No. 17-532

In the Supreme Court of the United States

CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF FOR THE ASSOCIATION OF FISH AND WILDLIFE AGENCIES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Wyoming's admission to the Union, or the establishment of the Bighorn National Forest, abrogated the Crow Tribe of Indians' right to hunt on the "unoccupied lands of the United States" negotiated in the Second Treaty of Fort Laramie (1868), thereby allowing for the 2016 criminal conviction of a Crow member who hunted elk on the Bighorn National Forest in Wyoming during closed season.

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INTEREST OF AMICUS CURIAE

The Association of Fish and Wildlife Agencies ("Association") is a nonprofit professional association that represents the state, provincial, and territorial fish and wildlife agencies of the United States and Canada.[1] These agencies are responsible for conserving wildlife resources on public and private lands within their borders. The Association supports science-based management and conservation policy, strengthened by a collaborative approach to governance of public wildlife and land use. Since 1902 the Association has built and maintained a productive network of state, federal, and private stakeholders who all seek to advance lasting solutions to wildlife management challenges, from conservation financing to climate change adaptation to law enforcement. For more than a century the Association has helped shape state agency governance and advocated for dedicated funding sources to conserve game and non-game species.

From time to time the Association has participated as *amicus curiae* to protect the rights and interests of its member agencies as the primary trustees for the states' wildlife resources. Each of the Association's member agencies exercises its constitutionally or statutorily derived powers to achieve the common goals of fish and wildlife conservation and public enjoyment

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[1] Pursuant to this Court's Rule 37.6, amicus and its counsel note that no part of this brief was authored by counsel for any party, and no person or entity other than the Association or its members made any monetary contribution to the preparation or submission of the brief. The parties have filed blanket consents to the filing of amici briefs in this matter.

of those resources. This goal is best met when application of the law—whether in statute, regulation, or treaty—is clear and consistent, allowing wildlife managers to address urgent issues as they arise. The authority of one of our member agencies to manage resident wildlife is at stake in this case, and the same goes for the agencies of many other states on whose lands a reversal of the court below could revive off-reservation treaty rights to hunt and fish in derogation of prevailing state and federal law.

In this case, the District Court of Wyoming for Sheridan County affirmed Petitioner's conviction on charges of taking big game during Wyoming's closed season and for being an accessory to the same, rejecting his defense of treaty rights under the Second Treaty of Fort Laramie of 1868 ("Crow Treaty"). The Association files this brief because its member agencies have a direct and substantial interest in affirmance of the ruling below.

The filing of this brief was authorized by the Executive Committee of the Association during its meeting on August 9, 2018. The brief is filed with the blanket consent of Petitioner and Respondent under this Court's Rule 37.2(a).

SUMMARY OF ARGUMENT

The Association's member state agencies, including the Wyoming Game and Fish Department, retain the primary legal authority to manage fish and wildlife within their borders to the extent that there is no conflict with federal law. The agencies derive this authority from their state police power and public trust authority over fish and resident wildlife. If this Court

reverses the judgment of the court below, Wyoming's and other states' long-recognized authority to regulate the use of resident wildlife could be instantly curtailed, with highly uncertain results for tribal and non-tribal beneficiaries as well as state and federal managers of natural resources. We ask this Court to affirm the ruling of the district court.

ARGUMENT

I. REVERSAL OF THE JUDGMENT OF THE WYOMING DISTRICT COURT WOULD HARM STATE FISH AND WILDLIFE CONSERVATION ACROSS THE WESTERN UNITED STATES.

The Association adopts the facts and arguments raised in Respondent's brief. The Association believes it can be of most use by providing this Court with an overview of its member agencies' legal authority to manage fish and wildlife within their borders, and by discussing how reversal of the Wyoming district court would harm fish and wildlife conservation across the United States.

A. States have primary legal authority to manage fish and wildlife within their borders with the exception of federally protected species.

