

ARTICLES

FISH AND WILDLIFE MANAGEMENT ON FEDERAL LANDS: THE AUTHORITIES AND RESPONSIBILITIES OF STATE FISH AND WILDLIFE AGENCIES

BY
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This Article rebuts certain legal analyses and factual assertions offered by Martin Nie et al., Fish and Wildlife Management on Federal Lands: Debunking State Supremacy, 47 ENV'T L. 797 (2017), regarding the extent of state authority to manage fish and wildlife within their borders. Like Dr. Nie et al., this Article reviews relevant provisions of the U.S. Constitution, state and federal case law, and federal statutes enacted for the management of federal lands and conservation of wildlife. In contrast with Nie et al., however, this Article shows how this complex legal framework reserves state fish and wildlife agencies primary wildlife management authority.

This Article also discusses the relevance of the North American Model of Wildlife Conservation, a conceptual framework embracing normative and descriptive elements, to wildlife professionals in state and federal agencies. Finally, the Article cites several examples to show how state-federal collaboration in service of wildlife and habitat conservation enhances these essential activities and shows that such cooperation is mutual and based on issues of common

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interest to state and federal agencies and the natural resources under their regulation.

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I. INTRODUCTION

In 2017 Dr. Martin Nie et al. (Nie et al.) published an article purporting to “debunk the myth that ‘the states manage wildlife and

federal land agencies only manage wildlife habitat” and arguing that “states assert wildlife ownership to challenge the constitutional powers, federal land laws, and supremacy of the United States.”¹

At the heart of the matter, Nie et al. are concerned with lines—among them the abstract line sometimes drawn between wildlife and habitat, the division of federal and state responsibilities, and the lines distinguishing “ownership” from “trust” and “management” from “duties.”²

Nie et al.’s article makes a number of claims that unduly diminish the authority of state wildlife agencies to manage wildlife resources within the U.S. constitutional structure and discredit the Association of Fish and Wildlife Agencies’ (AFWA) role as a convener and facilitator of state wildlife agencies. Broadly stated, Nie et al.’s arguments include:

- “[F]ederal land agencies have considerable powers and statutory duties to manage wildlife on federal lands, even if they have chosen not to exercise those powers consistently in the past.”³
- “[T]he states’ assertion that they own wildlife—full stop—is incomplete, misleading, and needlessly deepens divisions between federal and state governments.” States rightfully claim “sovereign ownership” in trust for the public but do not fulfill attendant duties.⁴
- “[The North American Model of Wildlife Conservation’s] frequent invocation by AFWA and the states is problematic, from providing a . . . narrow and hunting-centric view of conservation history to asserting the power and authority of the states to regulate wildlife.”⁵
- Memoranda of agreement between AFWA and federal agencies are “legally questionable policy channels” and are “nontransparent”. Federal agencies “should expect scrutiny of the assignment of blanket authority to states using MOUs.”⁶
- “AFWA[s] initiatives[] reflect a fundamental misunderstanding of the federal role in managing wildlife.”⁷

This Article fully rebuts those lines of argument. Part II provides a clear and unifying reading of the constitutional provisions and case law necessary to understand the roots of shared jurisdiction of state and

¹ Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV'T L. 797, 798 (2017).

² *Id.* at 1–7.

³ *Id.* at 803–04.

⁴ *Id.* at 804.

⁵ *Id.* at 912–13.

⁶ *Id.* at 894, 919.

⁷ *Id.* at 897.

federal agencies on federal land, some of which, such as *parens patriae*, went unexplored by Nie et al. Part III reviews the federal statutes, regulations, and guidance central to the jurisdictional concerns of Nie et al. Finally, Part IV offers practical, conciliatory answers to outstanding questions rooted in these legal authorities, particularly with respect to the management of fish and resident wildlife located in national wildlife refuges and wilderness areas.

To assert that state agencies and AFWA “fundamental[ly] misunderstand[]”⁸ the federal dimensions of wildlife management is to ignore the ambiguities in federal case law that feed this very debate. Even in light of the federal government’s expansive constitutional authority, states’ continued ownership of wildlife in trust remains a primary source of law and underlies invaluable programs including, but far from limited to, habitat preservation and restoration,⁹ non-game species recovery,¹⁰ cooperative research,¹¹ and law enforcement including anti-trafficking operations.¹² As can be expected in any area of regulation reserved to states, programs and priorities vary by state. But the historical record shows that state fish and wildlife agencies work to fulfill their duties with the seriousness their power demands, fully aware of the competing principles of the federalist system that make their mark on wildlife conservation, as they do across all areas of public life in America.

II. STATE OWNERSHIP, CONSTITUTIONAL LIMITATIONS, AND THE QUESTIONS LEFT TO US

In *Federalist 10*, James Madison suggested (optimistically) a nation abundant in land and people could limit the power and harms of

⁸ *Id.*

⁹ The U.S. Fish and Wildlife Service (FWS) estimated in 2014 that most funds disbursed to state fish and wildlife agencies due to the Federal Aid in Wildlife Restoration Act of 1937 (Pittman-Robertson Act), 16 U.S.C. § 669–669i (2018), have gone toward the “acquisition, development, and operation of wildlife management and public use areas involving about 68 million acres.” U.S. FISH & WILDLIFE SERV., WILDLIFE & SPORT FISH RESTORATION PROGRAM (2014), <https://perma.cc/2UXF-LSF6>.

¹⁰ See *infra* notes 59–66 and accompanying text.

¹¹ The Cooperative Research Unit (CRU) program, currently housed at the U.S. Geological Survey and established in 1935, provides research, graduate education, and technical services with support from state fish and wildlife agencies in a wide range of areas pertinent to non-game and game conservation. See U.S. GEOLOGICAL SURVEY, USGS COOPERATIVE FISH AND WILDLIFE RESEARCH UNITS: AREAS OF EXPERTISE 3 (2015), <https://perma.cc/5F9T-UD8A>.

¹² The Interstate Wildlife Violator Compact (IWVC), first established in 1989 and now agreed to by forty-five states (with four states in process), treats wildlife law violations in a party state by a non-resident as if the person were a resident in that state, making conservation law enforcement more efficient as well as providing for reciprocal recognition of license privilege suspensions. See *Interstate Wildlife Violator Compact*, NAT’L ASS’N OF CONSERVATION L. ENFORCEMENT CHIEFS, <https://perma.cc/7A4X-N9NU> (last visited Oct. 1, 2020).

factions.¹³ Like many of the Framers' theories that would later bend to unforeseen conditions, this Madisonian theory has shown its limitations. Relevant to multiple domains of local and national life, this pluralistic ideal stalks the edges of land use—a field constantly subjected to competing demands.

When we consult the Constitution and other sources of law to discern the role of modern factions (e.g., consumptive and non-consumptive users of wildlife, state and federal agencies), little about Congress's power to regulate federal property is as clear as Nie et al. contend. What is evident, however, is state and federal case law both provide for state management and trust authority—claimed and exercised in varying degrees—over fish and wildlife on all lands within a state.¹⁴ Savings clauses in federal statutes, contrary to Nie et al.'s arguments, are designed by Congress to preserve this substantial authority.¹⁵

A. *The State Management Backdrop: Ownership and Trust in Wildlife*

To discuss state authority to manage wildlife, it is useful first to make like the courts of the early nineteenth century, and ascertain the basis for state ownership of land, water, and wildlife.

1. *The Rise of Sovereign Ownership and Public Trust Doctrines*

Government “ownership” of land can be considered “proprietary” or “sovereign.”¹⁶ Proprietary ownership provides for exclusion of trespassers, conveyance of interests, and other functions inherent to personal ownership of real property.¹⁷ Sovereign ownership entails “regulati[on], tax[at]ion, confer[ral of] citizenship, and . . . other sovereign functions.”¹⁸

In 1821, New Jersey's highest court was the first in the country to proclaim “the sea, the fish, and the wild beasts” lay “in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit.”¹⁹ The U.S. Supreme Court took up this formulation in *Martin v. Waddell's Lessee*,²⁰ advancing the notions (1) the people of a

¹³ THE FEDERALIST NO. 10 (James Madison) (suggesting that “the greater the number of citizens and extent of territory which may be brought within the compass of republican . . . government . . . [the greater the] variety of parties and interests” available to protect the “rights of other citizens” and “control[] the effects of faction”).

¹⁴ Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 6 UTAH L. REV. 1437, 1462, 1488–504 (2013).

¹⁵ Robert L. Fischman & Angela M. King, *Saving Clauses and Trends in Natural Resource Federalism*, 32 WM. & MARY ENV'T L. & POL'Y REV. 129, 130 (2007).

¹⁶ See Joseph Blocher, *Selling State Borders*, 162 U. PENN. L. REV. 241, 249–50 (2014).

¹⁷ *Id.* at 249.

¹⁸ *Id.* at 249–50.

¹⁹ *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821).

²⁰ 41 U.S. 367 (1842).

state retain the right to fish in its navigable and tidal waters subject to state ownership of waterbeds, and (2) states may only transfer ownership interests in public trust resources in service of the common good.²¹ While *Arnold v. Mundy* and *Martin v. Waddell's Lessee* (along with *Illinois Central Railroad Co. v. Illinois*)²² did much to advance the idea of the Public Trust Doctrine (PTD) for states to write into their constitutions, statutes, and jurisprudence,²³ *Geer v. Connecticut*²⁴ first directly applied it to wildlife. And, as Nie et al. note, it is *Geer* that has received the most judicial reappraisal over its life.²⁵

In *Geer*, the Supreme Court drew upon ancient Roman and medieval English common law to hold that “power or control [over *wildlife*] lodged in the State, resulting from . . . common ownership, is to be exercised . . . as a trust for the benefit of the people” (emphasis added).²⁶ It therefore fell within the “police power of the state . . . to make such laws as will best preserve such game [and fish], and secure its beneficial use in the future to the citizens.”²⁷ While this notion held up in name for most of a century, a wave of federal statutes enacted pursuant to the Supremacy, Property, and Commerce Clauses, some of them implementing treaties, nipped at its edges.²⁸

In *Geer* the Court rejected the idea “the killing of game and its sale within the state” are “commerce in the legal meaning of that word” subject to the Commerce Clause.²⁹ The statutes that followed in *Geer*’s footsteps, and the Court’s reconception of the Commerce Clause during the New Deal Era,³⁰ gave the Court a second chance to embrace that

²¹ *Id.* at 368 (“When the revolution took place, 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, subject only to the rights since surrendered by the constitution to the general government.”); *id.* at 411 (“[T]he grant to an individual of an exclusive fishery in any portion of [the state’s dominion] is so much taken from the common fund entrusted to [the State’s] care for the common benefit.”).

²² 146 U.S. 387, 435 (1892) (establishing a “substantial impairment” standard to bar the disposition of land under navigable waters held in the public trust).

²³ Blumm & Paulsen, *supra* note 14, at 1438–39, 1438 n.4, 1439 n.5–6.

²⁴ 161 U.S. 519, 522, 529 (1896).

²⁵ Nie et al., *supra* note 1, at 806, 834.

²⁶ 161 U.S. at 529.

²⁷ *Id.* at 533.

²⁸ See, e.g., *Missouri v. Holland*, 252 U.S. 416, 431, 435 (1920) (upholding the Migratory Bird Treaty Act of 1918 against a lawsuit by Missouri claiming the federal government could not negotiate the treaty on which the act was based because states traditionally regulate the taking of wildlife); Endangered Species Act of 1973, 16 U.S.C. §§ 1531, 1537(a) (2018) (introducing and implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to conserve and restore populations of federally listed species); National Wildlife Refuge System Administration Act of 1966, Pub. L. 89-669, 80 Stat. 926 (1966) (subsequently amended by the National Wildlife Refuge System Improvement Act of 1997, Pub. L. 105-57, 111 Stat. 1252 (1997)); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (upholding the Wild and Free-Roaming Horses and Burros Act of 1971, providing for management of free-roaming horses on federal lands as constitutional under the Property Clause).

²⁹ *Geer*, 161 U.S. at 530.

³⁰ See *infra* Part II.B.1.

very idea. What followed, however, changed much less than meets the eye.

