



# WILDLIFE LAW CALL

## Case Updates and Recent Developments

WINTER 2016-2017

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## Introduction to the North American Model of Wildlife Conservation—the Seven Sisters

By the mid-1880s, settlers in the American West saw elk, bison, bighorn sheep, black bears, and whitetail deer nearly vanish from the frontier. With the leadership of famed outdoorsman Theodore Roosevelt, the North American Model for Wildlife Conservation developed. The Model consists of seven principles—often called the Seven Sisters—that conjoin to preserve wildlife for generations to come:

1. **Public Trust Doctrine:** Legal debate over ownership of wildlife dates back to the Roman Republic. An 1842 U.S. Supreme Court opinion established that government must hold wild nature in trust for all citizens, and that it cannot be “owned”.

2. **Prohibition on Commerce of Dead Wildlife:** Responding to the profitable yet destructive market for commerce in dead wildlife in the late 1800s and early 1900s, hunters and anglers led the effort to end commerce in dead animal parts to ensure the sustainability of wildlife populations.

3. **Democratic Rule of Law:** Wildlife is allocated for use by citizens via legislative processes. These processes protect wildlife from being appropriated by elites, as was common in Europe. All citizens can participate through courts, if necessary, in developing systems of wildlife conservation.

4. **Opportunity for All:** In the United States and Canada, every person has an equal opportunity under the law to participate in hunting and fishing. Neither hunters nor non-hunters may exclude others from access to game.

5. **Non-Frivolous Use:** Although laws govern access to wildlife and provide for citizen participation, guidelines for appropriate use govern killing for food and fur, self-defense, and property protection. Such laws enjoin killing of wildlife merely for antlers, horns, feathers, etc.

6. **International Resource:** The borders of states and nations are of little relevance to fish and wildlife. The Migratory Bird Protection Act of 1918 exemplifies international cooperation in conservation.

7. **Scientific Management:** Science is a crucial requisite of wildlife management. Interest in science and natural history is deeply ingrained in North American society, a trend attributed by wildlife

ecologist Aldo Leopold to the work of President Roosevelt.<sup>1</sup>

This issue of the *Wildlife Law Call* addresses each Sister in turn, and includes a selection of related legal issues appearing in the news and recent court decisions.

## THE SEVEN SISTERS



[Courtesy U.S. Fish & Wildlife Service](#)

### I. The Public Trust Doctrine

#### What You Should Know About the Public Trust

Delaney Callahan

**What is it?** The intangible anchor of wildlife law is the public trust doctrine.<sup>2</sup> With roots in Roman civil law, the doctrine builds on the ancient idea that certain types of property are owned by the public.<sup>3</sup> This

publicly owned property is held in trust for the benefit of the public.<sup>4</sup> The foundation of this doctrine is that trust property is universally important in people's lives, and each person has the right to access that property. *Id.* The beneficiary of the trust, the public, therefore, has the right to hold the trustee, the government, accountable for management of public property.<sup>5</sup>

#### Where does it appear in American law?

U.S. Supreme Court Chief Justice Roger Taney first utilized the public trust doctrine in an 1842 case to deny a landowner's claim brought to prevent others from hunting for oysters in New Jersey mudflats.<sup>6</sup> As Justice Taney's opinion noted, the old English law of the king holding public property as trustee passed down to each state government, endowing it with trustee authority. *Martin v. Waddell*, 41 U.S. 367, 432 (1842). Wildlife was then held to fall under the definition of public property in *Geer v. Connecticut*, 161 U.S. 519 (1896).<sup>7</sup> This particular application of the doctrine, however, has eroded.

Generally, the doctrine has developed in case law, though it has been expressly enumerated in several State constitutions.<sup>8</sup> The doctrine finds its rationale and basis through logical inferences of State and national constitutions.<sup>9</sup> The doctrine is supervisory, enforcing the constitutional reservation of powers designed to stop legislatures from squandering resources of public concern.<sup>10</sup> A challenge under the public trust doctrine is treated as a

<sup>1</sup> This introduction draws on AFWA's factsheet, *The North American Model of Wildlife Conservation*, available upon request.

<sup>2</sup> Gordon R. Batcheller et al., *THE PUBLIC TRUST DOCTRINE: IMPLICATIONS FOR WILDLIFE MANAGEMENT AND CONSERVATION IN THE UNITED STATES AND CANADA* 9 (2010).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 14.

<sup>6</sup> John Organ & Shane Mahoney, *THE FUTURE OF PUBLIC TRUST: THE LEGAL STATUS OF THE PUBLIC TRUST DOCTRINE* 19 (2007).

<sup>7</sup> Organ & Mahoney, *supra* at 20.

<sup>8</sup> *Id.*; Nicholas S. Bryner, *DECISION MAKING IN ENVIRONMENTAL LAW* 75 (2016).

<sup>9</sup> Bryner, *supra* at 75, 76.

<sup>10</sup> *Id.* at 76.

constitutional challenge. See, e.g., *Chelan Basin Conservancy v. GBI Holding, Co.*, 194 Wash. App. 478, 494 (2016).

The doctrine's basis in case law means that its judicial interpretation is ever-shifting.<sup>11</sup> The idea of a public trust is constant, but the allowable contents of that trust have varied.<sup>12</sup>

**How is it applied now, and is it properly applied?** The public trust doctrine has wandered from the holding in *Geer v. Connecticut*, in that wildlife has begun to creep out of the public trust due to commercialization and privatization.<sup>13</sup> Under the pressure of private interests, and with agencies' broad discretion to accommodate these pressures, a fragmented system of natural resource and wildlife management results.<sup>14</sup>

Any private interest in wildlife comes second to that of the public trust.<sup>15</sup> Additionally, this Roman-derived doctrine must be brought up to speed with the unique concerns of today, particularly conservation and environmental concerns.<sup>16</sup>

## BLM and the Problem of Wild Horse Overpopulation

Gabrielle Fournier

Over four decades ago, facing a rapidly declining wild horse population in the western United States, Congress acted to preserve the animals that represented "the historic pioneer spirit of the West."<sup>17</sup> The Wild and Free-Roaming Horses and Burros Act of 1971 outlawed harassment of, or harm to, these animals, and gave the U.S. Bureau of Land Management (BLM) power to manage their populations.<sup>18</sup> At the time, around 17,000 horses remained in the west, and BLM was tasked with restoring the population.<sup>19</sup> Since then, the wild horse population has exploded. BLM currently houses more than 45,000 horses and donkeys, while approximately 67,000 wild horses roam the western United States.<sup>20</sup>

Since the Act's enactment, the federal government has struggled to properly manage the horse population. BLM is permitted to round up and house horses as a management technique, but "qualified individuals" may adopt no more than four horses per year.<sup>21</sup> The existing adoption program is widely considered flawed with tens of thousands of horses waiting at a time for adoption in overcrowded government facilities and many going to the slaughterhouse.<sup>22</sup> However, adoption is not the only

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<sup>11</sup> Batcheller, *supra* at 24.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 26.

<sup>14</sup> Bryner, *supra* at 76-77.

<sup>15</sup> Organ & Mahoney, *supra* at 21.

<sup>16</sup> *Id.*

<sup>17</sup> 16 U.S.C.A. § 1331.

<sup>18</sup> Alexandra Felchlin, *Running Wild: The Bureau of Land Management and America's Wild Horses*, 2 ARIZ. J. ENVTL. L. & POL'Y 1047 (2012)

<sup>19</sup> *Id.*

<sup>20</sup> Niraj Chokshi, *No, the Federal Government Will Not Kill 45,000 Horses*, N.Y. TIMES, Sept. 15, 2016,

<http://www.nytimes.com/2016/09/16/us/no-the-federal-government-will-not-kill-45000-horses.html>.

<sup>21</sup> U.S. Bureau of Land Mgmt., *Adopting or Purchasing a Wild Horse or Burro – Frequently Asked Questions*,

[https://www.blm.gov/wo/st/en/prog/whbprogram/adoption\\_program/how\\_to\\_adopt.html](https://www.blm.gov/wo/st/en/prog/whbprogram/adoption_program/how_to_adopt.html) (last accessed Dec. 7, 2016).

<sup>22</sup> Kristen H. Glover, *Managing Wild Horses on Public Lands: Congressional Action and Agency Response*, 79 N.C. L. REV. 1108 (2001).

management tool at the Secretary's disposal. BLM is also authorized to manage overpopulation by destroying "old, sick, or lame" animals. If there is no market for adoption or the program is not sufficient, the Secretary is authorized to euthanize the animals in the most humane way possible.<sup>23</sup>



Courtesy PIXNIO

Even with the adoption program in place, the federal government has found itself overwhelmed. It cost an estimated 49 million dollars to maintain the housing facilities in 2015—46 percent of the entire Wild Horse and Burro program budget.<sup>24</sup> In response, the National Wild Horse and Burro Advisory Board recommended that the agency "kill or sell all of the 45,000 horses

and donkeys in its custody that cannot be adopted."<sup>25</sup>

When this recommendation became public, organizations such as the Humane Society of the United States (HSUS) were expectedly upset. HSUS referred to the plan as a "mass slaughter on an almost unimaginable scale"<sup>26</sup> HSUS also blamed BLM's poor management practices for the problem, arguing that BLM "cannibalized" its funds by wasting almost half of the budget on rounding up and housing the animals.<sup>27</sup> Before long, BLM's recommendation became national news. Outrage was sparked on social media platforms as the story gained traction in mainstream publications, such as *People* magazine.<sup>28</sup> An online petition gathered over 250,000 signatures, with many signing under the impression that BLM already planned to act on these recommendations.<sup>29</sup>

Fortunately, the misunderstanding was soon corrected. The *New York Times* ran an article appropriately titled, "No, the Federal Government Will Not Kill 45,000 Horses."<sup>30</sup> BLM stated definitively that it would not even consider the proposal.<sup>31</sup> A spokesman for the Bureau disclosed that there would be "no change" in the current management

<sup>23</sup> 16 U.S.C.A. § 1331.

