

WILDLIFE LAW CALL

SUMMER 2018

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I. Case briefs

a. Central Coast Forest Ass'n v. Fish & Game Comm'n

The California Fish and Game Commission (Commission) listed populations of coho salmon, *Oncorhynchus kisutch*, in creeks south of San Francisco as endangered under the California Endangered Species Act (CESA) in 1995. This listing was expanded in 2004 to include coho salmon living south of Punta Gorda, north of San Francisco, within the endangered Central California Coast evolutionary significant unit (CCC ESU).

The Central Coast Forest Association and Big Creek Lumber Co. (Petitioners) petitioned the Commission in 2004 to delist the coho salmon population south of San Francisco. The Commission rejected the petition in 2005 for insufficient evidence, and did so again on remand in 2007 after Petitioners successfully challenged the first rejection in the Superior Court for Sacramento County. After the superior court overturned the Commission's 2007 rejection, the Commission appealed to the Court of Appeal for the Third District of California. The Third District reversed, holding that a delisting petition must pertain to post-petition events. The Supreme Court of California disagreed on appeal and remanded to the Third District to consider the merits. Petitioners argued that (1) the listing does not satisfy the "native species" standard of CESA and (2) the salmon south of San Francisco are nonnative hatchery plants, disqualifying them as members of the CCC ESU.

CESA and Judicial Deference

The Commission may protect species under CESA that are facing extinction, and the public may petition the Commission to either list or delist certain species, based on available scientific evidence. CESA provides that an "endangered species" must be one that is a "native species or subspecies" to the state of California.

CESA listings are subject to judicial review under §2076. However, decisions of the Commission are rooted in "administrative agency [...] expertise," and, therefore, are "accorded some degree of judicial deference."

"Native Species" Evidence

Petitioners argued that the listings do not meet the "native species" requirement of CESA, asserting that coho

populations never existed south of San Francisco prior to hatchery plantings. They base this argument on archaeological evidence, historical accounts, unsuitable natural conditions for the coho, and the evidence of extensive hatchery plants. However, the court determined that Petitioners relied on largely speculative, insufficient evidence to support these claims. Furthermore, the Commission had greater and more reliable, scientific evidence to prove that a native population of coho salmon existed south of San Francisco both historically and at the time of the listing.

CCC ESU Membership

Petitioners asserted that, even if a native population of coho salmon existed south of San Francisco at some point historically, the population was extirpated due to unfavorable environmental conditions. This would mean that the entirety of the CCC ESU south of San Francisco were hatchery plants nonnative to waters south of San Francisco, making them ineligible to be listed in the endangered CCC ESU.



Again, the court found Petitioners reliant on speculation for their argument that the salmon "*most likely*" would have been extirpated during either of two major droughts in California history, and that these droughts "would *probably* have been capable" of killing off the native population of salmon. Regardless, it was the intent of the legislature for the native range of CESA-listed species to be throughout the entire state. Petitioners would have to show that the hatchery plants were brought into the state from outside of California, for which Petitioners presented no sufficient evidence. To the contrary, the Commission relied

on expertise and genetic evidence to prove that the population in question belonged in the CCC ESU.

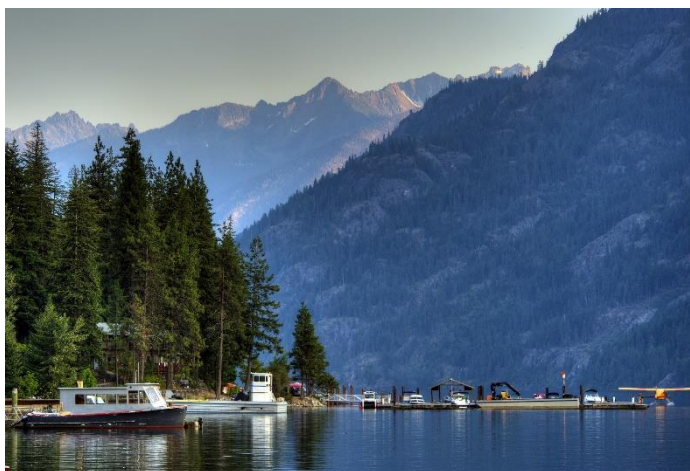
Petitioners further argued that that coho salmon south of San Francisco are not genetically distinct enough to be considered part of an ESU. This criterion is only relevant to the identification of an ESU itself, and is not required for listing as endangered under CESA. Even so, the court concluded that Petitioners provided insufficient evidence to support this claim, while the Commission relied on scientific, expert evidence to contradict it.

Due to the speculative nature of Petitioners' arguments regarding the "native species" and ESU standards of CESA, compared to the expert, scientific evidence presented by the Commission, the California Supreme Court upheld the Commission's listing decisions and reversed the court below.

—18 Cal.App.5th 1191, 227 Cal.Rptr.3d 656 (Jan. 5, 2018).

b. Chelan Basin Conservancy v. GBI Holding Co.

In 1927, GBI Holding Co.'s (GBI) predecessor in interest granted a flowage easement for its property on Lake Chelan, a navigable body of water in the state of Washington, to allow the construction of a dam that would inundate its property. GBI elevated the property in 1961 to its pre-dam dry level, creating the "Three Fingers Fill." In 1969, the Supreme Court of Washington in *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232 (1969) ruled that a similar landfill violated the public trust doctrine (PTD), but the court did not order the abatement of other fills. In response, the Washington legislature and voters enacted the Shoreline Management Act (*citation*), which



included a savings clause (RCW 90.58.270) that protected pre-*Wilbour* fills from public trust challenges.

GBI began efforts to develop the fill in 2010. Chelan Basin Conservancy (Conservancy) responded by suing GBI to force abatement of the fill in the Superior Court for Chelan County, which granted summary judgement for the Conservancy. On appeal, the Division 3 Court of Appeals of Washington reversed and remanded in favor of GBI. The Conservancy appealed to the Supreme Court of Washington, asserting that (1) that the Savings Clause and landfill both violated the public trust doctrine and (2) the Conservancy had standing to bring the suit under the PTD.

Public Trust Doctrine

The PTD is derived from ancient common law and protects the public's right to utilize navigable waterways for transportation and recreational purposes. The State has an obligation to maintain the public trust, but the State is also reserved the power to define limits in the protection of private rights. Private landowners cannot limit the public's access or interest in navigable waterways that fall under the public trust without consent of the legislature.

Savings Clause – Three Fingers

The state legislature clearly intended the impairment of public rights through the savings clause to extend to pre-*Wilbour* fills. The statute was a direct response to *Wilbour*, as it authorizes fills that took place before December 4, 1969, the date of the *Wilbour* decision, "unless the improvements were 'in trespass or in violation of state statutes.'"

