originally dismissed by the Wyoming federal district court, the case eventually reached the United States Supreme Court in *United States v. Midwest Oil Company*.<sup>142</sup> The Court upheld President Taft’s withdrawal, based on congressional acquiescence, a history of executive withdrawals, the lack of private injury, and the possibility of congressional reversal. Justice Van Devanter, the sole Justice ever to have come from Wyoming,<sup>143</sup> joined in a vigorous dissent arguing that the withdrawal was unique in its aim to withdraw from and suspend “the operation of the law . . . at least until a [different system of public land disposal] expressed by [the President] could be considered by the Congress.”<sup>144</sup>

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<sup>136</sup> Gene M. Gressley, *The French, Belgians, and Dutch Come to Salt Creek*, 44 BUS. HIST. REV. 498 (1970).

<sup>137</sup> *United States v. Midwest Oil Co.*, 236 U.S. 459, 466–67 (1915).

<sup>138</sup> *See id.*

<sup>139</sup> John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 296 (2001).

<sup>140</sup> J. Leonard Bates, *The Midwest Decision, 1915: A Landmark in Conservation History*, 51 PAC. NW Q. 26 (1960).

<sup>141</sup> William E. Colby, *The New Public Land Policy with Special Reference to Oil Lands*, 3 CAL. L. REV. 285 (1915).

<sup>142</sup> *Midwest Oil*, 236 U.S. 459.

<sup>143</sup> *Willis Van Devanter*, OYEZ, [www.oyez.org/justices/willis\\_van\\_devanter](http://www.oyez.org/justices/willis_van_devanter) (last visited Apr. 7, 2021) [<https://perma.cc/M92R-FCNV>].

<sup>144</sup> *Midwest Oil*, 236 U.S. at 512 (Day, J., dissenting).

Taft's order, and the Court's subsequent decision in *Midwest Oil*, reflected a pivot from a period of public land policy defined by capture, privatization, and disposal, towards one that advanced conservation by preventing private rights from ripening—a shift that, at the time, did not comport with Western state interests. In response, “oilmen, lawyers, and politicians in the West responded . . . with the greatest indignation at their treatment.”<sup>145</sup> In a statement that may seem particularly prescient in light of current conflicts, Senator Clarence D. Clark asserted that the *Midwest Oil* decision would put “a stop to the largest and greatest industry” in Wyoming.<sup>146</sup> Deprived of the patents they had previously sought, and hamstrung by a Court dominated “by a strong public sentiment through the eastern section” of the country, oil interests throughout the West turned to Congress, “piteously pleading” for the right to lease oil in public lands.<sup>147</sup> Those in the West, Wyoming's Senator Walsh declared, had “suffered most grievously by the abuse of the power of the executive officers,” such that “the least suggestion” of further withdrawals even for “the most necessary public purposes throws [Westerners] into a state of panic.”<sup>148</sup> In contrast to the shock experienced by oil men, the decision was heralded as a landmark for conservation leaders.<sup>149</sup> *Midwest Oil* compelled a compromise by “forc[ing] nearly all to accept the idea of leasing as the way out of an impasse” and thus paving the way for progressive conservation policy and administrative regulation of public mineral resources.<sup>150</sup> The Mineral Leasing Act, passed in 1920, later expressly withdrew oil, gas, coal and other fuel minerals from location under the mining laws and established the framework for the leasing system still in place today.<sup>151</sup>

Although the Federal Land Policy and Management Act later revoked the implied executive authority for withdrawing lands,<sup>152</sup> the *Midwest Oil* decision remains relevant to understanding state-federal conflicts and compromise regarding federal lands. Illustrating “how all three branches often interrelate

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<sup>145</sup> Bates, *supra* note 140, at 31.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 31–32 (quoting Senator Walsh to Senator Charles B. Henderson, Sept. 2, 1919, Thomas J. Walsh Papers, Library of Congress).

<sup>148</sup> J. LEONARD BATES, *THE ORIGINS OF TEAPOT DOME: PROGRESSIVES, PARTIES, AND PETROLEUM 1909-1921*, 56 (1963).

<sup>149</sup> *Id.* at 57.

<sup>150</sup> Bates, *supra* note 140, at 33.

<sup>151</sup> Mineral Leasing Act, ch. 85, § 1, 41 Stat. 437 (1920) (current version codified at 30 U.S.C. §§ 181–196); Laura Lindley & Robert C. Mathes, *Formal and De Facto Federal Land Withdrawals and Their Impacts on Oil and Gas and Mining Developments in the Western States*, in 48 *ROCKY MTN. MIN. L. INST.* § 25.01 (2002).

<sup>152</sup> Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 *VA. L. REV. ONLINE* 55 (2017); Federal Land Policy and Management Act, 43 U.S.C.A. §§ 1701–1782 (2020).



in the public lands context,”<sup>153</sup> *Midwest Oil* established protective presidential powers over public lands within the domain of acquiescence,<sup>154</sup> and broad discretion for liberal executive interpretations of withdrawal statutes.<sup>155</sup> Despite strong state and Western opposition, *Midwest Oil* also established the President’s “inherent authority to shape public rights in property,”<sup>156</sup> particularly towards “husbanding the resources of the national lands rather than exploiting them.”<sup>157</sup> This conservation precedent has allowed “the Executive branch to save countless other [mineral and non-mineral] acres from various forms of despoilation.”<sup>158</sup> This aspect of the decision may have continued relevance to questions regarding agency and executive authority over surface-use activities.<sup>159</sup>

In the one hundred years since the passage of the Mineral Leasing Act, there have been numerous other examples of adversity and cooperation between state and federal interests regarding the disposition of federal mineral interests, the extent of state regulatory authority over federal lands,<sup>160</sup> and the proper balance between conservation and commercial use.<sup>161</sup> Predictably, the license *Midwest Oil* provided to the executive branch has been exercised towards different ends. At times federal executive policy has aligned well with state interests, and other times it has been in stark contrast to them: the pendulum between cooperative federalism and adversarial federalism has shifted consistent with those ends. As a result, Wyoming has joined in litigation both with, and against, federal land management agencies. The record is mixed. In October 2020, a federal district court ruled in favor of the State of Wyoming and other oil-producing states and industry groups in a challenge to the Bureau of Land Management’s Waste Prevention Rule.<sup>162</sup> The

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<sup>153</sup> Harold Bruff, *Executive Power and the Public Lands*, 76 U. COLO. L. REV. 503, 505–06 (2005).

<sup>154</sup> Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 45–46 (1993).

<sup>155</sup> DAVID H. GETCHES, WITHDRAWALS OF PUBLIC LANDS UNDER THE FEDERAL LAND POLICY AND MANAGEMENT ACT, THE FEDERAL LAND POLICY AND MANAGEMENT ACT (Summer Conference, June 6-8) (1984), scholar.law.colorado.edu/federal-land-policy-and-management-act/12 [https://perma.cc/D2AU-HNR7].

<sup>156</sup> Seth Davis, *Presidential Government and the Law of Property*, 2014 WIS. L. REV. 471, 486–87 (2014).

<sup>157</sup> Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1101, 1104, 1120–21 (2004).

<sup>158</sup> *Id.* at 1104.

<sup>159</sup> Charles L. Kaiser & Scott W. Hardt, *Surface Use Regulation of Federal Oil and Gas Leases: Exploring the Limits of Administrative Discretion*, 39 ROCKY MTN. MIN. L. INST. 19 (1992).

<sup>160</sup> Federal and state agencies have disagreed about the applicability of state statutes such as the Wyoming Split Estate Act to federal split estates. See, e.g., Matt Micheli, *Showdown at the OK Corral – Wyoming’s Challenge to U.S. Supremacy on Federal Split Estate Lands*, 6 WYO. L. REV. 32, 34 (2006).

<sup>161</sup> See *supra* notes 47–51 and accompanying text.

<sup>162</sup> *Wyoming v. U.S. Dep’t of the Interior*, 2020 WL 7641067 (D. Wyo. 2020).

court vacated the Rule. It found that the primary purpose of the Rule to limit methane emissions exceeded the agency's authority under the Mineral Leasing Act. Validating the State's concerns, the court held that the Rule "upends the [Clean Air Act's] cooperative federalism framework and usurps the authority to regulate air emissions Congress expressly delegated to the EPA and States."<sup>163</sup> In other instances, Wyoming has joined the Department of Interior in litigation to defend agency actions intended to promote federal oil and gas development. In the same year, the State of Wyoming joined federal defendants in two separate successful challenges brought by conservation groups to vacate mineral lease sales based on new Interior Department policies that ignored established frameworks for sage grouse mitigation.<sup>164</sup> In both cases, Executive Branch actions regarding mineral development on federal land were overturned—in the first instance based on abrogation of state interests, and in the latter based on the insufficiency of federal procedures relative to public participation and wildlife protection.

The next century will likely present new challenges associated with climate change, development of new technologies and rare-earth element resources, shifting energy markets, and increasing conflict over the suitability of mineral leasing on federal land. A recent executive order from the Biden Administration announced a temporary leasing moratorium and review of fossil leasing and permitting procedures on public lands.<sup>165</sup> It was met with hostility. Governor Gordon directed state agencies to evaluate the fiscal impact of the ban,<sup>166</sup> and called a moratorium on new leasing a "direct attack" on the State with the potential of "devastating" impacts on revenue, schools, and communities.<sup>167</sup> If *Midwest Oil* is any indication, however, challenging the order may yield little fruit. Wyoming may be better served by efforts that seek federal support for fiscal impacts associated with dwindling fossil production from federal lands and which promote legislative compromises regarding new opportunities for commercial use.

### III. WILDLIFE

Thanks to large parcels of private and public land, low human populations, and its early conservation efforts including the establishment of Yellowstone

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<sup>163</sup> *Id.*

<sup>164</sup> *Mont. Wildlife Fed'n v. Bernhardt*, 2020 WL 2615631 (D. Mont. May 22, 2020); *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042 (D. Idaho 2020).

<sup>165</sup> EXEC. ORDER ON TACKLING THE CLIMATE CRISIS AT HOME AND ABROAD (Jan. 27, 2021), [www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/) [https://perma.cc/DK4K-86AE].

<sup>166</sup> Press Release, Wyoming Governor Mark Gordon, Governor Gordon Issues Executive Order Directing State Agencies to Determine Impacts of Federal Oil and Gas Lease Ban (Jan. 29, 2021), [governor.wyo.gov/media/news-releases/2021-news-releases/governor-gordon-issues-executive-order-directing-state-agencies-to-determin](https://www.governor.wyo.gov/media/news-releases/2021-news-releases/governor-gordon-issues-executive-order-directing-state-agencies-to-determin) [https://perma.cc/X9LK-5G35].

<sup>167</sup> *Id.*

National Park,<sup>168</sup> Wyoming provides some of the best remaining wildlife habitat in the United States. It is home to an abundant and diverse number of wildlife, including high-profile species such as grizzly bears and elk, but also lesser-known species like the Wyoming toad and the Kendall Warm Springs dace.

