

# WILDLIFE LAW CALL

FALL / WINTER 2019-2020

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## 1. The Public Trust Doctrine

### *a. Protect Our Parks, Inc. v. Chicago Park District*

**Raechel Broek**

Protect Our Parks, Inc. brought a lawsuit against the Chicago Park District and the City of Chicago in an effort to prevent development of the Obama Presidential Center (OPC) in Jackson Park on Chicago's South Side.<sup>1</sup> The group alleged, among other things, that the use of the land for the presidential center breaches the public trust under Illinois law.<sup>2</sup> The U.S. District Court for the Northern District of Illinois ruled in favor of the defendants, granting their motion for summary judgment with instructions to begin construction on the presidential center in Jackson Park.<sup>3</sup>

The Barack Obama Foundation began searching for a suitable location for the Obama Presidential Center in March of 2014.<sup>4</sup> The Foundation received nine proposals from the University of Chicago and the University of Illinois Chicago and evaluated the sites based on criteria such as the support of the surrounding community, the accessibility of the site, the tourism impact, and the enhancements to the physical environment at the site.<sup>5</sup> The Foundation made its selection on July 29, 2016 and announced that the OPC would be located on 19.3 acres of land in Jackson Park.<sup>6</sup>

Jackson Park was created by a 1869 Act which “provided for the formation of a board of public park commissioners.”<sup>7</sup> The Act required that the land selected by the commissioners “be held, managed and controlled by them and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever.”<sup>8</sup> In February 2015, the Park District's Board voted to approve the transfer of ~20 acres of parkland, the proposed OPC site, to the City of Chicago to secure “consolidated ownership of the sites and local decision-making authority in the City.”<sup>9</sup>

The City Council passed ordinances authorizing construction of the OPC and a Use Agreement providing the Foundation with the following rights for a 99-year term: (a) construction and installation of the Project Improvements (including the Presidential Center); (b) the right to occupy, use, maintain, operate and alter the Presidential Center Architectural Spaces; and (c) the right to use, maintain, operate and alter the Presidential Center Green Space and Green Space.<sup>10</sup> The Use Agreement does not transfer ownership of the OPC site, or lease it to the Foundation.<sup>11</sup>



Protect Our Parks, Inc. claims that construction of the proposed presidential center on parkland is “a breach of public trust under Illinois law.”<sup>12</sup> The parties disputed the applicability of the doctrine to the parkland, with the Court determining that “Illinois courts have extended the public trust doctrine to Chicago parkland, including Jackson Park” and that analysis under the public trust doctrine was proper.<sup>13</sup>

“Illinois public trust cases require courts to apply the doctrine using varying levels of deference, based upon the property's relationship to navigable waterways.”<sup>14</sup> In the present case, “[b]oth parties concede that as early as 1822, and at the time the state authorized the creation of Jackson

<sup>1</sup> *Protect Our Parks, Inc. v. Chicago Park District*, 385 F.Supp. 3d 662, 667 (N.D. Ill. June 11, 2019).

<sup>2</sup> *Id.* at 675.

<sup>3</sup> *Id.* at 667.

<sup>4</sup> *Id.* at 668.

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 670 (quoting Private Laws, 1869, vol. 1, p. 358).

<sup>8</sup> Private Laws, 1869, vol. 1, p. 360.

<sup>9</sup> 385 F.Supp. 3d 662 at 671.

<sup>10</sup> *Id.* at 672-673.

<sup>11</sup> *Id.* at 673.

<sup>12</sup> *Id.* at 675.

<sup>13</sup> *Id.* at 677.

<sup>14</sup> *Id.* at 678.

Park in 1869, the OPC site sat above Lake Michigan.”<sup>15</sup> The Court declined to constitute the land as ‘formally submerged’ due to Illinois State Archeological Survey reports that the area “may have been submerged approximately 11,000 years ago.”<sup>16</sup> Therefore, the appropriate standard for the Court to apply was an inquiry into “whether sufficient legislative intent exists for the given land reallocation or diversion.”<sup>17</sup>

The Court ruled that, under the relevant Park District Aquarium and Museum Act, the legislature had “explicitly state[d] that cities and park districts with control or supervision over public parks have authorization to ‘purchase, erect and maintain within any such public park . . . presidential libraries, centers, and museums.’”<sup>18</sup> The Court also found that “the Museum Act permits the City to contract with private entities to build a presidential center.”<sup>19</sup>

The Court decided that these portions of the Museum Act demonstrated sufficient legislative intent for the Chicago Park District and the City of Chicago to divert parkland for new public uses; therefore, the Act “sufficiently authorizes construction of the OPC in Jackson Park.”<sup>20</sup> The proposed center did not violate the public trust under the level of scrutiny applied to never-submerged lands.<sup>21</sup> For this reason, the court granted summary judgment and entered judgement in defendants’ favor with instructions to begin construction on the presidential center in Jackson Park without delay.<sup>22</sup> Plaintiffs appealed the court’s decision to the U.S. Court of Appeals for the Seventh Circuit on November 22, 2019.

—385 F.Supp. 3d 662 (N.D. Ill. 2019).

## **b. *Hayden v. Maryland Department of Natural Resources***

**Amanda Anderson**

A commercial fisherman in Maryland must obtain a tidal fish license each year to fish in state waters.<sup>23</sup> The term “fish” is interpreted broadly to include mollusks (oysters and clams).<sup>24</sup> However, a fisherman must also pay \$300 annually and “certify to the Department [of Natural Resources] that he or she has received certain publications.”<sup>25</sup> These publications include maps that show which areas are by law closed to oyster harvesting.<sup>26</sup> Normally, fishermen cannot harvest oysters from a closed area, but an exception exists for a person who relays oysters from a polluted area to a non-polluted personal aquaculture lease area under a permit from the Maryland Department of the Environment.<sup>27</sup>

Section 4-1210(a)(2) of the Maryland Natural Resources Code states that certain listed offenses are grounds for the revocation of a license to harvest oysters.<sup>28</sup> A fisherman who commits one of these offenses is entitled to a hearing, and his license will be revoked if it is determined that he “*knowingly* has committed an offense listed under subsection (a)(2).”<sup>29</sup>

### **The Issue: Meaning of “Knowingly”**

Defendant Hayden was in the process of harvesting oysters from a polluted closed area with the intent to relay them to his personal aquaculture lease.<sup>30</sup> He did not have a permit to do so and was not aware that it was illegal to relay the oysters without a permit.<sup>31</sup> He was subsequently stopped by a police officer and issued three citations.<sup>32</sup>

At his hearing, the judge revoked Hayden’s authorization to commercially harvest oysters.<sup>33</sup> The judge concluded that the evidence showed Hayden had knowingly taken

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<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (quoting 70 ILCS 1290/1 (emphasis added)).

<sup>19</sup> 385 F. Supp. 3d 662 at 678.

<sup>20</sup> *Id.* at 680.

<sup>21</sup> *Id.* at 681.

<sup>22</sup> *Id.* at 667.

<sup>23</sup> MD. CODE ANN., NAT. RES. §§ 4-101(r), 4-701(c) (LexisNexis 2012).

<sup>24</sup> § 4-101(j).

<sup>25</sup> § 4-701(g)(1)(i).

<sup>26</sup> § 4-1006.2(b)(2).

<sup>27</sup> § 4-1006.

<sup>28</sup> § 4-1210.

<sup>29</sup> § 4-1210(b)(2) (emphasis added).

<sup>30</sup> *Hayden v. Md. Dep’t of Nat. Res.*, No. 2434, 2019 Md. App. LEXIS 751 at \*9 (Md. Ct. Spec. App. Sept. 3, 2019).

<sup>31</sup> *Id.* at \*9, 11.

<sup>32</sup> *Id.* at \*10.

<sup>33</sup> *Id.* at \*16.

oysters in violation of the statute and that the statute did not contain a scienter requirement as to the illegality of the act.<sup>34</sup> Finally, the judge rejected a riparian rights defense raised by Hayden.<sup>35</sup> Hayden argued that his family had riparian right to harvest oysters in the area in question.<sup>36</sup> However, the judge concluded that the statute did not provide an exception for areas subject to riparian rights.<sup>37</sup>

Hayden challenged this revocation.<sup>38</sup> The Maryland Court of Special Appeals focused its analysis on the meaning of the term “knowingly” as used in the statute.<sup>39</sup>

### Scienter Requirement

In determining the meaning of the term “knowingly,” the appellate court considered the plain meaning of the words of the statute, its legislative history, and prior case law.<sup>40</sup> It determined that under plain meaning, within the context of the statute, and given the fact that Hayden certified that he had received information regarding closed areas from the Department of Natural Resources, he had knowledge of the relevant law.<sup>41</sup> The court further found that nothing in the legislative history provided support for a different interpretation of the term.<sup>42</sup> Finally, the court distinguished other case law in which the government did not provide notice of the law and the defendant did not certify his knowledge of such law.<sup>43</sup> The court concluded that as used in the Natural Resources Code, “knowingly” means deliberately or intentionally, but does not require that the defendant knew he was violating the law at the time he did so.<sup>44</sup>

### Deliberate or Intentional Actions

The appellate court next considered whether there was substantial evidence to conclude that Hayden acted

deliberately or intentionally in harvesting oysters on the occasion in question.<sup>45</sup> The court rejected Hayden’s riparian rights defense and concluded that riparian rights do not trump state regulations.<sup>46</sup> Further, the court determined that “knowledge of the law was imputed onto Mr. Hayden” when he acknowledged his receipt of the publications provided by the Department of Natural Resources.<sup>47</sup> The court held that Hayden acted deliberately or intentionally when he harvested the oysters.<sup>48</sup> It therefore upheld the lower court’s the revocation of his authorization to harvest oysters.<sup>49</sup>

—2019 Md. App. LEXIS 751 (Md. Ct. Spec. App. Sept. 3, 2019).

### *c. Peterson v. Smith*

#### Amanda Anderson

In Texas, a deer breeder’s permit issued by the Texas Parks and Wildlife Department (Department) allows the holder “to possess live breeder deer in captivity” and “engage in the business of breeding breeder deer.”<sup>50</sup> A transfer permit issued by the Department is required to move these deer in or out of a facility.<sup>51</sup>

There has been recent concern regarding chronic wasting disease (CWD) in Texas deer populations.<sup>52</sup> CWD is a fatal disease found in cervid species and is seen as a serious threat to maintaining healthy populations.<sup>53</sup> Because of this disease, the Department instituted a requirement that deer breeders perform CWD testing before they may apply for a transfer permit.<sup>54</sup> Later, the Department confirmed several cases of CWD-infected deer in the state, and subsequently implemented emergency rules stating that

<sup>34</sup> *Id.* at \*16-17.

<sup>35</sup> *Id.* at \*18.

<sup>36</sup> *Id.* at \*13.

<sup>37</sup> *Id.* at \*18.

