Who Calls the Shots?

By Thomas Baumeister and Tom Dickson

To hunt in Montana is to be faced with a whole lot of things you can do and a fair number you can't.

For example, hunters can hunt for five months each year, hunt for more than 20 game species, and hunt on more than 22 million acres of public land.

But unauthorized hunters can't hunt on Indian reservations. And no one may hunt ducks or geese without a federal migratory bird stamp, hunt any species in Glacier National Park, or hunt grizzlies anywhere in Montana.

Why is hunting restricted in some places and not others? More to the point, why can the state call the shots regarding wildlife management (including hunting opportunities) in some cases, yet the federal government and Indian tribes can trump state authority in others?

Most hunters don't give these questions a second thought. But they are worth pondering, because the answers lie at the heart of America's unique system of wildlife management. Over the past century, hunters and other concerned citizens have struggled to find the right balance of state, federal, and other authority over wildlife. Those struggles continue today, in court cases and legislation that could shift the balance of authority in ways that some argue are unfair, undemocratic, and even unconstitutional.

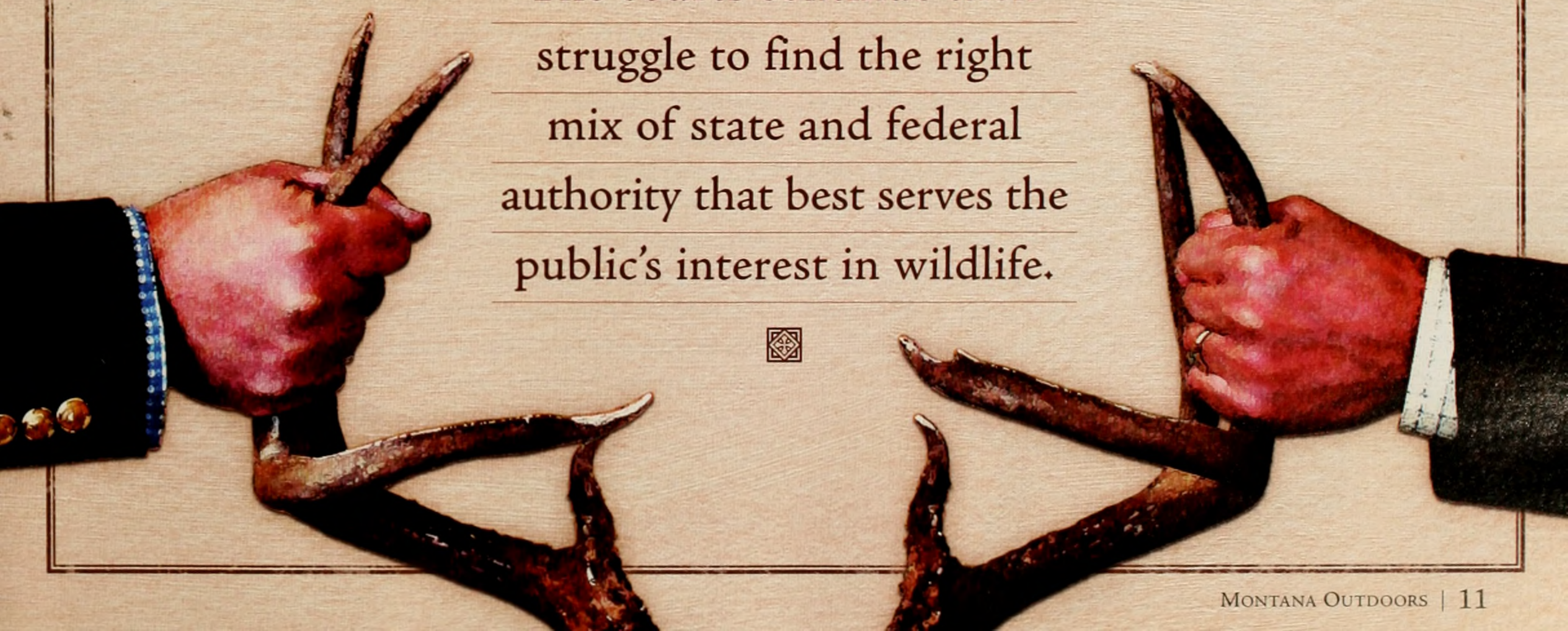
Most hunters this time of year focus their attention on deer, elk, and other game animals—not weighty legal or philosophical issues. Yet the hunting season can also be a time for reflection and discussion on why hunters are able to do some things but not others. And on how ongoing legal and legislative battles could affect the wildlife management authority of federal and state governments, and what that means to the future of wildlife management.

