

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

UTAH NATIVE PLANT SOCIETY and  
GRAND CANYON TRUST,

*Plaintiffs-Appellants,*

v.

U.S. FOREST SERVICE and  
TONY TOOKE, in his official capacity as  
Chief of the U.S. Forest Service.

*Defendants-Appellees.*

Case No. 17-4074

**DECLARATION OF MARTIN A.  
NIE IN SUPPORT OF  
APPELLANTS' RESPONSE TO  
THE ASSOCIATION OF FISH  
AND WILDLIFE AGENCIES'  
MOTION FOR LEAVETO FILE  
AN AMICUS-CURIAE BRIEF**

I, Martin A. Nie, declare as follows:

**Background**

1. I am writing for myself and not as a representative of The University of Montana or the Montana University System. Neither am I representing the views of the National Advisory Committee for Implementation of the National Forest System Land Management Planning Rule, a position to which I was appointed by the Secretary of Agriculture in 2014 and continue to serve.

2. I am a Professor of Natural Resources Policy and Director of the Bolle Center for People and Forests in the College of Forestry and Conservation at the University of Montana. The Center is named after Arnold Bolle, the former Dean of the School of Forestry at the University of Montana, whose work on the "Bolle Report," among other endeavors, catalyzed reform of the National Forest System

(and passage of the National Forest Management Act in 1976). For twenty years, I have taught, researched and published in the area of federal public lands, resources and wildlife policy and management. My latest book is *The Governance of Western Public Lands: Mapping Its Present and Future* (2008). I have authored dozens of peer-reviewed papers, law review articles, congressional and state legislative testimony, and more technical reports focused on federal lands policy and management, and much of this scholarship focuses on the National Forest System.

### **2017 Article about Fish and Wildlife Management on Federal Lands**

3. In 2015, I was asked by the Aldo Leopold Wilderness Research Institute to provide an authoritative review of the policy-legal issues related to wildlife management on federal lands and in federal wilderness, with the goal of providing a more common and objective understanding amongst federal and state agencies.

4. The Aldo Leopold Wilderness Research Institute was established in 1993 by the U.S. Forest Service to provide high quality, credible science that responds to the priority needs of wilderness managers, planners, and wilderness organizations. It operates under an interagency agreement among the federal agencies that have wilderness management or research responsibility: the Forest

Service the U.S. Bureau of Land Management, U.S. Fish and Wildlife Service, the National Park Service, and the U.S. Geological Survey.

5. In my capacity as Director of the Bolle Center, I assembled a research team consisting of three academics and three consultants to take on this project. Including myself, the team consisted of the following individuals: Sandra B. Zellmer, Robert B. Daugherty Professor of Law, University of Nebraska-Lincoln; Julie Lurman Joly, former Associate Professor of Resources Law and Policy at Alaska-Fairbanks; Christopher Barns, wilderness consultant and former Wilderness Specialist, Bureau of Land Management National Landscape Conservation System, and former BLM Representative at the Arthur Carhart National Wilderness Training Center; Jonathan Haber, wildlife planning and policy consultant and a former planning specialist for the U.S. Forest Service; and Kenneth Pitt, formerly a General Attorney for the USDA-Office of the General Counsel.

6. Much of this declaration is based on the research done as part of this team and can be found in the article: “Fish and Wildlife Management on Federal Lands: Debunking State Supremacy,” *Environmental Law*, 47, no. 4 (2017), pp. 797-932, attached as Exhibit A. Our research findings are of relevance to this appeal and counter some of the claims made by the Association of Fish and Wildlife Agencies (AFWA) in its proposed brief as *amicus curiae*.



On a general level, our research found a problematic tendency for federal land agencies to “reflexively acquiesce” to the states when it comes to fish and wildlife management on federal lands. The Article explains why federal land management agencies, including the U.S. Forest Service (USFS), have an obligation, and not just the discretion, to manage and conserve fish and wildlife on federal lands, contrary to the myth that the states manage wildlife and federal land agencies only manage wildlife habitat. We traced the origins of this myth and explain why it is both wrong from a legal standpoint and is limited from a biological one.

7. The research found that AFWA and the states regularly assert that states have an unqualified “ownership” of wildlife as a way to challenge federal authority to manage wildlife on federal lands. The Article explains why this assertion is incomplete, misleading, and needlessly deepens divisions between federal and state governments. The U.S. Supreme Court has rejected this argument time and again. “To put the claim of the State upon title is to lean upon a slender reed,” ruled the Court in *Missouri v. Holland*.<sup>1</sup> Decades later, in *Hughes v. Oklahoma*, the Court called such claims a “19th Century legal fiction.”<sup>2</sup> Our Article reviews these cases and subsequent decisions where the courts struck down state wildlife laws—and assertions of state ownership of wildlife—as being in

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<sup>1</sup> 252 U.S. 416, 434 (1920).