<sup>24</sup> Humane Soc'y of the United States, *BLM advisory board recommends euthanasia for 45,000 wild horses*, Sept. 9, 2016 ([http://www.humanesociety.org/news/press\\_releases/2016/09/blm-recommendation-090916.html?credit=blog\\_post\\_091316\\_id8421?referrer=http://blog.humanesociety.org/wayne/2016/09/advisory-board-recommends-euthanasia-45000-wild-horses.html?referrer=http://www.nydailynews.com/news/national/blm-advisory-board-recommends-euthanizing-45-000-wild-horses-article-1.2790902](http://www.humanesociety.org/news/press_releases/2016/09/blm-recommendation-090916.html?credit=blog_post_091316_id8421?referrer=http://blog.humanesociety.org/wayne/2016/09/advisory-board-recommends-euthanasia-45000-wild-horses.html?referrer=http://www.nydailynews.com/news/national/blm-advisory-board-recommends-euthanizing-45-000-wild-horses-article-1.2790902)) (last accessed Dec. 7, 2016).

<sup>25</sup> Chokshi, *supra*.

<sup>26</sup> Wayne Pacelle, Humane Soc'y of the United States, *Feds must dismiss unhinged advice on wild horses*, Sept. 13, 2016 ([http://blog.humanesociety.org/wayne/2016/09/advisory-board-](http://blog.humanesociety.org/wayne/2016/09/advisory-board-recommends-euthanasia-45000-wild-horses.html?credit=blog_post_091316_id8421_mr_091316)

[recommends-euthanasia-45000-wild-horses.html?credit=blog\\_post\\_091316\\_id8421\\_mr\\_091316](http://blog.humanesociety.org/wayne/2016/09/advisory-board-recommends-euthanasia-45000-wild-horses.html?credit=blog_post_091316_id8421_mr_091316)).

<sup>27</sup> *Id.*

<sup>28</sup> Kelli Bender, *Government Suggests Killing 45,000 Wild Horses to Help Beef Farms*, PEOPLE, Sept. 13, 2016, <http://people.com/pets/government-suggests-killing-45000-wild-horses-to-help-beef-farms/> (last accessed Dec. 7, 2016).

<sup>29</sup> Change.org, *Mass Killing of 45,000 Wild Horses Recommended – Tell Congress and the Administration NO!*, [https://www.change.org/p/say-no-to-mass-killing-of-wild-horses?recruiter=2285914&utm\\_source=petitions\\_share&utm\\_medium=copylink](https://www.change.org/p/say-no-to-mass-killing-of-wild-horses?recruiter=2285914&utm_source=petitions_share&utm_medium=copylink) (last accessed Dec. 7, 2016); Chokshi, *supra*.

<sup>30</sup> Chokshi, *supra*.

<sup>31</sup> *Id.*

policies and that the government was “not going to sell to slaughter or put down healthy horses.”<sup>32</sup>

While the federal government has no plans to kill any horses any time soon, the underlying problem remains. Even as outrage dies down and social media moves onto the next story, nearly 50,000 animals remain in the government’s care. HSUS has commented that BLM should “reconfigure their management paradigm to focus on humane management tools” and asked the agency to make an innovative new management plan a top priority.<sup>33</sup> This will surely be an issue over which animal rights groups, ranchers, and environmental groups struggle as a new administration takes over in 2017.

### **Case Brief: Chelan Basin Conservancy Co. v. GBT Holding Co.** **Delaney Callahan**

Chelan Basin Conservancy (CBC) sued to enjoin GBI Holding Co.’s from developing Three Fingers, a landfill owned by GBI and located on the “otherwise pristine shores of the lake and unreasonably interfer[ing] with access to the beach and navigable waters[.]” on the grounds that the plan violated the public trust doctrine. 194 Wash. App. 478, 482 (2016). CBC’s challenge also sought to have GBI abate the landfill. *Id.*

CBC’s claim relied on the Shoreline Management Act, which works to “manage the competing interests of development and conservation,” ultimately promoting the public’s interest in access to navigable waters. *Id.* at 482, 487. As a matter of law, compliance with the SMA means

compliance with the public trust doctrine. *Id.* at 487. However, the SMA has a savings clause to protect developed land or landfills that existed prior to a court decision in 1969. *Id.*

The Three Fingers landfill was acquired and filled by GBI between 1961 and 1962, meaning that the savings clause of the SMA could apply to it. *Id.* at 483. To resolve this issue, the court had to interpret the statute to determine whether the savings clause was meant to protect all pre-1969 fills from public navigational claims, or whether the fills were susceptible to navigational claims where a plaintiff could establish a statutory violation or trespass claim. *Id.* at 489-90. Here, CBC attempted to utilize Washington’s public nuisance statute as the predicate statutory violation. *Id.* at 492.

The court held that the savings clause protected the Three Fingers landfill from suit under the public trust or public nuisance theory. *Id.* at 493. It then moved to the issue of whether the savings clause itself violates the public trust doctrine. *Id.* “When a legislative challenge is made under the public trust doctrine,” the Court wrote, “[it] ‘must inquire as to (1) whether the State, by the questioned legislation, has given up its right of control over the [public’s inalienable rights of navigation] and (2) if so, whether by so doing the State (a) has promoted the interest of the public in [their rights of navigation], or (b) has not substantially impaired it.’” *Id.*, quoting *Caminiti v. Boyle*, 107 Wash.2d 662, 670 (1987). The court concluded that, as the burdened party, CBC failed to show that the savings clause was invalid as a whole. *Id.* at 495.

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<sup>32</sup> *Id.*

<sup>33</sup> Humane Soc’y, *supra*.

## Considering Animal Rights

### Sheila Murugan

An increasingly controversial issue today is that of animal personhood and the extent to which non-human animals should be entitled to legal rights. The long predominant school of thought holds that animals are property, owned by humans and subject to hunt or trade. A more progressive notion is that certain animals are entitled to particular legal rights, namely bodily integrity and liberty.<sup>34</sup>

One organization devoted to this cause is the Nonhuman Rights Project (NhRP), which works to change the status of certain animals to make them legal persons. NhRP focuses on animals that research determines meet certain criteria valued by courts in a legal person. Under such standards, examples of suitable animals are chimpanzees and elephants.<sup>35</sup>

A primary issue with granting such animals legal rights is where to draw the line. In the event that chimpanzees and elephants are entitled to bodily integrity and liberty, would this entitlement not apply to other animals as well? Where does the litany of rights that should be guaranteed to these animals end? Detractors of animal personhood further suggest that animals do not have the senses of morality and duty that humans innately possess.<sup>36</sup> Without these crucial characteristics, they argue that animals do not qualify for the legal rights reserved for humans. Granting such rights would effectively blur the line between humans and animals.



Courtesy U.S. Fish & Wildlife Service

The accompanying case regarding chimpanzees illustrates this point. There the court ultimately determined that the plaintiffs bringing suit had not suffered an injury and therefore had no standing to bring the case.<sup>37</sup> In doing so, the court stated that it had no business changing precedent that declared animals to be without legal rights.<sup>38</sup> Essentially, to prove that the chimpanzees had suffered an injury, the animals themselves would have to bring the case to court.

While the movement to secure personhood for animals is gaining momentum, decades of strong court precedent remains a tough obstacle. With animals no longer uniformly seen as property, individuals are now taking on the task of proving that some animals deserve legal rights not only for the sake of species equity but in order to protect intelligent and emotionally complex animals from lives of misery. While such arguments have the potential to win people's hearts, only time

<sup>34</sup> See, e.g., Nonhuman Rights Project, *About Us*, <http://www.nonhumanrightsproject.org/about-the-project-2/> (last accessed Dec. 7, 2016).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, Civ. No. 16-cv-149 (KBJ) (D.D.C. Sept. 14, 2016).

<sup>38</sup> *Id.*

will tell if they will suffice to change a lifetime of precedent.

### **Case Brief: New England Anti-Vivisection Society v. USFWS**

**Sheila Murugan**

The New England Anti-Vivisection Society (“Society”), a non-profit involved in animal welfare issues, has filed a lawsuit against the U.S. Fish and Wildlife Service (“FWS”) to prevent authorization of a wildlife export permit. FWS permitted Yerkes National Primate Research Center (“Center”) to transfer eight chimpanzees to a zoo in the United Kingdom upon the condition the Center donate money toward a chimpanzee conservation program. However, the Society claims such a permit violates a multitude of acts, notably the Endangered Species Act (ESA) and the Administrative Procedure Act (APA).

The Court had to determine whether the Society had Article III standing to bring this lawsuit before deciding on the merits of this case. In doing so, the plaintiff must satisfy three conditions: (1) demonstration of an injury in fact, (2) a connection between the actual injury and the defendant’s actions, and (3) a showing that a decision in the plaintiff’s favor will redress the injury.

The U.S. District Court for the District of Columbia granted summary judgment for FWS, finding that plaintiff did not meet any of the criteria required to assert Article III standing. The Court found that, while plaintiff’s arguments were persuasive, Article III standing requires more than just a challenge to government action regarding endangered animals—it must be the plaintiffs themselves who suffer the injury,

rather than the animals they seek to protect. No. 16-cv-149-KBJ (D.D.C. Sept. 14, 2016).

## **II. Prohibition of Commerce in Dead Wildlife**

### **Case Brief: U.S. v. Simms**

**Chris Tymeson**

On February 24, 2015, the government charged defendant with conspiring to violate the Lacey Act. The charge arose from defendant’s participation in a business that organized mountain lion and bobcat hunts. The government alleged that defendant provided guiding services in furtherance of the conspiracy from 2006 through 2010. Defendant argued that his involvement with the conspiracy ended prior to February 24, 2010, outside of the five-year statute of limitations. The Court denied defendant’s motion, reasoning that a conspirator is liable for the reasonably foreseeable actions taken by his co-conspirators in furtherance of the conspiracy. Therefore, defendant was deemed to still be involved in the conspiracy even after his period of direct involvement was complete. No. 15-CR-00080-MSK-GPG, 2015 WL 5210659 (D. Colo. Sept. 8, 2015).

### **Case Brief: U.S. v. Rodebaugh**

**Chris Tymeson**

Defendant ran an outfitting business in Colorado where he frequently took out-of-state hunters on elk and deer hunts. In order to attract the big animals, defendant spread salt around the base of the tree stands, prohibited as “baiting” under Colorado law. Defendant was found guilty of six counts of selling wildlife taken in violation of state law, a federal crime under

the Lacey Act. In addition, the judge ordered several sentence enhancements to be applied. The main issues on appeal were: (1) whether defendant's admission to spreading salt was involuntary; (2) whether the Colorado law prohibiting baiting was unconstitutionally vague, and (3) whether the district court erred in applying a sentence enhancement for actions that "create a significant risk of disease transmission among wildlife."