States have primary legal authority to manage fish and resident wildlife within their borders, with the specific exception of species protected under federal law, such as the Endangered Species Act, 16 U.S.C. § 1531 *et seq*., or the Migratory Bird Treaty Act, 16

U.S.C. §§ 703-712.[2] States exercise their police power to conserve wild, non-domesticated species in trust for all people, in conformity with precedent spanning two centuries.

State ownership of natural resources was first recognized in 1821 by New Jersey's highest court. *Arnold v. Mundy*, 6 N.J.L. 1, 43 (N.J. Sup. Ct. 1821) (finding that navigable waters and the lands below them came into state trusteeship following the American Revolution). This Court, in *Martin v. Waddell's Lessee*, adopted the *Arnold* court's theory of trust ownership and recognized that the people of a state retain the right to fish in its navigable and tidal waters subject to state ownership. 41 U.S. 367, 368 (1842). Next, in *Geer v. Connecticut*, this Court applied the public trust directly to wildlife:

> The ownership being in the people of the state, the repository of the sovereign authority . . . it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict [that right], as . . . will best subserve the public welfare.

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[2] *See Missouri v. Holland*, 252 U.S. 416, 435 (1920) (holding that the Migratory Bird Treaty prevailed over state regulation of migratory birds pursuant to the Supremacy Clause); *Kleppe v. New Mexico*, 426 U.S. 529, 547 (1976) (holding that the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 *et seq*., authorizes the federal government, pursuant to the Property Clause, to regulate wild horses and burros); *Hughes v. Oklahoma*, 441 U.S. 322, 342 (1979) (holding that state regulations of wildlife may be invalidated for improper discrimination against interstate commerce).

161 U.S. 519, 533 (1896). Even in *Hughes v. Oklahoma*, where this Court overturned a state prohibition on transport of minnows out-of-state for discrimination against interstate commerce, the Court recognized in unambiguous terms the need to preserve "the legitimate state concerns for conservation and protection of wild animals" as "legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." 441 U.S. 322, 335-37 (1979).

At least seven states have amended their constitutions to codify a state common-law public trust in fish and wildlife, thereby creating authority to manage those resources.[3] In at least twelve others the

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[3] *See* ALASKA CONST. art. VIII, § 4 ("Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."); HAW. CONST. art. XI, § 1 ("For the benefit of present and future generations, the State…shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."); LA. CONST. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people."); MASS. CONST. art. XCVII ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby

public trust is recognized expressly through statute, while in 29 others the state's judiciary has interpreted state authority or been persuaded by rulings in sister states to recognize a public trust encompassing wildlife. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 6 UTAH L. REV. 1437, 1493-1504 (2013).

This public trust obligation, including the mechanisms for disposition of resources and public accountability, comes in many forms. In some states a private or governmental cause of action is available,[4]

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declared to be a public purpose."); MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment…"); PENN. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); TEX. CONST. ANN. art. 16, § 59(a) ("The conservation and development of all of the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.").

[4] *Compare Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 590-91 (Cal. Ct. App. 2008) ("[P]rivate parties have the right to bring an action to enforce the public trust [in wildlife]") *with In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (holding that, while "no individual citizen" has a PTD right to seek recovery for damages to waterfowl, "the state certainly has a sovereign interest" in doing so).

while in others one finds an emphasis on public welfare or mixed use of resources.[5]

For all of these variations, such provisions show clearly that "the state ownership doctrine lives on in the twenty-first century in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat." Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 706 (2005).

State ownership of wildlife not only encourages, but requires stewardship on behalf of all residents. Bound together by a shared history of emergency and renewal, professional and recreational conservationists pursue management and enjoyment of wildlife based on principles of public trust, sound science, and rule of law.

B. Even under the understanding of treaty rights and state sovereignty established by *Mille Lacs*, the hunting rights at issue were terminated by federal and state law.