The Conservancy claimed that Three Fingers constituted such an exception to the savings clause by violating the public nuisance statute RCW 7.48.140. The legislative intent of the savings clause, however, was to preclude pre-*Wilbour* developments from public nuisance claims. If the Three Fingers development would be considered as a violation of 7.48.140, the court stated, it would nullify the purpose and intent of 90.58.270.

Standing

GBI argued that the Conservancy did not have standing to bring the public trust claim in Chelan County Court, i.e., that their action was actually a "public nuisance claim" failing to satisfy the standing requirements of RCW 7.48.210. The Conservancy argued that its claim was distinctly brought under the public trust. The Court

determined that the two overlap, as public nuisances may violate the public trust. The Conservancy’s members are recreational users of the Chelan Basin, making harms to their public trust rights “distinct from the general public.” Such harms satisfy the requirements of 7.48.210, giving the Conservancy adequate standing.

Savings Clause – Public Trust Doctrine

Given that Three Fingers was precluded from nuisance challenges by 90.58.270, the court then had to determine whether the legislature violated the PTD when enacting the savings clause. The court did not evaluate this public trust claim according to the usual standards it set in *Caminiti v. Boyle*, 107 Wash.2d 662, 670, 732 P.2d 989 (1987) (considering whether the state ceded its right of control over the public right of use, and, if so, whether the state promoted the public interest or did not substantially impair it), as the *Caminiti* test does not account for contextual information regarding legislative intent. Furthermore, towns established near Chelan on landfills would suddenly be subject to scrutiny under *Caminiti* if it were applied, but the destruction of entire towns to abate landfills is not a realistic resolution. The Conservancy’s argument for a “piecemeal, as-applied” approach would not prevent this outcome, nor any historical fill in the state, from being subject to *Caminiti* scrutiny.

The Washington Supreme Court, therefore, held that the savings clause does not violate the PTD, and affirmed the decision below.

—190 Wash.2d 249 (2018).

c. Florida Fish & Wildlife Comm’n v. Daws

Owners of inholdings within the Blackwater Wildlife Management Area (WMA) sued the Florida Fish and Wildlife Conservation Commission (FFWCC) in the State of Florida Circuit Court for the Second Judicial Circuit, alleging that FFWCC’s grant of dog deer hunting permits on the WMA constituted inverse condemnations and nuisances. Landowners also sought a temporary injunction to force FFWCC to stop the hunters from trespassing on private property within the WMA. FFWCC sought summary judgment on both the taking and nuisance claims on the basis of sovereign immunity.

The circuit court ruled in favor of the landowners, denied FFWCC’s motions for summary judgement and granted

the injunction. FFWCC appealed to the District Court of Appeal of Florida for the First District.

Sovereign Immunity

Sovereign immunity prevails in the state of Florida with two exceptions: (1) violations of the state or federal constitution and (2) where the State has waived its immunity through statute. Florida waived its immunity from tort suits in FL Stat § 768.28, pursuant to Article X §13 of the Florida Constitution, only in instances “where the State owes the plaintiff an underlying common law or statutory duty of care and where the challenged government actions are not discretionary and inherent in the act of governing.”

Takings Claim

Landowners argue that the FFWCC permits, which resulted in hunters and their dogs damaging and trespassing on their private properties, constituted unlawful takings under Article X §6 of the Florida Constitution. In order to assert a takings claim, landowners had to assert that either (1) FFWCC required the Appellees to concede permanent, physical occupation of their property or (2) an FFWCC regulation “completely deprived them of all economically beneficial use of their land.”

Landowners did not argue, and could not have argued, either in their complaint. FFWCC established temporary seasons for dog deer hunting, contrary to the first condition. As for the second condition, landowners still could have taken legal action against the hunters, themselves, for trespassing. FFWCC also asserted that the trespasses were “sporadic.” The appellate court ruled that the trial court erred in not recognizing FFWCC’s sovereign immunity and not granting it summary judgment on the takings claim.

Nuisance Claim

Landowners’ nuisance claim must meet the two conditions of §768.28; otherwise, FFWCC would be protected by sovereign immunity. FFWCC owed no duty of care to the landowners, as FFWCC had adopted regulations and taken actions to prevent the trespasses: requiring the hunters to have permits, prescribing a season and open hunting areas, and requiring hunters to remotely track their dogs. FFWCC had sovereign immunity in this regard, as the hunters violated the regulations and would be liable themselves.

FFWCC hunting regulations are “inherent in the act of governing,” given that they have the same force of legislative policy, and are “purely discretionary functions of the FWC.” Thus the second condition of §768.28 went unmet, failing to overcome FFWCC’s sovereign immunity. The trial court erred, again, in not granting summary judgment on these grounds.

Because both the takings and nuisance claims failed, the case was remanded for entry of summary judgment in favor of FFWCC.

Injunction

The temporary injunction granted by the trial court directs FFWCC to prevent the nuisances alleged by landowners. Language in the trial court’s order equated the permits to those nuisances, and, therefore, was essentially directing FFWCC “to perform its duties in a particular manner.” Furthermore, the injunction was “overly broad” and left doubt to FFWCC’s ability to grant permits. Judging that these requirements violated the separation of powers doctrine, the appellate court dissolved the injunction.

—2018 WL 3911472 (Fla. 1st Dist. Ct. App. Aug. 16, 2018).

d. Friends of Animals v. U.S. Fish & Wildlife Service

The U.S. Fish and Wildlife Service (USFWS) listed the northern spotted owl (*Strix occidentalis caurina*) as a threatened species in 1990, pursuant to the Endangered Species Act (ESA). 16 U.S.C. 1531 *et seq.* Declines in spotted owl populations are partially due to its competition with the barred owl (*Strix varia*) for prey and increasingly limited habitat. USFWS issued its Oregon office a scientific collection permit to take 1,600 barred owls, as required by the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.* and 50 C.F.R. § 21.23, to study the ecological impacts of barred owls on spotted owls.

Friends of Animals (Friends) brought suit in the U.S. District Court for the District of Oregon, alleging that the USFWS permits violated the MBTA and National Environmental Policy Act (NEPA). 42 U.S.C. § 4321 *et seq.* The district court granted USFWS summary judgement on both grounds. Friends appealed to the Ninth Circuit on the MBTA claim alone, alleging that take authorized by a scientific collection permit under the MBTA must benefit the respective species being taken, otherwise referred to as the “same-species theory.”



The MBTA directs the Secretary of the Interior to “adopt suitable regulations” allowing the take of migratory birds in a manner that “is compatible with the terms of the conventions.” 16 U.S.C. § 704. Of the conventions, only the Mexico Convention protects owls. Friends argued that Article II of the Mexico Convention codifies the same-species theory, as it states that a bird may be taken during the closed season “when used for scientific purposes.” Friends asserted that the term “used” implies that such take should be limited to when taking a bird is done to advance conservation of its own species.