<sup>2</sup> 441 U.S. 322, 335 (1979), *overruling* *Geer v. Connecticut*, 161 U.S. 519 (1896).



violation of the U.S. Constitution, thus clarifying that state powers over wildlife on federal lands are qualified.

### **The North American Model of Wildlife Conservation**

8. AFWA's brief makes extensive reference to the North American Model of Wildlife Conservation [hereinafter Model]. The Model is a set of seven broadly stated principles, which include the following: (1) Wildlife resources are a public trust, (2) Markets for game are eliminated, (3) Allocation of wildlife is by law, (4) Wildlife can be killed only for a legitimate purpose, (5) Wildlife is considered an international resource, (6) Science is the proper tool to discharge wildlife policy, and (7) Democracy of hunting is standard.

9. AFWA's brief (at 5-6, 11) states that "Utah's transplantation of mountain goats onto state land near the Manti-La Sal National Forest illustrates the North American Model of Wildlife Conservation at work," that the Model is "supported by federal jurisprudence [and] provides State agencies with valuable flexibility to address local and regional issues," and that "[t]he jurisprudence underlying the Model affirms Utah's authority to conduct transplants on state land near federal land."

10. Other than its first principle—that "wildlife resources are a public trust"—the Model has no independent legal authority and is not supported by federal jurisprudence. Providing such support would be difficult given the

vagueness and ambiguity of most of the Model's broadly-stated principles. As shown below, the Model is often incoherent as a guide for decision making and so full of exceptions that it leaves most of the central issues of modern wildlife conservation unaddressed.

11. AFWA's brief, at 6, states that "[o]ver the past two decades the Model has exemplified modern implementation of case law stretching back to the 19th century." As discussed below, the only principle of which this statement could apply is that "wildlife resources are a public trust." The Model is not an extension of, or popular packaging of, federal jurisprudence related to wildlife management on federal lands. It is of more recent origin, first articulated by University of Calgary biologist Valerius Geist in the mid-1990s,<sup>3</sup> and formally adopted by AFWA in 2002.<sup>4</sup>

12. AFWA invokes the Model as a way to assert state primacy for wildlife management on federal lands. AFWA's brief, at 11, references "the principles of cooperative federalism that emerge from the governing law," but its mistaken interpretation is that cooperative federalism means that federal agencies must

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<sup>3</sup> Conference Report, Valerius Geist et. al., Why Hunting has Defined the North American Model of Wildlife Conservation: Transactions of the 66th North American Wildlife and Natural Resources Conference, 175 (2001) (citing earlier references and antecedents to the Model), [http://conservationvisions.com/sites/default/files/why\\_hunting\\_has\\_defined\\_the\\_north\\_american\\_model\\_of\\_wildlife\\_conservation.pdf](http://conservationvisions.com/sites/default/files/why_hunting_has_defined_the_north_american_model_of_wildlife_conservation.pdf).

<sup>4</sup> ASS'N OF FISH AND WILDLIFE AGENCIES, Wildlife Management Authority: The State Agencies' Perspective 13 (Feb. 2014), at [http://www.fishwildlife.org/files/AFWATaskForce\\_State\\_Authorities\\_v3-5-14.pdf](http://www.fishwildlife.org/files/AFWATaskForce_State_Authorities_v3-5-14.pdf)

acquiesce to state interests in all but the narrowest cases of preemption. This interpretation does not comport with federal case law or the Model itself. The Model provides no principle or guidance about how to address the complicated tensions between federal, state and tribal governments in the management of wildlife on federal lands. In fact, the Model fails to include a principle related to habitat at all, nor does it mention the role played by federal lands (and federal environmental law) in American wildlife conservation.

13. Because the Model does not set out a clear and coherent framework for managing wildlife, states often apply its principles selectively and fail to abide by key tenets of the Model. AFWA's brief references a technical review of the Model by The Wildlife Society (THE WILDLIFE SOC'Y, THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION, Tech. Rev. 12-04 (Dec. 2012)) (hereinafter Technical Review). The Technical Review, at viii, begins by emphasizing that "the Model itself is not a monolith carved in stone." It analyzes the Model's principles, while assessing some of the principles' primary threats, challenges and inconsistencies. For example, the fourth principle is that "wildlife can be killed only for a legitimate purpose." In theory, this principle is based on "the code of the sportsman," with values of fair-chase, no unnecessary pain or suffering of game, and the non-commercial use, without waste of all game killed (Technical Review, at 19.). But as the Technical Review points out, this



principle is difficult to reconcile with state-sanctioned practices such as broad-scale prairie dog shooting, crow hunting, and predator control programs.