Wyoming's role in the field of wildlife conservation began early. Some have suggested that the wildlife conservation movement seeded with the establishment of Yellowstone National Park in 1872 "as a resistance to powerful political and social forces that were squandering the nation's heritage without regard for its future."<sup>169</sup> Over time, Wyoming's role in wildlife conservation has included a host of subsequent milestones, among them: the location of the last remaining elk and wild bison herds in the United States after the American big-game decimation of the late 1800s;<sup>170</sup> Beth Williams's 1978 discovery of chronic wasting disease;<sup>171</sup> and the 1996 reintroduction of the gray wolf in Yellowstone National Park.<sup>172</sup>

The management of Wyoming's wildlife primarily falls to the State of Wyoming as the Wyoming Legislature has declared that "all wildlife in Wyoming is the property of the state."<sup>173</sup> The Wyoming Supreme Court has interpreted this declaration to entail ownership in a "sovereign capacity for the common benefit of all its people" and as "one of a trustee with the power and duty to protect, preserve and nurture the wild game."<sup>174</sup> Thus, Wyoming's sovereign ownership of

<sup>168</sup> BRUCE L. SMITH, WHERE ELK ROAM: CONSERVATION AND BIOPOLITICS OF OUR NATIONAL ELK HERD 19 (2012).

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

<sup>170</sup> *Id.*

<sup>171</sup> E.S. Williams & S. Young, *Chronic Wasting Disease of Captive Mule Deer: A Spongiform Encephalopathy*, 16 J. WILDLIFE DISEASE 89 (1980); Alison Macalady, *Solving the Puzzle of Chronic Wasting Disease: Veterinarian Beth Williams*, HIGH COUNTRY NEWS (Feb. 16, 2014), [www.hcn.org/issues/268/14563](http://www.hcn.org/issues/268/14563) [<https://perma.cc/DWW8-NKGB>].

<sup>172</sup> *Wolf Restoration*, NAT'L PARK SERV. (May 21, 2020), [www.nps.gov/yell/learn/nature/wolf-restoration.htm](http://www.nps.gov/yell/learn/nature/wolf-restoration.htm) [<https://perma.cc/74YP-5T33>]. After the 1996 reintroduction of the gray wolf in Yellowstone National Park, Wyoming was once again home to four native large carnivore species: the gray wolf, grizzly bear, black bear, and mountain lion. While big carnivores help to restore a natural ecosystem balance, their presence has not always been welcomed, and carnivore management and conflict continues to be a vexing subject in Wyoming, often resulting in federalism conflicts.

<sup>173</sup> WYO. STAT. ANN. § 23-1-103 (2020).

<sup>174</sup> *O'Brien v. State*, 711 P.2d 1144, 1148–49 (Wyo. 1986) (noting that "[w]ildlife within the borders of a state are owned by the state in its sovereign capacity for the common benefit of its people"). In 2012, Wyoming residents voted to approve a constitutional amendment concerning the opportunity to hunt, fish, and trap. Wyoming Constitution Article 1, § 39 states: "[t]he opportunity to fish, hunt and trap wildlife is a heritage that shall forever be preserved to the individual citizens of the state, subject to regulation as prescribed by law, and does not create a right to trespass on private property, diminish other private rights or alter the duty of the state to manage wildlife." WYO. CONST. art. 1, § 39. The State governs wildlife on private lands and has delegated some planning authority to the State's twenty-three counties and numerous municipalities. WYO. STAT. ANN. §§ 18-5-301, 201 (2021).

its wildlife in trust for its people includes a conservation responsibility for those trust resources.

Despite Wyoming's declaration of complete ownership of wildlife, that ownership is limited by federal law preemption, including, as discussed below, reserved Tribal treaty rights to wildlife on and off reservation,<sup>175</sup> federal wildlife conservation statutes including the Endangered Species Act (ESA),<sup>176</sup> and federal wildlife conservation obligations arising on federal public land.<sup>177</sup> Rather than preempting all state authority over wildlife, Congress has often utilized the principle of cooperative federalism in public lands and natural resource statutes via savings clauses that disclaim any intention to displace state wildlife authority and law so long as state law does not conflict with, or undermine, federal prerogatives.<sup>178</sup> Applied across the variety of federal public lands in Wyoming, cooperative federalism arrangements concerning authority over wildlife are diverse: spanning exclusive federal jurisdiction in Yellowstone National Park,<sup>179</sup> cooperative federalism requirements in the National Elk Refuge and Grand Teton National Park<sup>180</sup> and primarily state authority over wildlife in BLM lands.<sup>181</sup> Yet these clauses are often vague resulting in disputes as to whether they “elevate or undermine the importance of state interests in federal natural resources programs.”<sup>182</sup> This relationship has, as Professor Bob Keiter has noted, “promot[ed] both collaboration and conflict.”<sup>183</sup> Indeed, some of the most famous cases in the area of federal public lands and resources law involve questions of federalism and wildlife management.<sup>184</sup>

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<sup>175</sup> See *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

<sup>176</sup> Endangered Species Act, 16 U.S.C. § 1536(a)(1).

<sup>177</sup> See Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV'T L. 797, 803–04 (2017) (noting that the federal government has constitutional authority under the Property Clause, Treaty Clause, and Commerce Clause to manage wildlife on federal public land).

<sup>178</sup> *Id.* at 838.

<sup>179</sup> 16 U.S.C. §§ 21–22.

<sup>180</sup> Wildlife Refuge System Improvement Act of 1997 (Refuge Act), Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified as amended at 16 U.S.C. § 668dd–ee); An Act to Establish a New Grand Teton National Park in the State of Wyoming and for Other Purposes, Ch. 950, 64 Stat. 849 (1950) (codified at 16 U.S.C. § 406d-1 and note, 431a, 451a) (requiring that “[t]he Wyoming Game and Fish Commission and the National Park Service shall devise . . . and recommend to the Secretary of the Interior and the Governor of Wyoming for their joint approval, a program to insure the permanent conservation of the elk within Grand Teton National Park established by this Act. Such program shall include the controlled reduction of elk in such park . . .”).

<sup>181</sup> 43 U.S.C. § 1732(b); 43 C.F.R. pt. 24 (laying out the Department of Interior's policy statement on intergovernmental cooperation in the preservation, use and management of fish and wildlife resources).

<sup>182</sup> Robert L. Fischman & Angela M. King, *Savings Clauses and Trends in Natural Resource Federalism*, 32 WM. & MARY ENV'T L. & POL'Y REV. 129, 145 (2007).

<sup>183</sup> Keiter, *supra* note 76, at 36.

<sup>184</sup> Nie et al., *supra* note 177, at 801.

Cooperative federalism over wildlife management in Wyoming has led to several “major battles” that have primarily been waged over Wyoming’s “charismatic megafauna”—grizzly bears, wolves, bison, and elk—and many of these skirmishes continue, often on the national stage.<sup>185</sup> Yet, Wyoming’s collaboration with federal land and wildlife managers has also led to wildlife conservation achievements, including among other examples the discovery, conservation, and reintroduction of the black footed ferret (a species thought to be extinct); a significant conservation campaign that led to the preclusion of an ESA listing for the greater-sage grouse; and national leadership on big game migration conservation.

### A. *National Elk Refuge & Wyoming v. United States*

One of Wyoming’s more contentious and ongoing wildlife cooperative federalism disputes concerns management of wildlife on the National Elk Refuge (Refuge). Created by Congress in 1912, the Refuge was considered necessary to conserve a dwindling regional elk population. Elk numbers had declined as a result of a series of severe winters whose impacts were compounded by settlement in the Teton valley and its forage being “cut and stockpiled to feed cattle and horses.”<sup>186</sup> At the time, elk, whose migrations routes out of the valley in winter had been cut off, were forced to either raid haystacks or starve to death.<sup>187</sup> To address this problem, supplemental winter feed was provided to the elk on the Refuge and the practice has continued although it is not legislatively mandated.<sup>188</sup>

Despite the good intentions that led to supplemental winter feeding, the practice has resulted in high winter animal concentrations of elk and bison which has contributed to the prevalence and transmission of brucellosis,<sup>189</sup> a bacterial disease that affects free-ranging domestic ungulates such as elk, bison, and cattle.<sup>190</sup>

<sup>185</sup> Keiter, *supra* note 76, at 48.

<sup>186</sup> SMITH, *supra* note 168, at 20–21.

<sup>187</sup> *Id.* at 20, 26. Smith notes that “in the worst of harsh winters preceding the creation of the NER, it was said you could “walk for miles on the strewn carcasses of dead elk.” *Id.* at 21.

<sup>188</sup> U.S. FISH AND WILDLIFE SERV. & NAT’L PARK SERV., RECORD OF DECISION, FINAL BISON AND ELK MANAGEMENT ACTION PLAN 2 (2007), [www.fws.gov/bisonandelkplan/ROD.pdf](http://www.fws.gov/bisonandelkplan/ROD.pdf) [<https://perma.cc/JYH4-PP7W>]. Today, the National Elk Refuge, managed by the U.S. Fish and Wildlife Service (FWS) provides winter refuge and supplemental winter feed to an average of 7,426 elk from the Jackson Herd, as well as around 1,000 bison. Angus M. Thuermer, Jr., *Game and Fish Plans for Deadly Disease at Elk Feedgrounds*, WYOFIL (Dec. 3, 2020), [www.wyofile.com/game-and-fish-plans-for-deadly-disease-at-elk-feedgrounds/](http://www.wyofile.com/game-and-fish-plans-for-deadly-disease-at-elk-feedgrounds/) [<https://perma.cc/8KR4-JWJK>]. U.S. FISH AND WILDLIFE SERV. & NAT’L PARK SERV., *supra*, at 2. The Wyoming Game and Fish Department also provides supplemental feed to elk on twenty-two winter feedgrounds in northwestern Wyoming located on federal and state land. *Id.*

<sup>189</sup> U.S. FISH AND WILDLIFE SERV. & NAT’L PARK SERV., *supra* note 188, at 2.

<sup>190</sup> Brant Shumaker et al., *Brucellosis in the Greater Yellowstone Area: Disease Management at the Wildlife-Livestock Interface*, 6 HUMAN-WILDLIFE INTERACTIONS 48 (2012).

Elk roam freely in northwestern Wyoming, crossing public and private lands and often intermixing with cattle, particularly on winter feed lines.<sup>191</sup> Cattle ranchers in northwestern Wyoming are acutely concerned about brucellosis transmission to their cattle, as it can result in cattle losses, herd quarantines, culling of infected herds,<sup>192</sup> as well as a revocation of the State's brucellosis free status, which negatively impacts the State's cattle industry by limiting access to interstate and international beef markets.<sup>193</sup>

Conflicts over management of elk on the Refuge boiled over when the U.S. Fish and Wildlife Service (FWS) blocked efforts by the Wyoming Game and Fish Department to vaccinate elk on the Refuge against the disease due to health and safety concerns related to the vaccine.<sup>194</sup> In 1998, Wyoming filed a complaint in the United States District Court for the District of Wyoming challenging the FWS's refusal to permit the State to vaccinate elk on the Refuge.<sup>195</sup> The State of Wyoming alleged the FWS's denial interfered with the State's sovereign right to manage wildlife within its borders, including its right to vaccinate elk on the Refuge.<sup>196</sup> Specifically, the State argued it had authority to manage wildlife on the Refuge because the National Wildlife System Improvement Act of 1997 (Refuge Act) neither implicitly nor explicitly preempts the State from doing so, and further the FWS violated the Tenth Amendment by prohibiting the State vaccination program and thus restricting Wyoming's sovereign authority to manage wildlife within its borders.<sup>197</sup>

Judge Clarence Brimmer, Jr., while sympathizing with Wyoming's efforts to eradicate brucellosis, held that "Wyoming does not have the sovereign power to manage wildlife on federal lands and the provisions of the Refuge Act do not grant Wyoming that power."<sup>198</sup> Instead, referencing the United States Supreme Court's decision in *Kleppe v. New Mexico*,<sup>199</sup> he determined that the authority to regulate wildlife on federal lands "was taken by the Federal Government under the auspices of the Property Clause" and was not a power left to the states under the Tenth Amendment.<sup>200</sup> Although suggesting the parties "take seriously the spirit of cooperation expressed by Congress in the Refuge Act," Judge Brimmer concluded

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<sup>191</sup> *Id.* at 49.

