WILDLIFE LAW CALL

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ASSOCIATION of FISH & WILDLIFE AGENCIES

I. FEDERAL LITIGATION

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a. *Defenders of Wildlife v. Zinke*

NextLight Renewable Power LLC (NextLight) sought to construct two solar power facilities, Silver State North and Silver State South.[1] The proposed sites of the two solar power facilities fell within the Eastern Mojave Recovery Unit, part of which has been designated as a critical habitat for the desert tortoise, listed as threatened under the Endangered Species Act (ESA).[2] In reviewing the right of way application submitted by NextLight to the Bureau of Land Management (BLM), BLM deferred approval of the South site.[3] Despite avoiding critical habitat, the proposed South fell within a corridor between Silver State North and the Lucy Gray Mountains containing a geographical linkage point[4]—an area "providing the most reliable potential for continued population connectivity throughout the Ivanpah Valley."[5] BLM contacted the U.S. Fish and Wildlife Service (FWS) and BLM issued a draft supplemental environmental impact statement (SEIS).[6] Based on FWS's recommendations, BLM initiated formal consultation with a new proposal that 1) minimized reduction of the corridor between Silver State North and the Lucy Gray Mountains, and 2) minimized adverse effects on the desert tortoise.[7] Silver State South also agreed to fund a monitoring program to track the regional desert tortoise population for changes in demographic and genetic stability.[8] FWS issued a Biological Opinion (BiOp), finding that Silver State South would likely not produce a large adverse effect on the tortoise, its habitat, or its long term recovery.[9] BLM subsequently approved Silver State South.[10]

Shortly thereafter, Defenders of Wildlife (Defenders) sued to enjoin construction on the grounds that FWS's determination of "no jeopardy" and conclusion of "no adverse modification" were arbitrary and capricious.[11]

First, Defenders argued that the no-jeopardy finding "impermissibly relied upon unspecified remedial measures."[12] Defenders drew this argument from the BiOp's conclusion, which it interpreted to state itself "dependent on the ability [of Defenders] to detect future demographic or genetic degradation and implement remedial measures."[13] This argument failed because the BiOp did not rely on mitigation measures and precedent does not require FWS to supply specifics regarding mitigation measures that target uncertain future harms.[14] Rather, specifics are only required when a mitigation measure targets certain or existing harms.[15]

Second, Defenders argued that the BiOp's inclusion of critical habitat within Silver State South's "action area" "expressly conceded that there would be an effect on critical habitat, which should have obligated the FWS to conduct an adverse modification analysis in the BiOp."[16] The court rejected this argument, reasoning that if the action agency (BLM) and the consulting agency (FWS) are in agreement that there are unlikely to be adverse effects on critical habitat and no formal consultation is required.[17]

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[1] *Defenders of Wildlife v. Zinke*, No. 15-55806, 2017 WL 2174546, at *3 (9th Cir. May 18, 2017).

[2] *Id.*

[3] *Id.* at *4.

[4] *Id.* At *3.

[5] *Id.*

[6] *Id.* At *4.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *5.

[10] *Id.*

[11] *Id.* at *6.

[12] *Id.*

[13] *Id.*

[14] *Id.* at *7.

[15] *Id.*

[16] *Id.*

[17] *Id.* at *8.

Third, Defenders argued that the BiOp needed an adverse modification analysis because Silver State South would reduce the geographical linkage area and adversely affect the connectivity of the desert tortoise as it impacts the critical habitat's recovery value.[18] The court found that this reduction in area did not constitute adverse modification because the construction wouldn't result in alteration to critical habitat.[19]

No. 15-55806, 2017 WL 2174546 (9th Cir. May 18, 2017).

b. *Ellis v. Housenger*

The U.S. Environmental Protection Agency (EPA) registered pesticides containing clothianidin and thiamethoxam.[20] Plaintiffs argue that clothianidin and thiamethoxam can adversely impact the survival, growth and health of honey bees and other pollinators.[21]

Plaintiffs sued, arguing first that EPA violated the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) by failing to grant plaintiffs' request for an emergency suspension of the registration of the pesticides at issue.[22] Plaintiffs also argued that, in making the decision to withhold an emergency suspension, EPA arbitrarily and capriciously failed to consider their supplemental filings.[23] The court rejected these arguments because there is no duty to grant an emergency suspension absent an imminent hazard or harm.[24] Plaintiffs did not address in their petition whether there was an imminent hazard or show that the harms of the pesticides outweighed the benefits.[25] Plaintiffs failed to cite evidence such as an article or study to show that the use of the pesticides would adversely affect the chance of an endangered or threatened species survival.[26] The fact that EPA did not consider plaintiffs' supplemental filings has no effect on the courts' findings because these supplemental filings did not contain evidence of an imminent hazard from use of the pesticides.[27]

Plaintiffs further argued that EPA violated FIFRA and the Administrative Procedure Act (APA) by permitting the registration of products containing clothianidin or thiamethoxam without providing notice in the Federal Register.[28] The court finds that EPA did not commit a violation because the notice requirement only concerns registration of pesticide products for new uses.[29] The uses of the pesticides in question here had all previously been registered and announced in the Federal Register so there was no need to provide notice again.[30]

Finally, plaintiffs argued that EPA violated the Endangered Species Act (ESA) by failing to consult with the U.S. Fish and Wildlife Service (FWS).[31] EPA argues that of the 68 pesticides at issue, eleven are not agency actions.[32] An agency action is present when, "the agency affirmatively authorized, funded, or carried out the underlying activity, and . . . the agency had some discretion to influence or change the activity for the benefit of a protected species."[33] Ultimately, the court agrees that nine of them are not agency actions.[34] Of the 59 remaining pesticides, third party defendants and the EPA argued that most of the claims were prohibited by the collateral attack doctrine.[35] The Court found that the collateral attack doctrine did not bar the remaining claims under Ninth Circuit precedent that "the collateral attack doctrine does not bar a claim that the EPA failed to consult when it registered a pesticide product."[36] The court agreed with plaintiffs that EPA violated ESA by failing to

[18] *Id.* at *9.

[19] *Id.* at *10.

[20] *Ellis v. Housenger*, No. 13-cv-01266-MMC, 2017 WL 1833189, at *1 (N.D. Cal. May 8, 2017).

[21] *Id.* at *1.

[22] *Id.*

[23] *Id.*

[24] *Id.* at *4 – 5.

[25] *Id.* at *5.

[26] *Id.* at *4.

[27] *Id.* at *6.

[28] *Id.* at *1.

[29] *Id.* at *9.

[30] *Id.*

[31] *Id.* at *1.

[32] *Id.* at *14.

[33] *Id.*

[34] *Id.*

[35] *Id.* at *18.

