PROTECTING THE SUBLETTE ANTELOPE MIGRATION: AN ANALYSIS OF THE EVOLUTION OF THE LEGAL TOOLS EMPLOYED TO PROTECT THE SUBLETTE ANTELOPE HERD FROM FENCING OBSTRUCTIONS

by
*Colin Reynolds**

A biological marvel of the natural world, each year a small herd of pronghorn antelope—called the Sublette herd—migrate over 300 miles through a mix of public and private land in Wyoming. The Sublette herd's annual movement constitutes one of the largest remaining "big game" migrations within the continental United States. Unfortunately, this migration faces an increasing number of obstacles threatening its long-term viability; chief among them being fencing obstacles. This Comment examines the evolution of the legal tools the federal government, the state of Wyoming, and everyday citizens can use to protect the Sublette herd's migration.

* J.D., *cum laude*, Lewis & Clark Law School, 2022. I would like to thank Erica Hansen, John MacPherson, and Hall Sawyer for taking the time to answer my questions, as well as Professor Tomás Gómez-Arostegui and Sarah Hammond for their feedback on earlier drafts of this Comment. I would like to thank the authors of *Wild Migrations: Atlas of Wyoming's Ungulates*, Matthew J. Kauffman, James E. Meacham, Hall Sawyer, Alethea Y. Steingisser, William Rudd, and Emilene Ostlind, as well as the University of Oregon InfoGraphics Lab. I would also like to thank the staff of the Lewis & Clark Law Review, particularly Victoria Bejarano Hurst Muirhead, April Stricker, Rebecca K. Tucker, and Annamarie White Carty for their editing and review.

INTRODUCTION

Each autumn in western Wyoming, a group of approximately 200 to 400 pronghorn antelope migrate south, from the high altitudes of Grand Teton National Park to the lower elevations of the Upper Green River Basin, to escape deep snow conditions; and each spring this group returns north to forage and reproduce.[1]

[1] David N. Cherney, *Securing the Free Movement of Wildlife: Lessons from the American West's Longest Land Mammal Migration*, 41 ENV'T L. 599, 602–03 (2011). For an in-person account of this journey, see Emilene Ostlind, *The Perilous Journey of Wyoming's Migrating Pronghorn*, HIGH COUNTRY NEWS (Jan. 4, 2012), https://www.hcn.org/issues/43.22/the-perilous-journey-

This journey of approximately 340 miles—round trip—constitutes one of the longest remaining large mammal ("big game") migrations in the continental United States.[2] Along the journey, this group of pronghorn antelope, also known as the Sublette herd, passes through a variety of jurisdictions, including Department of Agriculture's U.S. Forest Service (USFS) land, Department of the Interior's Bureau of Land Management (BLM) land, and, finally, privately owned land subject to Wyoming laws.[3] With each migration, the Sublette herd faces an increasing number of obstacles and problems that threaten the continued existence of their movement; chief among these threats is fencing.[4] This area is home to hundreds of miles of fencing, much of which either completely prevents or inhibits pronghorn movement.[5] This pervasive fencing obstacle forces the migrating antelope, at worse, to risk injury when attempting to pass through the fencing and, at a minimum, causes the antelope to expend critical energy resources needed for their migratory journey in any attempt to negotiate passage through a fence.[6]

Fortunately, both the federal and state governments currently consider the preservation of this migration important. In 2008, the USFS created the first Migration Corridor in the United States, protecting the pronghorn movement through

---

of-wyomings-migrating-pronghorn.

[2] Cherney, *supra* note 1, at 601. This movement was once considered the longest big game migration; however, longer distance migrations have recently been documented. *See* Temple Stoellinger, Heidi J. Albers, Arthur Middleton, Jason F. Shogren & Robert Bonnie, *Where the Deer and the Antelope Play: Conserving Big Game Migrations as an Endangered Phenomena*, 31 DUKE ENV'T L. & POL'Y F. 81, 92 (2020) ("In 2016, a female mule deer . . . trekked over 242 miles during her spring migration and again on her return in the fall.").

[3] Cherney, *supra* note 1, at 602–03; NAT'L FISH & WILDLIFE FOUND., 2020 WYOMING ACTION PLAN FOR IMPLEMENTATION OF DEPARTMENT OF INTERIOR SECRETARIAL ORDER 3362, at 30–32 (2020), https://www.nfwf.org/sites/default/files/2020-09/Wyoming2020SAP.pdf.

[4] This Comment intends to examine the powers of the state and fencing obstructions, yet the Sublette herd faces many other obstacles such as economic and residential development, road impacts, and oil and gas development. At times, this Comment may touch on these issues, however overall, the obstruction this Comment is focused on is fencing.

[5] Wenjing Xu, Nandintsetseg Dejid, Valentine Herrmann, Hall Sawyer, Arthur D. Middleton, *Barrier Behavior Analysis (BaBA) Reveals Extensive Effects of Fencing on Wide-Ranging Ungulates*, 58 J. APPLIED ECOLOGY 690, 693–94 (2020).

[6] ABBY MELLINGER, DIANA HULME, LAURA RYAN, JORDAN VANA & KATY TESON, UNIV. OF WYO., IMPROVING BIG GAME MIGRATION CORRIDORS IN SOUTHWEST WYOMING 3 (2010), http://www.uwyo.edu/haub/_files/_docs/ruckelshaus/open-spaces/2010-improving-big-game-migration-corridors.pdf ("Fences can be a barrier to most migrating big game species, and are especially problematic for migrating pronghorn."); *see also id.* at 4 ("Many fences on Wyoming rangelands are constructed with woven or barbed wire . . . . Consequently, pronghorn are unable to cross these fences . . . ."). For a recent study of fencing obstacles facing the Sublette herd, see Xu et al., *supra* note 5, at 696 ("[O]ur study underlines an unexpected conservation challenge that summer as well is a costly season for pronghorn considering energy spent interacting with fences.").

the Bridger-Teton National Forest (BTNF).[7] In 2018, Ryan Zinke—then the Secretary of the Interior—issued a Secretarial Order calling for the preservation of big-game movement.[8] Finally, in 2020, Mark Gordon—the current Governor of Wyoming—issued an Executive Order developing a process for the State of Wyoming to protect animal migrations.[9]

These steps either directly affect the Sublette herd—such as the USFS Migration Corridor—or have the potential to do so in the future, depending on the implementation of the Interior Secretarial Order and the Wyoming Executive Order. Additionally, a number of citizen groups have recently formed in the region to protect the Sublette herd, and these groups have also taken steps to identify problematic fencing and to work with fence owners to make it more "wildlife-friendly."[10] These federal, state, and local efforts have gone a long way to preserve the Sublette migration; however, much more needs to be done. In recent years, the Sublette herd has diminished in numbers and, per recent studies, the herd still must cross, on average, hundreds of fencing obstacles on its journey.[11] To ensure the continued preservation of the Sublette migration, all these interested parties may need to leverage all their available powers and legal authorities.

Historically, the American legal foundation concerning the regulation of wildlife and livestock originated and evolved in English common law. When the English colonists brought their common law to the New World, the resulting new American common law regarding wildlife and livestock quickly adapted to the circumstances of America's unique geography. In the subsequent years, the American common law further evolved empowering federal and state governments, and its citizens, with tools today to protect wildlife such as the Sublette herd.

This Comment offers a new take to current scholarship by examining how the evolution of state ownership of wildlife doctrine, from its English common law roots

---

[7] CAROLE HAMILTON, U.S. DEP'T OF AGRIC., DECISION NOTICE & FINDING OF NO SIGNIFICANT IMPACT: PRONGHORN MIGRATION CORRIDOR FOREST PLAN AMENDMENT (May 31, 2008); *see* Cherney, *supra* note 1, at 609 ("[T]he first ever national migration corridor . . . .").

[8] U.S. DEP'T OF THE INTERIOR, OFF. OF THE SEC'Y OF STATE, ORDER NO. 3362: IMPROVING HABITAT QUALITY IN WESTERN BIG-GAME WINTER RANGE AND MIGRATION CORRIDORS (2018).

[9] WYO. OFF. OF THE GOVERNOR, EXEC. ORDER NO. 2020-1, WYOMING MULE DEER AND ANTELOPE MIGRATION CORRIDOR PROTECTION (2020).

[10] Cherney, *supra* note 1, at 611–12.

[11] Hall Sawyer, Jon P. Beckmann, Renee G. Seidler & Joel Berger, *Long-Term Effects of Energy Development on Winter Distribution and Residency of Pronghorn in the Greater Yellowstone Ecosystem*, CONSERVATION SCI. & PRAC., Sept. 2019, at 1, 8 ("[T]he Wyoming Game and Fish Department . . . annually estimated pronghorn abundance for the larger Sublette herd unit that includes our study area and most of the Green River Basin. Those estimates suggest pronghorn declined by 47% between 2005 . . . and 2017 . . . ."); Xu et al., *supra* note 5, at 694 ("Pronghorn encountered fences on an average of 248.5 . . . times per year . . . .").

to the present day, equips state, federal, and local citizen groups with a legal basis to protect the Sublette herd. Part I examines the English common law historical relationship of government and wildlife and documents the evolution of the common law in America. Part II describes the Unlawful Inclosures of Public Lands Act and a series of cases that equip both authorities and citizens with legal tools to remove fences obstructing migrating big game.[12] Part III documents current federal, state, and local efforts to preserve the Sublette migratory herd. Part IV offers policy suggestions to enhance these federal, state, and local efforts that will legally help authorities and interested parties preserve the Sublette herd moving forward.

I. WILDLIFE AND LIVESTOCK

In America, generally speaking, who "owns" non-flying wildlife depends on the land in question: on federal land, the federal government "owns" the wildlife unless they decline their right to do so; on state land, the state "owns" wildlife and will correspondingly regulate any takings.[13] Furthermore, individuals own livestock, or domesticated animals raised in an agricultural setting to produce labor and commodities, and their state laws specify the nature of the fencing a livestock owner is required to erect, lest they become responsible for any damages their livestock may commit. Present American common law concerning wildlife and livestock can be traced to early English common law, and its evolution from its beginnings to present hold relevance for how the federal government and Wyoming will attempt to manage and preserve the Sublette pronghorn herd.

A. English Common Law and Wildlife

English common law evolved to recognize sovereign ownership of wildlife.[14] This process began during the reign of King William I, who asserted his authority over wildlife, circa 1066, as head of the newly introduced Norman feudal system, by establishing royal forests that restricted the take of wild animals.[15] Royal Forests were lands, not necessarily forests, in which the Crown had the exclusive right to hunt wild animals.[16] Once land was designated as a Royal Forest, administrators

[12] The Unlawful "Inclosures" Act uses an antiquated spelling of Enclosures.

[13] This Comment does not discuss Native American Indian Law because the Sublette herd does not travel through Tribal land.

[14] Traditionally, wildlife was referred to as *ferae naturae*. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1452 ("Animals *ferae naturae*, or 'of a wild nature . . . .'").

[15] Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENV'T L. 673, 680–81 (2005) ("The expansion of forest jurisdiction was not the only way the English Crown restricted the taking of wild animals.").

[16] DALE D. GOBLE, ERIC T. FREYFOGLE, ERIC BIBER, FEDERICO CHEEVER & ANNECOOS

managed the game and the land for the benefit of the Crown and anyone else the Crown decided could hunt on the land.[17] Correspondingly, the ability of persons that lived on the land within these forests to use their land was severely restricted, and violators of these "forest laws" were punished, sometimes severely, as in the case of poachers.[18] However, these restrictions protected "the vert and Venison" (the plants and animals) and "largely prevented overharvest of England's game animals."[19]

Over time, the Crown's constant need to raise revenue led to the development of "franchises" or the "exclusive powers to hold markets, to manufacture certain goods . . . and to capture certain fish and game."[20] The franchises concerning fish and game were known as hunting franchises, and they "narrowed how and when a wild animal could be reduced [from its wild state] to individual possession."[21] The right of the sovereign to manage this wildlife was challenged in court, and the sovereign's power was consistently upheld.[22] For example, in 1592, the King's Bench held in *The Case of Swans* that unmarked swans, as well as whales and sturgeons, "belong to the King by his prerogative."[23] Additionally, in 1587, the King's Bench extended the King's prerogative in *Bowlston v. Hardy* to include ownership of all of England's fisheries and all wild animals.[24]

Overall, English courts concluded that the Crown owned wildlife in a sovereign capacity, meaning that they were obligated to manage wildlife in the interests for all, rather than for the Crown's benefit.[25] Thus, the Crown had the power to protect wildlife by regulating its take and by restricting any habitat alteration.[26] Consequently, the core of England's wildlife law on the eve of the American Revolution remained the complete authority of the English sovereign to determine what rights others might have to take wildlife.[27]

WIERSEMA, WILDLIFE LAW CASES AND MATERIALS 195 (3d ed. 2017); *see also id.* at 193 (Henry de Bracton wrote in 1256 that wild animals were "things that are owned by no one [by natural law, but] do now belong to the king"). For simplicity, I will refer to the English monarch as "Crown" rather than King or Queen.

[17] Blumm & Ritchie, *supra* note 15, at 680.

[18] *Id.*

[19] *Id.*

[20] GOBLE ET AL., *supra* note 16, at 192.

[21] Blumm & Ritchie, *supra* note 15, at 681.

[22] GOBLE ET AL., *supra* note 16, at 192.

[23] The Case of Swans (1592) 77 Eng. Rep. 435 (KB).

[24] Bowlston v. Hardy (1597) 78 Eng. Rep. 794 (KB).

[25] ERIC T. FREYFOGLE, DALE D. GOBLE & TODD A. WILDERMUTH, WILDLIFE LAW: A PRIMER 21 (2d ed. 2019).

[26] GOBLE ET AL., *supra* note 16, at 202.

[27] *Id.* at 193 (William Blackstone asserted that "the king, by his prerogative, and [holders of royal franchises] are the *only* persons who may acquire any property . . . in these [wild animals].").