<sup>38</sup> *Id.* at \*2.

<sup>39</sup> *Id.* at \*9.

<sup>40</sup> *See id.* at \*25-39.

<sup>41</sup> *See id.* at \*25-32.

<sup>42</sup> *Id.* at \*37.

<sup>43</sup> *See id.* at \*38 (distinguishing *Liparota v. United States*, 471 U.S. 419 (1985); *Chow v. State*, 903 A.2d 388 (Md. 2006); *Greenway v. State*, 259 A.2d 89 (Md. Ct. Spec. App. 1969)).

<sup>44</sup> *See id.* at \*39.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*40.

<sup>48</sup> *Id.* at \*39.

<sup>49</sup> *See id.* at \*41.

<sup>50</sup> TEX. PARKS & WILD. CODE ANN. §§ 43.352(a), .357(a)(1) (West 2013).

<sup>51</sup> § 43.362(b).

<sup>52</sup> *See Peterson v. Smith*, No. 03-17000703-CV, 2019 Tex. App. LEXIS 8517, at \*3 (Tex. Ct. App. June 28, 2019) (citing *Chronic Wasting Disease*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/prions/cwd/index.html> (last visited June 24, 2019)).

<sup>53</sup> *Id.* (citing *Chronic Wasting Disease*, *supra* note 52).

<sup>54</sup> *Id.* (citing 31 TEXAS ADMIN. CODE § 65.604 (2018)).

“no live breeder deer may be transferred anywhere for any reason” except as allowed by the new rules.<sup>55</sup>

### The Issue: Property Rights in Breeder Deer

Peterson, an owner of captive breeder deer, sued the Department seeking invalidation of the emergency rules or, alternatively, a declaration that the Department was violating provisions of the Parks and Wildlife Code.<sup>56</sup> He argued that deer bred in captivity become the private property of the breeder, and therefore, the emergency rules were a violation of procedural due process.<sup>57</sup> The district court held that it lacked jurisdiction regarding Peterson’s ownership claim, based on the Department’s sovereign immunity.<sup>58</sup> It further held that summary judgment in favor of the Department was appropriate for Peterson’s due process claim since he did not possess an ownership interest in the deer.<sup>59</sup> Peterson appealed to the Texas Court of Appeals.<sup>60</sup>

### Sovereign Immunity

“Sovereign immunity prohibits ‘suits against the state unless the state consents and waives its immunity.’”<sup>61</sup> However, Peterson attempted to plead a waiver of the Department’s immunity, which may be granted for “claims challenging the validity of ordinances or statutes.”<sup>62</sup> The waiver does not apply “when the plaintiff seeks a declaration of his or her rights under a statute or other law.”<sup>63</sup> The appellate court found that, because Peterson’s suit sought a declaration of his statutory right to own captive breeder deer, the waiver did not apply.<sup>64</sup> Therefore, the district court correctly concluded that it lacked the jurisdiction to hear Peterson’s claim of ownership.<sup>65</sup>

### Procedural Due Process

Under Texas case law, wild game is not owned by private individuals, but instead is owned by the people of the state in their sovereign capacity.<sup>66</sup> This version of the public trust doctrine is codified in a statute that reads “All wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state.”<sup>67</sup> Further, the appellate court emphasized that although breeder deer may be held captive under a permit, they are still considered wild animals and are therefore public property.<sup>68</sup>

Private property rights in captive breeder deer would also be inconsistent with the legislative intent of temporary permission-based rights, because such deer can only be held in captivity under a permit.<sup>69</sup> This permit is for a limited duration and does not confer any rights to the deer after the time expires.<sup>70</sup> Because of this, breeders do not have property rights in captive breeder deer.<sup>71</sup> Therefore, Peterson’s procedural due process rights were not violated, and the district court’s grant of summary judgment in favor of the Department is affirmed.<sup>72</sup>

—2019 Tex. App. LEXIS 8517 (Tex. App. June 28, 2019).

### d. *Hill v. Coggins* Chelsea Lenard

This case illustrates the public trust principle of the North American Model of Wildlife Conservation. Wildlife is held in the public trust for the benefit of all people.

This case stands for the proposition that keeping grizzly bears in a roadside zoo in unnatural conditions to which they are unaccustomed in the wild does not violate that

<sup>55</sup> *Id.* at \*5 (quoting 40 TEX. REG. 5568-69).

<sup>56</sup> *Id.* at \*1, 5.

<sup>57</sup> *Id.* at \*5-6.

<sup>58</sup> *Id.* at \*8.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at \*9.

<sup>61</sup> *Id.* at \*10 (quoting *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018)).

<sup>62</sup> *Id.* at \*11-12 (quoting *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633-34 (Tex. 2010)).

<sup>63</sup> *Id.* at \*12 (quoting *Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011)).

<sup>64</sup> *Id.* at \*13 (citing *Sefzik*, 355 S.W.3d at 621).

<sup>65</sup> *Id.* (citing *McLane Co. v. Tex. Alcoholic Beverage Comm’n*, 514 S.W.3d 871, 876 (Tex. App. 2017)).

<sup>66</sup> *Id.* at \*19 (quoting *Geer v. Connecticut*, 161 U.S. 519, 529 (1979)).

<sup>67</sup> *Id.* at \*20-21 (quoting TEX. PARKS & WILD. CODE ANN. § 1.011(a)) (West 2013).

<sup>68</sup> *Id.* at \*24-25 (quoting § 43.364).

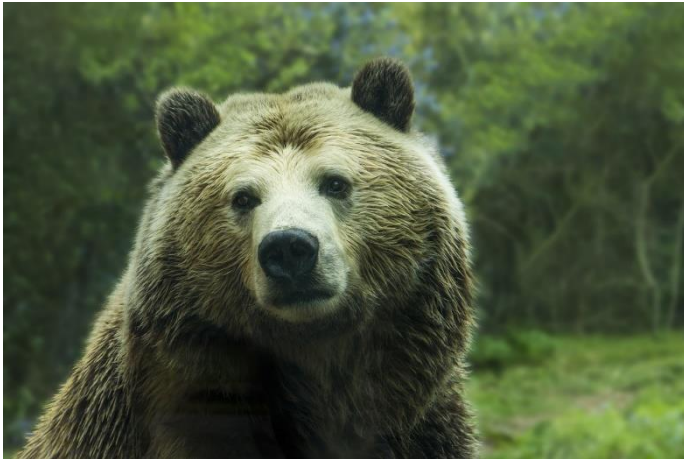
<sup>69</sup> *Id.* at \*25 (quoting § 43.351(1)).

<sup>70</sup> *Id.* (citing §§ 43.352(b), .351-.369).

<sup>71</sup> *Id.* at \*26 (citing *Anderton v. Tex. Parks & Wildlife Dep’t*, 605 F. App’x 339, 348 (5th Cir. 2015)).

<sup>72</sup> *See id.* at \*26, 40.

principle. On December 3, 2013, Peggy Hill and Amy Walker (“Plaintiffs”) initiated a citizen’s suit against Barry and Collette Coggins (“Defendants”).<sup>73</sup> The Coggins operated an unaccredited roadside zoo in Cherokee, North Carolina.<sup>74</sup> Plaintiffs alleged that Defendants violated the Endangered Species Act (ESA) by keeping four adult grizzly bears in undersized concrete pits constituting an unlawful taking and unlawful possession of an endangered species.<sup>75</sup> Plaintiffs’ experts stated that the pit enclosures did not meet generally accepted animal husbandry standards because the block walls were much higher than a bear could reach, devoid of any enrichment, lacked adequate shade, and were too small in size.<sup>76</sup> The bears were observed to be pacing, which is abnormal behavior.<sup>77</sup> The bears were publicly fed, which encouraged the bears to beg for food and put them at risk for disease.<sup>78</sup> According to one of experts, the American Zoo Association (AZA) Accreditation Standards formed the basis for generally accepted practices in the field of zoology.<sup>79</sup>



Plaintiffs alleged that Defendants’ conduct both harmed and harassed the bears thereby constituting a “taking” as defined under the ESA.<sup>80</sup> The definition of “harass” under ESA regulations included certain exceptions for captive wildlife, one of which was generally accepted animal

husbandry practices.<sup>81</sup> Defendants argued that they fell under the exclusion because their animal husbandry practices complied with the minimum standards under the Animal Welfare Act (AWA).<sup>82</sup> Plaintiffs argued that animal husbandry practices are only exempt when they are both generally accepted and AWA-compliant.<sup>83</sup> The U.S. Court of Appeals for the Fourth Circuit agreed with Plaintiffs and remanded the case to the U.S. District Court for the Western District of North Carolina to resolve whether the zoo’s husbandry practices fell within the ESA’s definition of harassment and whether those practices fell within the enumerated exclusion from that definition.<sup>84</sup>

The District Court found that Plaintiffs failed to prove by a preponderance of the evidence that there was any generally accepted husbandry practice so widely known as to give Defendants fair notice about how to comply with such standards.<sup>85</sup> Plaintiffs’ experts were unable to cite any treatise, literature, or scholarly writing to support the conclusion that the zoo’s husbandry practices were not generally accepted.<sup>86</sup> The court found that the exception applied and that Defendants’ treatment of the four grizzly bears did not constitute harassment under the ESA.<sup>87</sup>

Plaintiffs also failed to prove by a preponderance of the evidence that Defendants’ treatment of the grizzly bears constituted harm under the ESA.<sup>88</sup> No injuries to the bears actually occurred.<sup>89</sup> The potential for injury was not enough.<sup>90</sup> The Court concluded that Defendants did not significantly impair the bears’ behavioral patterns of feeding and sheltering.<sup>91</sup> The bears were, therefore, not subjected to harm such that a taking occurred under the ESA.<sup>92</sup> The Court dismissed the action with prejudice.<sup>93</sup>

—2019 U.S. Dist. LEXIS 162742 (W.D.N.C. Sept. 24, 2019).

<sup>73</sup> *Hill v. Coggins*, 2019 U.S. Dist. LEXIS 162742, 1 (W.D.N.C. Sept. 24, 2019).

<sup>74</sup> *Id.* at 3.

<sup>75</sup> *Id.* at 1-2.

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 6.

<sup>78</sup> *Id.* at 7-8.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.* at 13.

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

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 15.

<sup>85</sup> *Id.* at 34.

<sup>86</sup> *Id.* at 33.

<sup>87</sup> *Id.* at 34.

<sup>88</sup> *Id.* at 35.

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

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

<sup>91</sup> *Id.* at 36.

<sup>92</sup> *Id.* at 37.

<sup>93</sup> *Id.* at 38.