2. *The Rise of the Commerce Clause and the Evolution of the Modern Universe of Public Trust Doctrines*

While it is not surprising that the Supreme Court would fix its sights on *Geer*,³¹ the Court did nothing to definitively situate wildlife conservation in the federal sphere.³² In *Hughes v. Oklahoma*³³—a case with facts much like *Geer*'s—the Court declared *Geer* dead after applying the Dormant Commerce Clause test to strike down an Oklahoma statute banning transport of minnows out of state.³⁴ On its own terms, applying the Dormant Commerce Clause was sensible enough. But then the Court went on:

The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of “conserving” the wild animals within its borders when equally effective nondiscriminatory conservation measures are available

The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders. Today’s decision makes clear, however, that States may promote this legitimate purpose only in ways consistent with the basic principle that “our economic unit is the Nation,” . . . and that when a wild animal “becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.”³⁵

In Nie et al.’s analysis, none of this need be said, as *Hughes* simply stands for the proposition title alone cannot convey management authority.³⁶ But this simplistic view does not engage with many of the real issues in play. When does a wild animal become an “article of commerce?” If and when such a transformation takes place, what constitutes a limitation of use to the citizens of one state? What is “use?” The questions that remain are substantial, and they cannot be resolved

³¹ Nie et al., *supra* note 1, at 834–35; *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (“The cases defining the scope of permissible state regulation in areas of congressional silence reflect an often controversial evolution of rules to accommodate federal and state interests. *Geer v. Connecticut* was decided relatively early in that evolutionary process. We hold that time has revealed the error of the early resolution reached in that case, and accordingly *Geer* is today overruled.”).

³² See, e.g., U.S. GEN. ACCOUNTING OFF., CED-81-107, NATIONAL DIRECTION REQUIRED FOR EFFECTIVE MANAGEMENT OF AMERICA’S FISH AND WILDLIFE 1–2 (1981) [hereinafter GAO 1981] (“Historically, [Fish and Wildlife] Service programs were designed to meet specific needs not being addressed by States . . . Historically, matters pertaining to fish and wildlife resources have been the province of the States.”).

³³ 441 U.S. 322 (1979).

³⁴ *Id.* at 336–38.

³⁵ *Id.* at 337–39.

³⁶ Nie et al., *supra* note 1, at 907–08.

through a prescriptive approach that looks only to Federal authorities. To rely on one single use of the Dormant Commerce Clause to declare statewide bodies of law obsolete, as Nie et al. do, is itself (to borrow from the *Hughes* Court) to lean upon a slender reed.³⁷

Nie et al. themselves recognize the reality that simple “ownership” is no longer the question facing wildlife management. Juxtapose the state of Oklahoma’s brief in *Hughes*—defending its minnow transport ban but strategically conceding that “[s]tate ‘ownership’ may no longer be acceptable as a descriptive term of valid state interests in wildlife”³⁸—with Nie et al.’s inverse concession nearly four decades later: “The states are on firm ground when declaring a ‘sovereign ownership’ of wildlife that must be managed in the public interest.”³⁹ Just how clear is the division between state and federal authority over wildlife if Nie et al., debunking state authority, manage to find state authority precisely where a state once rhetorically ceded it?⁴⁰

Even without the backstop of *Geer*, states still rely on the foundation of case law built up in nineteenth-century cases like *Arnold v. Mundy* and *Illinois Central Railroad*.⁴¹ In the modern era the PTD can be understood as either or both of (a) “a common means by which private citizens can question the validity of actions by government agencies relating to natural resources”⁴² and/or (b) a state’s exclusive authority and duty to protect those resources as a fiduciary.⁴³ Grounds to question governmental action include the denial of “public trust uses.”⁴⁴ The larger the universe of natural resources protected in trust,

³⁷ *Hughes*, 441 U.S. at 331–32.

³⁸ Brief of Appellee at 6, *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (No. 77-1439), 1978 WL 207120.

³⁹ Nie et al., *supra* note 1, at 908.

⁴⁰ See *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371, 392 (1978) (Burger, C.J., concurring) (“[The doctrine of State ownership of wildlife] manifests the State’s special interest in regulating and preserving wildlife for the benefit of its citizens Whether we describe this interest as proprietary or otherwise is not significant.”) (internal citation omitted).

⁴¹ See Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-NW. J. ENV’T L. & POL’Y 113, 151–53 (2010) (“Some thirty-five state courts have cited *Illinois Central* in the context of articulating their public trust doctrine. Of those, at least twenty-nine appear to recognize *Illinois Central* as a general statement of federal law by the United States Supreme Court that restrains their ability to convey public trust lands”); James R. Rasband, *The Public Trust Doctrine: A Tragedy of the Common Law*, 77 TEXAS L.R. 1335, 1342 (1999) (“[T]he public trust doctrine’s proponents generally view the evolution of the doctrine as a logical march from Roman law, through English common law, to *Arnold* and *Martin*, and finally to *Illinois Central*. Indeed, these days, most courts and commentators simply begin with *Illinois Central*.”).

⁴² Darren K. Cottriel, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1263 (1996).

⁴³ Allen Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENV’T L. & POL’Y F. 57, 75–77 (2005).

⁴⁴ Cottriel, *supra* note 42, at 1263.

the larger the universe of potential questions and mechanisms (if not necessarily causes of action) and protected uses. The expansion of this PTD universe in several states reaches assets like state parks, fish habitat, fossil beds, marine life, dry sands on beaches, and even non-navigable streams;⁴⁵ and uses such as bird habitat and scenery.⁴⁶ The evolution of the PTD into multifarious branches is consistent with its mixed historical provenance and its voyage from a small maritime nation to a continental nation comprising dozens of subdivisions and ecosystems.⁴⁷

Sovereign ownership and public trust came together to lay the groundwork for a limited cause of action in 2008, in the case of *Center for Biological Diversity, Inc. v. FPL Group, Inc.*⁴⁸ There, a California court of appeals held the PTD required state agencies to protect wildlife resources, and members of the public could enforce the wildlife trust against the state as long as the correct agencies are brought before the court, allowing judges to “make complex and delicate balancing judgments with[] the benefit of the expertise of the agencies responsible for protecting the trust resources . . .”⁴⁹ The court stopped short of promising substantive intervention due to the relative infancy of the wind turbine technology at issue,⁵⁰ but courts in Alaska, Louisiana, and Virginia have recognized the wildlife trust and afforded it varying degrees of rigor in state civil procedure.⁵¹

Conversely, a federal court in Virginia affirmed that State’s public trust in wildlife in 1980 by holding Virginia, along with the federal government, could recover damages under the PTD and as *parens patriae* for the deaths of 30,000 migratory waterfowl due to an oil spill.⁵² In the wake of *Hughes* (but not citing it), the Court concluded while Virginia “does not ‘own’ the migratory waterfowl’ in question . . . the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources.”⁵³ Nie et al. also cited this case discussing the Property

⁴⁵ *Id.* at 1263–64.

⁴⁶ *Id.* at 1265–66; Kanner, *supra* note 43, at 83–84 (citing *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) and its progeny—all still good law—to show the rationale for preserving lands as habitat for birds and marine life).

⁴⁷ Blumm & Paulsen, *supra* note 14, at 1469–70.

⁴⁸ 83 Cal. Rptr. 3d 588, 590 (Cal. Ct. App. 2008)

⁴⁹ *Ctr. for Biological Diversity, Inc., et al. v FPL Group, Inc., et. al.*, 83 Cal. Rptr. 3d 588, 590, 596 n.12 (Cal. Ct. App. 2008) (dismissing plaintiffs’ claim for not being brought against the correct parties but holding that state agencies were required to take measures to conserve birds from takings by wind turbines; citing Professor Sax—progenitor of the modern PTD—for the idea that wildlife “ought to be reserved for the whole of the populace”).

⁵⁰ *Id.* at 1371.

⁵¹ See Blumm & Paulsen, *supra* note 14, at 1478 n.302, 1481–82 & nn.324–27, 1482–84 & nn.334–36.

⁵² *In re Stuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980). See *infra* Part II.B.3 for further discussion of *parens patriae*.

⁵³ *In re Stuart Transp. Co.*, 495 F. Supp. at 39–40.

Clause,⁵⁴ but disregarded the “duty” language while arguing states have minimal trust responsibilities.⁵⁵

Nie et al. object that “[t]here is relatively little case law on [what affirmative conservation duties go along with trust ownership in wildlife], and states have generally done little to fill in the details.”⁵⁶ But of course these duties are given life outside the courtroom by state fish and wildlife managers across the country, and agencies along with their partners have picked up a lot of the courts’ slack in defining these duties.⁵⁷

The Endangered Species Act⁵⁸ (ESA) of course creates tightly prescribed duties to conserve species and increase their numbers⁵⁹ (e.g., consultation requirements,⁶⁰ critical habitat designation,⁶¹ and take prohibitions).⁶² One common knock on state management is supposedly state endangered species acts and other protections are of comparatively lesser value⁶³ and gaps run through management of non-listed species.⁶⁴ But that argument takes no heed of the shift in the landscape it purports to seek—that is, states increasingly take on affirmative conservation duties for non-game species. Nowhere, for instance, do Nie et al. mention State Wildlife Action Plans (SWAPs), under which 12,000 state-managed species of greatest conservation need (SGCN) are identified and conserved by state fish and wildlife agencies.⁶⁵ These Plans are reviewed and revised each decade as a condition that states must meet before receiving federal conservation funding for SGCN.⁶⁶

⁵⁴ Nie et al., *supra* note 1, at 819 n.122.

⁵⁵ *Id.* at 909–10.

⁵⁶ *Id.* at 807.

⁵⁷ See Daniel J. Decker et al., *Impacts Management: An Approach to Fulfilling Public Trust Responsibilities of Wildlife Agencies*, 38 WILDLIFE SOC’Y BULLETIN 2, 4–5 (2013) (discussing the various forms of the PTD as legally and philosophically distinct from a financial trust that is solely administered to produce economic benefits and calling for management to produce a wide variety of positive outcomes in order to benefit the largest possible number of beneficiaries); Christian A. Smith, *The Role of State Wildlife Professionals Under the Public Trust Doctrine*, 75 J. WILDLIFE MGMT. 1539 (2011) (distinguishing between elected and appointed officials as “trustees” and agency professionals as “trust managers”).

⁵⁸ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

⁵⁹ Nie et al., *supra* note 1, at 842–43.

⁶⁰ *Id.* at 843–44 (citing 16 U.S.C. § 1536(a)).

⁶¹ *Id.* at 844–45.

⁶² *Id.* at 845–47.

⁶³ *Id.* at 848.

⁶⁴ *Id.*

⁶⁵ See generally Nie et al., *supra* note 1, at 806–14 (While Nie et al. discuss the concept of state wildlife trusts and the laws, decision-making and funding that implement state wildlife trusts, significantly, the State Wildlife Action Plan is missing from their discussion.); *State Wildlife Action Plans*, ASS’N OF FISH & WILDLIFE AGENCIES, <https://perma.cc/6KZ6-4D3H> (last visited Sept. 22, 2020) [hereinafter ASS’N OF FISH & WILDLIFE AGENCIES].

⁶⁶ ASS’N OF FISH & WILDLIFE AGENCIES, *Best Practices for State Wildlife Action Plans*, at ix (2012), <https://perma.cc/83XA-ABN5>; ASS’N OF FISH & WILDLIFE AGENCIES, *supra* note 65. See also ASS’N OF FISH AND WILDLIFE AGENCIES, STATE & TRIBAL WILDLIFE

Indeed, a casual scan of state fish and wildlife agency websites clearly demonstrates deep commitments to managing non-game species and the habitats upon which they depend.⁶⁷ These commitments are described in detail in their respective SWAPs.⁶⁸

And, of course, it is not the fault of state agencies that some state courts and legislatures have not found occasion to fill in the blanks where sister states' counterparts have embarked on that path—or that the paucity extends to federal courts as well. State fish and wildlife agencies must also contend with jurisdictional ambiguities related to issues including conservation of plants that are crucial to habitats for species of concern, halting the spread of wildlife diseases, combatting of invasive plant and animals, and other issues where state legislatures have to varying degrees splintered authority among a panoply of state agencies.⁶⁹

GRANTS PROGRAM: 10 YEARS OF SUCCESS (2011), <https://perma.cc/G56K-7JTP> (last visited Sept. 22, 2020) (highlighting examples of SWAP success stories in each state and territory).