B. American Common Law and Wildlife

The English colonists brought the concept of sovereign ownership of wildlife and a restricted right for an individual to take wildlife to the New World, but the colonists quickly rejected the English common law—largely for food and clothing purposes—and embraced everyone's right to take game in unenclosed lands. This general, unrestricted right to take wildlife persisted into early Colonial America until the need for state intervention became apparent when the severe loss of game threatened food supplies.

1. Early American Rejection of the Common Law

English common law restricted a right to take wild animals, largely conditioning the right to take game on one's connection to the sovereign and his hunting franchises.[28] As Blumm and Richie noted, America's early settlers promptly rejected the common law and allowed for unrestricted take for liberty reasons (rejecting traditional class-based restrictions) and for survival purposes, in that, unlike England, the new colonists almost *had* to allow hunting in order to access food and clothing—two commodities frequently in short supply.[29] Finally, America's early settlers allowed for unrestricted take in order to conquer and tame the great American wilderness, wilderness unlike anything that existed in England.[30]

The unrestricted take of wildlife continued through the dawn of the new republic as nineteenth century state legislatures, viewing nature as "inexhaustibly bountiful" and knowing that market hunting (or commercial hunting) was an important part of the economy, allowed the unrestricted take of wildlife.[31] However, Blumm and Paulsen noted, "[H]arvest practices without limits encouraged overexploitation, as hunters competed to capture the economic benefits from trade in wild animals, and this practice soon devastated wildlife populations."[32] By the later 1800s, many states and territories—to include Wyoming in 1869 as a territory,[33]

---

[28] Blumm & Ritchie, *supra* note 15, at 684–85.

[29] *Id.* at 685–86.

[30] *Id.*

[31] *Id.* at 690.

[32] Blumm & Paulsen, *supra* note 14, at 1456. For an account on how this unregulated take decimated Wyoming's pronghorn population see Jim D. Yoakum, Bart W. O'Gara & Volney W. Howard, Jr., *Pronghorn on Western Rangelands*, in RANGELAND WILDLIFE 211, 213 (Paul R. Krausman ed., 1996) ("[Pronghorn][n]umbers dropped from an estimated 35,000,000 in 1800, to perhaps 13,000 in 1910."); *see also* David N. Cherney & Susan G. Clark, *The American West's Longest Large Mammal Migration: Clarifying and Securing the Common Interest*, 42 POL'Y SCI. 95, 97 (2008) ("By 1900, industrial-level hunting reduced [pronghorn] numbers to near extinction. Wyoming's pronghorn population was 2,000 by 1912.").

[33] An Act for the Protection of Game and Fish in the Territory of Wyoming, ch. 12, 1869 Wyo. Sess. Laws 289 § 1 ("It shall be unlawful for any person or persons to offer for sale any elk, deer, antelope, mountain sheep, or young of their kind, between the first day of February, and the fifteenth day of August in each year"); *id.* § 4 ("Any person who shall violate any section or sections

and in 1890 as a state[34]—responded with legislation that imposed catch limits or shortened the hunting season in order to preserve the food supply.[35] Additionally, at this time, states proclaimed ownership of wildlife in statutes and constitutions—including Wyoming, which, in 1909, passed a law stating that "all wild animals . . . in this State shall be, and are hereby declared to be the property of the State."[36] This said, in the nineteenth century, many aspects of these laws were challenged, and courts generally upheld these laws, citing the concept that sovereign ownership of wildlife transferred from England to America at the nation's formation.[37]

---

of this act, shall forfeit and pay the sum of fifty dollars, one-fourth to go to the informer and remainder to the public schools within the county where the offense was committed . . . ."); *id.* § 5 ("Non-payment . . . shall subject the offender to sixty days imprisonment . . . .").

[34] An Act for the Protection of Wild Game and Insectivorous Birds, ch. 69, 1890 Wyo. Sess. Laws 117–18 § 3 ("It shall be unlawful to pursue, hunt or kill any deer, elk, moose, mountain sheep, mountain goat or antelope, for any purpose whatever . . . . No non-resident of this territory shall pursue, hunt or kill any of the above named animals by any means whatever; *Provided*, *however*, Any actual or bona fide resident of the territory may at any time pursue, hunt and kill any of said animals for the purpose only of supplying himself and his family with food in reasonable quantities; but it shall be unlawful to sell directly or indirectly to offer for sale the carcass of any such animal or the head, horns or any part thereof."); *id.* § 8 ("Any . . . person . . . violating any of the provisions of section three . . . of this act shall be deemed guilty of a misdemeanor, and on conviction shall be find in any sum not less than twenty dollars nor more than one hundred dollars for each offense, or in the case of person . . . be imprisoned in the county jail for a period of not more than ninety days . . . .").

[35] Blumm & Paulsen, *supra* note 14, at 1457; An Act Providing for the Protection of Wild Game, ch. 163, 1909 Wyo. Sess. Laws 232 § 25 ("It shall be unlawful for any person . . . to kill any antelope . . . until the open season for other game animals in 1915 . . . . Any person convicted of violation of the provisions of this section shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars, nor more than three hundred dollars, or by imprisonment in the county jail for not less than thirty days, nor more than six months . . . ."). For an extensive history of early Wyoming efforts to manage the take of wildlife, see Kim Viner, *From Slaughter to Law: Wyoming Protects Big Game—Slowly*, WYOHISTORY.ORG (June 28, 2020), https://www.wyohistory.org/encyclopedia/slaughter-law-wyoming-protects-big-game%E2%80%94slowly. In regard to pronghorn, these measures worked. *See* Yoakum et al., *supra* note 32, at 213 ("[An early twentieth century] concerned public enacted proactive laws and supported conservation management. Within a decade, the [pronghorn] population more than doubled . . . All regulated sport hunting was curtailed until numbers increased sufficiently to sustain viable populations.").

[36] 1909 Wyo. Sess. Laws 228 § 1 ("That all wild animals and wild birds, both resident and migratory, in this State shall be, and are hereby declared to be the property of the State."). State ownership of wildlife is not in the Wyoming Constitution, however, there have been recent efforts to enshrine the state ownership of wildlife doctrine into the Wyoming Constitution. *See, e.g.*, S.J. Res. SJ0001, 66th Legis., Reg. Sess. (Wyo. 2012).

[37] Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are*? *Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 884 (2000) ("The Crown's transcendent interest in wildlife evolved into the legal

In 1889, the Supreme Court heard one of these challenges to states' ability to regulate the take of wildlife. This case would be the first of many Supreme Court cases that would shape our present understanding of the federal and state responsibility for wildlife.

2. Geer v. Connecticut *and the Ownership Doctrine*

In 1888, Connecticut passed a statute preventing the interstate transport of waterfowl taken within the state.[38] In 1889, Connecticut charged and convicted Edward Geer for violating this statute. Geer appealed, and the case made its way to the Supreme Court in a landmark case known as *Geer v. Connecticut*.[39] In this case, the Court faced the question whether Connecticut could regulate game in a manner that made possession of the game within the state lawful but subsequent transport of the same game to another state impermissible.[40]

The Court upheld the state law,[41] and Justice Edward White, writing for the Court, cited both the duty of the state to utilize its police power to preserve the food supply and the state's sovereign ownership in wildlife as originating from English common law.[42] Concerning the English common law, the Court wrote:

> [T]his attribute of government to control the taking of [wild animals], which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.[43]

Thus, in 1896, the Court "confirmed that states own[ed] wildlife in a sovereign sense and indicated that the authority to ensure conservation of wildlife is inherent

---

principle that the State 'owned' wildlife."); *see* Blumm & Ritchie, *supra* note 15, at 696 ("Just as the king owned all wildlife at common law, so [did] the states, by the transfer of royal authority . . . which provided them authority to limit the taking of game.").

[38] Geer v. Connecticut, 161 U.S. 519, 521 (1896).

[39] *Id.* at 520.

[40] *Id.* at 522.

[41] *Id.* at 529 ("The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy.").

[42] *Id.* at 521, 534 ("Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply."); *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited July 11, 2022).

[43] *Geer*, 161 U.S. at 527–28.

in state ownership"—as long as it is not incompatible with the Constitution.[44] As will be discussed later in this Comment, in 1979, the Supreme Court expressly overturned *Geer*'s Commerce Clause holding (that the state can restrict the interstate transportation of wildlife) in *Hughes v. Oklahoma*.[45] But the concept that the state owns wildlife as a sovereign—as long as it is not incompatible with the Constitution—is still good law today and underpins many states' present laws, including Wyoming's.[46]

3. The Establishment of the Federal Power to Regulate Wildlife up to Hughes

In the decades that followed *Geer*, the Supreme Court whittled *Geer* down to the current understanding that the federal government can expressly preempt state law regarding wildlife management[47] and has power to manage wildlife on federal lands within a state.[48] However, in the federal government's absence, the state can still regulate wildlife either as owner or in trust.[49]

a. Missouri v. Holland

The process of shaping *Geer* to our current understanding of federal–state wildlife management began in 1920, when the Supreme Court in *Missouri v. Holland* "established the federal treaty-making power as superior to states' property interest in [wild] animals."[50] In this case, Missouri sought to prevent a U.S. game warden from attempting to enforce the Migratory Bird Treaty Act, the implementing legislation for a treaty between the United States and Great Britain, on behalf of Canada.[51] Missouri argued the Act was invalid because it was "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment," and the Act interfered with their recognized ownership in wild birds within the state.[52]

The Court rejected these arguments, and Justice Oliver Wendell Holmes, writing for the Court, first noted that "[t]he treaty in question does not contravene any prohibitory words . . . found in the Constitution."[53] Next, the Court noted that the state's authority over wildlife is "not . . . exclusive of paramount powers [of the fed-

---

[44] Blumm & Paulsen, *supra* note 14, at 1460.

[45] Hughes v. Oklahoma, 441 U.S. 322, 338 (1979).

[46] WYO. STAT. ANN. § 23-1-103 (2021) ("[A]ll wildlife in Wyoming is the property of the state.").

[47] Hunt v. United States, 278 U.S. 96, 100 (1928).

[48] Kleppe v. New Mexico, 426 U.S. 529, 546 (1976).

[49] *See, e.g.*, WYO. STAT. ANN. § 23-1-103.

[50] Missouri v. Holland, 252 U.S. 416, 434–35 (1920); Blumm & Ritchie, *supra* note 15, at 702.

[51] *Holland*, 252 U.S. at 430–31. Canada was a Dominion of the United Kingdom at the time of the treaty. *See id.* at 431.

[52] *Id.* at 431.

[53] *Id.* at 431, 433; *Justices 1789 to Present*, *supra* note 42.

eral government]," thus establishing the federal government's right to protect wildlife despite the state ownership doctrine.[54] As for the birds themselves, the Court noted that "[w]ild birds are not in the possession of anyone" and "[b]ut for the treaty . . . there soon might be no birds for any powers to deal with."[55] Overall, *Missouri v. Holland* established that state ownership is limited because the Tenth Amendment will not prevent the federal government from entering into a treaty protecting migratory birds that may be found on state lands.[56]

b. Hunt v. United States

In 1928, the Supreme Court held in *Hunt v. United States* that the federal government has the power to manage federal land in contravention of state law through lawful acts of Congress and the Property Clause.[57] Here, the appellants interfered with USFS efforts to cull "large numbers of the deer" that were degrading vegetation in the Kaibab National Forest in Arizona.[58] The appellants justified this interference by claiming that the USFS officials were killing these deer in violation of Arizona game laws.[59]

In rejecting this claim, Justice George Sutherland, writing for the Court, said that "[t]he direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt."[60] Thus, the federal power over public lands via the Property Clause trumps state law.[61] This said, there arguably was some ambiguity as to the reach of *Hunt* regarding the extent of federal power on public lands. The Supreme Court would largely resolve this ambiguity in a case called *Kleppe v. New Mexico*.[62]

c. Kleppe v. New Mexico

In 1976, in *Kleppe v. New Mexico*, the Supreme Court largely resolved lingering questions regarding the breadth of federal power derived from the Property Clause.[63] In this case, the specific issue the Court resolved was whether Congress exceeded its powers in enacting the Wild Free-Roaming Horses and Burros Act in 1971.[64] This

---

[54] *Holland*, 252 U.S. at 434; Blumm & Paulsen, *supra* note 14, at 1460.

[55] *Holland*, 252 U.S. at 434–35.

[56] Babcock, *supra* note 37, at 884 n.149.

[57] Hunt v. United States, 278 U.S. 96, 99–100 (1928).

[58] *Id.*

[59] *Id.* at 100.

[60] *Id.*

[61] Blumm & Ritchie, *supra* note 15, at 702; *Justices 1789 to Present*, *supra* note 42.

[62] Kleppe v. New Mexico, 426 U.S. 529, 537 (1976) ("[A]ppellees [cite *Hunt*] for the proposition that the Property Clause gives Congress only the limited power to regulate wild animals in order to protect the public lands from damage.").

[63] *Id.* at 529.

[64] *Id.* at 531.

Act protected unbranded and unclaimed horses and burros on public lands from "capture, branding, harassment, or death" and granted the BLM or the USFS the authority to enforce this Act.[65] New Mexico argued that the Property Clause did not support this Act and cited *Hunt* in support of their proposition that the Property Clause only gave Congress limited powers "to protect the public lands from damage."[66]

In an opinion written by Justice Thurgood Marshall, the Court affirmed the constitutionality of the Act, rejected New Mexico's "narrow reading," and held that "[t]he power over the public lands thus entrusted to Congress is without limitations."[67] Additionally, the Court reaffirmed the holding in *Geer* that states' powers over wild animals within their jurisdictions "exist only 'in so far as [their] exercise [is] not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.'"[68] Consequently, after *Holland*, *Hunt*, and *Kleppe*, the state ownership doctrine persisted, as long as it was not preempted by federal power.

d. Hughes v. Oklahoma

In 1979, the Supreme Court expressly overruled *Geer*'s Commerce Clause aspects in a case called *Hughes v. Oklahoma*.[69] The facts in *Hughes* are similar to the facts in *Geer*. In *Hughes*, the Court confronted whether an Oklahoma statute that prohibited the transportation or shipment outside the state of a certain type of fish

---

[65] *Id.* (quoting Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649, 649 (1971) (codified as amended at 16 U.S.C. §§ 1331–40)).

