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WILDLIFE LAW CALL

WINTER 2021 WILDLIFE LAW

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THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION

Joshua Hoebeke

The North American Model for Wildlife Conservation (Model) is hailed as the "best single effort to conserve and manage wildlife in perpetuity that the world has ever seen."[1] This success is attributed to the Model's unique design of positioning outdoorsmen as the stewards of the very animals and resources that they appreciate. As a result of the Model's implementation, an extraordinary amount of diverse wildlife live and thrive in North America today.[2]

The Model is exactly that- a model; based on seven distinct, interrelated principles, transferable between regions and generations.[3] The model and its historic accomplishments are largely attributed to North American hunters and anglers, who continue to primarily support and fund the conservation efforts made possible by the model today.[4]

[5]

1) Wildlife Is A Public Resource

Since the age of the Roman Empire, the question of who may own and access wildlife has been debated.[6] The Model provides the answer- the public.[7] Today, the idea of public ownership is embedded into American law as the Public Trust Doctrine.[8] Animals are essentially owned by the state, which has trustee-like duties to manage the populations for the good of all people.[9] As a result, continental-wide approaches to wildlife conservation are possible through government authority to create law and enter into treaties, and all citizens are empowered to shape policies governing wildlife use and protection through the democratic process.[10]

2) Markets for Game are Eliminated

In the latter half of the nineteenth century, the commercial sale of dead wildlife was a booming industry.[11] Commercial exploitation of dead wildlife drove many species to extinction or severe depletion.[12] Concerns over these practices led to the passage of the Lacey Act in 1900, which effectively eliminated wildlife markets.[13] By eliminating legal trafficking in dead wildlife, many species were saved from possible extinction.[14]

3) Allocation of Wildlife by Law

While the commercial use of dead wildlife is eliminated, other uses are still permissible, which raises the question of how the rights governing wildlife use should be allocated. Under the Model, these rights are allocated by democratic rule of law, as opposed to by custom or birthright.[15] As a result, every citizen has the opportunity and responsibility to participate in the formation of wildlife policy, placing wildlife firmly in the cradle of democracy.[16]

4) Wildlife May Only be Killed for Legitimate Purposes

Although the Model establishes law as the tool through which all citizens are given access to wildlife and through which wildlife use is allocated, guidelines were needed to define appropriate uses.[17] Four uses have been identified as appropriate when killing wildlife: (1) for food; (2) for fur; (3) in self-defense; and (4) to protect property.[18]

5) Wildlife Is an International Resource

Wildlife and fish do not respect the borders of states and nations, and, therefore, the North American Model recognizes them as international resources.[19] The proper management of species that migrate freely across these boundaries is through international treaties and laws.[20] This reality was first recognized under American law through the passage of the Migratory Bird Treaty Act of 1918, which labeled certain species of birds as international resources shared by the U.S. and Canada.[21]

6) Science Is the Basis for Wildlife Policy

Since its inception, North American society has shown a deep appreciation of science and natural history.[22] Accordingly, science was recognized as a critical requirement of wildlife management at the earliest stages of the North American

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[1] Ontario Federation of Anglers and Hunters, *Opportunity for All – The Story of the North American Model for Wildlife Conservation* (Aug. 11, 2015), https://www.youtube.com/watch?v=G4yCr0d6LnY.
[2] *Id.*
[3] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (2018).
[4] Ontario Federation of Anglers and Hunters, *supra* note 1.
[5] Photo from *Association of Fish & Wildlife Agencies.*
[6] Ontario Federation of Anglers and Hunters, *supra* note 1.
[7] North American Model of Wildlife Conservation, *supra* note 3.
[8] Ontario Federation of Anglers and Hunters, *supra* note 1.
[9] ERIC FREYFOGLE, ET AL., WILDLIFE LAW: A PRIMER (2019).
[10] Ontario Federation of Anglers and Hunters, *supra* note 1.
[11] *Id.*
[12] *Id.*
[13] *Id.*; *see* 16 U.S.C. §§ 3371-78.
[14] Ontario Federation of Anglers and Hunters, *supra* note 1.
[15] *Id.*
[16] North American Model of Wildlife Conservation, *supra* note 3.
[17] *Id.*
[18] Ontario Federation of Anglers and Hunters, *supra* note 1.
[19] North American Model of Wildlife Conservation, *supra* note 3.
[20] Ontario Federation of Anglers and Hunters, *supra* note 1.
[21] *Id.*; 16 U.S.C. §§ 703-12.
[22] Ontario Federation of Anglers and Hunters, *supra* note 1.

Model's development.[23] Because of the government's role as trustee of wildlife resources for the benefit of the public, the model requires governmental decisions concerning the management of these intricate resources to be based on the best available science, not on opinion or conjecture.[24]

7) Democracy of Hunting

Under traditional European law, only wealthy landowners enjoyed the right to hunt.[25] In fact, many of the early settlors who left Europe to build new lives for themselves in the "New World" of North America sought to escape the confines of this European tradition, favoring a new system in which access to wildlife resources was considered a sacred right.[26]

The Model reflects this idea.[27] Every man, regardless of social or economic status, has equal opportunity under the law to hunt, fish, and trap wildlife.[28] Because people value what they have access to and neglect what they do not value, this principle has proven to be a fundamental component of conservation.[29]

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PRINCIPLE 1: WILDLIFE IS A PUBLIC RESOURCE

EXPANSION OF THE PUBLIC TRUST DOCTRINE TO COMBAT CLIMATE CHANGE

Cody Belland

The Public Trust Doctrine (PTD) under the North American Model says that ownership of wildlife should be held in trust by the states for the benefit of current and future generations. The origins of the PTD can be traced back to Roman civil law which was later adopted by the English in the Magna Carta.[31] English law placed natural resources, including wildlife, in the king's ownership, as a trustee for the nation. English common law was brought to the United States in its founding and along with it, came the concept of the PTD.[32] In the United States, this "trustee" status was ascribed to the individual states in *Martin v. Waddell*, and *Illinois Central Railroad Co. v. Illinois* held that each state in its sovereign capacity holds permanent title to all submerged lands within its borders and holds their lands in public trust.[33]

While it is often asserted that the PTD is an essential element of North American wildlife law, courts have generally declined to extend public trust doctrine to upland wildlife and their habitat. Recently, however, a nationwide environmental campaign to use the PTD as a vehicle to bring lawsuits against state governments in the context of climate change has begun. In these cases, the plaintiffs are attempting to expand the PTD to apply to additional resources beyond submerged and submersible lands underlying navigable waters. Expanding the PTD to additional resources is likely to have major implications on wildlife in the United States.

In a case from 2014, *Kanuk v. Alaska Department of Natural Resources*, six Alaskan teenagers (acting through their guardians) filed a suit claiming that the State had violated its duties under the Alaskan Constitution and the PTD; although the PTD holds navigable waters within a state's geographical boundaries in trust, the plaintiffs argued that the doctrine also applies to the atmosphere and that Alaska must protect its atmosphere for future generations, especially in the face of significant and potentially disastrous climate change.[34] The Alaskan Supreme Court acknowledged that the plaintiffs make a good case that the atmosphere is an asset of the public trust, but said that declaring the atmosphere to be subject to the PTD "would have no immediate impact on greenhouse gas emissions in Alaska, […] nor would it protect the plaintiffs from the injuries they allege in their complaint."[35] The teenagers ultimately lost this case, but the suit brought up an interesting question of whether the public trust doctrine should apply to additional resources.

In a more recent case, *Chernaik v. Brown*, two young Oregonians relied on an expanded view of the PTD and brought action against the Governor and State of Oregon arguing that "the state was required to act as a trustee […] to protect various natural resources in Oregon from substantial impairment due to greenhouse gas emissions."[36] The plaintiffs sought a judicial declaration that would expand the PTD to include all waters of

[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] North American Model of Wildlife Conservation, *supra* note 3.
[28] *Id.*
[29] *Id.*
[30] Photo from *Association of Fish & Wildlife Agencies.*
[31] John F. Organ, *The North American Model of Wildlife Conservation and the Public Trust Doctrine*, IN NORTH AMERICAN WILDLIFE POLICY AND LAW 125, 126-27 (Boone and Crocket Club, 2018).
[32] *Id.*
[33] *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842); *Ill. C. R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892).
[34] *Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1090-91 (Alaska 2014).
[35] *Id.* at 1102.
[36] *Chernaik v. Brown*, 367 Or. 143, 147 (2020).

the state, fish and wildlife, and the atmosphere.[37] However, in October of 2020, the Oregon Supreme Court ruled that the PTD only encompasses submerged and submersible lands underlying navigable waters and the navigable waters themselves.[38] While the court ultimately ruled against the expansion of the PTD, the court stated that it "can be modified to reflect changes in society's needs" and "did not foreclose the idea that the public trust doctrine may evolve to include more resources in the future."[39]

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As concerns over climate change continue to grow, we can expect to see an increase in lawsuits across the country based on similar PTD expansion claims. While we do not know how courts may rule on the PTD in the years to come, it is certain that expanding the doctrine to other resources, such as atmosphere, land, habitat, and wildlife, would impact wildlife and state governance. Climate change can have direct impact on wildlife by causing habitat disruptions, shifting life cycles, and altering migration patterns. With that in mind, it would seem that expanding the PTD would be beneficial to wildlife through the related climate change lawsuits. However, there is also the possibility that expanding the PTD to include wildlife could have unintended consequences that make wildlife management more difficult. For example, an expansion of the PTD to wildlife could upset long-settled expectations regarding private property, which could discourage investment in wildlife habitat improvement and conservation, which are both crucial for effective management. Additionally, expansion could increase the power of courts, giving them the ability to override the executive branches of government or legislatures who arguably have greater authority to speak for the people and decide the public's interest. We can only speculate as to what effect an expansion of the Public Trust Doctrine would have on wildlife in reality, so monitoring the relevant environmental cases and claims to expand the doctrine are important.

PACIFIC RIVERS V. BUREAU OF LAND MANAGEMENT

Shane Preston

In 2016, after a four-year revision process, the Bureau of Land Management (BLM) issued updated Regional Management Plans (Plans) and an Environmental Impact Statement (EIS) regarding the protection of fish habitat and related ecosystems in Western Oregon.[41] The National Marine Fisheries Service concurrently issued a Biological Opinion (Opinion) concluding the Plans "were 'not likely to jeopardize' endangered or threatened species or critical habitat."[42] Pacific Rivers, an environmental interest group, claims the Plans, EIS, and Opinion all violated the Administrative Procedure Act, Endangered Species Act, and/or National Environmental Policy Act.[43]


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The court rejected Pacific Rivers claim because the government did not violate the mandate to use the best scientific and commercial data available.[45] The EIS was not legally deficient because BLM reasonably took the required "hard look" at the consequences.[46] Additionally, during the process of developing the new Plans, EIS, and Opinion, BLM held thirty-eight public outreach events, took vast amounts of input from local, state, and federal government entities, and consulted with nine Indian tribes over four years.[47] Ultimately, the District court granted summary judgment to the government and the Circuit Court affirmed.[48]

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[37] *Id.* at 149.
[38] *Id.* at 156.
[39] *Id.* at 156; *Id.* at 166.
[40] Photo of Habitat Enhancement from NWTF.org.
[41] *Pac. Rivers v. BLM*, 815 Fed.Appx. 107, 108 (9th Cir. 2020).
[42] *Id*.
[43] *Id.*
[44] PWA Partners with Pacific Rivers Council in Sucker Creek and Illinois River. Illinois River Watershed, Southern Oregon. (October 17, 2020) pacificwatershed.com/news-events/pwa-partners-pacific-rivers-council-sucker-creek-and-illinois-river.
[45] *Id*. at 109.
[46] *Id*. at 110.
[47] *Id.* at 108.
[48] *Id.* at 110.

The first principle of the North American Model of Wildlife Conservation is that wildlife is a public resource.[49] In the Unites States, wildlife is considered a public resource, independent of the land or water where wildlife may live. State government has a role in managing that resource on behalf of all citizens and to ensure the long-term sustainability of wildlife populations, which is to be based on scientific data (Principle 6 of the Model). The amount of time that BLM took to work with all stakeholders on such a big policy is rational given the responsibilities under the North American Model.