The Ninth Circuit found that the context of the Mexico Convention clearly intended for a broader application of the word “use” than implied by the same-species theory. Article II allows take “to satisfy the need set forth in [Article I],” which allows the parties to protect migratory birds “by means of adequate methods [as] the contracting parties may see fit.” USFWS’s take of barred owls is aimed at conserving the spotted owl, which satisfies the purpose set forth in Article I. On the contrary, “[u]nder Friends’ interpretation, the Service could seemingly take barred

owls to display them in museums but could not take them to prevent the extermination of spotted owls.”

Friends also claimed that Article II should be read so that the terms having similar meanings, based on *noscitur a sociis*, arguing that “scientific purposes” of Article II should be limited “for propagation” or “for museums.” The court held that *noscitur* does not apply in this case, however, as there is no “common denominator among” the unrelated terms. Even if *noscitur* did apply, USFWS’s take of barred owls was intended to assist in the propagation of spotted owls and would still satisfy Article II.

Friends’ final argument was that the terms of the other three conventions – those with Canada, Japan and Russia – support the same-species theory. This argument failed because the protections of these conventions do not include owl species. Regardless, there is no convention text that expressly establishes or implies the same-species theory.

The Ninth Circuit held that the USFWS permits to take barred owls to advance conservation of the spotted owl did not violate the MBTA or the terms of the conventions, and the ruling of affirmed the ruling of the district court.

—879 F.3d 1000 (9th Cir. 2018).

e. Hill v. Missouri Dep’t of Conservation

The Missouri Conservation Commission (Commission), acting through the Missouri Department of Wildlife Conservation (Department), proposed new regulations of the captive cervid industry in an effort to eradicate chronic wasting disease (CWD) in deer and elk populations. The regulations banned the importation of cervids, and imposed stricter fencing, recordkeeping, and veterinary inspection requirements. Captive cervid owners, who breed cervids and operate hunting preserves, sued the Commission and Department in the Circuit Court of Gasconade County to prevent the new regulations from going into effect. The circuit court ruled in favor of the cervid owners. The state’s appeal was transferred to the Missouri Supreme Court under article V, section 10 of the state constitution.

Commission Authority

The Commission argued that its regulatory authority under Article IV, §40(a) of the state constitution extends to captive cervids, and authorizes the Commission to regulate

“game” and “wildlife resources of the state.” Cervid owners argued that the term “wildlife” does not include captive cervids, as it refers to animals that are both (1) “wild by nature” and (2) untamed and undomesticated. They further argued that “game” is a subset of that definition of “wildlife.”

The Missouri Supreme Court rejected the cervid owners’ argument, finding that the terms “wildlife” and “game” include all animals that are wild by nature, regardless of being domesticated or undomesticated. The cervid owners’ interpretation would determine the limits of the Commission’s authority on an “unworkable animal-by-animal basis” compared to a “rational species-by-species basis.” The text of article IV, section 40(a) does not suggest the application of such an “animal-by-animal basis,” and neither do historical interpretations of the text.

Cervid owners also argued that privately owned cervids are not “resources of the state.” The court rejected this argument as well, finding that it was “strained” and that “resources of the state” simply refers to those within the state’s geographical borders. Therefore, the Commission has the authority to regulate captive cervids as “game” and “wildlife resources of the state.”

Constitutional Right to Farm

The Commission argued that the circuit court erred in its determination that the proposed regulations violated the right to farm under article I, section 35 of the state constitution. This provision guarantees “the right of farmers and ranchers to engage in farming and ranching practices.” Cervid owners failed to show that they were engaged in such practices. Nothing in the provision suggests any intention to limit the Commission’s regulatory authority of “game” and “wildlife.” Furthermore, nothing suggests that the provision was intended to restrict longstanding Commission practice of regulating the captive cervid industry.

The Missouri Supreme Court reversed in favor of the Commission and Department on both counts.

— No. SC 96739, 2018 WL 3235854 (Mo. July 3, 2018).

f. Naruto v. Slater

Naruto, a crested macaque, took photographs of itself after a photographer, Slater, left his camera unattended. Slater published the photographs in a book, which identifies

Slater as one of the copyright owners of the photographs. Dr. Antje Englehardt, who had studied Naruto since birth, as well as PETA, sued Slater in the U.S. District Court for the Northern District of California, alleging copyright infringement as next friends of Naruto. The district court dismissed for lack of subject matter jurisdiction and for failure to state claim. PETA and Dr. Englehardt appealed to the U.S. Court of Appeals for the Ninth Circuit, shortly after which Dr. Englehardt withdrew.

Next Friend Standing

In order to establish next friend standing, it must be shown that (1) the petitioner cannot litigate due to mental incapacity or lack of access to the court and (2) the next friend has a “significant relationship” with the petitioner. *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1159–60 (9th Cir. 2002) (quoting *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001)). Unlike Dr. Englehardt, PETA did not assert that its relationship with Naruto is any more significant than its relationship with any other animal. Because PETA failed to meet the second requirement, it could not bring suit as next friend to Naruto. Even if PETA did have a significant relationship with Naruto, it still could not bring the suit as next friend, as there is no statutory authorization from Congress to do so on the behalf of animals.

Article III Standing

The Ninth Circuit still had to address the merits of the case. PETA’s lack of next friend status does not invalidate Naruto’s standing under Article III of the U.S. Constitution. Article III does not compel the conclusion that a suit in the name of an animal cannot meet its “case or controversy” requirement, if the animal suffers concrete or particularized injuries. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). PETA asserted that Naruto suffered such injuries due to the copyright infringement activity of Slater. This sufficed to satisfy conditions of Article III standing, so the remaining issue was whether Naruto had the necessary statutory standing.

Statutory Standing

The complaint alleged that Naruto’s statutory standing derived from the Copyright Act (17 U.S.C.A. § 101 et seq.) But the Copyright Act does not explicitly authorize animals to sue for infringement of its provisions. The Ninth Circuit stated that, if Congress intended for statutes to grant animals the standing to sue, such intent must be expressed



plainly in the statute’s language. If there is no such language, the animal has no standing to sue under the respective statute (Cetacean). Furthermore, several of the terms in the Copyright Act, such as “children,” “grandchildren,” “legitimate,” “widow,” and “widower” all imply humanity and necessarily exclude animals” (17 U.S.C. §§ 101, 201, 203, 304) (Slater).

Based on the Copyright Act’s lack of explicit authorization of animals to sue, the Ninth Circuit affirmed the judgment below that neither Naruto, nor animals in general, have standing to sue for copyright infringement.

