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Management of National Wildlife Refuges - An Inherent Federal Responsibility

There are current efforts in the Interior Department, in Washington, DC, to negotiate a contract with the Confederated Tribes of western Montana regarding the National Bison Range, Pablo and Ninepipe National Wildlife Refuges, and the NW Montana Wetlands District that raise many disturbing issues concerning the legal authority to allow such action. Section 403(k) of the 1994 "Self-Governance Act," the authority Interior cites for proposing to sign over management of at least 40 National Wildlife Refuges (NWR) and 30 National Parks to various tribal organizations, explicitly excludes "functions or activities that are inherently federal" from the agreements.

The fundamental bases for federal authorities over wildlife reside in the Constitution. In 1842 the Supreme Court declared that wildlife was not private property, owned by individuals, but rather the collective property of all the people. That decision recognized the paramount role of government in wildlife conservation. Placing wildlife (animals ferae naturae) in a status with oceans and air can be dated to the Roman Empire-and then traced through feudal Europe to England. England's wildlife laws, over time, moved away from Royal to Parliamentary powers and came to America with the Colonies. Legislative and regulatory authority over American wildlife was almost exclusively exercised by the states until passage of the Lacey Act in 1900. The federal exercise of those latent powers has since grown to a comprehensive array of statutes in the United States Code today. Where Constitutional federal authorities end, the powers of the states begin. The exercise of those inherent powers constitutes wildlife conservation in America.

Without individual ownership of wildlife, so long as they remain in a wild and generally unconfined condition, only government acting as public trustee can implement a comprehensive range of actions to insure fairness in distributing public benefits, and perpetual conservation of healthy, viable stocks. For-profit organizations, or even those accepting non-profit orientation, lack the authority as well as the freedom to resist their own special interests, and adjust activities for fairness, and conservation.

Based in part on section one of the original Lacey Act, the federal government initiated actions to reserve lands specifically for wildlife conservation. Today's 547 units of the National Wildlife Refuge System are direct lineal descendants of those first reservations. Presidential authority established the first refuges, with congressional acceptance in 1906. Since then numerous statutes applicable to National Wildlife Refuges have been enacted. The Supreme Court has repeatedly affirmed the Constitutional foundations and supremacy of federal authority.

Whenever treaties entered into by the United States require the high contracting powers to conserve migratory or other wildlife, it has intended National Wildlife Refuges to serve prominently in meeting those obligations. Only the Federal Government may negotiate, sign and implement treaties, which become the supreme law of the land, parallel with the Constitution. The international commitments of the United States encompass most classes of American wildlife, and, wherever such wildlife exists on National Wildlife Refuges, it becomes a federal responsibility. Treaties with Mexico, Canada, Russia and Japan commit to the conservation of North American migratory birds. About 70-75% of

America's National Wildlife Refuges were specifically acquired and developed to conserve migratory birds, and to fulfill such obligations. All National Wildlife Refuges shelter birds covered by treaty, and are expected to contribute to their conservation. Over two dozen treaties commit to the conservation of whales, seals, fishes, polar bears, caribou, Mexican game animals, endangered species, wetlands, and other components of our natural systems. Many National Wildlife Refuges, including those in Alaska, have statutory mandates to fulfill the wildlife treaty obligations of the United States. Such responsibilities and authorities are not delegable beyond the federal government, except as expressly permitted in law.

Delegations from Congress under the property and commerce (interstate and foreign) clauses of the Constitution for federal management of National Wildlife Refuges have occurred throughout its 100-year history. The latest comprehensive statute guiding federal management became law in 1997 (National Wildlife Refuge System Improvement Act). Numerous federal laws (over 100) have applicability to refuges or the Refuge System, such as the National Environmental Policy Act, Endangered Species Act, clean water, clean air, archeological, cultural, and historical resources protection, Wilderness and other special designations, including Biosphere Reserves and World Heritage Sites. Additional federal powers, applicable to wildlife conservation and refuges, based in the general welfare and the immunities and privileges provisions of the fourteenth amendment, have been alluded to by the courts, but remain to be more fully developed. Each rests squarely in the federal arena.

In 1966, the Refuge System Administration Act defined the System and placed all refuges, whatever their previous nomenclature, under that umbrella. Thus, while individual refuges might have been viewed separately in earlier years, they became part of a whole now further recognized and shielded by Congress. In 1976, the "Game Range Act" mandated that all NWRs be administered through the Director of the U.S. Fish and Wildlife Service. Other 1966 Act amendments, and provisions in the Federal Land Policy and Management Act, removed authority of the President and Secretary of the Interior to revoke any refuge. Congress alone retains power over disposition and management of NWRs. The 1997 NWRS Improvement Act added fresh goals and mandates to Refuge System law. Among them is a requirement that each refuge be managed to achieve their original establishing purposes, then the Refuge System's purpose. Any NWR managed for non-federal goals and objectives would abridge those mandates.

Neither the President nor Secretary of the Interior has authority to unmake a refuge. Neither of them has authority, absent explicit law, to reassign management of any National Wildlife Refuge to an agency, organization, or other entity beyond the U.S. Fish and Wildlife Service. The "Self-Governance Act" doesn't contain such explicit power. Assigning management program responsibilities beyond explicit control of the FWS Director would violate the law. NWR management resulting in noticeable deviations from the traditional (i.e. a parallel refuge concept) would violate NWRS law.

One can argue that each of the Constitutionally based elements above give sufficient reason to conclude that NWR management is inherently federal; the combined weight of the whole must surely remove residual doubt, if any exists. While individual NWR activities, undertaken within but only as part of the total NWRS management program, may be available to qualified contractors, authorized refuge employees, hired and assigned under standard federal personnel practices, must design any such activity and oversee the work. A properly educated and trained Refuge Manager, professionally qualified and hired under U.S. Civil Service rules, must administer each National Wildlife Refuge and report to the FWS Director. It is an inherently federal matter.