14. Inconsistent application of the Model by states is also demonstrated by the principle that “markets for game are eliminated.” As noted in the Technical Review, at 15, this principle is threatened by practices allowed by the states, such as predator killing contests, the commercial trade in reptiles, amphibians, and fish, and the “robust market for access to wildlife...in the form of leases, reserved permits, and shooting preserves.”

15. A third example is provided by the principle that “wildlife is considered an international resource,” which the Model supports by making reference to the Migratory Bird Treaty of 1916. But an internal inconsistency arises by states’ reliance on the Model here because states challenged the constitutionality of the Treaty and its implementing legislation by asserting state ownership of wildlife. In *Missouri v. Holland*, the Supreme Court rejected state claims of “exclusive authority” to manage wildlife under the state-ownership doctrine, holding instead that states must cede to federal laws like the Migratory Bird Treaty Act.<sup>5</sup>

16. There is scholarly and professional disagreement about the how the Model ought to be interpreted and used as a way to guide wildlife management

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<sup>5</sup> 252 U.S. 416, 434-35 (1920).

decisions. Some proponents of the Model, for example, claim that it “has often been interpreted to be more than its original articulators’ intention to describe key components of the philosophy and approach to wildlife conservation that developed in North America.”<sup>6</sup> Critics of the Model, by contrast, see it as more than just a description of the past but rather as a narrow and incomplete set of guiding principles for future wildlife conservation.<sup>7</sup> This is because most references to the Model go beyond description and use it to justify various positions or decisions made by state wildlife agencies.

17. The Model is also routinely criticized for its narrow emphasis on hunting, hunter access, and the significance of license-based revenue for state wildlife agencies.<sup>8</sup> (Funding for state wildlife management generally comes from the sale of hunting, fishing and trapping licenses at the state level and from federal funds generated through targeted excise taxes. The result is that hunting, fishing

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<sup>6</sup> John F. Organ, et al., *Public Trust Principles and Trust Administration Functions in the North American Model of Wildlife Conservation: Contributions of Human Dimensions Research*, 19 *Hum. Dimensions of Wildlife: An Int’l J.* 407, 408 (2014).

<sup>7</sup> See Susan J. Clark & Christina Milloy, *The North American Model of Wildlife Conservation: An Analysis of Challenges and Adaptive Options*, in *LARGE CARNIVORE CONSERVATION: INTEGRATING SCIENCE AND POLICY IN THE NORTH AMERICAN WEST* 301 (Susan G. Clark & Murray B. Rutherford ed., 2014) (questioning “whether the model is capable of conserving wildlife and ecosystems into the future without major adaptations.”). See also Michael P. Nelson, et al., *An Inadequate Construct? North American Model: What’s Flawed, What’s Missing, What’s Needed*, *THE WILDLIFE PROF.*, Summer 2011, at 58 (arguing, “The rise in the Model’s popularity is worrisome in both its descriptive and prescriptive modes: one rests upon an inadequate account of history and the other on an inadequate ethic.”).

<sup>8</sup> Michael P. Nelson, et al., *An Inadequate Construct? North American Model: What’s Flawed, What’s Missing, What’s Needed*, *THE WILDLIFE PROF.*, Summer 2011.

and trapping-derived revenue “comprise between 60 and 90 percent of the typical state fish and wildlife agency budget.”<sup>9</sup> This arrangement is often referred to as a “user-pay, user-benefit” funding model because states apply most of these funds to the management of sport fish and game species.<sup>10</sup>) As explained by the Model’s originators, though other interest groups such as bird enthusiasts played roles in the conservation movement, “[i]t is hunters, however, or more accurately, hunting, that led to development [of the Model’s principles] and form[s] the foundation for North American wildlife conservation.”<sup>11</sup> AFWA similarly states that “hunting and angling are the cornerstones of the North American Model with sportsmen and women serving as the foremost funders of conservation.”<sup>12</sup>

18. The Model’s focus on state primacy and hunting (and the license-based revenue it generates for the states) is much narrower than the national conservation mandate provided to the USFS in its Organic Act, the Multiple Use Sustained Yield Act (MUSYA) and the National Forest Management Act.

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<sup>9</sup> J.F. ORGAN ET. AL., THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION: TECHNICAL REVIEW 12-04, 9 (Theodore A. Bookhout, December 2012).

<sup>10</sup> *Id.*

<sup>11</sup> Conference Report, *supra* note 3, at 179. See also James R. Heffelfinger et al., *The Role of Hunting in North American Wildlife Conservation*, 70 INT’L. J. ENVTL. STUDIES 399, 399 (2013) (noting that “regulated hunting is the foundation of the North American Model of Wildlife Conservation”).