COUNTY OF MAUI, HAWAII V. HAWAII WILDLIFE FUND

Shannon Masington

The Hawaii Wildlife Fund and other environmental groups brought a successful citizens' suit under the Clean Water Act (CWA)[50] against the County of Maui (Maui) in an effort to prevent Maui from pumping partially treated water into the ground.[51] Th groups alleged, among other things, that Maui discharged a pollutant into navigable waters without the required permit.[52] The CWA forbids an addition of any pollutant from "point sources" to "navigable waters" without an appropriate permit from the Environmental Protection Agency (EPA).[53] Point source pollution means a "single identifiable source" of pollution, such as a pipe.[54]

[55]

Maui maintains a wastewater reclamation facility that collects sewage from surrounding areas, then partially treats it, and pumps approximately 4 million gallons of this water into the ground through wells each day; this water then travels through the groundwater to the Pacific Ocean.[56] The environmental groups alleged that Maui violated the CWA by not obtaining a permit from the EPA before "discharging" a "pollutant" to "navigable waters."[57] However, Maui maintained that a permit is only required if a *point source* ultimately delivers the pollutant to navigable waters.[58] The District Court found that the discharge from Maui's wells into the nearby groundwater was "functionally one into navigable water."[59] The Ninth Circuit affirmed, stating that a permit is required when "pollutants are *fairly traceable* from the point source to a navigable water."[60]

Upon review, however, the Supreme Court found that the statutory context limits the reach of the phrase "from any point source" to a range of circumstances narrower than that which the Ninth Circuit's "fairly traceable" interpretation suggests.[61] The statute's structure indicates that, as to groundwater pollution and nonpoint source pollution, Congress left substantial responsibility and autonomy to the States and did not give EPA authority that could interfere with the state's responsibility.[62] "The statute's words reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater."[63] Ultimately, in reversing the lower courts' decisions, the Supreme Court concluded that the statutory provisions at issue required a permit only when there is direct discharge from a point source or when there is the "functional equivalent of a direct discharge" from the point source into navigable waters.[64] This phrase is meant to capture Congress's intent regarding when a federal permit is required-

> an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.[65]

The holding of the Supreme Court is encompassed in the North American Model of Wildlife Conservation's first pillar-

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[49] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, /www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (2018).
[50]The Clean Water Act establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. 33 U.S.C. §§1251.
[51] *County of Maui, Hawaii v. Hawaii Wildlife Fund Et. Al*., 140 S.Ct. 1462 (2020).
[52] *Id.* at 1465.
[53] *Id*. at 1468.
[54] Point Source, NATIONAL OCEAN SERVICE (last visited Dec. 15, 2020) oceanservice.noaa.gov/education/tutorial_pollution/03pointsource.html.
[55] Photo from *Water Encyclopedia* depicting a point source.
[56] *County of Maui*, supra note 51 at 1469.
[57] *Id*. at 1465.
[58] *Id.* at 1473.
[59] *Id*. at 1469.
[60] *Id.* (quoting 886 F.3d 737, 749 (2018)).
[61] *County of Maui* at 1470.
[62] *Id.* at 1471.
[63] *Id*. at 1476.
[64] *Id.*
[65] *Id.*

Wildlife is a Public Resource.[66] State wildlife agencies have been tasked with the responsibility of managing publicly owned wildlife resources through this doctrine unless federal law states otherwise. The CWA authorizes the EPA to study the issue, share information with and collect information form the States, and issue monetary grants.[67] Specifically, the Supreme Court expressed doubt "that Congress intended to give EPA the authority to apply the word 'from' in a way that could interfere as seriously with States' traditional regulatory authority, authority the Act preserves and promotes, as the Ninth Circuit's 'fairly traceable' test would."[68]

GRAND CANYON TRUST V. PROVENCIO

Robert Matthews

This case, the decision of which has been appealed to the Ninth Circuit, demonstrates the first pillar of the North American Model of Wildlife Conservation: that wildlife is a public resource, and that the government is responsible for managing that wildlife for the benefit of all citizens.

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Background

Six miles south of the Grand Canyon lies the beginnings of a seventeen-acre uranium mine.[70] The Canyon Mine was first proposed in 1984, and after the completion of environmental impact studies, the United States Forest Service approved the plan in 1986.[71] Appeals were filed challenging the approval, but were ultimately rejected by the Ninth Circuit in 1991.[72] Ultimately, only surface structures and 50 feet of the planned 1,500 foot shaft were constructed because of low uranium prices in 1992.[73] The mine was maintained but inactive until 2011, when Energy Fuels Resources informed the Forest Service that it intended to resume its mining operations under the original 1986 plan.[74] The Forest Service reviewed the original plan and determined that "the effect of resumed operations on wildlife and any threatened, endangered, or sensitive species," among other impacts, was sufficiently accounted for by the original plan.[75] Consequently, a lawsuit was filed by environmental groups and the Havasupai Tribe, claiming that, among other violations, the Forest Service was wrong not to conduct a new environmental impact study.[76]

Analysis on Wildlife Conservation Measures

There were two main wildlife concerns in the area: the local elk population's foraging and water resources would be displaced by the Canyon Mine's operation, and the likelihood that California condors[77] would be attracted to the mine and then adversely affected by its waste.[78] The environmental groups and Havasupai Tribe argued that the necessary steps required to protect the condor population was not factored into the cost estimate under the 1986 plan.[79]

Regarding the elk population, the original plan required that Energy Fuels "replace 32 acres of elk foraging habitat" and replace the water source.[80] In total, under the 1986 environmental impact study, this was estimated to cost roughly $14,500.[81] Regarding the condor population, the plan was less specific about protection methods. The U.S. Fish and Wildlife Service recommended that mine employees be advised to avoid condor interaction and that evaporation ponds at the mining site be made inaccessible to condors.[82] However, those were merely recommendations; the 1986 plan did not include specific instruction. Energy Fuels suggested that this could be done by "covering the ponds with a net."[83] Ultimately, the court concluded that the environmental groups and the Havasupai Tribe failed to "meet their burden of showing that the omission was harmful."[84]

[66] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (2018).
[67] *Id.* at 1471.
[68] *Id.*
[69] Canyon Mine www.fs.usda.gov/detail/kaibab/home/?cid=FSM91_050263.
[70] *Grand Canyon Trust v. Provencio*, 467 F.Supp.3d 797, 801 (D. Ariz. 2020).
[71] *Id.* at 801-02.
[72] *Id.* at 802.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 803.
[76] *Id.* at 801, 803.
[77] A critically endangered species.
[78] *Grand Canyon Trust*, *supra* note 70 at 814.
[79] *Id.* at 811, 814.
[80] *Id.* at 814.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 823.

Impact

This decision highlights a duality of the government's ability to protect the first pillar of the North American Model of Wildlife Conservation. On one hand, it demonstrates that the government can be capable of balancing industrial interests that benefit humans while still devising a workable plan to preserve wildlife for the enjoyment of all. But on the other hand, it calls into question whether the government fulfills its duty responsibly by choosing to operate on an environmental impact premise that may be outdated by thirty-four years. At the time of this article's writing, the Ninth Circuit Court of Appeals awaits the submission of the appellants' brief. If the decision is upheld and it is found that a new environmental impact study was not required to re-open the Canyon Mine, a question of proper scientific management may be raised.

PRINCIPLE 3: ALLOCATION OF WILDLIFE BY LAW

STATE OF OREGON V. STOCKERT

Shane Preston

In this case, a hunter was convicted of a wildlife crime after shooting at a deer decoy.[85] The fake deer was put into place by Troopers from the Oregon Department of Fish and Wildlife and the hunter shot the decoy one hour before sunrise, which is thirty minutes before legal shooting light/time.[86] The hunter challenged if shooting a decoy should in fact be considered *hunting*, because the main issue is whether a person attempts to take wildlife if they shoot at a decoy.[87] The appellate court upheld the trial court conviction and said attempting to take wildlife includes shooting a decoy.[88] The parties' arguments focused on statutory interpretation, and whether the legislature intended that the presence of a live animal was a necessary condition for the purposes this statute; according to legislative testimony and history, the statute was designed to capture this situation.[89]

The court first looked at a common dictionary definition of hunting: "to follow or search for game or prey for the purpose and with the means of capturing or killing."[90] In Oregon, the statute was similar: hunting includes acts intended to kill, capture, or pursue wildlife, whether successful or not.[91] Put simply, a person is hunting when they are engaged in the hunt- the scouting, tracking, pursuing, and killing or capturing of wildlife. That they are ultimately unsuccessful in those efforts does not render them not hunting. The legislative history also showed that the Oregon legislature contemplated decoys and decided to include them as another took to help prosecute offenders.[92] One Sergeant testifying on behalf of the legislation said the purpose of the wildlife enforcement decoys is to save wildlife by apprehending the violator before killing true wildlife.[93]

[94]

The third principle in the North American Model of Wildlife Conservation is that wildlife should be allocated by law.[95] Additionally, wildlife is a public resource managed by government.[96] As a result, access to wildlife for hunting is through legal mechanisms such as set hunting seasons, bag limits, license requirements, etc. In *Stockert*, the state government was managing the wildlife and proactively looking to catch wildlife law violators. The effort of the state aligns with the North American Model of Wildlife Conservation. Without the effort of the state, the deer (and wildlife in general) would not be allocated and managed.

PRINCIPLE 4: KILLING FOR LEGITIMATE PURPOSES

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS V. TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND

Amelia Pezzetti

The 2020 Netflix documentary "Tiger King," which features two big cat facilities, engendered nationwide awareness and conversation regarding the inhumane treatment of protected

[85] *State v. Stockert*, 303 Or.App. 314 (Apr. 2020).
[86] *Id.* at 316.
[87] *Id.* at 317.
[88] *Id.* at 323.
[89] *Id.* at 322.
[90] *Stockert*, *supra* note 85 at 320.
[91] *Id.* at 319; *See also* ORS 496.004.
[92] *Stockert*, *supra* note 85 at 322.
[93] *Id.* at 322-23.
[94] Photo from *Walmart.com* of a *Delta Decoys Intruder 3D Deer Target.*
[95] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (2018).
[96] *Id.*

species under the Endangered Species Act ("ESA").[97] However, People for the Ethical Treatment of Animals, Inc. ("PETA") has been publicizing and taking legal action to protect these types of endangered species long before this recent nationwide attention.[98] In 2017, PETA brought an action against Tri-State Zoological Park of Western Maryland, Inc. ("Tri-State") alleging a "take" of tigers, lions, and lemurs under the ESA.[99] A "take" violation occurs under the ESA when a protected species is harassed, harmed, pursued, hunted, shot, killed, trapped, captured, or collected.[100] The notion of "take" is reflected in the North American Model of Wildlife Conservation that "[w]ildlife can be killed only for a legitimate purpose," encompassing that some forms of "take" shall be illegal due to their illegitimate purpose and as a violation of conservation efforts and waste of shared resources.[101]

 [102]

Tri-State owned two lemurs, five tigers, and two lions, all species protected under ESA.[103] Between 2016 and 2019, five of the nine animals died under Tri-State's ownership and care.[104] The United States District Court for the District of Maryland published an Opinion that contained a lengthy findings of fact section that detailed Tri-State's care of the animals. The Opinion stated that the grounds of the facility were overcome by "filth and feces", ranging from the animal enclosures to the kitchen.[105] The animal's diets were found to be lacking the necessary nutrition due to improperly prepared food, as the food was located near feces and was often expired.[106] The enclosures contained old animal carcasses, piles of feces, and unsanitary water, in addition to the enclosures not being up to standard to sufficiently replicate each species' natural habitat, showing stress in the animals, even rising to the level of causing "permanent psychological and physical injury."[107] The Court detailed the lack of veterinary care provided to the animals, providing ample evidence of lack of trained veterinarians, medical record documentation, preventative care, pain management, and in person examinations.[108] These factual findings showed that the animals had incurred psychological stress, prolonged and severe pain, and physical deterioration .[109]

Unsurprisingly, the Court entered judgement in favor of PETA, finding Tri-State liable for a "take" due to the harassment and harm caused to all nine of the animals at issue.[110] The Court cited factors that affected each animal, including unsanitary living conditions, poor diets, lack of and inappropriate veterinary care, and inadequate shelter and enrichment.[111] Tri-State filed an appeal to the United States Fourth Circuit Court of Appeals on January 7, 2020. The Court stated the violations of the ESA were so egregious that success on appeal was unlikely, that the animals would be irreparably harmed if left in Tri-State's possession, and that Tri-State's actions were contrary to public policy.[112]