⁶⁷ See generally OR. FISH & WILDLIFE, THE OREGON CONSERVATION STRATEGY (2020), <https://perma.cc/XD28-85UR> (last visited Sept. 22, 2020) (displaying an interactive website dedicated to various conservation issues, conservation opportunity areas and a conservation toolbox); *State Wildlife Grants*, ALA. DEP'T OF CONSERVATION & NAT. RES.: OUTDOOR ALABAMA (2020), <https://perma.cc/PS9T-6VUB> (last visited Sept. 22, 2020) (providing educational information and range maps for species listed in the state plan); *Connecticut's Wildlife Action Plan*, CONN. DEP'T OF ENERGY & ENV'T PROTECTION (2020), <https://perma.cc/A29S-7UF9> (last visited Sept. 22, 2020) (sharing state's conservation goals).

⁶⁸ See generally *Massachusetts State Wildlife Action Plan*, MASSWILDLIFE, <https://perma.cc/8RJT-EYAK> (last visited Sept. 22, 2020) (presenting 570 Species of Greatest Conservation Need, the 24 types of habitat that support these species and the action necessary to conserve them.); *Minnesota's Wildlife Action Plan 2015–2025*, MINN. DEP'T OF NAT. RES., <https://perma.cc/5T8L-AVM6> (last visited Sept. 22, 2020) (describing the 346 species that are identified in plan are rare, their populations are declining, or they face serious threats that may cause them to decline); *Iowa's Wildlife Action Plan*, IOWA DEP'T OF NAT. RES., <https://perma.cc/Y57C-H4MM> (last visited on Sept. 22, 2020) (describing the state's proactive plan to conserve all wildlife in Iowa before the wildlife becomes rare or more costly to protect).

⁶⁹ Compare ARIZ. REV. STAT. ANN. § 3–903 (West 2020) (residing authority to list plants with Arizona's Department of Agriculture) with CAL. FISH & GAME CODE §§ 2062, 2067 (West 2020) (empowering California's Department of Fish and Wildlife to list plants as threatened or endangered) with FLA. STAT. ANN. § 581.186 (West 2014) (creating an Endangered Plant Advisory Council consisting of appointees by the Commissioner of Agriculture which are required to cooperate with the Fish and Wildlife Conservation Commission along with other agencies). Compare 410 ILL. COMP. STAT. ANN. 90/1 (West 2020) (authorizing Illinois' Department of Agriculture to cooperate with FWS to reduce the transmission of wildlife diseases) with KY. REV. STAT. ANN. § 150.720(1) (West 2020) (authorizing Kentucky's Departments of Agriculture and Fish and Wildlife Resources to issue regulations for the eradication of wildlife diseases). Compare 505 ILL. COMP. STAT. ANN. 100/1 (West 2020) and 525 ILL. COMP. STAT. ANN. 10/1 (dividing authority to regulate noxious and invasive plants between Illinois' Departments of Agriculture and Natural Resources, respectively) with WIS. STAT. ANN. §§ 23.22(2)(b), 23.235, 23.24 (West 2020) (authorizing Wisconsin's Department of Natural Resources to designate and regulate aquatic invasive plants, as well as certain noxious weeds).

Finally, as a complement to the PTD universe, the North American Model of Wildlife Conservation (the Model) merits more consideration than Nie et al. afford it—not as a source of legal authority drawing from any one precedent or statute, but as a motivating conceptual force for state, federal, and non-governmental conservation professionals.

3. *The Descriptive Import of the North American Model*

Nie et al. discuss AFWA's adoption of the Model and states that it has “no independent legal authority” despite being oft referenced in state agency documents.⁷⁰ The Model comprises seven tenets:

1. Wildlife resources are conserved and held in trust for all citizens.
2. Commerce in dead wildlife is eliminated.
3. Wildlife is allocated according to democratic rule of law.
4. Wildlife may only be killed for a legitimate, non-frivolous purpose.
5. Wildlife is an international resource.
6. Every person has an equal opportunity under the law to participate in hunting and fishing.
7. Scientific management is the proper means for wildlife conservation.⁷¹

Nie et al. are correct to consider the Model “descriptive-historical” as well as “normative-prescriptive.”⁷² Where Nie et al. deem the Model too emphatic of hunting and fishing or omissive of federal lands and environmental law,⁷³ however, Nie et al. miss the point of the Model. The Model's influence on the decisions of state fish and wildlife agency personnel and the high profile it gives to funding and leadership from hunting and angling do not confine it to life as a tool for hunting interests, as Nie et al. assert.⁷⁴ Rather, the Model provides a conceptual framework that allows wildlife professionals in a multidisciplinary setting to coordinate decision-making and implement programs coherently on the ground.⁷⁵

Where Nie et al. want to find a lack of “academic and professional scrutiny,”⁷⁶ a 2012 technical review by conservation professionals with

⁷⁰ Nie et al., *supra* note 1, at 811–12.

⁷¹ ASS'N OF FISH & WILDLIFE AGENCIES, *supra* note 65.

⁷² Nie et al., *supra* note 1, at 812.

⁷³ *Id.*

⁷⁴ *Id.* at 814.

⁷⁵ See Steven M. Davis, *Preservation, Resource Extraction, and Recreation on Public Lands: A View from the States*, 48 NAT. RESOURCES J. 303, 321 (2008) (“[State wildlife management areas] share a lot of characteristics with natural areas: they tend to be biologically rich tracts with limited public access, limited recreational opportunities, and relatively little infrastructure . . . [E]ven the most game-oriented state wildlife agencies can hardly be characterized as *unconcerned* about endangered or non-game species.”).

⁷⁶ Nie et al., *supra* note 1, at 813.

experience in state agencies, federal agencies, non-governmental organizations, and academia in the United States, Mexico, and Canada found that “the Model . . . is not a monolith carved in stone” and, like other models of governance structures and decision-making frameworks, is merely “a description of a system that accounts for its key properties.”⁷⁷ In this review the Model is contextualized alongside keystone federal laws including the Migratory Bird Treaty Act⁷⁸ (MBTA) and ESA, each of which, like the Model, “arose amidst [their own set of] social and environmental circumstances . . .”⁷⁹ The review discusses how the Model can mature for the twenty-first century to meet new challenges and better address habitat degradation.⁸⁰

Conservationists who use the Model do not do it the disservice of adhering to it uncritically. In 2017, for example, Chris Smith, a former Deputy Director for the Montana Department of Fish, Wildlife, and Parks, wrote that despite its omissions the Model is “useful” because of its focus, but also that wildlife managers must be “cognizant of its limitations.”⁸¹ Like the U.S. Constitution,⁸² the Model is a living framework that can adapt to changing circumstances and competing interpretations of the obligations that it imposes.

Moreover, the authors who first described the Model in 2001 (Valerius Geist, Shane Mahoney, and John Organ)⁸³ have themselves acknowledged that the Model should be considered inspirational, not prescriptive. In a recent article, they state:

Our intent in articulating the Model was to celebrate our achievements and to form a basis for understanding where gaps exist in law and policy that may threaten conservation of all wildlife for future generations. As such, we feel we should look backwards only to ensure we fully understand what has made North American conservation unique, as it will guide us in the more important task of looking forward to place emphasis on ensuring we have the needed legal and policy constructs for the future. The future should be our focus.⁸⁴

⁷⁷ WILDLIFE SOC’Y ET AL., *THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION*: TECH. REV. 12-04, at viii (Theodore A. Bookhout, ed. 2012), <https://perma.cc/G5RU-J7W2>.

⁷⁸ Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).

⁷⁹ WILDLIFE SOC’Y ET AL., *supra* note 77, at 5. *See also id.* at 8, 17 (discussing the specifics of state wildlife governance set against federal land agencies’ constitutional authorities).

⁸⁰ *Id.* at 24–29.

⁸¹ Chris Smith, *Commentary: Can We Get Beyond Arguments About the North American Model?*, WILDLIFE MANAGEMENT INSTITUTE (Oct. 2017), <https://perma.cc/2SZX-M38L>.

⁸² For a brief discussion of the everlasting debate between constitutional originalism and the concept of a “living constitution,” see an excerpt published at David A. Strauss, *The Living Constitution*, U. CHI. L. SCH. (Sept. 27, 2010), <https://perma.cc/TMU4-GXXJ>.

⁸³ 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).

⁸⁴ John F. Organ et al., *Our Precious Wildlife Resources: Further Thoughts on the North American Model*, 13 WILDLIFE PROF. 30, 33 (Jan./Feb. 2019).

Of course, as guiding principles like the Model are deployed and adapted, so has the interplay between crucial portions of the U.S. Constitution deeply influenced wildlife management by federal and state agencies, while leaving much of the primary responsibility to the states.

B. The Constitutional Foreground: The Supremacy and Property Clauses, the Tenth Amendment, and Parens Patriae

The tension between the Supremacy and Property Clauses on one hand, and the Tenth Amendment on the other, often resolves in favor of federal law—but only where Congress expresses its clear and manifest intent for this to occur.⁸⁵ The history of preemption in land and wildlife management indeed shows increasing willingness by Congress to exercise its constitutional authority, but it also shows a resolute and enduring intent to reserve authority for fish and resident wildlife management to the states.⁸⁶

1. Preemption and Anti-Commandeering Doctrine

Long before the enactment of our modern corpus of federal environmental law in the 1960s and 1970s, the Commerce and Supremacy Clauses generated foundational caselaw between the enactment of the MBTA in 1918⁸⁷ and that of the Federal Aid in Wildlife Restoration (Pittman-Robertson) Act in 1937.⁸⁸

First, the Supreme Court in *Missouri v. Holland* held that the federal government could manage migratory birds as a “national interest of very nearly the first magnitude[,]” and that Missouri’s claim to exclusive authority failed for “lean[ing] upon the slender reed” of title to such birds.⁸⁹ Two decades later, the Court upheld the wage and hour provisions of the Fair Labor Standards Act⁹⁰ (FLSA) and stated not only that Congress’s commerce power “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of

⁸⁵ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 607 (1992).

⁸⁶ See *Defs. of Wildlife v. Andrus*, 627 F.2d 1238, 1248–50 (D.C. Cir. 1980) (holding that DOI’s decision not to halt a state program of culling wolves on federal land was not a major federal action under NEPA because, “[f]ar from attempting to alter the traditional division of authority over wildlife management, FLPMA broadly and explicitly reaffirms it” and a state agency required to seek federal approval for such a program “can hardly be said to have ‘responsibility and authority’ for its own affairs”), *cited by* *Utah Native Plant Soc’y v. U.S. Forest Serv.*, 923 F.3d 860, 870 (10th Cir. 2019) (explaining state agencies “retain[] a measure of sovereignty over wildlife management within the national forest [system] . . . absent federal law to the contrary”).

⁸⁷ 16 U.S.C. § 703 (2018).

⁸⁸ 16 U.S.C. § 669–669i (2018); *Holland*, 252 U.S. 416, 432 (1920); *United States v. Darby*, 312 U.S. 100, 103 (1941).

⁸⁹ *Holland*, 252 U.S. at 434–35.

⁹⁰ Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2018).

Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end”—but also that the Tenth Amendment is “a truism that all [powers not delegated to the United States by the Constitution, nor prohibited by it to the States are] retained which [have] not been surrendered.”⁹¹ The Court brought the Commerce Clause to its apex in 1985 by holding Congress could apply FLSA to a Texas government-operated transit system,⁹² and so the Tenth Amendment—merely “declaratory” of the federal-state relationship⁹³—limped on until the Supreme Court in *New York v. United States*⁹⁴ struck down a federal statute controlling how states disposed of nuclear waste.⁹⁵

The end of this back-and-forth came alongside the Court’s creation, under Chief Justices Burger and Rehnquist, of a series of “super-strong” clean statement rules that “establish[ed] very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text” and embedded constitutional values within statutes.⁹⁶ Justice O’Connor made a far-reaching statement in *Gregory v. Ashcroft*⁹⁷ that preemptive power in traditionally state-regulated areas is “extraordinary . . . in a federalist system” and must be “exercise[d] lightly.”⁹⁸ *Gregory* heralded a decisive move to protect core state functions from federal override, as well as respond to the “diverse needs of a heterogenous [sic] society.”⁹⁹ This holding’s protective posture toward state authority weighs the type of function being protected or preempted: “[T]he ‘more sovereign’ the state law, the more deferential to state interests [a] preemption analysis should be.”¹⁰⁰

Under the anti-commandeering doctrine developed in *New York*, the federal government may not require states to use their sovereign authority to implement federal law.¹⁰¹ But the federal government may

⁹¹ *Darby*, 312 U.S. at 115, 118, 123–24 (holding that Congress’s prohibition of interstate shipment of goods produced under labor conditions violating the Fair Labor Standards Act was constitutional). See also *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (extending Congress’s commerce power to apply to activity producing goods not intended for commerce across state lines).

⁹² *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985).

⁹³ *Darby*, 312 U.S. at 124.

⁹⁴ 505 U.S. 144 (1992).

⁹⁵ *Id.* at 161.

⁹⁶ Eskridge & Frickey, *supra* note 85, at 611–12.

⁹⁷ 501 U.S. 452 (1991).

⁹⁸ *Id.* at 624 (citing *Gregory*, 501 U.S. at 460). See also *State v. Cline*, 322 P.2d 208, 213 (Okla. Crim. App. 1958) (“It is a well-established rule of construction that statutes whereby a state relinquishes jurisdiction over lands to the Federal Government are to be strictly construed, and it will not be presumed, in the absence of a clearly expressed intent, that the state has relinquished its control of said lands.”).

⁹⁹ *Gregory*, 501 U.S. at 458.

¹⁰⁰ Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 560 (2007).

¹⁰¹ *New York v. United States*, 505 U.S. 144, 161 (1992); *Printz v. United States*, 521 U.S. 898, 933–35 (1997) (invalidating a federal provision requiring state law enforcement officers to conduct background checks on some prospective handgun purchasers).

still regulate state activities if such regulation does not “seek to control or influence the manner in which States regulate private parties.”¹⁰²

Relative to wildlife management, anti-commandeering principles have seen little play, but cases like *Strahan v. Coxe*¹⁰³ may represent their nadir in species conservation.¹⁰⁴ There the United States Court of Appeals for the First Circuit held that the Massachusetts Division of Marine Fisheries, by authorizing a third party to take Northern Right whales, could violate the ESA.¹⁰⁵ Yet, even that holding was based on the very specific conclusion Congress, in enacting the ESA, intended to prohibit states from enacting commercial fishing licensure schemes under which “it is not possible” for licensees to be certain of avoiding illegal take, such that states could be liable for violating the ESA as a category of regulated actors akin to private parties.¹⁰⁶

In 2014, another case signaled a move away from applying anti-commandeering principles. In *Aransas Project v. Shaw*,¹⁰⁷ an environmental non-profit group alleged that the Texas Commission on Environmental Quality (TCEQ) violated the ESA by failing to manage freshwater flows into whooping crane habitat.¹⁰⁸ The United States Court of Appeals for the Fifth Circuit, more skeptical than the First Circuit that a state agency could violate the ESA through water licensing that results in habitat modification, gave passing mention to the anti-commandeering doctrine but backed away from applying it to ESA taking prohibitions because it did not find that TCEQ proximately caused the crane takes.¹⁰⁹ Nie et al. survey anti-commandeering and the Tenth Amendment cases, citing opinions involving no federal lands and steering clear of the more complex issues posed by state licensure and proximate cause while asserting that such claims have “generally failed” since 1920,¹¹⁰ and ignore that the anti-commandeering doctrine

¹⁰² *Reno v. Condon*, 528 U.S. 141, 150–51 (2000) (citing *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)).

¹⁰³ 127 F.3d 155 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998).

¹⁰⁴ *Id.* at 163 (“[A] governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”).

¹⁰⁵ *Id.* at 164, 165–66.

¹⁰⁶ *Id.* at 164, 167–68.

¹⁰⁷ 775 F.3d 641 (5th Cir. 2014), *reh’g en banc denied*, 774 F.3d 324 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2859 (2015).

¹⁰⁸ *Id.* at 646–47.

¹⁰⁹ *Id.* at 664, 656 n.9 (“Among the federal appellate courts, only the First Circuit has held that a state licensure can constitute ESA take. The First Circuit’s reasoning, however, is challenged by other appellate opinions maintaining that the state governments may not be commandeered into enforcing federal prohibitions. Because [plaintiff] has not demonstrated proximate cause, we need not decide whether a state can be held liable for licensing a take under the Supreme Court’s anti-commandeering jurisprudence . . .”) (citations omitted); *see also* N.C. Fisheries Ass’n, Inc. v. Pritzker, No. 4:14-CV-138-D, 2015 WL 4488509, at *9 (E.D.N.C. July 22, 2015) (declining to address whether a state agency’s “involvement in licensing an entire industry” can give rise to proximate cause for ESA take liability because it dismissed case on other grounds).

¹¹⁰ Nie et al., *supra* note 1, at 831–33.

continues to be relevant to questions of natural resource management, including wildlife, by state authorities.

2. Regulation of Activity on State Land Near or Within Federal Land

For wildlife residing both on state and federal land, one of the most urgent jurisdictional issues is what laws apply to those species and populations. Indeed, one federal analysis pointed out the differing management objectives and practices of federal agencies with respect to a single population may “adversely affect wildlife resources and management efficiency.”¹¹¹

To be sure, as Nie et al. note, *Palila v. Hawaii Department of Land and Natural Resources*¹¹² erects a high barrier to state activity that modifies or destroys habitat of ESA-protected species.¹¹³ And both *Hunt v. United States*¹¹⁴ and *Kleppe v. New Mexico*¹¹⁵ stand for the proposition that Property Clause power extends to resource activities that damage federal land or wildlife “integral” to federal land.¹¹⁶ But Nie et al.’s invocation of *Gibbs v. Babbitt*¹¹⁷—where the Fourth Circuit upheld regulations on taking of endangered red wolves on private property¹¹⁸—does not address management of non-listed species and does not circumscribe the Tenth Amendment beyond what the ESA clearly does. And Nie et al.’s citation of *Camfield v. United States*¹¹⁹—where the Supreme Court upheld an exercise of the Property Clause over private land use that affected federal land¹²⁰—is inapposite because state-owned land is not private land. Indeed, federal power was analogized to state police power, not made preemptive of it in that analysis.¹²¹

¹¹¹ GAO 1981, *supra* note 32, at 49–51.

¹¹² 471 F. Supp. 985 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981).

¹¹³ *Id.* at 993–94 (holding that the presence of a species limited to only one state does not preclude ESA enforcement under the Supremacy and Commerce Clauses); Nie et al., *supra* note 1, at 831–32, 902 n.811 (discussing *Palila v. Haw. Dept. of Land and Nat. Res.*).

¹¹⁴ 278 U.S. 96 (1928).

¹¹⁵ 426 U.S. 529 (1976).

¹¹⁶ *See Hunt*, 278 U.S. at 99–100 (holding that United States officials had authority to kill deer located on federal reserves and transfer their carcasses outside of the reserve because it was “necessary” to protect the reserve lands’ flora); *Kleppe*, 426 U.S. at 540–41 (footnote omitted) (“In our view, the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.”).

¹¹⁷ 214 F.3d 483 (4th Cir. 2000) *cert. denied*, 531 U.S. 1145 (2001).

¹¹⁸ *Id.* at 496 (holding that the regulation at issue “aims to reverse threatened extinction and conserve the red wolf for both current and future use in interstate commerce”).

¹¹⁹ 167 U.S. 518 (1897).

¹²⁰ *Id.* at 528 (“[I]n passing the act in question, congress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property.”). *See also* *United States v. Alford*, 274 U.S. 264, 267 (1927) (holding that Congress may regulate activity on private land which “imperl[s]” federal property).

¹²¹ *See* *Camfield*, 167 U.S. at 525 (“The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.”). *See also* Nie et al., *supra* note 1, at 824–25.

Nie et al. then cite a bundle of opinions ruling that the federal government has jurisdiction over activities on state property affecting federal property by virtue of proximity.¹²² But, in the first of these, *Minnesota v. Block*,¹²³ the United States Court of Appeals for the Eighth Circuit held that restrictions on the use of motorboats and snowmobiles applied to private persons, not states per se.¹²⁴ The second, *United States v. Brown*,¹²⁵ hinged upon the state's express knowledge of and consent to cession of jurisdiction.¹²⁶ The third, *Organized Fishermen of Florida v. Hodel*,¹²⁷ considered no constitutional issues.¹²⁸ The fourth, *United States v. Lindsey*,¹²⁹ extended the holding of *United States v. Alford*¹³⁰—that Congress may regulate activity on private land which “imperil[s] federal property”¹³¹—to state-owned land.¹³² But Nie et al. failed to mention *United States v. Grant*,¹³³ where a subsequent court held that it lacked jurisdiction over federal arson violations on state land near national forests:

Lindsey simply establishes that the regulation did not overreach the government's constitutional authority; it does not answer the question of whether the government has jurisdiction in the absence of a statute or regulation that criminalizes conduct on state land...[W]ithout an explicit statutory basis, this Court does not have jurisdiction over a crime that was committed on state lands...Here...the lands at issue are not owned or leased by the United States. In the absence of even a minimal proprietary interest, and no expression of intent by either Congress or the Montana legislature for the federal government to exercise legislative power over these lands, the federal government does not have ‘partial, concurrent, or exclusive jurisdiction’ over them.¹³⁴

¹²² Nie et al., *supra* note 1, at 825 n.167 (discussing opinions cited *infra* notes 124–128, 132).

¹²³ 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

¹²⁴ *Id.* at 1252.

¹²⁵ 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977).

¹²⁶ *Id.* at 821 (footnote omitted) (“Although the state of Minnesota did not expressly cede jurisdiction over the waters in the park to the United States, the state did consent to the creation of the park with the knowledge that the federal government intended to prohibit hunting within the boundaries of the park.”).

¹²⁷ 775 F.2d 1544 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

¹²⁸ *Id.* at 1547 (analyzing contract, estoppel, and Administrative Procedure Act issues).

¹²⁹ 595 F.2d 5 (9th Cir. 1979).

¹³⁰ 274 U.S. 264 (1927).

¹³¹ *Id.* at 267.

¹³² *Grant*, 595 F.2d at 6 (“The fact that title to the land on which the violations occurred was in the state of Idaho does not deprive the United States of regulatory control over appellees’ conduct.”).

¹³³ 318 F. Supp.2d 1042 (D. Mont. 2004).

¹³⁴ *Id.* at 1045–46.

For wildlife management activity that may affect federal property, the case law shows no general federal claim on primary jurisdiction.¹³⁵ With the support of the anti-commandeering doctrine, state wildlife managers are right to seek utmost clarity from Congress and the courts where preemption may occur. Where there is clarity, it often runs in the other direction, as discussed with respect to savings clauses in Part III.A.1 below.