—888 F.3d 418 (9th Cir. 2018).

g. PETA v. Miami Seaquarium

The National Marine Fisheries Service (NMFS) designated the Southern Resident killer whale (SRKW), *Orcinus orca*, distinct population segment (DPS) as endangered in 2005 under the Endangered Species Act (16 U.S.C. §1531 et seq.). The Miami Seaquarium had previously purchased a SRKW in 1970. The listing originally excluded captive SRKWs, but

NMFS granted a 2013 PETA petition requesting that the Seaquarium's SRKW be recognized as protected under the ESA and that the exclusion for captive SRKWs be removed.

PETA sued the Seaquarium in the U.S. District Court for the Southern District of Florida, arguing that conditions of confinement "harm[ed]" and "harass[ed]" the SRKW and amounted to an ESA take violation under §1538. The district court granted summary judgment in favor of the Seaquarium, after which PETA appealed to the U.S. Court of Appeals for the Eleventh Circuit.

Statutory and Ordinary Constructions

PETA alleges thirteen injuries to the SRKW caused by its tank, subjecting the SRKW to "harm" and "harass[ment]." Section 1538 of the ESA makes it unlawful to "take" any species listed under the ESA, and "take" is defined in §1532 of the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Neither "harass" nor "harm" are defined by the ESA. The ordinary definition of "harass" is "to vex, trouble, or annoy continually or chronically," whereas the ordinary definition of "harm" is "to cause hurt or damage to...injure." Neither definition answers the question to what degree they are actionable.

Noscitur Analysis

To ascertain the degree to which "harm" or "harass[ment]" are actionable, the Eleventh Circuit applies the canon of *noscitur a sociis* to interpret the meanings of those terms based on the related terms around it in the statute. The other terms in the definition of "take" all imply "deadly" or "seriously threatening conduct," and, therefore, "harm" and "harass" should be interpreted as having similar, serious implications.

PETA asserts that the application of *noscitur* is inappropriate given precedent set in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995). However, *Sweet Home* concerned a regulation, whereas this case concerns a statute. Also, nothing in *Sweet Home* advises against the application of *noscitur* in this case.

ESA Application

Congress' primary intent in passing the ESA was to prevent the extinction of listed species. If only the ordinary definitions of "harm" and "harass" were applied, *de minimis* annoyances, such as those alleged by PETA here,

would be subject to ESA enforcement—"a result inconsistent with its purpose."

Furthermore, NMFS defines "harm" in the context of ESA take violations as "an act which actually kills or injures fish or wildlife [that] may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns." The NMFS does not define "harass". Its definition by the U.S. Fish and Wildlife Service, which implements the ESA for non-marine species, "only covers acts or omissions that create a likelihood of a sufficiently serious threat."

Given that a *de minimis* interpretation in the context of the ESA lay outside congressional intent and agency practice, "harm" and "harass[ment]" are only actionable if they seriously threaten the animal. The Eleventh Circuit held that none of PETA's thirteen alleged injuries satisfied that standard, and the district court's judgement was therefore affirmed.

—879 F.3d 1142 (11th Cir. 2018).

h. U.S. v. Charette

Defendant shot and killed a protected grizzly bear that was harassing his animals and approaching his home near the area where he was standing. The U.S. District Court for the District of Montana convicted Charette of taking the bear in violation of §1538 of the Endangered Species Act (ESA). Defendant appealed to the Ninth Circuit, asserting that the district court erred by (1) holding that there was sufficient evidence to infer Defendant did not have a permit to take the bear, (2) violating his Sixth Amendment right to trial by jury, and (3) incorrectly analyzing his self-defense claim under an objective standard rather than a subjective standard.

Sufficiency of Evidence

Prosecutors did not ask defendant during their investigation whether he had a take permit, or to provide evidence of a permit. Although logical inferences from circumstantial evidence are permissible, suspicion or speculation alone is not sufficient for such inferences (*U.S. v. Lindsey*, 634 F.3d 541, 552 (9th Cir. 2011)), quoting *U.S. v. Bennett*, 621 F.3d 1131, 1139 (9th Cir. 2010)). Therefore, the district court erred in inferring proof of Charette's lack of a take permit.

However, this error is harmless if Charette, rather than the government, bore the burden of proof for presenting a take permit or evidence thereof. Congress provides in §1539(g) of the ESA that the burden of proof for a permit or exemption does not fall on the Government, but rather on the alleged violator. Defendant presented no proof of such permit at trial, making the error of the lower court harmless. Defendant’s argument for reversal on sufficiency of evidence was rejected.

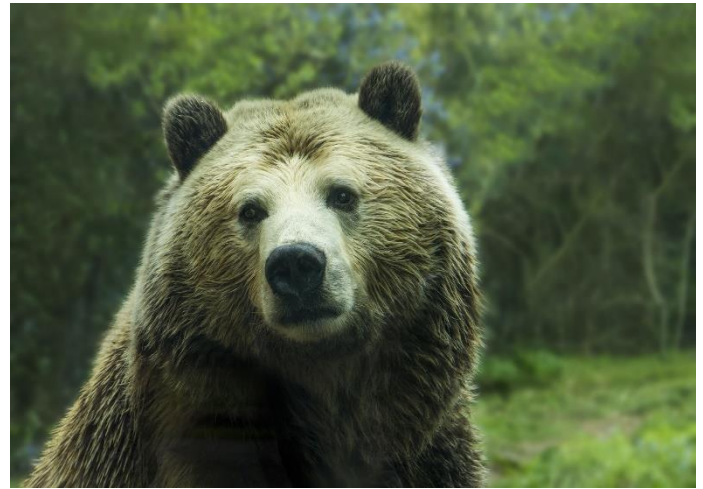
Right to Trial by Jury

Defendant argued for reversal claiming that the trial court violated his Sixth Amendment right to trial by jury, as the penalties for his take violation would be “so severe that [he] deserves a jury trial.” However, the Ninth Circuit previously held that the taking of a grizzly bear contrary to the ESA or Department of Interior regulation is considered a petty offense rather than “a serious offense,” and a petty offense does not entitle him to trial by jury. Defendant’s argument for reversal on this ground was rejected.

Objective vs. Subjective Standard

Section 1540(b)(3) of the ESA provides that self-defense from endangered or threatened wildlife “based on a good faith belief” is a valid defense to prosecution of ESA violations. §1540(b)(3) “good faith belief” requires only a “subjective belief”, rather than an “objectively reasonable belief”. This subjective standard is satisfied when a defendant acts, “even if unreasonably”, in self-defense “from perceived danger from a grizzly bear.” Thus, the district court erred in applying an objectively reasonable standard to Defendant’s self-defense claim. This error was not harmless, as Defendant believed that his “subjective belief in the need for self-defense” claim would not be considered and, thus, did not testify in his defense.