NATURAL RESOURCES DEFENSE COUNCIL, INC. V. U.S. DEPARTMENT OF THE INTERIOR

Daniel Trentacoste

This case demonstrates the broad protections for migratory birds under the Migratory Bird Treaty Act. This directly implicates Principle 4 of the North American Model of Wildlife Conservation, because killing is only allowed under conditions acceptable by law.[113]

Until recently, the Department of the Interior (DOI) took the position that the Migratory Bird Treaty Act (MBTA or the Act) prohibited incidental or accidental killing of protected migratory birds.[114] However, in December 2017, the DOI, under the Trump Administration's directive, essentially added an intent requirement for violations of the Act. In

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[97] TIGER KING (Netflix 2020).
[98] *See, e.g., Victory: Roadside Zoo Ordered to Stop Declawing, Exhibiting Lion and Tiger Cubs* (Feb. 13, 2018), www.peta.org/media/news-releases/victory-roadside-zoo-ordered-stop-declawing-exhibiting-lion-tiger-cubs.
[99] *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park, Inc.*, 424 F.Supp.3d 404 (D. Md. 2019).
[100] 16 U.S.C. § 1532(19).
[101] J.F. Organ et al., *North American Model of Wildlife Conservation*, 12-04 U.S. FISH & WILDLIFE SERVICE TECHNICAL REVIEW 1, 18–19 (2012) wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf.
[102] Pictured is one of the female tigers at issue and Robert Candy, owner of Tri-State. Ken Nolan, *PETA sues Tri-State Zoological Park again*, Cumberland Times-News (May 19, 2020).
[103] *People for the Ethical Treatment of Animals*, *supra* note 99 at 408.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 409, 418.
[107] *Id.* at 414-18.
[108] *Id.* at 411-13.
[109] *Id.* at 430-33.
[110] *Id.*
[111] *Id.* at 408.
[112] *Id.* at 434.
[113] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (2018).
[114] Incidental Take Prohibited Under the Migratory Bird Treaty Act, Memorandum M-37041 (Jan. 10, 2017).

Memorandum M-37050 ("the M-Opinion"), the DOI concluded that the "MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."[115] Shortly thereafter, the FWS issued guidance that explained what action was prohibited under the M-Opinion, which implemented the intent requirement.[116]

[117]

The Act makes it unlawful "by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird. . . ."[118] The Act does not define "take," but it commonly refers to an act by which a person achieves possession or control over an animal. The U.S. Fish and Wildlife Agency ("FWS") generally defines "take" to mean "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect."[119] Violating the Act is a strict liability crime and the government does not need to prove that a person acted intentionally in the killing of a protected bird, meaning that many types of industrial businesses can be found liable for violating the Act if a protected bird is killed in the course of everyday business.[120] The FWS regularly investigates causes of incidental takes of migratory birds.[121]

In May 2018, environmental interest groups and several states challenged the M-Opinion, arguing that the DOI's current interpretation of the Act was contrary to the Act's plain language.[122] Judge Valerie Caproni for the Southern District of New York found this argument compelling. Judge Caproni explained that the Act's use of the phrase "by any means or in any manner" in describing the broad term "kill" means that "any killing is a violation, which plainly includes dumping oil waste, building wind turbines, or pressure washing bridges, irrespective of whether those activities are specifically directed at wildlife."[123] The DOI's interpretation in the M-Opinion that only "means" and "manners" directed at birds are prohibited runs counter to that plain language.[124] Judge Caproni added, "[t]here is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds. Nor does the statute prohibit only intentionally killing migratory birds. And it certainly does not say that only 'some' kills are prohibited."[125] She noted that, while Congress could have so limited the Act, it chose not to, and there is no basis to impose such a limitation on the scope of the Act.[126] Thus, this case aligns with the North American Model, in that wildlife is a shared resource that must not be wasted.[127] The incidental and accidental killings of migratory birds is not a legitimate purpose and is unlawful under the Migratory Bird Treaty Act.

PETA v. Wildlife in Need

Jamie VandenOever

Plaintiff in this case, People for the Ethical Treatment of Animals, Inc. (PETA), and Defendants, Wildlife in Need and Wildlife in Deed (WIN), filed cross motions for partial summary judgment, and PETA is seeking a permanent injunction against WIN under the Endangered Species Act (ESA).[128] PETA received a preliminary injunction against WIN in 2018.[129] WIN operates a non-profit exotic animal zoo in Charlestown, Indiana, that houses exotic and endangered

[115] Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, Dep't of the Interior, to Secretary et al., Dep't of the Interior, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take, (Dec. 22, 2017).
[116] Memorandum from Principal Deputy Director, Dep't of the Interior, to Service Directorate, Dep't of the Interior, Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act, (Apr. 11, 2018).
[117] Photo of an Eastern Turkey from NWTF.org.
[118] 16 U.S.C. § 703(a) (2004).
[119] 50 C.F.R. § 10.12.
[120] *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 2020 WL 4605235, 2 (S.D. N.Y. 2020). ("*Nat. Res. Def. Council (2020)*").
[121] *Id*.
[122] *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 397 F.Supp.3d 430, 434 (S.D. N.Y. 2019).
[123] *Nat. Res. Def. Council (2020)*, *supra* note 120 at 8.
[124] *Id.* at 9.
[125] *Id.* at 13.
[126] *Id.* at 14.
[127] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (2018).
[128] *PETA V. Wildlife in Need*, 2020 WL 4448481 (S.D. Ind. Aug. 3, 2020) at 1.
[129] *Id.* at 3.

animals, including big cats.[130] WIN routinely declawed the young big cats, and prematurely separated them from their mothers after birth.[131] The preliminary injunction, until the action regarding the ESA was heard, prevented further separation and declawing.[132]

 [133]

In the matter of the parties' cross-motions for summary judgment, the issue is if WIN violated the ESA.[134] This action was to determine whether WIN was liable under Section 9 of the ESA, which prohibits any person from "taking" any endangered species.[135] "Take" has been expanded to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[136] PETA moved for partial summary judgment on the grounds that WIN harmed, harassed, and wounded big cats both in their actions of declawing the cats and through their separation of the cats from their mothers- WIN insisted neither act violated the ESA.[137] The owners of the roadside zoo regularly declawed their young big cats, as the baby big cats were involved in a program called "Tiger Baby Playtime," where members of the public would have hands-on encounters (playing, interacting, and feeding) with the young cubs in exchange for a monetary donation.[138] The ages of the big cats involved ranged from six to sixteen weeks, so declawing the young big cats allowed for easier handling, but the procedure was never conducted out of medical necessity.[139]

The Court found, based on the aforementioned facts, that WIN defendants harmed and harassed on both grounds.[140] Through "Tiger Baby Playtime," the young big cats are harassed to the point that it significantly disrupts their normal behavior patterns.[141] By having members of the public holding them, preventing them from escaping uncomfortable situations, forcing them to be awake for many hours, and feeding them under conditions of extreme stress- the harassment reaches an extent so that it conducts actual harm, as it actually injures the big cats physically and emotionally.[142] Prematurely separating the baby big cats from their mothers also stressed the immune systems and development, thus constituting a "taking" from normal behavior and development.[143] The declawing of the young big cats also constituted a "taking," as it harmed, harassed, and wounded them without medical necessity, which is a violation of the ESA.[144] The WIN defendants did not provide expert evidence to counter the findings of Plaintiff's experts and the Court, and Plaintiff's motion for partial summary judgment was granted.[145] The Court found that PETA is entitled to a permanent injunction, and will be able to file a motion to place the big cats with a reputable wildlife sanctuary.[146]

The Court, in providing the means for the big cats to seek better treatment, opens up the conversation with the North American Model of Wildlife Conservation. Wildlife shall not be subjected to frivolous uses, especially not for uses that result in their safety and wellbeing being harmed or harassed. "Wildlife is protected from wanton killing, and take is allowed only under conditions acceptable by law."[147]

PRINCIPLE 5: WILDLIFE IS AN INTERNATIONAL RESOURCE

SEA SHEPHERD NEW ZEALAND V. UNITED STATES

Allisyn Mattice-Eskau

Wildlife as an international resource is one of the principles under the North American Model of Conservation and serves as a reminder on how important it is for the *world* to do its part in conservation efforts.[148] The Marine Mammal Protection Act

[130] *Id.* at 2.
[131] *Id.* at 1.
[132] *Id.* at 3.
[133] Photo from Wildlife in Need, https://wildlifeinneed.wordpress.com/.
[134] *PETA V. Wildlife in Need, supra* note 128 at 2.
[135] *Id.* at 1.
[136] *Id.* at 7.
[137] *Id.*
[138] *Id.* at 1.
[139] *Id.* at 1-2.
[140] *Id.* at 13.
[141] *Id.* at 11.
[142] *Id.* at 12.
[143] *Id.* at 11.
[144] *Id.* at 7.
[145] *Id.* at 13.
[146] *Id.*
[147] John F. Organ, *The North American Model of Wildlife Conservation and the Public Trust Doctrine*, IN NORTH AMERICAN WILDLIFE POLICY AND LAW 129 (Boone and Crocket Club, 2018).
[148] John F. Organ et al., *The N. Am. Model of Wildlife Conservation*, 12-04 The Wildlife Soc'y Tech. Review, 1, 11 (Dec. 2012) wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf.

(MMPA) requires incidental kill of marine mammals through "commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."[149] In order to do this, the MMPA develops regulations that limit incidental catch, which both domestic and foreign fisheries must comply with in order to export products to the United States.[150] If incidental take occurs of ocean mammals in excess of the standards, the U.S. must ban products from that commercial fishery.[151] The National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) implements the MMPA.[152]

The Maui dolphin, of which there are only 60 known to be alive, lives around the North Island in New Zealand.[153] Sea Shepherd New Zealand requested a preliminary injunction of the U.S. Department of Commerce under the MMPA for failure to ban the importation of fish products, which is resulting in the incidental take of the Maui dolphin through gillnets and other gear.[154] The defendants asked to remand the matter to the NOAA Fisheries to create emergency rulemaking regarding "new fishery measures implemented by the New Zealand Government (NZG) […] [and] new factual information presented in connection with those measures."[155]

Maui dolphins have an exceptionally low birth rate and studies show that "only one Maui dolphin roughly every 20 years could be removed from the population while still allowing Maui dolphins to reach or maintain their optimum sustainable population."[156] The NZG has implemented numerous threat management plans for its protection and recently created a new plan in October to "extend existing, and create new, areas that prohibit the use of commercial and recreational set-nets," "extend the closure to trawl fishing," "put in place a fishing-related mortality limit of one dolphin," and "prohibit the use of drift nets."[157]

NOAA Fisheries requested a voluntary remand to consider NZG's new measures and determine whether they should implement import restrictions.[158] They argued that "[n]o Maui dolphin has been confirmed to have been stranded due to entanglement in commercial fishing operations since 2013."[159] In determining whether the agency's request for voluntary remand is substantial and legitimate, the court must find "(1) the agency 'provided a compelling justification for its remand request,' (2) the need for finality 'does not outweigh the justification for voluntary remand' and (3) the 'scope of [the] remand request is appropriate.'"[160]

[161]

The court found voluntary remand is warranted due to the new regulations developed by NZG.[162] The new regulations imposed go above those issued in 2019, where a similar petition was brought by plaintiffs but was denied by the defendants, alleging the NZG regulations were insufficient to protect the dolphins.[163] Additionally, the NZG requested a ban on a larger geographical range, since the Maui dolphin's habitat changed.[164] The court found that the NOAA Fisheries would be the best agency to review this information- between a wider ban and the previous NZG measures, "there is no reason to think that NOAA Fisheries would come to the same conclusion with the benefit of this additional information."[165]

The Court's remand allows NOAA Fisheries to review the importation regulations and comparability assessment.[166] The Court will continue to oversee the NOAA Fisheries determination and if it agrees a ban is necessary for the Maui dolphin, "it could be implemented just as, or more rapidly, than if the court proceeded on the preliminary injunction."[167] Therefore, the court held that voluntary remand is appropriate and NOAA Fisheries must look to make a redetermination on emergency rulemaking under the MMPA ban of importation regarding the Maui Dolphin utilizing new information that is supplemented by the New Zealand Government.[168]

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[149] *Sea Shepherd N.Z. v. U.S.*, No. 20-00112, 2020 WL 4719278, at 2 (D.C. Aug 13, 2020).
[150] *See id*.
[151] *See id*.
[152] *See id*.
[153] *Id*.
[154] *See id*.
[155] *Id.*
[156] *Id.* at 2.
[157] *Id.* at 3.
[158] *See id.*
[159] *Id.*
[160] *Id.* at 4.
[161] Photo from www.dw.com/en/are-mauis-dolphins-facing-their-last-chance/a-18532213.
[162] *Sea Shepard N.Z., supra* note 149 at 4.
[163] *See id* at. 2, 4.
[164] *See id.* at 4.
[165] *Id.*
[166] *See id.* at 5.
[167] *See id.*
[168] *See id.*

PRINCIPLE 6: SCIENTIFIC MANAGEMENT

WILDEARTH GUARDIANS V. UNITED STATES FISH & WILDLIFE SERVICE

Shannon Masington

WildEarth Guardians sued the U.S. Fish and Wildlife Service (FWS) on the ground that the FWS's Biological Opinions[169], issued for the protection of the Mexican Spotted Owl, were arbitrary and capricious.[170] This was a pivotal case in addressing the protection of the Owl.