On appeal, defendant argued that his confession to law enforcement concerning his illegal baiting was involuntary but the court upheld it because there was no evidence that defendant was unusually susceptible to a forced confession. Next, defendant argued that the Colorado law prohibiting baiting, defined as "placing, exposing, depositing, distributing, or scattering of any salt, mineral, grain, or other feed so as to constitute a lure, attraction or enticement for wildlife", was unconstitutionally vague. The court rejected this argument.

The last issue on appeal was defendant's sentence enhancement. The sentencing guidelines stated that the base offense level must be increased by two "[i]f the offense ... created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants." At trial evidence was presented that showed elk congregating around the areas where defendant spread salt, and an expert testified that when elk congregate in that manner, their noses come in close proximity to each other, causing disease to spread more rapidly. The Court therefore upheld the sentence enhancement. 798 F.3d 1281 (10th Cir. 2015).

## Case Brief: Friends of Animals v. Jewell Kalie Tyree

Plaintiff, an international animal advocacy organization, sued the U.S. Fish and Wildlife Service (FWS) for reinstating a rule exempting U.S. captive-bred endangered antelope species from the Endangered Species Act (ESA).

In 2005, FWS listed three antelope species as endangered. The same day, the Service issued an exemption for qualifying domestic entities and individuals, including certain sport hunting programs, which breed the antelope species in captivity. Plaintiffs alleged that the exemption violated the ESA as well as the Administrative Procedure Act (APA). Section 9 of the ESA makes it unlawful for any person to "take, possess, sell, deliver, carry, transport, or ship" any endangered species in violation of the act. ESA section 10 authorizes FWS to permit any act otherwise prohibited by Section 9 for scientific purposes or to enhance the survival of the affected species. The court concluded that FWS has the flexibility under ESA to assess how to conserve a species after it has been listed as endangered, and therefore did not violate the APA, the separation of powers, or the ESA. 824 F.3d 1033 (D.C. Cir. 2016), *cert. denied*, 2016 WL 4721612 (2016).



[Courtesy PIXNIO](#)

### III. Democratic Rule of Law

#### Ballot Measure I-177: Traps and Snares

Kalie Tyree

In Montana, voters rejected a ballot measure to prohibit the use of traps and snares to harvest wildlife on public land. The Animal Trap Restrictions Initiative No. 177 (I-177) would have made trapping on public land a criminal misdemeanor in Montana. I-177 failed with over 300,000 “No” votes.<sup>39</sup>

The ballot language for I-177 was as follows:

“I-177 generally prohibits the use of traps and snares for animals on any public lands within Montana and establishes misdemeanor criminal penalties for violations of the trapping prohibitions. I-177 allows the Montana Department of Fish, Wildlife, and Parks to use certain traps on public land when necessary if nonlethal methods have been tried and found ineffective. I-177 allows trapping by public employees and their agents to protect public health and safety, protect livestock and property, or conduct specified scientific and wildlife management activities. I-177, if passed by the electorate, will become effective immediately.”<sup>40</sup>

Passage of I-177 would have reduced trapping license revenues by approximately

\$61,380 per year.<sup>41</sup> In addition, the state would have incurred other costs associated with monitoring wolf populations and hiring additional full-time employees at the Department of Fish, Wildlife, and Parks.

Initiatives like I-177 directly interfere with states’ ability to manage public lands. In Montana, approximately 40 percent of all wolves are harvested through trapping.<sup>42</sup> If I-177 had passed, the growing population of wolves, coyotes, and other predatory animals would have significantly disrupted game animals, livestock, and people.<sup>43</sup> Disproportionate amounts of predators on public land create losses of game herd populations, especially deer.<sup>44</sup>

I-177 was sponsored by Timothy Provow and Montanans for Trap-Free Public Lands.<sup>45</sup> This group tried to petition trapping in 2010 as well, but did not collect enough signatures. This year, however, more than 24,000 signatures were gathered by Footloose Montana, placing I-177 on November’s ballot.<sup>46</sup> \$149,805.65 in total was raised in support of the initiative.<sup>47</sup>

Opposing the initiative were Montanans for Effective Wildlife Management, Montanans for Wildlife & Public Land Access, National Deer Alliance, and more.<sup>48</sup> The total amount raised against the initiative was \$320,273.50.<sup>49</sup>

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<sup>39</sup> Ballotpedia, *Montana Animal Trap Restrictions Initiative, I-177 (2016)*, [https://ballotpedia.org/Montana\\_Animal\\_Trap\\_Restrictions\\_Initiative\\_I-177\\_\(2016\)](https://ballotpedia.org/Montana_Animal_Trap_Restrictions_Initiative_I-177_(2016)) (last accessed Dec. 8, 2016).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Nat’l Deer Alliance, *Trapping Ban in Montana Would be Bad for Deer and Other Wildlife*, <https://nationaldeeralliance.com/editorial/trapping-ban-in-montana-would-be-bad-for-deer> (last accessed Dec. 8, 2016).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Ballotpedia, *supra*.

<sup>46</sup> Bobby Caina Calvan, *Anti-trap initiative qualifies for Montana’s November ballot*, WASH. TIMES, July 1, 2016,

<http://www.washingtontimes.com/news/2016/jul/1/anti-trap-initiative-qualifies-for-montanas-novemb/>.

<sup>47</sup> Ballotpedia, *supra*.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Trappers must now take ballot initiatives like I-177 as a warning for potential future initiatives, which would damage their livelihood. Montana maintains a strong tradition of hunting and trapping, but this initiative shows how easily traditions can be outlawed.

The only states that have enacted similar statutes are Arizona, California, Colorado, Massachusetts, and Washington.<sup>50</sup>

## Case Brief: *Clampitt v. U.S. Forest Service*

Meg Enter

The third sister of the North American Model—Democratic Rule of Law—emphasizes protection and conservation of wildlife through public processes in which citizens have the opportunity and responsibility to develop systems of wildlife conservation and use.<sup>51</sup> As discussed above, voting on a ballot issue is one proactive way for a citizen to exercise her opportunity and fulfill her responsibility to form the basis of governmental action or inaction to protect public lands and the resources within and around them. Another mechanism to which citizens often resort is challenging an agency action in Article III court to revise it in a manner consistent with the interests of affected parties. Recently, after a public outcry over the United States Forest Service's (USFS) approval of a recreational shooting range within national forest land, opponents united in Federal court to exercise this democratic opportunity.

In *Clampitt v. United States Forest Service*, No. 1:15-cv-72-MOC-DLH (W.D.N.C. Oct. 13, 2016), plaintiffs alleged that USFS violated the National Environmental Protection Act (NEPA) and Administrative Procedure Act (APA) when it failed to “rigorously explore and objectively evaluate the full range of reasonable alternatives,” failed to prepare an Environmental Impact Statement (EIS), and failed to “prepare its decision and [Environmental Assessment (“EA”)] to conform to NEPA.” *Id.* at 3. The administrative record reveals that the original idea traced back to a USFS employee; the idea then came before the public for comment on six separate occasions; USFS conducted several studies regarding the project's effect on noise, traffic, and dust levels; and after a decade of review, the public reaction was mixed. *Id.* at 1. USFS authorized the construction of several shooting lanes, adjacent parking, and a service road to the site. *Id.*

The Court first analyzed the USFS's decision to issue an EA and a subsequent Finding of No Significant Impact (FONSI) instead of a corresponding EIS. *Id.* at 3. Under NEPA, when an agency finds that a proposed project is not categorically excluded from environmental review, it is obligated to undertake an EA and then subsequently issue either an EIS or a FONSI.<sup>52</sup> The agency is required to prepare an EIS when the project represents a major federal action significantly affecting the quality of the human environment. *Clampitt* at 3.

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<sup>50</sup> Sportsmen's Alliance, *Montana Voters to Decide Trapping Ban*, July 19, 2016, <http://www.sportsmensalliance.org/news/montana-voters-to-decide-on-trapping-ban/>.

<sup>51</sup> Rocky Mountain Elk Foundation, *The North American Wildlife Conservation Model*

<<http://www.rmef.org/Conservation/HuntingIsConservation/NorthAmericanWildlifeConservationModel.aspx>> (accessed Dec. 2, 2016).

<sup>52</sup> U.S. Env'tl. Protection Agency, *National Environmental Policy Act Review Process*, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (accessed Dec. 2, 2016).

USFS determined that an eight-lane shooting range with a ten-space parking lot did not constitute a major federal action that would significantly affect the quality of the human environment. *Id.* An agency determination regarding whether to prepare an EIS or a FONSI is subject to review under an “arbitrary and capricious” standard, which requires a court to determine whether an “administrative decision is based on agency expertise and represents an agency decision.” *Id.* The Court cited the USFS noise studies, which concluded that nearby homes and the trail system as a whole were only minimally affected, in determining that the agency had fulfilled its obligation to act in a manner that is neither arbitrary nor capricious. *Id.*

Plaintiffs claimed that, given the presence of a nearby shooting range, a “no-build” alternative was rejected out-of-hand. *Id.* The Court rejected this claim on the basis of USFS’s common sense determination that the range would mitigate potential safety hazards arising from the common practice of shooting within forest lands and nearby private lands without a designated shooting range in the forest. *Id.* Additionally, the Court discussed the aforementioned noise studies (which indicated the agency’s initiative to mitigate potential harm), and the record of public support for the project as a means to mitigate the potential harm from continuous unregulated hunting within the forest and on nearby private properties. *Id.*

Lastly, the Court rejected plaintiffs’ argument that the agency failed to adequately consider the effect on noise, traffic, and dust levels. *Id.* at 4-5. The Court again referred back to the record on noise studies and discerned that the two traffic

studies, the incorporation of a traffic mitigation plan, and the results of a dust study revealing a predicted impact not in excess of Environmental Protection Agency (EPA) standards indicated that USFS engaged in the “hard look” necessary to satisfy its responsibilities under “arbitrary and capricious” review. *Id.* at 5. Plaintiffs’ claim in this instance appeared to be a catch-all designed to question USFS’s findings overall and, as such, the Court treated the challenge in the same manner as it did in its determination that the agency was justified in issuing a FONSI rather than an EIS. For these and other reasons, the Court dismissed plaintiffs’ motion for summary judgment and further affirmed USFS’s final decision to go forward with the project. *Id.* at 7.