One of the founding principles of wildlife management in the United States is that no one owns wildlife. Put another way, everyone owns wildlife equally (though not "owning" it in a strictly legal sense, like a person would own a car or a house).

The concept has its roots in ancient Roman law. Under the legal codes established by Emperor Justinian (AD 529), wildlife and other natural resources could not be owned by anyone until it was captured and reduced to possession. For example, no one owned the fish in a lake. But if you caught a fish, it was considered yours.

The concept changed in England during the Middle Ages when various kings declared that people could be punished, even killed, for hunting on royal property. Ownership of wildlife and other public resources remained under the king's authority. Though wildlife was considered in public ownership, only the king could decide who had access to that wildlife, granting or selling it to those of privilege and wealth.

By the 15th century, however, some people in England began to rebel against the crown. The rebellion grew out of religious strife and persecution, which eventually led to a rejection by the public of royal prerogatives and wealth. This rebellious spirit led to the idea that



The courts continue their struggle to find the right mix of state and federal authority that best serves the public's interest in wildlife.

natural resources should be owned and controlled by the general public. Centuries later, the concept would characterize the American attitude toward wildlife.

In America's early years, the question of who had authority over wild animals rarely came up because there appeared to be enough wildlife for everyone to use. But by the late 19th century, the growing human population began to compete for what previously had seemed to be limitless natural resources.

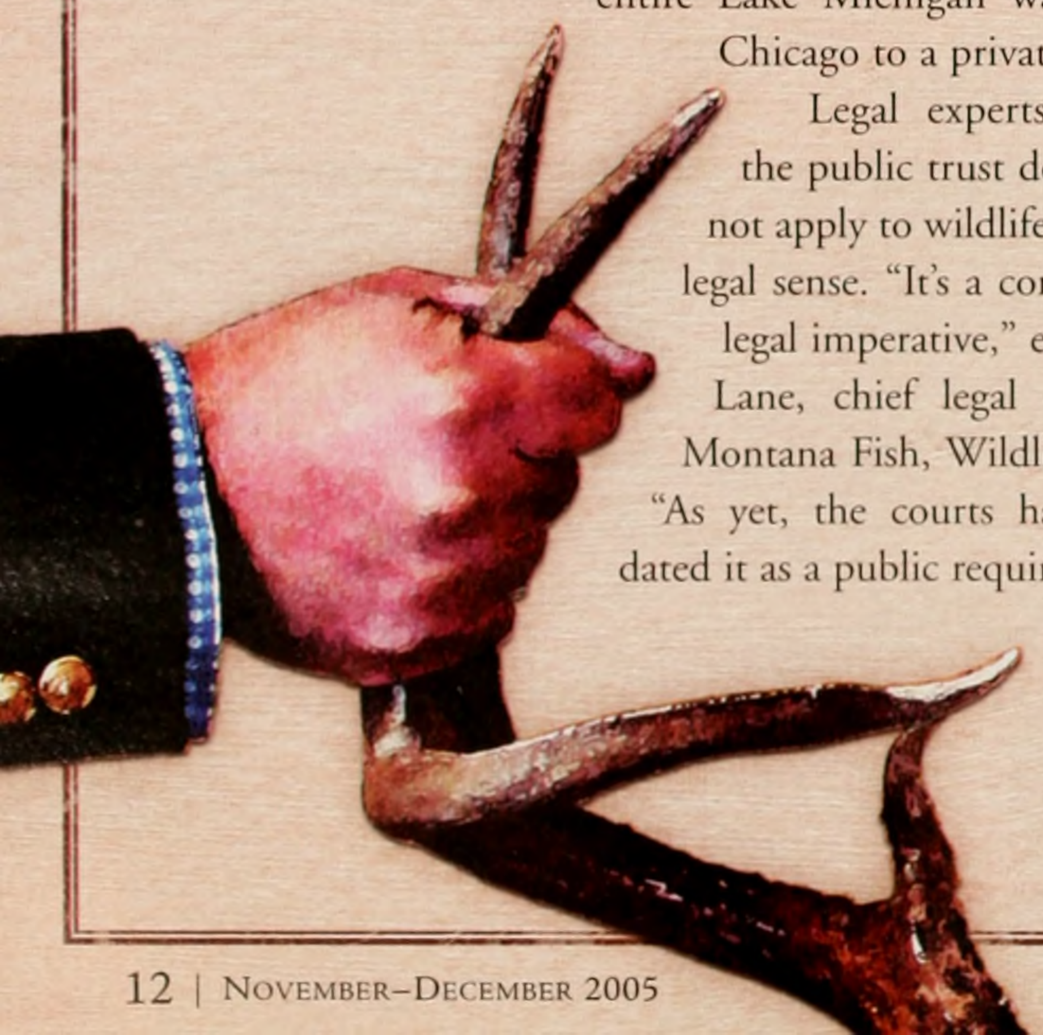
Several landmark court cases in the 1800s shaped Americans' thinking about wildlife management responsibilities. The first was *Martin v. Waddell* (1842), in which a landowner along the New Jersey coast tried to exclude others from harvesting oysters in the mudflats of his property. Martin claimed that he owned the seashore based on a land grant from the king of England made before the United States declared independence.