[66] *Id.* at 537, 539.

[67] *Id.* at 531, 537, 539 ("And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940))); *Justices 1789 to Present*, *supra* note 42.

[68] *Id.* at 545 (quoting Geer v. Connecticut, 161 U.S. 519, 528 (1896)). In 2002, the Tenth Circuit cited *Kleppe* extensively in *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002). In this case, Wyoming challenged a U.S. Fish and Wildlife Service (FWS) refusal to allow Wyoming to vaccinate elk on the National Elk Refuge (NER)—public land managed by the FWS. *See id.* at 1218. Wyoming argued they had a "sovereign right" to manage wildlife within its borders as reserved to them by the Tenth Amendment. *Id.* at 1223. The court dismissed this claim holding that "[h]istorically, States have possessed 'broad trustee and police powers over the . . . wildlife within their [borders]' . . . [however] these powers are not constitutionally-based. . . . The Property Clause simply empowers Congress to exercise jurisdiction over federal land within a State if Congress so chooses." *Id.* at 1226–27 (quoting *Kleppe*, 426 U.S. at 545). The court concluded that "we believe the point painfully apparent that the Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife . . . on the NER." *Id.* at 1227.

[69] Hughes v. Oklahoma, 441 U.S. 322, 322 (1979).

caught in Oklahoma violated the Commerce Clause.[70] The Court found the Oklahoma statute unconstitutional and, in doing so, overruled *Geer*'s Commerce Clause rationale.[71]

Justice William Brennan, writing for the Court, explained their decision to overrule *Geer*—which found Connecticut's prohibition on out of statement shipments of wildlife constitutional—and noted that *Geer* "was decided relatively early in [the Commerce Clause's] evolutionary process," which is now understood to prevent the "economic Balkanization that had plagued relations among the Colonies and later . . . the States."[72] As for the state ownership of wildlife doctrine, the Court wrote that "[t]he 'ownership' language . . . must be understood as no more than a nineteenth-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"[73] This said, the Court ended its opinion by noting, "[t]he overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders . . . [and] States may promote this legitimate purpose" as long as it does not violate the Constitution.[74]

In dissent, then Justice William Rehnquist noted that "the concept expressed by the 'ownership' doctrine is not obsolete . . . [as the] Court long has recognized that the ownership language of *Geer* . . . is simply a shorthand way of describing a State's substantial interest in preserving . . . natural resources within its boundaries for the benefit of its citizens."[75] Justice Rehnquist then concluded that "[u]nless the [hypothetical state regulation protecting wildlife] directly conflicts with a federal statute or . . . [the Constitution] . . . the State's special interest in preserving its wildlife should prevail."[76] Thus, *Hughes* overruled *Geer* on its Commerce Clause grounds and also noted that the state ownership doctrine is a "legal-fiction," but held that the state may continue to protect wildlife as long as it does not conflict with the constitution.

4. State Ownership of Wildlife in Wyoming in the Wake of Hughes

In the wake of *Hughes*, courts "continue[d] to rely on the rationale that the state 'owns' wildlife;"[77] therefore, a state's responsibility in preserving wildlife justified any state action in that regard.[78] Additionally, because the *Hughes* Court left

---

[70] *Id.* at 323.

[71] *Id.* at 338 ("We therefore hold that [the Oklahoma statute] is repugnant to the Commerce Clause.").

[72] *Id.* at 325–26; *Justices 1789 to Present*, *supra* note 42.

[73] *Hughes*, 441 U.S. at 335 (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1948)).

[74] *Id.* at 338–39.

[75] *Id.* at 341–42 (Rehnquist, J., dissenting).

[76] *Id.* at 342–43.

[77] Blumm & Ritchie, *supra* note 15, at 707.

[78] Babcock, *supra* note 37, at 886.

intact the state duty to protect wildlife, the "[p]re-*Hughes* cases retain[ed] precedential vitality,"[79] and as such, "states continue to rely on *Geer* in support of state regulation of wildlife,"[80] including Wyoming.

In 1977, Wyoming passed § 23-1-103 "Ownership of wildlife," which states "all wildlife in Wyoming is the property of the state."[81] This statute is still good law and is cited in court cases within Wyoming. For example, in 1986, the Supreme Court of Wyoming in *O'Brien v. State*[82] quoted this statute and referenced the common law sovereign ownership of wildlife in writing:

> The declaration of ownership and preemption by the state of the management and control of all wildlife in Wyoming has constitutional sanction . . . . [T]he wildlife within the borders of a state are owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership and in the exercise of its police power, the state may regulate the taking and use thereof.[83]

Additionally, in 1993, the Supreme Court of Wyoming in *Parker Land and Cattle v. Wyoming Game and Fish Commission* wrote that "[the State] has for many years declared that 'all wildlife in Wyoming is the property of the state.'"[84]

Overall, because the federal government has the constitutional ability to manage wildlife on federal lands and because Wyoming state law claims ownership of all wildlife within the state, the question of which authority has the power to regulate wildlife in Wyoming hinges on the jurisdiction of the land in question—specifically, whether the land is federally owned.

C. Livestock

Wyoming is a "fence-out" state, meaning landowners who prefer not to have livestock on their property are responsible for fencing the livestock out. This is a rejection of the English common law, which was largely embraced by many Eastern States. Moreover, as we will see in Wyoming, the combination of "fence-out" laws, the growth of the state's cattle industry, and the development of barbed wire have led to a proliferation of fencing throughout the state. Incidentally, this has also led to a proliferation of obstructions for migrating wildlife.[85]

---

[79] *Id.* at 889.

[80] Blumm & Paulsen, *supra* note 14, at 1461.

[81] WYO. STAT. ANN. § 23-1-103 (2021).

[82] O'Brien v. State, 711 P.2d 1144 (Wyo. 1986).

[83] *Id.* at 1148–49.

[84] Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n, 845 P.2d 1040, 1041 (Wyo. 1993) (quoting WYO. STAT. ANN. § 23-1-103).

[85] Andersen v. Two Dot Ranch, Inc., 49 P.3d 1011, 1015, 1026 (Wyo. 2002).

1. English Common Law

Under English common law, the owner or possessor of livestock has a duty to enclose them in fencing or be strictly liable for damages resulting from their trespass; this is known as a "fence-in" rule.[86] This largely reflects the relatively high population density and the limited amount of open land found within England, as livestock could not be allowed to roam free in such confined spaces and could be dangerous to the community at large.[87]

2. American Common Law and Fencing in Wyoming

In America, some states have rejected the English common law "fence-in" rule. Generally speaking, the Eastern states have retained the "fence-in" rule because of their high population density.[88] On the other hand, the Western states, "because of the unique physical and demographic characteristics," adopted the "fence-out rule," meaning landowners who prefer not to have livestock on their property are responsible for fencing them out—and consequently, the common law strict liability does not apply.[89] Wyoming is a "fence-out" state, as Wyoming law states that "any person owning . . . any livestock . . . which breaches into any lawful enclosure belonging to someone [else] is liable to the party sustaining the injury for all damages sustained by reason of such breaching."[90]

Although this law was passed in 1977, it reflects the nineteenth century concept of the open-range, a doctrine established during the settlement of the West that allowed unregulated grazing of public lands.[91] Specifically, in Wyoming, the cattle industry developed the "open-range system" in the early 1870s to take advantage of

---

[86] *Id.* at 1015; Buford v. Houtz, 133 U.S. 320, 331 (1890) ("[T]he rule of the [common] law of England, that every man is bound to keep his beasts within his own close under the penalty of answering in damages for all injuries resulting from their being permitted to range at large . . . ." (quoting Logan v. Gedney, 38 Cal. 579, 581 (1869))).

[87] *See* Seeley v. Peters, 10 Ill. (5 Gilm.) 130, 142 (1848) ("However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours."); Coby Dolan, *Examining the Viability of Another Lord of Yesterday: Open Range Laws and Livestock Dominance in the Modern West*, 5 ANIMAL L. 147, 151 (1999).

[88] *Andersen*, 49 P.3d at 1015 ("The 'fence-in' rule is the prevalent legal doctrine in the high population density states of the Eastern United States.").

[89] *Id.*; *see also* Buford, 133 U.S. at 326 ("We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use."). For additional discussion on Eastern incorporation of English common law see Dolan, *supra* note 87, at 157–58.

[90] WYO. STAT. ANN. § 11-28-108(a) (2021). The Wyoming Supreme Court recognized Wyoming as a "fence-out" in *Andersen v. Two Dot Ranch, Inc. See Andersen*, 49 P.3d at 1020 n.15 ("[T]he Fence Out Statute (§ 11–28–108) . . . .").

[91] WYO. STAT. ANN. § 11-28-108(a); *see* Cole Ehmke, *If You Fence It, They'll Stay Out*, BARNYARDS & BACKYARDS, Winter 2008, at 14; Dolan, *supra* note 87, at 148, 151.

the unique physical characteristics of the then territory.[92] As described by Harold Briggs, in his 1934 study of open-range ranching,[93] Wyoming was a territory of "great possibilities" for the cattle business operating the open-range system because the territory was

> [A]bundantly watered, while its short nutritious buffalo grass cured on the stem during the dry months of July and August made an excellent winter feed. Its thickets of small trees and bushes along the deep bedded creeks afforded natural shelter for stock while its buttes and mesas broke the force of the winter winds.[94]

However, these conditions would be short lived, as the "removal" of the native population, coupled with the growth of railroad construction, led to a cattle boom that, by 1886, "overstocked" the range, forcing cattle into poor grazing areas.[95] Moreover, the yearly success of the Wyoming cattle industry, operating under the open-range system, hinged on the severity of the weather, especially winter, as each spring ranchers would count their cattle and would "[feel] relieved if fortune was with him" and the losses of cattle to starvation and exposure were low.[96]

The cattle boom and the declining quality of the open-range grasses led cattlemen to begin to buy more land and build fences equipped with a new invention called "barbed wire." Before the invention of barbed wire, fencing in the West was costly, due to the difficulty of acquiring lumber or rock—the latter of which was predominately used in the Eastern states.[97] However, beginning in 1868 and ending in 1874, inventors secured patents for barbed wire, which introduced a cheap, easy, and quick way to fence land. Its subsequent widespread use "changed life . . . dramatically and permanently" in the West, as cattlemen began to buy land and build fences "to protect their investments."[98] The increase in fenced land, the overstocked range, and the unpredictable nature of weather came to a head in the severe winter of 1886–87, where a series of storms and extremely cold temperatures led to the loss of over 50% of open-range cattle.[99] Coincidentally, and grimly, as will be discussed later in this Comment, many of the open-range cattle died "piled up

---

[92] Harold E. Briggs, *The Development and Decline of Open Range Ranching in the Northwest*, 20 MISS. VALLEY HIST. REV. 521, 522, 525 (1934).

[93] *Id.* at 525.

[94] *Id.*

[95] *Id.* at 526–27, 531, 533.

[96] *Id.* at 531–32.

[97] *Glidden's Patent Application for Barbed Wire*, NAT'L ARCHIVES [hereinafter *Glidden's Patent*], https://www.archives.gov/education/lessons/barbed-wire (Oct. 11, 2017).

[98] *Id.*; John E. Mitchell & Richard H. Hart, *Winter of 1886-87: The Death Knell of Open Range*, RANGELANDS, Feb. 1987, at 3, 5.

[99] Mitchell & Hart, *supra* note 98, at 6–7.

against . . . fences."[100] Overall the losses were so severe—a reported monetary loss of more than $20 million in Wyoming alone[101]—that, effectively, "large-scale, open-range cattle enterprises disappeared," as the risks were too high with placing cattle in the open-range "without the benefit of reserve feed and shelter."[102]

Over the subsequent decades, the use of barbed wire fencing continued to proliferate, and the use of fencing grew.[103] Today, in Wyoming, a lawful fence is generally considered one that is constructed well enough to keep out livestock; Wyoming statute § 11-28-102 ("Lawful fences generally") identifies a 3-strand barbed wire, board, pole, and rail fences as "lawful fences in this state."[104] However, notably absent from the statute—as will be discussed later in this Comment—is any restriction on the heights on both the top and bottom wire or rail. Economically, the expansion of fence usage in Wyoming had the positive benefit of allowing new farmers the ability to protect their livestock while also having the negative effect of obstructing wildlife migration routes, at times ensnaring and killing wildlife.[105] However, the proliferation of fencing that began in the 1870s, with the invention and use of barbed wire, was one of the factors that led to the 1885 passage of a key federal law known as the Unlawful Inclosures of Public Lands Act, which provided modern plaintiffs a statutory justification to a claim if a fence restricts the migratory movement of pronghorn.[106]

---

[100] *Id.* at 6.

[101] *Glidden's Patent*, *supra* note 97. Using an online inflation calculator, $20 million in 1887 would be worth over $570 million today. CPI INFLATION CALCULATOR, www.in2013dollars.com (last visited July 11, 2022) (comparing 1887 and 2021).

[102] *Glidden's Patent*, *supra* note 97; Mitchell & Hart, *supra* note 98, at 7.

[103] *Glidden's Patent*, *supra* note 97 ("The widespread use of barbed wire changed life on the Great Plains dramatically and permanently.").

[104] WYO. STAT. ANN. § 11-28-102(a) (2021); CHRISTINE PAIGE, WYO. WILDLIFE FOUND., A WYOMING LANDOWNER'S HANDBOOK TO FENCES AND WILDLIFE 4 (2d ed. 2015), https://westernlandowners.org/wp-content/uploads/2017/09/A-Wyoming-Landowners-Handbook-to-Fences-and-Wildlife_2nd-Edition_-lo-res.pdf ("Generally, a lawful fence is a fence constructed well enough to keep out livestock."). For a helpful guide to Wyoming Fencing Laws, see NAT'L AGRIC. L. CTR., STATES' FENCE STATUTES: WYOMING, https://nationalaglawcenter.org/wp-content/uploads/assets/fencelaw/wyoming.pdf (last visited July 11, 2022).