<sup>192</sup> *Id.*

<sup>193</sup> *Wyoming v. United States*, 279 F.3d 1215, 1221 (10th Cir. 2002).

<sup>194</sup> *Id.*

<sup>195</sup> *Wyoming v. United States*, 61 F. Supp. 2d 1212, 1214 (D. Wyo. 1999).

<sup>196</sup> *Id.* at 1214.

<sup>197</sup> *Id.* at 1214, 1216.

<sup>198</sup> *Id.* at 1217, 1222.

<sup>199</sup> *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

<sup>200</sup> *Wyoming v. United States*, 61 F. Supp. 2d at 1217.

that Congress, through the plain meaning and intent of the Refuge Act, intended to give the Secretary of Interior complete administrative and management authority over national refuges.<sup>201</sup>

Wyoming appealed Judge Brimmer's decision to the Tenth Circuit, challenging all aspects of his rulings.<sup>202</sup> The Tenth Circuit affirmed in part and reversed in part, finding the case not to be "as clear cut and easily resolved as the parties urge."<sup>203</sup> The Tenth Circuit rejected Wyoming's claim that the Tenth Amendment reserves to the State the right to manage wildlife in the Refuge and that the Refuge Act, via its savings clause, reserves to the State the unencumbered right to manage wildlife on the Refuge.<sup>204</sup> The court deemed it "painfully apparent that the Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife, or more specifically vaccinate elk, on the Refuge, regardless of the circumstances."<sup>205</sup> After significant discussion of the issue, including an analysis of the legislative history of the savings clause in the Refuge Act, the court further concluded that the Refuge Act plainly vests in the FWS the authority to administer the Act and manage national wildlife refuges.<sup>206</sup>

However, the court did not completely foreclose the possibility of cooperative state and federal management within the Refuge. The Tenth Circuit began its decision by referencing the cooperative federalism dynamic at issue, noting that "[i]n the judicially-fragmented Yellowstone Area . . . one thing is certain: [w]ildlife management policies affecting the interests of multiple sovereigns demand a high degree of intergovernmental cooperation. Such cooperation is conspicuously absent in this case."<sup>207</sup> Noting that the Refuge Act does make numerous references to the need for cooperation between the FWS and the states to achieve the Act's objectives,<sup>208</sup> the court determined Congress did not intend the savings clause to be a complete rejection of preemption of state wildlife regulation within refuges, but rather an intent on the part of Congress to apply normal principles of conflict preemption.<sup>209</sup> Applying those principles, the court

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<sup>201</sup> *Id.* at 1222–23. The Refuge Act's savings clause reads as follows: "Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several states to manage, control, or regulate fish and resident wildlife under state law or regulation in any areas within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practical, consistent with state fish and wildlife laws, regulations, and management plans." *Id.*

<sup>202</sup> *Wyoming v. United States*, 279 F.3d 1215, 1224 (10th Cir. 2002).

<sup>203</sup> *Id.* at 1224.

<sup>204</sup> *Id.* at 1234–35, 1227.

<sup>205</sup> *Id.* at 1227.

<sup>206</sup> *Id.* at 1231–33.

<sup>207</sup> *Id.* at 1218.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1234.

held that the FWS possessed the authority to make a decision denying Wyoming permission to vaccinate elk on the Refuge.<sup>210</sup> Reviewing the State's request to overturn the FWS's decision under the Administrative Procedure Act, the Tenth Circuit reversed the district court's decision under the traditional agency review principles set forth in Section 706(2)(A), remanding the matter for "full plenary review" of the FWS's decision.<sup>211</sup>

The Tenth Circuit concluded by admonishing both parties for failing to cooperate.<sup>212</sup> Specifically, the court noted "that wildlife management is inherently political . . . [t]hus wildlife managers simply cannot view wildlife management in isolation"<sup>213</sup> The court went on to note that:

The FWS's apparent indifference to the State of Wyoming's problem and the State's insistence of a "sovereign right" to manage wildlife on the NER do little to promote "cooperative federalism." Given the [Refuge Act's] repeated calls for a "cooperative federalism," we find inexcusable the parties' unwillingness in this case to even attempt too amicably resolve the brucellosis controversy or find any common ground on which to commence fruitful negotiations.<sup>214</sup>

Perhaps taking the Tenth Circuit's advice to heart, after the court's decision the FWS and the Wyoming Game and Fish Department reached a settlement agreement resolving the litigation.<sup>215</sup> In 2002, the FWS released a Finding of No Significant Impact for Proposed Elk Vaccination on the Refuge,<sup>216</sup> and vaccination of elk on the Refuge commenced until 2015, when it was determined that brucellosis vaccines were not effective in elk.<sup>217</sup>

Supplemental winter feeding on the Refuge and adjacent state-run feedgrounds remains a controversial and litigated topic. The practice continues to result in the transmission of brucellosis. More recently, it raised concerns

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<sup>210</sup> *Id.* at 1235.

<sup>211</sup> *Id.* at 1241.

<sup>212</sup> *Id.* at 1240.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *United States and Wyoming Settle Suit on Elk Vaccinations*, DEP'T OF JUST. (July 21, 2002), [www.justice.gov/archive/opa/pr/2002/July/02\\_enrd\\_442.htm](http://www.justice.gov/archive/opa/pr/2002/July/02_enrd_442.htm) [<https://perma.cc/ZLB6-GVTW>].

<sup>216</sup> *News Release: Finding of No Significant Impact Released for Proposed Elk Vaccination Plan on National Elk Refuge*, U.S. FISH AND WILDLIFE SERV., [www.fws.gov/mountain-prairie/pressrel/2003/03-07.htm](http://www.fws.gov/mountain-prairie/pressrel/2003/03-07.htm) (last visited Apr. 20, 2021) [<https://perma.cc/REE8-VPK>].

<sup>217</sup> Gavin G. Cotterill et al., *Winter Feeding of Elk in the Greater Yellowstone Ecosystem and Its Effects on Disease Dynamics*, 373 PHIL. TRANS. R. SOC. B. 1, 4 (2017).



related to spread of Chronic Wasting Disease, an always fatal disease affecting mule deer, white-tailed deer, elk, and moose.<sup>218</sup> Yet, opposition to cessation of winter feeding and feedground closures also remains high. Sportsmen, outdoor recreationists, businesses, and cattle producers remain concerned about elk population reductions and greater increases among numbers of elk on private lands if feedgrounds closed.<sup>219</sup> However, recent federal court decisions seem to paint the writing on the wall that the days of winter supplemental feeding may soon come to an end.<sup>220</sup> As the State of Wyoming and the federal government move forward to address these and other wildlife management challenges in the next century, it seems wise to heed Judge Brimmer's advice: "take seriously the spirit of cooperation" and work together.<sup>221</sup>

### *B. Tribal Reserved Hunting Rights in Federal Land: From Race Horse to Herrera*

The right of many Tribal Nation members to continue to hunt and fish off their reservation lands is a fundamental aspect of their civil rights. In many treaties throughout the West and some in the Midwest, Tribal Nations reserved their aboriginal right to continue to fish off their reservation at "usual and accustomed" fishing grounds and stations as well as to hunt off reservation on "unoccupied" public lands.<sup>222</sup> By 1896 the practice was so predominant that the United States Attorney General argued that "[t]he Government has always recognized the right to hunt as essential to the happiness and welfare of the Indians, and has secured it in most if not all treaties with them."<sup>223</sup>

Tribal Nations' right to off-reservation hunting and fishing soon clashed with states' asserted sovereign right to regulate fish and game within their borders.<sup>224</sup>

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<sup>218</sup> *Chronic Wasting Disease (CWD) in Wyoming Wildlife*, WYO. GAME AND FISH DEP'T (Dec. 11, 2020), [wgfd.wyo.gov/Wildlife-in-Wyoming/More-Wildlife/Wildlife-Disease/Chronic-Wasting-Disease](https://wgfd.wyo.gov/Wildlife-in-Wyoming/More-Wildlife/Wildlife-Disease/Chronic-Wasting-Disease) [https://perma.cc/36QM-7CLR].

<sup>219</sup> Shumaker et al., *supra* note 190, at 48.

<sup>220</sup> *See* Defs. of Wildlife v. Salazar, 561 F.3d 112, 117 (D.C. Cir. 2011) (noting the FWS has committed to ending supplementing feeding, but not requiring them to do so by any particular date); *W. Watersheds Project v. Christiansen*, 348 F. Supp. 3d 1204, 1220–21 (D. Wyo. 2018) (finding the U.S. Forest Service failed to comply with NEPA when it approved the Wyoming Game and Fish's special use permit for the Alkali Creek Feedground for failing to address the risk to elk posed by chronic wasting disease).

<sup>221</sup> *Wyoming v. United States*, 61 F. Supp. 2d 1212, 1223 (D. Wyo. 1999).

<sup>222</sup> *See, e.g.*, Treaty with the Makah, Makah-U.S., Jan. 31, 1855, 12 Stat. 939; Treaty with the Yakimas, 12 Stat. 951 (June 9, 1855); Treaty with the WallaWalla, U.S.-WallaWalla, June 9, 1855, 12 Stat. 945; Treaty between the United States of America and the Nez Perce Indians, Nez Perce-U.S., June 11, 1855, 12 Stat. 957, 958. *See generally* STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES 185–204* (2012).

<sup>223</sup> Transcript of Record at 156, *Ward v. Racehorse*, 163 U.S. 504 (1896) (No. 841).

<sup>224</sup> *See, e.g.*, *Greer v. Connecticut*, 161 U.S. 519 (1896); *see also* *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *U.S. v. McCullagh*, 221 F. 288, 293, 294 (D. Kan. 1915) (quoting *Race*

When Pacific Northwest states in the 1960's and 1970's began disregarding the off-reservation right to fish, Tribal Nations staged civil rights "fish ins."<sup>225</sup> The United States Supreme Court responded with a series of cases confirming the right of off-reservation fishing subject only to state regulation when "necessary for conservation."<sup>226</sup> Rather than embrace such a shared governance conservation model and negotiate with the affected Tribal Nations, Wyoming's engagement has been hindered by its continued and recently unsuccessful reliance<sup>227</sup> on perhaps one of the more pernicious United States Supreme Court cases involving Tribal Nations—*Ward v. Race Horse*.<sup>228</sup>

Decided within weeks of the infamous *Plessy v. Ferguson*, *Race Horse* became a similarly iniquitous opinion—denying Native peoples their civil right to hunt on aboriginal lands. The post-Civil War period witnessed escalating efforts to enact stricter laws protecting game species. Congress, for instance, passed an 1894 act restricting hunting within Yellowstone,<sup>229</sup> followed six years later by the general Lacey Act banning illegal trade in wildlife.<sup>230</sup> These actions culminated in the clash between Wyoming's exercise of its police power and a treaty protected right to continue to hunt on unoccupied public lands. The Bannock and Shoshone, whose traditional hunting grounds include the Yellowstone and Grand Teton areas, had exercised their hunting rights. This resulted in the arrest of a Bannock Tribe member, Race Horse, a resident of the Fort Hall Reservation in Idaho, who "stood trial in proxy for the Tribe in a test case to determine whether the 1868 treaty would be upheld."<sup>231</sup>

Uinta County sheriff John H. Ward took Race Horse into custody, after Race Horse admittedly killed seven elk about twenty miles southeast of Mount

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*Horse*, 163 U.S. at 504); *Ex parte Crosby*, 149 P. 989, 991 (Nev. 1915) (citing *Race Horse*, 163 U.S. at 504).