*Clampitt* presents an interesting and increasingly common situation in which an agency seeks to place a private object on public land. In the interest of public fairness, perhaps agency action should be more closely scrutinized where financial benefits have the potential to compromise decision-making.

Because arbitrary-and-capricious review is so deferential, the plaintiff bears a heavy burden to prove wrongdoing on the part of the agency. Democratic rule of law is at least in part rooted in the notion that democracy strives to allow citizens to meaningfully challenge agency actions; *Clampitt* once again highlights the power of the regulatory state to adjudicate the interests of the citizens it is meant to serve. This conflict comes to the fore when agency and private interests overlap, given how frequently and closely agencies work with private entities to build facilities and provide services.

## IV. Hunting Opportunity for All

### Proposals for Constitutional Rights to Hunt

Jeffrey Caviston

#### A Recent Trend

This past November, two states—Indiana and Kansas—overwhelmingly passed referendums to recognize that their citizens have a constitutional right to hunt and fish, joining a movement that has been spreading across the country.<sup>53</sup>

For many, hunting and fishing may seem to be an intrinsic part of American life, and one-third of states have moved to enshrine hunting and fishing in their constitutions, with nearly all having adopted such amendments in the last twenty years.<sup>54</sup>

Although no two states have passed the same Right to Hunt amendment, these amendments generally affirm what has been recognized throughout the 240-year history of the country—that, subject to reasonable restrictions, a state cannot prohibit public hunting and fishing. Many of these amendments include additional affirmations that public hunting and fishing are the favored means of state wildlife management.

While history seems to favor sportsmen when it comes to the public's ability to hunt and fish, emerging concerns include increasing urbanization; local, state, and federal regulations; and the efforts of animal rights organizations.<sup>55</sup> However, that is not to say that these amendments lack precedent prior to the past two decades; Vermont was first to adopt a constitutional hunting provision in 1777, reacting with disdain for the British royalty's choice to reserve the right solely for itself.

The amendments also come at a time when fewer people were participating in sportsmen activities and the federal government was taking a more active role in wildlife management, traditionally been as a power of the state. In accordance with the North American model of wildlife conservation, public hunting and fishing remains the primary tool employed by state wildlife agencies to manage wildlife. Furthermore, hunters and anglers are the leading source of revenue for wildlife conservation in the United States.<sup>56</sup> One hopes that these amendments will encourage more hunting and fishing by ensuring that such activities are more readily available and promoted by state agencies; more sportsmen means more resources for state agencies, thus reinforcing the state's principal role in wildlife management.

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<sup>53</sup> Ballotpedia, *Kansas Right to Hunt and Fish, Constitutional Amendment 1* (2016), [https://ballotpedia.org/Kansas\\_Right\\_to\\_Hunt\\_and\\_Fish,\\_Constitutional\\_Amendment\\_1\\_\(2016\)](https://ballotpedia.org/Kansas_Right_to_Hunt_and_Fish,_Constitutional_Amendment_1_(2016)) (last accessed Dec. 8, 2016); Ballotpedia, *Indiana Right to Hunt and Fish, Public Question 1* (2016), [https://ballotpedia.org/Indiana\\_Right\\_to\\_Hunt\\_and\\_Fish,\\_Public\\_Question\\_1\\_\(2016\)](https://ballotpedia.org/Indiana_Right_to_Hunt_and_Fish,_Public_Question_1_(2016)) (last accessed Dec. 8, 2016).

<sup>54</sup> Nat'l Conference of St. Legs., *State Constitutional Right to Hunt and Fish*, (Nov. 9, 2016), <http://www.ncsl.org/research/environment->

<and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx> (last accessed Dec. 8, 2016).

<sup>55</sup> See, e.g., Humane Soc'y of the U.S., *Lethal Wildlife Management*, [http://www.humanesociety.org/issues/lethal\\_wildlife\\_management/](http://www.humanesociety.org/issues/lethal_wildlife_management/) (last accessed Nov. 11, 2016).

<sup>56</sup> U.S. Fish & Wildlife Serv., *What Do Hunters Do for Conservation?* (2014), <http://www.fws.gov/hunting/whatdo.html> (last accessed Dec. 8, 2016).



Courtesy U.S. Fish & Wildlife Service

## Criticisms

As states continue to amend their constitutions to include the right to hunt and fish, some question whether such measures are actually necessary. Critics point out that no state has outlawed hunting or fishing, nor have environmental groups pushed for outright bans or used the court system to broadly enjoin either activity; rather, activists target inhumane or unpopular methods of wildlife conservation, such as trapping.<sup>57</sup> Nevertheless, the fear is that these efforts create a slippery slope toward an inevitable outcome: today's ban on bear hounding,<sup>58</sup> for example, may pave the way for tomorrow's prohibition of hunting altogether.

Opponents of these amendments<sup>59</sup> further argue that constitutions are not the place to protect a "sport"—a term notably attributed to hunting by the Supreme Court in *Baldwin v. Fish & Game Commission of*

Montana, 436 U.S. 371 (1978). However, constitutions are designed to reflect what people believe government should, and should not, affect. The point of amending a state's constitution is to acknowledge the popular beliefs of citizens by elevating something from the ambit of legislative or regulatory action to a state of paramount importance, thereby constraining such action. Thus, supporters of these hunting and fishing amendments (again, usually substantial majorities) evidently consider hunting and fishing to be of paramount importance—more than just a recreational activity—and thus worthy of constitutional protection.

## Mixed Results

While enshrining hunting and fishing as rights in a state constitution seems on its face to afford sufficient protection, doing so may still fail to achieve the desired effect. Perhaps the biggest problem is calibrating an amendment's language to avoid giving the right too much or too little individual protection. If the right is construed as paramount to state regulatory authority, it could severely constrain a state's wildlife management to the detriment of sportsmen. For example, a state may no longer be able to prohibit poaching or over-harvesting. Furthermore, courts may be unwilling to give an amendment much legal force if its effect were to have such dire consequences on a state's reasonable effort to manage wildlife. On the other hand, an amendment that permits too

<sup>57</sup> Stacey Gordon, *A Solution in Search of a Problem: The Difficulty with State Constitutional "Right to Hunt" Amendments*, 35 PUB. LAND & RESOURCES L. REV. 3, 13-17 (2014).

<sup>58</sup> Bear hounding involves the use of packs of radio-collared hounds to pursue bears until they shelter in trees, at which point they are shot or fight the hounds. Humane Soc'y of the U.S., *Facts About Bear Hounding*,

[http://www.humanesociety.org/issues/bear\\_hunting/facts/hound-hunting-fact-sheet.html](http://www.humanesociety.org/issues/bear_hunting/facts/hound-hunting-fact-sheet.html) (last accessed Dec. 8, 2016).

<sup>59</sup> Tom Coyne, *Indiana Hunting Measure Pits Animal Versus Gun Rights*, WNDU (Oct. 13, 2016), <http://www.wndu.com/content/news/Indiana-hunting-measure-pits-animal-versus-gun-rights-397001161.html>.

much regulation could leave the door open to laws and lawsuits that could leave it without teeth.

Because of the potential legal pitfalls of adopting hunting and fishing amendments, states are turning to model legislation to accomplish their goals. The language of these model amendments emphasizes three things: (1) a reasonableness standard by which courts should gauge regulations on hunting and fishing; (2) protection of hunting and fishing methods as they exist now; and (3) use of hunting and fishing as a preferred means of conservation. Nevertheless, it is uncertain how the model language or, for that matter, most of the amendments currently enacted, will fare in the courts or against anti-hunting litigation.

Ultimately, the real power of Right to Hunt amendments may be not in their legal effect, but rather in the message they convey.<sup>60</sup> State legislatures are likely to be far more thoughtful in enacting laws respecting hunting and fishing considering the widespread public support of the amendments and the potential lawsuits to which such laws may be subject. Similarly, agencies themselves, as instruments of a publicly accountable executive branch, will likely use far more caution before promulgating rules or taking enforcement action that run contrary to the popular sentiment embodied by these amendments. The extent of popular support for these amendments, in addition to the financial incentives offered by fees and taxes, may also lead agencies to do more to actively encourage hunting and fishing.



Courtesy U.S. Fish & Wildlife Service

Given their persuasive power, Right to Hunt amendments may also be a useful tool for states in asserting their authority to manage wildlife—that is, a warning signal to federal agencies or congressional representatives to refrain from certain types of legislation or regulation.

Whether these amendments will provide sufficient protection for hunting and fishing remains uncertain, though the support they have shown should allow advocates to continue adapting and strengthening the laws should the need arise. In any event, the popularity of Right to Hunt amendments is obvious and it is likely that many more states will continue to join the movement in the coming years.

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<sup>60</sup> Cong. Sportsmen's Found., *Right to Hunt, Fish and Harvest Wildlife*, <http://sportsmenslink.org/policies/state/right-to-hunt-fish> (last accessed Dec. 8, 2016).

## V. Non-Frivolous Use

### Case Brief: State v. Brannon

Chris Tymeson

Defendant, a partial owner of a bird shooting preserve, set out snares after having problems with coyotes. Wildlife authorities were called to investigate after a neighbor's dog died in one of the snares. The officers noticed several violations on the property, set up a trail cam, and caught Defendant setting up the traps. A jury convicted defendant of eight wildlife regulation violations; defendant appealed on separate issues.

First, defendant argued that infringing his right to protect his property violated the Ohio constitution. The Court found that Defendant was not forbidden from using snares, but was required to comply with all regulations; therefore, his right to protect his property was not taken away. Next, defendant claimed that the trial court erred by failing to grant his motion to dismiss because the officer did not have a warrant. The court held that the open field exception eliminated the requirement for a warrant. Defendant had no reasonable expectation of privacy because the property was a large wooded area with no private residence. 2015-Ohio-1488 *appeal not allowed*, 2015-Ohio-4947, 144 Ohio St. 3d 1407, 41 N.E.3d 446, 2015 WL 1774364.