## ***e. Utah Native Plant Society v. U.S. Forest Service***

**Jamileh Naboulsi**

This case concerns a portion of the Manti-La Sal National Forest in the La Sal Mountain Range of Utah.<sup>94</sup> The U.S. Forest Service (USFS / the Service), designated this specific portion as the Mt. Peale Research National Area (RNA) due to rare plants growing in this area.<sup>95</sup> In June 2013, Utah's Division of Wildlife Resources (UDWR) approved Utah's mountain goat statewide management plan, which authorized the release of 200 mountain goats into the mountain range, adjacent to the rare plants the RNA was intended to protect.<sup>96</sup> Upon notification of the intentions of the UDWR, the Service requested that UDWR hold off on the release.<sup>97</sup> This request was rejected and the goats were released incrementally.<sup>98</sup> The goats then moved to higher ground and wallowed and foraged within the protected area.<sup>99</sup> At this point, the Grand Canyon Trust (GCT) intervened and demanded that the Service prevent additional goats from entering the land; by removing the current goats and regulating UDWR's occupancy and use of the forest by requiring a special use permit.<sup>100</sup> The Service denied this request, claiming the actions were beyond its control and that the actions did not occur on its

regulated land.<sup>101</sup> Additionally, the Service took a wait-and-see approach to the goats' inhabiting of the land.<sup>102</sup>

Plaintiffs requested that the court determine that the denials were arbitrary and capricious and that the Service was supposed to maintain the RNA in the "virgin or unmodified" condition mandated by 36 CFR 251.23 where the presence of goats might detract from such condition.<sup>103</sup> The court held that these actions were in fact final agency actions, and that the state retained police power over wildlife within its borders.<sup>104</sup> Additionally, the court held that the Service's failure to act due to the lack of authority was not arbitrary, capricious, or an abuse of discretion.<sup>105</sup>

The court also held that the Service did not "own" the goats because they were wild animals and therefore not property of those whose private lands they enter.<sup>106</sup> This holding comports with the North American Model of Wildlife Conservation principle that all animals are held in trust by the government until they are formally captured. Overall, Tenth Circuit held that the Service acted within its authority and its inaction was not arbitrary or capricious; therefore the court determined that it had no basis to order UDWR to take specific action with respect to goats under its management authority on state lands.<sup>107</sup>

—923 F.3d 860 (10th Cir. 2019).

## **2. Prohibition on Commerce in Dead Wildlife**

### ***a. U.S. v. Turtle***

**Raechel Broek**

The U.S. Attorney's Office for the Middle District of Florida brought criminal charges against Jack W. Turtle, a member of the Seminole Tribe of Florida, for seven counts of selling American alligator eggs on the Brighton Seminole Indian Reservation in violation of the Lacey Act predicated on the Endangered Species Act (ESA).<sup>108</sup> Turtle filed a pretrial motion to dismiss the charges for failure to



<sup>94</sup> *Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 863 (10th Cir. 2019).

<sup>95</sup> *Id.* at 863.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 864.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 865.

<sup>104</sup> *Id.* at 866-69.

<sup>105</sup> *Id.* at 871.

<sup>106</sup> *Id.* at 870-71.

<sup>107</sup> *Id.* at 875.

<sup>108</sup> *U.S. v. Turtle*, 365 F. Supp. 3d 1242, 1244 (M.D. Fla. 2019).

allege facts constituting a prosecutable offense.<sup>109</sup> Turtle argued that the federal government did not have the authority to impose its laws on members of the Seminole Tribe where “the Tribe has traditional sovereign hunting and fishing rights never relinquished by treaty.”<sup>110</sup> The U.S. District Court for the Middle District of Florida held that, although the Tribe’s usufructuary rights included the right to sell alligator eggs gathered from the reservation and the ESA did not abrogate the Tribe’s right to sell alligator eggs, Congress could still regulate the tribe’s usufructuary rights with reasonable and necessary conservation measures.<sup>111</sup> Therefore the ESA and Lacey Act are still enforceable against the Tribe as reasonable and necessary conservation measures.<sup>112</sup> Turtle’s motion was denied accordingly.<sup>113</sup>

Turtle was charged with selling 3,996 American alligator eggs for \$19,980 in violation of the Lacey Act, 16 U.S.C. § 3371.<sup>114</sup> To address Turtle’s motion to dismiss, the Court assumed that the allegations against him were true in order to “determine whether they implicate [him] for the charged crimes as a matter of law.”<sup>115</sup>

“The Lacey Act prohibits knowingly selling wildlife when . . . the defendants should have known the wildlife was taken in violation of state or federal law.”<sup>116</sup> The ESA lists the American alligator as a threatened species and the Secretary of the Interior has promulgated a rule “prohibit[ing] the taking and sale of American alligator eggs unless [it is] done in accordance with the laws and regulations of the State or Tribe in which the taking and sale occur.”<sup>117</sup>

Turtle’s pretrial motion challenged the authority of the federal government to impose its laws on members of the Seminole Tribe where “the Tribe has traditional sovereign hunting and fishing rights never relinquished by treaty.”<sup>118</sup>

“[T]he Government conceded that the Tribe has implicit hunting and fishing rights, [but disputed the Tribe’s] right to sell wildlife.”<sup>119</sup>

The court consulted the executive order that established the Tribe’s reservations as well as the history of the Seminole Tribe for an express limitation on the Tribe’s implied hunting and fishing rights, but did not find any limitations that must be interpreted as limiting the right to sell wildlife.<sup>120</sup> The Court found that the Tribe’s rights included the right to sell alligator eggs gathered on the reservation.<sup>121</sup>



The government argued that the Tribe still must comply with the ESA because “Congress abrogated Turtle’s right to collect the alligator eggs when it passed the ESA and the Lacey Act.”<sup>122</sup> “While Congress has plenary power over Indian tribes, it must demonstrate ‘clear and plain intent when abrogating Indian rights.’”<sup>123</sup> The Lacey Act addressed and specifically declined to abrogate Indian rights.<sup>124</sup> The Court analyzed whether Congress chose to abrogate the Tribe’s usufructuary rights under the ESA and

<sup>109</sup> *Id.* (see *United States v. Coia*, 719 F.2d 1120, 1123 (11<sup>th</sup> Cir. 1983)).

<sup>110</sup> 365 F. Supp. 3d 1242 at 1245.

<sup>111</sup> *Id.* at 1250.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1244.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1244-1245.

<sup>117</sup> *Id.* at 1245, 1248.

<sup>118</sup> *Id.* at 1245.

<sup>119</sup> *Id.* at 1246.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1247.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (quoting *United States v. Dion*, 476 U.S. 734, 739 (1986)).

<sup>124</sup> “Nothing in this chapter shall be construed as...repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute, or executive order pertaining to any Indian tribe, band, or community[.]” 16 U.S.C. § 3378(c)(2).

found that there was no clear and convincing evidence of intent to do so.<sup>125</sup> Therefore, Turtle’s usufructuary right to sell the alligator eggs remained intact.<sup>126</sup>

The government prevailed on its final argument that “the ESA and Lacey Act are still enforceable against the Tribe as reasonable and necessary conservation measures.”<sup>127</sup> Precedent established in *Puyallup Tribe v. Department of Game of Washington* authorizes the State to regulate the manner of fishing, hunting, and other methods of take “in the interest of conservation, provided [that] the regulation meets appropriate standards and does not discriminate against the Indians.”<sup>128</sup> The court found that the *Puyallup* test is appropriately applied to federal laws.<sup>129</sup>

The court reasoned that “[t]he American alligator has remained federally protected [under the ESA] for the past thirty plus years” and that “[r]equiring the Seminole Tribe to recognize the American alligator’s protected status is necessary to the continued and successful conservation efforts to protect the health and safety of the species.” Turtle’s tribal right to sell alligator eggs gathered on the Seminole reservation were not abrogated by Congress, but are subject to “reasonable and necessary conservation measures” such as enforcement of the ESA through the Lacey Act.<sup>130</sup>

The court denied Turtle’s motion to dismiss. The case was resolved by plea agreement on March 26, 2019 in which Defendant pled guilty to two counts of taking American alligator eggs in violation of the ESA.<sup>131</sup>

The outcome of this case aligns with the North American Model of Wildlife Conservation’s principle of eliminating markets for wildlife. The American alligator was once classified as an endangered species due to overharvest to satisfy a thriving market for their hides.<sup>132</sup> Thanks to federal and state protections, the American alligator was able to recover from classification as an endangered species to a stable, yet still protected, population.<sup>133</sup>

—365 F.Supp. 3d 1242 (M.D. Fla. 2019).

## **b. Art & Antique Dealers League of America, Inc. v. Seggos**

**Chelsea Lenard**

This case concerns the regulation of trade in the African elephant, and deals directly with the North American Model of Wildlife Conservation principle of prohibiting commerce in dead wildlife.

Plaintiffs are trade organizations representing art and antique dealers with an “economic and professional interest in . . . the purchase, sale, distribution or trading of antique elephant ivory.” Defendant is the Commissioner of the New York Department of Environmental Conservation (DEC), a state agency tasked with protecting New York’s natural resources and environment. The Endangered Species Act (ESA) prohibits the import and export of endangered species and the sale, offering for sale, or movement of endangered species in interstate or foreign commerce. These prohibitions, however, have exceptions for “antique articles” that are 100 years of age or older. Those who wish to import such antique articles need to first obtain a federal permit. Under the regulations promulgated by the Secretary of the Interior, trade in African elephant ivory is generally prohibited. Only certain items containing a de minimis quantity of ivory are exempt. The state of New York imposed a ban on elephant ivory with even narrower exceptions than the ESA.

The DEC only issued licenses authorizing trade in ivory pursuant to the State Ivory Law’s exceptions. The licenses issued by the DEC restricted the advertisement and display of ivory products. Plaintiffs challenged the constitutionality of the State Ivory Law on preemption and First Amendment grounds and filed a motion for summary judgment, which Defendants and Intervenors opposed.

The Court determined that section 6(f) of the ESA did not preempt the State Ivory Law because the ESA prohibitions only applied to interstate or foreign commerce while the State Ivory Law applied to intrastate commerce. As result, the exceptions contained in the State Ivory Law did not prohibit what was authorized by the ESA. The Court

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<sup>125</sup> 365 F. Supp. 3d 1242 at 1248.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1245.

<sup>128</sup> *Puyallup Tribe v. Dep’t of Game of Wash.*, 391 U.S. 392, 298 (1968).

<sup>129</sup> 365 F. Supp. 3d 1242 at 1248.

<sup>130</sup> *Id.* at 1247.

<sup>131</sup> *U.S. v. Turtle*, 2019 WL 1581379 (M.D. Fla.).

<sup>132</sup> 365 F. Supp. 3d 1242 at 1248-1249.

<sup>133</sup> *Id.*

granted Defendant's motion to dismiss on Count I because it was not "the clear and manifest purpose of Congress to preempt state laws restricting purely intrastate commerce in ivory."