<sup>225</sup> See generally A REPORT PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALY INDIANS 195–98 (1970).

<sup>226</sup> See Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Dep't of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968). For insights in the Supreme Court's deliberations, see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1637 (1996).

<sup>227</sup> See *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

<sup>228</sup> *Race Horse*, 163 U.S. 504.

<sup>229</sup> Yellowstone Game Protection Act, 28 Stat. 73 (May 7, 1894).

<sup>230</sup> See generally Theodore Whaley Cart, *The Lacey Act: America's First Nationwide Wildlife Statute*, 17 FOREST HIST. NEWSLETTER 4 (1973).

<sup>231</sup> JOEL C. JANETSKI, INDIANS IN YELLOWSTONE NATIONAL PARK 112–17 (*rev'd ed.* 2002). Dwindling bison became concerning, as well, while the Smithsonian worked with the region to secure animals for the Institution. DIANE SMITH, YELLOWSTONE AND THE SMITHSONIAN: CENTERS OF WILDLIFE CONSERVATION 79–109 (2017).

Hoback on July 1, 1895. No one disputed the elk were essential for Race Horse's livelihood and that of his family and other Tribal members, and it was uncontested that abundance of game existed in the area and that the elk were more than necessary as food for himself.<sup>232</sup> In a petition for writ of *habeas corpus*, Race Horse argued his detention and imprisonment was illegal, contrary to Article 4 of the 1868 Second Fort Bridger Treaty. That article secured the Bannock's and the Shoshone's "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."<sup>233</sup> Participating counsel included future United States Supreme Court Justice Willis Van Devanter for Wyoming, and Gibson Clark, former Wyoming Supreme Court Justice and first U.S. Attorney in Wyoming, for Race Horse.

Wyoming principally argued its admission into the Union abrogated the treaty-protected right to hunt on unoccupied lands. At the outset, the State rejected any restraint on an "absolute" exercise of its police power over game within its borders. It argued that the lands were not "unoccupied," and that nevertheless the treaty right was abrogated by Wyoming's admission as a state.<sup>234</sup> The admission of new states and their respective enabling acts elicited a host of jurisdictional questions, including whether state courts would exercise jurisdiction over crimes by non-Natives in Indian Country.<sup>235</sup> The equal footing doctrine was rife with possible applications, soon to envelop an application of *Plessy v. Ferguson*<sup>236</sup> to the control of introduction of liquor in Indian Country,<sup>237</sup> and the controversial fight over Oklahoma's ability to switch its state capital from Guthrie to Oklahoma City.<sup>238</sup> The State claimed the equal footing doctrine required that, upon Wyoming's admission, its police power could not be constrained by an earlier treaty.<sup>239</sup> Although accepting the lands were unsettled public lands open to entry and settlement, Wyoming argued they were occupied owing to their inclusion within round-up districts being used for grazing and proximity to lands

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<sup>232</sup> Transcript of Record at 161, *Ward v. Racehorse*, 163 U.S. 504 (1896) (No. 841).

<sup>233</sup> Treaty with the Eastern Band Shoshoni and Bannock, Eastern Band Shoshoni-U.S., July 3, 1869, 15 Stat. 673 [hereinafter Treaty].

<sup>234</sup> *Id.* at 18.

<sup>235</sup> *E.g.*, *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 622 (1881).

<sup>236</sup> *E.g.*, *McCabe v. Atchison, Topeka & S.F. R. Co.*, 235 U.S. 151 (1914), *aff'g* 186 F. 966 (8th Cir. 1911).

<sup>237</sup> *E.g.*, *Geralds v. Johnson*, 183 F. 611 (D. Minn. 1911) (relying on *Ward v. Race Horse*, 163 U.S. 504 (1896)); *see also* *United States v. U.S. Express Co.*, 180 F. 1011 (W.D. Ark. 1910); *Ex parte Webb*, 22 U.S. 663, 683, 690 (1912).

<sup>238</sup> *Coyle v. Smith*, 221 U.S. 559, 573, 576 (1911) (citing *Race Horse*, 163 U.S. 504).

<sup>239</sup> Transcript of Record at 131, *Ward v. Racehorse*, 163 U.S. 504 (1896) (No. 841).

which had been surveyed and settled, noting specifically that Race Horse had visited a nearby store on the day he killed the elk.<sup>240</sup>

Concluding that Wyoming's argument ignored principles of treaty interpretation, including the broader rule of construction involving Tribal treaties,<sup>241</sup> circuit court Judge Riner accepted Race Horse's contrary argument.<sup>242</sup> Judge Riner rejected Wyoming's claim that all lands in the state were "occupied" noting that Race Horse killed the elk in a wooded mountain area some sixty miles from the nearest "occupied" ranch or settlement. As such, U.S. Attorney General Judson Harmon would later suggest that occupied lands were lands reduced to some private right or possession,<sup>243</sup> neither of which had occurred. Judge Riner also rejected Wyoming's equal footing arguments. The United States had argued it enjoyed an unquestioned right to dispose of its lands, including an ability to ensure that existing rights to tribes on those lands would remain free from state interference.<sup>244</sup> It noted how repeals by implication are disfavored, notably with treaties and particularly with a Tribal treaty that secured what was described as a vested right to hunt.<sup>245</sup> Riner agreed, concluding that nothing in the Enabling Act, or the equal footing doctrine and Wyoming's assumption of authority over game under its police power, warranted abrogating the prior treaty.<sup>246</sup> Wyoming's police power would still be subservient to a proper exercise of congressional power, such as under the Property Clause or the Treaty Power.

In a 7–1 opinion, the United States Supreme Court reversed Riner.<sup>247</sup> Justice White's majority opinion assumed the hunting right was "temporary and precarious" because it could be extinguished. The Court deemed immaterial the evidence the State introduced to suggest the lands were not unoccupied, and instead focused on interpreting the hunting right as limited to "hunting districts." It then reasoned that, because "hunting districts" on public lands could cease, their "temporary" nature became subservient to Congress' subsequent will—identifying as an exemplar the Yellowstone Act. The Court considered Wyoming's Enabling Act and the State's assumption of sovereignty—and corresponding right to regulate game under its police power—upon an equal footing with the original thirteen states as repealing or ending the "temporary" treaty right. A repeal, it reasoned, occurred because the treaty right and Wyoming's

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<sup>240</sup> *Id.* at 9, 60; see *In re Race Horse*, 70 F. 598, 605 (D. Wyo. 1895).

<sup>241</sup> *Race Horse*, 70 F. at 605.

<sup>242</sup> See *id.*

<sup>243</sup> Transcript of Record at 147, *Ward v. Racehorse*, 163 U.S. 504 (1896) (No. 841).

<sup>244</sup> *Id.* at 155.

<sup>245</sup> *Id.* at 156.

<sup>246</sup> *Race Horse*, 70 F. at 608–13.

<sup>247</sup> *Ward v. Race Horse*, 163 U.S. 504 (1896). Justice Brewer was absent; and Justice Brown dissented.

sovereign rights were in an “irreconcilable” conflict—and the Enabling Act lacked any express language preserving the treaty right. As Justice Brown noted in dissent, Justice White’s opinion completely ignored how treaties ought to be construed in favor of the tribes, including on issues following a state’s admission into the union.<sup>248</sup> Moreover, as one recent article aptly observes, White “found that those rights could be *implicitly* abrogated in favor of the rights of newly created states.”<sup>249</sup>

One hundred years later, Indian law doctrines had changed dramatically—*Race Horse*, though, somehow persisted. The allotment and assimilation era of the late nineteenth and early twentieth centuries became eclipsed by an interest in allowing self-determination, culminating in the Indian Reorganization Act of 1934, which succumbed to the racist and moribund assimilation period of the 1950s, and which, in turn, morphed into the modern period of Indian self-determination.<sup>250</sup> In 1942, the United States Supreme Court opined how it was “impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes.”<sup>251</sup> Notably, in the 1960’s and 1970s, the United States Supreme Court confirmed the continued force of off-reservation treaty rights.<sup>252</sup> It confirmed that courts should construe treaties liberally as Tribal sovereigns would have understood them and that it would not easily construe legislation as upsetting treaty rights.

Despite these trends, when the next principal off-reservation hunting case surfaced, *Crow Tribe of Indians v. Repsis*, Wyoming invoked *Race Horse* and quoted Yogie Berra: “Except for a 100-year time span, this case is simply ‘*déjà vu* all over again.”<sup>253</sup> The 1995 case involved Wyoming Game Warden Chuck Repsis’s citation of Thomas L. Ten Bear, a Crow Tribal member living in Montana, for killing an elk in the Big Horn National Forest without a Wyoming hunting license. The 1868 Treaty with the Crow Nation secured “the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.”<sup>254</sup> Wyoming relied upon *Race Horse*’s holding

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<sup>248</sup> *Id.* at 517; see *In re Kansas Indians*, 72 U.S. 737, 756 (1866) (Kansas’ admission was conditioned on not impairing Native American rights).

<sup>249</sup> Sammy Matsaw et al., *Cultural Linguistics and Treaty Language: A Modernized Approach to Interpreting Treaty Language to Capture the Tribe’s Understanding*, 50 ENV’T L. 415, 425 (2020).

<sup>250</sup> See generally Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009).

<sup>251</sup> *Tulee v. Washington*, 315 U.S. 681, 684 (1942).

<sup>252</sup> See *supra* note 225 and accompanying text.

<sup>253</sup> Brief in Opposition to Petition for a Writ of Certiorari at 1, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995) (No. 95-1560).