In March of 1993 the FWS listed the Mexican Spotted Owl as a "threatened" species under the Endangered Species Act (ESA).[171] In the listing, the FWS noted that over one million acres of the Owl's habitat had been converted from suitable to "unsuitable… but capable of becoming suitable sometime in the future."[172] At the same time as the listing, the FWS developed the 1995 Recovery Plan to protect conditions and structures used by the Owls. In order to encourage population growth, the Recovery Team also created an "adaptive management" plan, which was depicted as a three-legged stool, supported equally by: 1) population monitoring; 2) habitat monitoring, and 3) management recommendations.[173]

In 2012, prior to the issuance of the 2012 BiOps, FWS issued a revised Recovery Plan which focused on: 1) protecting existing populations; 2) managing habitat into the future; 3) managing threats; 4) monitoring population and habitat; and 5) building partnerships to help facilitate recovery.[174] After issuing the revised Recovery Plan, the FWS released a Biological Opinion which indicated that, since timber harvesting techniques had shifted, thus reducing the threat of loss of habitat, the Mexican Spotted Owl was no longer a threatened species and therefore, the US Forest Service's (USFS) forest management would not jeopardize the continued existence of the Owl.[175] However, in order to be removed from the threatened species list, the ESA imposed mandatory Mexican Spotted Owl population trend monitoring requirements to demonstrate that the Owl's population was stable or increasing.[176] Unfortunately, the Mexican Spotted Owl is difficult to track and the USFS was unable to follow the monitoring necessary to delist the Owl under the ESA.[177]

In order to guarantee protection for threatened and endangered species, wildlife managers and policy makers need to understand how biological systems work and how to monitor and evaluate impacts of management actions. This concept is encompassed in the North American Model of Wildlife Conservation's sixth pillar, "Scientific Management[178]." WildEarth Guardians argues that since the U.S. Fish and Wildlife Service had never engaged in Mexican Spotted Owl population monitoring, stand-alone forest plan measures protecting the Owl's habitat could not be a basis for a "no-jeopardy" determination under the ESA because it would never provide enough scientific information about population trends to allow for delisting, nor an accurate assessment of whether the population range-wide was recovering.[179]

Ultimately, the Court ruled that the FWS's "no-jeopardy" determination with respect to the forest plan failed to account for recovery of the Mexican Spotted Owl by not conducting population monitoring as required by the ESA, and, thus, was unsupported, arbitrary, and capricious.[180]

[181]

HIGH COUNTRY CONSERVATION ADVOCATES V. U.S. FOREST SERVICE

Robert Matthews

This case demonstrates government agencies' responsibility to include reasonable alternatives that align with a project's objectives in detailed study when creating a Supplemental Final Environmental Impact Statement (SFEIS).

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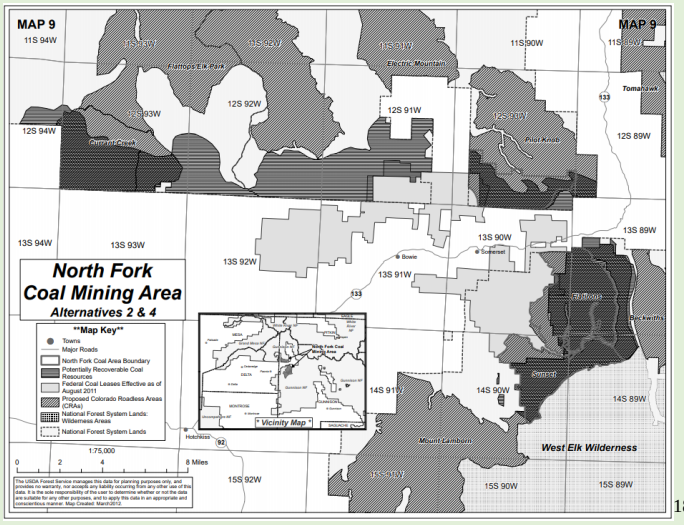
[169] "The Endangered Species Act's formal consultation process culminates in the consulting agency's production of a biological opinion that advises the action agency as to whether the proposed action, either alone or in combination with other effects, would endanger the existence of the listed species or adversely modify its habitat." 50 C.F.R. § 402.14(g)(4).
[170] *WildEarth Guardians v. U.S. Fish & Wildlife Serv*., 416 F.Supp.3d 909, 918 (D.Ariz. 2019).
[171] *Id.* at 920.
[172] *Id*.
[173] *Id*.at 921.
[174] *Id.* at 923.
[175] *Id.* at 922.
[176] *Id.* at 911.
[177] *Id.* at 922.
[178] In order to manage wildlife as a shared resource fairly, objectively, and knowledgably, decisions must be based on sound science such as annual waterfowl population surveys and the work of professional wildlife biologists.
[179] *WildEarth Guardians*, *supra* note 170 at 926.
[180] *Id.* at 909.
[181] Photo from NWTF.org.

Background

Since 2012, the Colorado Roadless Rule has prohibited the construction of roads on approximately 4.2 million acres of National Forest lands in the state.[182] However, an area of land known as the North Fork Coal Mining Area was excepted from this rule, permitting the "construction of temporary roads for exploration and surface activities related to coal mining for existing and future coal leases" in that area.[183]



[184]

In 2016, Mountain Coal Company requested a coal lease in this "North Fork Exception," and the United States Forest Service (USFS) and the Bureau of Land Management (BLM) issued an SFEIS and approved the requests.[185] Environmental organizations brought this suit, alleging that the USFS and BLM agencies violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) "by unreasonably eliminating alternatives from detailed study in the North Fork SFEIS."[186]

The North Fork Exception "includes parts of three roadless areas: Pilot Knob, Sunset, and Flatirons."[187] After the 2012 adoption of the Colorado Roadless Rule, the USFS and BLM granted Mountain Coal a lease to mine in the Sunset Roadless Area.[188] This spurred NEPA complaints from environmental groups and resulted in two court cases, both finding NEPA violations by the USFS and BLM.[189] This case, *High Country Conservation Advocates v. U.S. Forest Service*, is the third installment in the saga.[190]

Following these cases, conservation groups requested that the USFS consider an alternative to the Mountain Coal lease that would permit road construction in the Sunset and Flatiron areas but would preserve the Pilot Knob Roadless Area.[191] This "Pilot Knob Alternative" would protect 5,000 acres of roadless, forested area while still allowing mining access to 14,800 acres containing 128 million tons of coal.[192] The USFS and BLM refused to consider the alternative in its detailed study, and ultimately chose to allow roads to be constructed throughout the entire North Fork Exception, which allowed access to 172 million tons of coal.[193]

Discussion

The court held that the USFS and BLM violated NEPA by eliminating the Pilot Knob Alternative from detailed study, finding that the agencies' failure to do so was arbitrary and capricious.[194] Under NEPA, a federal agency must take a pause before undertaking a project "and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives."[195] These alternatives to a proposed action must be included in the Environmental Impact Statement that is required under NEPA.[196]

The court determined that eliminating the Pilot Knob Alternative was not reasonable because the alternative fell within the agencies' statutory mandate, and because the alternative reflected the agencies' objectives for the project.[197] The bulk of the court's reasoning hinged on the agencies' objective stated in the North Fork SFEIS, which said that the purpose and need for reinstating the North Fork Exception is to "provide management direction for conserving about 4.2 million acres of [Colorado roadless areas] while addressing the state's interest in not foreclosing opportunities for exploration and development of coal resources in the North Fork Coal Mining Area."[198]

The court noted that this particular objective for the North Fork Exception "echoes the USFS's general statutory mandate of balancing multiple possible uses."[199] By eliminating the Pilot Knob Alternative from the study and deciding to allow road

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[182] Special Areas; Roadless Area Conservation; Applicability to National Forests in Colorado, 77 Fed. Reg. 39,576 (2012).
[183] *Id.* at 39,578.
[184] Map from www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5291712.pdf.
[185] *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217, 1220 (10th Cir. 2020).
[186] *Id.* at 1220-1221
[187] *Id.* at 1221.
[188] *Id.*
[189] See *High Country Conservation Advocates v. U.S. Forest Serv*., 52 F. Supp. 3d 1174, 1181 (D. Colo. 2014); *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1266-67 (D. Colo. 2014).
[190] *High Country Conservation Advocates*, *supra* note 185.
[191] *Id.* at 1221.
[192] *Id.*
[193] *Id.* at 1221-22.
[194] *Id.* at 1222.
[195] *N.M. ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 703 (10th Cir. 2009).
[196] 42 U.S.C. § 4332(C)(iii).
[197] *High Country Conservation Advocates*, *supra* note 190 at 1224.
[198] *Id.*
[199] *Id.*

construction throughout the North Fork exception, the USFS and BLM ignored their objective of conserving roadless areas within the state, which the Colorado Roadless Rule recognizes as "important fish and wildlife habitat[s]."[200]

This outcome aligns with the North American Model of Wildlife Conservation's principle of science as the proper tool for managing wildlife because it reflects the importance of Environmental Impact Studies and their necessity in maintaining fish and wildlife habitats.[201] As shown in this case, government agencies may not ignore alternatives that mitigate damage to wildlife while still allowing for industrial growth. The court's decision to find the USFS and BLM's actions as arbitrary and capricious protected the important scientific pillar of the North American Model of Wildlife Conservation.

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NEW MEXICO FARM & LIVESTOCK BUREAU V. U.S. DEPARTMENT OF INTERIOR

Amelia Pezzetti

Jaguars have long been at issue in political agendas because of the need to balance conservation and recovery of the species with other land usages and priorities.[203] In this case, New Mexico Farm and Livestock Bureau ("Bureau") brought suit against the U.S. Department of Interior regarding such land usage priorities.[204] The Bureau alleged that the U.S. Fish and Wildlife Service's ("Service") designation of two areas in New Mexico and Arizona as "critical habitat" for jaguars under the Endangered Species Act ("ESA") was arbitrary and capricious and; therefore, was invalid.[205] The U.S. District Court for the District of New Mexico ruled in favor of the Service, stating first that it owed deference to the Service on matters of scientific expertise such as the designation of critical habitat, and second, that the Service's alternative determination that the area was an "unoccupied critical habitat" was adequate justification to be designated as a "critical habitat."[206] The ESA defines critical habitat for endangered species as geographical areas "occupied by the species[]at the time it is listed" that are essential to the conservation of the species and "which may require special management considerations or protections."[207] Further, this definition allowed this unoccupied area to be classified as "critical habitat" if it is "essential for the conservation of the species."[208]

In 1972, the Service listed only the *foreign* jaguar as a protected endangered species under ESA's precursor, the Endangered Species Conservation Act.[209] The Service stated in 1980 that the failure to list *domestic* jaguars was an "inadvertent oversight," and domestic jaguars were ultimately listed as an endangered species in 1997.[210] Furthermore, in 2014, the Service designated, under the ESA, six (6) units of land, constituting over 760,000 acres in New Mexico and Arizona, as "critical jaguar habitats."[211] The Bureau claimed that the designation of Unit 5 and Unit 6 of this area was based on inadequate data that the Service used to conclude this area may have been occupied by jaguars during this time period.[212] The data, provided by the Service, stated that jaguars were only spotted in those areas in 1995, 1996, and 2006, with no sightings prior to this period.[213]


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[200] Special Areas; Roadless Area Conservation; Applicability to National Forests in Colorado, 77 Fed. Reg. 39,576 (2012).
[201] North American Model of Wildlife Conservation, U.S. Fish Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (2018).
[202] Photo of Habitat Enhancement from NWTF.org.
[203] Staci Matlock, Jaguar Recovery Efforts Lack Support from Federal Agency, The New Mexican (Jan. 17, 2008), santafenewmexican.com/SantaFeNorthernNM/Jaguar_recovery_efforts_lack_support_from_federal_agency.
[204] *New Mexico Farm and Livestock Bureau v. U.S. Dep't. of Interior*, 952 F.3d 1216, 1221 (10th Cir. 2020).
[205] *Id.*
[206] *Id.*
[207] 16 U.S.C. § 1532(5)(A).
[208] *New Mexico Farm and Livestock Bureau*, *supra* note 204 at 1221.
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] David Briggs, *Critical Habitat – An Ineffective Way to Protect the Jaguar*, Arizona Daily Independent (June 12, 2016), arizonadailyindependent.com/2016/06/13/critical-habitat-an-ineffective-way-to-protect-the-jaguar.