Plaintiff's second count alleged that the State Ivory Law's permit requirement violated the First Amendment of the U.S. Constitution. The display restriction in the license prohibited the physical display for sale of any item not authorized for intrastate sale under the State Ivory Law even if the merchant was authorized under the ESA to sell the item in interstate commerce. The Court determined that the in-store display of ivory products constituted commercial speech because the display constituted lawful activity. New York had a substantial interest in regulating the sale of ivory within its borders and the display restriction directly advanced that interest. The Court was unable to determine whether the display restriction burdened substantially more speech than was necessary to further the government's legitimate interests.

Ultimately the Court granted Defendant's and Intervenor's cross-motions to dismiss with respect to preemption and denied both the Defendant's and Plaintiff's motions for summary judgment with respect to the First Amendment claim.

—394 F.Supp. 3d 447 (S.D.N.Y. Aug. 14, 2019).

<sup>134</sup> Bald & Golden Eagle Protection Act, 16 USCS § 668(a) (1940).

<sup>135</sup> *U.S. v. Tree Top*, 931 F.3d 720, 720 (8th Cir. 2019).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 720-21.

### c. *U.S. v. Tree Top*

#### Steffen Mammen

The Bald and Golden Eagle Protection Act (BGEPA) created criminal penalties for anyone who "shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles."<sup>134</sup> In 2014, Sheldon Tree Top did just that when he sold a bald eagle feather to a man for \$50.<sup>135</sup> The next week Tree Top sold the same man another 63 feathers for \$80.<sup>136</sup> As it turned out, the man was a confidential informant, and Tree Top was charged with violating BGEPA, to which he pled guilty.<sup>137</sup> The U.S. District Court in South Dakota sentenced him to six months in prison with one year parole.<sup>138</sup> The court is permitted to order restitution as a condition of supervised release and did so to the tune of \$5,000.<sup>139</sup> Tree Top challenged this restitution on appeal.<sup>140</sup>

The relevant legislation permitting restitution also requires that the amount must be no more than the provable loss of the victim.<sup>141</sup> The court relied on a previous Eighth Circuit case, *United States v. Bertucci*, which established that the restitution value should be based on the replacement value of the taken bird.<sup>142</sup> Under this standard, the district court used expert testimony to



<sup>138</sup> *Id.* at 721.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (quoting *U.S. v. Bertucci*, 794 F.3d 925 (8th Cir. 2015)).

determine that the feathers were from a juvenile bald eagle worth approximately \$5,000.<sup>143</sup> On appeal, the Eighth Circuit rejected the comparison to *Bertucci*, as the defendant in that case had pled guilty to actually killing the birds in question.<sup>144</sup>

Here, Tree Top was only convicted of selling the feathers.<sup>145</sup> The court thus capped the available restitution as \$130, the value for which the informant bought the feathers.<sup>146</sup> The case was remanded to provide the district court an opportunity to impose a fine permitted under BGEPA, which it previously chose not to enforce on account of the large restitution imposed.<sup>147</sup>

—931 F.3d 720 (8th Cir. 2019).

### 3. Allocation of Wildlife by Democratic Rule of Law

#### a. *Friends of Animals v. Ross*

##### Chelsea Lenard

This case is applicable to two of the seven principles of the North American Wildlife Conservation Model: (1) wildlife is held in the public trust and (2) democratic rule of law.<sup>148</sup>

This case demonstrates how government agencies have the right to manage wildlife on public lands. This includes the discretion to list a species as endangered under the Endangered Species Act (ESA). The queen conch, a large gastropod mollusk with a whorl-shaped shell containing spines at the apex and a pink interior, “is one of the most important fishery resources in the Caribbean.”<sup>149</sup> There is demand for queen conch meat from not only the Caribbean market but from abroad as well.<sup>150</sup>



WildEarth Guardians (WEG) petitioned the National Marine Fisheries Service (the Service) on February 27, 2012 to list the queen conch as endangered or threatened under the Endangered Species Act (ESA).<sup>151</sup> The Service published a finding in the Federal Register stating that there was substantial information indicating that the queen conch could be listed under the ESA.<sup>152</sup> The Service then began a status review of the queen conch<sup>153</sup> and published its decision on November 5, 2014, ultimately deciding based on the status review not to list the conch because it was not currently in danger of extinction nor likely to become extinct in the foreseeable future.<sup>154</sup> WEG sued the Service on July 27, 2016, and both parties filed cross-motions for summary judgment.<sup>155</sup> WEG asked the U.S. District Court for the District of Columbia to vacate the Service’s listing decision based on six grounds.<sup>156</sup> The Court only addressed the sixth argument set forth by WEG—that the Service erred in its finding that the queen conch was not endangered or threatened through a significant portion of its range.<sup>157</sup>

To be listed, a species does not need to be endangered or threatened throughout all of its range.<sup>158</sup> A species being

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 721-22.

<sup>147</sup> *Id.* at 722.

<sup>148</sup> *The North American Wildlife Conservation Model*, ROCKY MOUNTAIN ELK FOUNDATION (last visited Dec. 2, 2019), <http://www.rmef.org/Conservation/HuntingIsConservation/NoNorthAmericanWildlifeConservationModel.aspx>.

<sup>149</sup> *Friends of Animals v. Ross*, 396 F. Supp. 3d 1, 4 (D.D.C. Aug. 26, 2019).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 5.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 6.

<sup>155</sup> *Id.* at 7.

<sup>156</sup> *Id.* at 9

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

endangered or threatened throughout a significant portion of its range is enough.<sup>159</sup> However, the ESA did not define what constituted a species' range or what is considered significant.<sup>160</sup> In 2011, the Service issued a Final Policy interpreting what "significant portion of a species range" meant.<sup>161</sup> The policy provided that a portion of a species' range is significant if, without that portion of the population, the rest of the species would become endangered or extinct.<sup>162</sup> In May 2018 the Northern District of California held that the Service's policy defining "significant portion" was inconsistent with the ESA when used to withdraw the proposed listing of the bi-state sage grouse.<sup>163</sup> That definition was then vacated nationwide.<sup>164</sup>

Both parties agreed that the Service applied the now-vacated policy in concluding that no portion of the queen conch's range was significant, but the Service contended that relying on the policy was harmless in light of the alternative rationale that it used in its determination.<sup>165</sup> WEG contended that there was no alternative rationale used by the Service.<sup>166</sup> The Court found that the Service's decision did not indicate use of an alternative rationale, but merely supported the conclusion that under the Policy, no portion of the queen conch's range was significant.<sup>167</sup> Therefore, only one rationale was used in its determination to not list the queen conch, and that rationale was the vacated policy.<sup>168</sup>

The Court held that the error the Service committed in relying on the now-vacated definition was not harmless, vacating the listing decision and remanding it to the Service.<sup>169</sup> WEG's motion for summary judgment was granted in part and the Service's was denied.<sup>170</sup>

—396 F.Supp. 3d 1 (D.D.C. Aug. 26, 2019).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 9-10.

<sup>163</sup> *Id.* at 10.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 11.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 12.

<sup>171</sup> Anna V. Smith, *The Klamath River now has the legal rights of a person*, High Country News (Sept. 24, 2019),

## b. Yurok Tribe declaration of personhood for the Klamath River

**Steven Mudel**

Earlier this year, the Yurok Tribe issued a declaration of personhood for the Klamath River, the first for river in North America.<sup>171</sup> The move stemmed in part from elevated rates of disease in salmon in the Klamath River resulting from low water flows.<sup>172</sup> A 2013 biological opinion from the National Marine Fisheries Service (NMFS) examined the infection rate of the parasite *C. Shasta* in juvenile Coho salmon with the desire to enact a plan to decrease the rate of infection and to cap the maximum infection rate for the plan to be effective at 49%.<sup>173</sup> However, what they found in the 2014 and 2015 salmon samples were infection rates of 81% and 91% respectively.<sup>174</sup> The increased rate of sickness has led to cancelled fishing seasons on the river in the past.<sup>175</sup>

The Yurok tribe is another part in a growing push for natural resource rights and protections; other such examples include the White Earth Band of Ojibwe and the New Zealand government creating protections for wild rice and a large river.<sup>176</sup> The Yurok tribe looked at what the Ojibwe did as well as the United Nations Declaration on the Rights of Indigenous People, which grants rights of conservation and protection to them for their resources.<sup>177</sup> The Tribe's resolution would allow cases to be brought in tribal court to remedy an injury to the Klamath River.<sup>178</sup> The Yurok tribe feels this resolution is a holistic approach to conservation by addressing all environmental problems, not just water levels or pollution.<sup>179</sup>

Resolutions like this come from the international concept of the "Rights of Nature" that suggests nature should have

<https://www.hcn.org/issues/51.18/tribal-affairs-the-klamath-river-now-has-the-legal-rights-of-a-person>

<sup>172</sup> *Questions & Answers about the 2017 Klamath River Ruling*, Earth Justice, <https://earthjustice.org/features/questions-and-answers-about-the-2017-klamath-river-ruling> (last updated May 1, 2018).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Smith, *supra* note 171.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

the same rights as humans do.<sup>180</sup> Attorneys involved with the Yurok and Ojibwe tribes feel this is a growing movement where tribal values are coming more into the mainstream and allow for more legislative avenues and ways to change how people view natural resources.<sup>181</sup> The Klamath River being declared a legal person in tribal law invokes the democratic rule of law tenet of the North American Model of Wildlife Conservation by increasing the ways people can legally involve themselves with nature.<sup>182</sup>

### c. City of Toledo ordinance granting Lake Erie personhood

#### Steven Mudel

Earlier this year, residents of Toledo, Ohio passed the Lake Erie Bill of Rights in response to the 2014 algae bloom that radically altered the lake.<sup>183</sup> The algae bloom turned the water in the lake green, and cut off 500,000 people from drinking its water.<sup>184</sup> This particular application of the “rights of nature” movement is unique compared to others because Lake Erie is a body of water spanning 10,000 miles, making it far larger.<sup>185</sup> The watershed of Lake Erie spans 30,000 square miles of land in both the United States and Canada, showing just how large of a reach this ordinance potentially has.<sup>186</sup> The new ordinance would allow citizens of the City to act on behalf of the lake and sue for pollution cleanup costs and prevention programs.<sup>187</sup>

However, despite a 61-39% vote split in favor of the ordinance, critics have been very outspoken about the reach of the ordinance.<sup>188</sup> In a statement, the Ohio Farm Bureau raised concerns that the ordinance could leave

many citizens, businesses, and farmers vulnerable to large legal costs and that it may either be unconstitutional or unenforceable.<sup>189</sup> Similarly, a farmer filed the first lawsuit challenging the ordinance a mere 12 hours after the final tally claiming it was unconstitutional and put his farm at risk.<sup>190</sup> Most recently, in the case of *Drewes Farms P'ship v. City of Toledo*, the Sixth Circuit denied a request for reconsideration made by Lake Erie Ecosystem and Toledoans for Safe Water Inc. and held that neither could be a party in a federal lawsuit pursuant to Federal Rule of Civil Procedure 17(b)(3).<sup>191</sup> The court, relying on the *Granholt* decision<sup>192</sup>, further held that because their interest in the suit was a generic interest of the citizenry, it was not enough to support a claim of intervention.<sup>193</sup> In August, Toledoans for Safe Water filed an amicus brief alleging local provisions can go beyond state guidelines if they are pursuant to public health and safety.<sup>194</sup>

Regardless of where this issue goes in the future, it relates to many issues in the North American Model of Wildlife Conservation. This is a wildlife as a democratic rule of law case where citizens of a city are trying to become individual guardians of a lake.<sup>195</sup> While the algae bloom was caused by agricultural runoff and other pollutants, farmers in northern Ohio do not want to be held liable for every bit of pollution that makes its way into a watershed the size of Lake Erie.<sup>196</sup> On the other side of this debate are people who feel they are, “ushering in a new era of environmental rights,” by passing this ordinance.<sup>197</sup> One problem this issue faces as a democratic rule of law case is that only 9%

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Shane Mahoney, *The Seven Sisters: Pillars of the North American Wildlife Conservation Model*, CONSERVATIONVISIONS.COM, [https://www.conservationvisions.com/sites/default/files/the\\_seven\\_sisters.\\_pillars\\_of\\_the\\_north\\_american\\_conservation\\_model\\_part\\_3.pdf](https://www.conservationvisions.com/sites/default/files/the_seven_sisters._pillars_of_the_north_american_conservation_model_part_3.pdf) (last visited Dec. 8, 2019) at 2.