<sup>254</sup> Treaty with Crows, Crows-U.S., May 7, 1868, 15 Stat. 649, 650.

that the state Enabling Act had repealed the treaty right, adding also that the lands within the Big Horn National Forest were not “unoccupied.” *Race Horse*, after all, had chilled off-reservation hunting in other areas.<sup>255</sup> The Crow Nation countered that the lands were unoccupied and *Race Horse* involved not only a different treaty but also anachronistic jurisprudence. The federal district court accepted Wyoming’s arguments.<sup>256</sup>

The Crow Nation fared even worse at the Tenth Circuit. Despite changes in Indian law jurisprudence and the Supreme Court’s message in the fishing rights cases, a Tenth Circuit panel (with one panelist a senior district court judge sitting by designation) accepted Wyoming’s reliance on *Race Horse*. Only a few reported cases had interpreted off-reservation hunting rights.<sup>257</sup> One decision indicated that *Race Horse* had been superseded<sup>258</sup> and another emphasized that rights reserved by Indian nations would not be lost absent clear and plain congressional language.<sup>259</sup> Even so, ignoring twentieth century canons of treaty interpretation, the Tenth Circuit concluded the Crow Nation Treaty language mirrored the treaty language in *Race Horse*, and consequently the language had the same meaning.<sup>260</sup> The court then accepted the argument that, because the language contemplated that the ability to *exercise* the right *might* be limited or lost if all lands become occupied (or if peace no longer subsisted), the *right itself* had to be understood as *temporary*.<sup>261</sup> That questionable logic, overlooking how “rights” often are subject to conditions and yet not considered temporary, allowed the court to engage in a Kantian leap that as a temporary right Congress implicitly intended its repeal upon Wyoming’s admission into the Union.<sup>262</sup> The court held that *Race Horse* remained a powerful and applicable precedent. Alternatively, the Tenth

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<sup>255</sup> Other Indian nations had their right to continue to hunt on lands ceded to the United States restricted, either through an interpretation of what lands were open to hunting or by specific legislation establishing national parks. See PHILIP BURNHAM, INDIAN COUNTRY, GOD’S COUNTY: NATIVE AMERICANS AND THE NATIONAL PARKS 47 (2000) (hunting in Glacier National Park and noting 1916 Interior Solicitor opinion).

<sup>256</sup> Crow Tribe of Indians v. Repsis, 866 F. Supp. 520 (D. Wyo. 1994).

<sup>257</sup> E.g., New York *ex rel* Kennedy v. Becker, 241 U.S. 556 (1916) (applying conservation law); People v. LeBlanc, 223 N.W.2d 305, 306–10 (Mich. Ct. App. 1974) (upholding fishing right but posing question about whether regulation necessary for conservation). There were cases involving prosecution under state gaming laws when Tribal nations had been terminated. E.g., State v. Sanapaw, 124 N.W.2d 41 (Wis. 1963); State v. Arthur, 261 P.2d 135 (Idaho 1953).

<sup>258</sup> Cf. State v. Tinno, 497 P.2d 1386 (Idaho 1972) (involving off-reservation fishing right as embraced by hunting right and detailed discussion in concurrence).

<sup>259</sup> E.g., Scalia v. Red Lake Nation Fisheries, Inc., 982 F.3d 533, 534–35 (8th Cir. 2020) (Occupational Safety and Health Act regulations not applied to fishery operations).

<sup>260</sup> Crow Tribe of Indians v. Repsis, 73 F.3d 982, 987 (10th Cir. 1995).

<sup>261</sup> *Id.* at 988. It contrasted “continuous” treaty rights with those that are “temporary and precarious.” The Court in *United States v. Winans*, 198 U.S. 371 (1905), used “continuous” when suggesting something akin to an easement or an usufructuary right, not as employed subsequently.

<sup>262</sup> *Id.* at 991–92.

Circuit concluded the establishment of the Big Horn National Forest Reserve's establishment rendered the lands unavailable for disposal or use without federal authority and, consequently, occupied.<sup>263</sup> As an unfortunate coda to its opinion, the panel proclaimed that “[u]nlike the district court’s apologetic interpretation of and reluctant reliance upon *Ward v. Race Horse*, we view *Race Horse* as compelling, well-reasoned, and persuasive.”<sup>264</sup>

Though the United States Supreme Court denied *certiorari* in *Repsis*, the Court rebuffed *Race Horse* in its next two principal off-reservation treaty rights cases—with its 2019 decision in *Herrera v. Wyoming* finally interring both *Race Horse* and *Repsis*. In 2014, Wyoming charged Herrera, a member of the Crow Nation, with two misdemeanors when he crossed over from the Crow Reservation in Montana to the Bighorn National Forest in Wyoming and killed three elk in violation of Wyoming law. After his conviction, he appealed to a state district court in Wyoming, asserting his treaty right and pressing the argument that the court ought to take evidence on the nature of the treaty right. The court refused such evidence regarding the treaty right and instead affirmed the conviction on the ground that the issue had been resolved by *Repsis*. The court avoided considering how the United States Supreme Court’s 1999 decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*<sup>265</sup> had implicitly overruled *Race Horse* and that enough caselaw established that state sovereignty over natural resources presented no irreconcilable conflict with Tribal Nation’s treaty rights.

Indeed, in *Mille Lacs*, the Court rejected Minnesota’s argument that the Mille Lacs Band of Chippewa Indians’ off-reservation treaty fishing and hunting rights were temporary and extinguished upon its admission to the Union on an equal footing with the original thirteen states.<sup>266</sup> The Court opined that Indian treaties must be construed liberally, resolving any ambiguities in favor of the Tribal Nations and requiring “clear evidence” of an intent to abrogate a treaty right.<sup>267</sup> It added that *Race Horse* had “been qualified by later decisions of this Court” and further that little disagreement existed over *Race Horse*’s equal footing analysis which had been “consistently rejected over the years.”<sup>268</sup>

When the Wyoming Supreme Court passed on considering the lower court decision, Herrera enlisted the United States Supreme Court and was joined in his

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<sup>263</sup> *Id.* at 993. This conclusion lacked support. *Cf.* Confederated Tribes of Umatilla Indian Rsr. v. Maison, 262 F. Supp. 871 (D. Ore. 1966) (hunting on “unclaimed” forest system lands).

<sup>264</sup> *Repsis*, 73 F.3d at 994.

<sup>265</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>266</sup> *See* Petition for Writ of Certiorari at i, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>267</sup> *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 174, 202–03.

<sup>268</sup> *Id.* at 205.

arguments by the United States.<sup>269</sup> The resulting decision is emblematic of the modern Court's approach toward treaty rights and will likely garner considerable academic attention in the years to come.<sup>270</sup> This, therefore, is where our story of *Race Horse* closes, with the Court in *Herrera* expressly overruling the opinion and its analysis. Justice Sotomayor's majority (5–4) opinion observed that abrogation of a treaty right would only occur if Congress has expressed a “clear intent” to do so and that, while *Mille Lacs* may not have expressly overruled *Race Horse*, its analysis “methodically repudiated” it. No longer can a state summon the equal footing doctrine or its admission into the Union and corresponding Enabling Act to argue that off-reservation treaty rights have been extinguished, such as in Wyoming.<sup>271</sup>

As the story of *Race Horse* ends, a new one including the potential of a conservation standard and promoting shared conversation governance among Tribal Nations, Wyoming, and the United States is poised to emerge. The Crow Tribe acknowledged in *Repsis* the concept of a conservation standard, presumably one that could be jointly arrived at through a shared-governance structure—possibly a management agreement.<sup>272</sup> This approach has surfaced in connection with off-reservation fishing rights.<sup>273</sup> The idea of affording Tribal Nations a management role over species of historic interest, after all, is implicit in Alaska Republican Don Young's proposed Bison Management congressional proposal.<sup>274</sup> Collaborative shared governance may be the epilogue to *Race Horse*.

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<sup>269</sup> *Herrera v. Wyoming*, 138 S. Ct. 2707 (2018).

<sup>270</sup> For some commentary, see Sammy Matsaw, Dylan Hedden-Nicely, & Barbara Cosens, *Cultural Linguistics and Treaty Language: A Modernized Approach to Interpreting Treaty Language to Capture the Tribe's Understanding*, 50 ENV'T L. 415, 427–33 (2020); Benjamin Cantor, *The Race Horse That Wouldn't Die: On Herrera v. Wyoming*, 14 DUKE J. CONST. L. & PUB. POL'Y 165 (2019); Jason Mitchell, Case Note, *Unoccupied: How a Single Word Affects Wyoming's Ability to Regulate Tribal Hunting Through a Federal Treaty*; *Herrera v. Wyoming*, 19 WYO. L. REV. 1 (2019).

<sup>271</sup> The majority further rejected the argument that the forest lands were categorically “occupied” either upon statehood or when President Cleveland established the forest—reserving judgment about the specific area where *Herrera* killed the elk. Justice Alito's dissenting opinion would have accepted that *Repsis* required applying issue preclusion.

<sup>272</sup> See Reply Brief of Petitioners at 1, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995) (No. 1560).

<sup>273</sup> *E.g.*, *People v. Caswell*, 2021 Mich. App. LEXIS 950 (Mich. App. Feb. 11, 2021) (noting a consent decree between the state and the Indian nations for how to address inland hunting and fishing).

<sup>274</sup> Indian Buffalo Management Act, H.R. 5153, 116th Cong., (1st Sess. 2019). The Interagency Bison Management Plan, although recently held to violate the National Environmental Policy Act, *Cottonwood Envtl L. Ctr. v. Bernhardt*, D. Mont., No. 18-12, Dec. 10, 2020, includes tribes as participating members.



## IV. WATER

And lastly we turn to the essence of life. Wyoming's waters are many—flowing from the Winds, the Tetons, the Absarokas, and beyond—for it is a headwaters state.<sup>275</sup> Witness the Green, Snake, and Yellowstone rivers springing from melted snow blanketing those stunning, alpine peaks.<sup>276</sup> Or the Laramie and North Platte rivers cutting through canyons and mountain valleys, meandering across high, windswept plains, on their way to the Gulf of Mexico.<sup>277</sup> Portions of no fewer than four major river basins—the Missouri, Colorado, Columbia, and Great—span Wyoming's borders.<sup>278</sup> It is no wonder water has been on the minds of faculty members at the UW College of Law for several generations. Former Dean Frank Trelease—“the nation's leading water law scholar”—is especially notable.<sup>279</sup> But the legacy stretches forward to the likes of George Gould, Mark Squillace, Reed Benson, and Larry MacDonnell.

As these scholars' writings attest, water federalism is a real thing in Wyoming—not an intellectual abstraction, but something manifest on the landscape, both physical and cultural. From water spring relationships. And that is inevitably so in the American West, Wyoming and more broadly, where political and hydrological boundaries often diverge.<sup>280</sup> This divergence has been the “mother of invention.”<sup>281</sup> It has forced dealings—sovereign relations—at and within the state's rectangular borders. Such dealings have spawned in some instances from the U.S. Constitution as applied to interstate rivers,<sup>282</sup> and in others from the pre-territorial treaty that created Wyoming's sole Indian reservation, the Wind River Reservation, on which the Eastern Shoshone and Northern Arapaho

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<sup>275</sup> U.S. DEP'T OF THE INTERIOR, U.S. GEOLOGICAL SURV., THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, WYOMING (2004), web.archive.org/web/20160412100227/http://nationalmap.gov/small\_scale/printable/images/pdf/reference/pagegen\_wy.pdf [https://perma.cc/E4YH-3TW9].

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Mapping U.S. Watersheds*, NAT'L GEOGRAPHIC, www.nationalgeographic.org/activity/mapping-us-watersheds/ (last visited Apr. 13, 2021) [https://perma.cc/4NEV-ECJ9]. The “Watersheds of the United States” map on this webpage uses the term “Pacific Northwest” to refer to the Columbia River Basin.

<sup>279</sup> Charles J. Meyers, *Tribute*, 22 LAND & WATER L. REV. 291, 293 (1987).