On Appeal , the U.S. Court of Appeals for the Tenth Circuit determined that, despite the use of the word "foreign" in the Service's list of endangered species under the Endangered Species Conservation Act, foreign and domestic jaguars were one "species" under the ordinary meaning of the word, and thus the listing date of domestic jaguars as protected endangered species was 1972 .[215] Second, the Appellate Court ruled that the designation as a "critical habitat" was arbitrary and capricious due to the lack of factual evidence of jaguar presence between 1962 and 1982, the ten years (estimated average lifespan of the species) before and after the listing date of the jaguar as endangered.[216] Lastly, the Service argued that, even though the Court determined the area was unoccupied, Unit 5 and 6 could be protected under the ESA because the area was "unoccupied critical habitat."[217] The Court rejected this argument, stating that the Service failed to meet the higher standard that the critical habitat, which was determined to not be occupied at the time, were "inadequate to ensure the conservation of the species."[218] Thus, the Appellate Court reversed the District Court decision affirming the Service's designation of Unit 5 and Unit 6 as "critical habitat" for the endangered jaguar, holding that the designation was arbitrary and capricious.[219] This case is an excellent example of the court's usage of science as a tool to analyze, regulate, and manage wildlife in accordance with the North American Model of Wildlife Conservation.[220]

CENTER FOR BIOLOGICAL DIVERSITY V. ROSS, SECRETARY OF COMMERCE

Allisyn Mattice-Eskau

As an endangered species, only about 400 right whales exist today.[221] In order to ensure its protection, the National Marine Fisheries' Services (NMFS) issued a 2014 Biological Opinion (BiOp) regulating the commercial lobster fisheries service, which often catch right whales in their fishing gear.[222] The 2014 BiOp did not contain an incidental take statement, which is required by the Endangered Species Act (ESA).[223] Without an issued BiOp though, the lobster fisheries industry would be required to close.[224] The district court held that the NMFS did not follow the ESA and therefore, the 2014 BiOp was invalid, meaning that the court is faced with determining what the lobster fisheries must do while a new BiOp is created.[225]


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The Center for Biological Diversity and the Massachusetts Lobstermen's Association agree that the agency should have until early 2021 to create a new BiOp.[227] However, they disagree on (1) whether they should have until January 31 or May 31 of 2021 to create the new rule; (2) whether the court should vacate or remand the BiOp; and (3) whether lobster fisheries should be paused while the rule is being created.[228]

1. Deadline for a New BiOp

Under the Marine Mammal Protection Act, NMFS must create a take-reduction plan for endangered marine mammal species, such as the right whale.[229] The Atlantic Large Whale Take Reduction Team has been working on regulations to reduce incidental take by lobster fishing gear prior to the court ruling due to a higher number of right whale deaths in 2017.[230] Unfortunately, this has taken longer than the conservation groups anticipated, but will likely be done by May 31, 2021.[231] Additionally, the winter months are often slower for the lobster industry, the COVID crisis may impact agency review time, and the groups did not provide any critical difference between the two possible deadlines.[232] Thus, the new BiOp must be issued by May 31, 2021.[233]

2. Vacate 2014 Biop, Relief Stayed Until May 31, 2021

Consequently, the court held to vacate the 2014 BiOp, but relief stayed until May 31, 2021. The court considered "the seriousness of the [action's] deficiencies (and thus the extent of

[215] *New Mexico Farm and Livestock Bureau*, *supra* note 204 at 1225.
[216] *Id*. at 1226.
[217] *Id*. at 1227.
[218] *Id*. at 1231.
[219] *Id*. at 1233.
[220] J.F. Organ et al., *North American Model of Wildlife Conservation*, 12-04 U.S. FISH & WILDLIFE SERVICE TECHNICAL REVIEW 1, 20–23 (2012) wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf.
[221] *Ctr. for Biological Diversity et al., v. Ross*, No. 18-112, 2020 WL 4816458, at 1 (D.C. Aug. 19, 2020).
[222] *Id.*
[223] *Id.* at 2.
[224] *See id.*
[225] *See id.*
[226] Photo from www.fisheries.noaa.gov/species/north-atlantic-right-whale.
[227] *Ctr. for Biological Diversity*, *supra* note 221 at 2.
[228] *See id.*
[229] *Id.*
[230] *See id.*
[231] *See id.* at 3.
[232] *See id.* at 7.
[233] *See id.*

doubt whether the agency chose correctly)" and "the disruptive consequences of an interim change that may itself be changed."[234] In this case, the agency violated the ESA by not including an incidental take report and the error was serious because NMFS found that three or more right whales could be killed yearly from lobster fisheries equipment.[235] However, the second prong did not have much consideration since the change will not occur until a new BiOp is issued.[236] The court did issue a warning though that any further extensions by the agency would not be considered favorably.[237]

3. Denial of Injunctive Relief off the Coast of Massachusetts

The plaintiffs requested immediate relief through permanent injunction to close "lobster fishery south of Nantucket Island."[238] For a permanent injunction, the court must find that there is irreparable harm to the right whale.[239] The plaintiffs met this standard by showing seven right whales in the last three years were entangled in the area off the coast of Massachusetts and that the industry has the potential to kill three right whales annually.[240]

Congress has provided NMFS with the authority to be the expert to determine whether the area should be prohibited for lobster fishing as a management tool.[241] The deliberate Take Reduction Plan process by the NMFS is much better suited than allowing the court to intervene.[242] The court held that to close down the fishing area would be "intrusive" and "disruptive" to the current regulatory process.[243]

Lastly, the lobster fishermen and the survival of communities must be taken into consideration for the balance of harms.[244] Due to the COVID-19 crisis and its impact on the lobster industry, permanent injunction would have a financial hit to many lobster fishermen with a closure of fishing off the coast.[245] Therefore, it is not justified.[246]

Conclusion

In order to sustain the right whale population, the court properly denied the 2014 BiOp and provided the agency with the adequate time necessary to ensure the best protection of the whale is provided.[247] The court concluded that the agency is the proper entity to ensure science is taken into consideration when determining the Take Reduction Plan and the closure of certain fishing locations, not the court.[248] This court utilized the principles of the North American Model of Wildlife Conservation to not only legally review this case, but to ensure protection and sustainability of the right whale and the lobster fishery industry.

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CROW INDIAN TRIBE V. UNITED STATES

Daniel Trentacoste

This case concerns the protections of Yellowstone National Park's grizzly bear populations under the Endangered Species Act and demonstrates the complexity of removing protections for a particular species once it is added to the Endangered Species List. This implicates Principle 6 of the North American Model of Wildlife Conservation that Science is the proper tool to discharge wildlife policy. Wildlife managers and policymakers need to understand how biological systems work and how to monitor and evaluate impacts of management actions. They must also be objective and transparent in the use of facts that form the basis for decisions.

The protection of grizzly bears in the Greater Yellowstone Ecosystem was one of the original goals and successes of the Endangered Species Act ("ESA") and served as one of the incentives for the passage of the ESA.[250] These bears were labeled as a distinct population segment ("DPS") under the ESA, meaning that Yellowstone's grizzlies were a distinct population of grizzly bear separate from the rest, which allows the United States Fish and Wildlife Service ("FWS") to further the ESA's purpose of protecting endangered and threatened species by narrowly tailoring their decisions to protect these distinct populations of bears.[251] The FWS followed up this designation for grizzly bears with the Grizzly Bear Recovery Plan in 1982, which identified six different, geographically

[234] *See id*. at 5.
[235] *See id*.
[236] *See id*. at 6.
[237] *See id*. at 8-9.
[238] *Id.* at 9.
[239] *Id.* at 10.
[240] *See id*.
[241] *See id*. at 12.
[242] *See id*.
[243] *See id*.
[244] *See id*. at 14.
[245] *See id.*
[246] *See id.*
[247] *See id*. at 12.
[248] *Id*.
[249] Photo of Habitat Enhancement from NWTF.org.
[250] *Crow Indian Tribe, et al. v. Wyoming*, 965 F.3d 662, 669 (9th Cir. 2020) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183-184 (1978) (citing 119 Cong. Rec. 42,913 (1973)).
[251] *Id.* (quoting 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996)).

isolated ecosystems extending from the Greater Yellowstone area, to parts of Idaho and Montana, the North Cascades area of Washington, and into Southeast British Columbia.[252]

The ESA's protections for these bears has been so successful in Idaho, Montana, and Wyoming that, for the last 15 years, the FWS has been trying to have the Yellowstone's grizzly bears' designation as a DPS removed from the list, while still retaining protections for other grizzly bear populations.[253] The FWS first tried to delist the Yellowstone grizzly population in 2007.[254] Doing so would remove federal protections and allow grizzly bears to be hunted if found outside the national park.[255]

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Jamie VandenOever

The appellant in this case, the FWS, brought forth an appeal on the aspects of delisting of the Greater Yellowstone grizzly bears; which requires a study of the effect of delisting on the remaining, still listed, grizzly population outside of the Yellowstone area.[257] Other agencies, as well as the states of the Yellowstone region, have also intervened on the government's behalf.[258] The appellees consist of the Crow Indian Tribe and other environmental and tribal groups.[259] The lower court held:

1. FWS "failed to adequately consider the impact of delisting the remnant grizzly population",
2. FWS acted "contrary to the best available science when it determined that the Yellowstone grizzly was not threatened by a lack of genetic diversity", and
3. FWS was at fault for "failing to include a commitment to recalibration in the event a different population estimator were to be adopted."[260]

On the first finding, the appellants contend that the remand is too harsh, and that the district court's order for a "comprehensive review" of the effect of delisting on the remnant species is broader than that required by Section 4 of the ESA.[261] Section 4(a) outlines factors that are necessary for reviewing the status of a species listed as "threatened," which the Court agrees is not demanded by the ESA or prior case law.[262] That level of full analysis, as held by the Court, is only required in making a decision to delist, not when reviewing the status.[263] While the Court vacated the order for a "comprehensive review" on the remnant grizzly population, the Court remands the district court to order further examination on the effect from delisting the remnant grizzly population.[264] On the second finding, the FWS concluded that genetic concerns did not pose a threat to the grizzly population in the Greater Yellowstone area, contrary to the course laid out by the agency in 2007 insisting that the Yellowstone grizzly's long-term genetic diversity would be threatened without further actions taken, such as migration.[265] The 2007 Rule, based on the best available science, corroborated the scientific studies from the 2017 Rule: the Yellowstone grizzly's genetic health is a threat in the long term.[266] The district court held that it was the responsibility of the FWS to act in accordance to the science and commit to future action that adequately factors for alleviating a threat of endangerment.[267] The Court affirmed the district court's ruling that the 2017 Rule is arbitrary and capricious and remands to FWS for inclusion of adequate measures for long-term protection.[268]

FWS did not appeal on the third finding, as the appellants accept the district court's order to include a commitment to recalibration.[269] Intervenors did appeal, arguing their commitment to the current population estimator and that planning for another future estimator that requires recalibration would be unnecessary and speculative.[270] The Court affirmed the district court's holding that the statement is necessary regardless of present intent to remain with the present

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[252] *Id.* at 672 (quoting 2017 Rule, 82 Fed. Reg. at 30,508–09).
[253] *Id.* at 670.
[254] *Id.*
[255] Maggie Caldwell, *Bears in the Crosshairs: Inside Earthjustice's case to decide the fate of Yellowstone's iconic bears* (Jan. 17, 2019), earthjustice.org/features/yellowstone-grizzly-bears-in-the-crosshairs.
[256] Photo from www.nps.gov/yell/learn/nature/grizzlybear.htm.
[257] *Crow Indian Tribe*, *supra* note 250 at 670.
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.* at 675.
[262] *Id.* at 678.
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.* at 679.
[267] *Id.* at 680. (The Court reasoned that simply listing the Yellowstone grizzly again if FWS's delisting proves to be successful is not a sufficiently adequate regulatory mechanism to ensure long-term genetic health.)
[268] *Id.*
[269] *Id.* at 681.
[270] *Id.*

estimator, as it impacts the future of the Yellowstone grizzlies.[271] The Court's reliance on science as the proper tool for wildlife policy is directly influenced by the North American Model of Wildlife Conservation. Utilizing the best science practices allows for wildlife management to be objective, fair, and ensures the longevity of the Yellowstone grizzly population.