[36] *Id.*

consult with FWS regarding approval of the pesticides, and granted summary judgment on these claims.[37]

No. 13-cv-01266-MMC, 2017 WL 1833189 (N.D. Cal. May 8, 2017).

c. Western Exploration, LLC v. U.S. Dep't of Interior

In 2010 the U.S. Fish and Wildlife Service (FWS) issued a finding that listing the greater sage-grouse under the Endangered Species Act (ESA) is warranted but precluded by higher-priority listing actions.[38] FWS reviewed other federal agencies' protection programs and found they had inadequate protection programs for sage-grouse species.[39] In response the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), and other federal agencies began to implement sage-grouse protection measures into their land management plans.[40]

Plaintiffs sued the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS), arguing that their land management plans would violate the National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLPMA), National Forest Management Act (NFMA), and Small Business Administration Regulatory Flexibility act (SBREFA).[41] On appeal, plaintiffs' motion did not address their previous SBREFA claim, so the court found that plaintiffs waived assertion of these claims.[42]

Under FLPMA, plaintiffs argued that BLM "ignor[ed] consistency requirements and (2) fail[ed] to manage federal lands for multiple-use and sustained yield."[43] The Court rejected both arguments.[44] Under the consistency argument, plaintiffs contended that the BLM plan and local land use plans were not consistent with each other and that BLM did not offer a plan to reconcile the inconsistencies.[45] The Court found that FLPMA only required BLM to identify the inconsistencies brought to their attention and how BLM addressed them, but not that BLM must do this in detail.[46] Under the multiple use argument, plaintiffs argued that BLM's closing of millions of acres of land for multiple use failed to balance diverse resources uses based on the relative values of those resources.[47] The court found that BLM's net conservation gain strategy allows some degradation to public land for multiple-use purpose, and that any degradation of sage-grouse habitat can be counteracted and therefore does not violate FLPMA.[48] This is because net conservation gain strategy accounts for disturbances caused by multiple use by planning ahead for mitigation of sage-grouse habitat through restorative projects.[49]

Under NFMA, plaintiffs argued that USFS ignored the multiple-use mandate by placing restrictions on millions of acres of land.[50] The court, however, found that these restrictions are in place to conserve and enhance sage-grouse habitat and that USFS's restrictions USFS did sought to balance sustainable human use and adequate habitat conservation.[51] The court found that USFS did not violate NFMA.[52]

Finally, under NEPA, plaintiffs argued that a supplemental environmental impact statement (SEIS)

[37] *Id.* at *20.

[38] *W. Expl. LLC v. United States Dep't of the Interior*, No. 3:15-cv-00491-MMD-VPC, 2017 WL 1237971, at *2 (D. Nev. Mar. 31, 2017).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at *14.

[43] *Id.* at *16.

[44] *Id.*

[45] *Id.* at *17.

[46] *Id.*

[47] *Id.* at *18.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at *19.

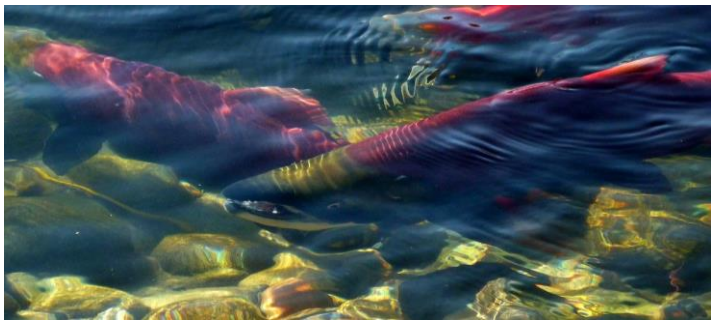
[52] *Id.*

needed to be prepared.[53] The court agreed that BLM and USFS were in violation of NEPA because an SEIS must be prepared when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[54] The changes made between the draft EIS and the final EIS, specifically the designation of 2.8 million acres of Focal Areas in Nevada, were significant enough to require a SEIS in order to provide a platform for commentary about the changes as provided for under NEPA.[55]

No. 3:15-cv-00491-MMC-VPC, 2017 WL 1237971 (D. Nev. Mar. 31, 2017).

d. Audubon Society of Portland v. U.S. Army Corps of Engineers

The Columbia River is home to salmonids who every year must attempt to survive their journey through the Federal Columbia River Power System (FCRPS), which consists of hydroelectric dams, powerhouses, and associated reservoirs.[56] Thirteen species of Columbia and Snake River salmonids have been listed as endangered or threatened under the Endangered Species Act (ESA).[57] Biological Opinions (BiOps) are released by the National Marine Fisheries Service (NMFS) evaluating the effect of the FCRPS on the salmonids and their habitats.[58] After the 2014 BiOp was challenged in court and found to be in violation of the ESA and National Environmental Policy Act (NEPA), NMFS determined that "reducing [Double-crested Cormorants (DCCO)] to the base period population level would reduce their predation on juvenile salmonids to the level that has been assumed in the 2008 BiOp."[59]



The U.S. Army Corps of Engineers (Corps) proceeded to draft an environmental impact statement (EIS) on a DCCO management plan that evaluated three alternatives to reducing DCCO predation on salmonids.[60] After the U.S. Fish and Wildlife Service (FWS) raised concerns, a fourth alterative was added to the final EIS which called for the killing of 10,912 adult DCCOs and oiling and destroying a total of 26,096 nests.[61] The U.S. Army Corps of Engineers (Corps) applied for a permit from FWS to kill DCCOs and FWS approved the permit.[62]

i. NEPA Claims

Plaintiffs sued the Corps and FWS, first arguing that they violated NEPA by not considering all reasonable alternatives.[63] The court agreed, finding that the Corps never considered an alternative to the culling of DCCOs, "such as alternatives to hydropower operations or other measures to increase salmon productivity."[64] They instead continuously reported that the culling was necessary because of the FCRPS.[65]

Plaintiffs also claimed a NEPA violation because the purpose and need statement was unreasonably narrow.[66] The court found no violation of NEPA in this circumstance, as great deference is given to agencies in drafting statements of purpose and need.[67]

Plaintiffs' final NEPA claim charged the agencies with failure to properly analyze the benefit to salmonid productivity.[68] The court did not find this an appropriate NEPA claim—though possibly an ESA claim.[69] Plaintiffs' argued that the benefit to the salmon that would come with

[53] *Id.*

[54] *Id.*

[55] *Id.* at *20.

[56] *Audubon Soc'y of Portland v. United States Army Corps of Eng'rs*, No. 3:15-cv-665-SI, 2016 WL 45770009, at *1 (D. Or. Aug. 31, 2016).

[57] *Id.*

[58] *Id.* at *2.

[59] *Id.*

[60] *Id.* at *3.

[61] *Id.*

[62] *Id.*

[63] *Id.* at *4.

[64] *Id.* at *8.

[65] *Id.*

[66] *Id.*

[67] *Id.* at *9.

[68] *Id.* at *10.

[69] *Id.*

of killing the DCCOs would not materialize which is a Section 7 challenge of the ESA.[70]

Despite finding that defendants violated NEPA by failing to assess reasonable alternatives, the court did not vacate the management plan because the plan benefits the salmonids which are ESA-listed, unlike the DCCOs, which are not listed.[71]

ii. Other Claims

Plaintiffs also argued that the Corps violated the Water Resources Development Act (WRDA) because, under WRDA, the Corps needed a management plan developed by FWS in order to reduce populations of avian predators and FWS did not develop the EIS or DCCO management plan.[72] The Court found that defendants did not violate the WRDA as the FWS was sufficiently involved in the development of the DCCO management plan and final EIS.[73] In addition FWS created a national DCCO management plan meeting the criteria under WRDA.[74]

Plaintiffs finally alleged that FWS violated the Migratory Bird Treaty Act (MBTA) because the total "take" of DCCOs reduced the population to a potentially unsustainable level and therefore potentially threatened the species.[75] The court disagreed with this argument, finding that determining the effect of the culling operation on DCCO populations is not an exact science and there is a rational connection between the facts on record and the decision made.[76]

No. 3:15-cv-665-SI, 2016 WL 4577009 (D. Or. Aug. 31, 2016).

e. Conservation Congress v. U.S. Forest Service

The U.S. Forest Service (USFS) began planning the Smokey Project in December 2009 "to administer fuel and vegetative treatments intended to further habitat and fire management goals in the Mendocino National Forest ("MNF") and contribute to the MNF's timber production goals."[77] The majority of the project was to take place in a region of MNF known as, Buttermilk LSR.[78] Portions of the proposed project were to be located in area designated as critical habitat for the northern spotted owl (NSO).[79]

USFS released a draft environmental assessment (EA) and consulted with the U.S. Fish and Wildlife Service

(FWS) about the project's possible impacts on endangered and threatened species.[80] The project was modified when root disease was found.[81] To address three substantive changes, USFS reopened scoping for the project in 2012.[82] FWS's BiOp found that the project was not likely to jeopardize the northern spotted owl (NSO).[83]Conservation Congress sued USFS, first arguing that USFS violated

[70] *Id.* at *11.