## VI. International Resources

### Case Brief: NRDC v. EPA

Kevin Brick

The Clean Water Act requires vessels to use the best technology available to clean ballast water. The U.S. Environmental Protection Agency (EPA) has been issuing Vessel General Permits that regulate the discharge of ballast water from vessels. EPA issued the first permit in 2008, and began to issue a second type of general permit in 2013 after further study. This new permit required vessels to perform ballast water treatments while the water is on-board in the tanks to just satisfy the discharge levels permitted by the International Maritime Organization (IMO). The permit did not consider all types of water treatment, including filtrations, halogenations (the addition of chlorine, bromine, or another kind of halogen), or ultraviolet light radiation. Nor did the permits consider on-shore ballast water treatments as an option. The permit even granted exceptions from these simple regulations to a majority of the vessels shipping goods into the Great Lakes.

The Natural Resources Defense Council (NRDC) and other environmental activists and organizations felt that the EPA was not enforcing the Clean Water Act (CWA) to the best of its ability, and filed suit. The U.S. Court of Appeals for the Second Circuit agreed in its decision last year, *NRDC v. EPA*, 808 F.3d 556 (2d Cir. 2015). The Court held that exempting ships from CWA requirements would undermine efforts to fight the spread of invasive species. EPA's permits could allow a vessel to avoid keeping current with the best methods for treating ballast water—thereby defeating the purpose of the Act. EPA's approach to the permits looked at the baseline minimum standards as set forth by the IMO and required permit holders to satisfy that standard using whatever technologies necessary. CWA, meanwhile, explicitly

states that the best available technologies must be used to achieve the highest level of results. The Court ordered EPA to reevaluate its Vessel General Permit, by considering all best technologies to treat ballast water for all ships within the Great Lakes and strengthening the standard for protecting the Great Lakes from invasive species and other biological and environmental pollutants.

## The Canadian Anti-Invasive Species Act Kevin Brick

Normally, when a foreign army of soldiers invades a territory, it is met with apprehension and resistance. It should follow that, when a foreign species invades the territory of native fish or wildlife, resistance gathers to preserve the native species. Why is it, then, that the Great Lakes are overpopulated with destructive invaders such as the round goby, zebra mussel, and Asian carp? Invasive species have often been difficult opponents because the threat they pose does not usually make itself obvious until it is already harming native wildlife populations. The lag between invasion and detection is especially pronounced when the invasive species is aquatic—underwater and out of sight.

Additionally, natural environments and habitats rarely stay within national boundaries. Ecosystems transcend national borders and become the responsibility of

nations working in cooperation with each other to preserve their fish and wildlife populations. The internationality of fish and wildlife is one of the pillars of the North American Model of Wildlife Conservation. Under the Model, the United States and Canada jointly coordinate fish and wildlife and habitat strategies, as these creatures migrate freely across boundaries between states, provinces, and countries.<sup>61</sup> However, some migrations benefit, often unwittingly, from human action. One such form of assistance is the dumping of ballast water from ships into the Great Lakes. Many species native to the Black, Yellow, and Caspian Sea are inadvertently dumped into our freshwater ecosystems and wreak havoc upon arrival.<sup>62</sup>

In 1985, Canada put its enabling Fisheries Act into force to protect fish populations in Canadian waters.<sup>63</sup> In the early 1990s, to reduce the number of invasive species, Canadian authorities mandated that all vessels bound for the Great Lakes undergo ballast water exchange, whereby a vessel exchanges its coastal ballast water with mid-ocean water at least 200 miles offshore and 2,000 meters deep.<sup>64</sup> The high salinity of ocean water would be much less friendly to any creatures that a vessel failed to wash out.

Then, in 2006, Canada implemented a new measure for vessels entering the Great Lakes, requiring all vessels with empty ballast tanks to perform a ballast tank flush mid-

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<sup>61</sup> Rocky Mountain Elk Found., *The North American Wildlife Conservation Model*, <http://www.rmef.org/Conservation/HuntingIsConservation/NorthAmericanWildlifeConservationModel> (last accessed Dec. 8, 2016).

<sup>62</sup> Susan Cosier, Nat. Res. Def. Council, *Hey Congress, Don't Roll Out the Welcome Mat for Invasive Species* (June 9, 2016), <https://www.nrdc.org/onearth/hey-congress-dont-roll-out-welcome-mat-invasive-species> (last accessed Dec. 8, 2016).

<sup>63</sup> Fisheries Act, R.S.C. 1985, c. F-14.

<sup>64</sup> *Ballast Water Management in the Great Lakes Reduces the Introduction of Aquatic Invasive Species: Fisheries and Oceans Canada Study*, Gov't of Canada, Dep't of Fisheries & Oceans (Sept. 8, 2016), <http://www.dfo-mpo.gc.ca/science/publications/article/2011/06-13-11-eng.html> (last accessed Dec. 8, 2016).

ocean to ensure that any creature remaining in the tank was either washed out or forced into a high salinity environment to die.<sup>65</sup> Canadian authorities have also implemented inspection and compliance efforts to ensure these regulations are followed. Every vessel that enters the Saint Lawrence Seaway outside of Canada must be inspected by Transport Canada or the United States Coast Guard once that vessel reaches the Port of Montreal.<sup>66</sup> This unique binational inspection program is viewed as highly effective and a pinnacle of bilateral regulatory cooperation.<sup>67</sup>

In addition to enforcing the Fisheries Act, Ontario implemented its own Invasive Species Act in November 2015.<sup>68</sup> The Act distinguishes between prohibited invasive species (those that have not yet been established in Ontario), and restricted invasive species (those that have been established in the province but whose spread must be prevented). Under the Act, no person shall:

- a) bring a member of a prohibited invasive species into Ontario or cause it to be brought into Ontario;
- b) deposit or release a member of a prohibited invasive species or cause it to be deposited or released;
- c) possess or transport a member of a prohibited invasive species;
- d) propagate a member of a prohibited invasive species; or
- e) buy, sell, lease or trade or offer to buy, sell, lease or trade a member of a prohibited invasive species.<sup>69</sup>

For restricted invasive species, no person shall:

- a) bring a member of a restricted invasive species into a provincial park or conservation reserve or cause it to be brought into a provincial park or conservation reserve; or
- b) deposit or release a member of a restricted invasive species in Ontario or cause it to be deposited or released in Ontario.<sup>70</sup>

These provisions pertain to both land and water territory of Ontario. Corporate violators of this Act on the first instance may be fined up to \$1,000,000, while individuals may be fined up to \$250,000 and face up to one year in prison as well as forfeiture and destructions of their invasive specimens.<sup>71</sup> Warrants are not necessary to make arrests under this Act.<sup>72</sup>

On the other side of the border, the United States relies on the Clean Water Act (CWA) and National Invasive Species Act (NISA) to regulate the dumping of ballast water. The CWA is enforced by the U.S. Environmental Protection Agency (EPA), while NISA is enforced by the U.S. Coast Guard. Although the goals of the United States and Canada are in tune with the North American Model, a great deal of harmonization and coordination between agencies domestically and internationally remains necessary to further protect the Great Lakes from invasive species.

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Invasive Species Act, 2015, R.S.O. 2015, c. 22 – Bill 37 (Can.).

<sup>69</sup> *Id.* at § 7.

<sup>70</sup> *Id.* at § 8.

<sup>71</sup> *Id.* at § 44.

<sup>72</sup> *Id.* at § 36.

## A Fork in the Road for the Migratory Bird Treaty Act

Joshua Jackson

Under the Migratory Bird Treaty Act (MBTA), taking a migratory bird is prohibited and punishable by a fine. However, the definition of “take” in §703(a) is unclear, and has recently been interpreted differently from five circuit courts; two include unintentional deaths as prohibitions under the Act and three circuits do not. The United States Fish and Wildlife Service (USFWS), to clarify the differences, may implement a permit program for unintentional deaths of migratory birds.

In *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), a corporation washed a pesticide into a nearby lake killing migratory birds. In *United States v. Apollo Energies Inc.*, 611 F.3d 679 (10th Cir. 2010), migratory birds died after landing on electrical lines. Both held that corporations can “take” migratory birds. Although these takings were not intentional, the courts construed MBTA to prohibit not only acts like hunting and poaching, but also the broad protection of migratory birds. The Second Circuit viewed the poisoning of migratory birds as strict liability, and said that, although FMC did not intentionally kill the migratory birds, they reasonably should have known the dangers since they were aware of the danger to humans. The Tenth Circuit considered the deaths of migratory birds more broadly, viewing the language of the statute to prohibit any causing of migratory bird deaths, even if unintentional. The court ruled that, since Apollo Energies was the cause of the migratory bird deaths and those deaths were foreseeable by the installation of electrical lines, they violated the Act.

Other courts, however, have interpreted “take” narrowly and excluded unintentional takings from the prohibitions in the MBTA. The Eighth, Ninth, and Fifth circuits held that “take” was narrow and only prohibited intentional acts like hunting and poaching. The Eighth Circuit in *Newton County Wildlife Association v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997), and the Ninth circuit in *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1997) both considered timber sales by the government. The plaintiffs argued that since the sale of timber and destruction of habitat of migratory birds would likely lead to their deaths, it was an unintentional but prohibited act under the MBTA. Both courts denied this understanding of the MBTA, and ruled that “take” was limited to intentional acts like hunting and poaching. The courts looked to the original meaning of “take” and interpreted Congressional intent to have only included acts like poaching and hunting.

The most recent case, with the most extensive reasoning on MBTA takes, is the Fifth Circuit's decision in *United States v. CITGO*, 801 F.3d 447 (5th Cir. 2015). CITGO was indicted under the MBTA and the definition of “take” for not preventing migratory birds from landing in oil processing equipment resulting in their death. The court looked at the common-law history of “take” and the Endangered Species Act to decide how broadly Congress meant “take[.]” The court held that given the traditional use of “take” to mean killing in the context of hunting and the difference in the definition given from the Endangered Species Act, “take” was meant to be narrowly defined and only applied to intentional acts, not unintentional killings.

Although the courts are currently split on what is prohibited under MBTA, the U.S. Fish and Wildlife Service (FWS) has started the process to implement an incidental take permitting system. “Migratory Bird Permits; Programmatic Environmental Impact Statement,” 80 Fed. Reg. 30032, 30036 (May 26, 2015). The system would allow for FWS to issue permits to corporations for unintentional takings of migratory birds without violating the MBTA. These permits would resemble those granted under the Endangered Species Act. However, the issue of how broadly to define “take” could still pose problems. If the Supreme Court someday rules that “take” does not include unintentional acts, FWS’s permitting system would be invalid as FWS would not have the authority to regulate unintentional deaths under MBTA.