The case went to the U.S. Supreme Court, where Chief Justice Roger Taney ruled the king could not grant or give away property held "as a public trust," and that "since the revolution, the people of each state became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soil under them; for their own common use…including the animals living on it."

Taney's decision became known as the "public trust doctrine." The concept, upon which wildlife has since been managed and regulated in the United States, maintains that the government holds natural resources in trust for its citizens, and that wildlife should not be privately owned.

Another important ruling that helped frame the public trust concept came in 1892 with *Illinois Central Railroad v. Illinois*. Here, the Supreme Court ruled that a state can't sell off natural resources held in the public trust—in this case, Illinois's attempt to sell nearly the entire Lake Michigan waterfront of Chicago to a private railroad.

Legal experts note that the public trust doctrine does not apply to wildlife in a strictly legal sense. "It's a concept, not a legal imperative," explains Bob Lane, chief legal counsel for Montana Fish, Wildlife & Parks. "As yet, the courts haven't mandated it as a public requirement."



Though not legally binding, however, the idea that government doesn't own wild animals but is entrusted with conserving wildlife for the benefit of all citizens is pervasive.

"The public trust doctrine is the basic model used for state and federal wildlife laws," says Lane. "It's a concept that seems reasonable and logical to most people, but so far no such case has come before the courts."

Most people agree that government should be entrusted with managing wildlife for the public good. But which government? Though state, federal, and Indian governments all have trustee responsibilities for wildlife, debate continues over how those responsibilities are balanced.

Generally, the states have primary management authority for wildlife, with several exceptions. The Supreme Court has granted tribal authority on some lands for some purposes, subject to treaty rights. Another exception is the federal Endangered Species Act, under which certain species may not be hunted. And then there are national parks, where hunting is not allowed.

Generally, the states have primary management authority over wildlife. But there are several notable exceptions.

The federal government also has authority over migratory birds as part of the Migratory Bird Treaty of 1916, which the U.S. government entered into with Canada, Mexico, and Russia. This treaty provides the U.S. Fish and Wildlife Service with nearly complete control over the hunting of ducks, geese, swans, and other migratory birds.

In some cases it's commerce, not conservation, that has challenged aspects of state management authority over wildlife. The Supreme Court ruled in 1947 that South Carolina could not charge out-of-state commercial boats 100 times higher shrimping fees than it charged resident shrimpers. The high court cited the U.S. Constitution's commerce clause when it said it is unconstitutional for states to preclude nonresidents from engaging in interstate commercial activities.