[71] *Id.* at *13.

[72] *Id.* at *4.

[73] *Id.* at *10.

[74] *Id.*

[75] *Id.* at *4.

[76] *Id.* at *15.

[77] *Conservation Cong. v. United States Forest Serv.*, No. 2:13-cv-01977-JAM-DB, 2017 WL 661959, at *1 (E.D. Cal. Feb. 17, 2017).

[78] *Id.* at *6.

[79] *Id.*

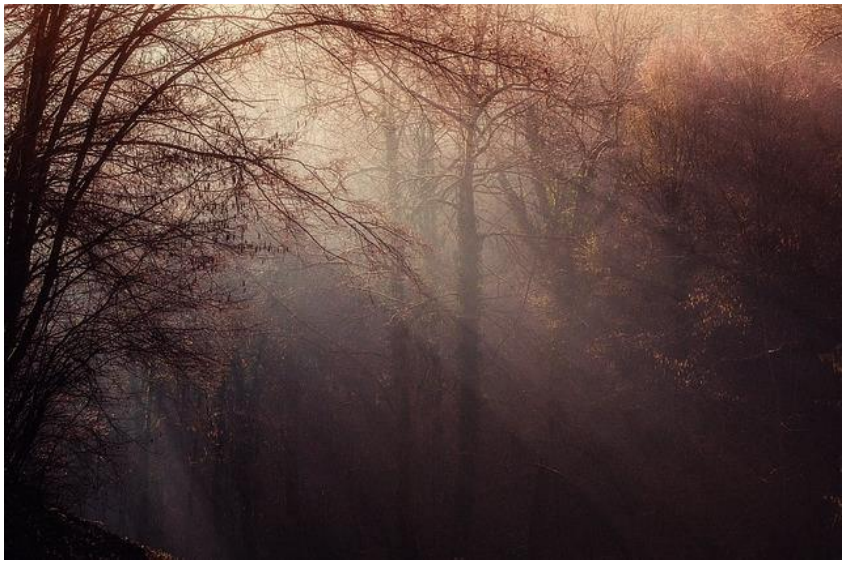
[80] *Id.* at *1.

[81] *Id.*

[82] *Id.*

[83] *Id.*

NEPA by "(1) failing to prepare an EIS; (2) failing to adequately assess cumulative impacts; (3) failing to evaluate alternatives; (4) failing to take a hard look at the Project's impacts; and (5) failing to prepare a supplemental environmental assessment (EA) or environmental impact Statement (EIS)."[84] The court found that USFS violated NEPA by failing to develop alternatives.[85] Conservation Congress raised alternatives during the collaborative process and USFS choose to not entertain these alternatives as required under NEPA.[86] In addition, the court found that USFS failed to take a hard look at the project as is required by NEPA.[87] USFS failed to adequately assess alternatives, and address past monitoring practices.[88] USFS also inconsistently stated the Limited Operating Period (LOP), in the BiOp, the supplemental BiOp's, the EA, and in a letter written by USFS.[89]



The court found that USFS did not need to prepare an EIS, as there was no indication that the project would cause significant degradation of a human environmental factor.[90] Subsequently, the Court did not feel it was necessary for USFS to prepare a supplemental EA or EIS[91], and that USFS adequately assessed the cumulative impacts of the project in the EA and underlying reports.[92]

Conservation Congress also argued that USFS violated the Endangered Species Act (ESA) by producing a BiOp that contradicted FWS's findings—specifically, that 1) the placement of activity centers was not rationally connected to NSO habitat needs, 2) USFS failed to assess the effect of the project on the Buttermilk LSR, and 3)that the LOP requirement had changed.[93] The court finds that a part of Conservation Congress' arguments regarding inconsistencies among USFS and FWS's findings are based on a recovery action from 2011, which is a non-regulatory and therefore non-binding document.[94] The court accordingly found that USFS's BiOp was consistent with FWS's findings.[95] The second part of Conservation Congress' argument picks on USFS's interpretation of available data.

The court finds that deference must be given to USFS and that absent a showing of evidence that USFS should have considered but failed to do so, the court must find that the placement of activity centers were rationally connected.[96] The court also finds that there was no duty to evaluate the effect of the project on the function of Buttermilk LSR.[97] The court finds that to impose an obligation upon USFS to go beyond forming an opinion about the projects cumulative effects by asking USFS to evaluate the continuing function of Buttermilk LSR is unfounded.[98] Lastly, the court finds that the previous LOP was incorporated into the new LOP so the requirement has not changed.[99]

No. 2:13-cv-01977-JAM-DB, 2017 WL 661959 (E.D. Cal. Feb. 17, 2017).

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[84] Id. at *5.

[85] Id. at *12.

[86] *Id.*

[87] *Id.* at *16.

[88] *Id.* at *17.

[89] *Id.* at *16.

[90] *Id.*

[91] *Id.* at *17.

[92] *Id.* at *12.

[93] *Id.* at *18–20.

[94] *Id.* at *18.

[95] *Id.*

[96] *Id.* at *19.

[97] *Id.*

[98] *Id.*

[99] *Id.* t *20.

II. ARTICLE: SITUATING STATE OWNERSHIP OF WILDLIFE AMID A CHANGING PUBLIC TRUST DOCTRINE

Lane Kisonak

Introduction

The Public Trust Doctrine (PTD), as professionals in wildlife management and conservation know, governs state management of fish and wildlife resources for the benefit of all people in the United States.[100] In some states the PTD is enshrined in constitution[101]; in others, statute[102]; and in others it may appear most explicitly as part of the Interstate Compact on Wildlife Violators.[103] But in virtually every state the courts have come to rely on PTD in some form over the past two centuries, shaping and expanding it to resolve disputes over public waters, access to natural resources, and inform other legal frameworks, such as eminent domain, cooperative federalism, and substantive due process.[104]

In the 21st century, the public trust in water resources has continued to evolve in sometimes subtle, sometimes profound directions.

Over the past decade—and the past few years especially—the PTD has entered a state of flux, giving rise to a few persistent questions:

- Where are the limits on state impairment of public trust resources with respect to federal authority and multiple state uses of wildlife?
- What affirmative duties does a state have to protect public trust resources?
- Where do the public trusts in wildlife and non-wildlife resources overlap or diverge?
- In the near future, will the PTD empower or disempower state agencies in wildlife management?

To answer these questions, it is helpful to examine a few areas where things have changed in recent years, including ownership of public, private, and navigable waters, coastal development, and atmospheric trust litigation.

a. Private, Public, and Navigable Waters

Depending state of residence, an owner of private water resources may be bound by one of multiple doctrines. As the U.S. Supreme Court described in *U.S. v. Gerlach Live Stock*, riparian doctrine prevails in Eastern states with abundant water resources, and recognizes each riparian owner's right to the natural flow of water to their property.[105] In Western states, on the other hand, first in possession is best in title.[106]

As for public waters, the PTD finds its foundation in the landmark case of *Illinois Central Railroad Co. v. Illinois*, where the Supreme Court held that a grant by the state of Illinois to a railroad company of submerged land in Lake Michigan, including much of the Chicago shoreline, was a "substantial impairment" of the public trust.[107]

In the twenty-first century the public trust in water resources has continued to evolve in sometimes subtle, sometimes profound directions. In 2000, the Hawai'i Supreme Court, in a widely cited case, held for the first

[100] The Wildlife Soc'y, *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada*, Tech. Rev. 10-01, 9 (Sept. 2010), *available at* http://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf [hereinafter "TWS Technical Review"].