**Case Brief: Protect Our Communities Foundation v. Jewell**  
**Joshua Jackson**

The U.S. Bureau of Land Management (BLM) granted Tule Wind a right of way on federal land to construct a wind energy project east of San Diego. Although BLM had performed an environmental impact study, environmental activist groups sued to enjoin development of the land. The groups argued that, because the wind energy program would likely result in migratory bird deaths and violate the Migratory Bird Treaty Act (MBTA), BLM should not be allowed to grant the permit and would also be liable for bird takes under the Act.

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<sup>73</sup> Steve Griffin, *Wolf management a back-and-forth battle*, MIDLAND DAILY NEWS, Oct. 24, 2016, <http://www.ourmidland.com/sports/article/Wolf-management-a-back-and-forth-battle-10158617.php>;

The Ninth Circuit, however, held that even if bird deaths were to occur as a result of the project, BLM is only indirectly involved in its regulatory capacity and not liable for any violations of the MBTA arising from the program. No. 14-55842 (9th Cir. June 7, 2016).



Courtesy PIXNIO

## VII. Scientific Management

### Delisting the Gray Wolf

**Brittney Ellis**

In 2012 the U.S. Fish and Wildlife Service delisted wolves under the Endangered Species Act, returning management authority to the State of Michigan.<sup>73</sup> Since the listing of wolves in 1978, the Minnesota population has expanded into Michigan’s Upper Peninsula.<sup>74</sup> By 2011 the population exploded to an estimated 4,000 wolves.<sup>75</sup>

Amanda Reilly, *D.C. Circuit grapples with Great Lakes delisting*, GREENWIRE, Oct. 18, 2016, <http://www.eenews.net/stories/1060044462>.

<sup>74</sup> Reilly, *supra*.

<sup>75</sup> *Id.*

Conflicts with wolves began to increase in the Upper Peninsula, with pets and livestock being killed, and the white-tailed deer population decreasing.<sup>76</sup> In response to these issues, the Michigan Department of Natural Resources updated its 2008 wolf management plan and held its first and only wolf hunt.<sup>77</sup>

The court of public opinion seemingly disagreed with the wolf hunt and Michigan voters voted to discontinue it in 2014.<sup>78</sup> Also disagreeing with the decision to hold a wolf hunt, the Humane Society of the United States (HSUS) sued to have wolves relisted.<sup>79</sup> The U.S. District Court for the District of Columbia found that, until wolves recovered throughout their historic range, they could not be delisted.<sup>80</sup> This decision effectively remanded wolf management to the federal government.<sup>81</sup> The case is now on appeal and a decision could come as early as December 2016.<sup>82</sup>

At the heart of the case is whether hunting wolves is a necessary and scientifically sound management tool.<sup>83</sup> The Michigan DNR has compiled a comprehensive management plan and concluded that hunting is an important facet of wolf management.<sup>84</sup> However, some conservation groups and wolf experts

disagree with this assessment and offer data to refute the plan.<sup>85</sup>

Michigan states that it has invested “an enormous amount of resources into the management and recovery of Michigan wolves . . . on the expectation that it would regain exclusive jurisdiction over wolves once they recovered.”<sup>86</sup> The comprehensive process that DNR undertook to create its wolf management plan evidences the claim.<sup>87</sup>

The plan recommends that hunting and other methods be used to control increased conflicts with livestock, pets, and people.<sup>88</sup> However, the DNR made clear that hunting should be used only when other methods “are not feasible” to minimize conflicts.<sup>89</sup> Other non-lethal methods include guard animals and fencing, and the DNR has often found that these methods sufficed on their own.<sup>90</sup> Michigan DNR designated three areas in the Upper Peninsula as meeting the criteria for consideration of a hunt under the plan.<sup>91</sup> In designating these areas, DNR tried to include wolf packs that have caused conflicts in order to remove “problem” wolves and have a minimal impact on the rest of the wolf population.<sup>92</sup> DNR recommended the harvest of 43 wolves,

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<sup>76</sup> Griffin, *supra*.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Reilly, *supra*.

<sup>84</sup> Adam Bump, *Michigan wolf hunt: DNR expert Adam Bump explains why hunt is conservative and necessary*, MLIVE (Nov. 4, 2013),

[http://www.mlive.com/news/index.ssf/2013/11/michigan\\_wolf\\_hunt\\_adam\\_bump\\_m.html](http://www.mlive.com/news/index.ssf/2013/11/michigan_wolf_hunt_adam_bump_m.html) (last accessed Dec. 8, 2016).

<sup>85</sup> Garrett Ellison, *How legal wolf hunting might actually increase, not decrease, poaching*, MLIVE (May 17, 2016),

[http://www.mlive.com/news/index.ssf/2016/05/wolf\\_poaching\\_study\\_michigan.html](http://www.mlive.com/news/index.ssf/2016/05/wolf_poaching_study_michigan.html) (last accessed Dec. 8, 2016); John Barnes, *Michigan wolf hunt: Rolf Peterson, globally known wolf expert, argues a hunt is ill conceived*, MLIVE (Nov. 6, 2013),

[http://www.mlive.com/news/index.ssf/2013/11/michigan\\_wolf\\_hunt\\_rolf\\_peters.html](http://www.mlive.com/news/index.ssf/2013/11/michigan_wolf_hunt_rolf_peters.html) (last accessed Dec. 8, 2016).

<sup>86</sup> Bump, *supra*.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

which it found would not “impact the overall Michigan wolf population over time.”<sup>93</sup>

DNR included hunting in the management plan because its studies show that hunting can cause behavioral changes in wolves—including fear of humans—that may lead to fewer conflicts and reduced numbers.<sup>94</sup> Michigan plans to monitor the results of any hunts and, if the hunt is not an effective management tool, the strategy will be modified.<sup>95</sup> There is opposition to this strategy, however, with conservation groups and wolf experts alike opposing the hunt.<sup>96</sup>



[Courtesy PIXNIO](#)

Those who oppose the hunt argue that DNR misrepresented the science behind its management plan and overinflated claims of wolf attacks on livestock and family pets.<sup>97</sup> Opponents cite the fact that farmers and wildlife specialists may already legally kill nuisance wolves, and therefore a hunt is pointless for management purposes.<sup>98</sup> They also cite studies showing that random killing

of wolves can disrupt stable packs, instead serving the intended purpose of removing problem wolves. *Id.* One recent study found that a wolf hunt may lead to increased poaching.<sup>99</sup>

Scientific evidence supports both sides of the argument. It is unclear, however, which side will prevail on appeal. Conservationists can only hope that the court will weigh the evidence in light of best available scientific evidence.

### **Case Brief: Audubon Soc’y of Portland v. U.S. Army Corps of Engineers** Brittney Ellis

Plaintiffs sued the U.S. Army Corps of Engineers and Fish and Wildlife Service because their double-crested cormorant management plan authorized the killing of cormorants in the Columbia River estuary. 2016 WL 4577009, at \*3. The plan provided benefits to salmonids (steel head and salmon) listed as endangered under the Endangered Species Act (ESA), based on scientific evidence showing that salmonids would increase if more cormorants (not yet listed under the ESA) were killed. *Id.* at \*3-\*4. The Court found, however, that the Corps violated NEPA by failing to consider a reasonable alternative to the taking of cormorants. *Id.* at \*9.

However, the Court left the plan in place because, “[i]n considering effects on endangered and threatened species, the ‘benefit of the doubt’ must go to the endangered species.” *Id.* at \*13. Any new plan must set forth a reasonable alternative to killing the cormorants. *Id.*

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Barnes, *supra*; Ellison, *supra*.

<sup>97</sup> Barnes, *supra*.

<sup>98</sup> *Id.*

<sup>99</sup> Ellison, *supra*.

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

## **Case Brief: Oregon Wild v. U.S. Forest Service**

**Jeffrey Caviston**

Several environmental groups (Plaintiffs) challenged a 2011 U.S. Forest Service (USFS) decision, made after informal consultation with the U.S. Fish & Wildlife Service (FWS), to authorize livestock grazing in newly designated critical habitat for Klamath River bull trout (Trout)—a “threatened species” under the Endangered Species Act (ESA).

Under the ESA, USFS “must insure [its] actions . . . are ‘not likely to jeopardize the continued existence’” of the Trout or destroy or adversely modify the Trout’s “critical habitat”; to do so, USFS is required to consult with FWS, which it did several times between 1998 and 2011. The agencies concluded in 2011 that grazing “would have no effect . . . [or] was not likely to adversely affect” the Trout. Plaintiffs claimed the 2011 decision was “arbitrary, capricious, an abuse of discretion, [and] not in accordance with the ESA,” the Clean Water Act (CWA), the National Forest Management Act (NFMA), and the Wild and Scenic Rivers Act (WSRA).

While noting that the “Plaintiffs raise[d] legitimate concerns about the future of [the Trout],” the Court nevertheless largely deferred to the agencies based on their expertise, the informal nature of the consultation, and the agencies’ “reasonabl[e] answer[.]” to the “narrow question of whether grazing would adversely affect” the Trout and its habitat. Likewise, the Court held that Plaintiffs were unable to overcome USFS’s “reasoned judgment” that grazing would not

substantially interfere with enjoyment of the river, a requirement of the WSRA, or argue that the decision was inconsistent with the USFS’s management plan under NFMA. Finally, the Court concluded that the decision comported with the CWA and NFMA because the Oregon Department of Environmental Quality, which has “sole authority to determine violations[,]” deemed USFS’s actions compliant with Oregon state law.

Thus, the Court denied the Plaintiff’s claims and granted summary judgment in favor of the Defendants; no appeal has been filed as of the date of this writing. No. 1:15-cv-00895-CL, 2016 U.S. Dist. LEXIS 79006 (D. Ore. June 17 2016).

## **Case Brief: Alliance for the Wild Rockies v. Savage**

**Jeffrey Caviston**

In 2015, Plaintiff, an environmental group located in Montana, sued the U.S. Forest Service (USFS), Fish & Wildlife Service (FWS), and Department of Agriculture (USDA) over a USFS decision to authorize logging on a forest restoration project in northwestern Montana because of its potential effect on threatened species under the Endangered Species Act (ESA). Specifically, Plaintiff alleged the decision (1) would “result in [an] unpermitted take of grizzly bears” due to the creation of new logging roads, (2) failed to adequately consider the project’s effect on bull trout, and (3) did not comply with Canadian lynx management standards.