[105] Geoffrey O'Gara, *The Last Open Range*, HIGH COUNTRY NEWS (Mar. 1, 2004), https://www.hcn.org/issues/269/14586; Dolan, *supra* note 87, at 155.

[106] Unlawful Inclosures of Public Lands Act, ch. 149, 23 Stat. 321 (1885) (codified as amended at 43 U.S.C. §§ 1061–66); *see also* Leo Sheep Co. v. United States, 440 U.S. 668, 683–84 (1979) (describing how the "illegal fencing of public lands" led Congress to pass the Act).

II. THE UNLAWFUL INCLOSURES OF PUBLIC LANDS ACT, *CAMFIELD*, *STODDARD*, *BERGEN*, AND WILDLIFE

The Unlawful Inclosures of Public Lands Act (UIA) is an important tool for persons wanting to ensure the migratory movement of wildlife across public lands. Since the nineteenth century passage of the Act, courts have, over a series of cases—beginning in Colorado[107] and ending in Wyoming[108]—interpreted the statute to prohibit the enclosure of public lands in general and then later to both livestock and wildlife. Although the UIA does not include a citizen-suit provision, it statutorily allows citizens to file an affidavit with a U.S. District Attorney asserting UIA violations, which provides interested parties a tool to prevent the unlawful obstruction of migrating wildlife.[109]

A. UIA

1. Sections 1061 & 1063

In 1885, in an attempt to halt conflicts between settlers, to encourage homesteading on the remaining public lands, and to stem a rise in illegal fencing,[110] Congress passed the UIA, which states as follows:

> [§ 1061. Inclosure of or assertion of right to public lands without title]
>
> "All inclosures of any public lands in any State . . . heretofore or to be hereafter made . . . are declared to be unlawful . . . ."[111]
>
> [§ 1063. Obstruction of settlement on or transit over public lands]
>
> "No person . . . by any fencing or inclosing . . . shall prevent or obstruct . . . any person from peaceably entering upon . . . on any tract of public land . . . or shall prevent or obstruct free passage or transit *over or through* the public lands . . . ."[112]

---

[107] Camfield v. United States, 167 U.S. 518, 524–25 (1897).

[108] United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1504 (10th Cir. 1988).

[109] Unlawful Inclosures of Public Lands Act § 102, 43 U.S.C. § 1062.

[110] Dolan, *supra* note 87, at 155 ("Ranchers themselves started erecting fences on both private and public land in an effort to enclose range for their exclusive use."); George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENV'T L. 1, 27, 30 (1982) ("Homesteaders fenced their plots to exclude roaming livestock, and ranches fenced vast tracts to exclude settlers and nomads. The quarrels and bloodshed caused by fencing compelled both state and federal governments to legislate on the question.").

[111] Unlawful Inclosures of Public Lands Act § 1, 43 U.S.C. § 1061.

[112] Unlawful Inclosures of Public Lands Act § 3, 43 U.S.C. § 1063 (emphasis added). The government is able to own and maintain a fence that would otherwise be prohibited under the UIA. *See* Crow Tribe of Indians v. Repsis, 73 F.3d 982, 993 (10th Cir. 1995) ("The Wyoming Game and Fish Commission owns and maintains a fence . . . . The fence impedes the movement

2. Enforcement and Significance

The federal government is responsible for enforcing the UIA, as the UIA does not provide for a private cause of action.[113] This said, the UIA does explicitly note that a citizen can file an affidavit alerting a U.S. District Attorney to potential violations of the UIA, and upon receipt, the U.S. Attorney must institute a civil-suit against the parties named or described in the affidavit.[114] If an enclosure is found unlawful, the government may be authorized to remove it[115] and persons found guilty of UIA violations may be subject to fines or imprisonment.[116]

The UIA is significant for modern purposes for three reasons: (1) the UIA is still good law; (2) the UIA provides a route for citizens to file complaints with the U.S. Attorney; and (3) due to the construction of the statute, courts have construed the UIA to prevent the obstruction of the passage of both humans and animals on public lands.[117] Between the passage of the UIA and its current understanding stand a series of cases, beginning with *Camfield v. United States*,[118] that equip advocates for migrating wildlife with a tool to remove fencing located on private land that obstructs wildlife on public land.

---

of elk onto private property. The United States, through the Department of Interior, agreed that the elk-proof fence should be constructed; provided matching funds for its construction and maintenance; and approved the subsequent management strategies for the elk contained therein.").

[113] Unlawful Inclosures of Public Lands Act § 2, 43 U.S.C. § 1062 ("It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated . . . to institute a civil suit in the proper United States district court . . . in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of . . . ."); *Crow Tribe of Indians*, 73 F.3d at 993 ("[T]he UIA specifically provides for federal enforcement to be brought in the name of the United States; there is no private right of action."); *id.* at 994 ("Once a case is properly commenced by the United States, it is possible for an interested party, such as the Tribe, to obtain permission to intervene.").

[114] Unlawful Inclosures of Public Lands Act § 2, 43 U.S.C. § 1062.

[115] Unlawful Inclosures of Public Lands Act § 5, 43 U.S.C. § 1065 ("The President is authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any . . . public lands . . . and to employ civil or military force as may be necessary . . . .").

[116] Unlawful Inclosures of Public Lands Act § 4, 43 U.S.C. § 1064 ("Any person violating any provisions of this chapter, whether as owner . . . shall be deemed guilty of a misdemeanor and fined in a sum not exceeding $1,000, or be imprisoned not exceeding one year . . . .").

[117] *See* United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1509–11 (10th Cir. 1988).

[118] Camfield v. United States, 167 U.S. 518, 528 (1897).

B. Cases Using the UIA to Remove Fencing Enclosures of Public Lands

1. Camfield v. United States

In 1897, the Supreme Court upheld the UIA in *Camfield v. United States.*[119] In this case, the defendants constructed fences on their private property in such a manner as to enclose approximately 20,000 acres of the public domain.[120] The United States sought to compel the removal of these fences, yet the defendants argued that this removal would be unconstitutional, as the fences were located on private property.[121] In other words, the defendants argued that they "could do whatever [they] wished on [their] own land."[122] The Court disagreed, declaring the fence to be a nuisance and upholding the constitutionality of the UIA.[123]

Justice Henry Brown, writing for the Court, stated that "[n]o person maintaining such a nuisance can shelter himself behind the sanctity of private property."[124] Additionally, as to the intent of the property owner who owns the fence, the Court noted that the "only matter at issue was whether or not the fence violated the statute."[125] Lastly, the Court addressed the takings claim, writing that anyone who "under the guise of enclosing his own land . . . builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government . . . is guilty of an unwarrantable appropriation of that which belongs to the public at large."[126] This language was later cited by the Tenth Circuit in *United States ex rel. Bergen v. Lawrence*—a case discussed later in this Comment—to reject the defendant's takings argument.[127]

Camfield is important in upholding the constitutionality of the UIA, removing any consideration of intent from the adjudication, declaring that the UIA can apply to fences located on private lands that obstruct public lands, and rejecting the argument that "removal of a fence" constitutes a takings claim. Additionally, *Camfield* is used in both *Stoddard v. United States* and *United States ex rel. Bergen v. Lawrence*, two cases that involve the UIA and wildlife that are important to the present day, and which I will discuss in due course. However, next, our focus moves to a modern

---

[119] *Id.*

[120] *Id.* at 519.

[121] *Id.* at 522.

[122] *Bergen*, 848 F.2d at 1505 (citing *Camfield*, 167 U.S. at 525).

[123] *Camfield*, 167 U.S. at 525 ("[W]e think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement . . . ."); *id.* at 528 ("We are of opinion that, in passing the act in question, Congress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property; that the act is valid . . . .").

[124] *Id.* at 523.

[125] *Bergen*, 848 F.2d at 1505.

[126] *Camfield*, 167 U.S. at 528.

[127] *Bergen*, 848 F.2d at 1507–08 (citing *Camfield*, 167 U.S. at 528).

New Mexico case where, like *Camfield*, the government used the UIA to enjoin the enclosure of public lands; this case is instructive for contemporary purposes as to the elements the government might need to prove in a modern suit.

2. United States v. Byers

In 1998, the federal government brought action in the District Court of New Mexico to enjoin Paul Byers from unlawfully enclosing public lands (in violation of § 1061) and obstructing the passage *over* public lands (in violation of § 1063).[128] The court examined the alleged violation of § 1063 first and noted that to prove the defendant violated the statute, the government "must demonstrate he 1) prevented or obstructed[;] 2) the entry upon . . . or the free passage or transit over or through . . . [;] 3) the public lands."[129] In this case, the government proved each element by establishing that the defendant locked the gate, which prevented the government from entering upon the public land.[130] Consequently, the court entered an injunction to restrain further UIA violations.[131] As for the unlawful enclosure violation of § 1061, the court dismissed the claim as moot, reasoning that by enjoining the defendant from interfering with access to the public lands at issue, violations of § 1061 were not possible.[132]

Although this case does not have precedential value in Wyoming, it is instructive as to the elements a court may require the government to establish to prove a violation of § 1063. Additionally, this case demonstrates that courts may require that the government prove UIA violations by individual section. The legal matter that *Camfield* and *Byers* did not involve is the UIA's applicability to livestock and wildlife; for this, we must first turn our attention to North Dakota in the early 1900s in *Stoddard v. United States*.

C. Cases Using the UIA for Livestock and Wildlife Purposes

1. Stoddard v. United States

In 1914, the Eighth Circuit heard a case concerning a fence built by John Stoddard.[133] The government argued that Stoddard obstructed free transit over and through public lands by constructing a barbed-wire fence-in a manner that, when coupled with the geography of the area ("precipitous buttes and impassible gullies"),

---

[128] United States v. Byers, No. CIV. 98-1359 JP/LFG, 2001 WL 37125234 (D.N.M. Mar. 27, 2001).

[129] *Id.* at *5.

[130] *Id.*

[131] *Id.* at *6.

[132] *Id.*

[133] Stoddard v. United States, 214 F. 566 (8th Cir. 1914). Note that this case occurred in North Dakota and was adjudicated prior to the 1929 establishment of the Tenth Circuit, thus it is the law within the Tenth Circuit. *See Landmark Legislation: Tenth Circuit*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-tenth-circuit (last visited July 11, 2022).

effectively obstructed "the free range of stock."[134] Stoddard made two arguments in his defense. The first argument was that he "built his fence on his own land, and not upon land belonging to the government."[135] Here, the court quickly rejected that argument, referencing *Camfield*.[136]

Stoddard's second argument was that UIA § 1063 is solely applicable to people.[137] Specifically, Stoddard argued that the reference to people in the first portion of § 1063 ("[n]o person . . . by any fencing or inclosing . . . shall prevent or obstruct . . . any person from peaceably entering upon . . . on any tract of public land . . . .") applies to § 1063's second portion ("shall prevent or obstruct free passage [of any person] through the public lands . . . .").[138] The court disagreed with this "forced and unwarrantable construction," noting the UIA "was intended to prevent the obstruction of free passage or transit for any and all lawful purposes over public lands," which included "free herding and grazing of cattle."[139]

Thus, *Stoddard*, coupled with *Camfield*, supports the proposition that a private citizen can file an affidavit with the government claiming that a fence unlawfully obstructs the free passage of livestock over or through public lands. As for UIA's applicability to wildlife in Wyoming, the Tenth Circuit would later answer that question in *United States ex rel. Bergen v. Lawrence*.

2. United States ex rel. Bergen v. Lawrence

In 1988, the Tenth Circuit heard a case concerning a 28-mile fence built by Lawrence on private lands in Wyoming.[140] The issue was that, due to the allocation of land, this fence effectively enclosed over 20,000 acres of private, state, and federal land.[141] Additionally, the fence Lawrence constructed was a "barbed and woven" wire fence with no gap in the bottom that effectively made it antelope-proof.[142] Consequently, the location of Lawrence's fence obstructed pronghorn migrating to a "critical [winter] range" called Red Rim, where the winds blow snow and expose

---

[134] *Stoddard*, 214 F. at 568.

[135] *Id.* at 569.

[136] *Id.* ("This argument is fully answered by the case of *Camfield* . . . . The fence, in our opinion, as constructed by him, effectually accomplished the purpose intended by him, and as effectually served the purpose of thwarting the obvious intent of the act. It in fact prevented and obstructed the free passage over the public lands by ranchers and their stock, and, except for the relief granted by the court . . . would permit the defendant to enjoy a monopoly of the grazing on the public lands . . . .").

[137] *Id.* at 568.

[138] *Id.* (quoting Unlawful Inclosures of Public Lands Act § 3, 43 U.S.C. § 1063).

[139] *Id.* at 568–69.

[140] United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1504 (10th Cir. 1988).