But first another key area of case law curiously omitted by Nie et al. merits discussion—*parens patriae*. In *parens patriae* courts sometimes rediscover state natural resources authority through an alternative lens—that of sovereign and quasi-sovereign proprietary and regulatory interests.¹³⁶

3. *Parens Patriae, Police Powers, and Natural Resource Interests*

The court-driven doctrine of *parens patriae* has come a long way in a short time. As recently as 2004 Black's Law Dictionary defined it as “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit”¹³⁷ Since then it has become a means for states to ensure the federal government is faithful in its exercise of federal powers.¹³⁸ It is still not often invoked but has proven central to a few pivotal natural resources cases involving the protection of “quasi-sovereign” interests:

A “quasi-sovereign” interest is a direct and independent interest of the state, and not merely an attempt by the state to recover for the benefit of individuals. Actions to vindicate states’ sovereign and quasi-sovereign interests are sometimes referred to as *parens patriae* actions...Whatever the label, a state may recover costs or damages incurred because of behavior that threatens the health, safety, and welfare of the state’s citizenry.¹³⁹

A state may also sue as *parens patriae* to recover damages to proprietary interests.¹⁴⁰ More uniform than the PTD and with strong foundation in federal precedent,¹⁴¹ *parens patriae* standing requires a state to “assert . . . a ‘quasi-sovereign’ interest”—that is, “the exercise of sovereign power over individuals and entities within the relevant

¹³⁵ See generally Nie et al., *supra* note 1, at 825 (stating that few cases touch on federal authority over wildlife management outside of the boundaries of the public lands).

¹³⁶ Kanner, *supra* note 43, at 101.

¹³⁷ *Parens Patriae*, BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

¹³⁸ See, e.g., *Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 519–20 (2007) (bearing this dynamic out).

¹³⁹ Kanner, *supra* note 43, at 100–01.

¹⁴⁰ *Id.* at 101.

¹⁴¹ *Id.* at 101–02.

jurisdiction . . . involv[ing] the power to . . . enforce a legal code, both civil and criminal.”¹⁴²

When asserting a proprietary interest, the state must show a greater-than-nominal interest,¹⁴³ and if asserting a quasi-sovereign interest, the state must show that it is acting for the “well-being of the populace”; successful efforts to do so involve natural resources issues such as “discharge of sewage, flooding, water pollution, diversion of water, and air pollution.”¹⁴⁴ State standing as *parens patriae* was key to obtaining relief in *Massachusetts v. Environmental Protection Agency*,¹⁴⁵ where a group of states sued the federal government to force it to regulate greenhouse gases as air pollutants upon a finding of endangerment to public health.¹⁴⁶ And in *Maine v. M/V Tamano*,¹⁴⁷ the state of Maine sought to recover damages to coastal waters and marine life from an oil spill and prevailed over defendants’ motion to dismiss.¹⁴⁸

Where *parens patriae* ends and police power begins is much like the public trust doctrine, a question of complex history converging on the transfer of power from the British crown to the states.¹⁴⁹ But arguably the simplest and best answer is that *parens patriae* is a “direct reflection of evolving understandings of the state’s police powers in our constitutional system.”¹⁵⁰ In wildlife law, therefore, the affirmative powers and duties of a state-as-trustee are as wide as the Constitution allows—not as narrow as implied by the least charitable reading of a statute.

Examples abound. In *Lacoste v. Department of Conservation*,¹⁵¹ the Supreme Court upheld a state tax on furbearer skins by virtue of its application to all such skins whether kept within or taken out of the state: “[p]rotection of the wildlife of [a] State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection.”¹⁵² *Baldwin v. Fish & Game*

¹⁴² Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

¹⁴³ *Id.* at 601–02.

¹⁴⁴ Kanner, *supra* note 43, at 103–04.

¹⁴⁵ 549 U.S. 497 (2007).

¹⁴⁶ *Id.* at 520 (“Given [the right to challenge federal actions as arbitrary and capricious under the Administrative Procedure Act] and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”). *See also* Georgia v. Tenn. Copper Co., 206 U.S. 230, 238–39 (1907) (holding that Georgia had standing to request relief, and demonstrated injury, from a Tennessee company’s pollutants as “threaten[ing] damage on... [a] considerable...scale to [Georgia’s] forests and vegetable life”).

¹⁴⁷ 57 F. Supp. 1097 (D. Me. 1973).

¹⁴⁸ *Id.* at 1102.

¹⁴⁹ Margaret S. Thomas, *Parens Patriae and the States’ Historic Police Power*, 69 SMU L. REV. 759, 800 (2016).

¹⁵⁰ *Id.*

¹⁵¹ 263 U.S. 545 (1924).

¹⁵² *Id.* at 550–52, quoted in *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371, 391 (1978).

Commission of Montana,¹⁵³ although held up by *Nie et al.* for the proposition that “the States’ interest in regulating and controlling . . . wildlife[] is by no means absolute”¹⁵⁴—clarified that recreational big-game hunting is not a “means to . . . nonresident[s]’ livelihood” and therefore a state’s licensing scheme strongly favoring residents would not run afoul of the Privileges and Immunities or Equal Protection Clauses.¹⁵⁵ As articulated by the *Baldwin* court, “preservation of a finite resource”¹⁵⁶ extends to activity far beyond license fee systems, and should be read alongside, not apart from, complementary validations of state jurisdiction in civil and criminal contexts.

In *State v. Cline*,¹⁵⁷ Oklahoma’s highest criminal court reiterated that retention of police power is the default, including on state holdings within federal lands:

[W]hen Oklahoma became a state, it was not the intention of either the Federal Government to deprive Oklahoma of jurisdiction over [a game reserve within Wichita National Forest] or the State of Oklahoma to deny itself jurisdiction therein in either civil or criminal matters, or to deny the inhabitants thereof of their rights and privileges as citizens of Oklahoma, or to absolve them from their duties as citizens of the state. It appears it was the intention of the United States to assert less than exclusive jurisdiction over the area in question.¹⁵⁸

While this opinion came before the enactment of the National Wildlife Refuge System Administration Act¹⁵⁹ (NWRSA) in 1966 and National Wildlife Refuge System Improvement Act¹⁶⁰ (NWRISA) in 1997, the court was well aware of how wildlife jurisdictional issues arose in refuges and reserves at that time and how they would continue to do so, writing that the then-applicable code “[was] designed to prevent trespass on refuge lands but . . . not intended to interfere with the operation of local game laws.”¹⁶¹

Parens patriae and cases discussing state police powers give doctrinal depth to the residue of authority left to the states by the Tenth Amendment,¹⁶² whose surface implications are sometimes obscured by

¹⁵³ 436 U.S. 371 (1978).

¹⁵⁴ *Id.* at 385–86; *Nie et al.*, *supra* note 1, at 834.

¹⁵⁵ *Baldwin*, 436 U.S. at 385–91.

¹⁵⁶ *Id.* at 390.

¹⁵⁷ 322 P.2d 208 (Okla. Crim. App. 1958).

¹⁵⁸ *Id.* at 214. *See also Brown*, 552 F.2d 817, 820 (8th Cir. 1977).

¹⁵⁹ National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (2012).

¹⁶⁰ National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee (2012) (amending the National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 926–930).

¹⁶¹ *Cline*, 322 P.2d at 215.

¹⁶² *See* U.S. Const. amend. X; *Cline*, 322 P.2d at 215–16 (discussing Oklahoma’s retention of police power and jurisdiction over federal land when congressional legislation is silent on the issue); *Baldwin*, 436 U.S. 371, 388, 391 (1978).

friction with the Property and Supremacy Clauses. Left undiscussed by Nie et al., these crucial elements of state law are key to a full understanding of wildlife management authority. Thus Nie et al.'s analysis continues to circle around the question of what the Constitution leaves for state management of non-ESA and non-MBTA species on state land and federal property, failing to land on a persuasive answer.

III. UNSOLVED JURISDICTIONAL ISSUES AND ONGOING MANAGEMENT DISPUTES OVER WILDLIFE ON FEDERAL LAND

Throwing more light on the case law of state powers and duties under the doctrines of public trust, anti-commandeering, and *parens patriae* only does half of the work. It is also necessary to examine federal statutes, regulations, and guidance to determine what affirmative duties bind the federal government and pinpoint the fatal flaws in Nie et al.'s case against state primacy.

A. National Wildlife Refuges

When we discuss the National Wildlife Refuge System (NWRS), we do so in the context of its organic act, the NWRSAA, and amendments contained in the NWRSIA, which provide primarily for wildlife and ecosystem conservation and permit the use of refuges subject to system and unit purposes as well as compatibility determinations.¹⁶³ The system mission, as Nie et al. note, is to “administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”¹⁶⁴ Building on the organic act and amendments are unit-specific acts with distinct purposes.

1. NWRSIA Savings Clauses

Nie et al. summarily dismisses NWRSIA's two savings clauses. First: “Nothing in this Act shall be construed to authorize the Secretary [of the Interior] to control or regulate hunting or fishing of fish and resident wildlife on land or waters that are not within the [Refuge] System.”¹⁶⁵ Second:

Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or

¹⁶³ 16 U.S.C. §§ 668dd–668ee (amending the National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 926–930).

¹⁶⁴ Nie et al., *supra* note 1, at 902 (citing 16 U.S.C. § 668dd(a)(2)).

¹⁶⁵ *Id.* at 855 (citing 16 U.S.C. § 668dd(l)).

regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.¹⁶⁶

Many land-management statutes contain relatively little prescriptive language, leaving the “fine details of management” to agencies.¹⁶⁷ It is true that, as opposed to the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM), which manage federal land under multiple-use mandates, the U.S. Fish and Wildlife Service (FWS) manages refuges for the dominant use of fish and wildlife conservation.¹⁶⁸ But interpretation of FWS’s own jurisdiction does not appear to be one of the “fine details” that Congress left to FWS.¹⁶⁹

Nie et al.’s argument that consistency of federal regulation with state law is “not mandated at the expense of the other requirements of the statute”¹⁷⁰ states little more than a truism. But it looks bigger than it is by virtue of the inflective case of *Wyoming v. United States*.¹⁷¹

In *Wyoming*, the Tenth Circuit determined that (a) Congress cannot be read to preempt state authority unless it has stated its “clear and manifest” intent to do so; (b) courts must give full effect to savings clauses where doing so does not upset the federal regulatory scheme; (c) unlike in maritime law, there has not been a manifest “federal interest” in regulating wildlife since the beginning of the Republic and indeed wildlife management is a field “which the States have traditionally occupied”; and (d) Congress did not intend to displace state management where it “bears directly upon the well-being of state interests arising outside those public lands” and “rejected complete preemption of state wildlife regulation within the NWRs.”¹⁷² These extensive findings, favoring state authority, did not stop the Court from looking for conflict preemption and concluding that it was “highly unlikely” that “Congress would carefully craft the substantive provisions of the NWRsIA to grant authority to the [FWS] to manage the [National Elk Refuge] . . . and then essentially nullify those provisions and regulations with a single sentence.”¹⁷³ After this 180-degree turn, the Court offered a consolation prize in the form of a ruling that refuge management is not exempt from the Administrative Procedure Act (APA) because the NWRsIA showed

¹⁶⁶ *Id.* (citing 16 U.S.C. § 668dd(m)).

¹⁶⁷ Vicky J. Meretsky et al., *Migration and Conservation: Frameworks, Gaps, and Synergies in Science, Law, and Management*, 41 ENV’T L. 447, 495 (2011).

¹⁶⁸ Nie et al., *supra* note 1, at 851.

¹⁶⁹ *Id.* at 914; Meretsky et al., *supra* note 167, at 495.

¹⁷⁰ Nie et al., *supra* note 1, at 855.

¹⁷¹ 279 F.3d 1214 (10th Cir. 2002); Nie et al., *supra* note 1, at 832–33.

¹⁷² *Wyoming v. United States*, 279 F.3d at 1230–31, 1234.

¹⁷³ *Id.* at 1234–35.

Congress's intent to limit the discretion of the Secretary of the Interior to override state policy.¹⁷⁴

Wyoming's takeaway appeared to be that state authority to manage fish and resident wildlife exists where there is no federal conflict, but if the Secretary refuses to cooperate with a state initiative involving resident wildlife on a refuge, the state may show through the APA that the Secretary is acting arbitrarily and capriciously.

That a state must narrow its claims to APA would not be expected from reading NWRSIA's savings clauses or the pre-*Wyoming* case law. Just a year before *Wyoming*, the Supreme Court in *Solid Waste Agency of Northern Cook County v. Army Corps*¹⁷⁵ read sections 101(b) and 404(a) of the Clean Water Act (CWA) to stop short of reaching abandoned sand and gravel pits targeted by a rule designating them as intrastate navigable waters providing habitat for migratory birds:

Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ' 33 U.S.C. § 1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.¹⁷⁶

The Court's decision not to defer to the Army Corps' reading of CWA shows how the Tenth Circuit in *Wyoming* might have proceeded, and how courts may yet proceed in resolving jurisdictional disputes.