State fish and wildlife agencies regulate game harvest in order to conserve resources, obtain data, and ensure public safety. Through regulations setting open seasons, allowable means for harvest, bag limits, and available tags, state agencies apply the best available

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[5] *See, e.g.*, ALASKA CONST. art. VIII, § 4 (articulating mixed-use and sustained-yield principles); LA. CONST. art. IX, § 1 (balancing protection of environmental resources with public health, safety, and welfare).

science to sustain the activities that perpetuate the bonds between people and nature.

The need for interjurisdictional regulatory certainty, where it can be secured, cannot be overstated. In 2010 The Wildlife Society, an international scientific organization devoted to wildlife conservation, identified resource availability for enforcement of seasons, bag limits, and methods of take, as a key challenge to wise state allocation of wildlife resources, including regulation of harvest. THE WILDLIFE SOC'Y, THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION, Tech. Rev. 12-04 at 18 (Dec. 2012). In particular a "lack of specific permits" may reduce the ability of a state wildlife agency to base its decisions in science and collaborate with its federal counterparts. *Id*.[6]

While the scope of *Geer* and its progeny has been limited over the course of the twentieth century, *see note* 2 *supra*, states continue to enjoy a "presumption of legislative validity" when exercising their broad police powers in the public interest. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Wyoming's law enforcement personnel, in exercising the state's police powers against Petitioner, were working well within the bounds of authority still recognized by courts in a majority of states, *see* Blumm & Paulsen, *supra*, at

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[6] *See also* H. Rep. No. 238, 115th Cong., 1st Sess. 6 (2017) ("The Department of the Interior and the U.S. Forest Service are expected to prioritize continued coordination with other Federal agencies and State fish and wildlife agencies to recognize and fully utilize State fish and wildlife data and analyses as a primary source to inform land use, planning, and related natural resource decisions.").

1493-1504, and blessed by this Court in *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-604 (2012), which held that the public trust doctrine "do[es] not depend on the [U.S.] Constitution" and "remains a matter of state law[.]"

The Wyoming Game and Fish Department (WGFD) was created by the state's legislature, WYO. STAT. ANN. § 23-1-401, and is supervised by the Wyoming Game and Fish Commission (WGFC), itself created in 1911. *See* David Willms & Anne Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding It, Preserving It, and Funding Its Future*, 14 WYO. L. REV. 659, 674 (2014). State ownership of wildlife in Wyoming is expressed in typical statutory form. WYO. STAT. ANN. § 23-1-103 ("For the purpose of [1939 Wyo. Sess. Laws 83-116], all wildlife in Wyoming is the property of the state . . . It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife . . . ").

Early in the life of the WGFD, agency leaders joined with volunteer conservationists to translocate elk from Jackson Hole and other areas in Wyoming to the Bighorn Mountains and create feedgrounds to counteract the elimination of winter ranges. Some of these elk transplants occurred with the support of the Federal Aid in Wildlife Restoration Act ("Pittman-Robertson Act"), which apportions funds from an excise tax on firearms and ammunition to state fish and wildlife agencies for wildlife and habitat management. 16 U.S.C. §§ 669-669i (2012). *See* CALVIN L. KING, REESTABLISHING THE ELK IN THE BIGHORN MOUNTAINS

OF WYOMING 5-37 (1963); Willms & Alexander, *supra*, at 677.

Article IV of the 1868 Treaty specifies that the Crow "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. 650.

Even though the 1868 Treaty did not name Wyoming statehood as a circumstance that would terminate the Crow's right to hunt, and Indian treaties are generally interpreted to mean what tribal parties would have understood them to mean at the time of their negotiation, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), federal and state regulation of land and wildlife resources within Wyoming's borders sufficed to extinguish the Article IV right as contemplated by the Treaty parties by asserting jurisdiction over ceded lands. *See* Section II(b) *infra*; Br. of Resp. at 6-10.

Chiefly this occurred through federal recognition and reservation of state authority over wildlife. In 1899, Congress enacted a law regarding the protection and administration of forest preserves, directing national forest administrators, supervisors, and agents to "aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game . . . " 30 Stat. 1095.