<sup>280</sup> U.S. DEP'T OF THE INTERIOR, U.S. GEOLOGICAL SURV., THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, RIVERS AND LAKES (2003), web.archive.org/web/20160412234659/http://nationalmap.gov/small\_scale/printable/images/pdf/outline/rivers\_lakes.pdf [https://perma.cc/ZHN9-YBMT].

<sup>281</sup> PLATO, THE REPUBLIC 49 (Benjamin Jowett trans., 2015) (“[T]he true creator is necessity, who is the mother of our invention.”).

<sup>282</sup> Equitable apportionment suits such as *Wyoming v. Colorado* are original actions brought by states in the U.S. Supreme Court under Article III, § 2 of the U.S. Constitution. Interstate water compacts such as the Colorado River Compact are founded on the Compact Clause in Article I, § 8 of the U.S. Constitution.

peoples reside.<sup>283</sup> Contrasting federalism in adversarial and cooperative forms, these dealings reflect lessons and wisdom for downstream in time.

#### A. Wyoming v. Colorado & the Colorado River Compact

Consider initially the Laramie and Colorado rivers. They will forever be connected. Not in a hydrological sense, but rather a legal one, with key episodes in the history of U.S. water law forming this connection. The United States Supreme Court forged it in 1922 with *Wyoming v. Colorado*—where the Court equitably apportioned an interstate river, the Laramie, for the first time—setting the stage for drafting of the first-ever interstate water compact, the Colorado River Compact, later that year.<sup>284</sup> As entwined as these milestones are, markedly different approaches to water federalism animated them, the latter arising out of the former’s proverbial ashes.

Transmountain diversions can turn neighbors into adversaries.<sup>285</sup> The culprit in *Wyoming v. Colorado* was the Laramie-Poudre Tunnel.<sup>286</sup> Sited near the Laramie River’s headwaters in northern Colorado, Front Range settlers began envisioning the tunnel as early as 1897, keen on diverting Laramie River flows into the Cache la Poudre River watershed for irrigation.<sup>287</sup> With funding secured in 1909, boring of the tunnel began.<sup>288</sup> But the law, too, would have to be navigated for the project to come into reality, placing in question the fate of water users along the Laramie in Wyoming.<sup>289</sup> “Prompted by necessity and formulated by custom,” described Justice Van Devanter—former Chief Justice of the Wyoming Territorial Supreme Court<sup>290</sup>—both states had adopted within their borders “the same doctrine respecting the diversion and use of the waters of natural streams” such as the Laramie: prior appropriation.<sup>291</sup> “As between different appropriations

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<sup>283</sup> Treaty, *supra* note 233.

<sup>284</sup> See generally *Wyoming v. Colorado*, 259 U.S. 419 (1922); WYO. STAT. ANN. § 41-12-301 (2021) (Colorado River Compact) [hereinafter Compact].

<sup>285</sup> For excellent historical scholarship on *Wyoming v. Colorado*, see DANIEL TYLER, *SILVER FOX OF THE ROCKIES: DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS* (2003); NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* (2d ed. 2009).

<sup>286</sup> *Wyoming*, 259 U.S. at 490–94.

<sup>287</sup> *Id.* at 490–91.

<sup>288</sup> *Id.* at 494.

<sup>289</sup> As described by the Court: “The Laramie is an innavigable river which has its source in the mountains of northern Colorado, flows northerly 27 miles in that State, crosses into Wyoming, and there flows northerly and northeasterly 150 miles to the North Platte River, of which it is a tributary.” *Id.* at 456.

<sup>290</sup> *Willis Van Devanter*, *supra* note 143.

<sup>291</sup> *Wyoming*, 259 U.S. at 458–59.

from the same stream,” the doctrine was plain, “the one first in time was deemed superior in right.”<sup>292</sup> Would the Justices harness temporal priority to effect an equitable apportionment between Wyoming and Colorado as state sovereigns?

It was a cutting-edge issue—the United States Supreme Court’s equitable apportionment doctrine having just been announced a few years earlier in *Kansas v. Colorado*<sup>293</sup>—and consternation surrounded the prospect of prior appropriation’s interstate application. That was particularly what Colorado’s lead attorney, Delph Carpenter, sought to avoid.<sup>294</sup> Retained by the State and the Greeley-Poudre Irrigation District (tunnel proponent), Carpenter lived with *Wyoming v. Colorado* from start to finish, an eleven-year term.<sup>295</sup> He could be honest with his diary about the ordeal—in a word, “Hell.”<sup>296</sup> And no doubt Justice Van Devanter’s unanimous opinion didn’t assuage those feelings. “[T]he rule of priority prevailed,” held the Court.<sup>297</sup> “Since both Wyoming and Colorado ‘pronounce the rule [of priority] just and reasonable’ when applying it to waters *within* each state, ‘the principle . . . is not less applicable to *interstate* streams and controversies.’”<sup>298</sup>

It would be an understatement to say Wyoming’s “victory” caused problems for its neighbors. “Wyoming suicided and incidentally half murdered all the other states of origin,” declared Delph Carpenter.<sup>299</sup> “It is unfortunate that a Wyoming judge . . . brought about such a disaster.”<sup>300</sup> The particular thorn stuck in Carpenter’s side by *Wyoming v. Colorado* involved the contemporaneous work of a negotiating body called the Colorado River Commission (Commission). “Headwaters states . . . would not fare well in interstate stream conflicts if the Supreme Court decided the outcome.”<sup>301</sup> For Carpenter—a member of the Commission—that was the upshot of Wyoming’s “victory.” “When states began to rely on the Supreme Court for the solution of interstate water problems, they were engaging in the equivalent of war without first exploring the possibility of diplomacy.”<sup>302</sup> The Commission sought to change that equation by solving interstate water conflicts via a domestic “treaty”—that is, by compact.<sup>303</sup>

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<sup>292</sup> *Id.* at 459.

<sup>293</sup> *See id.* at 464 (describing *Kansas v. Colorado*, 206 U.S. 46 (1907), as “a pioneer in its field”).

<sup>294</sup> TYLER, *supra* note 285, at 89.

<sup>295</sup> *Wyoming*, 259 U.S. at 455–56.

<sup>296</sup> TYLER, *supra* note 285, at 89.

<sup>297</sup> HUNDLEY, JR., *supra* note 285, at 177.

<sup>298</sup> *Id.* at 178 (quoting *Wyoming*, 259 U.S. at 424).

<sup>299</sup> TYLER, *supra* note 285, at 173.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 107.

<sup>302</sup> *Id.* at 110.

<sup>303</sup> *Id.* at 111.

High stakes attached to the Commission's work. It focused on a grander scale than in *Wyoming v. Colorado*: the 244,000-square-mile Colorado River Basin.<sup>304</sup> In addition to the federal government, seven states had skin in the game: Wyoming, Colorado, Utah, and New Mexico on the one hand, and California, Arizona, and Nevada on the other—colloquially, the Upper Basin and Lower Basin states. Thirty sovereign Tribal Nations likewise held water rights under *Winters v. United States* that inherently would be affected by any potential compact.<sup>305</sup> They were enveloped in the allotment era, however—"a forgotten people" throughout the basin and nation—and thus had no voice on the Commission.<sup>306</sup> Commencing its negotiations in early 1922, the Commission was an exclusive body, composed solely of federal and basin-state representatives.<sup>307</sup>

The United States Supreme Court announced *Wyoming v. Colorado* during the middle of that year—or, more pointedly, the decision crashed down on the heads of the Upper Basin states, Wyoming included, at that time.<sup>308</sup> Interstate application of prior appropriation in the Colorado River Basin would *not* bode well for the headwaters states. Senior appropriative rights generally did not lie within their borders, but rather inside California's, particularly attached to Imperial Valley's fertile soil. It was a hard truth that spurred Delph Carpenter, Wyoming Commissioner Frank Emerson, and other Upper Basin leaders. "We simply must use every endeavor," Carpenter wrote Emerson, "to bring about the conclusion of a compact at the next meeting at Santa Fe; otherwise, we are badly exposed and we may never again have a like opportunity."<sup>309</sup>

And so they did. Five months later, on November 24, 1922, the Colorado River Commission signed the first interstate water compact drafted in U.S. history.<sup>310</sup> Here was a different approach to "equitable apportionment"—one placing cooperation above adversity. To be clear, though, the compact has never been a panacea. Among other things, its flow obligations have strained basin-state and federal-state relations, and its cursory treatment (non-treatment, really) of Tribal water rights poses serious justice issues.<sup>311</sup> Yet the instrument neutralized

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<sup>304</sup> Lawrence J. MacDonnell, *Colorado River Basin*, in 4 WATER AND WATER RIGHTS 3 (Amy K. Kelley ed., 2021).

<sup>305</sup> *Winters v. United States*, 207 U.S. 564 (1908). For a map of the basin's twenty-nine Indian reservations, see COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY, STUDY REPORT App'x. 1B-1 (2018), [www.usbr.gov/lc/region/programs/crbstudy/tws/docs/Appx%201B%20Federally%20Rec%20Tribe%2012-13-2018.pdf](http://www.usbr.gov/lc/region/programs/crbstudy/tws/docs/Appx%201B%20Federally%20Rec%20Tribe%2012-13-2018.pdf) [<https://perma.cc/SRY8-WV42>]. This map omits the federally recognized San Juan Southern Paiute Tribe.

<sup>306</sup> HUNDLEY, JR., *supra* note 285, at 80.

<sup>307</sup> *Id.* at 138.

<sup>308</sup> *Wyoming v. Colorado* was decided on June 5, 1922. 259 U.S. 419, 419 (1922).

<sup>309</sup> TYLER, *supra* note 285, at 172.

<sup>310</sup> HUNDLEY, JR., *supra* note 285, at 214. For the ratification saga, see *id.* at 215–99.

<sup>311</sup> The compact's flow obligations appear in Articles III(c)–(d), and its one-sentence disclaimer regarding tribal water rights appears in Article VII. Compact, *supra* note 284, at arts. III(c)–(d), VII.

*Wyoming v. Colorado* in the Colorado River Basin,<sup>312</sup> and it also laid a framework for collaboration that has been critical in recent decades.<sup>313</sup> Further, the compact heralded the future. Wyoming would choose the cooperative approach a half dozen more times after 1922,<sup>314</sup> and in doing so join nearly one-third of the water-apportionment compacts formed in the West.<sup>315</sup>

*B. Tribal Reserved Water Rights: Big Horn Adjudication & the Settlement Era*

Those compacts are not the last word on Wyoming and water federalism, however. Another tributary of legal history must be explored. Its headwaters trace to long before the United States superimposed state borders onto the landscape of western North America—to time immemorial for the Native peoples currently residing on Wyoming’s Wind River Reservation. The Eastern Shoshone and Northern Arapaho tribes are *sovereigns*,<sup>316</sup> and they have endured an epic struggle with the State of Wyoming over water rights in the Wind River Basin.<sup>317</sup>

The document that created the reservation in 1868, the Second Treaty of Fort Bridger,<sup>318</sup> is crystal clear about one thing: Wind River was intended as a “permanent home.”<sup>319</sup> Yet the Treaty is opaque about another. Nowhere does it spell out precisely what legal rights the tribes hold to the essential resource for creating and maintaining a homeland on the arid landscape of what is now Wyoming: water. Therein lies the rub—and the entry point for a nearly four-decade-long judicial proceeding aimed largely, though not wholly, at sorting out the tribes’ federal law-based reserved rights to use water in the Wind River Basin.<sup>320</sup>

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<sup>312</sup> See *id.* at art. VIII (addressing satisfaction of Lower Basin present perfected rights).