[141] *Id.*

[142] Chandra Rosenthal & Kara Gillon, *Don't Fence Me In—Application of the Unlawful Inclosures of Public Lands Act to Benefit Wildlife*, 5 ANIMAL L. 1, 9 (1999).

sagebrush that pronghorn eat.[143] Unfortunately, during the "unusually severe" winter of 1983—in a situation similar to the 1888–87 winter where cattle died along fencing—antelope collected or "stacked up" against this fence and starved.[144] Approximately 700 antelope died.[145]

The United States brought this action under the UIA (§§ 1061 to 1066) seeking an order compelling removal of the fence or modification to allow free and unrestricted access by pronghorn antelope to the enclosed public lands.[146] The district court, like *Stoddard*, relied on UIA Section 3 (§ 1063) to conclude that the "UIA prohibition against enclosing public lands was not limited to people."[147] The Tenth Circuit agreed with this conclusion and found additional reasons to extend the UIA to cover wildlife and to dismiss Lawrence's argument that the UIA is inapplicable to antelope.[148]

First, the court found the language of UIA Section 1 (§ 1061) declaring that "[a]ll inclosures of any public lands . . . are . . . declared to be unlawful," to be "emphatic and absolute" and not subject to a reinterpretation that excludes wildlife.[149] Second, and in response to Lawrence's argument that there was no mention of wildlife in the legislative history of the UIA, thus narrowing its applicability, the court found support to extend the UIA "beyond people."[150] Moreover, the court used the same logic of the *Stoddard* court to find that the UIA was not limited to persons and was "intended to prevent the obstruction of free passage or transit for *any and all lawful purposes over public lands*."[151]

Thus, the court asked whether "winter forage by antelope" was "a lawful purpose of public lands," and answered in the affirmative by referring to the Federal Land Policy and Management Act (FLPMA) to determine what uses of public lands are lawful—as the uses of public lands will change over time.[152] And here, the

---

[143] *Bergen*, 848 F.2d at 1504; Rosenthal & Gillon, *supra* note 142, at 9. For a journalistic account of the events surrounding *Bergen*, see Dirk Johnson, *Cheyenne Journal; When Antelope Don't Roam Free*, N.Y. TIMES (Nov. 18, 1988), https://www.nytimes.com/1988/11/18/us/cheyenne-journal-when-antelope-don-t-roam-free.html ("The fence prevented the antelope from reaching their natural feeding grounds, and hundreds died. Environmentalists throughout the nation voiced outraged. People from as far away as New York came to Wyoming with shears, trying to cut through the fences.").

[144] *Bergen*, 848 F.2d at 1504; *see also* Johnson, *supra* note 143.

[145] Johnson, *supra* note 143.

[146] *Bergen*, 848 F.2d at 1504; Crow Tribe of Indians v. Repsis, 73 F.3d 982, 994 (10th Cir. 1995) ("Wildlife Federation joined as intervenors in UIA case.").

[147] *Bergen*, 848 F.2d at 1508.

[148] *Id.*

[149] *Id.* at 1508–09; (quoting Unlawful Inclosures of Public Lands Act § 1, 43 U.S.C. § 1061).

[150] *Id.* at 1509.

[151] *Id.* (quoting Stoddard v. United States, 214 F. 566, 568–69 (8th Cir. 1914)).

[152] *Id.*

FLPMA states that "the public lands be managed in a manner . . . that will provide food and habitat for fish and wildlife and domestic animals."[153] For these reasons, the Tenth Circuit held that Lawrence "cannot maintain a fence which encloses public lands and prevents the lawful purpose of antelope access to their winter feeding range."[154]

Lastly, Lawrence argued that the district court's order for him to remove the fencing was an impermissible and unconstitutional taking.[155] The court rejected this argument by citing *Camfield* and stating that "all that [the defendant] has lost is the right to exclude others, including wildlife, from the public domain—a right he never had."[156]

Collectively, *Camfield*, *Stoddard*, and *Bergen* stand for the principle that a private citizen in Wyoming can file an affidavit with the government claiming that a fence—constructed on private lands—which unlawfully obstructs the free passage of livestock *or* migrating antelope on public lands is unlawful under the UIA. Taken together, the tools the federal government, state government, and private citizens can use to prevent the obstruction of wildlife migration in Wyoming are as follows: (1) The federal government owns wildlife on public lands and is able to use the UIA—using *Stoddard* and *Bergen* as precedent—to prevent the unlawful obstruction of livestock and migrating wildlife on public lands. Per *Bergen*, any fencing on private lands that obstructs animal movement on public lands is unlawful. (2) The state owns wildlife on private lands and can make laws regulating this wildlife accordingly. (3) Per the UIA, a private citizen may file an affidavit alerting the United States of potential UIA violations.

Also factoring into this equation is Wyoming's status as a fence-out state—stemming from their rejection of the common law—which requires a property owner to fence any lands they do not want livestock to enter. Consequently, in Wyoming, there is a situation where the state ownership doctrine can clash with the fence-out doctrine in regard to migrating wildlife.

---

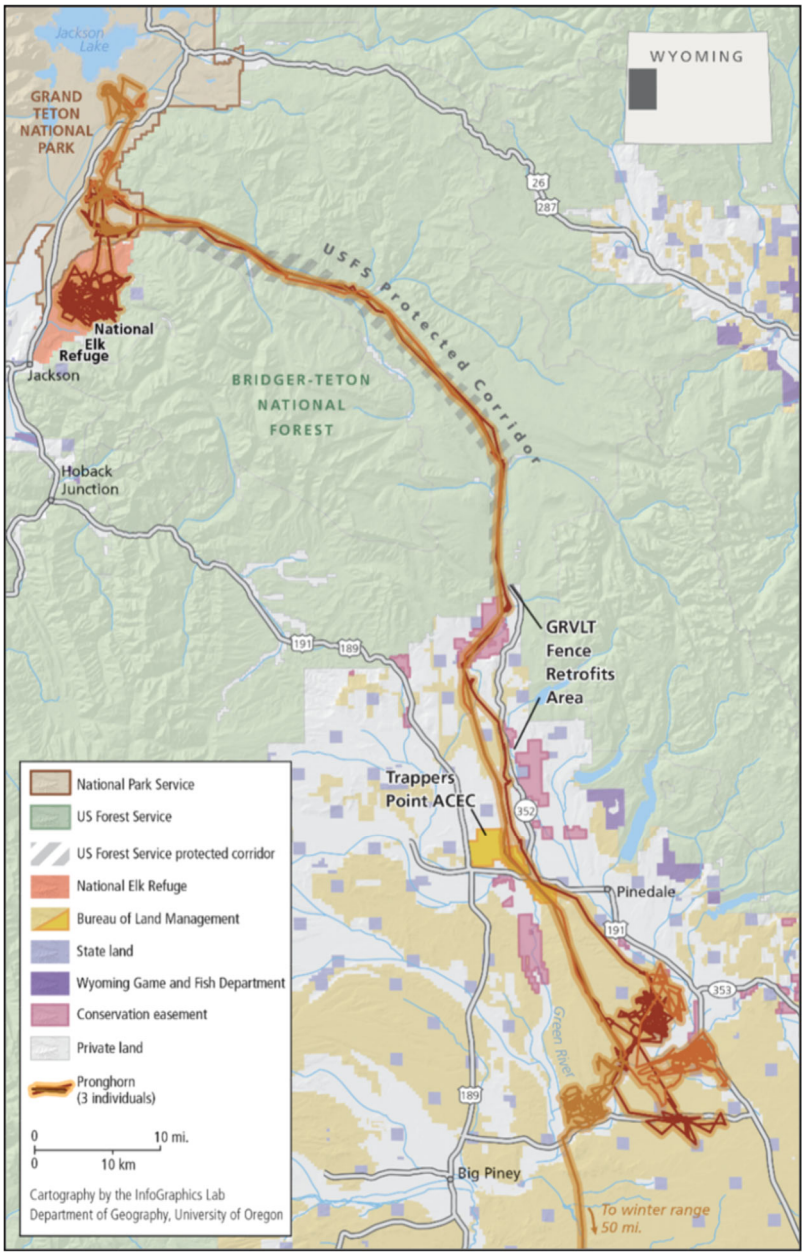
[153] *Id* (quoting Federal Land Policy and Management Act of 1976, § 102(a)(8), 43 U.S.C. § 1701(a)(8) (1988)).

[154] *Id.* 1511–12 (quoting United States *ex rel*. Bergen v. Lawrence, 620 F. Supp 1414, 1420 (D. Wyo. 1985)).

[155] *Id.* at 1505, 1507.

[156] *Id.* at 1508; *see* Camfield v. United States, 167 U.S. 518, 528 (1897). As a postscript, in 1991, the Wyoming Game and Fish Department purchased the land in question in *Bergen* and the agency designated it the Red Rim-Daley Wildlife Habitat Management Area, permanently protecting the land for wintering pronghorn. *Wild Migrations: Atlas of Wyoming's Ungulates* by Matthew J. Kauffman, James E. Meacham, Hall Sawyer, Alethea Y. Steingisser, William Rudd, and Emilene Ostlind. Published by the Oregon State University Press, Corvallis, 2018.

III. CASE STUDY: SUBLETTE PRONGHORN HERD



(Figure 1) This map is a depiction of the Sublette Herd migration route in Wyoming. (Reprinted with permission from: *Wild Migrations: Atlas of Wyoming's Ungulates*, Oregon State University Press © 2018 University of Wyoming and University of Oregon).[157]

[157] Kauffman et al., *supra* note 156, at 137. For a color map, see online version of Comment.

A. Migration Route Background and Jurisdiction

The migrating Sublette pronghorn antelope herd is a biological marvel of the natural world. Only first documented in the 1950s, this *ungulate*[158] herd consists of about 200–400 antelope, out of the approximately 500,000 located in Wyoming, and every year they embark on a 170-mile annual migration (one-way).[159] The migration begins near Jackson Hole, Wyoming, in the eastern portions of Grand Teton National Park, where each fall the pronghorn move east into the BTNF and then south into a mix of public land owned by BLM and privately-owned land.[160] The migration terminates around the Trappers Point Area of Critical Environmental Concern (ACEC) near Pinedale, Wyoming.[161] This migration can be treacherous; the pronghorn must cross streams and pass through steep, rugged terrain, and at times, in deep snow conditions, the pronghorn will travel single file while rotating leaders in front break a path through the snow.[162]

Two additional important areas along the migration route are "stopover areas" and "bottlenecks." Stopover areas or sites are "habitat patches along the migration routes where animals rest and forage to renew energy reserves."[163] Studies have shown that migrating pronghorn spend as much as 95% of their time in stopover

---

[158] *Pronghorn*, NAT'L WILDLIFE FED'N, https://www.nwf.org/educational-resources/wildlife-guide/mammals/pronghorn (last visited July 11, 2022) ("Pronghorn are ungulates (hoofed animals) and related to goats and antelope."); Cherney & Clark, *supra* note 32, at 97 ("Historically, [the Sublette herd migration] was halted in the early 1900s, likely due to the low population from over hunting. In the 1950's, [Wyoming Game and Fish Department] observed the migration's reestablishment on its own.").

[159] Cherney, *supra* note 1, at 601–02. There is evidence that this migration continues farther south. *See* Mike Koshmrl, *Pronghorn Path, Again, Migrates Back on Track Toward Protections*, JACKSON HOLE NEWS & GUIDE (June 17, 2020), https://www.jhnewsandguide.com/news/environmental/pronghorn-path-again-migrates-back-on-track-toward-protections/article_34205105-7556-5ea3-90ff-680830b0d4b1.html [hereinafter Koshmrl, *Pronghorn*] ("But that's not where the animals stop . . . . [S]ome Sublette herd animals press as far south as Interstate 80, where they're then cut off . . . ."). The upper number of estimated yearly Sublette herd migrating pronghorn vary. *E.g.*, Cherney, *supra* note 1, at 602 ("200 to 300"); Ostlind, *supra* note 1 ("300 to 400"). Although I am not aware of any specific yearly tabulation of Sublette herd members migrating, recent trends indicate the pronghorn regional population is in decline. *See* Sawyer et al., *supra* note 11, at 8 ("[T]he Wyoming Game and Fish Department . . . annually estimated pronghorn abundance for the larger Sublette herd unit that includes our study area and most of the Green River Basin. Those estimates suggest pronghorn declined by 47% between 2005 . . . and 2017 . . . .").

[160] *See supra* Figure 1.

[161] Cherney, *supra* note 1, at 603. Trappers Point is located on Figure 1.

[162] Ostlind, *supra* note 1.

[163] Stoellinger et al., *supra* note 2, at 98 (quoting Hall Sawyer & Matt Kauffman, *Stopover Ecology of a Migratory Ungulate*, 80 J. ANIMAL ECOLOGY 1078, 1078 (2011)).

areas, and their protection has become a conservation priority.[164] Bottlenecks are "areas where many animals must funnel through one confined or narrow landscape feature."[165] For the Sublette herd, although the route is mostly about a mile wide, the route traverses three noteworthy bottlenecks, two of which are less than 200 meters wide as the result of human development.[166] The other noteworthy bottleneck is known as Trappers Point. This area is bounded by rivers and is biologically, historically, and culturally important because it has served as a big game bottleneck for approximately 6,000 years and is the location of historical American Indian pronghorn harvesting.[167] Unfortunately, recent development "has narrowed the Trapper's Point bottleneck from one mile to one-half mile in width."[168]

Another human-related issue the Sublette herd encounters are fences—such as the one at issue in *Bergen*—and recent studies have shown that migrating Sublette herd antelope will encounter fences over 240 times per year on average as, along their route, there are over 3,700 miles of fencing.[169] Pronghorn are amazing animals and have the ability to jump over most fences; however, for some unknown reason, pronghorn prefer to pass under fences, and that is where they can get in trouble, as many fences are too low, have barb wire on the bottom rungs, and the wiring will snare male pronghorn antlers.[170] Additionally, in winter, snow can block pronghorn passage under the bottom rung, and those who attempt to jump can be "easily entangled in the wires and killed."[171] Moreover, even when a pronghorn eventually

---

[164] *Id.*

[165] *Id.*

[166] Joel Berger & Steven L. Cain, *Moving Beyond Science to Protect a Mammalian Migration Corridor*, 28 CONSERVATION BIOLOGY 1142, 1143 (2014); Joel Berger & Kim Murray Berger, *Let the Antelope Roam*, N.Y. TIMES (Aug. 9, 2006), https://www.nytimes.com/2006/08/09/opinion/09berger.html.

[167] Stoellinger et al., *supra* note 2, at 99; Berger & Cain, *supra* note 166, at 1143.

[168] Stoellinger et al., *supra* note 2, at 99.

[169] Xu et al., *supra* note 5, at 694 ("Pronghorn encountered fences on an average of 248.5 . . . times per year"); *id.* at 693 ("Fencing digitization and correction generated 6,244.33 km of fence in the study area . . . .").