<sup>183</sup> Daniel McGraw, *Ohio city votes to give Lake Erie personhood status over algae blooms*, The Guardian, (Feb. 28, 2019) <https://www.theguardian.com/us-news/2019/feb/28/toledo-lake-erie-personhood-status-bill-of-rights-algae-bloom>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Drewes Farms P'ship v. City of Toledo*, 2019 U.S. App. LEXIS 17410 (6th Cir., June 10, 2019) at 2.

<sup>192</sup> *See Coal. to Defend Affirmative Action v. Granholt*, 501 F.3d 775 (6th Cir. 2007).

<sup>193</sup> *Drewes*, *supra* note 191, at 3.

<sup>194</sup> Michael Phillis, *Enviro Says City Can Go Beyond Ohio's Lake Erie Rules*, LAW360.COM (Aug. 15, 2019), <https://www.law360.com/articles/1189098>.

<sup>195</sup> *See McGraw*, *supra* note 183.

<sup>196</sup> John Daley, *Toledo, Ohio, Just Granted Lake Erie the Same Legal Rights as People*, SMITHSONIAN MAG. (Mar. 1, 2019), <https://www.smithsonianmag.com/smart-news/toledo-ohio-just-granted-lake-erie-same-legal-rights-people-180971603/>.

<sup>197</sup> *Id.*

of the city's population voted on the ordinance.<sup>198</sup> However, this effort shows how citizens are using their voices to impact natural resource and wildlife related issues.

#### **d. Conservation Congress v. U.S. Forest Service**

**Tyler Steger**

In August of 2012, the Bagley Fire went through 46,000 acres of land in California, 70 percent of which was contained in the Shasta-Trinity National Forest, home to the Northern Spotted Owl—a threatened species under the Endangered Species Act (ESA).<sup>199</sup> In response to this disaster, the U.S. Forest Service (USFS) implemented the Bagley Hazard Tree Abatement Project (Project) to restore the roads within the national forest to working order.<sup>200</sup> This Project had the main goal of getting the roads back to operating condition by clearing downed logs and cutting down damaged trees and snags in danger of falling.<sup>201</sup> In March of 2013, the USFS began the administrative process to have the Project authorized under the Endangered Species Act and the National Environmental Policy Act (NEPA).<sup>202</sup> In doing so, the USFS requested public comment and put forward a draft environmental assessment (EA).<sup>203</sup> The USFS also put forward a biological assessment, and the U.S. Fish and Wildlife Service (FWS) issued a concurrence letter to support the USFS's findings as required for a no-effect finding under ESA section 7 consultation.<sup>204</sup>

In September of 2013, plaintiff filed a complaint against the defendants claiming that the Project threatened the habitat of the Northern Spotted Owl.<sup>205</sup> After years of litigation, the parties filed for summary judgment in 2017.<sup>206</sup> The plaintiff claimed that the defendants violated both NEPA and the ESA when implementing the Project.<sup>207</sup>

The court ruled that the defendants adhered to NEPA and granted them summary judgment.<sup>208</sup> The court noted that

the defendants followed all allowable standards when analyzing the impacts of logging on both the public land and the affected private land by using past projects to analyze the impact to the Northern Spotted Owl and putting plans in the EA to mitigate the effects on the owl.<sup>209</sup> Although the plaintiff also argued that the USFS did not consider any reasonable alternatives to their current plan, the court held that in the EA, the USFS considered three alternatives, all of which would have led to unsafe and unusable roads.<sup>210</sup>



The last argument put forward by the plaintiff was that the concurrence letter issued by the FWS was “arbitrary and capricious” and was not based on the best science and data available, which is required under the ESA.<sup>211</sup> Under the Administrative Procedure Act (APA), for the court to overturn agency action it has to be proven that it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>212</sup> Here, however, the court held that the plaintiffs gave no evidence to show that the FWS did not use the best science available other than that they did not follow the 2011 Northern Spotted Owl Recovery Plan.<sup>213</sup> The court noted that recovery plans are not binding law, and that determinations of what the best science is at any time is at the discretion of the agency.<sup>214</sup> In the concurrence letter, the USFWS considered the

<sup>198</sup> *Id.*, see also *Mahoney*, *supra* note 182, at 2.

<sup>199</sup> *Conservation Cong. v. United States Forest Serv.*, 377 F. Supp. 3d 1039, 1044 (E.D. Cal. 2019).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1045.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1045-46.

<sup>206</sup> *Id.* at 1046.

<sup>207</sup> *Id.* at 1047.

<sup>208</sup> *Id.* at 1056.

<sup>209</sup> *Id.* at 1049-50.

<sup>210</sup> *Id.* at 1053.

<sup>211</sup> *Id.* at 1054.

<sup>212</sup> 5 U.S.C. § 706(2)(A).

<sup>213</sup> 337 F. Supp. 3d at 1054.

<sup>214</sup> *Id.* at 1054.

recovery plan as one of many studies used to decide whether or not the Project will have any adverse effects on the wildlife.<sup>215</sup> The court held that the plaintiff may disagree with the FWS’s concurrence letter, but “the agency’s determination must be given deference.”<sup>216</sup> Based on the evidence, the court granted the defendants’ motion for summary judgment.<sup>217</sup>

This case dealt with the third and seventh pillars of the North American Model of Wildlife Conservation—the third due to the discourse involved in the democratic process for wildlife conservation, and the seventh due to the fact that science was the driving factor in how the parties and the courts evaluated the consultation that took place for this Project.

—377 F.Supp. 3d 1039 (E.D. Cal. 2019).

#### 4. Non-Frivolous Use of Wildlife

##### a. *PETA v. Wildlife in Need & Wildlife in Deed, Inc.*

**Jamileh Naboulsi**

Defendants in this case, Wildlife in Need and Wildlife in Deed, Inc. and its managers, operate a nonprofit organization that possesses big cats and other exotic animals.<sup>218</sup> Plaintiff, People for the Ethical Treatment of Animals (PETA), claims that defendants run an unaccredited roadside zoo that exhibits exotic animals for financial gain.<sup>219</sup> Defendants claim the organization is dedicated to rehabilitation and release of endangered species.<sup>220</sup> Previously, the court entered orders stating that Defendants must do the following: preserve all tangible and documentary evidence regarding the exotic animals; refrain from declawing and using the animals in public encounters; and prematurely separating the exotic animals from their mothers during a pending action relating to violations of the Endangered Species Act.<sup>221</sup> Additionally, the Defendants were to not transfer ownership of any of

the animals under the preservation of tangible evidence order.<sup>222</sup> One of the managers, however, subsequently admitted to intentionally moving the animals to a zoo he opened with another individual.<sup>223</sup> Plaintiffs claim the tangible evidence order was unclear and therefore they had no actual knowledge of any prohibition on moving the animals.<sup>224</sup>

The court held that Defendants were to protect and maintain the animals in their current state absent a court order that states otherwise and this prohibited them from transferring, moving, or relocating the animals before the litigation was to end.<sup>225</sup> Defendants claimed the animals were not tangible, but the court disagreed and further indicated that Defendant’s produced communications were concerning.<sup>226</sup> Additionally, the court found the owner of the zoo had actual knowledge of the preliminary injunction according to his deposition and text messages yet still decided to act in concert with Defendants in violation of the order.<sup>227</sup> The Defendants and the zoo owner were also required to comply with the order from the entry of the decision.<sup>228</sup> However, the court entertained the idea that Defendants may not have initially known they could not transfer the cats under the final Preservation Order and denied the request for sanctions, contempt, transferred ownership, and an order to show cause.<sup>229</sup>

The holding in this case resonates with the principle from the North American Model of Wildlife Conservation that animals must be used for a legitimate purpose such as for protection of self and property or sustenance.

—2019 WL 3342087 (S.D. Ind. July 25, 2019).

##### b. *Neighbors Against Bison Slaughter v. National Park Service*

**Tyler Steger**

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<sup>215</sup> *Id.* at 1054-55.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1056.

<sup>218</sup> *People for the Ethical Treatment of Animals v. Wildlife in Need & Wildlife in Deed, Inc.*, No. 417-cv-186-RLY-DML, 2019 WL 3342087 at \*1 (S.D. Ind. July 25, 2019).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at \*3-\*4.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at \*3.

<sup>226</sup> *Id.* at \*2, \*4.

<sup>227</sup> *Id.* at \*4.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at \*5.