This statute augured a longstanding state-federal consensus, reaffirmed nearly a century later in federal regulation, that state agencies retain authority to

manage fish and wildlife resources on federal land. As 43 C.F.R. 24.3(a), promulgated in 1983, reaffirms: "In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State."

As for the National Forest System, not covered by 43 C.F.R. part 24, the Federal Land Policy and Management Act ("FLPMA") provides equivalent language:

> [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 and adjacent waters or as *enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife*.

43 U.S.C. § 1732(b) (emphasis added).

While 43 C.F.R. 24.3(a) also recognizes that treaties constitute a source of Federal authority to manage fish and wildlife, *id*., the same canons requiring congressional clarity to terminate tribal treaties counsel great caution in finding displacement of state management authority. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (federal exercise of preemptive powers in traditional areas of state regulation is "extraordinary . . . in a federalist system" and must be "exercise[d] lightly").

Of course FLPMA's language does not address the question of what rights survive in the 1868 Treaty, but this Court's canons of federalism and its holdings on public trust from *Geer* to *PPL Montana*, along with the

congressional and regulatory recognitions of state management authority dating to 1899, all show that courts, lawmakers, and regulators over the lifetime of the Treaty understood that it would take a clear showing from Congress to curtail the authority of state fish and wildlife agencies to regulate game within their borders. Defeasible treaty rights like the one in Article IV of the 1868 Treaty do not amount to such a showing.

Therefore WGFD retains its authority to manage fish and game within Wyoming, and its law enforcement officers retained authority to cite Petitioner for the misdemeanors of taking big game without a license or during closed season, to which assertion of the Article IV right cannot be a defense.

II. REVERSAL OF THE JUDGMENT OF THE WYOMING DISTRICT COURT WOULD CAUSE JURISDICTIONAL CONFUSION BETWEEN STATE, TRIBAL, AND FEDERAL LAND MANAGERS.

Management of wildlife resources held in trust by the states on one hand, and federal lands on the other, is a delicate dance even without the surprise of off-reservation treaty rights long understood by game managers to be extinguished. Recognizing the right in Article IV of the 1868 Treaty would produce even more jurisdictional uncertainty, and burden the administration of the wildlife trust held for all people.

A. Even if the Crow's right to hunt was not extinguished by Wyoming's statehood, Wyoming should retain authority to regulate tribal hunting off-reservation because this Court and the Forest Service have both interpreted *Mille Lacs* to allow for such regulation.

In 1968, this Court ruled that a state may exercise its police power to regulate tribal fishing off-reservation pursuant to surviving treaty rights in the interest of conservation if "the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968) (citing *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563-64 (1916): "[The reserved treaty right] is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees . . . but subject, nevertheless, to that necessary power of appropriate regulation . . . which inhered in the sovereignty of the state over the lands where the privilege was exercised.").[7]

While the *amicus* brief of the natural resources law professors asserts that tribal members "tend to take only a small percentage of the available large game animals" and cites irrelevant 2016 deer figures from

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[7] The Ninth Circuit elaborated on this "conservation necessity" standard by requiring that such measures be necessary to preserve a reasonable margin of safety between existing levels of stock and imminence of extinction (for fishing), *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983), whereas the Tenth Circuit has not elaborated beyond *Puyallup*.

Wisconsin for this assertion, Br. of Natural Res. Law Profs. at 22-23, tribal take must not be considered in a vacuum separate from the factors that inform elk management throughout the state of Wyoming. Though the amicus professors assert that elk populations in the Bighorn National Forest are currently "higher than the desired management goal," *id*. at 23, the seasons, harvest limits and other regulations set by WGFD are expressly targeted to mitigate the effects of the type of off-season conduct engaged in by petitioner, i.e., "activity on winter range involv[ing] collection of antler sheds" which can disturb the range, "increase mortality[,]" and result in a "lack of elk security." U.S. Forest Serv., *Final Environmental Impact Statement for the Revised Land and Resource Management Plan* at 3-219–3-220 (2005). As the Forest Service's EIS for Bighorn states: "[U]nder most climate conditions, hunter harvest is the most important factor influencing population abundance." *Id*. at 3-221. Without the extent of its full authority to regulate tribal and non-tribal hunting alike, WGFD may be unable to fully satisfy the environmental requirements for secure elk populations.