While Plaintiff claimed that the new logging roads were not permissible under the grizzly bear management plan, the Court held that USFS’s exclusion of the new roads from the definition contemplated

within the plan was “consistent” and did not constitute an increase requiring formal consultation. As to the bull trout, because there was a “complete absence of evidence” that the species even existed within the Project, the court held that USFS’s conclusion that the Project would have no effect on the bull trout was “supported by the record and within [its] discretion.” Finally, the Court determined that the Ninth Circuit’s recent holding in *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015), did not require USFS and FWS to reinitiate consultation prior to USFS’s decision because that court only addressed a question of standing; it did not create a “per se rule prohibiting timber projects from proceeding pending [USFS] and [FWS] reinitiating consultation” specifically based on lynx management. The Court further held that, through their consultation and analysis independent of the lynx management plan, USFS and FWS had “reasonably determined” that the lynx was unlikely to be harmed by the Project. Therefore, the Court granted Defendants’ motion for summary judgment.

Plaintiff appealed to the Ninth Circuit, which issued a stay on the project pending its decision in early 2017. U.S. App. LEXIS 17136, at \*1-2 (9th Cir. Sept. 13, 2016).

## CRIMINAL LAW UPDATE

Chris Tymeson

### Caetano v. Massachusetts

The Supreme Judicial Court of Massachusetts upheld a law prohibiting stun guns by examining “whether a stun gun is the type of weapon contemplated by Congress in 1789 as protected under the Second Amendment.” The Supreme Court

granted certiorari and held that the prohibition was unconstitutional. While the Massachusetts court found that stun guns were not in common use at the time of the Second Amendment’s enactment—thus falling outside of Second Amendment protection—the Supreme Court applied its precedent in *D.C. v. Heller*, 554 U.S. 570 (2008), which indicates that the Second Amendment extends to arms not in existence at the time of the Constitution’s ratification. 136 S.Ct. 1027 (2016).

### State v. Paskar

Oregon state troopers, patrolling a halibut fishery, observed defendants reeling in a yellow-eye rockfish, a species prohibited in that area. Defendants never landed the fish, but instead released it and thus complied with the law. However, after being released, the fish floated to the surface belly-up. The officers grabbed defendants’ boat and asked whether defendants had caught anything. After defendants stated they had caught three halibut, the officers announced they would inspect the halibut tags with “the tone and content of a command[.]” Defendants complied and provided their tags, which were not yet validated. Oregon law requires the tags be validated immediately after the fish are caught, and, thus, defendants were charged with three counts of violating sport-fishing regulations. At trial, defendants moved to suppress the evidence found during the search, arguing that the troopers had illegally stopped them and exploited the illegal stop to obtain the evidence. The trial court agreed that the stop was an illegal seizure, reasoning that even if the officers had reasonable suspicion regarding the yellow eye rockfish, they exceeded the scope of their stop when they asked about

the halibut tags. The state appealed, arguing that the stop was justified.

On appeal, the state argued that this was simply a friendly encounter and not a seizure. The court did not agree, holding that it was an illegal seizure as the officers announced their authority and demanded to see the angler's tags. The state further contended that any seizure was lawful because it was supported by reasonable suspicion in relation to the failure to release the yellow-eye rockfish unharmed. The Court concluded that this argument was invalid because any stop regarding the yellow-eye rockfish was unlawfully extended by the officer's announcement to inspect defendant's halibut tag. 271 Or. App. 826, 352 P.3d 1279 (2015).

### **Maryland v. Kulbicki**

In 1993, James Kulbicki fatally shot his mistress in the head at point blank range. At trial, the prosecution demonstrated that the ballistic evidence removed from the victim's brain and that taken from Kulbicki's gun were a close enough match. Over a decade later, Kulbicki filed a petition for post-conviction relief arguing he received ineffective assistance of counsel as his attorneys failed to question the legitimacy of the ballistic evidence. The Maryland court agreed and vacated his conviction. The Supreme Court then held there was no ineffective assistance of counsel. The Court held the Maryland court erred by viewing the legitimacy of the ballistic evidence based on the contemporary view rather than the view of the evidence at the time of the trial. At the time of the trial, this sort of evidence was considered highly accurate and was only shown to be unreliable over a decade later. Therefore, the court held it

would not be reasonable to expect the attorney to seek alternative avenues for the defense. 136 S.Ct. 2 (2015).

### **Montgomery v. Louisiana**

In 1963, Montgomery was sentenced to life in prison without parole less than two weeks after his seventeenth birthday. In 2012 the Supreme Court issued an opinion holding that a mandatory sentencing scheme, requiring children convicted of homicide to be sentenced to life imprisonment without parole, violated the Eighth Amendment. Montgomery then filed a motion in a state district court arguing his sentence violated his Eighth Amendment rights. The Louisiana Courts denied the motion on the grounds that the new holding does not apply retroactively. The Supreme Court granted Certiorari, and held the decision does apply retroactively. The Court stated when the Court establishes a substantive constitutional rule, that rule must apply retroactively because such a rule provides for constitutional rights that go beyond procedural guarantees. The rule at issue here was a substantive rule because it prohibited the imposition of a sentence of life without parole for juvenile offenders. 136 S.Ct. 718 (2016).

### **Weary v. Cain**

The issue of this case is whether the defendant's due process rights were violated when the prosecution failed to disclose relevant evidence that would have supported his innocence. In 1998, a man was murdered, and a man who was currently incarcerated, Scott, implicated defendant. Scott gave the police a statement, but changed his facts four times upon realizing his statement did not match

with the facts of the case. Scott testified at trial and admitted he had changed his statement a number of times. Another witness also admitted he had made statements to the police he later had to amend. The state offered no physical evidence, but instead provided circumstantial evidence. After the conviction, information emerged that the prosecution had withheld evidence. The State knew a witness had made statements while in jail that he wanted to see the defendant get convicted. Another inmate recanted his statement that he had witnessed the murder, as Scott had coerced him to make the statement. Another witness only sought to testify in exchange for a plea deal. Finally, the court refused to admit medical records that would have contradicted the story of the witnesses.

On appeal the court affirmed stating he would not have been prejudiced even if his due process rights were violated. The Supreme Court said in *Brady v. Maryland* that a failure by the prosecution to admit evidence material to the defendant's guilt is a violation of the defendant's due process rights. The Supreme Court criticized the Louisiana court for analyzing each piece of evidence in isolation as opposed to the cumulative nature of the evidence. The court said the State court did not fully appreciate the materiality of the evidence that was not admitted. If the jury had been aware of all the facts not presented at trial, the court suspects the jury would have decided the case in a different way. Therefore, because the defendant's due process rights were violated, the refusal of post-conviction relief was reversed. 136 S.Ct. 1002 (2016).

## Mullenix v. Luna

Plaintiffs sued a police officer after he shot Israel Leija. After engaging police officers in a high-speed chase, Leija called the police dispatcher, saying he was planning to shoot the police officers. Trooper Mullenix decided to shoot Leija's car in order to disable it, even though he had no training in this action and had never done so before. He then radioed the pursuing officers and his supervisor informing them of his plan, but did not wait for a response before exiting his vehicle. When Leija's car approached, Mullenix fired six shots. The car struck spike strips, hit the median, and rolled several times. It was later determined Leija died as a result of Mullenix' shots, four of which struck his body and none of which struck the car's radiator, hood, or engine block.

The Supreme Court determined Mullenix was entitled to qualified immunity. The doctrine of qualified immunity shields officers from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known. A clearly established right is one "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Here, there was no clear legal precedent that governed the exact situation at hand. The Court pointed out the legal precedent for excessive force claims are murky at best as each claim is fact intensive. Mullenix's actions were not clearly unreasonable as it would have been impossible to make such a legal analysis mentally with the amount of time he had. 136 S.Ct. 305 (2016).

## **U.S. v. Citgo Petroleum Corp.**

CITGO Petroleum Corporation (CITGO) was convicted of several misdemeanors under the Migratory Bird Treaty Act (MBTA). To conduct its oil-water separation treatment process, CITGO had two large tanks containing oil. The district court found CITGO guilty of three counts of taking migratory birds for leaving the tanks uncovered, allowing birds to land and perish inside. On appeal, CITGO argued that the definition of “taking” only criminalizes acts related to hunting or poaching, not omissions or inactions that unintentionally result in bird deaths. The Fifth Circuit agreed with CITGO, stating that, under common law, to “take” is to “reduce those animals, by killing or capturing, to human control.” Because the MBTA made no attempt to alter this definition, the Court held that, in order to “take”, the defendant must undertake an affirmative action to kill or control a bird, and that no strict liability applies for an unintentional death. 801 F.3d 477 (5th Cir. 2015).

## **State v. Oxendine**

On September 1, 2012, officers on patrol came across a group of dove hunters. When one of the officers asked to see defendant’s license, defendant became hostile and uttered profanities at the officers. Defendant claimed he did not need a hunting license and the officers were “trampling on his rights”. Defendant received a citation for hunting without a license. Two days later the incident repeated itself. Defendant then filed a pretrial motion to prevent the North Carolina Wildlife Commission from issuing a citation on him because he is a Native American and thus exempt from the requirement to

obtain a hunting license. The motion was denied and defendant was found guilty. Defendant appealed, arguing for a jury instruction that read: “For the defendant to have unlawfully and willfully committed the offense of hunting [without] a license, you must consider if he was exempt from getting a license under the exemption.” However, the appellate court upheld the verdict, finding that there was no evidence at trial to show that defendant belonged to a tribe or that he told the officers anything to that effect. 775 S.E.2d 19 (N.C. Ct. App. 2015).

## **Risner v. Ohio Dep’t of Natural Resources**

At issue here was whether the Ohio Department of Natural Resources (ODNR) has the authority to seek civil restitution for the value of an illegally taken deer under Ohio statute. Responding to reports that appellant was hunting on private property without permission, officers found entrails from a deer. They took a sample from the organs and went to a local meat locker where the appellant had taken a deer. The officers confiscated the deer meat and antlers and performed tests showing that the organs, meat, and antlers belonged to a single deer. The trial court convicted appellant of poaching and ordered him to pay a \$200 fine, \$90 restitution for the processing fee, and \$55 in court fees. They also sent appellant a letter for restitution in the amount of \$27,851.33 and suspended his hunting license until the full amount was paid. Appellant claimed that the ODNR confiscated the deer in lieu of restitution and violated the Ohio constitution. The trial court agreed, stating that the ODNR could not seek restitution.