In a small patch of public land contained in Yellowstone National Park, native Americans and local residents have participated in an annual bison hunt since it started in 2005.<sup>230</sup> The little piece of land that is a quarter square mile has been home to the bison hunt since a number of native tribes first exercised their treaty rights to hunt these bison every winter.<sup>231</sup> These tribes partake in this practice to: try and preserve their culture; to gather materials used in clothing and other traditional items; and to obtain the meat that is a “integral part of the Tribes’ diet”.<sup>232</sup> However, some of the other local residents do not like the practice, and as a result a suit was filed asking for a preliminary injunction to stop the 2019 bison season.<sup>233</sup> The plaintiffs are other local residents that live nearby who fear that they could be hit by a stray bullet, that they could contract brucellosis from the leftover gut piles, and that claim they are having trouble renting out their cabins during the hunting season due to the large numbers of bison that are killed.<sup>234</sup>

In its decision, the court laid out the standard for granting a preliminary injunction requiring the plaintiff to show the following: that it is likely to succeed on the merits; that without the injunction irreparable harm is likely to occur; that the balance of “equities tips in its favor;” and that the injunction is in the public’s interest .<sup>235</sup>



The court’s analysis began with the irreparable harm standard. The court critiqued the plaintiffs’ position saying that irreparable harm is very unlikely if you look at

the timing of the suit.<sup>236</sup> The hunt was approved in December 2018, yet the plaintiffs waited until October of 2019 before filing the lawsuit, after the season had already begun.<sup>237</sup> The court further noted that loss of the rental income is also not irreparable as that can be solved with monetary damages.<sup>238</sup> The court held that although fear of getting hit by a stray bullet can be irreparable harm, the plaintiffs have provided no evidence of this being likely as the Tribes require the participants to go through an orientation to make sure proper safety regulations are met.<sup>239</sup> The court also noted that the contraction of brucellosis could be irreparable, but concluded that this is also unlikely and the plaintiffs have provided no evidence to show otherwise.<sup>240</sup> Lastly the plaintiffs alleged that the killing of the bison have made them suffer from trauma.<sup>241</sup> The court resolved this issue by saying “the Plaintiffs could choose not to watch the bison hunt, thereby preventing their trauma.”<sup>242</sup>

The court then analyzed the impact of the bison hunt on the public at large. While the court concluded that the hardship on the plaintiffs is minimal, it recognized the hardship that would likely be placed on the tribe as its members rely on the meat for sustenance, the hides for “clothing and other items,” and for the act of cultural preservation.<sup>243</sup> The court found that the Tribe’s food source and cultural preservation, as well as the public interests, outweigh the “unlikely risks to the Plaintiffs,” and denied the preliminary injunction.<sup>244</sup>

This case revolves around the third and fourth pillars of the North American Model of Wildlife Conservation that are the democratic rule of law and non-frivolous use. Regarding the former, the court said that everyone has a chance to voice their opinion on this matter. The court also noted that the tribes use all of the buffalo, which fits into the non-frivolous provision of the Model.

—2019 U.S. Dist. LEXIS 207401 (D. Mont. Dec. 2, 2019).

<sup>230</sup> *Neighbors Against Bison Slaughter v. Nat’l Park Serv.*, 2019 U.S. Dist. LEXIS 207401 at 2 (D. Mont. Dec. 2, 2019).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 4-5.

<sup>233</sup> *Id.* at 6.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 7-8.

<sup>236</sup> *Id.* at 9-10.

<sup>237</sup> *Id.* at 10.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 11-12.

<sup>240</sup> *Id.* at 12.

<sup>241</sup> *Id.* at 13.

<sup>242</sup> *Id.* at 14.

<sup>243</sup> *Id.* at 15.

<sup>244</sup> *Id.*

## 5. Wildlife as an International Resource

### *Center for Biological Diversity v. McAleenan*

Jessica Chapman

In 1996, Congress enacted § 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a provision within the Immigration and Nationality Act of 1965 (INA).<sup>245</sup> Section 102 of the IIRIRA authorized the Attorney General to “take such actions as may be necessary to install additional physical barriers and roads” to prevent illegal entry into the United States.<sup>246</sup> Specifically, § 102 delegated to the Attorney General the authority to construct “fencing and road improvements” in high traffic areas.<sup>247</sup> Congress, through § 102(b) and § 102(a), gave “broad grant of discretion to the Executive Branch” to identify new geographical areas “along the southwest border where [a]dditional fencing must be built, and . . . designated particular stretches of land as [p]riority areas[.]”<sup>248</sup>



In 2008, Congress revised the IIRIRA by eliminating its enumerated list of specific border areas, and including the following language: “In carrying out [§ 102(a)], the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest

border where fencing would be most practical and effective and provide for the installation of additional physical barriers . . . to gain operational control of the southwest border.”<sup>249</sup> Through these new provisions, Congress expressly granted the Department of Homeland Security (DHS) the ability to waive restrictions of all laws to more quickly erect border protection, including the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).<sup>250</sup> Congress also expressly restricted the federal courts’ jurisdiction to preside only over claims of U.S. Constitutional violations brought against DHS’s waiver administration.<sup>251</sup>

### Facts and Procedural History

In January 2017, President Trump ordered DHS to “take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border.”<sup>252</sup> In order to execute this mandate, DHS published in the Federal Register that it would issue two waivers that identified specific stretches of land and would waive 25 statutes, pursuant to § 102(c).<sup>253</sup>

The Center for Biological Diversity, Southwest Environmental Center, Defenders of Wildlife, and the Animal Legal Defense Fund (“plaintiffs”) sued DHS to prevent it from constructing the wall because one of the waivers permitted construction that intersected the Chihuahuan Desert in New Mexico, which is “one of the world’s most biologically diverse deserts due to the presence and abundance of endemic species that exist nowhere else on earth.”<sup>254</sup> Plaintiffs stated the wall’s erection would cause “numerous negative impacts on the wildlife, vegetation, and the sensitive biological habitats on and near the proposed Project site.”<sup>255</sup> Plaintiffs claimed DHS’s waiver authority under the IIRIRA § 102(c), was *ultra vires*,<sup>256</sup> and so, unlawful, because the statute did not include the New Mexico territory within § 102(c)’s waivers.<sup>257</sup> Plaintiffs also argued DHS’s issuance of the waivers violated the U.S. Constitution through the

<sup>245</sup> Ctr. for Biological Diversity v. McAleenan, No. 18-cv-655 (KBJ), 2019 WL 4228362, at \*1, \*2 (D.D.C. Sept. 4, 2019).

<sup>246</sup> *Id.* at \*3 (internal quotations and citations omitted).

<sup>247</sup> *Id.* (internal quotations and citations omitted).

<sup>248</sup> *Id.* (quoting IIRIRA Pub. L. No. 104-208, 110 Stat. 3009-546 § 102 (b)(1)(A), (B) [hereinafter IIRIRA]).

<sup>249</sup> *Id.* (quoting IIRIRA § 102 (b)(1)(A)).

<sup>250</sup> *Id.* at \*4 (internal quotations omitted).

<sup>251</sup> *Id.* at \*5.

<sup>252</sup> *Id.* (internal quotations and citations omitted).

<sup>253</sup> *Id.* at \*5, \*6 (internal quotations and citations omitted).

<sup>254</sup> *Id.* (internal quotations and citations omitted).

<sup>255</sup> *Id.* (internal quotations and citations omitted).

<sup>256</sup> *Ultra vires* occurs when a party exercises “an invalid excess or power of authority.” See *What is ULTRA VIRES?*, LAW DICTIONARY (last visited Nov. 23, 2019), <https://thelawdictionary.org/ultra-vires/>.

<sup>257</sup> Ctr. for Biological Diversity, 2019 WL 4228362, at \*6.

following: Take Care Clause;<sup>258</sup> the Non-Delegation and Separation Powers Doctrine;<sup>259</sup> and the Presentment Clause.<sup>260</sup> DHS filed for a motion to dismiss plaintiff's claims, stating its actions were statutorily lawful and those actions did not violate the Constitution.<sup>261</sup>

## Rules and Analysis

The court found plaintiffs' argument that DHS acted beyond the scope of § 102(c) was meritless. The court held that the language of § 102(c)(2)(A) "plainly evidences Congress's intent to preclude non-constitutional causes of action" that impede DHS's ability to administer waivers to implement the IIRIRA.<sup>262</sup> Furthermore, the court recognized that Congress expressly deprived federal courts of jurisdiction over non-constitutional claims against DHS's waiver administration in § 102(c)(2)(A).<sup>263</sup> Because Congress expressly stated in the IIRIRA that DHS had the authority to administer waivers that exempted construction on behalf of the IIRIRA for *all* statutes, including the ESA and NEPA, the court noted, DHS was within its statutory authority to administer the waiver for the New Mexico construction. Additionally, the court concluded that because Congress removed the enumerated list of land in § 102(a) and gave DHS the authority to construct walls where it "would be most practical and effective," DHS was within its statutory authority to erect walls along the New Mexico/Mexico border.<sup>264</sup>

The court found plaintiff's claims that DHS's waiver administration violated the Constitution were also meritless. The court noted that constitutional claims brought under the separation-of-powers context are "rarely successful" because courts have established narrow instances in which Congressional delegation of authority to

other branches of government violates the Constitution.<sup>265</sup> Through the analysis of *Defenders of Wildlife v. Chertoff*,<sup>266</sup> the court found DHS's authority to administer waivers was within the discretion of § 102(b).<sup>267</sup> In this regard, the court stated, "from the standpoint of what suffices as guidance from Congress regarding how the Executive Branch is to exercise the authority granted in the statute for constitutional purposes, what is set forth in subsections 102(a) and 102(c) is enough."<sup>268</sup> Therefore, the court held, Congress provided DHS with a "guiding principle" to administer waivers in order to expeditiously execute the border wall's construction in § 102,<sup>269</sup> and DHS's authority did not violate the Constitution's separation of powers requirements through the Take Care Clause, the Non-Delegation Doctrine, or the Presentment Clause. For these reasons, the court ruled that it did not have jurisdiction to hear plaintiff's claims, found DHS's waiver administration constitutional, and ultimately dismissed the case.<sup>270</sup>

This case aligns with the Public Trust Doctrine principle of the North American Model of Wildlife Conservation that wildlife is considered an international resource because the wall is located in proximity to the border between the United States and Mexico and because the countries have historically made cooperative efforts to conserve wildlife. Flora and fauna that are indigenous to the land where the wall exists may struggle to survive because the wall creates an artificial barrier that prevents species, who do not recognize political barriers, from being able to flourish within their native habitat.

—2019 WL 4228362 (D.D.C. Sept. 4, 2019).

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<sup>258</sup> The Take Care Clause differentiates the President's power from Congress's authority to draft laws, and exists to ensure the President of the United States will *take care* to "faithfully execute[]" the laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); U.S. CONST. art. II, § 3.

<sup>259</sup> The Non-Delegation Doctrine prohibits Congress from delegating its legislative authority to other entities, particularly the President of the United States. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

<sup>260</sup> *Ctr. for Biological Diversity*, 2019 WL 4228362, at \*6. The Presentment Clause requires that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become[s] a Law, be presented to the President of the United States," U.S. CONST. art. I, § 7, cl. 2, in order to

"erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps." *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 957 (1983).

<sup>261</sup> *Ctr. for Biological Diversity*, 2019 WL 4228362, at \*7.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at \*3 (quoting IIRIRA § 102 (b)(1)(A)).

<sup>265</sup> *Id.* at \*16.

<sup>266</sup> 527 F. Supp. 2d. 119, 120-128 (D.D.C. 2007).

<sup>267</sup> *Ctr. for Biological Diversity*, 2019 WL 4228362, at \*19.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at \*21.