Accommodating state conservation needs under *Puyallup* is a well-trod and reasonable path for this Court to take. But it is not the only path that would reaffirm WGFD's authority to regulate tribal hunting off-reservation. This Court has previously shown due concern for exercises of federal jurisdiction that terminate tribal treaty rights in the interest of resource management, and should do the same here.

In *South Dakota v. Bourland*, this Court held that the Flood Control Act of 1944, 58 Stat. 887, and the Cheyenne River Act of 1954, 68 Stat. 1191, jointly

terminated the Cheyenne River Sioux Tribe's right to regulate hunting and fishing by non-Indians in areas taken by statute for the Oahe Dam and Reservoir. 508 U.S. 679, 683, 695 (1993). The Tribe had possessed authority to exclude non-Indians from and regulate non-Indians' use of lands taken for the Dam and opened for general public recreation, including hunting and fishing subject to federal and state regulations. *Id*. at 683, 689-90. Justice Thomas's majority opinion (holding that "general principles of 'inherent sovereignty' . . . [did] not enable the Tribe to regulate non-Indian hunting and fishing in the taken area[,]" *id*. at 694) notes that tribal rights were expressly "subject . . . to regulations governing the corresponding use by other [United States] citizens[.]" *Id*. at 679.

Six years later, in the wake of *Mille Lacs*, the Forest Service entered into a memorandum of understanding (MOU) with tribes who obtained recognition of their off-reservation treaty rights in that case. This MOU acknowledged the "existing treaty rights of Tribes to hunt and fish . . . on national forest lands in accord with applicable regulatory authorities of the States or other federal agencies having jurisdiction over such activities." *Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842* at 1 (June 11, 1999) [hereinafter Tribal-USFS MOU].

While no explicit limitation of the type at issue in *Bourland* appears in Article IV of the 1868 Treaty, the Article IV right should nonetheless be construed as limited by WGFD's regulations to the extent that they were promulgated in order to address mortality factors

relating to tribal and non-tribal hunting under WGFD's statutory authority and in collaboration with the Forest Service.

Should this Court hold that the Crow Tribe's right to hunt off-reservation was not extinguished by Wyoming's statehood, it should still take heed of the language used by the Forest Service's and tribes' common understanding forged months after *Mille Lacs*, and preserve WGFD's management authority.[8]

B. Even if the Crow's right to hunt was not extinguished by Wyoming's statehood, the Bighorn National Forest as well as state lands managed for wildlife are occupied within the meaning of the treaty.

Mille Lacs held that the Crow right to hunt on federal lands was not temporary because the reasoning of *Ward v. Race Horse*, 163 U.S. 504 (1896), would lead to an absurd result where any federal right may be considered temporary "because Congress could terminate [it] at any time by selling the lands." 526 U.S. at 207. But in the case at bar, it is not the disposition of the ceded lands that resulted in the end of the off-reservation treaty hunting right. Rather, the right was extinguished through a series of clear exercises of federal jurisdiction under the Property

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[8] Though *Bourland* preceded *Mille Lacs*, the central holding in *Mille Lacs*—i.e., that "Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources", 526 U.S. at 208—does not conflict with *Bourland*'s central holding that legislation creating a regime of federal management, which itself preserves state authority, may terminate off-reservation treaty rights without expressly repealing them.

Clause and reservations of state authority under mixed-use legislation enacted over the course of the twentieth century. In terminating the treaty right these actions did not produce an absurd result; they produced an inevitable one.