[101] *See, e.g.*, Alaska const. art. 8, §3: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

[102] *See, e.g.*, Ky. Rev. Stat. §150.015: State policy is to "protect and conserve the wildlife of the Commonwealth to insure a permanent and continued supply of the wildlife resources of this state for the purpose of furnishing sport and recreation for the present and future residents of this state."

[103] *See* §11: "The participating states find that wildlife resources are managed in trust by the respective states for the benefit of all their residents and visitors."

[104] TWS Technical Review, *supra* note 100, at 23.

[105] 339 U.S. 725, 743-44 (1950).

[106] *Id.* at 746.

[107] 146 U.S. 387, 453, 464 (1892).

time that the public trust encompasses "all water resources without exception or distinction"—including groundwater.[108] The Court interpreted Hawai'i's constitution to "plain[ly]" adopt the PTD in consideration of the "vital importance of all waters to the public welfare", and applied scientific fact from the evidentiary record to conclude that no dichotomy exists between surface water and groundwater, such that each resource depends on the other.[109] Other states have adopted this holding and carried it forward to resources and uses that are ecological or recreational in nature.[110] This growing body of case law reveals an ongoing (and somewhat freewheeling process) whereby appellate courts make holistic use of scientific evidence and constitutional language to extend the PTD in new directions, with valuable assistance from sister state precedent.

Still, this process of expansion is tethered to surface water and groundwater, and the legal/scientific basis of public trust in wildlife is relatively static in comparison. Courts are not as likely to change existing PTD case law when wildlife conservation statutes prevail at the state or federal level.[111]

APPELLATE COURTS MAKE HOLISTIC USE OF SCIENTIFIC EVIDENCE AND CONSTITUTIONAL LANGUAGE TO EXTEND THE PTD IN NEW DIRECTIONS, WITH VALUABLE ASSISTANCE FROM SISTER STATE PRECEDENT.

When it comes to private causes of action, the states still differ widely. Take, for example, *Glisson v. City of Marion*, where Illinois's highest court construed its constitution, which directs the state to "provide and maintain a healthful environment[,]" to provide private citizens no claim for protection of wildlife.[112] Fast-forward nine years, however, and an appellate court in California recognized a private claim against state fish and wildlife agencies for permitting operation of wind farms that threatened to harm raptors and other birds held in trust for the people of the state.[113]

b. Access, Development, and New Developments

The PTD-expansion process merits comparison with a process most recognizable in the case of *Lucas v. South Carolina Coastal Council*—that of divining "background principles" in state law to determine the extent (or lack) of a taking under eminent domain.[114] *Lucas* concerned South Carolina's power to determine the "bundle of rights" that accrue to property—or, put differently, what public obligations burden a piece of land and reduce or remove the requirement for just compensation after a taking.[115] As Justice Anthony Kennedy's opinion stated, no compensation to an owner is necessary if a regulation "simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[116]

Public trust can be such a background principle, and indeed subsequent federal courts have read state statutes to implicitly include the PTD and enjoin property use.[117] But the precise boundaries of background principles are still unresolved, and the question has the potential to shape future development of the PTD. (For example, privately owned beach is subject to the PTD in New

[108] *In re Water Use Permit Applications* (Waiāhole), 9 P.3d 409, 445 (Haw. 2000).

[109] 9 P.3d at 443, 447.

[110] *See, e.g.*, *Envtl. L. Found. v. State Water Resources Central Bd.*, No. 34-2010-800000583 (Cal. Super. Ct. July 15, 2014) (holding that the PTD covers groundwater extraction directly affecting navigable waters; a trial on the facts is still pending); *Mineral Cty. v. State Dept. of Conserv. & Nat. Resources*, 117 Nev. 235, 246-47 (2001) (citing *Waiāhole* to expand the PTD to ecological and recreational uses).

[111] Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 678 (2012) (citing *EPIC v. Ca. Dep't of Forestry & Fire Protec.*, 187 P.3d 888 (2008)).

[112] 720 N.E.2d 1034, 1045 (Ill. 1999).

[113] *Ctr. for Biological Diversity v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 602-07 (Cal. Ct. App. 2008). *See also* Frank, *supra* note 111, at 671-73.

[114] 505 U.S. 1003 (1992).

[115] *Id.* at 1027.

[116] *Id.* at 1029.

[117] *See generally* John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931 (2012).

Jersey.[118]) Where the bounds of property rights and constitutional or statutory principles remain unclear, however, new legal instruments may fill the vacuum.

Rolling easements are an emerging trend in coastal development, particularly in Texas, which prioritizes public access to beaches along eroding shorelines.[119] Rolling easements are characterized by: (1) prohibition of hard shoreline armoring (ensuring public access); (2) requiring movement or abandonment of any structure when the shoreline reaches it; and (3) defining the boundary between public and private lands by way of statutory frameworks or real property interests.[120] States may soon consider how instruments in the vein of rolling easements could be applied to wildlife and habitat management, as a complement to PTD authority, and should be prepared for courts to undertake these types of remedy *sua sponte*. In the last year, legal scholarship has produced the concept of a "rolling trust" in wildlife, a set of protections following wildlife populations as they seek new habitats when their current ranges come under stress; such a trust would work by easing burdens on abandoned land while protecting newly inhabited land.[121]

While these new concepts could address uncertainties endemic to the public trusts in water and wildlife resources as we currently know it, the public trust may yet change in ways that could reshape it beyond on-the-ground practitioners' recognition. The main frontiers for such change are atmospheric trust and climate change litigation, as well as the much narrower, but no less pivotal playing field of federal common law.

c. Federal Common Law, Atmospheric Trust, and Climate Change Litigation

We cannot adequately discuss atmospheric trust litigation (ATL) and climate change litigation without first discussing how federal common law may apply.

While it is universally known that *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), by overturning *Swift v. Tyson*, 16 Pet. 1 (1842), nearly eliminated the federal common law, and most commentators regard *Illinois Central* and the PTD in general as deriving from state law,[122] the Supreme Court may still develop [non-general] federal common law when the Court is "implicitly authorized by a positive law source, such as a statute or the Constitution" and "when relevant federal interest warrants the displacement of state law[.]"[123] Indeed, *Illinois Central* may be a pre-*Erie* example of such a decision.[124] If it turns out that the chance of an appellate court finding a federal common law element in the DNA of public trust is higher than generally thought, then the flexibility and uncertainty displayed in the aggregate of cases from *Waiāhole* to *Lucas* may create a surprisingly fertile landscape for future courts to resolve lingering questions by finding a federal public trust in a wide range of resources—including air as well as wildlife.

Whether this occurs in fits or starts, or all at once, or not at all, will turn on many factors, including whether a claimant can sufficiently plead an injury in fact, a causal connection to a particular regulatory failure, or the (in)ability of the public trust framework to resolve the problem. And there is plenty of reason to think that federal

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[118] *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005) (holding that upland sands of a private beach must be made reasonably available to the public under the PTD; applying four factors, including (1) the location of dry sand relative to the foreshore; (2) the extent and availability of publicly owned upland sand area; (3) the nature and extent of public demand; and (4) usage of upland sand area by the owner). *See also Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (affirming denial of permission to develop shoreline based on the implicit expression of public trust principles in Washington statute); *See* Erica Novack, *Resurrecting the Public Trust Doctrine: How Rolling Easements Can Adapt to Sea Level Rise and Preserve the United States Coastline*, 43 B.C. ENVTL. AFF. L. REV. 575, 589-90, 599 (2016).