## 6. Opportunity to Hunt and Fish for All

### a. *Carter v. Iowa Dep't of Natural Resources*

Amanda Anderson

Iowa law regarding the issuance of hunting and fishing licenses is more favorable to resident landowners than non-resident landowners.<sup>271</sup> The law is even more favorable to resident owners of agricultural land.<sup>272</sup> The owner of a farm unit whose “principal and primary residence or domicile” is in the state may obtain the following deer hunting licenses for no fee and for use only on the farm unit:

- 1 antlered/any sex, and
- 1 antlerless.<sup>273</sup>

The owner may then purchase two more antlerless deer hunting licenses for use only on the farm unit.<sup>274</sup> On the other hand, the owner of land within the state who is *not* a resident can apply to purchase one antlered/any sex deer hunting license.<sup>275</sup> 6,000 of these licenses are available through a drawing, and those who do not win one are given preference for a limited number of antlerless deer licenses.<sup>276</sup>

#### The Issue: Meaning of “Owner”

Russell Carter, a nonresident who owns hunting land in Iowa, petitioned the Iowa Department of Natural Resources (DNR) for a declaratory judgment to establish him as an owner as used in the licensing requirements or an alternative ruling that failure to consider him an owner violates his inalienable property rights and equal protection rights as established by the Iowa Constitution.<sup>277</sup> Because the DNR failed to respond to Carter’s petition, it was considered denied, and Carter

petitioned for judicial review.<sup>278</sup> The district court found in favor of the DNR on both issues and stated that the licensing differences for residents and nonresidents were a valid exercise of the state’s police powers. Carter appealed to the Iowa Court of Appeals.<sup>279</sup>

#### Inalienable Rights

The Iowa Supreme Court has held that property ownership does not carry with it the right to hunt.<sup>280</sup> Therefore, the purchase of property within Iowa did not give Carter the right to hunt on that property. For this reason, the Court of Appeals held that Carter’s right to hunt is not protected as an inalienable right.<sup>281</sup>

#### Equal Protection Rights

The Court of Appeals relied on the rational basis test to determine whether an apparently discriminatory law is valid as an exercise of the state’s police powers.<sup>282</sup> Under this test, the law in question must be “rationally related to a legitimate government interest.”<sup>283</sup> A rationally related law is then presumed to be valid “unless the relationship . . . is so weak the classification must be viewed as arbitrary or capricious.”<sup>284</sup> The Court of Appeals held that the management and conservation of wildlife, including the regulation of deer hunting, falls within the state’s police power.<sup>285</sup> The limiting of nonresident licenses is a reasonable exercise of this police power, as it serves to sustain the proper balance of genders and preserve herd size within the state.<sup>286</sup> Because of this rational relationship, the Court of Appeals upheld the decision of the district court in favor of the DNR.<sup>287</sup>

—2019 Iowa App. LEXIS 119 (Iowa Ct. App. Feb. 6, 2019).

<sup>271</sup> *Carter v. Iowa Dep’t of Nat. Res.*, No. 18-0087, 2019 Iowa App. LEXIS 119, at \*1 (Iowa Ct. App. Feb. 6, 2019) (quoting *Democko v. Iowa Dep’t of Nat. Res.*, 840 N.W.2d 281, 287 (Iowa 2013)).

<sup>272</sup> See IOWA CODE § 483A.24(2)(c) (2018).

<sup>273</sup> *Id.*

<sup>274</sup> § 483A.24(2)(d).

<sup>275</sup> § 483A.8(3), (5).

<sup>276</sup> § 483A.8(3)(c), (3)(e), (5).

<sup>277</sup> *Carter*, 2019 Iowa App. LEXIS 119, at \*3-4.

<sup>278</sup> *Id.* at \*4.

<sup>279</sup> *Id.* at \*4-5.

<sup>280</sup> *Id.* at \*6 (quoting *Democko v. Iowa Dep’t of Nat. Res.*, 840 N.W.2d 291, 293 (Iowa 2013)).

<sup>281</sup> *Id.* at \*8.

<sup>282</sup> *Id.* at \*12-15.

<sup>283</sup> *Id.* at \*14 (quoting *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012)).

<sup>284</sup> *Id.* (quoting *King*, 818 N.W.2d at 28).

<sup>285</sup> See *id.* at \*15 (quoting *Metier v. Cooper Transp. Co.*, 378 N.W.2d 907, 914 (Iowa 1985)).

<sup>286</sup> *Id.* (quoting *Schutz v. Thorne*, 415 F.3d 1128, 1135 (10th Cir. 2005)).

<sup>287</sup> *Id.*

## b. *Sturgeon v. Frost*

### Steffen Mammen

For nearly forty years, John Sturgeon revved up his hovercraft, piloted it up Alaska's Nation River, and scouted the shore for a moose to take home.<sup>288</sup> His favorite hunting spot lay beyond a section of the river that flowed through the Yukon-Charley Rivers National Preserve, a unit under management of the National Park Service (NPS).<sup>289</sup> On one of these trips, Sturgeon was confronted by a park ranger who instructed that hovercrafts were prohibited on river within any federal preserve.<sup>290</sup> Sturgeon complied, but filed suit against NPS asking that he be permitted to continue to traverse his time honored route.<sup>291</sup> Little could he have known, Sturgeon's case presented such a complex issue that the Supreme Court granted certiorari not once, but twice.<sup>292</sup>



Typically NPS regulation does in fact prohibit hovercrafts, but Sturgeon argued that Alaska was provided an exception under the Alaska National Interest Lands Conservation Act (ANILCA).<sup>293</sup> Sturgeon claimed that ANILCA ensured that NPS regulations only applied to public federal land in Alaska, and that the Nation River he so frequently piloted his hovercraft upon was not public land as defined in

ANILCA.<sup>294</sup> In its first review of the case, the Supreme Court found it necessary to remand to the U.S. Court of Appeals for the Ninth Circuit on two key questions—Is the Nation River public federal land with respect to ANILCA, and if not, does NPS still retain authority to regulate Sturgeon's hovercraft use on the section of the river within the Yukon-Charley Preserve?<sup>295</sup>

Alaska has a long history of negotiating between preservation of its natural resources and making economic use of them.<sup>296</sup> It is in this conflict that the dual goals of ANILCA arise, with the act simultaneously providing mechanisms for preservation and protection whilst maintaining opportunity for all of Alaska to benefit from its bounty economically and socially.<sup>297</sup> As such, ANILCA set aside 104 million acres of federally owned land within the state for preservation.<sup>298</sup> Unlike preservation areas in the lower 48 states, however, this designation was done based on natural features, as opposed to being carved out by land which was already mostly federally owned.<sup>299</sup> Aware that this decision enclosed state, Native, and private land, Congress ensured that ANILCA would not hold land which was previously conveyed to these groups as subject to federal restrictions and that this sort of land would not be understood a “public.”<sup>300</sup>

On remand, the Ninth Circuit found that the section of the Nation River in question was considered public land, thus rejecting Sturgeon's request once more.<sup>301</sup> Holding that this answer was inadequate based on the history of ANILCA, the Supreme Court again granted certiorari.<sup>302</sup> The Court recognized that running water cannot be owned.<sup>303</sup> It also recalled that the Submerged Land Act of 1953 transferred title of the riverbed to Alaska upon its admission as a state.<sup>304</sup> When this statute is read with the later-enacted ANILCA, it is clear that the river is not considered public land due to its title being transferred to the state prior to ANILCA's enactment.<sup>305</sup> The Park Service tried to claim that it owned an interest in the water itself,

<sup>288</sup> *Sturgeon v. Frost*, 139 S. Ct. 1066, 1072 (2019).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 1072-73 (citing 36 CFR §2.17(e) (2018); 94 Stat. 2371).

<sup>294</sup> *Id.* at 1073.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 1073-74.

<sup>297</sup> *Id.* at 1075.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 1075-76.

<sup>301</sup> *Id.* at 1078.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 1074 & 1078 (citing 43 U.S.C.S § 1311).

<sup>305</sup> *Id.* at 1079.

but the Court found no evidence that Congress intended ANILCA to achieve such a result and that it would not preclude Sturgeon from running his hovercraft over it anyway.<sup>306</sup>

In answering its second question, the Supreme Court noted that in any other state Sturgeon's claim would not succeed as the Park Service has the power to regulate non-public lands in its parks—but Sturgeon lives in Alaska.<sup>307</sup> The Court held firm that the text and partial purpose of ANILCA is to preserve the rights and opportunity of Alaskans to use their land to their social and economic advantage.<sup>308</sup> With both of its questions answered, the Supreme Court reaffirmed that “Park Service regulations—like the hovercraft rule—do not apply to non-public lands in Alaska even when those lands lie within national parks.”<sup>309</sup> With this interpretation of ANILCA, “Sturgeon can again rev up his hovercraft in search of moose.”<sup>310</sup>

—139 S. Ct. 1066 (2019).

## 7. Scientific Management

### *a. Alliance for the Wild Rockies v. Probert* **Raechel Broek**

Alliance for the Wild Rockies (“Alliance”) alleged that the U.S. Forest Service (USFS) and U.S. Fish and Wildlife Service (FWS) failed to adequately consider impacts to the Cabinet-Yaak grizzly bear population from adopting access amendments to the Kootenai National Forest Plan and approving a timber sales project.<sup>311</sup> The Alliance moved for the Court to take notice of two documents outside of the administrative record concerning the grizzlies’ population status, and both the Plaintiff and Defendant filed cross-motions for summary judgement.<sup>312</sup> While the Alliance’s motion to supplement the record was rejected, the U.S. District Court for the District of Montana granted the motion for summary judgement in favor of the Alliance due to the agencies’ failure to account for ineffective road closures when considering environmental impacts on the

grizzly population.<sup>313</sup> The matter was remanded back to the agencies with instruction to conduct a supplemental environmental impact statement (EIS) on the effect of USFS’s 2013 approval of the Pilgrim Creek Timber Sale Project (“Pilgrim Project”) on grizzlies, as well as instruction to reinstitute Endangered Species Act (ESA) consultation for both the access amendments and the Pilgrim Project.<sup>314</sup>

The access amendments to the Forest Plan are motorized vehicle access and security guidelines which “[limit] the mileage of open and total roads in areas used regularly by bears but outside designated bear recovery zones.”<sup>315</sup> The Pilgrim Project is an initiative approved by USFS that “authorizes timber harvest on the Kootenai National Forest in order to maintain and increase forest resilience to insects, disease and disturbance ... and improve big game forage production while providing support to the local economy through commercial timber harvest.”<sup>316</sup>

In 2013, the Alliance sued under the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and ESA, alleging that the Pilgrim Project would “create a net increase in linear miles of total roads in violation of Standard II(B) of the 2011 Access Amendments to the Kootenai National Forest Plan.”<sup>317</sup> The court found the Project compliant with the access amendments and the U.S. Court of Appeals for the



<sup>306</sup> *Id.* at 1079-80.

<sup>307</sup> *Id.* at 1080.

<sup>308</sup> *Id.* at 1084.

<sup>309</sup> *Id.* at 1085.