[272]

WESTERN WATERSHEDS PROJECT V. BERNHARDT

Katherine Wheeler

Grizzly bears have been a threatened species for the last fifty years, their protection and conservation is very important to several recovery ecosystems in the lower-48 states.[273] According to three conservation organizations, the killing of these bears would be detrimental to this continued conservation. In 2020, three non-profit conservation organizations, Western Watersheds Project, Yellowstone to Uintas Connection, and the Alliance for the Wild Rockies sued the Secretary of the Interior, the Fish and Wildlife Service, and the Forest Service, challenging the 2019 Biological Opinion and Incidental Take Statement that was issued by the FWS.[274] The groups contested the portion of the Biological Opinion that allowed ranchers to move their cattle through an enclosure within the Upper Green River Area Rangeland Project (UGRA Project) and was the sole habitat area of the Kendall Warm Springs dace, an endangered fish species.[275] The challenge to the incidental take statement is the focus of this brief.

The FWS's incidental take statement authorized the lethal removal of 72 grizzly bears over a period of ten years, with a review every three years, from the UGRA Project.[276] UGRA is a government developed area with livestock grazing allotments, located within the Greater Yosemite Ecosystem, and the grizzly bear population has increased significantly in this area since becoming a threatened species in 1975.[277] When a species is considered threatened under the Endangered Species Act, take is only permitted under three circumstances: other reasonably possible means of removing the grizzly bear have been exhausted, taking is done in a humane manner, and the take is reported to the FWS within five days.[278] In 2019, the incidental take statement authorized the removal of grizzly bears because of their interference with the livestock that are permitted to graze within UGRA.[279]

In this case, the Court ultimately denied the motion because the organizations failed to show that there would be irreparable harm if the killing of the bears was allowed to continue.[280] The Court decided the case for four reasons. It to the increase in the population of the grizzly bear, plaintiff's lack of hurry in filing the lawsuit, their failure to show that great harm would likely occur, and the FWS's preference for non-lethal measures, and only using lethal measures when other efforts have failed.[281] This case was decided in accordance with the sixth principle of the North American Model of Wildlife Conservation which instructs that science be used to make conservation decisions. The FWS clearly utilized science when making their decision to allow a certain number of grizzlies to be killed because the bear must meet certain qualifications, specifically being a nuisance, before the bear can be taken, they put into place measures to keep the bears out, and will capture and move the bears before killing them.[282]


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[271] *Id.*
[272] Photo of "capture & collar" from Bear-Tracks.org.
[273] Endangered Species | Mammals – Grizzly Bear, U.S. Fish & Wildlife Service (last accessed Jan. 14, 2021), www.fws.gov/mountain-prairie/es/grizzlybear.php.
[274] *Western Watersheds Project v. Bernhardt*, 468 F.Supp.3d 29, 1 (2020).
[275] *Id.*
[276] *Id.* at 3.
[277] *Id.* at 1-2.
[278] *Id.* at 3.
[279] *Id.*
[280] *Id.* at 12.
[281] *Id.* at 11-14.
[282] *Id.* at 14.
[283] Photo from *Association of Fish & Wildlife Agencies*.

NATIONAL WILDLIFE FEDERATION V. SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

Joshua Hoebeke

The North American Model provides that, under the Public Trust Doctrine, the government holds wildlife resources in trust for the benefit of the public.[284] Accordingly, the model encourages the government to make decisions involving wildlife and land management based upon sound science and in a transparent manner.[285] The Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA) further this idea.

The ESA ensures decisions involving wildlife and land management are based upon sound environmental science by requiring federal agencies to consult with environmental authorities before engaging in any discretionary decisions to "insure" such decisions are "not likely to jeopardize the continued existence of any endangered species or threatened species"[286] and ultimately issue an opinion to the agency that addresses how the proposed action will impact endangered species and critical habitats.[287] Similarly, NEPA furthers the scientific management principle by requiring federal agencies to prepare an environmental impact statement, a public document that details the direct and indirect environmental effects of an agency's decision as well as how these environmental considerations influenced such decision, before making major discretionary decisions that will significantly impact the environment.[288]

In this case, the National Wildlife Federation (NWF) challenged the decision of the Pipeline and Hazardous Materials Safety Administration (PHMSA)[289] to approve two oil spill response plans submitted by Enbridge Energy Company, an oil pipeline operator, because PHMSA did not comply with the ESA or NEPA before making such decision.[290] The court held PHMSA was not required to comply with the ESA or NEPA because the agency had no choice but to approve Enbridge's plans under the Clean Water Act (CWA).[291]


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Enbridge's Pipeline: "Line 5"

The oil spill response plans at issue involved Enbridge's pipeline known as "Line 5."[293] For over sixty years, Line 5 has transported oil across the bottom of the Straits of Mackinac, the body of water that serves as the border between Lakes Huron and Michigan, on a route beginning in Wisconsin and ending in Ontario, Canada.[294] According to environmental researchers, a worst-case scenario spill from Line 5 in the Straits of Mackinac would "release 32,000 to 58,000 barrels of crude oil into the Great Lakes and put 47 wildlife species and 60,000 acres of habitat at risk."[295] Because of these environmental and wildlife concerns, NWF argued PHMSA was required to comply with the ESA and NEPA before it could approve Enbridge's oil spill response plans, which are governed by the CWA.[296]

The Clean Water Act

To ensure oil pipeline operators are adequately prepared for potential oil spills, the CWA prohibits such operators from transporting oil through their pipelines until they develop a PHMSA-approved oil spill response plan.[297] Under the CWA, these plans have six requirements[298], and PHMSA "shall . . . approve any plan" that satisfies the requirements.[299]

Between 2015 and 2020, Enbridge submitted two different response plans for Line 5, as required for the pipeline's continued operation under the CWA.[300] Without consulting environmental authorities under the ESA or preparing an environmental impact statement under NEPA, PHMSA approved both plans after concluding each plan satisfied the

[284] Boone and Crockett Club, North American Wildlife Policy and Law, 125 (Bruce D. Leopold et al. eds., 2018).
[285] *Id.* at 130.
[286] 16 U.S.C. § 1536(a)(2).
[287] § 1536(b)(3)(A).
[288] 42 U.S.C. § 4332(C); *Nat'l Wildlife Fed'n v. Sec'y of Dep't of Transp.*, 374 F. Supp. 3d 634, 655-56 (E.D. Mich. 2019).
[289] PHMSA is the federal agency responsible for regulating interstate oil pipelines.
[290] *Nat'l Wildlife Fed'n v. Sec'y of Dep't of Transp*., 960 F.3d 872, 875 (6th Cir. 2020).
[291] *Id.* at 880.
[292] Photo from MIBiz.com.
[293] *Nat'l Wildlife Fed'n*, *supra* note 290 at 874.
[294] *Id.*
[295] Beth LeBlanc, *Study: Line 5 'Worst-Case' Spill Would Hit 400 Miles of Great Lakes Shoreline*, The Detroit News (July 19, 2018, 11:27 AM), www.detroitnews.com/story/news/local/michigan/2018/07/19/study-line-5-worst-case-spill-would-impact-400-miles-shoreline/800191002/.
[296] *Nat'l Wildlife Fed'n*, *supra* note 290 at 875.
[297] *Id.* at 874.
[298] *See* 33 U.S.C. § 1321(j)(5)(D)(i)-(vi).
[299] § 1321(j)(5)(E)(iii).
[300] *Nat'l Wildlife Fed'n*, *supra* note 290 at 875.

CWA's statutory requirements.[301] In response, NWF sued, alleging PHMSA's approvals violated the ESA and NEPA.[302]

Endangered Species Act & National Environmental Policy Act

NWF argued that PHMSA was required to consult with environmental authorities before approving Enbridge's oil spill response plans under the ESA to ensure the plans adequately protected the wildlife and critical habitats of the Great Lakes.[303] Likewise, NWF argued that PHMSA was required to prepare an environmental impact statement before approving the plans under NEPA because an oil spill from Line 5 would significantly impact the Great Lakes environment.[304] However, the court disagreed because the requirements under both acts only apply to discretionary agency decisions, not to decisions mandated by law.[305]

The language of the CWA provides that PHMSA "*shall*" approve any plan that satisfies the Act's six enumerated requirements.[306] The use of "shall," meaning must, rather than a permissive term, such as "may," indicates a statutory mandate.[307] Accordingly, upon concluding Enbridge's plans met the CWA's statutory requirements, the CWA did not provide PHMSA the discretion to approve such plans; instead, the Act mandated the approval.[308] Therefore, the court reasoned, PHMSA's approval did not constitute discretionary agency action and, consequently, neither ESA nor NEPA applied.[309] Thus, the court held that PHMSA's approval did not violate the ESA or NEPA.[310]

Conclusion

Because an oil spill in the Great Lakes presents serious risks to wildlife and critical habitats, the North American Model would encourage PHMSA to make its decision based upon sound environmental science and in a transparent manner, both of which would have been achieved if compliance with the ESA and NEPA was required. Unfortunately, the language of the CWA prevented this outcome, which raises the question of whether an amendment to the CWA should be considered.

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PRINCIPLE 7: DEMOCRACY OF HUNTING

STATE V. BARTON

Rachel Tackman

This case looks at whether multiple offenses of Oregon wildlife law should be merged into only one charge.[312] Barton was charged with eight counts of violating wildlife law in connection with two instances of taking and possessing buck deer without a hunting permit.[313] Barton argued that the violations should all be considered as one violation instead of eight since they all relate to the same statute.[314] He claimed that the trial court made a mistake when it concluded that the taking charges (Counts 7 and 8) did not merge with the possession charges (Counts 1 and 3).[315]

Background

Trooper Andrews with Oregon State Police's Fish and Wildlife Division began his investigation into the Barton in November 2015.[316] Despite not obtaining deer tags for the years 2015 and 2016, Andrews found several examples of Barton posting evidence of buck deer he had killed on Facebook.[317] Based off

[301] *Id.*
[302] *Id.*
[303] *Id.* at 876-78.
[304] *Id.* at 879-80.
[305] *Id.* at 880.
[306] § 1321(j)(5)(E)(iii).
[307] *Nat'l Wildlife Fed'n*, *supra* note 290 at 876.
[308] *Id.* at 875-76.
[309] *Id.*
[310] *Id.* at 880.
[311] Photo from NWTF.net
[312] *See generally State v. Barton*, 468 P.3d 510, 512 (Or. 2020).
[313] *See id.* at 513.
[314] *See id.* at 514.
[315] *See id.*
[316] *See id.*
[317] *Id.* at 513.

of the evidence from the pictures, including the Trooper's knowledge about visible tissue and blood of the deer, Andrews determined that Barton had unlawfully taken two buck deer without a license or tag.[318] After obtaining a search warrant to search Barton's home, Barton admitted to Andrews that he had unlawfully taken two bucks, one in November 2015 and the other in October 2016.[319]

Analysis

Both Oregon Revised Statutes 161.067(1) and (3) require charges to be merged only if the violations were committed during the same criminal episode or by the same conduct.[320] According to the court, two crimes are considered part of the same criminal episode if they are "cross-related," which means that "a complete account of each crime necessarily include details of the other."[321] The state argued that "the crimes … were not cross-related because each pair involved one conviction for possessing a deer in violation of wildlife laws and another conviction for taking the deer in violation of wildlife laws."[322] The court decided that Barton's possession of the bucks furthered his primary and overarching objective to unlawfully take state wildlife for his own use.[323] Because of this, the court determined that the conduct underlying the possession and taking charges (Counts 1 and 7) for the 2016 buck and the possession and taking charges (Counts 3 and 8) for the 2015 buck were each directed toward a common criminal objective, and were a part of the same criminal episode, and therefore, were eligible to be merged together.[324] The court also looked to legislative intent, and concluded that the legislature did not intend to treat a person's taking and possession of wildlife as violating more than one statutory provision, thus confirming that taking and possession should be merged.[325]

Conclusion

The court decided that the trial court was mistaken when it did not allow the merging of taking and possessing to allow for a single conviction for Barton's conduct of unlawfully taking the 2016 buck, and a single conviction for Barton's conduct of unlawfully taking the 2015 buck, since these together accurately portray the nature and extent of the Barton's actions.[326] Therefore, this court decided that the taking and possession of wildlife is to be included in the same charge in the state of Oregon.[327]

This case represents the North American Model democracy of hunting principle. Hunting is available to all citizens, but is a privilege provided to the public so long as the laws related to government regulation of wildlife are obeyed. Barton has a right to hunt, but was punished because he broke the law by failing to obtain a hunting license before taking deer.