State conservation agencies have long eyed the commerce clause nervously, because it threatens their traditional management authority to limit the number of licenses they sell to out-of-state hunters and to charge nonresidents more for licenses than residents. (On the other hand, some argue that the commerce clause helps keep overly protective states in check and ensures that public resources are managed fairly for all American citizens.)

In 1978, the Supreme Court favored the states when it ruled that Montana could charge nonresident elk hunters higher fees than residents. Montana argued in *Baldwin v. Fish and Game Commission* that nonresidents require more enforcement effort

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(because they don't know the landscape as well) and that residents pay through taxes for infrastructure such as roads, fire control, and search-and-rescue efforts that nonresidents aren't funding.

The court found support for its conclusion because it viewed hunting as a recreational privilege and not a fundamental right as granted by the Constitution. But the court also gave warning that the disparity between resident and nonresident hunting and fishing fees could not be unreasonably high.

State regulatory authority over wildlife was challenged recently in an Arizona case called *Conservation Force v. Manning*. In 2004, the court ruled that Arizona's system of limiting the number of nonresident elk and deer licenses discriminated against interstate commerce and therefore was unconstitutional. Because the nonresident hunters who sued the state's wildlife agency planned to sell elk hides and antlers in another state, the court determined that the products were "articles of commerce" covered by the commerce clause.

The court's decision sent shock waves through state conservation agencies. After the ruling, the lead plaintiff and his attorney met with directors of several other state conservation departments, including Montana Fish, Wildlife & Parks, and threatened to sue. So far, no suit has been brought against Montana, but the parties have filed suit against three other states.

Recently, state conservation agencies got relief in the form of a bill introduced by Nevada senator Henry Reid at the urging of the International Association of Fish and Wildlife Agencies. The Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005, which was passed by Congress and signed into law this year, says states may differentiate between residents and nonresidents when setting seasons, allocating permits, and pricing licenses.

Montana and other states cheered passage of the bill. However the federal law may open up a new can of worms by emboldening some groups or states to consider further restrictions on nonresidents. At least one national hunting group has announced it considers the new federal legislation unfair to nonresidents.

Because Congress and the courts are in two separate branches of government, the judiciary isn't bound to uphold the new legislation. But in recent court cases it has, and for the time being, the "Reid Law" seems to have effectively countered the commerce clause strategy used to weaken states' authority to regulate wildlife within their borders.

Restricting licenses and charging higher fees to nonresidents come under a state's authority—granted as part of its obligations to meet its public trust responsibilities—to control who can "take" (capture, kill, or otherwise affect the well-being of) wildlife. To manage wildlife for the public good, states pass laws and regulations that control the place, time, and manner of taking. That's why, for example, big game hunters in Montana must immediately attach a possession tag to their kill.

Tagging is just one condition the state sets for pursuing and obtaining possession of a big game animal. These conditions—also known as hunting regulations—are set to ensure equal opportunity, public safety, and the conservation of wildlife populations. Another condition is that hunters must pursue animals in a certain manner (such as within season frameworks and during legal shooting hours). Yet another is that hunters can't sell the meat from or waste dead game animals.

Perhaps the most unique condition required by the state is that a hunter actually has to work to possess a big game animal. Under the American hunting system, possession is not granted by the grace of a sovereign or other ruler but is earned through personal effort. The idea that labor leads to possession traces back to the Roman era and has been the cornerstone of this country's relationship with wildlife. To legally possess a wild animal, you have to obey the regulations, hunt the animal, and then kill the animal yourself. This is known as the rule of capture.

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Americans, who highly value self-reliance, have long supported the rule of capture. But there's less agreement on other aspects of wildlife management. Since this country was founded, citizens have struggled with conflicting impulses regarding wildlife: to possess it for themselves while sharing it with others, to use wildlife today while conserving enough for their grandkids, to maintain local control over some species and conditions of management while granting federal authority over others. The challenge is finding the right mix of federal, state, and other authority to best serve the public's interest in wildlife today and in the future. As it has been for more than 100 years, the subject continues to be debated in hunting camps, conservation clubs, and courtrooms across the country. We urge you to join in.