If the notion that a treaty "itself defines the circumstances under which [its] rights would terminate", *Mille Lacs*, 526 U.S. at 207, applies to the 1868 Treaty, then a plain reading of Article IV of that treaty provides numerous occasions for this Court to find termination.

The 1868 Treaty established tribal hunting rights on "unoccupied lands of the United States." Art. IV, 15 Stat. 650. While the Tenth Circuit held in *Crow Tribe of Indians v. Repsis* that the creation of the Bighorn National Forest occupied the land by making it "no longer available for settlement[,]" 73 F.3d 982, 993 (10th Cir. 1995), Petitioner and the United States as *amicus* argue to the contrary. Br. of Pet'r at 24-30; Br. of United States at 32-40. The Association submits that the federal and state governments occupied the ceded lands within the meaning of the Treaty, but that this Court need not rely solely on *Repsis* to come to such a conclusion.

The principles of multiple use have applied to the National Forest System since its inception. Forest Service Chief Ferdinand Silcox explained them succinctly in 1936:

> [T]he national forests are put, and must be put, to a multiplicity of uses. Often these uses conflict. Sometimes the conflict can be harmonized, sometimes one use must give way.

> Making the forests of greatest possible public service would be wholly impossible without careful planning to govern land use . . .

U.S. FOREST SERV., U.S. DEP'T OF AGRIC., REPORT OF THE CHIEF 2 (1936). A mandate for multiple-use governance came in the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528-531, which requires timber, recreation, fish and wildlife, and watershed uses to be planned for on equal statutory footing. § 528. The National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1687, sets forth legal standards to guide national and local planning, and under the Sikes Act Extension of 1974, 16 U.S.C. §§ 670g-670o, comprehensive state-federal plans to conserve wildlife in national forests require that state hunting, fishing, and trapping law control. § 670h(b).

Long before MUSYA, the Sikes Extension, and NFMA, however, forest planners were guided by the assumption that "range and timber were the focus of activity in virtually all national forests." Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 24 (1985).

This Court need not rely on the reasoning of *Repsis* to conclude that the creation of the Bighorn National Forest in 1897 was but one step in a process that resulted in the occupation of ceded land. In *Repsis* the Tenth Circuit concluded that because President Cleveland created the Forest pursuant to authority conferred by Congress, 29 Stat. 909-10, and later the Organic Act and MUSYA were enacted, the land became occupied. 73 F.3d at 993.

But the Supreme Court of Idaho took a different path, one that is not foreclosed by *Mille Lacs* and which should still be satisfied by Respondent and the Forest Service here. In *State v. Cutler*, that court noted that the federal government "is not . . . foreclosed from using specific tracts of lands in such a manner that the signatory Indians to treaties would have understood the lands to be claimed, settled or occupied" so as to "exclu[de]" treaty rights. 708 P.2d 853, 856 (Idaho 1985). Roads, campsites, or administrative buildings can be considered to occupy the land. *Id*. at 859.

Not only those structures, but also the various accoutrements of wildlife conservation, must be able to occupy the land within the treaty's meaning.

In 1902 President Theodore Roosevelt's Attorney General Philander C. Knox informed Representative John Lacey that he interpreted the Organic Act of 1897, 30 Stat. 35, to signify that the United States, as "proprietor" of the national forests, could "forbid and punish any and all kinds of trespass upon or injury to the forest reserves, including the trespass of entering upon or using them for the killing, capture, or pursuit of game" so as "not [to] conflict with any State authority" applicable to the killing, capture, or pursuit of game. Letter from Hon. P.C. Knox to Rep. John F. Lacey (Jan. 3, 1902), *reprinted in* H.R. Rep. No. 968, 57th Cong., 1st Sess. 14 (1902).

Conversely, federal grazing policy on the lands that would become national forests was initially permissive of grazing free of fees or regulation. *See Buford v. Houtz*, 133 U.S. 320, 327-28 (1890) ("Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their

horses, cattle, hogs and sheep could run and graze" across open areas "[un]separated from the lands owned by the United States".). At this time the federal government's plan was to "transfer ownership of the public domain in small parcels to farmers under the homesteading and preemption laws." 64 OR. L. REV. at 93.