[328]

CURRENT EVENTS

BAITING AND THE NORTH AMERICAN MODEL

Katherine Wheeler

Chronic Wasting disease is a disease affecting deer. It spreads primarily through prions[329] that exist in saliva, urine, feces, and infected carcasses and can survive in the environment for up to ten years.[330] There is no known treatment or vaccine, affected animals will eventually die from the disease, and it's often difficult to visually discern which animals are impacted as they do not show signs until late stages of the disease.[331] Some of these symptoms are weight loss, tremors, drooping ears, stumbling, and tremors.[332] CWD has been detected in 26 different states and Canada.[333] Often, animals harvested from impacted animals must be checked for CWD before being

[318] *Id.*
[319] *Id.*
[320] *Id.* at 516.
[321] *Id.*
[322] *Id.* at 517.
[323] *Id.*
[324] *See id.*
[325] *See id.* at 518.
[326] *Id.* at 522.
[327] *See generally id.*
[328] Photo from NWTF.org.
[329] Prions are protein particles that are responsible for the spread of brain diseases like CWD, Mad Cow, Scrapies (in sheep).
[330] Center for Disease Control, *Prion Diseases*, www.cdc.gov/prions/index.html (last visited Nov. 30, 2020); Wyoming Game and Fish Department, *Chronic Wasting Disease Monitoring and Surveillance*, (2020), wgfd.wyo.gov/WGFD/media/content/PDF/Vet%20Services/CWD_flyer_Surveillance-and-Monitoring-Revised-2020_1.pdf.
[331] Wyoming Game and Fish Department, *Chronic Wasting Disease Monitoring and Surveillance*; Congressional Sportsmen Foundation, Chronic Wasting Disease (CWD), congressionalsportsmen.org/policies/state/chronic-wasting-disease-cwd (last visited Nov. 30, 2020).
[332] Congressional Sportsmen Foundation, Chronic Wasting Disease (CWD), congressionalsportsmen.org/policies/state/chronic-wasting-disease-cwd (last visited Nov. 30, 2020).
[333] *Id.*

consumed.[334] Currently, the Center for Disease Control and the World Health Organization are unsure if CWD can be spread to humans.[335]

Baiting increases the spread of CWD among these animals by artificially congregating deer and changing their eating patterns.[336] Because of this high risk of spread and based on the North American Model of Wildlife Conservation's principles, baiting should be banned to prevent the further spread of CWD. The North American Model has seven principles that should be used when developing laws that are best for the preservation and conservation of wildlife.

The first principle is the public trust doctrine. This instructs that wildlife belongs to the people, and their interest should be protected by the government on the public's behalf.[337] This principle would encourage the ban because a failure to stop the spread of CWD could potentially end hunting of all cervids if the population becomes too infected. This would destroy the ability of future generations to hunt.

[338]

The fifth principle requires the ability for all to hunt and says that hunting should not be done casually, wastefully, or in a way that mistreats the game.[339] Hunting should be done for food and fur, self-defense, or property protection.[340] Many hunters rely on hunting as a form of sustenance for themselves and their families, and without the ability to hunt animals, they could be seriously harmed. The doctrine of fair chase is also included under this principle. This doctrine instructs that the hunter should have a fair, ethical, and lawful approach to the taking of game.[341] Arguably, the use of bait in hunting gives the hunter an improper advantage of the animal.

The third and fourth principles would also encourage baiting to be banned. The third principle requires that science be the managing force behind wildlife control and law making. The fourth principle goes hand in hand with the public trust doctrine, as it requires that allocation of wildlife be done by law. Together, these principles instruct that lawmaking should be done in accordance with what the best science instructs. In the case of CWD, science urges baiting to be banned because of its ability to spread the disease between animals.

Different states have taken different approaches to baiting. Colorado and Idaho both have an outright ban on baiting in big game.[342] CWD has been found in Colorado cervids but not in Idaho.[343] Other states, however, have adopted a partial ban. In Michigan, baiting is banned entirely in the "core CWD surveillance areas" and they do have cases of CWD in deer, which includes all of the lower peninsula, and some parts of the Upper Peninsula.[344] Wisconsin takes a similar approach, allowing baiting in counties where no CWD has been detected in the last 36 months and in adjacent counties with no detection for 24 months.[345] Wyoming, which has a serious CWD problem, allows baiting after issuance of a permit on private land.[346] Pennsylvania, where CWD has been found, prohibits baiting in all areas except Southeastern Pennsylvania where baiting is permitted to aid in the removal of nuisance deer.[347] Nebraska however allows baiting but prohibits hunting over bait piles and they have yet to discover a CWD infected animal.[348] Massachusetts has not found CWD, but has adopted laws that prohibit baiting 10 prior to the beginning of hunting season and during the season.[349] Texas and Kansas both allow

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[334] Wyoming Game and Fish Department, *Chronic Wasting Disease Monitoring and Surveillance*, (2020), wgfd.wyo.gov/WGFD/media/content/PDF/Vet%20Services/CWD_flyer_Surveillance-and-Monitoring-Revised-2020_1.pdf.
[335] *Id*.
[336] Clarissa Kell, *Baiting Ban Shrouded in Confusion, Debate*, THE DAILY NEWS, Nov. 11, 2019, www.ironmountaindailynews.com/news/local-news/2019/11/baiting-ban-shrouded-in-confusion-debate/.
[337] Boone and Crockett Club, *The North American Model of Wildlife Conservation, Sportsmen, and the Boone and Crockett Club*, www.boone-crockett.org/north-american-model-wildlife-conservation#:~:text=The%20North%20American%20Model%20of,the%20Boone%20and%20Crockett%20Club.&text=It%20represents%20how%20%22we%20as,betterment%20of%20wildlife%20and%20people, (last visited Nov. 30, 2020).
[338] Photo from www.usatoday.com/story/news/health/2019/02/16/zombie-deer-chronic-wasting-disease-could-affect-humans/2882550002/.
[339] Boone and Crockett Club, *supra* note 337.
[340] *Id.*
[341] Boone and Crockett Club, *Fair Chase Statement*, www.boone-crockett.org/fair-chase-statement#:~:text=FAIR%20CHASE%2C%20as%20defined%20by,improper%20advantage%20over%20such%20animals, (last visited Nov. 30, 2020).
[342] Melinda Cosgrove, *Chronic Wasting Disease and Cervidae Regulations in North America*, MICHIGAN DEPARTMENT OF NATURAL RESOURCES, (Apr. 2019).
[343] *Id*.
[344] *Id*.
[345] *Id*.
[346] *Id*.
[347] *Id*.
[348] *Id*.
[349] *Id*.

baiting without restriction, but Texas is the only one of the two that has had animals positive for CWD.[350]

Because of the inability to detect CWD in many animals, and its rampant spread, under the North American Model, a substantial case could be made for an outright ban on baiting. This would mean that the model would agree the most with approaches like Colorado and Idaho that entirely ban baiting. Laws like these would preserve the ability to hunt for generations to come, continue to allow people to hunt for sustenance, support a science-backed approach, and disallow the mistreatment of animals. The United States has had a long, successful history of following the North American Model when it comes to conservation, and a ban on baiting would uphold that long standing tradition.

DRILLING IN THE ARCTIC NATIONAL WILDLIFE REFUGE: AT WHAT COST?

Jess Clody

The Arctic National Wildlife Refuge is in the Northeast corner of the great state of Alaska.[351] The Alaska National Interest Lands Conservation Act (ANILCA) of 1980 designated four purposes of the present refuge: "to conserve animals and plants in their natural diversity, ensure a place for hunting and gathering activities, protect water quality and quantity, and fulfill international wildlife treaty obligations."[352] The Refuge is roughly 30,500 square miles and is managed by the U.S. Fish and Wildlife Service.[353] It is home to "42 fish species, 37 land mammals, eight marine mammals, and more than 200 migratory and resident bird species."[354]

Some of the harshest climate conditions have kept most human communities running swiftly to the mainland, yet the indigenous Inupiaq and Gwich'in people have adapted over centuries to thrive in the Kaktovik and Arctic villages of northeastern Alaska.[355] The Inupiaq diet consists of "bowhead and beluga whale, bearded seal, walrus, polar bear, duck, and other mammals" found in the course of subsistence hunting.[356] The Gwich'in people, a tribe of the Athabascan Indians, are known as 'The Caribou People.'[357] Though moose, beaver, and salmon can be found in the Gwich'in diet, the lifestyle of the Gwich'in revolves around the porcupine caribou herd. [358]


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Seemingly most important to the conversation about the Arctic National Wildlife Refuge is the source of hydrocarbon reserves that lay just underneath the land.[360] In 2017, President Donald Trump signed an executive order that approved offshore drilling in the Arctic and Atlantic oceans, areas that were previously protected by the Obama administration with the Outer Continental Shelf Lands Act.[361] To avoid rewriting federal leasing plans, Trump was hoping that the executive order would quickly allow access to the reserves under the Refuge, bumping the economy into high gear.[362] However, in March of 2019, U.S. District Court Judge Sharon Gleason ruled that the executive order was "unlawful and invalid."[363] This meant that the drilling ban would remain intact, forcing the Trump administration to go back to the drawing board.[364] In August of 2019, however, Trump announced his plan to open the coastal plain of the Refuge to drilling.[365] Interior Secretary, David Bernhardt, signed off on the plan, stating that the Refuge drilling could lead to the creation of many jobs and billions in income for the country.[366]

Shortly after the announcement, fifteen states sued the Trump administration for "opening up. . . the Arctic National Wildlife

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[350] *Id.*
[351] *E.g.*, Kenneth Pletcher, *Arctic National Wildlife Refuge*, BRITANNICA, www.britannica.com/place/Arctic-National-Wildlife-Refuge.
[352] *About the Refuge*, U.S. FISH AND WILDLIFE SERVICE (Apr. 10, 2013), www.fws.gov/refuge/Arctic/about.html.
[353] *See* Pletcher, *supra* note 351.
[354] About the Refuge, *supra* note 352.
[355] *See People of the Arctic National Wildlife Refuge*, ALASKA WILDERNESS LEAGUE, www.alaskawild.org/wp-content/uploads/2014/10/People-of-the-Arctic-National-Wildlife-Refuge.pdf.
[356] *Id.*
[357] *Id.*
[358] *Id.*
[359] Photo from Arctic National Wildlife Refuge | Alaska Conservation Foundation.
[360] Pletcher, *supra* note 351.
[361] Juliet Eilperin, *Trump signs executive order to expand drilling off America's coasts: 'We're opening it up.'*, THE WASHINGTON POST (Apr. 28, 2017, 1:26 PM), www.washingtonpost.com/news/energy-environment/wp/2017/04/28/trump-signs-executive-order-to-expand-offshore-drilling-and-analyze-marine-sanctuaries-oil-and-gas-potential/.
[362] *Id.*
[363] Kevin Bohn, *Judge rules Trump executive order allowing offshore drilling in Arctic Ocean unlawful*, CNN POLITICS (Mar. 30, 2019), www.cnn.com/2019/03/30/politics/trump-offshore-drilling-arctic/index.html.
[364] *See id.*
[365] Rachel Frazin, *Trump administration finalizes plan to open up Alaska wildlife refuge to drilling*, THE HILL (Aug. 17, 2020), https://thehill.com/policy/energy-environment/512294-trump-administration-finalizes-plan-to-open-up-alaska-wildlife.
[366] *Id.*