Given that Defendant could not have presented an effective defense without testifying as to his mental state when shooting the bear, the Ninth Circuit vacated his conviction and remanded his case.



—No. 17-30059, 2018 WL 3117903 (9th Cir. June 26, 2018).

II. Article | Louisiana’s Struggle with the Public Trust Doctrine: Is the North American Model Jeopardized in “Sportsman’s Paradise”?

Kyle Glynn

Louisiana is well-known as a “Sportsman’s Paradise” for good reason: the state has a healthy abundance of North America’s most iconic fish and wildlife species; vibrant ecosystems make for diverse fish and wildlife habitat throughout the state; and the state’s well-established outdoor heritage provides often-unparalleled hunting, fishing and recreation opportunities. Those characteristics are perhaps most prevalent in South Louisiana’s coastal wetlands.¹

However, an increasingly contentious debate over private property rights is gripping sportsmen and the state judiciary: Should the public have access to *de facto* navigable waterways that flow through those coastal wetlands that are largely considered privately owned, including the myriad public trust resources found in those waters?²

¹ Kevin F. Gotham, *Coastal Restoration as Contested Terrain: Climate Change and the Political Economy of Risk Reduction in Louisiana*. 31 SOCIOLOGICAL FORUM, 787, 792 (2016) (Louisiana contains 40 percent of wetlands belonging to the lower 48 states).

² Christopher Flavelle, *The Fighting Has Begun Over Who Owns Land Drowned by Climate Change*, Bloomberg Businessweek, Apr. 25, 2018, <https://www.bloomberg.com/news/features/2018-04-25/fight-grows-over-who-owns-real-estate-drowned-by-climate-change>.

I. Background

a. The Public Trust Doctrine in Louisiana

The public trust doctrine (PTD) is well-established principle providing that the government manages natural resources, such as water and wildlife, in trust for citizens' enjoyment.³ Louisiana's PTD is established in the state's constitution:

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. The legislature shall enact laws to implement this policy.⁴

Louisiana's PTD is further codified in Louisiana Civil Code on the division and ownership "[o]f things."⁵ Article 452 establishes a public right to use "public things,"⁶ defined by Article 450 to include:

[R]unning waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.⁷

Louisiana claims title to all fish and wildlife within the state.⁸ Not only are these resources reserved for public use by the Civil Code,⁹ but the public's right to hunt, fish and trap these resources is guaranteed by the Louisiana Constitution.¹⁰ This right does not extend to private property.¹¹

b. Water Navigability

Common law typically characterizes certain waterways as navigable for title purposes if they were used for commerce, navigation, or fisheries in their natural condition, but interpretations of what constitutes commerce to determine navigability vary over time and between jurisdictions.¹² The states, including Louisiana, received ownership of all navigable and tidal water beds within their respective state borders upon admittance to the Union.¹³ The U.S. Supreme Court upheld this "equal footing" doctrine in *Phillips Petroleum v. Mississippi*.¹⁴ Natural state-navigability of waters influenced by the "ebb and flow of the tide" does not affect state title to tidelands, and the waters that flow over them are burdened by the PTD.¹⁵ States have the authority to alienate water beds to private ownership.¹⁶

Since Louisiana's admittance to the Union in 1812, the state has lost more than 1.2 million acres, or more than 25 percent, of its coastal wetlands due to energy development and erosion.¹⁷ Much of this loss has occurred over the last 60 years, resulting in an increasingly inundated coastline and more openly accessible, seemingly navigable waterways.¹⁸ The state government alienated a majority of South Louisiana's wetlands and water beds to private ownership since 1812, resulting in most inshore waters flowing over privately owned bottoms.¹⁹

c. Access Limitations and Ramifications on Sportsmen

The courts have not recognized any public or state right to access the majority of these inshore waters,²⁰ despite these

with its continuous movement and change, further confuses the issues of title and use").

¹³ *Id.* at 9-5.

¹⁴ 484 U.S. 469, 476 (1988).

¹⁵ *Id.* at 472.

¹⁶ *Id.* at 475 ("[I]ndividual States have the authority to define the limits of lands held in the public trust and to recognize private rights in such lands as they see fit.").

¹⁷ Gotham, *supra* note 1, at 792.

¹⁸ *Id.*

¹⁹ Doug Olander, *Louisiana Policies Threaten Sport Fishing*, Sport Fishing, May 22, 2018, <https://www.sportfishingmag.com/louisiana-policies-threaten-sport-fishing> ("Of Louisiana's millions of acres of inshore waters, 80 percent are considered private.").

²⁰ Olander, *supra* note 19 (approximately 80% of southern-state water bodies have privately owned beds).

³ Christian A. Smith, *The Role of State Wildlife Professionals Under the Public Trust Doctrine*, 75 J. WILDLIFE MGMT. 1539 (2011).

⁴ LA. CONST. art. IX, §1 (1974).

⁵ LA. CIV. CODE ANN. arts. 448-487 (1978).

⁶ LA. CIV. CODE ANN. art. 452 (1978).

⁷ LA. CIV. CODE ANN. art. 450 (1978).

⁸ LA. STAT. ANN. 56:3 (1985) ("The ownership and title to all wild birds, and wild quadrupeds, fish, other aquatic life, [...] remain the property of the state, and shall be under the exclusive control of the Wildlife and Fisheries Commission").

⁹ LA. CIV. CODE ANN. art. 452 (1978).

¹⁰ LA. CONST. art. I, §27 (2004).

¹¹ *Id.* ("Nothing contained herein shall be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property.").

¹² Land Title Institute, *Water Rights and Related Issues*, 9-1, 9-1 and 9-2 (2001) ("The very nature of the subject matter, water,

coastal waterways appearing navigable-in-fact, “running waters” being considered a PTD resource²¹ and legal efforts of both the State and recreational fishermen.²²

The State of Louisiana intervened in *Dardar v. Lafourche Realty* to claim title to thousands of acres of tidal waters and bottoms along the coast in an effort to protect public use of these waters, relying on precedent set in *Phillips*.²³ The U.S. Court of Appeals for the Fifth Circuit rejected this claim, finding that the waters in question were not “subject to the ebb and flow of the tide in [...] 1812,” but rather by “indirect tidal overflow.”²⁴ The State also argued that, since the waters were presently saline, subject to the ebb and flow of the tide, and *de facto* commercially navigable, they should be considered “public things” under the Civil Code.²⁵ The Fifth Circuit, however, brushed aside this claim and did not address its merits due to it being “inadequately briefed.”²⁶

The State advanced similar efforts in *Walker Lands, Inc. v. East Carroll Parish Police Jury*²⁷ and *Parm v. Shumate*, both stemming from attempts by fishermen in North Louisiana to fish a lake created naturally by the Mississippi River but normally inaccessible except for a manmade ditch.²⁸ The Fifth Circuit rejected the State and fishermen’s claims that a navigational servitude and/or PTD rights burdened the inundated property.²⁹ The Fifth Circuit equated “waters on private property” to private property, itself, which is exempt from the constitutional right to

hunt, fish and trap,³⁰ even though the waters themselves are considered public under Article 450 of the Civil Code.