Of course, not all savings clauses are alike. Nie et al., discussing the Multiple-Use Sustained-Yield Act's¹⁷⁷ (MUSYA) savings clause with respect to forest management, cite *California Coastal Commission v. Granite Rock Co.*¹⁷⁸ to argue that savings clauses "merely indicate[] that ordinary principles of preemption govern" jurisdictional disputes.¹⁷⁹ But the Supreme Court's preemption analysis there hinged on the General Mining Act of 1872¹⁸⁰ and its application to national forests through regulations requiring that permit applicants under the Act fully comply with state laws,¹⁸¹ as well as the Coastal Zone Management Act's¹⁸² requirement that prospective operators secure state certification of compliance with a state coastal management program. Both of these

¹⁷⁴ *Id.* at 1236–38.

¹⁷⁵ 531 U.S. 159 (2001).

¹⁷⁶ *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

¹⁷⁷ Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528–531 (2018).

¹⁷⁸ 480 U.S. 572 (1987).

¹⁷⁹ Nie et al., *supra* note 1, at 860 (citing *Granite Rock Co.*, 480 U.S. at 593–94).

¹⁸⁰ General Mining Act of 1872 (Mining Law of 1872), 30 U.S.C. §§ 22–47 (2018).

¹⁸¹ *Granite Rock Co.*, 480 U.S. at 583.

¹⁸² Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465 (2018); *Granite Rock Co.*, 480 U.S. at 589–91.

examples contrast with MUSYA’s “short and simple” savings clause,¹⁸³ which—like the NWRSA’s savings clause—does not demand further explanation by rulemaking or other statutory language requiring compliance with state law.¹⁸⁴

In 2019 the Tenth Circuit revisited its views on wildlife federalism after the State of Utah transplanted mountain goats onto state land adjacent to a research natural area (RNA) containing sensitive vegetation in the Manti-La Sal National Forest, which plaintiffs asserted required USFS to prohibit or demand Utah apply for a special use permit.¹⁸⁵ The court held USFS could not do either.¹⁸⁶ Though dealing with an action performed on state lands, the court made an important point that did not have occasion to arise in *Wyoming*: that resident wildlife as *ferae naturae* are not instrumentalities of the state.¹⁸⁷ Whether regarding MUSYA, FLPMA, or NWRSA, that last point from the Tenth Circuit should lend more weight to the clear intent of these savings clauses—that states are managing wild resources in which they have had a strong historic interest as trustees.

2. Refuge Purposes, Planning, and Compatibility—Policy and Guidance

The NWRSA treats “conservation” and “management” synonymously, defining both as activities that provide for “sustain[ing] and, where appropriate, restor[ing] and enhanc[ing], . . . methods and procedures associated with modern scientific resource programs.”¹⁸⁸ This definition is not clarified by the Act’s legislative history but points to principles of experimentation and adaptive management that are familiar to federal and state officials alike.¹⁸⁹ Individual refuges established since the 1970s have often included wildlife-oriented recreation and environmental education as refuge purposes.¹⁹⁰

Although, as Nie et al. note, individual refuge managers and supervisors determine consistency and practicability for purposes of applying state law on refuges,¹⁹¹ FWS’ compatibility regulations

¹⁸³ Nie et al., *supra* note 1, at 860 (citing 16 U.S.C. § 528 (1960)) (“Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests.”).

¹⁸⁴ 16 U.S.C. § 528 (1960).

¹⁸⁵ *Utah Native Plant Soc’y v. U.S. Forest Serv.*, 923 F.3d 860, 860–69 (10th Cir. 2019).

¹⁸⁶ *Id.* at 866–71.

¹⁸⁷ *Id.* at 870–71.

¹⁸⁸ National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668ee (2012). See also Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 518 (2002).

¹⁸⁹ Fischman, *supra* note 188, at 522–23.

¹⁹⁰ *Id.* at 603–04.

¹⁹¹ Nie et al., *supra* note 1, at 857. Since 2017, however, FWS has undertaken a coordinated effort to harmonize state and federal hunting regulations on refuges. See SEC’Y OF THE INTERIOR, ORDER NO. 3356: HUNTING, FISHING, RECREATIONAL SHOOTING, AND WILDLIFE CONSERVATION OPPORTUNITIES AND COORDINATION WITH STATES, TRIBES, AND TERRITORIES (Sept. 15, 2017) (directing Interior bureaus including FWS to “ensure that

consider conservation to include “regulated taking” such as hunting, trapping, and fishing—that is, “methods and procedures associated with modern scientific resource programs.”¹⁹² Refuge managers must therefore give weight to the conservation purposes of state management activities when determining the compatibility of refuge uses—particularly where uses (other than the “big six” exempt from appropriate-use analysis by a manager, including hunting, fishing, wildlife observation and photography, and environmental education and interpretation) are regulated under state law.¹⁹³ Among these uses are non-recreational forms of state management involving predator-prey dynamics, use of motorized vehicles and aircraft to conduct research (more on that issue below), and other forms of intervention needed to conserve or increase populations of wildlife.¹⁹⁴

Although the Service has developed guidance to define operational concepts such as “biological integrity, diversity, and environmental health”¹⁹⁵ and aid in evaluating refuge uses and other management actions, there is much dispute over how much of its Manual is binding upon Service employees and which concepts and mandates should prevail over others.¹⁹⁶ First, the question of compulsion: Although appropriate use, compatibility, and biological integrity policies underwent notice-and-comment rulemaking, they avoid the word “shall” in favor of “should” and “will,” while others—system missions and goals, refuge purposes, appropriate use, and wildlife-dependent recreation—cautioned in the Federal Register that they are not meant to be enforced in court.¹⁹⁷ Second, the question of priority: While the NWRSA does not mandate the creation of these policies, certain ones (wildlife-dependent recreation; compatibility) are more closely linked to the language of the

hunting and fishing regulations . . . complement the regulations on the surrounding lands and waters to the extent legally practicable; and . . . in close coordination and cooperation with the appropriate state, tribal, or territorial wildlife agency, begin the necessary process to modify regulations in order to advance shared wildlife conservation goals/objectives that align predator-management programs, seasons, and methods of take permitted on all Department-managed lands and waters with corresponding programs, seasons, and methods established by state, tribal, and territorial wildlife management agencies to the extent legally practicable”).

¹⁹² Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,458–62, 480 (Oct. 18, 2000).

¹⁹³ U.S. FISH & WILDLIFE SERV., SERVICE MANUAL 603 FW: APPROPRIATE REFUGE USES 1.6(A)(3), 1.6(C) (2006), <https://perma.cc/M3PD-U7JT>.

¹⁹⁴ See, e.g., Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska; Final Rule 81 Fed. Reg. 52,248, 52,268, 52,272–73 (Aug. 5, 2016) (regulating camping, cabins, motorized vehicle use, and aircraft landings to protect predator-prey dynamics).

¹⁹⁵ U.S. FISH & WILDLIFE SERV., SERVICE MANUAL 601 FW 3: BIOLOGICAL INTEGRITY, DIVERSITY, AND ENVIRONMENTAL HEALTH (2001), <https://perma.cc/7ZEM-X6M3> (last visited Oct. 2, 2020).

¹⁹⁶ See Robert L. Fischman, *From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENV'T L.J. 77, 118–31 (2007).

¹⁹⁷ *Id.* at 125–26.

NWRSIA than others.¹⁹⁸ These policies, with roots nearer to statute, should prevail over others in cases of conflict, and should be implemented with appropriate avoidance of preemption.¹⁹⁹

Finally, Nie et al. failed to discuss the existence of Coordination Areas within the Refuge System, which are managed by state agencies pursuant to cooperative agreements with the Service under the Fish and Wildlife Coordination Act or under leases made under the Bankhead-Jones Farm Tenant Act.²⁰⁰ Refuge uses on coordination areas are not subject to compatibility determinations.²⁰¹ While *Wyoming* created regrettable ambiguity around the NWRSIA's savings clause at 16 U.S.C. § 668dd(m), the structure of the statute and the processes giving rise to FWS's regulations and policy show that state management of wildlife on refuges remains a primary component of that particular federal-state relationship.

B. Wildernesses

Areas managed under the Wilderness Act of 1964 present a few dilemmas for statutory construction and fulfillment of purposes for their respective lands. The Act creates a mandate to keep lands designated as wilderness “untrammeled by man” and manage them to remain 1) unmarked by humans, 2) conducive to solitude and primitive recreation, 3) large enough to preserve and use unimpaired, and 4) comprising features of scientific, educational, scenic, or historical value.²⁰² The Act prohibits uses including permanent roads, motor vehicles, and motorized equipment.²⁰³ Wilderness purposes are “within and supplemental” to the purposes of the national forests, parks, or refuges to which a wilderness designation applies.²⁰⁴ As such, wildernesses are “managed by the Department and agency having jurisdiction thereover” before their inclusion in the wilderness system.²⁰⁵

Nie et al. insist that the core of the Wilderness Act further preempts state management authority for wildlife on underlying lands. Quoting *Wilderness Watch v. Vilsack*,²⁰⁶ Nie et al. note preserving land for wilderness character is the “primary duty of the underlying unit.”²⁰⁷

¹⁹⁸ *Id.* at 128–29.

¹⁹⁹ See *Wyoming v. United States*, 279 F.3d 1214, 1234 (10th Cir. 2002) (“Congress did not intend to displace entirely state regulation and management of wildlife on federal public lands, especially where such regulation and management bears directly upon the well being of state interests arising outside those public lands.”).

²⁰⁰ Fish and Wildlife Coordination Act 16 U.S.C.S. §§ 661, 664, 668ee (2018); 50 C.F.R. § 25.12(a) (2019).

²⁰¹ 50 C.F.R. § 25.12(a).

²⁰² Wilderness Act of 1964, 16 U.S.C. § 1311(c) (2018).

²⁰³ *Id.* §§ 1131(c), 1133(c).

²⁰⁴ *Id.* § 1133(a).

²⁰⁵ *Id.* § 1131(b).

²⁰⁶ 229 F. Supp. 3d 1170 (D. Idaho 2017).

²⁰⁷ Nie et al., *supra* note 1, at 884, n.660.

But that court also recognized section 1133(d)(7) of the Act states “[n]othing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.”²⁰⁸ This savings clause, as the court understood, “preserves a State’s *right* to manage wildlife in the Wilderness Area,”²⁰⁹ not just a substanceless “traditional interest” as Nie et al. would call it.²¹⁰ This understanding is consistent with an integrated reading of cases like *Baldwin, Wyoming*, and *Utah Native Plant Society*²¹¹ as discussed in III(a)(i) above. Similar language to the Wilderness Act’s savings clause has been included in thirty-one wilderness statutes, beginning in 1978, with increasing prevalence in recent legislation.²¹²

Peculiarly, section 1133(d)(7) may be the clearest-written reservation of management authority in any federal natural resource statute. Nie et al. read this provision, which section 1782(c) of the Federal Land Policy and Management Act of 1976²¹³ (FLPMA) extends to BLM lands,²¹⁴ as succumbing to a broad federal mandate to manage public lands for “wildlife and fish,” not merely “wildlife and fish habitat.”²¹⁵ While FLPMA section 1702(c) may invite such an all-inclusive reading of BLM’s mandate,²¹⁶ FLPMA’s reservation of authority to states for fish and wildlife management in section 1732(b) makes clear that states in fact retain their wildlife jurisdiction:

[N]othing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System . . . or as enlarging or diminishing the responsibility and authority of the States for management of *fish and resident wildlife*.²¹⁷

Nie et al. then highlight BLM’s policy for “special status species,” developed to conserve listed species and prevent further listings.²¹⁸ Covered species include ESA-listed species and those “requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA.”²¹⁹ Although

²⁰⁸ 16 U.S.C. § 1133(d)(7).