[170] *See id.* at 696 ("[M]ales might be more constrained by fences because their large horns could prevent them from crossing underneath."). Experts recommend that the bottom wire of a barb wire fence should be unbarbed or smooth and rest at a height of at least 16 inches, depending on the location to allow for pronghorn passage underneath. *See* Yoakum et al., *supra* note 32, at 222. Experts also recommend that the top wire should be no higher than 42 inches. *See* MELLINGER ET AL., *supra* note 6, at 6; *see also* Christine Peterson, *One of Wyoming's Largest Fence Replacement Projects Underway*, CASPER STAR TRIB. (Sept. 25, 2014), https://trib.com/outdoors/one-of-wyomings-largest-fence-replacement-projects-underway/article_e069a0da-6f66-5e11-9129-37e6080f9afb.html ("Most of [the dead pronghorn] caught a leg trying to jump over a fence, or antlers trying to climb under. Then they stayed there until they starved.").

[171] Kauffman et al., *supra* note 156, at 120.

passes through a fence, it usually costs them energy and time,[172] or sometimes, the pronghorn will simply choose not to cross, potentially threatening their migration.[173]

The extensive amount of fencing the Sublette herd encounters can be attributed to Wyoming's livestock economy and their "fence-out" status. Ranchers in Wyoming will use perimeter fencing to contain livestock on their property and then subdivide their property into smaller pastures to manage where and when livestock graze on their property.[174] Additionally, because Wyoming is a "fence-out" state, even landowners who do not own livestock will need to fence their property if they want to ensure open-range livestock does not venture onto their land.[175]

Additionally, the Sublette migration route is critical for the Greater Yellowstone Ecosystem (GYE) because it is the sole remaining migration route servicing the southern portion of the GYE, as six of the eight historical routes "have been lost" and the "possibility of adoption of alternate routes is low."[176] And because the Sublette migration route is considered "invariant"—or not subject to change or alteration—any obstruction along this route is likely to extirpate pronghorn from Grand Teton National Park (the southern portion of the GYE) and may threaten the existence of pronghorn within the whole GYE, jeopardizing a key cog in the "predator-prey system."[177] Consequently, to limit negative impacts and allow for this migration to occur, all actors need to do their best to enable and protect it.

B. Agencies and Actors Involved in Sublette Herd Migration Efforts

Three main actors are responsible for the lands over which the Sublette herd migrates. These actors are the Department of Agriculture's USFS, Department of Interior's BLM, and the State of Wyoming. Factoring into this mix is the rise of concerned citizens groups which have played an increasingly important role in recent years in protecting the Sublette herd.

---

[172] Xu et al., *supra* note 5, at 696.

[173] Stoellinger et al., *supra* note 2, at 110–11.

[174] JACKSON HOLE LAND TR., OPEN LANDS: WINTER NEWSLETTER 6 (2020), https://jhlandtrust.org/wp-content/uploads/2020/12/JHLT_8.5x11_newsletter-2020-web-1.pdf; E-mail from Erica Hansen, Landscape Prot. Specialist & Staff Biologist, Jackson Hole Land Tr., to Colin Reynolds, Student, Lewis & Clark L. Sch. (Mar. 29, 2021, 12:37 PST) (on file with author).

[175] JACKSON HOLE LAND TR., *supra* note 174, at 6.

[176] Joel Berger, Steven L. Cain & Kim Murray Berger, *Connecting the Dots: An Invariant Migration Corridor Links the Holocene to the Present*, 2 BIOLOGY LETTERS 528, 530 (2006) ("Of note is the unsuccessful apparent attempt to use an alternate route . . . during spring migration. After blockage by a highway and multiple efforts to cross a 3500 m[eter] mountain chain, a collared female retraced her course and subsequently followed the historic and still functioning corridor to reach summering grounds.").

[177] *Id.*; Berger & Cain, *supra* note 166, at 1144.

1. Department of Agriculture and U.S. Forest Service

Beginning in the North, the pronghorn pass through BTNF.[178] As highlighted in *Kleppe*, the Property Clause gives the USFS power "without limitations" to manage the land that Congress entrusted to the federal government.[179] Additionally, the National Forest Management Act (NFMA) requires annual planning to ensure appropriate forest management, and any changes or alterations to a plan is subject to the National Environmental Policy Act (NEPA).[180] Acting pursuant to that authority, on May 2008, the BTNF issued a NEPA compliant Environmental Assessment (EA)[181] proposing to amend its 1990 Land and Resource Management Plan and designate a 47,000 acre Pronghorn Migration Corridor.[182] As explained in the EA, this Corridor would "create a standard requiring that projects, activities and infrastructure authorized by the Forest Service in the corridor be designed, timed and/or located to allow continued successful [pronghorn antelope] migration."[183]

On May 31, 2008, BTNF Forest Supervisor Carole Hamilton issued a Decision Notice & Finding of No Significant Impact (FONSI).[184] This Decision Notice adopted the proposed amendments to its management plan and designated the first federally recognized wildlife migration route in the country, which became known as the "Path of the Pronghorn."[185] In issuing this decision, Forest Supervisor Hamilton established that "[a]ll projects, activities, and infrastructure authorized in the

---

[178] *See supra* Section III.A.

[179] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

[180] 16 U.S.C. § 1604(g)(1) ("[S]pecifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act . . . .").

[181] 40 C.F.R. § 1508.9 (2019) ("Environmental assessment: [m]eans a concise public document for which a Federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact[;] (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.").

[182] U. S. DEP'T OF AGRIC., FOREST SERV., ENVIRONMENTAL ASSESSMENT: BRIDGER-TETON NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN AMENDMENT: PRONGHORN MIGRATION CORRIDOR, at i, 3 (2008) [hereinafter ENVIRONMENTAL ASSESSMENT].

[183] *Id.* at i.

[184] HAMILTON, *supra* note 7, at 4. For more on what an EA and FONSI entails, see Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,360 (July 16, 2020) (to be codified at 40 C.F.R. pt. 1501.5) ("An environmental assessment shall: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact . . . ."); 40 C.F.R. § 1508.13 (2019) ("*Finding of no significant impact* means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.").

[185] HAMILTON, *supra* note 7, at 1; *see also* Cherney, *supra* note 1, at 609. Although the Path of the Pronghorn is the first, and only, federally recognized migration corridor, in Texas, along

designated Pronghorn Migration Corridor will be designed, timed and/or located to allow continued successful migration of the pronghorn."[186]

Furthermore, Forest Supervisor Hamilton then made three additional notes:

- Firstly, "[a]ctivities currently authorized . . . within this migration corridor, including livestock grazing operations, coexist with the currently successful pronghorn migrations, so changes to current activities and infrastructure are not required by this amendment."[187]
- Secondly, "[b]efore future activities can be authorized, a determination must be made that the activity will allow continued successful migration."[188]
- Lastly, "[i]t is important to note that, while the full length of the pronghorn migration route includes lands under various jurisdictions, this Forest Plan amendment applies only to National Forest System lands within that larger corridor."[189]

Therefore, taken together, the BTNF has declared that along the designated area, all current activities "coexist" with the migration and any future changes will be measured against this standard. This said, BTNF emphasized that their designation only applied to the lands they administer. Finally, because of NEPA, if any changes were to occur in the future along this route, it would result in a NEPA compliant study and the opportunity for public comment.[190]

Finally, some have criticized this designation. For example, David Cherney, an expert on the Sublette herd, wrote in "Securing the Free Movement of Wildlife" that "[g]iven that current activities within the forest boundary do not impact the migration, and no major future developments are currently planned, [this designation] is mostly a symbolic endeavor signifying that the pronghorn migration is important to the region."[191]

---

the U.S.–Mexico border, the FWS considers the Lower Rio Grande Valley National Wildlife Refuge to be a Wildlife Corridor; this was established in 1979. *See Creating a Wildlife Corridor*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/refuge/Lower_Rio_Grande_Valley/resource_management/wildlife_corridor.html (Feb. 3, 2015); *see also* John Burnett & Marisa Peñaloza, *Border Wall Threatens National Wildlife Refuge That's Been 40 Years in the Making*, NPR (Jan. 14, 2020, 5:00 AM), https://www.npr.org/2020/01/14/795215639/border-wall-threatens-national-wildlife-refuge-thats-been-40-years-in-the-making.

[186] HAMILTON, *supra* note 7, at 1.

[187] *Id.* at 2; ENVIRONMENTAL ASSESSMENT, *supra* note 182, at 7 ("While there are numerous range management fences in the corridor, they do not preclude successful pronghorn migration.").

[188] HAMILTON, *supra* note 7, at 2.

[189] *Id.* at 2.

[190] 16 U.S.C. § 1604(g)(1); HAMILTON, *supra* note 7, at 1–2.

[191] Cherney, *supra* note 1, at 611.

This said, because any future developments along this route would be subject to NEPA compliance, it would allow migration advocates the opportunity to participate in any future planning and potentially challenge any rulemaking through the Administrative Procedure Act.[192] Lastly, although this designation was largely symbolic—as it did not result in any immediate changes within the BTNF—it did result in a surge in attention and public interest, some of which arguably resulted in further action by the state.[193]

2. Department of Interior and Bureau of Land Management

As the migration departs BTNF, it enters largely BLM land interspersed with private and state-owned land. BLM is an agency within the Department of the Interior, and on February 9, 2018, then Secretary of the Interior Ryan Zinke issued Secretarial Order (SO) 3362 titled "Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors."[194] The purpose of the SO is to "enhance and improve the quality of big-game winter range and migration corridor habitat on Federal lands under the management jurisdiction of [Interior] in a way that recognizes state authority to conserve and manage big-game species and respects private property rights."[195] Additionally, the SO "seeks to expand opportunities for big-game hunting by improving priority habitats to assist states in their efforts to increase and maintain sustainable big game populations."[196]

Specifically, for the purposes of this Comment, the SO directs Interior, and its bureaus, to work with states and to collaborate with state wildlife agencies to further migration corridor habitat conservation.[197] Additionally, the SO directs Interior to work "cooperatively with private landowners . . . to achieve permissive fencing measures, including potentially modifying (via smooth wire), removing (if no longer necessary), or seasonally adopting fencing (seasonal lay down) if proven to impede movement of big game through migration corridors."[198]

To achieve the objectives of the SO, each of the Western States were asked to identify their "top 3-5 priority corridor and/or winter range areas" for big game

---

[192] Administrative Procedure Act § 10(e), 5 U.S.C. § 706.

[193] Berger & Cain, *supra* note 166, at 1148 (describing 2005 efforts by early Migration Corridor supporters who successfully garnered state support for the project by noting that if the Migration Corridor was designated, Wyoming could then claim the world's first national park (1872: Yellowstone), its first national monument (1906: Devils Tower), the first national forest (1891: Shoshone), and the first designated migration corridor).

[194] U.S. DEP'T OF THE INTERIOR, *supra* note 8.

[195] *Id.* at 1.

[196] *Id.*

[197] *Id.* at 2.

[198] *Id.* at 5; Angus M. Thuermer Jr., *As Zinke Touts Migration Safeguards, Conservationists Protest*, WYOFILE (Oct. 9, 2018), https://www.wyofile.com/as-zinke-touts-migration-safeguards-conservationists-protest/.

species within their states through State Action Plans.[199] Additionally, some notable hallmarks of the SO and its subsequent implementation are the explicit recognition of state authority to conserve and manage big game and a recognition of the collaborative nature of this effort among state authorities, private landowners, industry, conservation partners, and others.[200]

In August 2020, Interior provided an update on its implementation of SO 3362 and noted that efforts to "further . . . migration corridor habitat conservation" are ongoing and Interior has funded projects to "replace woven wire fence with three-strand wildlife-friendly fencing."[201] Additionally, the update described the allocation of $125,000 to study the movement of the Sublette herd, and the Wyoming Game and Fish Department (WGFD) report on their implementation of this funding described their outreach efforts to local groups and organizations as well as "numerous land owners on fence modifications or removal."[202] Finally, this SO has also allocated money to the Sublette corridor preservation.[203]

Despite laudable efforts, there has been some criticism of this effort. Firstly, SOs are not subject to Administrative Procedure Act (APA) rulemaking requirements and do not carry the force and effect of law.[204] Consequently, any governmental action incongruent with this SO is not subject to legal challenge via the APA. Secondly, since the issuance of this order, many have criticized Interior for actually doing "little to improve and protect big game migration habitat and corridors," and in fact, argued activists, BLM efforts to continue oil and gas development in the region is incongruent to the SO's goal of protecting migration habitat.[205]

---

[199] CASEY STEMLER, DEP'T OF THE INTERIOR, SECRETARIAL ORDER 3362: IMPROVING HABITAT QUALITY IN WESTERN BIG-GAME WINTER RANGE AND MIGRATION CORRIDORS IMPLEMENTATION PROGRESS REPORT 5 (2020), https://www.blm.gov/sites/blm.gov/files/Final-SO3362-report-081120.pdf.

[200] U.S. DEP'T OF THE INTERIOR, *supra* note 8, at 1; STEMLER, *supra* note 199, at 2, 4–5.

[201] U.S. DEP'T OF THE INTERIOR, *supra* note 8, at 4–5; STEMLER, *supra* note 199, at 10.

[202] NAT'L FISH & WILDLIFE FOUND., *supra* note 3, at 34; STEMLER, *supra* note 199, at 34.

[203] Angus M. Thuermer Jr., *National Debate Erupts Over Wildlife Migration Routes*, WYOFILE (May 7, 2019), https://www.wyofile.com/national-debate-erupts-over-wildlife-migration-routes ("The National Fish and Wildlife Foundation described two of the funded projects. One will . . . modify 55 miles of fences and restore 2,355 acres of public land to benefit the Platte Valley and Sublette mule deer herds.").

[204] Administrative Procedure Act § 4(a)(3), 5 U.S.C. § 553(b)(3) ("Except when notice or hearing is required by statute, this subsection does not apply— (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ."); Stoellinger et al., *supra* note 2, at 140.