Refuge to oil and gas development."[367] These states include Vermont, Washington, California, Delaware, Connecticut, Michigan, Illinois, Maine, Massachusetts, Maryland, Minnesota, New Jersey, Rhode Island, Oregon, and New York.[368] Critics and conservationists warn that Trump's plan could harm the landscape, put several wildlife species in danger, and advance climate change.[369] Polar bears, for example, are predicted to be put under intense pressure by the melting ice caps, threatening the species into extinction.[370] Even more troubling, the migration and survival of the porcupine caribou herd would be the main source of wildlife interference during drilling.[371] "Development on the sacred calving grounds of the [porcupine caribou herd]" could have devastating effects on the Gwich'in people.[372] Not only does the tribe rely on the caribou for food, but the Gwich'in also consider the herd a cultural and spiritual motif in their native history.[373]

Recently, in summer of 2020, two new cases were filed by environmentalist and indigenous organizations: "*Gwich'in Steering Committee v. David Bernhardt* and *National Audubon Society v. David Bernhardt*, both [in] the U.S. District Court for the District of Alaska."[374] "[C]hallengers include the Natural Resources Defense Council Center for Biological Diversity, Alaska Wilderness League, and The Wilderness Society."[375] In response to the backlash over Trump's decision, the Interior Department noted that the development in the Arctic National Wildlife Refuge would "include extensive protections for wildlife, including caribou and polar bears."[376] Though, many speculate that these assertions are without merit.[377]

If President Biden were to continue with Trump's plan and if the efforts of the environmental and indigenous groups were to fail to protect the Refuge from drilling, the oil companies still must "decide whether development on the coastal plain is worth it."[378] The entire coastal plain will be authorized for lease before 2024.[379] Because of the low cost of oil and the attractive "reserves in shale formations in the [l]ower 48", the Refuge isn't quite as hot of a commodity as it once was.[380] Similarly, a "president could use the Antiquities Act to declare the coastal plain a national monument, permanently halting the lease sale."[381] President Biden's plan, for example, includes protection of the Arctic National Wildlife Refuge.[382] However, in one of the presidential debates of 2020, Biden assured the public he was not against fracking.[383] So, only time will decide the future of the Arctic National Wildlife Refuge.

NATIONAL PARK SERVICE IN ALASKA RULE TO ALLOW KILLING OF BEARS & WOLVES IN DENS

Rachel Tackman

Under the Obama administration, the National Park Service (NPS) had banned the practice of hunting and killing bears and wolves in their dens in Alaska's national preserves.[384] In a controversial move, the NPS has reversed this rule, and deferred to the state for harvest management authority.[385] This move is important for preserving state autonomy over the land, but has caused uproar from supporters of the NPS arguing that the rescinding of the ban goes against the Park Service's mission.[386] The new rule does not only allow for the den hunting of bears and wolves, but also allows hunters to use artificial lighting to coax black bears out of their dens, use bait to attract black and brown bears, catch caribou while they are swimming, and hunt coyotes during their denning season.[387] While these hunting practices are not new and have been traditionally permitted across the state, the practices had previously been prohibited on NPS managed lands.[388]

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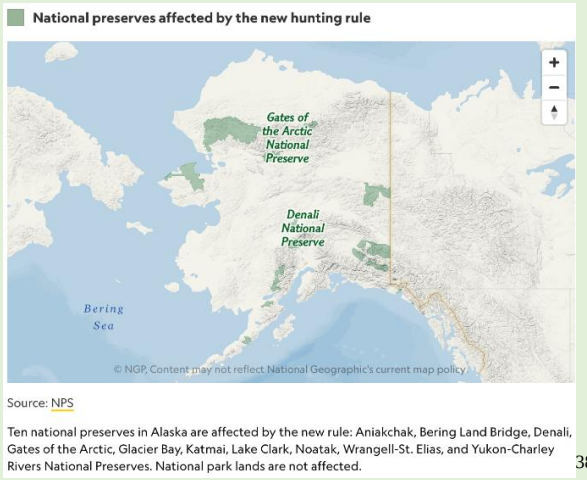
[367] *Id*.
[368] Liz Ruskin, *15 states sue to stop drilling plan for Arctic Refuge*, KTOO (Sept. 10, 2020), www.ktoo.org/2020/09/10/15-states-sue-to-stop-drilling-plan-for-arctic-refuge/.
[369] Frazin, *supra* note 365.
[370] *See* Sara Connors, *Gwich'in Nation launches lawsuit in effort to stop oil drilling in Arctic National Wildlife Refuge*, APTN NATIONAL NEWS (Sep. 26, 2020), www.aptnnews.ca/national-news/gwichin-nation-launches-lawsuit-in-effort-to-stop-oil-drilling-in-arctic-national-wildlife-refuge/.
[371] *Id*.
[372] Lisa Newcomb, *Trump Administration Denounced for 'Foolish and Damaging' Plan to Drill in Arctic Wildlife Refuge,* COMMON DREAMS (Aug. 17, 2020), www.commondreams.org/news/2020/08/17/trump-administration-denounced-foolish-and-deeply-damaging-plan-drill-arctic.
[373] Jennifer A. Dlouhy, *Trump's Arctic Drilling Plan Challenge Over Polar Bear Threat*, MSN (Aug. 24, 2020), www.msn.com/en-us/news/us/trumps-arctic-drilling-plan-challenged-over-polar-bear-impact/ar-BB18jIUL.
[374] *Id*.
[375] *Id*.
[376] *Id*.
[377] *See* Newcomb, *supra* note 372.
[378] Victoria Petersen, *Why the Arctic National Wildlife Refuge may not be drilled*, HIGH COUNTRY NEWS (Sep. 11, 2020), www.hcn.org/articles/north-oil-why-the-arctic-national-wildlife-refuge-may-not-be-drilled.
[379] Dlouhy, *supra* note 373.
[380] *Id*.
[381] *Id*.
[382] *See id.*
[383] Holmes Lybrand, *Fact Check: Biden falsely claims he never opposed fracking*, CNN POLITICS (Oct. 23, 2020), www.cnn.com/2020/10/23/politics/biden-fracking-fact-check/index.html.
[384] *See* Dan Bross, *Killing Predator Pups, Cubs OK in Preserves*, KUAC (May 21, 2020), fm.kuac.org/post/killing-predator-pups-cubs-ok-preserves.
[385] *See id.*
[386] *See generally id.*
[387] Meghan Roos, *Trump Faces Backlash Over New Rules That Will Let Alaska Hunters Kill Bears, Wolves in Their Dens*, NEWSWEEK (May 28, 2020, 4:12 PM), www.newsweek.com/trump-faces-backlash-over-new-rules-that-will-let-alaska-hunters-kill-bears-wolves-their-dens-1507204.
[388] Rachel Nuwer, *Why the U.S. Government is Allowing Bears, Wolves to be Hunted in Their Dens*, NAT'L GEOGRAPHIC (Aug. 7, 2020), www.nationalgeographic.com/animals/2020/08/new-hunting-rules-alaska-national-preserves/.



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The Alaska National Interest Lands Conservation Act (ANILCA), which grants the state management authority over the state's lands, supersedes the National Park Service Organic Act and some of the NPS' regular management policies. This means that the parks were originally intended to have areas which allowed for hunting per state law.[390] According to the NPS, the new rule will "more closely align hunting and trapping regulations with those established by the state of Alaska by providing more consistency with harvest regulations between federal and surrounding non-federal lands and waters."[391]

Some view this rule change as going against one of the most basic conventions of hunting – the fair chase.[392] This principle of fair chase is one of the foundations of the North American model of conservation, serving as a cornerstone for game laws established by the states.[393] Groups such as the Defenders of Wildlife in Anchorage argue that the harvests lead to the killing of bear cubs and wolf pups in their dens, which is not in line with the principle of fair chase and the purpose of these national preserves.[394] The CEO of the National Parks Conservation Association stated "[t]hrough this administration's rule, such treasured lands will now allow sport hunters to lure bears with greased doughnut bait piles to kill them, or crawl into hibernating bear dens to shoot bears and cubs. Shooting hibernating mama and baby bears is not the conservation legacy that our national parks are meant to preserve and no way to treat or manage park wildlife."[395] There is also worry about what effect the rule will have on the Kenai brown bear population in Alaska.[396]

Others do not agree with the previous stated objections, but instead worry how the rule change might undermine the NPS's mission to preserve and protect nature not only in Alaska, but in the entire United States.[397] There are fears about whether this rule opens the door to allowing potentially dangerous exploitation of wildlife in federally protected areas of the United States.[398] This rule change could lead to other states lobbying the federal government to allow controversial hunting and trapping practices in other nationally protected areas.

While controversial in nature and difficult to understand for people not aware of the customary practices in the state of Alaska, the state has only authorized the predator hunts in limited areas where the practices are customary and traditional.[399] Supporters of the rule change argue that "bureaucrats and anti-hunting influences" in the lower 48 states should not determine what is considered ethical in Alaska.[400] They argue that outsiders do not understand that these practices are a part of a centuries-old way of life for Alaskan natives to provide meat for their families.[401] Because of the limited hunting area, the National Park Service does not expect that the population level of these species will be effected.[402] Despite the lack of projected effect on population, the NPS expects law suits resulting from this rule change.[403]


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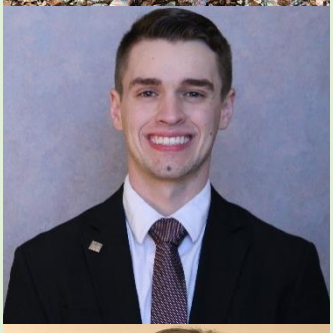
[389] Photo from www.nationalgeographic.com/animals/2020/08/new-hunting-rules-alaska-national-preserves/.
[390] Dan Bross, *National Park Service Rule Change Ends Bans On Controversial Bear and Wolf Hunts*, KTOO (May 23, 2020), www.ktoo.org/2020/05/23/national-park-service-rule-change-ends-bans-on-controversial-bear-and-wolf-hunts/.
[391] Roos, *supra* note 387.
[392] Nuwer, *supra* note 388.
[393] *See* Boone and Crocket Club, *North American Model of Wildlife Conservation*, www.boone-crockett.org/north-american-model-wildlife-conservation (last visited Nov. 16, 2020).
[394] *See* Bross, *supra* note 379.
[395] Roos, *supra* note 377.
[396] *Id.*
[397] *See* Nuwer, *supra* note 388.
[398] *Id.*
[399] *See* Bross, *supra* note 390.
[400] Jon Schuppe, *The Fight Over Alaska's Hunting Rules Runs Deeper Than Using Doughnuts to Bait Bears*, NBC NEWS (June 14, 2018, 7:30 AM), www.nbcnews.com/news/us-news/fight-over-alaska-s-hunting-rules-runs-deeper-using-doughnuts-n882811.
[401] *See id.*
[402] *Id.*
[403] *Id.*
[404] Photo from Why the U.S. government is allowing bears and wolves to be hunted in their dens (nationalgeographic.com).



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About the Wildlife Law Call

These case and current event briefs were composed by the students in the Fall 2020 semester of *Wildlife Law* at Michigan State University College of Law. The course is taught by Carol Frampton, Chief of Legal Services for the National Wild Turkey Federation (NWTF), assisted by Shelby DeVuyst, Assistant Director of the Center for Conservation Excellence (CCE), housed at the NWTF.

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NWTF is a nonprofit organization dedicated to the enhancement of wild turkey populations and habitat, and recruitment, retention, and reactivation of hunters. 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.

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