The appellate court reversed, and the Ohio Supreme Court affirmed, holding that the statute unambiguously expressed a legislative intent not to qualify ODNR authority to seek civil restitution. 42 N.E.3d 718 (Ohio, 2015).

### **Estrada v. State**

At issue here is whether the Alaska Department of Fish and Game (ADFG) was required to follow standard notice-and-comment procedure under Alaska's Administrative Procedure Act when setting the annual limit on a fish subsistence permit.



Courtesy PIXNIO

Subsistence fishing of sockeye salmon prior to ADFG's changes was limited to 25 fish annually—an unsustainable level, according to a 2001 departmental study. In 2002 and 2004, the residents of Angoon agreed to a moratorium on fishing, which the Department found ineffective. In May 2007, the Department decided to reduce the amount of sockeye allowed to be taken with a subsistence permit from 25 to fifteen. No notice-and-comment procedure took place as required by the APA before promulgating a regulation.

Four defendants were arrested for possessing 148 salmon while only being permitted to take fifteen each. Defendants contended the fifteen-fish limit was invalid because the Department had not gone through notice-and-comment. The trial court concluded that the permit limitation was a regulation as defined in the APA. The appellate court reversed, determining that the Alaska Board of Game had the authority to enact regulations authorizing the Department to impose terms or conditions on fishing permits that restrict harvest level.

The Supreme Court granted review, and discussed two key elements of regulation: 1) whether a provision implements, interprets, or makes specific the law enforced by the state agency; and 2) whether the practice affects the public. The Department contended that the regulation was an internal policy, but the court found that the procedure imposed a general requirement on the public that restricted its liberties while fishing. This type of procedure required ADFG to issue notice of the specifics of an impending regulation and provide an opportunity to comment. Because ADFG did not do this, the regulation was held invalid and the charges dismissed. 362 P.3d 1021 (Alaska 2015), *reh'g denied* (Jan. 6, 2016).

### **For Further Reading: *Inside the Equal Access to Justice Act***

Lane Kisonak

The Equal Access to Justice Act (EAJA) allows a party to a lawsuit against the United States government to recover the cost of litigation and attorney's fees upon winning

all or part of a case.<sup>100</sup> EAJA provides for awards as to the part(s) of the case in which a claiming party prevails.<sup>101</sup> Because EAJA can be invoked even in the event of a settlement entered by the presiding judge, this particular provision makes it incumbent upon attorneys to bill their hours with an exacting eye. Routinely invoked by environmental nongovernmental organizations (NGOs) after judgments, EAJA draws on tax dollars and therefore came into effect with the requirement that annual reports on EAJA awards be submitted to Congress.<sup>102</sup> However, with the cessation of reporting in 1995, these reports are only available from 1982 to 1994.<sup>103</sup>

Over the past two decades, EAJA has facilitated conservation litigation by providing NGOs with attorney's fees upon the entry of a favorable judgment or consent decree.<sup>104</sup> At times, the pace of litigation challenging the conservation decisions of agencies like the U.S. Fish and Wildlife Service (FWS) has strained agency resources and drawn on funds that could otherwise be used to engage in wildlife and habitat protection.<sup>105</sup> When agencies settle before trial to minimize these strains—as has become routine—EAJA intertwines adjudication and rulemaking in a phenomenon commonly called “sue-and-settle.”<sup>106</sup> A consent decree resulting from a case of sue-and-settle traditionally forces the defending agency to make a decision on the matter at issue, but does not require that the agency make a particular choice

among decisions.<sup>107</sup> These decrees, however, often delay conservation and undermine public input into the regulatory process.<sup>108</sup>

The funding and organizational challenges facing FWS and its partner agencies require practitioners of conservation and environmental law to consider every type of legal solution to the ever-present dilemmas of Endangered Species Act (ESA) listing and public lands use. For example, when FWS strives to comply with a 2011 multidistrict litigation settlement (MDL) and receives a notice of intent to sue from NGOs regarding many of the species covered by said MDL, the goals of streamlining the listing process and complying with statutory deadlines come to loggerheads. To be sure, federal budget sequestration is unlikely to ease matters.<sup>109</sup>

Lowell Baier's treatment of the statute—*Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats* (Rowman & Littlefield, 2016)—offers a comprehensive account of EAJA's history, ubiquity, and weaknesses, and concludes by articulating the choice our government will face:

At what point is slickpot peppergrass, the giant Palouse earthworm or the Arapahoe snowfly more important to save from extinction, than the West's

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<sup>100</sup> 28 U.S.C. §2412(a)-(b).

<sup>101</sup> §2412(b).

<sup>102</sup> Lowell Baier, *INSIDE THE EQUAL TO JUSTICE ACT: ENVIRONMENTAL LITIGATION AND THE CRIPPLING BATTLE OVER AMERICA'S LANDS, ENDANGERED SPECIES, AND CRITICAL HABITATS* 128 (2016).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 409.

<sup>105</sup> *Id.* at 275-77.

<sup>106</sup> See Ben Tyson, *An Empirical Analysis of Sue-and-Settle in Environmental Litigation*, 100 VA. L. REV. 1545 (2014).

<sup>107</sup> *Id.* at 1551.

<sup>108</sup> Baier, *supra*, at 369-70.

<sup>109</sup> Candee Wilde, *Evaluating the Endangered Species Act: Trends in Mega-Petitions, Judicial Review, and Budget Constraints Reveal a Costly Dilemma for Species Conservation*, 25 VILL. ENVTL. L.J. 307, 329-30 (2014).

economy and lifestyle that are iconic in America's heritage and character and part of our national identity? ... Eventually Congress will be forced to react by some unprecedented event or calamity in an attempt to find a way to balance the country's biodiversity and its demands for natural resources.<sup>110</sup>

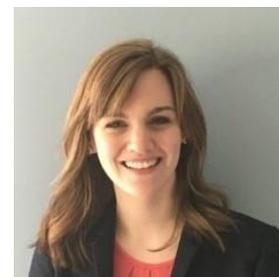
**Brittney Ellis** is a current Michigan State University College of Law student and is expected to graduate in 2018. She graduated from Lake Forest College in 2014 with a bachelor's degree in Environmental Studies and plans on pursuing a career in environmental law. She can be reached at [ellisbr5@msu.edu](mailto:ellisbr5@msu.edu).



**Megan A. Enter** is a member of the Michigan State University College of Law class of 2017. She is interested in the fields of suretyship and procurement law, having gained practical experience throughout her law school career at the Michigan State Housing Development Authority. Her work there involved legal issues of historic preservation and the development of procurement policy.



**Gabrielle Fournier** is an expected spring 2017 graduate of Michigan State University College of Law, and is interested in regulatory affairs and a career in the Washington, D.C. area.



**Joshua Jackson** is currently a second-year student at Michigan State University College of Law, and is interested



## Author Biographies



**Kevin Brick** is a third-year student at Michigan State University College of Law, hoping to pursue a career in

the U.S. Navy and eventually end up back in his home of western New York.

**Delaney Callahan** is part of the Michigan State University College of Law class of 2018, and graduated from Calvin College with a Bachelor of Science in biology in 2015. She is primarily interested in pursuing intellectual property law. She can be reached at [delcallahan@gmail.com](mailto:delcallahan@gmail.com).

**Jeffrey Caviston** is a second-year law student at Michigan State University College of Law, with a background in public policy. In his spare time, he enjoys sailing, biking, hiking, playing music, and watching MSU sports.



<sup>110</sup> Baier, *supra*, at 505.

in working in business law after graduation. He can be contacted at [jack1330@msu.edu](mailto:jack1330@msu.edu).

**Lane Kisonak** is the Legal Strategy Attorney for the Association of Fish and Wildlife Agencies. He previously clerked at Oceana, Inc., Law Offices of Carolyn Elefant PLLC, and the U.S. Senate Judiciary Committee. He graduated in 2016 from the George Washington University Law School, and is licensed to practice law in the District of Columbia. He can be reached at [lkisonak@fishwildlife.org](mailto:lkisonak@fishwildlife.org).



Department of Revenue, where he also interned while in law school. Chris is the Vice-Chair of the Association of Fish and Wildlife Agencies legal committee, a position he has held since 2006.

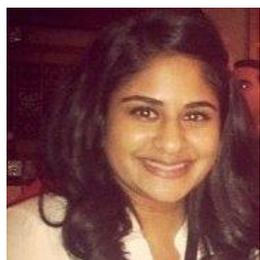
A graduate of Missouri Southern State College and the Washburn University School of Law, he proudly served in the United States Army as an airborne infantryman in Panama and a tour in Iraq with the 101st Airborne Division. Chris is a 2013 Leadership Kansas graduate as well as a commissioned law enforcement officer with the KDWPT.



He is an avid hunter and angler and has hunted and fished in most of the western United States, some Canadian

provinces, Africa and Asia. He is a life member of Safari Club International and the National Rifle Association. Chris is also a hunter education instructor and is active in recruiting youths and novices to hunting.

Chris lives in Overland Park, Kansas with his son and daughter, Gage and Taylor.



**Sheila Murugan** is a fourth-year JD/MBA student at Michigan State University College of Law. With an interest in health care, she aspires to work for an

organization such as the National Institutes of Health (NIH) or Centers for Disease Control and Prevention (CDC). She can be contacted at [sheila.murugan9@gmail.com](mailto:sheila.murugan9@gmail.com).

**Heather Olson** is in her second year at Michigan State University College of Law and is concurrently studying to get her master's degree in social work. In her free time, she enjoys backpacking, hiking, and training dogs.

**Chris Tymeson** is the Chief Legal Counsel for the Kansas Department of Wildlife, Parks, and Tourism, and has been with the agency for 17 plus years. Prior to that, he was an attorney with the Kansas

**Kalie Tyree** is a third-year student at Michigan State University College of Law. She is the President of the MSU Law Federalist Society, Vice President of the Bull Moose Conservation Law Society, and has competed in Moot Court.

After graduation, she hopes to practice litigation in the conservation law field.



## About Wildlife Law Call

Carol Bambery assigned these case summaries and articles to her Fall 2016 wildlife law course at Michigan State University College of Law (photographed below). The students chose recent fish- and wildlife-related decisions and emerging issues to summarize for this 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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