These PTD limitations have criminalized most instances of angling and recreating in *de facto* navigable waters in South Louisiana. Sportsmen technically trespass if they traverse or fish on most of these waters. Property owners often rely on vigilante enforcement of these trespass laws, which tends to result in sportsmen, mostly anglers, being threatened with legal action, or even firearms.³¹ .³² Furthermore, due to the ambiguity as to which waters are public or private, there is often no reliable way for sportsmen to know where they can legally access PTD resources. While the implications of these decisions mostly affect recreational access to waters in South Louisiana, title status of waterways in North Louisiana also continue to be called into question.³³

II. Limited Recreational Access Impedes the North American Model

The North American Model of Wildlife Conservation was pioneered during the late-19th and early 20th centuries as a response to the drastic depletion of previously-abundant wildlife populations.³⁴ Obstacles that threaten the public’s access to PTD resources, including privatization of wildlife, also potentially threaten key principles of the North American Model.³⁵

²¹ LA. CIV. CODE ANN. art. 450 (1978).

²² *Parm v. Shumate*, 513 F.3d 135, 137 (5th Cir. 2007). The Fifth Circuit rejected State and fishermen’s argument that “the public has a federal and state right to fish on the Property when it is submerged under the Mississippi River.

²³ 985 F.2d 824, 827 (5th Cir. 1993).

²⁴ *Id.* at 830.

²⁵ *Id.* at 831.

²⁶ *Id.*

²⁷ 871 So.2d 1258 (La. Ct. App. 2004).

²⁸ 513 F.3d 135, 137-138 (5th Cir. 2007).

²⁹ *Id.* at 138, 144. Louisiana was not a party in *Shumate*, but agreed with Plaintiff’s position and issued Louisiana Attorney General Opinion No. 96-206, concluding that channels of the Mississippi River traversed the Property and were “river bed” owned by the State.

³⁰ *Id.* at 145.

³¹ Todd Masson, *Paradise Lost: Louisiana anglers getting squeezed out of most tidal waters*, The Times Picayune, July 7, 2016, https://www.nola.com/outdoors/index.ssf/2016/07/paradise_lost_louisiana_angler.html (“I had one guy wave a pistol at me.

He told me I was trespassing and needed to get out of there, or bad things were going to happen”).

³² B.A.S.S. Communications, *'Powerful opposition' kills public access reform in Louisiana*, Bassmaster, Apr. 20, 2018, <https://m.bassmaster.com/conservation-news/powerful-opposition-kills-public-access-reform-louisiana>. (“As a result, families out for a day of fun have been subjected to armed challenges from guards hired by big landowners and told to leave the unmarked, seemingly open water.”).

³³ Vickie Welborn, *State doesn't own big stretch of Bayou Dorcheat*, Houma Today, June 15, 2010, <http://www.houmatoday.com/entertainment/20100615/state-doesnt-own-big-stretch-of-bayou-dorcheat> (Referencing Bayou Dorcheat on the Louisiana-Arkansas border, which was originally thought to be state-owned).

³⁴ The Wildlife Society, *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada*, Tech. Rev. 10-01, at 14 (2010) http://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf.

³⁵ *Id.*

a. **Wildlife Resources are Conserved and Held in the Public Trust for All Citizens**

The PTD is an essential component of the North American Model of Wildlife Conservation.³⁶ Due to judicial interpretation of the PTD as applied to waterway navigability or lack thereof, sportsmen have increasingly limited access to fish and wildlife resources in the ostensibly public “running waters” of South Louisiana.³⁷ PTD resources in coastal wetlands and bayous are considered private and can be closed to public or State access at the owner’s discretion.³⁸ These “running waters” are considered private regardless of their *de facto* navigability.³⁹ The citizens’ right to utilize “running waters” of the state under Article 452 has only ever been recognized in *Chaney v. State Mineral Bd.* by the Louisiana Supreme Court,⁴⁰ but this precedent is largely disregarded and has “failed to carry the day in Louisiana courts” in regard to public access.⁴¹

These limitations do not only apply to those anglers who may be fishing on waters considered private; such “trespassing” violations extend to anglers, and even hunters, who may have to traverse those waters to reach areas burdened by the PTD. This results in private entities having exclusive jurisdiction over access to the majority of the fish and wildlife resources in South Louisiana, often regarded as some of the most valuable in the nation; this undermines the PTD and a fundamental principle of the North American Model.

b. **Wildlife is Allocated According to Democratic Rule of Law**

Under the North American Model, wildlife resources are allocated to the public by law, rather than by land ownership.⁴² Public access to these resources “is an inherent part of the North American experience, unlike many other nations where access is reserved for those with special privilege.”⁴³ Public input must be considered in order not only to insure equitable allocation of and access to these resources, but also to protect those resources from degradation threats such as competing land uses.⁴⁴

Residents who rely on South Louisiana’s coastal wetlands, and even nonresidents who visit those wetlands due to their famed reputation, are increasingly restricted access to an incredible variety of PTD resources.⁴⁵ Exclusive control of wetlands containing much of South Louisiana’s fish and wildlife resources by a handful of private landowners supersedes public interest and compromises the PTD. Such privileged access undermines the “North American experience,” similar to nations that do not allocate fish and wildlife resources in an equitable manner.⁴⁶ It is concerning that sportsmen contribute to management of PTD resources through the “user pay-user benefit” structure of the American System of Conservation Funding,⁴⁷ but could be restricted access to a majority of those resources in their state’s tidelands, swamps and bayous.

c. **Equal Opportunity Under the Law to Participate in Hunting and Fishing.**

Opportunity for all, regardless of status, to hunt or fish is championed by the North American Model.⁴⁸ The right to do so is constitutionally protected in the state of Louisiana, but this right has not been extended to *de facto* navigable,

³⁶ Smith, *supra* note 3, at 1539.

³⁷ Masson (2016), *supra* note 31.

³⁸ 513 F.3d at 137.