<sup>12</sup> Ass’n of Fish & Wildlife Agencies, *Investing in America’s Conservation Legacy, The Voice of Fish & Wildlife Agencies* (2016), [http://www.fishwildlife.org/index.php?section=north\\_american\\_model\\_of\\_wildlife\\_conserv.](http://www.fishwildlife.org/index.php?section=north_american_model_of_wildlife_conserv.)



19. The public trust doctrine, as applied to wildlife, is regarded as the Model's cornerstone.<sup>13</sup> Asserting that public trust principles relating to wildlife are most clearly found in state law, AFWA references the Model to advocate the primacy of state management authority over wildlife.

20. Our research found that the "public trust in wildlife" is most often invoked by states when declaring broad power and authority to regulate fish and wildlife resources. As exemplified in AFWA's brief, the open-ended nature and ambiguity of the "wildlife trust doctrine" is often used to assert jurisdictional powers and control over wildlife, rather than focusing on what affirmative conservation duties go along with this trust responsibility. Not answered in AFWA's brief is the question of what must states do, and not do, in order to meet the responsibilities of the wildlife trust?<sup>14</sup> There is relatively little case law on this matter and states have generally done little to fill in the details. As is the case with the public trust doctrine more broadly, there are many unanswered questions about the exact parameters and possible applications of a "wildlife trust," if the term is to be taken literally.

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<sup>13</sup> See generally THE WILDLIFE SOCIETY, THE PUBLIC TRUST DOCTRINE: IMPLICATIONS FOR WILDLIFE MANAGEMENT AND CONSERVATION IN THE UNITED STATES AND CANADA: TECH. REVIEW 10-01, Sept. 2010, at 9.

<sup>14</sup> See generally Susan Morath Horner, *Embryo, Not Fossil: Breathing Life Into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23 (2000); Patrick Redmond, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RESOURCES J. 249 (2009); and Gary D. Meyers, *Variations on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

21. The states' wildlife trust duty, insofar as it is defined at all, is also subject to the federal government's statutory and trust obligations over federal lands. Federal land laws, including those pertaining to the USFS, include trust-like language, similar to that found at the state-level pertaining to wildlife. The federal trust obligation is frequently referenced in judicial decisions and acknowledged in Interior Department regulations.<sup>15</sup>

### **MUSYA and the Federal Land Policy and Management Act**

22. Our Article comprehensively reviews federal land laws and regulations pertaining to wildlife management on federal lands. Included is a review of the statutory savings clauses found in the Multiple Use Sustained Yield Act (MUSYA) and the Federal Land Policy Management Act (FLPMA). These provisions demonstrate Congress's desire to acknowledge some level of state responsibility over wildlife management. The clauses exemplify the complicated nature of cooperative federalism in federal lands and resources law, as clearly Congress had no intention to completely displace some state laws related to wildlife—so long as such laws do not conflict or undermine federal prerogatives. In no way should these clauses be interpreted to diminish the federal government's

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<sup>15</sup> “The Secretary of Interior reaffirms that fish and wildlife must be maintained for their ecological, cultural, educational, historical, aesthetic, scientific, recreational, economic, and social values to the people of the United States, and that these resources are held in public trust by the Federal and State governments for the benefit of present and future generations of Americans.” 43 C.F.R. § 24.1(b).

vast constitutional and statutory authority to manage its own lands and resources, even when objected to by a state.

23. AFWA's brief, at 20, references a Department of Justice report prepared for the Public Land Law Review Commission of 1970.<sup>16</sup> Though I have not read this report, I am very familiar and have written about the last Public Land Law Review Commission. Much of what eventually became FLPMA can be traced to the work of this Commission whose recommendations were published as *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (Washington, D.C.: Government Printing Office 1970). The Commission's chapter on fish and wildlife management demonstrates what was understood to be the balance of federal-state power prior to FLPMA's passage in 1976. This is important for understanding what state powers over wildlife were considered reserved by Congress in FLPMA. Far from affirming the "primary authority" of the states to manage wildlife on federal lands, the Commission emphasized the extent of federal powers to preempt the states. Referenced within their recommendations pertaining to fish and wildlife is a 1964 opinion by the Solicitor of the Interior stating that "regulation of the wildlife populations on federally owned land is an appropriate and necessary function of

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<sup>16</sup> U.S. DEP'T OF JUSTICE, LAND & NAT. RESOURCES DIV., FEDERAL LEGISLATIVE JURISDICTION REPORT, PREPARED FOR PUBLIC LAND LAW REVIEW COMMISSION 75, 88 (May 1969).



the Federal Government when the regulations are designed to protect and conserve the wildlife as well as the land,” and concluding that “this authority is superior to that of a state.” *Id.* at 158 (Recommendation 60), citing Interior Dec. 469, 473, 476 (Dec. 1, 1964).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of December, 2017.

  
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Martin A. Nie