[119] *See* Novack, *supra* note 118, at 590; Envtl. Prot. Agency, *Rolling Easements*, EPA 430R11001 (2011).

[120] Novack, *supra* note 118, at 589-90.

[121] *See* Hope M. Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change*, 95 NEB. L. REV. 649, 697 (2016).

[122] *See Horne v. Dep't of Agriculture*, 135 S.Ct. 2419, 2431 (June 22, 2015) (distinguishing a USDA raisin taking from an oyster shell return program on the ground that shellfish were *ferae naturae* under state law); *Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp.2d 1214, 1232 (S.D. Cal. 2011) (holding that a PTD complaint is unavailable under the Administrative Procedure Act, 5 U.S.C. §702).

[123] *See, e.g.*, Crystal S. Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 113, 138-39 (2010) (citing Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 885, 928 (1986) for the argument that *Erie* overturned *Swift* primarily with respect to "natural" law rather than positive law). Chase further argues that the Supreme Court in *Illinois Central* did not apply state law to reach its outcome, and that subsequent cases in dicta construed the public trust applied there to be a state question—foremost *Appleby v. City of New York*, 271 U.S. 364, 364-66, 380 (1926)—*Id*. at 146 n.207—while concrete evidence exists for a federal common law of public trust in wildlife. In *Missouri v. Holland*, for example, the Court stated that protection of wild birds was a "national interest of very nearly the first magnitude[.]" 252 U.S. 416, 435 (1920).

[124] Chase, *supra* note 123, at 146 n.207.

courts will be loath to bite when state courts handling ATL claims have been skeptical.[125]

But in 2016 one federal court in Oregon showed how a federal PTD may take shape in as stark a form as possible. A group of children and young adults, joined by NGOs and scientists, brought suit against the U.S. government alleging that it knowingly failed for decades to protect current and future generations from the destructive effects of anthropogenic climate change.[126] The plaintiffs' claims cited (1) substantive due process rights to life, liberty, and property; and (2) the federal government's obligation to "hold certain natural resources in trust for the people and for future generations"[127]—classic public trust language. These young people seek remedies including a declaration that their constitutional and PTD rights have been violated, an injunction against further violation of such rights, and development of an emissions-reduction plan.[128] In a decision that surprised most onlookers, the court denied the government's and industrial intervenors' motion to dismiss. The court applied political question doctrine in plaintiffs' favor, found standing, and concluded there is (1) a due process right to "a climate system capable of sustaining human life" that the government infringed by creating danger; and (2) a public trust obligation enforceable by plaintiffs under the Fifth Amendment.[129] This public trust obligation touches on assets owned by the federal government—namely, submerged lands three-to-twelve miles from U.S. coastlines, harmed by ocean acidification and rising temperatures and triggering federal duties as an "inherent attribute[] of sovereignty."[130]

Naturally, this preliminary decision has attracted vigorous disagreement. Some critics have focused on the court's apparent ease with judicializing the political question,[131] but some have questioned the pursuit of an atmospheric PTD as the basis for an all-encompassing federal claim applicable to water, air, land, and wildlife and enforceable by private citizens in court.[132] If Judge Ann Aiken's analysis holds up over the coming trial and in the coming years—of course, a big "if"—then cases like *CBD v. FPL Group*[133] may subject state fish and wildlife agencies to a growing docket of challenges to approved actions. Of course, any such challenges would be constrained by a high level of agency deference and the qualified sovereign immunity provided by the Eleventh Amendment.[134] But states with expressions of the PTD in their constitutions or statutes may find their courts evolving ever quicker in their approach to the PTD, acting flexibly[135] and marshalling scientific evidence in new ways to connect various strands of the doctrine.[136]

THIS LINE OF CASES MAY SUBJECT STATE FISH AND WILDLIFE AGENCIES TO A GROWING DOCKET OF CHALLENGES.

An Inconclusive Conclusion: The Changing PTD and Wildlife Management

If wildlife management someday gets caught up in the PTD net, a wide range of remedies may come into play, including structural injunctions[137] requiring agencies to

[125] *See, e.g.*, *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015) (declining to find an atmospheric trust obligation to combat greenhouse gas emissions, and noting that state and federal courts in other states had declined to find one because states had not extended the PTD to forests or lands in general; the court confined atmospheric claims to existing constitutional and statutory frameworks).

[126] *Juliana v. U.S.*, No. 6:15-cv-01517-TC (D. Or. Nov. 10, 2016).

[127] *Id.* at *2.

[128] *Id.*

[129] *Id.* at *6-*17 (political question); *18-*28 (standing); *32-33 (due process right); *40 (public trust assets and cognizable federal claim).

[130] *Id.* at *41-*42.

[131] *See, e.g.*, Ed Whelan, *'Groundbreaking' Means 'Insane'?*, Nat'l Rev. Online (Nov. 15, 2016), *available at* http://www.nationalreview.com/bench-memos/442201/aiken-oregon-climate-change-ruling-juliana (calling the presiding judge "Czarina Aiken" for concluding that the political question doctrine did not preclude the court from adjudicating plaintiffs' claim).

[132] *See esp.* Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 ENVTL. L. 1139 (2015) ("disagree[ing] about th efficacy of the atmospheric trust as an effective basis for a litigation strategy").

[133] *Supra* note 113.

[134] U.S. Const. amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit…commenced or prosecuted against one of the United States by Citizens of another State…" The Eleventh Amendment has also been extended to protect a state from suits by its own citizens. *See Alden v. Maine*, 527 U.S. 706, 732 (1999). *But see Ex parte Young*, 209 U.S. 123 (1908) (holding that federal courts may enjoin state officials from enforcing unconstitutional laws).

[135] Usually there is no set "procedural matrix" for determining whether a state is fulfilling its PTD obligations. *See Citizens for East Shore Parks v. Cal. State Lands Cmm'n*, 136 Cal. Rptr. 3d 162 (Cal. App. 1st Dist. 2011).

[136] *See, e.g.*, *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, *8-*9 (Wash. Super. Ct. Nov. 19, 2015) (*Foster* II) (holding that Washington has a state-constitutional obligation to protect the public's interest in natural resources, including a "healthful and pleasant atmosphere" and that "navigable waters and the atmosphere are intertwined" such that to argue their separation "is nonsensical"—but that the state was not failing to fulfill its regulatory duties).

[137] *See, e.g.*, Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy*

form recovery or study plans, or undertake certain rulemakings. Courts may also reassess the longstanding prioritization of certain public uses (such as navigation and commerce in streams and rivers) over others (recreational fisheries). How far will *Illinois Central*'s substantial impairment standard stretch if applied to a claim that certain wildlife species or populations are unlawfully protected at the expense of others? Or habitat? Or public access?

California alone has seen at least five cases citing *CBD v. FPL Group* for its public trust reasoning since 2008[138], and there are certainly more where those came from.

As Professor Sax wrote in 1980, "[t]he function of the public trust as a legal doctrine is to protect…public expectations against destabilizing changes, just as we protect conventional private property from such changes." While the PTD seems generally well-suited toward this goal of public policy, especially with respect to cut-and-dry takings claims and development near traditionally protected water resources, the doctrine itself may not be protected from profound changes at its margins.