[205] Tehri Parker, Opinion, *The Interior Department Has Turned Its Back on Rocky Mountain Big Game*, COLO. SUN (Feb. 9, 2020, 5:00 AM), https://coloradosun.com/2020/02/09/interior-department-bernhardt-wildlife-public-lands-opinion/ ("In little over a year, Interior has tried to lease nearly 1.2 million acres to the energy industry in big game priority landscapes, and over half of that is in the most crucial habitat identified by states."); *How the Interior Department Turned*

Moving forward, the SO can be a valuable tool to current or future Interior leadership who can use it as a springboard to meet the intent of this action. Additionally, Interior leadership can use the goals of the SO in a rulemaking process to give this policy the force and effect of law. Additionally, because Interior essentially pushed implementation to the state—recognizing their traditional authority to conserve and manage big game species—the success of this effort will largely fall on the state's shoulders.[206]

3. State of Wyoming

The State of Wyoming has taken some impressive steps to recognize and protect big game animal migrations. Beginning in 2016, the state adopted an Ungulate Migration Corridor Strategy managed by the WGFD.[207] In its 2019 update, the WGFD recommended the Wyoming Game and Fish Commission designate ungulate migration bottlenecks and stopover areas as "Vital" habitat and "recommend[s] no significant declines in species distribution or abundance or loss of habitat function."[208] Also, the WGFD announced the designation of Ungulate Migration Corridors;[209] presently, there are three approved Migration Corridors, all protecting Mule Deer.[210] As of June 2020, the Sublette herd's migration route is under consideration.[211] The impact of this WGFD designation of "Vital" habitat means that the WGFD will engage the federal government as it leases lands and advocate for "no significant declines in species abundance and habitat function."[212] In 2019, both

Its Back on Big Game Migration Corridors, ROCKY MOUNTAIN WILD, https://rockymountainwild.org/protectbiggame/ (last visited July 11, 2022) (overlaying "Crucial Big Game Habitat" and "Energy Lease Sales" in western Wyoming). For other criticisms see Stoellinger et al., *supra* note 2, at 140–41.

[206] Thuermer, *supra* note 198 ("[Secretary Zinke] agreed that significant research has been done in Western Wyoming on the mule deer route, on the Path of the Pronghorn between Grand Teton National Park and wintering grounds in Sublette County, and on other routes in the Yellowstone Ecosystem. 'Wyoming is a little ahead of the pack,' Zinke said.").

[207] For an overall description of Wyoming's progress, see Stoellinger et al., *supra* note 2, at 134–36; Matt Skroch & David Ellenberger, *Wyoming Conserves Habitat Where the Deer and the Antelope (Still) Play*, PEW (May 5, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/05/05/wyoming-conserves-habitat-where-the-deer-and-the-antelope-still-play.

[208] WYO. GAME & FISH DEP'T, UNGULATE MIGRATION CORRIDOR STRATEGY 1 (2019). The posted Wyoming Game and Fish Commission Mitigation Policy lists big game migration corridors, bottlenecks, and stopover areas as "Vital." *See* WYO. GAME & FISH COMM'N, POL'Y NO. VII H, MITIGATION 4 (2016).

[209] WYO. GAME & FISH DEP'T, *supra* note 208, at 1.

[210] *Big Game Animal Migration*, WYO. GAME & FISH DEP'T, https://wgfd.wyo.gov/wildlife-in-wyoming/migration/corridor-maps-and-data (last visited July 11, 2022).

[211] Koshmrl, *supra* note 159.

[212] Angus M. Thuermer Jr., *Game and Fish Proposes New Migration Corridor Protections*, WYOFILE (Mar. 5, 2019), https://www.wyofile.com/game-and-fish-proposes-new-migration-corridor-protections.

industry and conservationists criticized aspects of the plan, which slowed the designation process, leading Wyoming Governor Mark Gordon to pause the process overall in order to examine the protocol for designating migrations.[213]

That pause concluded on February 13, 2020, when the Governor signed Executive Order 2020-1 titled "Wyoming Mule Deer and Antelope Migration Corridor Protection."[214] The EO began with the recognition, harking back to the 1909 law[215]—and its common law roots—that "all wildlife in Wyoming are property of the State and the Wyoming Game and Fish Department is charged with managing all of the State's wildlife in trust for the benefit of the citizens of the State."[216] Next, the EO designated Migration Corridors for three herds of mule-deer,[217] established the process for future corridor designation[218]—of which the Sublette herd is currently a part—and outlined the effects that corridor designation will have on state management.[219]

This EO is important for corridor designations as any applicant for state-permitted projects must consult with WGFD as part of the permitting process, which could result in the denial of a permit.[220] Additionally, within identified and designated migration corridors, WGFD will work with landowners who voluntarily seek assistance in building or modifying fences.[221] This said, existing rights are recognized and respected in furtherance of this EO, and much of the community involvement is voluntary.[222]

As of June 2020, the Sublette herd is poised to be the first migration path to navigate the state's new process.[223] Yet, for designated migration corridors, there are

---

[213] *Id.* (reporting that some conservationists viewed the designations as "toothless"); Mike Koshmrl, *Migration Routes Hit a Bump*, JACKSON HOLE NEWS & GUIDE (Apr. 10, 2019), https://www.jhnewsandguide.com/news/environmental/migration-routes-hit-a-bump/article_19ef9c2b-a1d9-5e06-ada1-ea3c5103fbe9.html ("Receiving written concerns that range from oil and gas lease deferrals to private property rights, the Wyoming Game and Fish Department pumped the brakes on designating its fourth and fifth migration paths, which were vetted by the public this winter."); Koshmrl, *supra* note 159 ("The state agency's efforts, however, were slowed by protests from industry groups and put on hold by Gov. Mark Gordon.").

[214] WYO. OFF. OF THE GOVERNOR, *supra* note 9.

[215] An Act Providing for the Protection of Wild Game, ch. 163, 1909 Wyo. Sess. Laws 228.

[216] WYO. OFF. OF THE GOVERNOR, *supra* note 9, at 1.

[217] *Id.* at 2.

[218] *Id.* at 2, 5 app. B. It is unclear how this designation differs from the 2019 WGFD designation, see WYO. GAME & FISH DEP'T, *supra* note 208.

[219] WYO. OFF. OF THE GOVERNOR, *supra* note 9, at 7 app. C; Koshmrl, *supra* note 159.

[220] WYO. OFF. OF THE GOVERNOR, *supra* note 9, at 7.

[221] *Id.* at 10 app. F.

[222] *Id.* at 8 app. E.

[223] *Id.* at 7 app. C; Koshmrl, *supra* note 159 ("Now [the Sublette herd is] poised to be the first migration path to navigate the state's new process. 'We'll put it to test on the Sublette antelope,' said Angi Bruce, Game and Fish's deputy director of external operations."); *see Proposed*

already some benefits. For example, in a February 2019 BLM Environmental Assessment, the Bureau cited SO 3362 and, at the time, WGFD's identified migration corridors, while noting that "[a]ll parcels that would be offered, and that intersect designated big game migration corridors, will include a special lease notice to facilitate development of avoidance and other mitigation measures to protect the corridor."[224] These mitigation measures include fence modification and removal.[225]

It is clear that Wyoming leveraged the state ownership doctrine as codified under state law and the deference provided by the Department of the Interior in SO 3362 to protect big game wildlife. It remains to be seen if the process for listing new migration corridors detailed in EO 2020-1 will work and result in a timely and prudent listing of the Sublette Migratory Corridor. However, because the utility of that order is largely prospective, in that it only affects future development on Corridor designated lands, until the Sublette herd is listed, it largely will fall upon citizen groups to leverage their resources to protect this route.

4. Citizen Efforts

Since 2006, there have been several major community efforts to protect the Sublette Migration Corridor.[226] For example, in 2008, the Green River Valley Land Trust (GRVLT) developed and led the Corridor Conservation Campaign, which worked with other local community and governmental partners to identify and retrofit obstructive fencing.[227] Additionally, in 2009, the Wyoming Legislature passed the "Sublette Wildlife Fence Initiative," which allocated funding to modify fences to allow for wildlife passage and granted over $400,000 to GRVLT, the project sponsor.[228]

Another main leader in this effort is the Jackson Hole Land Trust (JHLT)—which "merged with and absorbed" the GRVLT in 2016.[229] The JHLT presently manages conservation easements located in the Sublette herd migration path[230] and

Sublette Pronghorn Corridor Map, JACKSON HOLE NEWS & GUIDE (Mar. 5, 2019), https://www.jhnewsandguide.com/proposed-sublette-pronghorn-corridor/image_cd47fd9f-d59e-537f-8982-4c2e0f182ac8.html.

[224] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., DOI-BLM-WY-0000-2018-0004-EA, DECISION RECORD ENVIRONMENTAL ASSESSMENT 21 (2019).

[225] *Id.* at 9.

[226] Cherney, *supra* note 1, at 611; Berger & Cain, *supra* note 166, at 1145 tbl.1.

[227] Cherney, *supra* note 1, at 611; MELLINGER ET AL., *supra* note 6, at 5–7. For a graphical display of GRVLT fence retrofit locations see Kauffman et al., supra note 156, at 137.

[228] 2009 Wyo. Sess. Laws 404 (codified at WYO. STAT. ANN. § 9-15-405) (repealed 2019).

[229] Mike Koshmrl, *JH Land Trust Helps Preserve Migration Path*, JACKSON HOLE NEWS & GUIDE (Sept. 12, 2019), https://www.jhnewsandguide.com/jackson_hole_daily/local/jh-land-trust-helps-preserve-migration-path/article_5c0cbc2b-6f3b-56f3-b010-38313e02b52e.html.

[230] *See* Angus M. Thuermer Jr., *Cabin Removed from Path of the Pronghorn*, WYOFILE (Jul. 18, 2017), https://www.wyofile.com/cabin-removed-path-pronghorn.

participates in fence modification programs.[231] This said, conversations with JHLT representatives highlighted the high cost of fence modification and replacement; on average, the cost of replacing a mile of old fence with a new, wildlife-friendly fence is between $12,000 and $18,000.[232] JHLT representatives did note that most landowners were receptive to wildlife-friendly modifications if they can get labor and cost assistance, as some landowners have over 10 miles of fencing on their property.[233]

Overall, the federal, state, and local efforts to protect the Sublette herd have made great progress in the past several years; though, a 2020 study of the Sublette herd indicates they still encounter many fencing obstacles along their path.[234] In other words, the need for action remains.

IV. PATH AHEAD

In the short- and medium-term, American common law provides governments and their citizens tools to ensure the continued migratory success of the Sublette herd. However, if those efforts do not work, other options exist to protect the Sublette herd, including UIA action, ESA listing, and statutory reform.

A. Short-Term Recommendations

Relatively speaking, the state, local, and federal effort to protect the Sublette herd migration has been a success. Both the state and federal governments have exercised their "ownership" of wildlife to justify implementation of administrative actions and programs. Moreover, citizen groups have demonstrated a committed effort to work with governments and to galvanize local support to remove or modify fencing in the Sublette migration region. In all, recent efforts to preserve the Sublette herd migration have been laudable and should serve as a template for other advocates to follow in their efforts to preserve migrations elsewhere. As for the Sublette herd, in the short-term, all actors should continue to work towards implementation of the programs and policies currently in existence. For example:

- BTNF should continue to maintain its Migration Corridor program and comply with NEPA before authorizing any activities along the Corridor. Interested community groups should participate in the

[231] WBR Staff, *$400K Grant Brings Green River Valley Fence Project to Goal*, WYO. TRIB. EAGLE (Apr. 29, 2009) https://www.wyomingnews.com/400k-grant-brings-green-river-valley-fence-project-to-goal/article_a50099b7-9bc2-564f-a4ac-2823a52d4a1c.html.

[232] E-mail from Erica Hansen, *supra* note 174.

[233] *Id.*

[234] Xu et al., *supra* note 5, at 694.

NEPA notice and comment process to ensure they retain the ability to challenge any decision through the APA.

- Interior and BLM should continue to execute SO 3362 and begin an APA-administered rulemaking process that will ensure the SO will have the force and effect of law. Also, Interior should consider making the voluntary aspect of landowner obstructive fence modification mandatory. If challenged by landowners that a mandatory policy is an unconstitutional taking, the government could cite both *Camfield*[235] and *Bergen*[236] for rejection of that argument and in support of its actions.
- Wyoming should continue to execute EO 2020-1, designate the Sublette herd route, and work with federal and citizen groups to ensure broad participation and management. Additionally, Wyoming should amend its state fencing laws (specifically, Wyoming Statutes Annotated § 11-28-102) to incorporate the Wyoming Wildlife Foundation's wildlife friendly fence recommendations, which have the goals of allowing animals to "jump over and crawl under" fencing without injury and for fencing to "[b]e highly visible for both ungulates and birds."[237] Specific recommendations include having the top and bottom wires set at a preferred height of 40 and 18 inches, respectively, with high-visibility flagging attached at regular intervals.[238] Additionally, the Foundation also recommends having the top and bottom wires "un-barbed" (that is, "barbless" or smooth) so if a pronghorn attempts to crawl under the fence, it will not get caught in the barbs.[239] Finally, the fence wire should be "very taut" to limit the possibility of animal entanglement.[240]
- Citizen groups should participate in any NEPA related process that affects the Migratory Corridor and continue to advocate for the removal of obstructive fencing. Also, a public campaign to preserve the local character of rural Wyoming as connected to "big game" migration could help in this effort, as the "Path of the Pronghorn" designation galvanized support circa 2008.[241] Additionally, Cherney and

---

235 Camfield v. United States, 167 U.S. 518, 528 (1897).

236 United States *ex rel.* Bergen v. Lawrence, 848 F.2d 1502, 1507–08 (10th Cir. 1988).

237 PAIGE, *supra* note 104, at 10.

238 *Id.*

239 *Id.*

240 Kauffman et al., *supra* note 156, at 91.

241 Berger & Cain, *supra* note 166, at 1148–49.

> Clark have observed the potential benefits of appealing for public support of wildlife migration-through the cultural ethic of open-range; thus a campaign linking Wyoming's open-range cattlemen and the wildlife migrations they encountered could work in publicly advocating for less obstructive fencing.[242]

B. Medium- and Long-Term Recommendations

In the medium- to long-term, the common law and current statutes provide other options supporters can utilize to preserve the migrating Sublette herd.