³⁹ *Id.* at 145 (“[A]lthough an owner must permit running waters to pass through his estate, Louisiana law ‘does not mandate that the landowner allow public access to the waterway,’” quoting *Buckskin Hunting Club v. Bayard*, 868 So. 2d 266, 274 (La. Ct. App. 2004) and *Dardar v. Lafourche Realty*, 985 F.2d 824, 834 (5th Cir. 1993)).

⁴⁰ *Chaney v. State Mineral Board*, 444 So.2d 105, 109 (La. 1983) (“[T]he riparian owner may use the running water for his purposes, but he may not interfere with, nor prevent, its use by the general public[.]”).

⁴¹ 985 F.2d at 834.

⁴² The Wildlife Society and the Boone and Crockett Club, *The North American Model of Wildlife Conservation*, Technical Review 12-04, at 16-18, (2012) ([http://wildlife.org/wp-](http://wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf)

[content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf](http://wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf)).

⁴³ *Id.* at 16.

⁴⁴ *Id.* at 18.

⁴⁵ Masson (2016), *supra* note 31.

⁴⁶ See, e.g., Raul Valdez et al., *Wildlife Conservation and Management in Mexico*, 34 *Wildlife Soc’y Bull.*, 270, 272 (2006) (referencing the Mexican *ejido* system, where private and communal entities have no incentive to manage wildlife resources on their lands).

⁴⁷ Congressional Sportsmen’s Foundation, *American System of Conservation Funding*, 2018, <http://congressionalsportsmen.org/policies/state/ascf>.

⁴⁸ Boone and Crockett Club, *Boone and Crockett Club Position Statement: The North American Model of Wildlife Conservation*, Aug. 29, 2014, https://www.boone-crockett.org/about/positions_NAM.asp.

public “running waters” by the courts.⁴⁹ The state legislature repealed a statutory provision protecting citizens from prosecution if they trespassed in an area that was not adequately posted as private property.⁵⁰ The result of this repeal and PTD judicial interpretations has been overwhelming ambiguity in not only enforcement of trespass laws,⁵¹ but also as to where the public’s right to fish exists, especially as more coastal lands erode and sea levels rise, making waters more open and accessible.⁵²

Such ambiguity led to the dispute in *Carpenter v. Webre*.⁵³ Daryl Carpenter, a Louisiana fishing guide, was threatened with arrest by police officers during a traffic stop if he was found trespassing on a certain landowner’s property.⁵⁴ When Carpenter asked the officer what the boundaries of that property in question are, the officer replied that Carpenter “would be arrested for trespassing if found on ‘any waters that the State Lands Map did not show as public.’”⁵⁵ However, the State Lands Map disclaimer states in part:

This information is intended to serve only as an initial reference for research and does not purport to provide evidence of legal title to property⁵⁶ [...] We strive, in good faith, to provide current, reliable and accurate information; however, we fully recognize the possibility of human and/or mechanical error occurring [...] Any person or entity that relies upon such information obtained from this site does so at his or her own risk.⁵⁷

Carpenter sought a declaration of which waters were private in the U.S. District Court for the Eastern District of Louisiana, and also alleged violations of his constitutional

due process rights by the officers.⁵⁸ The court dismissed the suit, even though it found that the officers violated Carpenter’s Fourth Amendment right against unreasonable seizures and acted with a “lack of due care.”⁵⁹

Given this dismissal and lack of any clarifying judicial declaration, sportsmen could be prevented from utilizing public, navigable waterways due to the lack of reliable, readily available sources for determining their title status. Vice versa, due to unreliable sources to prove title status, potentially including law enforcement officers, themselves, sportsmen could utilize supposedly public waterways, only to be prosecuted for criminal trespassing if the water bottoms turn out to actually be privately owned. Such situations undermine Louisianans’ constitutional right to hunt and fish, resulting in inequitable opportunities for hunting and fishing under the law in the state.

III. State Wildlife Management Capabilities and Authority: Are They at Risk?

The authority to manage fish and wildlife resources within a state’s borders is largely reserved to the state.⁶⁰ The right of the states to do so through their respective fish and wildlife management agencies has long been recognized in the United States.⁶¹

a. The American System of Conservation Funding

State fish and wildlife agencies are funded through the American System of Conservation Funding (ASCF).⁶² ASCF establishes the “user pay-user benefit” framework that advance principles of the North American Model,⁶³ and its foundations are established in three key pieces of

⁴⁹ See note 39 *supra*.

⁵⁰ House Legislative Services, Louisiana House of Representatives, *Selected Legislation on Criminal Law and Procedure from the 2003 Regular Session of the Louisiana Legislature*, at 11 (2003) http://house.louisiana.gov/H_Highlights/SelLeg_CL_2003RS.pdf (Referencing SB 98).

⁵¹ Masson (2016), *supra* note 31 (describes an incident where even though an angler took extra precaution to not fish on private property, the angler was found to be trespassing by enforcing officers who “argued for 45 minutes” and disagreed over the ambiguous open-water property line).

⁵² Gotham, *supra* note 1, at 788 (Louisiana’s coast will “experience a water-level increase of 4 to 5 feet” over the next century) and 792 (it is estimated that the Louisiana coast “loses a football field of land every hour”).

⁵³ 2018 WL 1453201 at *1 (E.D. La. 2018).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Louisiana State Lands Map, <https://wwwprd.doa.louisiana.gov/slo/disclaimer.htm>.

⁵⁸ 2018 WL 1453201 at *2.

⁵⁹ *Id.* at *9 and *12 (the court found that although Carpenter’s Fourth Amendment right against unreasonable seizures was violated by the traffic stop “for the sole and singular purpose of delivering a no trespass warning,” such a protection had only ever been recognized by one other court in the circuit and thus was “not clearly established”).

⁶⁰ Smith, *supra* note 3, at 1539 (“the majority of the PTD responsibility remains with state governments”).

⁶¹ *Id.*

⁶² Congressional Sportsmen’s Foundation, *supra* note 47.