III. ARTICLE: THE NORTHEAST CANYONS AND SEAMOUNTS MARINE NATIONAL MONUMENT AND OUTER CONTINENTAL SHELF ENERGY DEVELOPMENT

Michelle Castaline

If the Northeast Canyons and Seamounts Marine National Monument loses its monument designation, companies will still face obstacles if they want to use the area for offshore energy development. Loss of the designation or reduction in area will not just benefit offshore energy developers however, "It's . . . the fishermen. It's all the bait dealers, the mechanics and the marinas and all the businesses that only exist because there's a commercial fishing industry" that will be effected.[139]

The Antiquities Act of 1906 gives Presidents and Congress the power to designate special natural, historical and cultural areas as national monuments.[140] Under the antiquities act, Presidents have taken the initiative to designate marine national monuments such as Papahānaumokuākea, and Marianas Trench.[141]

On September 15, 2016, former president Barack Obama designated the Northeast Canyons and Seamounts off the coast of New England as a marine national monument.[142] It is the first monument to be designated in the Atlantic Ocean and it covers 4,913 square miles of marine ecosystems.[143] The area comprises three underwater canyons and four underwater mountains—biodiversity hotspots that serve as home to numerous rare and endangered species of marine life.[144] Among those species are Kemp Ridley's Sea Turtles, Sperm Whales , Fin Whales and sei whales.[145]

a. *Mass. Lobstermen's Ass'n v. Ross*

In designating the Northeast Canyons and Seamounts as a marine monument, President Obama also set forth regulations giving commercial fishing operators 60 days to transition away from the monument area.[146] In response to these regulations, on March 7, 2017, five commercial fishing organizations brought suit in *Massachusetts Lobstermen's Association v. Ross*.[147] These organizations challenge the designation under the claim that creation of marine national monuments exceeds the power granted to

Climate System: Judicial Recognition at Last, 6 WASH. J. ENVTL. L. & POL'Y 633, 667-68 (2016) (discussing the role of courts in remedying "severe breakdown[s] of agency performance" in institutional litigation across a wide variety of legal practice areas).

[138] *San Francisco Baykeeper, Inc. v. Ca. State Lands Cmm'n*, 194 Cal. Rptr.3d 880, 904-05 (Cal. App. 4th 2015); *Ctr. for Biological Diversity v. Ca. Dep't of Forestry & Fire Protec.*, 182 Cal. Rptr.3d 1, 19 (Cal. App. 4th 2014); *Light v. State Water Res. Control Bd.*, 173 Cal. Rptr.3d 200, 212 (Cal. App. 4th 2014); *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 169 Cal. Rptr.3d 413, 449-50 (Cal. App. 4th 2014); *Citizens for East Shore Parks v. Ca. State Lands Cmm'n*, 136 Cal. Rptr.3d 162, 187-88 (Cal. App. 4th 2011).

[139] Kathy Hoekstra, *Is The Ocean 'Land Owned or Controlled' by Feds' Antiquities Act Lawsuit Aims to Find Out* (Mar. 24, 2017) http://watchdog.org/291720/291720/.

[140] 54 U.S.C. §320301 (2012).

[141] Nat'l Oceanic and Atmospheric Admin., *Marine National Monument Program,* http://www.fpir.noaa.gov/MNM/mnm_index.html (last visited June 7, 2017).

[142] Proclamation No. 9496, 81 Fed. Reg. 65159 (Sept. 21, 2016).

[143] Fact Sheet from the Office of the Press Secretary, The White House, *Obama to Continue Global Leadership in Combatting Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean* (Sept. 15, 2016) (on file with author).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Massachusetts Lobstermen's Ass'n v. Ross*, No. 1:17-cv-00406 (D.D.C. filed Mar. 7, 2017) https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2017cv00406/184865.

the President under the Antiquities Act.[148] Plaintiffs argue that the Antiquities Act gives Presidents and Congress the power to designate areas of land as monuments but not areas of ocean.[149] The case is currently under stay as the parties wait for Secretary of the Interior Ryan Zinke to review all national monuments designated since January of 1996 per President Donald Trump's executive order.[150] If the case proceeds, plaintiffs will seek to have the court strip the Northeast Canyons and Seamounts of its monument designation.

b. Applicable laws:

i. Outer Continental Shelf Lands Act

The Northeast Canyons and Seamounts are outer continental shelf (OCS). OCS contains "all submerged land lying seaward and outside of the area of lands beneath navigable waters."[151] The Submerged Land Act designates navigable coastal area up to three miles offshore as belonging to the coastal state, but OCS outside of the three-mile boundary belongs to the federal government.[152] If the Northeast Canyons and Seamounts Marine National Monument loses its designation, pursuant to the Outer Continental Shelfs Land Act (OCSLA), the federal government would have the power to lease the land for offshore energy development.[153]

Offshore energy development includes extraction of oil and coal, as well as harnessing of wind, tidal and wave energy. Leasing of OCS land for all types of offshore energy development is overseen by the Bureau of Ocean Energy Management (BOEM), an agency in the Department of the Interior.[154] The OCS oil-and-gas leasing program was created pursuant to OCSLA.[155] Congress approved leasing of OCS lands for renewable energy in the Energy Policy Act of 2005 and former President Obama and former Secretary of the Interior Ken Salazar finalized the regulations in 2009.[156]

ii. National Environmental Policy Act

Absent designation, the Northeast Canyons and Seamounts will still enjoy the protections built into the two offshore energy programs. Before the Northeast Canyons and Seamounts could be leased for energy development, pursuant to the OCSLA, possible environmental impacts would need to be assessed.[157] Depending on the results of environmental studies, an environmental impact statement (EIS) may be required under the National Environmental Policy Act (NEPA).[158] If it is determined that commencing or continuing activity will cause serious harm to marine life, leases may be cancelled.[159] In the event that a lease for offshore oil and coal production is approved, a spill fund must be developed before work can be done.[160]

Absent designation, the Northeast Canyons and Seamounts will still enjoy the protections built into offshore energy programs.

A number of other protections supplement those provided by OCSLA.

iii. Endangered Species Act

Companies pursuing leases within the Northeast Canyons and Seamounts, should it lose its designation, will also have to follow the regulations set forth by the Endangered Species Act (ESA).[161] The ESA requires that agencies ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (2012).

[152] U.S. Submerged Land Act of 1953, 43 U.S.C. §§ 1301–15 (2012).

[153] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (2012).

[154] Bureau of Ocean Management, *Frequently Asked Questions* https://www.boem.gov/FAQ/ (last visited June, 7 2017).

[155] Bureau of Ocean Energy Management, *OCS Lands Act History* (last visited June 7, 2017) https://www.boem.gov/ocs-lands-act-history/.

[156] Bureau of Ocean Energy Management, *Renewable Energy on the Outer Continental Shelf* https://www.boem.gov/uploadedFiles/Fact%20Sheet%20BOEM%20Renewable%20Energy.pdf (last visited June 7, 2017).

[157] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (2012).

[158] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (2012); National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2012).