1. Utilizing the UIA to Remove Obstructive Fencing

As noted in earlier in this Comment, UIA Section 2 (§ 1062) allows for private citizens to file an affidavit with the United States District Attorney alleging a UIA violation.[243] Additionally, as noted by Rosenthal and Gillon, in their article about the UIA, previous advocates have employed the following three-prong test to make § 1061 allegations of illegal fencing that enclose public lands:

1. Whether the defendant erected an enclosure that encloses public lands;
2. Whether the defendant has a good faith claim or color of title to all of the enclosed land;
3. Whether the enclosure complies with the relevant federal government-fencing standard.[244]

Furthermore, as demonstrated in *Byers*, to establish a § 1063 violation, the government would likely need to prove that the party:

1. Prevented or obstructed;
2. The entry upon . . . or the free passage or transit over or through . . . .;
3. The public lands.[245]

Advocates, such as the JHLT, have worked on this issue for decades and are very familiar with the area, the issues, and its stakeholders. These advocates are also familiar with the locations of the problematic fences and the obstructive fencing issues the Sublette herd encounters.[246] Consequently, these actors could strategically utilize the UIA, as was done in *Bergen*.

The drawbacks to using the UIA in this manner are numerous. Right now, state and federal authorities are working toward the common goal of protecting wildlife migratory routes, and although this type of collaboration may be slow, it

---

[242] For a discussion on the utility of an appeal towards "cultural value" in "maintaining the local character of rural Wyoming," see Cherney & Clark, *supra* note 32, at 100–01.

[243] Unlawful Inclosures of Public Lands Act § 2, 43 U.S.C. § 1062.

[244] Rosenthal & Gillon, *supra* note 142, at 15.

[245] United States v. Byers, No. CIV. 98-1359 JP/LFG, 2001 WL 37125234, at *5 (D.N.M. Mar. 27, 2001).

[246] For a description of these obstacles, see Xu et al., *supra* note 5, at 691.

ultimately will likely result in the best possible conservation outcomes for advocates. If advocates decide to take the legal route without first exhausting all possible collaborative options, it might result in community backlash of a type seen in other locations.[247] Additionally, it is not guaranteed that the courts will be receptive to utilizing the UIA, as it was used in *Bergen*, in such a wildlife friendly manner today.[248]

2. New Legislation Protecting Migration Routes

A key shortcoming in the current legal approach to wildlife protection is its focus on preserving species threatened with extinction and lack of focus on maintaining species who may not be as imperiled, such as the pronghorn. In "The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance," Robert Fischman and Jeffrey Hyman note that current conservation laws are either abundance-dependent or abundance-independent.[249] An abundance-dependent law is triggered when the population falls below a particular threshold. An example of this type of law is the Endangered Species Act. An abundance-independent law is one that is triggered independent of any threshold of abundance. An example of this law is the Marine Mammal Protection Act, which protects marine mammals irrespective of their population levels.[250] Outside these categories, there is a need to conserve the process of migration as a phenomenon of abundance, and an early example of this is the USFS Path of the Pronghorn, which is, to the author's knowledge, the only migration corridor declared on federal lands.[251]

In 2011, Jeffrey Hyman, Andrea Need, and William Weeks argued for the creation of a federal Migration Protection Act in "Statutory Reform to Protect Migrations as Phenomena of Abundance."[252] This proposed act would craft a legal

[247] For a depiction of the deleterious effects to conservation when residents view conservation being forced upon them from federal authorities, see Ben Goldfarb, *When Wildlife Safety Turns into Fierce Political Debate*, HIGH COUNTRY NEWS (Jan. 1, 2020), https://www.hcn.org/issues/52.1/wildlife-when-wildlife-safety-turns-into-fierce-political-debate.

[248] For a description of the use of the UIA in *United States ex rel. Bergen v. Lawrence*, see Kauffman et al., *supra* note 156, at 121 ("The law hadn't been invoked for wildlife before, but it made a compelling argument.").

[249] Robert L. Fischman & Jeffrey B. Hyman, *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, 28 VA. ENV'T L.J. 173, 191 (2010).

[250] *Id.* at 191 n.71 (citing 16 U.S.C. § 1361 (2006)).

[251] Thuermer Jr., *supra* note 230.

[252] Jeffrey B. Hyman, Andrea Need & W. William Weeks, *Statutory Reform to Protect Migrations as Phenomena of Abundance*, 41 ENV'T L. 407 (2011). An April 2021 New York Times editorial called on the Biden administration to craft an "Abundant Species Act" as well as incorporate wildlife corridors for migratory wildlife in the Administration's 2021 infrastructure plan. *See* Paul Greenberg & Carl Safina, *We Don't Need More Life-Crushing Steel and Concrete*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/opinion/infrastructure-biden-nature.html.

framework to protect migrations that are often neglected, as they usually involve routes that cross jurisdictional lines.[253] The authors suggest that these migration routes could be identified as Nationally and Regionally Significant Migrations and, depending on the status of the species and migration route in question, could result in the acquisition of habitat and prohibitions modeled off of the Endangered Species Act.[254]

In recent years, several states have passed wildlife corridor acts, and in 2018, representative Don Beyer of Virginia sponsored the Wildlife Corridors Conservation Act of 2018, which explicitly provided for the identification and designation of wildlife corridors to "provide long-term habitat connectivity for native species for migration."[255] In 2019, then Senator Tom Udall of New Mexico sponsored the Wildlife Corridors Conservation Act of 2019, which was closely modeled after the 2018 proposed bill that has the same migration language included.[256] Although these bills did not pass Congress and become law, this is surely the type of legislation that lawmakers will reintroduce.[257]

---

[253] Hyman et al., *supra* note 252, at 437.

[254] *Id.* at 437–41.

[255] H.R. 7232, 115th Cong. § 4(b)(1)(B) (2018). For a description of the recent state level wildlife corridor activity see Stephanie Oxley, *Legal Analysis of Wildlife Corridor Acts' Potential to Reverse Biodiversity Decline*, LEWIS & CLARK ENV'T NAT. RES. & ENERGY L. BLOG (Aug. 19, 2020), https://www.lclark.edu/live/blogs/124-legal-analysis-of-wildlife-corridor-acts-potential.

[256] S. 1499, 116th Cong. § 2(b)(2) (2019).

[257] Recent bipartisan state efforts in Florida demonstrate wildlife corridor conservation efforts need not be partisan. *See* Jewel Wicker, *Big Cat Comeback? Florida Strikes Bipartisan Deal to Help Endangered Panthers*, GUARDIAN (May 7, 2021, 6:30 AM), https://www.theguardian.com/us-news/2021/may/07/florida-panther-conservation-wildlife-endangered-species ("[In 2021,] the Florida Wildlife Corridor Act passed with a 115-0 vote in the Florida state house and with a 40-0 vote in the state senate late last month."). Coincidentally—or not—one of the main advocates for the establishment of the Florida wildlife corridor is an advocacy group called "Path of the Panther." *Id.* On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act which contains two sections relevant to wildlife connectivity. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (to be codified in scattered sections of 23 U.S.C.); Press Release, White House, Bill Signed: H.R. 3684 (Nov. 15, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/bill-signed-h-r-3684/. The first is section 171: "Wildlife crossings pilot program" which establishes a pilot program to "provide grants for projects that seek to achieve a reduction in the number of wildlife-vehicle collisions" by "improv[ing] habitat connectivity for terrestrial and aquatic species." Infrastructure Investment and Jobs Act § 171, 23 U.S.C.A. § 171 (West). The second is section 172: "Wildlife-vehicle collision reduction and habitat connectivity improvement" which details the parameters of a study that the Department of Transportation (USDOT) will conduct to reduce wildlife-vehicle collisions. 23 U.S.C.A. § 172 (West). This section also requires USDOT standardize methodology for collision reporting and inserts into the United States Code the declaration that "Congress declares that it is in the vital interest of the United States . . . to ensure adequate passage of aquatic and terrestrial species, where appropriate." 23 U.S.C.A. § 144(a)(2) (West).

3. Endangered Species Act Listing

As a last resort, and if, despite all these efforts, the Sublette herd continues to decrease in numbers, the Fish and Wildlife Service (FWS) or an "interested person," by petition, could initiate the listing process for the Sublette herd under the Endangered Species Act (ESA).[258] If the listing moves forward and the FWS determines that the Sublette herd is in danger of extinction,[259] the designation of critical habitat would be simple, as the migration route is already largely defined to include the critical bottlenecks and stopover areas.[260] One listing issue is the fact that the *species* of pronghorn (*antilocapra americana*) is not currently threatened.[261] A solution to this issue would be to argue the Sublette herd is a "distinct population segment" (DPS), which would make the herd eligible for ESA listing.[262]

Under the current Joint DPS Policy,[263] three elements are considered in a decision regarding the status of a possible DPS as endangered or threatened: discreteness; significance; and conservation status. To satisfy the "discreteness" requirement, one could argue that the Sublette herd is "markedly separated from other populations of the same taxon" due to its unique migratory movement.[264] To satisfy the "significance" requirement, one could argue that the loss of this migration would result in the extirpation of pronghorn from the Yellowstone ecosystem[265] and the loss of this DPS would result in a significant gap in the taxon because this migrating unit would disappear. Finally, to satisfy the "status" requirement, the FWS will need to determine the Sublette herd is in danger of extinction.

The benefits of listing would be immediate. The listing of the Sublette herd would raise the specter of an ESA Section 7 Consultation for every discretionary action "authorized, funded, or carried out" by the government that either jeopardizes the continued existence of the Sublette herd or results in the adverse modification of their critical habitat.[266] The effects of this action would likely be dramatic,

---

[258] Endangered Species Act of 1973 § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A).

[259] 16 U.S.C. §§ 1532(6), 1533(b)(3)(B)(ii).

[260] *Id.* § 1532(5)(A)(i)(I).

[261] *Pronghorn*, IUCN RED LIST, https://www.iucnredlist.org/species/1677/115056938 (June 14, 2016).

[262] 16 U.S.C. § 1532(16). As mentioned previously, current estimates indicate the Sublette Herd has experienced recent population declines. *See* Sawyer et al., *supra* note 11, at 8 ("[T]he Wyoming Game and Fish Department . . . annually estimated pronghorn abundance for the larger Sublette herd unit that includes our study area and most of the Green River Basin. Those estimates suggest pronghorn declined by 47% between 2005 . . . and 2017 . . . .").

[263] *Interagency Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the ESA*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/endangered/laws-policies/policy-distinct-vertebrate.html (Jan. 30, 2020).

[264] *Id.*

[265] Berger et al., *supra* note 176, at 528, 530; Berger & Cain, *supra* note 166, at 1144.

[266] Endangered Species Act of 1973 § 7(a)(2), 16 U.S.C. § 1536(a)(2).

because most of the land the Sublette herd traverses is public, and would be subject to this process. The drawbacks of this strategy could be stark, as it might result in a severe backlash from the state and its citizens, throwing into jeopardy the "bottom-up" conservation progress developed by state and local authorities.[267] Consequently, any move of this nature should only be done as a last resort.

CONCLUSION

> I asscended to the top of the cutt bluff this morning, from whence I had a most delightfull view of the country, the whole of which except the vally formed by the Missouri is void of timber or underbrush, exposing to the first glance of the spectator immence herds of Buffaloe, Elk, deer, & Antelopes feeding in one common and boundless pasture.
>
> —Captain Meriweather Lewis, Monday, April 22, 1805[268]
>
> [The Missouri River] appears navagable as fur as any of the party was, and I am told to near its Source in morrasses in the open Plains, it passes . . . thro' a butifull extinsive vallie, rich & fertile and at this time Covered with Buffalow, Elk & antelopes, which may be Seen also in any other direction in this quarter . . . .
>
> —Lieutenant William Clark, Monday, April 22, 1805[269]

During their expedition, Captain Meriweather Lewis and Lieutenant William Clark were the first persons of European descent to accurately describe pronghorn—and essentially did so in their "pre-European contact" state.[270] In the quoted passages above, the "immence herds" of pronghorn antelope that Lewis and Clark observed covering the valley were in the vicinity of present-day McKenzie County North Dakota—a county in western North Dakota that borders Montana.[271] By 1925, as a result of hunting and habitat destruction, the population of pronghorn in North Dakota was just over 200.[272]

In the centuries since colonists brought English common law to the New World, the resulting American common law developed in such a manner to provide

---

[267] For a depiction of the deleterious effects to conservation when residents view conservation being forced upon them from federal authorities, see Goldfarb, *supra* note 247.

[268] *April 22, 1805*, JS. OF THE LEWIS & CLARK EXPEDITION, https://lewisandclarkjournals.unl.edu/item/lc.jrn.1805-04-22 (last visited July 11, 2022).

[269] *Id.*

[270] Paul A. Johnsgard, *Lewis and Clark on the Great Plains: A Natural History*, JS. OF THE LEWIS & CLARK EXPEDITION (2003), https://lewisandclarkjournals.unl.edu/item/lc.sup.johnsgard.01#fig04 ("Pronghorns were accurately described for the first time by Lewis and Clark, but they were not formally described and scientifically named until 1818.").

[271] *April 22, 1805*, *supra* note 268.

[272] Johnsgard, *supra* note 270.

tools to federal and state governments and citizens to assume ownership of wildlife and remove obstacles to their migration. A key demonstration of one of these tools was seen in *United States ex rel. Bergen v. Lawrence*, where advocates successfully persuaded the courts that the UIA applies equally to humans and wildlife. Moving forward, advocates will need to continue to leverage every legal tool available—and likely create new ones—to ensure migrations, such as the Sublette pronghorn migration, continue in perpetuity.