<sup>313</sup> See, e.g., Gary Pitzer, *A Colorado River Leader Who Brokered Key Pacts to Aid West’s Vital Water Artery Assesses His Legacy and the River’s Future*, W. WATER (Nov. 6, 2020), [www.watereducation.org/western-water/colorado-river-leader-who-brokered-key-pacts-aid-wests-vital-water-artery-assesses-his](http://www.watereducation.org/western-water/colorado-river-leader-who-brokered-key-pacts-aid-wests-vital-water-artery-assesses-his) [https://perma.cc/5R9T-NZ7S].

<sup>314</sup> See *Court Decrees and Interstate Compacts*, WYO. STATE ENG’RS OFF., [seo.wyo.gov/surface-water/interstate-compacts](http://seo.wyo.gov/surface-water/interstate-compacts) (last visited Apr. 7, 2021) [https://perma.cc/9CBJ-X258] (identifying Wyoming’s seven interstate water compacts).

<sup>315</sup> Douglas Grant, *Water Apportionment Compacts Between States, in WATER AND WATER RIGHTS* 46-2 (Amy K. Kelley ed., 2009).

<sup>316</sup> See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 204–20 (2005) (discussing inherent tribal sovereignty).

<sup>317</sup> This story is told well in GEOFFREY O’GARA, *WHAT YOU SEE IN CLEAR WATER: INDIANS, WHITES, AND A BATTLE OVER WATER IN THE AMERICAN WEST* (2002).

<sup>318</sup> Treaty, *supra* note 233.

<sup>319</sup> This phrase appears in Article IV. *Id.* at 674. The Eastern Shoshone were treaty signatories, while the Northern Arapaho were forcibly relocated to the reservation in 1878. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 487–88 (1937).

<sup>320</sup> See generally Jason A. Robison, *Wyoming’s Big Horn General Stream Adjudication*, 15 WYO. L. REV. 243 (2015) (surveying adjudication’s legal history).

Colloquially known as the “*Big Horn* adjudication,” the saga encompassed no fewer than seven Wyoming Supreme Court decisions, as well as one *per curiam* decision from the United States Supreme Court.<sup>321</sup> Handed down in 1988 and 1992, respectively, the most relevant cases in this line are *Big Horn I* and *III*.<sup>322</sup>

*Big Horn I* looked good on paper for the tribes. While the justices of the Wyoming Supreme Court split in their interpretations of the Second Treaty of Fort Bridger, the majority held that a federal law-based reserved right had been implicitly created when the Wind River Reservation was established on July 3, 1868.<sup>323</sup> It predates by roughly three weeks the Wyoming Territory’s designation and therefore stands superior in status to all junior state law-based water rights founded on the prior appropriation doctrine.<sup>324</sup> Dovetailing with this priority date was the Court’s quantification of how much water use the reserved right affords the tribes: no less than 499,862 acre-feet per year—equivalent to 162,880,532,562 gallons.<sup>325</sup>

But, of course, there’s more to *Big Horn I* and its cohort. Like adjudications of Indian reserved rights claims writ large, the case left lingering several vexing issues. First, what good was the 499,862 acre-feet reserved right if the Eastern Shoshone and Northern Arapaho tribes lacked infrastructure and funding to translate that “paper water” into “wet water” within their communities?<sup>326</sup> *Big Horn I* posed (and still poses) that rhetorical question. Second, four years after *Big Horn I* had recognized and quantified the tribes’ reserved right, *Big Horn III* teed up a related point of friction. Were these Tribal *sovereigns*—again that word warrants emphasis—allowed to dedicate an unused portion of their reserved right to instream flows for the Tribal fishery? Short answer: “no,” though under a rationale as fragmented as any in the history of Western water law.<sup>327</sup> Finally, *Big Horn I* and *III* both broached a heated subject regarding the reserved right’s administration. Does control lie with state or Tribal officials? *Big Horn III*

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<sup>321</sup> Summaries of these appellate decisions appear in *id.*

<sup>322</sup> *In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76 (Wyo. 1988) [hereinafter *Big Horn I*]; *In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 853 P.2d 273 (Wyo. 1992) [hereinafter *Big Horn III*].

<sup>323</sup> *Big Horn I*, 753 P.2d at 91.

<sup>324</sup> Wyoming Territory Act, *supra* note 5.

<sup>325</sup> Robison, *supra* note 320, at 283. One acre-foot equals 325,851 gallons. *Water Science Glossary of Terms*, U.S. GEOLOGICAL SURV., [water.usgs.gov/edu/dictionary.html](http://water.usgs.gov/edu/dictionary.html) (last visited Apr. 13, 2021) [<https://perma.cc/N35H-78B4>].

<sup>326</sup> See CONG. RSCH. SERV., INDIAN WATER RIGHTS SETTLEMENTS 2 (2020), [crsreports.congress.gov/product/pdf/R/R44148](https://perma.cc/3JL9-AU7M) [<https://perma.cc/3JL9-AU7M>] (distinguishing “paper water” and “wet water”) [hereinafter CRS REPORT].

<sup>327</sup> Robison, *supra* note 320, at 290–91.

dictated the former: the Wyoming State Engineer has administrative authority over all water rights on Wind River, including the tribes' reserved right.<sup>328</sup> In each of these ways, it's almost as though the Eastern Shoshone and Northern Arapaho tribes hold something they actually don't.

Who “won” through this adversarial approach to water federalism? Maybe the Tribes on paper. Maybe the State on the ground. But maybe the most thoughtful, accurate answer is *no one*. Take to heart former Wyoming State Engineer Jeff Fassett's synopsis of the process after being neck deep in the torrent of *Big Horn I* and *III*:

Wyoming has been used as a poster child for how not to quantify reserved water rights—through pure, hard-fought litigation. We got off on the wrong foot and found it almost impossible to stop the litigation chain. There were positive aspects: a huge settlement on a broad set of non-tribal federal reserved water rights and the resolution of many other issues through settlement processes. But clearly the hard-fought litigation left ill will among the parties. It damaged relationships. And it damaged the neighborhood.<sup>329</sup>

Wyoming's co-sovereigns have since proven to be of a like mind. *Big Horn I* and *III* sit as outliers to this cooperative federalism. Just as Western water compacts such as the Colorado River Compact have eclipsed equitable apportionment litigation such as *Wyoming v. Colorado*, Tribal water rights settlements have prevailed over litigation as the preferred method for resolving Indian reserved rights claims.<sup>330</sup> To date, thirty-six settlements have been formed, the earliest in 1978—one year after the *Big Horn* adjudication was filed.<sup>331</sup> This pattern is no surprise. Settlements are tailored to the values and aspirations of the negotiating parties—tribes, states, federal agencies, and others.<sup>332</sup> In this way, the many pitfalls of the *Big Horn* adjudication can be sidestepped,<sup>333</sup> including the unjust “paper water”/“wet water” disparity and the intergenerational carnage to relationships (sovereign and otherwise) inflicted by the sharp edge of litigation.

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<sup>328</sup> *Id.* at 292–93.

<sup>329</sup> Gordon “Jeff” Fassett, *Results Following Litigation: The Wind River Tribes/Big Horn River*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL 174* (Barbara Cosens & Judith V. Royster eds., 2012).

<sup>330</sup> To be clear, adjudications may prompt negotiated settlements. CRS REPORT, *supra* note 326, at 3.

<sup>331</sup> The *Big Horn* adjudication commenced in 1977. Robison, *supra* note 320, at 268. The first tribal water rights settlement, the Ak-Chin settlement, came about in 1978. CRS REPORT, *supra* note 326, at 6 tbl.1.

<sup>332</sup> CRS REPORT, *supra* note 326, at 6–8, 11–14, 16.

<sup>333</sup> *Id.* at 2.

Looking forward, the precise channel of water federalism on the Wind River Reservation remains to be carved. Yet there is reason for optimism. Just as climate change—an ongoing two-decade-long drought unprecedented in the historical record—is forcing innovative (albeit incremental) approaches to implementing the Colorado River Compact,<sup>334</sup> so too might the *Big Horn* adjudication become over time only the first chapter in a longer, less painful, and more honorable story. Here, too, out of the ashes of litigation might grow the fruit of cooperation, manifest in this context as a post-adjudication negotiated settlement revisiting, progressively and collaboratively, the Eastern Shoshone and Northern Arapaho tribes' reserved right to Wind River water: scope, permitted uses, infrastructure funding, tribal administration, etc.<sup>335</sup> Walking such a path would reflect hard-earned wisdom from *Big Horn I* and *III* . . . .

Discretion is the better part of valor—for headwaters states and other sovereigns.<sup>336</sup>

## V. CONCLUSION

Spanning more than a century, the stories above recount critical episodes in Wyoming's history that cut across distinct fields of natural resources law. Although other stories might be told, these stories are milestones that have undeniably molded the state's landscape. They illuminate how that landscape has been carved into areas designated as wild or tame—with both shaped by human management<sup>337</sup>—and how its ample, precious resources have been allocated for human use. Likewise, these events often prompted the most contentious arguments with Wyoming's co-sovereigns inside and adjacent to the state's borders—the federal government, other western states, and Tribal sovereigns—disputes often requiring resolution by Congress and the United States Supreme Court. No doubt contrasting examples exist, ones which did not generate legislation, judicial

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<sup>334</sup> See, e.g., BUREAU OF RECLAMATION, REVIEW OF THE COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND COORDINATED OPERATIONS FOR LAKE POWELL AND LAKE MEAD 15 (2020) (“The period of 2000 through 2019 was the lowest 20-year period in the historical natural flow record that dates back to 1906.”), [www.usbr.gov/ColoradoRiverBasin/documents/7.D.Review\\_FinalReport\\_12-18-2020.pdf](http://www.usbr.gov/ColoradoRiverBasin/documents/7.D.Review_FinalReport_12-18-2020.pdf) [<https://perma.cc/7XVL-HYQ8>]. The Colorado River Compact's apportionment—specifically, its flow obligations imposed by Article III(c)–(d)—is currently being implemented by a coordinated operating regime for Lake Powell and Lake Mead. U.S. DEPT OF THE INTERIOR, RECORD OF DECISION, COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND COORDINATED OPERATIONS FOR LAKE POWELL AND LAKE MEAD 49–53 (2007), [www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf](http://www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf) [<https://perma.cc/8EVC-PTR6>].

<sup>335</sup> Brandon Reynolds, Water Governance on the Wind River Reservation (May 28, 2019) (unpublished paper) (on file with the author).

<sup>336</sup> WILLIAM SHAKESPEARE, KING HENRY IV pt. 1 act 5, sc. 4, l. 110 (1598) (“The better part of valour is discretion.”).

<sup>337</sup> Carol Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENV'T L. L. 1, 30–31 (1994).



opinions, or news stories. Had we selected those, perhaps other narratives would have emerged.