[159] *Id.*

[160] *Id.*

[161] Endangered Species Act, 16 U.S.C. §§ 1531-44 (2012).

such species.[162] As mentioned above, the Northeast Canyons and Seamounts is home to endangered species so the lead federal agency must enter into consultation with the National Oceanic and Atmospheric Association (NOAA) or the Fish and Wildlife Service (FWS).[163] Consultation surrounding offshore energy primarily occurs with NOAA. Consultation can be informal or formal, and generally begins with the federal agency submitting a biological assessment (BA) or a biological evaluation (BE).[164] If endangered species or their critical habitat are found to be in jeopardy, alternatives are analyzed.[165] In some instances an incidental take permit (ITP) can be obtained.[166]

During consultation, FWS or NOAA will direct the federal agency to comply with the Marine Mammal Protection Act (MMPA). While the ESA prohibits the take of endangered species, the Marine Mammal Protection Act prohibits the take of all marine mammals.[167] Take is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[168] Like under the ESA, ITPs can be obtained under the MMPA.[169] To obtain an ITP the applicant must demonstrate no more than a negligible impact and must produce no unmitigable adverse impact on the viability of the species or stock for subsistence uses.[170] "Most incidental take authorizations have been issued for activities that produce underwater sound" (as discussed further below).[171]

iv. Marine Protection, Research and Sanctuaries Act

Other regulations, including those outlined in the Marine Protection, Research and Sanctuaries Act (MPRSA), the Clean Air Act (CAA) and the Clean Water Act (CWA) may not shield the Northeast Canyons and Seamounts from offshore energy development completely, but will provide some protections.[172] The MPRSA empowers the Environmental Protection Agency (EPA) to regulate ocean dumping of industrial wastes, sewage sludge and other wastes. Permit applications are evaluated to determine if dumping will "unreasonably degrade or endanger" human health, welfare, or the marine environment according to criteria set by the EPA.[173] These dumping provisions will help protect the Northeast Canyons and Seamounts' diverse marine habitats and endangered species from waste produced by potential offshore energy projects.

v. Clean Air and Clean Water Acts

The CAA sets standards for emission of air pollutants from industrial activities.[174] Companies seeking to participate in offshore energy development in the Arctic have not had to comply with the CAA since 2011 when the EPA requirement was revoked by a legislative rider attached to the Omnibus Appropriations Act. Control over air emissions in the artic was transferred to DOI.[175] The CAA standards still must be complied with however in areas like the Northeast Canyons and Seamounts.[176] Similar to the CAA, the CWA sets regulates discharge of pollutants into the water.[177] Regulations for both the CAA and CWA are overseen and enforced by the EPA. As a result, spill prevention control and countermeasures plans are now required.[178]

c. Why is protection needed?

If the plaintiffs in *Massachusetts Lobstermen's Association* succeed and the Northeast Canyons and Seamounts loses its designation, the biodiversity hotspot's marine residents face OCS energy development. "Seismic airguns…used to explore the reserves of oil and gas deep beneath the ocean floor," can harm or disrupt marine

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] Marine Mammal Protection Act, 16 U.S.C. § 1361(13) (2012).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] NOAA Fisheries, *Incidental Take Authorizations Under the MMPA* (Sept. 2, 2016), http://www.nmfs.noaa.gov/pr/permits/incidental/.

[172] Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1434, 33 U.S.C. §§ 1401-1405 (2-12); Clean Air Act, 42 U.S.C. § 7401 (2012); Clean Water Act, 33 U.S.C. §§ 1251-1388 (2012).

[173] Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431-34, 33 U.S.C. §§1401-05 (2012).

[174] Clean Air Act, 42 U.S.C. § 7401 (2012).

[175] Michael Levine, Peter Van Tuyn, Lay la Hughes, *Oil and Gas in America's Artic Ocean: Past Problems Counsel Precaution*, Seattle U.L. Rev., Summer 2014, 1271; Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 432, 125 Stat. 786, 1048 (2011).

[176] Michael Levine, Peter Van Tuyn, Lay la Hughes, *Oil and Gas in America's Artic Ocean: Past Problems Counsel Precaution*, Seattle U.L. Rev., Summer 2014, 1271.

[177] Clean Water Act, 33 U.S.C. §§ 1251-1388 (2012).

[178] *Id.*

life.[179] The Department of the Interior predicts 138,000 injuries of whales and dolphins may occur as a result of seismic blasts.[180] Whales and dolphins are not the only marine life that stand to be affected by seismic blasts. "Studies show that seismic airgun noise can reduce fish species – including tuna, marlin, swordfish, snapper and sea bass – by 40 to 80 percent."[181]

Short studies analyzing the effect of wind turbines on marine life have found that construction generally poses the biggest risk, but as an article on marine renewable energy installations (MREI) (i.e., wind, wave, and tidal) found, more studies must be performed to understand the long-term biological effects of these types of energy production.[182] Not only does existing research indicate that anthropogenic underwater noise vibrations from energy infrastructure installation may cause habitat loss[183], but "[the] addition of novel structure to habitats may also provide substrate for invasive species." [184] More research is necessary to clarify what species are colonizing these areas and in what numbers they are doing so.[185]

Much like the 2006 Panera case where it was decided that a burrito is not a sandwich, if the stay on *Massachusetts Lobstermen's Association v. Ross* is lifted, the outcome will likely hinge on which side makes the best argument for the definition of land.[186] Protection of marine life and habitats within the Northeast Canyons and Seamounts may come down to regulations set by OCSLA, NEPA, ESA, MMPA, MPRSA, CAA, and CWA.

IV. CRIMINAL LAW UPDATE

a. State v. Cruz

The Washington Court of Appeals upheld Defendant Cruz's motion to suppress evidence after a Department of Fish and Wildlife ("DFW") officer searched his vehicle without a warrant. The State appealed and argued an officer safety or exigent circumstances exception covered the encounter and the three firearms recovered.

After observing Cruz illegally snag a Chinook salmon, a DFW officer arrested and handcuffed him, and performed a search incident to a valid arrest. The officer asked if Cruz had any firearms, and he "volunteered" he did in his vehicle. The officer instructed Cruz's companion to stand away from Cruz's vehicle and put Cruz in his patrol truck. The officer then removed three firearms from Cruz's truck and ran his name through dispatch. The results showed a prior felony charge, meaning Cruz could not possess firearms. The DFW officer retained the firearms as evidence and Cruz was later charged with three counts of unlawful possession in the second degree.

The Washington Court of Appeals found that since both Cruz and his companion complied with the officer's instructions during the encounter, no "dangerous" factor was present to justify extending the search to Cruz's vehicle. The court reiterated that mere possession of firearms does not "make him dangerous or justify intrusion into his private space." For similar reasons, the court found an exigent circumstances exception did not cover the encounter, because there was no true emergency or threat of destruction of evidence. Finally, the court posed several alternative actions the officer could have taken: obtain consent to retrieve the firearms, obtain Cruz's keys and lock the vehicle during the encounter, and instruct the companion to move further away from Cruz's vehicle. Affirmed.

195 Wash. App. 120 (2016).

b. United States v. Cline

After several complaints from landowners of illegal hunting from vehicles in the area, officers set up a deer decoy to try to catch the violators. The officers observed a truck pull into a driveway and a van park behind. The driver of the truck fired at the decoy—the driver of the van, Defendant Cline, did not. Both vehicles left the scene. When officers turned on their lights and stopped the truck, the van rapidly backed away in the opposite direction, and was quickly pulled over by a second officer. The officer

[179] Vera Bergengruen, *No Atlantic Drilling for Now, but Seismic Airgun Blasts Might Go O*n (Apr. 5, 2016 4:12 PM), http://www.mcclatchydc.com/news/nation-world/national/article70080232.html.

[180] *Id.*

[181] *Id.*

[182] M.J. Witt Et Al., *Assessing Wave Energy Effects on Biodiversity: the Wave Hub experience*, 370 The Royal Soc'y 502, 504 (2017).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *White City Shopping Ctr., LP v. PR Rest., LLC dba Bread Panera*, No. 2006196313, 2006 WL 3292641, at *4 (Mass. Super. Ct. Oct. 31, 2006).

frisked Cline and found one .270 round in his pocket. The officer also saw a rifle through the van window and removed the gun from the vehicle, along with its three rounds. A magistrate judge reviewed the facts and issued a report and recommendation to the district court, to which both sides filed objections and appealed. The district court reviewed the magistrate's findings de novo.