⁶³ *Id.*

legislation: the Pittman-Robertson Act of 1937,⁶⁴ the Dingell-Johnson Act of 1950,⁶⁵ and the Wallop-Breaux Amendments of 1984.⁶⁶ Fishing and hunting license fees and excise taxes on gear to carry out those activities fund state fish and wildlife agencies, who then use that money to implement management and conservation programs for fish and wildlife resources.⁶⁷ Louisiana had 754,579 paid fishing license holders in 2017, who spent \$12,292,057.00 through their purchases of those licenses, tags, permits and stamps; this does not include their purchases of gear and boat fuel.⁶⁸

The situation in Louisiana has left a sour taste in the mouths of many anglers, and it often discourages those anglers, residents and nonresidents, from purchasing licenses or from fishing.⁶⁹ Economic drivers that promote fishing and fuel the purchase of such licenses and gear are beginning to flee the state, the most notable of such withdrawals being B.A.S.S. no longer hosting tournaments in proximity to Louisiana's wetlands.⁷⁰ These wetlands have been a regular stop for B.A.S.S. tournaments,⁷¹ and they are estimated to create millions of dollars in economic activity.⁷² A notable marina, which provides fishermen and hunters with fuel, gear and access to the state's coastal wetlands, faces closure due to not being given the

opportunity to renew its lease of a small, 300 yard canal.⁷³ It is estimated that this marina provides access for "2,500 to 3,000 boats a week during hunting season."⁷⁴

If this trend intensifies, license and excise tax revenues fueling state management and conservation programs could very easily be at risk. Challenges are already mounting against the ASCF, such as a population that is becoming increasingly disconnected with the outdoors and already inadequate funding for conserving nongame species.⁷⁵ Added pressure from limiting sportsmen's access could exacerbate the issue.

b. Enforcement, Safety and Management Access

The deteriorating situation in South Louisiana has resulted in an unsafe atmosphere for outdoor recreation. Landowners often threaten or harass, sometimes with firearms, those who are found to be fishing on waters considered to be their property.^{76,77} A goal of the Louisiana Department of Wildlife and Fisheries (LDWF) Strategic Plan is "[t]o provide public safety services by; protecting citizens of all ages when they are involved in recreational activities on the state's waterways."⁷⁸ Vigilante enforcement of trespass laws complicates this goal for law enforcement officers and sportsmen by (1) leaving

⁶⁴ 16 U.S.C. § 669.

⁶⁵ 16 U.S.C. § 777.

⁶⁶ 26 U.S.C. § 9504.

⁶⁷ Congressional Sportsmen's Foundation, *supra* note 47.

⁶⁸ U.S. Fish and Wildlife Service, Historical Fishing License Data, <https://wsfrprograms.fws.gov/subpages/licenseinfo/Fishing.htm>.

⁶⁹ Masson (2016), *supra* note 31 ("I got an email today from a guy in Orange, Texas, who said he used to buy an out-of-state license every year to fish Louisiana, but he doesn't anymore because he said there's nowhere to fish").

⁷⁰ B.A.S.S. Staff, *Louisiana waters off limits for 2018 Sabine Elite Tournament*, Bassmaster, Aug. 10, 2017, <https://www.bassmaster.com/news/louisiana-waters-limits-2018-sabine-elite-tournament> ("The uncertainty of access creates an uneven playing field and is unacceptable for top-level bass tournaments").

⁷¹ B.A.S.S. Communications, *Update: B.A.S.S. urges Louisiana legislators to restore public water access*, Bassmaster, Apr. 8, 2018, <https://www.bassmaster.com/news/bass-urges-louisiana-legislators-restore-public-water-access>. ("Numerous Bassmaster tournaments have been held in coastal fisheries of Louisiana, including four Bassmaster Classic world championships in the Louisiana Delta out of New Orleans between 1999 and 2011").

⁷² Todd Masson, *BASS prohibition must spur change to Louisiana's ridiculous water-access policy*, TIMES PICAYUNE, Aug.

11, 2017,

https://www.nola.com/outdoors/index.ssf/2017/08/bass_prohibition_must_spur_change.html#incart_river_home.

⁷³ Patrick Bonin, *Bob's Bayou Black Marina faces closure due to canal access issue; HB 391 filed in Legislature*. Louisiana Sportsman, Mar. 14, 2018,

<http://www.louisianasportsman.com/details.php?id=11864>.

⁷⁴ *Id.*

⁷⁵ Blue Ribbon Panel on Sustaining America's Diverse Fish and Wildlife Resources, *The Future of America's Fish and Wildlife: A 21st Century Vision for Investing in and Connecting People to Nature*, at 2, March 2016, https://www.fishwildlife.org/application/files/8215/1382/2408/Blue_Ribbon_Panel_Report2.pdf.

⁷⁶ Masson (2016), *supra* note 31 ("I had one guy wave a pistol at me. He told me I was trespassing and needed to get out of there, or bad things were going to happen").

⁷⁷ B.A.S.S. Communications (2018), *supra* note 36 ("As a result, families out for a day of fun have been subjected to armed challenges from guards hired by big landowners and told to leave the unmarked, seemingly open water.")

⁷⁸ La. Dep't of Wildlife and Fisheries, *Strategic Plan 2017-2018 through 2021-2022*, 14, July 2016, <http://www.wlf.louisiana.gov/sites/default/files/pdf/page/32540-about-ldwf/2016strategicplan.pdf>.

unanswered the question of how far LDWF enforcement authority extends for waterways other than “the state’s waterways” and (2) which waterways are actually state waterways.⁷⁹

Public safety is also compromised by barriers or markers constructed in *de facto* navigable waterways. If poorly maintained, these obstructions pose a transportation hazard to sportsmen, and landowners have no liability for injuries to these sportsmen.⁸⁰

Access by the State to privately owned waters is explicitly limited by both *Dardar*, “denying Plaintiffs and the State any access to the water bodies,”⁸¹ and by a restraining order upheld in *Walker Lands*, “prohibiting [...] government agencies” from accessing the property “without permission”.⁸² “[T]rust-based governance is critical to the future of wildlife conservation and management.”⁸³ The State is burdened by the PTD to manage and conserve fish and wildlife resources, but the access restrictions of *Dardar* and *Walker Lands* present potential obstacles to state fish and wildlife management authority.

IV. Conclusion

A fine line exists between private property rights and public access to the state of Louisiana’s coastal vast wetlands. As lands continue to erode and more waters become readily accessible, instances of sportsmen being accused of trespassing on supposedly “private” waters will

likely increase. This lack of access does not merely risk the state’s reputation as “Sportsman’s Paradise,” but also places state fish and wildlife management authority in an increasing state of flux. Though these circumstances are largely specific to Louisiana, as sea levels rise and coasts erode nationwide, other states could begin facing similar challenges to their PTDs.

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These case briefs and article were composed by the Association of Fish and Wildlife Agencies’ (AFWA) summer law clerk. **The *Wildlife Law Call* does not report every recent case or issue**, but we hope you will find these briefs and article, selected from recent fish- and wildlife-related decisions and emerging issues, interesting and informative.

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⁷⁹ Masson (2016), *supra* note 31.

⁸⁰ *Verdin v. Louisiana Land and Exploration Company*, 693 So.2d 162, 172 (La. Ct. App. 1997) (property owners immune from “liability for [...] injuries sustained while [anglers] were

pursuing a recreational fishing activity under Louisiana's recreational use immunity statutes.”).

⁸¹ 985 F.2d at 826.

⁸² 871 So.2d at 1268-1269.

⁸³ Smith, *supra* note 3, at 1542.