The formative stories told here, however, reveal Wyoming's tendency towards adversarial federalism. Consider the historic opposition to expansion of areas of federal domain, including Grand Teton and Yellowstone national parks, as well as restrictions on commercial uses of federal land, such as mineral exploration land withdrawals, allotment of the open range, and the roadless rule for national forests. These conflicts relate not just to ownership of land, but to resources associated with it, including water and wildlife, which cannot be contained within jurisdictional boundaries yet require regulatory consistency nonetheless.

Disputes over these issues have been resolved variably by the courts or Congress. Judicial resolution has rarely favored Wyoming, particularly in the long run. The judicial stamp of approval for federal conservation policies in the early *Midwest Oil*<sup>338</sup> and *Camfield*<sup>339</sup> decisions has extended to the National Elk Refuge via *Wyoming v. United States*.<sup>340</sup> Federal courts have rejected arguments that federal conservation efforts impinge on Wyoming's sovereignty or constitute executive overreach or unconstitutional takings. More recent cases, such as the roadless rule decision in *Wyoming v. U.S. Department of the Interior*,<sup>341</sup> affirm this trend.<sup>342</sup> Even when Wyoming has "prevailed" in litigation, as in *Wyoming v. Colorado*, the victories have sometimes been pyrrhic, unintentionally establishing precedent imperiling the State's interests and those of its headwaters neighbors. In Congress, Wyoming has fared slightly better. Efforts to block federal authority outright have mostly failed, as illustrated by President Roosevelt's veto of the bill abolishing Jackson Hole National Monument,<sup>343</sup> as well as Wyoming's Senator Clark's unsuccessful attempt to overturn the *Midwest Oil* decision.<sup>344</sup> Efforts at congressional compromise have been more successful in advancing state interests, including the legislation expanding Grand Teton National Park in exchange for exempting Wyoming from the Antiquities Act.<sup>345</sup>

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<sup>338</sup> *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

<sup>339</sup> *Camfield v. United States*, 167 U.S. 518, 524, 525 (1897).

<sup>340</sup> *Wyoming v. United States*, 279 F.3d 1215 (10th Cir. 2002).

<sup>341</sup> *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011) (rejecting Wyoming's challenge to the Forest Service's roadless area rule).

<sup>342</sup> *See, e.g., Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220 (10th Cir. 2012) (finding that Wyoming lacked standing to bring their challenge to the 2009 temporary winter use rule in Yellowstone because their alleged injuries were merely speculative); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011) (finding the FWS did not adequately analyze the impact of declining white bark pine, a food source, when delisting the Yellowstone population of grizzly bears from the threatened species list).

<sup>343</sup> *See supra* note 34 and accompanying text.

<sup>344</sup> *See supra* note 146 and accompanying text.

<sup>345</sup> 16 U.S.C. § 431a.

Results have been consistently more favorable when Wyoming has taken a collaborative approach from the outset. The original Grand Teton National Park legislation, National Forest Management Act, Wyoming Wilderness Act, Wyoming Range Legacy Act, and Wyoming Wild and Scenic River designations all serve as examples where the State has cooperated with federal land preservation efforts and generally benefited. Similarly, interstate water compacts have protected important state and federal interests, establishing collaborative relationships that have proven critical to responding to the strains of climate change. State and federal collaboration on sage-grouse conservation likewise prevented more restrictive regulations that would have resulted from listing of the species under the ESA.<sup>346</sup> And Wyoming's successful appeal from a district court case restoring ESA protections for grey wolves in the State suggests that federal courts may be more likely to defend collaborative arrangements against environmental challenges.<sup>347</sup>

In contrast to these mixed examples of cooperative and adversarial approaches to federal-state relations, Wyoming's approach to State-Tribal relations has been consistently acrimonious or dismissive. Throughout episodes spanning more than a century—including those involving Greater Yellowstone, Devil's Tower, Wind River, and treaty-based hunting rights—Tribal interests have been under-considered, opposed, or dismissed outright. These events essentially surround a fundamental issue in the natural resources domain: *control*. The *Herrera* decision is one illustration; the *Big Horn* opinions are another. Although not explored in detail here, Wyoming's challenge to the regulatory authority of the Eastern Shoshone and Northern Arapaho tribes under the Clean Air Act represents an additional example.<sup>348</sup> In each instance, the State has sought to limit Tribal engagement in natural resources governance, as well as to curtail treaty rights held by Tribal members, going so far as to argue that the creation of the State itself somehow abrogated these rights that are so core to Tribal sovereignty as well as Native culture and identity. Seeking to maximize the domain of State sovereignty, and to minimize (or perhaps eliminate) the sovereignty of Tribal Nations, has not only been profitless, as seen in *Big Horn* and *Herrera*, but also deeply hurtful. The resulting social and political impacts involve profound, inhumane ripple effects across generations. Whatever the challenges of the next century, this paradigm must change.

It can be difficult to discern definitive causal connections from such a mixed record. The reasons underlying Wyoming's consistent, deliberate decisions to engage in adversarial versus cooperative natural resource federalism are

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<sup>346</sup> See Temple Stoellinger & David "Tex" Taylor, *A Report on the Economic Impact to Wyoming's Economy from a Potential Listing of the Sage Grouse*, 17 WYO. L. REV. 79 (2017).

<sup>347</sup> *Def's. of Wildlife v. Zinke*, 849 F.3d 1077 (D.C. Cir. 2017).

<sup>348</sup> *Wyoming v. U.S. Env't Prot. Agency*, 875 F.3d 505, 511 (10th Cir. 2017).

undoubtedly nuanced and multifarious. An extensive exploration of these motivations goes beyond this Article's scope. Yet, the State's revenue in recent history has been deeply wedded to commercial extractive activities on federal lands, perhaps explaining reflexive resistance to market changes, new regulatory requirements, and protective designations.<sup>349</sup> Further, as revealed by its adjudication of Tribal water rights claims, the State is strongly interested in asserting primacy in natural resources governance. Moreover, as historians have observed, the choice to pursue adversarial pathways may also relate to an entrenched cultural identification with the defiant individualism of the frontier outpost, a mindset fixed on the idea that certain things—the land, wild creatures, running water, even “other” human beings—need to be dominated and subdued.<sup>350</sup> Adversarial federalism may persist in Wyoming so long as the West must be “won.”<sup>351</sup>

Regardless, this Article demonstrates that more times than not, adversity crowns no winners. In many notable instances, litigation—particularly protracted, expensive appellate litigation—has not served Wyoming's interests well. Its promises can evaporate like virga. At best, it has created new pathways for compromise—either through settlement or legislation—that frequently could have been explored earlier, more efficiently, and with less damage to relationships. Further, it ignores the regional and national trend in natural resources governance towards cooperative federalism among multiple sovereigns, as reflected in the multi-party sage grouse initiative<sup>352</sup> and Tribal “sovereignty-affirming subdelegations” such as the Bears Ears Commission.<sup>353</sup> If past is prologue, the vignettes recounted here also show that Wyoming's interests are not inherently inapposite to federal and conservation interests. Like fenceposts in the snow, this record abounds with examples where public opinion and political will have swayed towards conservation to promote tourism and to protect Wyoming's unique natural resources. Although state and federal sovereigns have sometimes been uneasy accomplices rather than staunch allies in these contexts, we derive from them encouragement and optimism for the next century.

Wyoming can be a powerful, innovative partner in cooperative federalism and, in doing so, can both protect and create new sources of revenue. Across the state, and particularly within the Greater Yellowstone Ecosystem, innovative

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<sup>349</sup> See Tara Righetti et al., *Adapting to Coal Plant Closures: A Framework for Understanding State Energy Transition Resistance* (forthcoming 2021).

<sup>350</sup> See generally LIMERICK, *supra* note 2; William Deverell, *Fighting Words: The Significance of the American West in the History of the United States* 25 W. HIST. Q. 185 (1994).

<sup>351</sup> HOW THE WEST WAS WON (Metro-Goldwyn-Mayer Cinerama 1963).

<sup>352</sup> See Robison, *supra* note 320, at 290–91.

<sup>353</sup> Samuel Lazerwitz, Note, *Sovereignty-Affirming Subdelegations: Recognizing the Executive's Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 STAN. L. REV. 1041, 1043–48 (2020) (describing the Bears Ears Commission and other opportunities for delegations around tribal sovereignty).

nature conservation initiatives have spawned, including recent ecosystem management initiatives, endangered species recovery efforts, and wildlife corridor designations.<sup>354</sup> Regularly drawing hordes of visitors, this world-renowned setting plays a critical role in Wyoming's vital tourism and recreation economy. Contemporary research establishes that the presence of protected federal lands constitutes a key element in local economic prosperity—debunking the longstanding myth that wealth only derives from natural resource extraction.<sup>355</sup> It is now apparent that Wyoming's protected federal lands provide a relatively stable economic base, one that should aid the State in diversifying its economy and surmounting recent shockwaves rippling through its mineral-based revenue model.

The twenty-first century's manifold challenges demand an accentuated commitment to cooperative federalism. Natural resource management issues will remain core to Wyoming as it navigates far-reaching energy and industrial transitions, as well as changes wrought on its ecosystems and landscapes by climate change. Many of these issues—whether over rare earth element mining, reduced water flows, or wildfire—will play out across Wyoming's diverse, immense public lands. Still others—closing coal mines, idling generation facilities, and potentially new air, water, and species protections—may impact both public and private lands. Opportunities will surely emerge, too, to develop novel recreation and tourism businesses, or alternative uses of public lands, including carbon capture and storage. These impending possibilities will compel reexamination of many of the existing, hard-fought measures. They will inevitably forge new compromises and consortiums while rendering others obsolete. They will prompt innovation. In addition, they will most likely require federal support, for workforce retraining, critical infrastructure, community development, and economic diversification.

Wyoming has met the natural resource challenges of the past 150 years with characteristic grit and “git'er done” aplomb. Indeed, the State's history is both triumphant and problematic. Although hindsight reveals that its adversarial approach to federalism may have been misdirected in many instances, the rewards of its labors are evident: the State is among the nation's leading producers of natural resource products while concurrently boasting plentiful wildlife and immense swathes of preserved lands. These accomplishments, however, have not come without costs, particularly to Native peoples who were the land's first stewards.

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<sup>354</sup> Keiter, *supra* note 76, at 49–70, 92–96, 154–75.

<sup>355</sup> See generally Ray Rasker et al., *The Effect of Protected Federal Lands on Economic Prosperity in the Non-metropolitan West*, 43 J. REG'L ANALYSIS & POL'Y 110 (2013); THOMAS M. POWER & RICHARD BARRETT, *COWBOY ECONOMICS: PAY AND PROSPERITY IN THE NEW AMERICAN WEST* (2d ed. 2001).

Wyoming's responses to challenges, both new and lingering, involving its relationships with co-sovereigns must transform from one enthroning individualism to one promoting community. Wyoming ought to shy away from expending valuable political and economic capital in the battlefield of litigation, while others are at the table crafting new institutions and initiatives around a common vision. This shift does not require, nor would we advocate, adopting wholesale approaches undertaken by other regions. Wyoming's approach to cooperation must be as unique as it is, taking into consideration its location, population, heritage, economy, and prevalent federal lands. Yet it is a shift that requires moving beyond nostalgic attachments and defiant go-it-alone individualism. Instead, Wyoming should embrace approaches that are cooperative and inclusive, that promote and advance Tribal sovereignty, and that identify new resources and opportunities. If it charts this future, the possibilities are as wide as its open sky.