Defendant Cline's objections alleged lack of reasonable suspicion to stop and lack of probable cause to stop. He made various arguments that the officer did not have reasonable suspicion to support a stop, to which the district court found he failed to tie to the facts or insignificant. Cline argued the officers did not know if he had landowner permission to hunt and that his conduct was unlawful to support the totality of the circumstances review of reasonable suspicion. However, Tennessee's statute includes "searching for" wildlife and "every act of assistance to another person" within its hunting definition, capturing Cline's conduct. Cline's objection to lack of probable cause to support the stop failed when the court found his rapid backing away fell within the statutory definition of "reckless driving while attempting to evade a police stop." The Court rejected Cline's due process violation argument when officers' lost written statements prepared after the incident before trial, because Cline failed to show bad faith.

The Government's arguments against the magistrate's recommended suppression of the rifle turned on whether its incriminating nature was immediately apparently. The magistrate reasoned that officers knew Cline did not shoot at the decoy—so its incriminating nature was not immediately apparent as required by the plain view exception. The district court found three factors weighed in favor of the rifle's criminality to support probable cause: the object's intrinsic nature and appearance in association with criminal activity, an officer's instantaneous perception, and the connection between the rifle and violation being investigated. The court found the plain view exception applied and the seizure did not violate Cline's 4th Amendment rights. Magistrate Judge's report and recommendation accepted to grant in part and deny in part motion to suppress and to deny motion to dismiss.

No. 3:14-CR-160-TAV-CCS, 2017 WL 218805 (E.D. Tenn. Jan. 18, 2017).

c. United States v. Hess

Hess, a taxidermist, pled guilty to one count of Lacey Act Trafficking and appealed the district court's sentence of 27 months' imprisonment as unreasonable and also for procedural error. The United States Fish and Wildlife Service (USFWS) investigated Hess's involvement in a trafficking scheme, specifically the purchase and sale of two black rhinoceros horns. He stipulated to the sentencing guidelines range of 27-33 months before actual sentencing. At sentencing, the district court denied his request for probation and sentenced him to 27 months' imprisonment plus three years supervision.

The Eighth Circuit reviewed for plain error the district court's statement that Hess "did not go to Africa and poach a black rhino. But by his actions, he helped establish a market for these black rhino horns, and that is a serious offense against the planet." Hess argued this an unsustainable finding on the record presented—when the horns were originally purchased in 1957, it was not in violation of the Endangered Species Act, so he did not "contribute to a market." At district court sentencing, a USFWS agent testified to the current "huge" rhinoceros horn market, "fueled" by prices and "contributing to the poaching epidemic." Thus, the Eighth Circuit found the record supported the district court's statement.

Secondly, Hess argued for a lesser sentence given his limited criminal history. The Eighth Circuit reviewed the district court's sentencing for substantive reasonableness. It found the district court carefully considered and explained the factors in the sentencing guidelines and Hess failed to overcome the presumption of reasonableness applied to "his bottom of the guidelines range sentence." Affirmed.

829 F.3d 700 (8th Cir. 2016).

d. O'Brien v. State

A jury convicted Defendant O'Brien of hunting an exotic animal and criminal trespass with a deadly weapon. He appealed and argued game camera photographs were not authenticated, improperly admitted as evidence, and violated his 6th Amendment Right to Confrontation. O'Brien also argued insufficient evidence to support his conviction, raising the defense of mistake.

Landowner Pickett visited his property to find the front gate shot off, tire barricades moved, sun awning cut off the cabin, trash, and shell casings in the firepit. He pulled images from his game camera, and alerted the warden. The previous landowner identified her son, SW, as one of four individuals in the photographs. The photos were also posted to online forums and Facebook, and all individuals were identified, including Defendant O'Brien and his brother. The warden found photos on O'Brien's Facebook account of two aoudad heads on Pickett's sun awning cut from the cabin.

O'Brien first argued the game camera photos were not properly authenticated because the warden did not have personal knowledge of the photos when taken or the camera equipment used. The court clarified the authenticating individual is not required to be present during the taking of the photos. Plus, any premature error of admitting the photos was cured when both Pickett and the warden testified and when O'Brien admitted certain facts. Pickett's and the warden's testimony also made them "available" at trial to negate O'Brien's 6th Amendment Right to Confrontation claim. The court noted O'Brien failed to preserve this claim anyway by failing to object at trial—thus waiving the claim.

O'Brien raised the defense of mistake to argue insufficiency of evidence. The charges required the State to prove beyond a reasonable doubt that O'Brien intentionally and knowingly 1) hunted an exotic animal on Pickett's land without his consent and 2) entered on property of another without consent [and with notice and while carrying a weapon]. O'Brien testified the hunting party entered the property from the south gate (not the front gate) at night and did not see "no trespassing" signs. Pickett rebutted the south gate was always locked, and a 200-foot canyon sits between the gate and his cabin, making entry impossible from that direction. O'Brien's overall contention was that SW told him SW's father still owned the property. The court still found evidence sufficient for reasonable inferences to be made by a jury that O'Brien had notice hunting was not permitted (and Pickett's consent not given) by the locked gates and signs on the property and that he carried out all acts knowingly and intentionally. Affirmed.

No. 08-14-00221-CR, 2017 WL 360692 (Tex. App. Jan. 25, 2017).

e. State v. Snyder

The Court of Appeals of Washington granted discretionary review of a limited jurisdiction court's reversal of Defendant Snyder's conviction. The court of appeals described in detail the proper tests to apply when an individual raises the affirmative defense of exercising treaty rights to an unlawful hunting violation. Here, Defendant Snyder killed an elk outside the reservation and out of season. He had a tag issued by the Snoqualmoo Tribe at the time of arrest.

> A member of an Indian tribe may assert his or her treaty right to hunt or fish as an affirmative defense to a charge of illegal hunting or fishing. This is because such rights, affirmed by federal treaty, preempt the application of state hunting laws. The defendant asserting such rights must prove them by a preponderance of the evidence.

The individual must show the following elements: existence of the treaty, of which he or she is a beneficiary, and as a matter of law, the treaty saves him or her from the operation and enforcement of hunting laws and regulations. The Treaty of Point Elliot was signed by the Snoqualmoo Tribe in 1855.

The second element, treaty beneficiary status, was at issue here. "To exercise treaty rights, members of a modern tribe must establish their group has preserved its tribal status." This is established by showing the tribe has maintained an organized tribal structure and members are descendants from a treaty signatory. Tribal structure was the narrow issue in this case. Precedent held tribal structure must be the same as the tribe that signed the treaty, and that "some defining characteristic of the original tribe persists in an evolving tribal community." The tribe must maintain political structure, in addition to social and cultural.

Additional precedent determined the modern Snoqualmoo Tribe was not a signatory to the Treaty of Point Elliot. In regard to political structure, this case pointed out tribal enforcement of hunting restrictions was "non-existent". The court also found members were a mixture of banished or ineligible individuals from the Snoqualmie Tribe. Cultural practices alone were not enough to maintain tribal structure, which the lower court mistakenly determined. Snyder failed to establish the

Snoqualmoo as a successor in interest to or a merger with a treaty tribe, as well. Reversed and convictions reinstated.

No. 73893-3-I (Wash. Ct. App. Apr. 3, 2017).

V. ABOUT THE *WILDLIFE LAW CALL*

AFWA legal staff, committee members, and summer law clerk composed these case briefs and articles for the Summer issue. We selected recent fish- and wildlife-related decisions and emerging issues to summarize for the newsletter. **The *Wildlife Law Call* does not report every recent case,** but we hope that you will find the included summaries and articles interesting and informative.

Carol is general counsel for the Association of Fish & Wildlife Agencies (AFWA) in Washington, D.C. AFWA is a professional organization whose members are the fish and wildlife agencies of the 50 U.S. states as well as territories, several Canadian provinces and Mexican states, as well as some U.S. federal agencies. AFWA attorney Lane Kisonak assisted with the production of the *Wildlife Law Call*.

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