²⁰⁹ *Wilderness Watch v. Vilsack*, 229 F. Supp. 3d 1170, 1181 (D. Idaho 2017) (emphasis added).

²¹⁰ Nie et al., *supra* note 1, at 887.

²¹¹ 923 F.3d 860 (10th Cir. 2019).

²¹² ROSS W. GORTE, CONG. RESEARCH SERV., R41649, WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES 2–3, 16 (2011).

²¹³ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1782 (2012).

²¹⁴ *Id.* § 1782(c).

²¹⁵ Nie et al., *supra* note 1, at 869, 887.

²¹⁶ 43 U.S.C. § 1702(c).

²¹⁷ *Id.* § 1732(b) (emphasis added).

²¹⁸ Nie et al., *supra* note 1, at 871–72 (citing BUREAU OF LAND MGMT., MANUAL TRANSMITTAL SHEET: 6840—SPECIAL STATUS SPECIES MANAGEMENT (2008), <https://perma.cc/6DN8-GRQP> [hereinafter BLM SPECIAL STATUS SPECIES POLICY]).

²¹⁹ BLM SPECIAL STATUS SPECIES POLICY, *supra* note 218, at § 6840.01.

most of this policy focuses on ESA implementation and therefore de-emphasizes cooperation with state agencies, BLM's *general* policy on wildlife and fisheries management reaffirms that, "except [for marine mammals, migratory birds, and ESA-listed species], the responsibility for managing . . . wildlife itself traditionally rests with the individual States."²²⁰ BLM's general policy affirms a sensible understanding of the practical results of FLPMA section 1732(b):

The States set seasons, bag limits, and license fees for harvesting game birds, mammals, and fish. They also conduct on-the-ground management and research for a variety of wildlife, including nongame species and species that are threatened and endangered. The Bureau conducts habitat . . . activities on public lands working with the State and other cooperators.²²¹

The Service's wilderness policy, even where its preference for preservation and non-interventionism is clearest, sets forth a subjective standard requiring that interference with ecosystem processes like predator-prey dynamics be "necessary to accomplish refuge purposes, including Wilderness Act purposes" and that there be "compelling evidence . . . that the proposed action will correct or alleviate identified impacts on native fish, wildlife, plants, or their habitats . . ."²²²—showings that state fish and wildlife agencies are manifestly well-equipped to make. The Forest Service's wilderness manual establishes similar principles, reaffirming state jurisdiction, merely "discourag[ing]" intervention into predatory-prey relationships, and calling for consideration of predator benefits to ecosystem before approval of control actions.²²³

We agree with Nie et al. that the collaborative planning processes like FLPMA's, which seek participation by state governments, are useful entry points. But to assert these processes are "conditioned on federal primacy [such that] priority be given to federal law and purposes in the land use planning processes"²²⁴ is to inappropriately brush aside the intent behind those planning processes—that is, to support states in carrying out wildlife conservation activities under their reserved jurisdiction on public lands, including wilderness.

Finding flexibility and maximizing state participation across wilderness management regimes will be a key part of addressing cross-cutting problems like anthropogenic climate change and its attendant effects, including invasive species, wildfires, diseases, pollution, and

²²⁰ BUREAU OF LAND MGMT., MANUAL TRANSMITTAL SHEET: 6500—WILDLIFE AND FISHERIES MANAGEMENT § 6500.07(C) (1988), <https://perma.cc/3P8J-64PY>.

²²¹ *Id.* § 6500.07(D).

²²² U.S. FISH & WILDLIFE SERV., WILDERNESS ADMINISTRATION AND RESOURCE STEWARDSHIP, 610 FW 2.16(B)(1), 2.20 (2008), <https://perma.cc/2HPH-T4FM>.

²²³ U.S. FOREST SERV., FOREST SERVICE MANUAL §§ 2323.32, 2323.33c (2007), <https://perma.cc/5FB3-6KK3>.

²²⁴ Nie et al., *supra* note 1, at 874.

extreme weather events.²²⁵ Programs to manage and restore ecosystem functions can make substantial use of state capabilities in tracking and preserving ecosystem functions, and carrying out translocations for species most at risk where *in situ* conservation may not be otherwise feasible.²²⁶ As discussed in Part II(a)(ii) *supra*, State Wildlife Action Plans (SWAPs) and other statewide strategies have been in use for a long time and are expected to be a central instrument in minimizing further losses in biodiversity.²²⁷

What will help state and federal agency collaboration, as Nie et al. note, is a concerted effort to reduce interagency jurisdictional conflict.²²⁸ With the amount of discretion built into federal refuge and wilderness management by virtue of their statutory structure, erasing recognitions of state authority in manuals and guidance will scarcely clarify the tasks before us. The next subsection, as well as Part IV, begin to suggest the path forward.

C. How Recognizing State Authority Can Reduce Interagency Conflict and Confusion

The decentralized structures of federal agencies including FWS—with regional offices encouraging attention to the priorities of state agencies rather than adversarial or competitive activity—often counterbalance the force of preemption.²²⁹ Indeed, interagency collaboration on a wide variety of fish and wildlife management issues is the norm, not the exception. For example, biologists from FWS serve on technical committees convened by state fish and wildlife agencies, and FWS routinely invites state fish and wildlife agency biologists to participate in conservation planning on federal lands or for federal trust species (e.g., endangered species and migratory wildlife) or both.²³⁰ In addition, the rapid professionalization of state agencies in many fields since the mid-20th century has also increased the benefits of cooperation

²²⁵ Elisabeth Long & Eric Biber, *The Wilderness Act and Climate Change Adaptation*, 44 ENV'T L. 623, 626, 632, 634 (2014) (“Because of . . . pervasive human impacts on all wilderness areas—particularly climate change—active human intervention in wilderness areas will be necessary to retain desired natural features, protect biodiversity, and maintain functioning ecosystems . . . [C]ritiques of the Wilderness Act are consistent with broader calls for changes in environmental law to allow for adaptation to climate change.”).

²²⁶ Jonathan Mawdsley et al., *A Review of Climate-Change Adaptation Strategies for Wildlife Management and Biodiversity Conservation*, 23 CONSERVATION BIOLOGY 1080, 1083–84 (2009).

²²⁷ See *supra* notes 65–68 and accompanying text.

²²⁸ Nie et al., *supra* note 1, at 926, 929–30.

²²⁹ See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2075–77 (2008).

²³⁰ See generally Nie et al., *supra* note 1, at 847–48 (describing an interagency policy that specifies ways states can utilize their expertise and information to help the FWS effectuate the ESA).

in setting and implementing policy.²³¹ As Heather Gerken puts it, “[s]tates and localities don’t shield people from national norms, but constitute sites for constructing those norms.”²³² Indeed, some courts have begun to conceive of situations where states may merit deference to their interpretations of statute.²³³ Even if deference of this sort is unlikely to become a pervasive fixture of federal doctrine, as a mediating principle it may be useful outside the courtroom. In wildlife conservation, looking at “the specific ways that Congress utilizes state implementers”²³⁴ would require an honest accounting for legislative findings and statements of jurisdiction like the savings clauses in the NWRSA, FLPMA, and the Wilderness Act.²³⁵

And yet, while Congress is “the institution most structured to represent state interests[,] . . . it is not clear that Congress offers significantly more sensitivity to state regulatory prerogatives than federal agencies do.”²³⁶ While Jack Goldsmith intuitively argues “[s]tates are among the most influential of interest groups in the federal legislative process, and thus are relatively well suited to convince Congress to revise unwanted judicial interpretations[,]”²³⁷ a 2007 study says otherwise, finding Congress “almost never” acts to override Supreme Court decisions on statutory preemption even when, as is often the case, a legislative majority disagrees with the judicial outcome.²³⁸ The necessary result is an ongoing bargaining process that minimizes the chance for legal conflict for wildlife stewardship on federal lands—

²³¹ Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 552 (2011).

²³² Heather K. Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1714 (2017); see also Gluck, *supra* note 231, at 564 (“[O]ne of the ways in which we have adapted state-centered institutions for national purposes is by using the states themselves to give meaning to federal statutory law.”).

²³³ Gluck, *supra* note 231, at 611–12 (discussing the growing number of cases where *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)—which require courts to accept reasonable agency interpretations of statutes where there is ambiguity, and in turn to accept agency interpretations of their own rules according to the agency’s persuasiveness and consideration—are considered potentially applicable to states, especially where states accept conditions imposed under federal spending programs).

²³⁴ *Id.* at 599.

²³⁵ See, e.g., *Nw. Env’t Def. Ctr. v. Cascade Kelly Holdings LLC*, 155 F. Supp. 3d 1100, 1125 (D. Or. 2015) (citing section 107(a) of the Clean Air Act, 42 U.S.C. § 7407(a), as an example of Congress showing “its intent to give states ‘the primary responsibility for assuring air quality within the entire geographic area comprising such state’” and thereby intending to require the court to “give ‘some deference’” to a state agency’s determinations as suggested by Professor Gluck).

²³⁶ Metzger, *supra* note 229, at 2080–81.

²³⁷ Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV., 2000, at 175, 186.

²³⁸ *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612, 1621–22 (2007). See also Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 41–42 (2013) (detailing some of the practical barriers to a congressional reaction to a preemption ruling).

one that recognizes the interplay between state constitutional and statutory trust obligations with federal statutory responsibilities rather than attempt to fallaciously separate them like wildlife from habitat.

What follows are a few proposed ways to achieve this recognition among state, federal, and NGO partners; create durable paths to minimize conflict; and collaborate proactively on a foundation of law that is as clear as possible while still cognizant of underlying ambiguity.

IV. TOWARD CONSTRUCTIVE COLLABORATION

The reasons for urgency on the part of Nie et al. are clear to state agencies and organizations like AFWA. Impacts from the worldwide and decades-long loss in biodiversity are already clear in the United States and will only grow.²³⁹ State fish and wildlife agencies and NGOs are responding to the associated ecological, economic, political, and legal challenges by engaging in a wide variety of collaborative approaches. These include the development of research projects and communications tools under existing grant programs and creation of informal memoranda of understanding.²⁴⁰ Agencies also recognize building on the historical success of the North American Model demands adaptation to an ever-more diverse base of wildlife users and their aggregate priorities, which include but are not limited to mitigating the biodiversity crisis.²⁴¹ And finally, agencies are actively making the case for substantial and permanent increases in funding for non-game species conservation.²⁴² These measures are not, in and of themselves, the legal basis for state authority to manage fish and wildlife but contribute to the affirmative case for their continued primary jurisdiction.

A. *Creating and Updating Memoranda of Understanding, and Regularly Updating Policy and Guidance*

It is well-established across a variety of regulatory areas that states often work with federal agencies by means of groups like AFWA. Whether known as “government interest groups” or “translocal organizations of government actors” (TOGAs),²⁴³ such groups employ

²³⁹ NAT’L WILDLIFE FED’N, REVERSING AMERICA’S WILDLIFE CRISIS: SECURING THE FUTURE OF OUR FISH AND WILDLIFE, at ii, 4, 10 (2018), <https://perma.cc/4SSZ-J9UZ> (“State Wildlife Action Plans have proven to be an effective means for states and their partners to target science-based conservation actions on behalf of the nation’s declining wildlife resources” at a time when “as many as one-third of America’s species are vulnerable” due to habitat loss and degradation, invasive species, climate change, disease, and pollution (citing ASS’N OF FISH & WILDLIFE AGENCIES) See *supra* note 65 and accompanying text.

²⁴⁰ See discussion *infra* Part IV.A.

²⁴¹ See discussion *infra* Part IV.B.

²⁴² See discussion *infra* Part IV.C.