It is not the merits of a permissive grazing policy or a restrictive game policy that are at issue, but rather the understanding, endorsed by this Court and repeatedly evidenced in the early history of forest management, that portions of ceded land that would become National Forests, as well as those that were sold to private landowners, were considered "used" for grazing purposes. Creating the Bighorn National Forest from lands that remained in the public domain, therefore, did not merely make land unavailable for settlement, as Petitioner argues, but set it apart for regulation distinct from the implied license framework then prevailing on private lands. *See Buford*, 133 U.S. at 326. While state agencies regulate game within their borders, *see* pages 3-10 *supra*, such authority must be understood as concurrent with the Forest Service's creation of a framework resulting in the use and occupation ceded lands.

The United States argues in support of Petitioner that the term "occupied" would have been narrowly understood by both parties to be "akin to physical settlement." Br. of United States at 33. But physical settlement has never been understood to be the only activity that indicates or defines the occupation of ceded lands.

The Association again points to canons of interpretation that require express congressional intent and judicial caution in finding preemption of state law. *Ashcroft*, 501 U.S. at 460. Working at cross-purposes with these canons is the requirement for Congress to "clearly express its intent" to terminate treaties. *Mille Lacs*, 526 U.S. at 202. Resolving the conflict between these canons hinges on a somewhat vexing question: Was Congress clearer in the 1868 Treaty (when it failed to elaborate the "right to hunt on the unoccupied lands of the United States") or in the Organic Act and subsequent statutes that repeatedly vested jurisdiction over ceded lands in the Forest Service and reserved primary wildlife authority for the states?

Petitioner maintains that "occup[ation]" at the time of the 1868 Treaty and other treaties was considered synonymous with "settle[ment]". Br. of Pet'r at 33-35 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). But a contemporary legal dictionary notes that "occupation" was also "synonymous with the expression 'subject to the will and control'[.]" 6 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 4902 (1904) (citing, *inter alia*, *U.S. v. Rogers*, 23 F. 658, 666 (W.D. Ark. 1885) ("The government of the United States occupies all of its public lands.")). This alternative definition bears heavily on the question of what constitutes a "hunting district" within the meaning of the 1868 Treaty. Petitioner argues that these areas merely "encompassed off-reservation lands where 'the whites' had not settled, for 'the whites' were located on the

opposite side of 'the borders of the hunting districts,' *i.e.*, the ceded land." Br. of Pet'r at 34. What this argument, grounded originally in the definition of "hunting district" found in Article 5 of the Fort Laramie Treaty of 1851, omits is that the regulatory framework of state wildlife management (by WGFD) and federal land management (by the Forest Service) altered the nature of the land within the "hunting districts" so as to occupy them by virtue of the federal government's will and control. *See also* Br. of Resp. at 42-48 (describing the historical understanding of the function of "hunting districts" relative to reservations, diminishing game supply, and statehood).

In *United States v. Dion* this Court established the requirement that "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." 476 U.S. 734, 740 (1986). Petitioner's brief argues that off-reservation usufructuary rights were not discussed in the lead-up to the passage of the General Revision Act, and cites the Ninth Circuit as rejecting the claim that the President may extinguish treaty rights by declaring a forest reserve. Br. of Pet'r at 39 (citing *Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983)). But, much as settlement is not exclusively synonymous with occupation, occupation was not at all limited to personal use and habitation, as Petitioner's brief asserts was the sole definition in legal practice at the time. Br. of Pet'r at 36. The courts, Congresses, state officials, and tribal leaders of the nineteenth and twentieth centuries shared a far broader understanding of occupation, and federal and state

officials successfully extinguished the Article IV right through occupation.

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In sum, this Court should affirm the judgment of the District Court of Wyoming for Sheridan County and thereby preserve the valid management authority of wildlife agencies in all states.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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