²⁴³ Compare DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 1646 (2d ed. 1972) and DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON:

several means of formal and informal consultation with federal agencies, including subject-matter working groups, annual meetings, and regular conference calls. These means of informal state-federal consultation, rather than “legally questionable” as Nie et al. suggest,²⁴⁴ are in fact protected by section 204(b) of the Unfunded Mandates Reform Act of 1995²⁴⁵ (UMRA), which exempts intergovernmental communications from the Federal Advisory Committee Act (FACA). UMRA’s specifications for state, local, and tribal input at 2 U.S.C. § 1534(b) go hand in hand with state consultation requirements set forth in the federal statutes discussed in this article.²⁴⁶

The Fish and Wildlife Service’s refuge manual makes clear that memoranda of understanding (MOUs) are an appropriate method of setting forth management responsibilities assumed by state fish and wildlife agencies.²⁴⁷ AFWA, acting as a TOGA, is an appropriate signatory to such MOUs because it represents state fish and wildlife agencies as voluntary members acting collectively on the basis of shared information to carry out programs where both parties’ jurisdictions converge, and because the MOUs themselves never create any binding legal obligations on behalf of the state or federal signatories.²⁴⁸ Allowing for use of MOUs is a wise policy, given the ambiguity surrounding the bindingness of federal policies issued below the level of rulemaking.²⁴⁹

While Nie et al. reductively suggest the legal-political dynamic of contested authority is shaped by state claims on “sovereign rights” and federal “self-denial,”²⁵⁰ state and federal managers must both contend with federal statutes drafted to varying degrees of clarity and interpreted by courts with varying degrees of fidelity to plain language

GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING 90 (1974) with Judith Resnik, *New Federalism(s): Translocal Organizations of Government Actors (TOGAs) Reshaping Boundaries, Policies, and Laws*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 83, 94–95 (Kathleen Claussen et al. eds., 2008).

²⁴⁴ Nie et al., *supra* note 1, at 894.

²⁴⁵ Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 658–658g, 1501–1571 (2018).

²⁴⁶ See *Wyoming Sawmills, Inc. v. U.S. Forest Serv.*, 179 F. Supp. 2d 1279, 1305–06 (D. Wyo. 2001) (holding that consultations between USFS and state, county, and tribal representatives fell within UMRA exemptions to FACA and “fulfill[ed] the Forest Service’s obligation under [federal statute] to consult with the other Federal, State, and local agencies and Indian tribes. . .”).

²⁴⁷ U.S. FISH & WILDLIFE SERV., *supra* note 193, at 1.2(B) (exempting state fish and wildlife agency activities from appropriate use policy when addressed in a regional MOU or comprehensive conservation plan).

²⁴⁸ Nie et al. acknowledges as much but does not proceed to withdraw its assertion that MOUs are “legally questionable.” Nie et al., *supra* note 1, at 920.

²⁴⁹ See Sandra B. Zellmer, *Wilderness Management in National Parks and Wildlife Refuges*, 44 ENV’T L. 497, 531 & n.247 (2014) (citing *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386, 1393–94 (S.D. Fla. 1997) for the holding that FWS’s wilderness stewardship policy at 610 FW 1-5 is likely nonbinding because, like certain chapters of the manual on general refuge administration, it did not go through APA rulemaking procedure).

²⁵⁰ Nie et al., *supra* note 1, at 932 n.998 (citing George Cameron Coggins & Michael E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 60, 84 (1981)).

principles, all set against a background of case law that, from *Geer* to *Hughes* and far beyond, is less clear at the margin than Nie et al. assert.

MOUs and other sub-regulatory tools can also provide more scaffolding for conflict resolution. The most strident non-interpretive portion of *Wyoming v. United States* is the opinion's admonition of the Service and the state agency's inability to "find any common ground on which to commence fruitful negotiations."²⁵¹ MOUs and guidance resulting from intensive consultation can be less expensive, more durable, and more clarifying than litigation. In a legislative era where environmental statutes are rarely updated, MOUs setting forth parameters for cooperation in specific subject areas and on projects of finite duration are necessary tools for carrying out wildlife management.

B. Setting the Record Straight on State Management, the North American Model, and the Public Trust Doctrine

The rise in litigation centered on jurisdictional conflict in the last decade provides an excellent opportunity to reflect on the role of the North American Model and the public trust doctrine and how each framework informs legal and non-legal agency personnel's performance of duties.

There has been a spate in recent years of cases involving novel assertions of the PTD in state and federal courts.²⁵² Some of these cases expound the wildlife trust as distinct from the trust uses of navigation, commerce, and fishing on navigable waters, while others seek to enforce an atmospheric trust. Others have clarified the administration of judicial remedy, or acknowledged existing limitations.²⁵³ Nie et al.

²⁵¹ *Wyoming v. United States*, 279 F.3d 1214, 1240 (10th Cir. 2002).

²⁵² See, e.g., *Lawrence v. Clark County*, 254 P.3d 606, 607 (Nev. 2011) (reaffirming Nevada's public trust doctrine); *Chernaik v. Brown*, 436 P.3d 26, 35 (Or. 2019) (declining to extend the PTD to impose "fiduciary obligations" on the state with regards to climate change).

²⁵³ See, e.g., *Ctr. for Biological Diversity, Inc.*, 83 Cal. Rptr. 3d 588, 606–08 (Cal. Ct. App. 2008) (declining to enjoin operation of a wind farm harming raptors and other birds—but noting that state fish and wildlife regulators may be susceptible to a public trust claim); *Citizens for East Shore Parks v. Cal. State Lands Comm'n*, 136 Cal. Rptr. 3d 162, 186 (Cal. App. 1st Dist. 2011) (concluding that there is no set "procedural matrix" to evaluate state fulfillment of the PTD, but compliance with the state environmental policy act usually will suffice); *San Francisco Baykeeper, Inc. v. State Lands Comm'n*, 194 Cal. Rptr. 3d 880, 911–12 (Cal. Ct. App. 2015) (distinguishing *East Shore Parks* as a case where there was no dispute as to whether a use was a public trust use); *Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225, 1227 (N.M. Ct. App. 2015) (declining to find an atmospheric PTD for lack of other such findings by state or federal courts, and requiring atmospheric trusts to be asserted through existing constitutional and statutory frameworks); *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, at *8 (Wash. Super. Ct. Nov. 19, 2015) ("[T]he State has a constitutional obligation to protect the public's interest in natural resources held in trust for the common benefit of the people . . ."). *Foster* resulted in promulgation of carbon emission reduction rules, which continued to be litigated at the remedial stage. See Michael C. Blumm & Mary Christina Wood, "No Ordinary Lawsuit": *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U.L. REV. 1, 76–77 (2017).

suggest that the wildlife PTD is still “limited when contrasted to other trust resources, such as navigable waterways, submerged lands, and public access”, that it is “ill-defined,” and that it “favors . . . national over state and local authority . . . as a matter of constitutional common law.”²⁵⁴ The shortage of procedural development around the broader PTD outside of states like California or Washington is not likely to go away anytime soon, but advocating for a federal trust component just while state courts are advancing their own PTDs will not serve the cause of reducing confusion.

Outside the courtroom, Nie et al. recommend revising the Model by “consider[ing] more seriously how states can cooperate, as co-trustees, with federal and tribal governments[.]”²⁵⁵ The states are in constant cooperation with federal and tribal agencies. Many of these areas of cooperation, if not governed by statute, would grind to a halt without guidance that Nie et al. seem intent to uproot.

Finally, proponents of the Model do not believe it is set in stone. If, as Nie et al. and AFWA agree, the Model is both “descriptive-historical” and “normative-prescriptive,” then each policy decision or management action applies the Model’s seven tenets and changes the tenet’s meaning, whether negligibly or significantly.²⁵⁶ Even though the Model was conceptualized in the twenty-first century, it describes conservation principles that took hold over the course of the late nineteenth and twentieth centuries, all while common law accumulated and the statutory landscape changed.²⁵⁷ This perpetual constitutive process continues today, and will continue through the twenty-first century. As recently noted:

Confusion continues to exist over the intent of the Model and its application. Today, most of the constructs are being applied to a wide array of both hunted and non-hunted taxa, such as ownership of wildlife, wildlife markets, legal allocation, legitimate purpose, international resource and science. However, the actual application is not consistent. The reason is not the Model itself, but rather resources and advocacy[.]²⁵⁸

C. Advocating for Higher Funding of State and Federal Wildlife Conservation Programs

AFWA and Nie et al. fundamentally agree on the need for greater permanent sources of funding for wildlife conservation at the state and federal levels. AFWA’s devotion of resources to promoting the

²⁵⁴ Nie et al., *supra* note 1, at 904, 908, 910 (internal citation omitted).

²⁵⁵ *Id.* at 913.

²⁵⁶ *Id.* at 812.

²⁵⁷ *Id.* at 811–13.

²⁵⁸ Organ et al., *supra* note 84, at 33.

Recovering America's Wildlife Act (RAWA), H.R. 3742 (2019),²⁵⁹ and Nie et al.'s support in principle of funding for non-game conservation show a common purpose in one of the most urgent and actionable issues limiting the country's ability to conserve biodiversity.²⁶⁰

A recent study of ESA recovery plans found that almost one quarter of eligible listed taxa lack final recovery plans, and plans are often outdated or took more than half a decade to finalize after listing.²⁶¹ Not another word need be written on the jurisdictional issues of managing non-listed wildlife on federal land to call for more resources for listed species. Indeed, the primary effort this decade to reduce the backlog of listing decisions, status reviews, and recovery planning, according to need and feasibility, arose from state-federal collaboration. The National Listing Workplan, released in 2016, created five "prioritization bins" for status reviews and twelve-month findings for petitioned species.²⁶² This Workplan descends from the Southeast Association of Fish and Wildlife Agencies' (SEAFWA) Southeast At-Risk Species program (SEARS), which originated from a partnership between SEAFWA and the FWS Southeast Region Office to guide decision-making for 404 aquatic species subject to a listing petition in 2010.²⁶³ This type of multi-year, regionally-based, state-federal collaboration is the rule—not the exception—and Nie et al.'s prescriptions would hinder all parties' efforts to fulfill their responsibilities under both state and federal law.

V. CONCLUSION

The many competing approaches to public lands and wildlife management provided for in federal statute, regulation, and policy all reflect the structures of the institutions designed to carry them out. They also reflect Congress's shifting and contingent expressions of intent to assign land and natural resource managements to these

²⁵⁹ *Statement from the Association of Fish and Wildlife Agencies Supporting the Introduction of the Recovering America's Wildlife Act*, W. ASS'N OF FISH & WILDLIFE AGENCIES (July 12, 2019), <https://perma.cc/5A5H-C3CH>.

²⁶⁰ Nie et. al., *supra* note 1, at 811 & n.54 (citing ASS'N OF FISH & WILDLIFE AGENCIES, SUSTAINING AND CONNECTING PEOPLE TO FISH AND WILDLIFE: A LOOMING CRISIS CAN BE AVOIDED, <https://perma.cc/BH9H-Z4NN> (last visited Sept. 18, 2020)).

²⁶¹ Jacob W. Malcom & Ya-Wei Li, *Missing, Delayed, and Old: The Status of ESA Recovery Plans*, 2018 CONSERVATION LETTERS 3 (2018), <https://perma.cc/CL8L-2M8T> (citing AFWA's Blue Ribbon Panel report, *The Future of America's Fish and Wildlife: A 21st Century Vision for Investing in and Connecting People to Nature*, to support the idea of dedicated revenue for species of greatest concern).

²⁶² U.S. Fish & Wildlife Serv., *Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act*, 81 Fed. Reg. 49,248 (2016).

²⁶³ A brief history of this collaboration is set forth in congressional testimony. *Oversight: Modernization of the Endangered Species Act: Hearing Before the S. Comm. on Env't & Pub. Works*, 115th Cong. 28 (statement of Gordon Myers, Exec. Dir. of the N.C. Wildlife Res. Comm'n) (2017).

institutions. But one indispensable source of localized knowledge and experience is the state fish and wildlife agency.

Nie et al., by glossing over ambiguities in federal case law and disregarding the exigencies for informal state-federal collaboration, seeks to advance a misunderstanding not only of wildlife conservation but also of federal and state relations in general, and state regulatory organizations' role within that framework. Moreover, Nie et al. have unnecessarily exaggerated its perception of conflict, becoming self-fulfilling to a sympathetic audience, without advancing the important conservation measures needed to sustain fish and wildlife populations on the landscape. This Article has sought to correct this misunderstanding because clarity is necessary for the tasks before us in the century ahead.