<sup>310</sup> *Id.* at 1073.

<sup>311</sup> *All. for Wild Rockies v. Probert*, 2019 WL 4889253, (D. Mont. Oct. 3, 2019).

<sup>312</sup> *Id.* at \*1.

<sup>313</sup> *Id.* at \*13.

<sup>314</sup> *Id.*

<sup>315</sup> *Agencies must analyze illegal road use bearing down on Montana grizzlies*, 2019 WL 5076803.

<sup>316</sup> 2019 WL 4889253 at \*2.

<sup>317</sup> *Id.* at 1.

Ninth Circuit affirmed.<sup>318</sup> The Court held that “the agency [is permitted to] exclude roads closed to motorized access by berms and barriers” from the mileage calculation of total roads, so long as the berms “effective[ly] prevent[ed] motorized access.”<sup>319</sup> Therefore “any closure that fails to effectively prevent motorized vehicle access fails to comply with Standard II(B) of the access amendments.”<sup>320</sup>

The Alliance brought the present claim alleging that the berms and barriers put in place by the Forest Service were insufficient to prevent illegal use of the roads and that unauthorized use is a danger to the grizzly population not considered in the development and approval of the access amendments and the Pilgrim Project.<sup>321</sup> For this reason, the Alliance brought claims against USFS and FWS for violations under NEPA, NFMA, and the ESA.<sup>322</sup> The Alliance prevailed on both its ESA and NEPA claims.

The Court sought to determine “whether the agencies adequately considered the impact of ineffective road closures on grizzly bears when they adopted the Access Amendments and approved the Pilgrim Project.”<sup>323</sup> The Forest Service conceded that “in developing the Access Amendments and approving the Pilgrim Project, the agencies assumed road closures were effective and they did not specifically consider the environmental impacts of illegal use caused by ineffective closures.”<sup>324</sup> However, it found that the agencies’ assessment of temporary road impacts sufficed for ESA section 7 consultation.<sup>325</sup>

The Court found that “the Alliance successfully demonstrated that agencies’ assumptions regarding closure effectiveness may have been reasonable in 2011,

[but] data over the last eight years demonstrates that ineffective closures have contributed to increases in linear road miles and potentially impacted grizzly bears in ways not previously considered.”<sup>326</sup> The Court conducted an analysis into whether to reinstate consultation for the effect of the Access Amendments on grizzlies, and found that reinstatement was appropriate.<sup>327</sup>

“[T]he Pilgrim Project is tiered to the Access Amendments” and was found not to have conducted its own second-tier biological opinion; therefore, reinstatement is required for the timber sales project as well.<sup>328</sup> The Court also concluded that a supplemental Environmental Impact Study is appropriate for the Pilgrim Project because “the ‘Direct and Indirect Effects’ section of the Project’s EIS specifically relies on restricted public access to roads.”<sup>329</sup> “The original NEPA documents for the Project incorrectly assumed all closures were effective; [therefore, the Court ruled that] a supplemental EIS is necessary.”<sup>330</sup>

The court granted the motion for summary judgment in favor of the Alliance and the matter was remanded back to the agencies with instruction to conduct a supplemental EIS on the effect of the Forest Service’s approved Pilgrim Project on grizzly bears, as well as an instruction to reinstate consultation of the effect on grizzly bears for both the “Access Amendments” and the Pilgrim Project.<sup>331</sup>

This outcome aligns with the North American Model of Wildlife Conservation’s principle of science as the proper tool for managing wildlife because the remanded instructions require the agencies to conduct further

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.*, citing *All. for the Wild Rockies v. Bradford*, 856 F.3d 1238, 1243 (9<sup>th</sup> Cir. 2017).

<sup>320</sup> 856 F.3d 1238 at 1243.

<sup>321</sup> 2019 WL 4889253 at \*1-\*2.

<sup>322</sup> *Id.* at \*1.

<sup>323</sup> *Id.* at \*5.

<sup>324</sup> *Id.* at \*2.

<sup>325</sup> *Id.* at \*5.

<sup>326</sup> *Id.* at \*2.

<sup>327</sup> “(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:  
(1) If the amount or extent of taking specified in the incidental take statement is exceeded;

(2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or

(4) If a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16(a). The Court found that reinstatement in the present case is required under subsections (1), (2), and (3).

<sup>328</sup> 2019 WL 4889253 at \*11.

<sup>329</sup> *Id.* at \*12.

<sup>330</sup> *Id.* at \*2.

<sup>331</sup> *Id.* at \*13.

investigation into the environmental impacts that their programs are having in the National Forest.

—2019 WL 4889253 (D. Mont. Oct. 3, 2019)

## **b. *Wild Watershed v. Hurlocker***

**Jessica Chapman**

The U.S. Forest Service (USFS) introduced the Hyde Park Project and the Pacheco Canyon Project (Projects) to manage the forests in those areas through thinning<sup>332</sup> and prescribed burning<sup>333</sup> in order to prevent the spread of disease, insect infestation, and “catastrophic” wildfires in those regions.<sup>334</sup> The Projects are located within land the Secretary of Agriculture designated as “insect and disease treatment areas,” in the Healthy Forests Restoration Act (HFRA).<sup>335</sup> Once the Secretary of Agriculture designates land as part of HFRA, USFS has the authority to “carry out priority projects on Federal lands [to] reduce the risk or extent of, or increase the resilience to, insect or disease infestation; or . . . to reduce hazardous fuels.”<sup>336</sup> Through this statutory authority, USFS provided notice and opportunity for public comment regarding the Projects, and subsequently approved them.<sup>337</sup> However, USFS did not prepare an environmental impact statement (EIS)<sup>338</sup> for the Projects.<sup>339</sup> USFS claimed those procedures were not required; according to the USFS the Projects were “categorically excluded” from the National Environmental Policy Act (NEPA) requirements<sup>340</sup> because they were not

“major federal actions” that would significantly affect the quality of the human environment.<sup>341</sup>

Wild Watershed et al. (“plaintiffs”) sued USFS asserting that USFS’s decision to designate land within the Projects under HFRA, and subsequently to approve the Projects, was: “arbitrary, capricious, and contrary to law”; violated NEPA and HFRA; and did not satisfy HFRA’s statutory requirements.<sup>342</sup> Plaintiffs argued NEPA required USFS to assess the “foreseeable cumulative impacts” the Projects would create before designating the land as part of HFRA.<sup>343</sup> Plaintiffs claimed these impacts would affect the surrounding environment, which made the designation a “major federal action,” and therefore, would require a NEPA programmatic impact analysis, and ultimately an



<sup>332</sup> “Thinning” is the act of removing trees from an area in order to provide neighboring trees with space and resources to grow. See John Punches, *Thinning: an important forest management tool*, OR. ST. U. (Sept. 2004), <https://extension.oregonstate.edu/forests/health-managment/thinning-important-forest-management-tool>.

<sup>333</sup> “Prescribed burns” are planned fires that manage vegetation in forested areas that meet pre-defined safety conditions and protect public safety. See *Wildland Fire: What is a Prescribed Fire?*, NAT’L PARK SERV. (last visited Nov. 23, 2019), <https://www.nps.gov/articles/what-is-a-prescribed-fire.htm>.

<sup>334</sup> *Wild Watershed v. Hurlocker*, 393 F. Supp. 3d 1086, 1090 (D.N.M. 2019).

<sup>335</sup> *Id.* at 1091; 16 U.S.C. § § 6501-6591b.

<sup>336</sup> *Wild Watershed*, 393 F. Supp. 3d at 1091 (quoting 16 U.S.C. § 6591a(b)(A), (B)).

<sup>337</sup> *Id.*

<sup>338</sup> An EIS provides “full and fair discussion of significant environmental impacts . . . and inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

<sup>339</sup> *Wild Watershed*, 393 F. Supp. 3d at 1091.

<sup>340</sup> *Id.* The purpose of NEPA is to establish “a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321.

<sup>341</sup> *Wild Watershed*, 393 F. Supp. 3d at 1093 (citing 42 U.S.C. § 4332(C)).

<sup>342</sup> *Id.* at 1091.

<sup>343</sup> *Id.* at 1093.

EIS.<sup>344</sup> Alternatively, plaintiffs argued that if the HFRA land designation process did not require NEPA review, USFS's approval of the Projects did because of their environmental impact through specific land treatment.<sup>345</sup> Plaintiffs requested the court order USFS to halt the Projects until USFS prepared an EIS.<sup>346</sup>

USFS argued that its designation of the Projects' lands under HFRA was not a major federal action because it was a "mapping exercise" that "categorized forest health" to prepare for future evaluations of specific areas.<sup>347</sup> Additionally, USFS argued that the land designation did not obligate the USFS to prepare an EIS for NEPA because it "did not authorize any projects, did not commit any resources, and did not have any concrete impacts on the environment" that USFS could evaluate.<sup>348</sup>

### Standard of Review

Plaintiffs suit against the USFS was a challenge to a "final agency action," which meant the court reviewed the claims within the restrictions of the Administrative Procedure Act (APA).<sup>349</sup> Therefore, the court "[could not] set aside [FRFA's] agency decision unless it fail[ed] to meet statutory, procedural or constitutional requirements, or unless it [was] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>350</sup> The court recognized that it could only find USFS's decision to designate the land and approve the projects arbitrary and capricious if USFS:

relied on factors on which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>351</sup>

Furthermore, the court concluded it would strongly defer to USFS's actions if its decisions "involve[d] technical or scientific matters within the agency's area of expertise."<sup>352</sup>

### Discussion

The court found that USFS did not violate NEPA by failing to prepare an EIS.<sup>353</sup> The court found multiple district court cases that determined NEPA does not require an environmental analysis for land prior to its HFRA designation.<sup>354</sup> The court analogized the facts of *Native Ecosystems Council v. Erickson*<sup>355</sup> to this case to complete its analysis.<sup>356</sup> Like USFS's HFRA designation of land in *Native Ecosystems Council*, the court noted, USFS's land designation in this case did not "trigger NEPA review" because its evaluation was not a "final agency action" that committed resources and USFS did not authorize any projects.<sup>357</sup> USFS's designation, at the time, was for "hypothetical, speculative" projects that USFS could not actually review.<sup>358</sup> The court held the HFRA designation itself, not the Projects, did not "significantly affect the quality of the human environment" because it by itself did not change the land.<sup>359</sup> The court confirmed that HFRA designation is an abstract concept that applies to "landscape-scale areas" that exist beyond NEPA review, which is limited to specific areas within the total landscape.<sup>360</sup> Once actual treatment projects exists, with specific land identified, USFS must then prepare an EIS.<sup>361</sup>

Additionally, the court found that USFS could exclude treatment projects in designated areas that satisfy certain criteria if the category under which the project falls has

<sup>344</sup> *Id.*; 42 U.S.C. § 4332(C).

<sup>345</sup> *Wild Watershed*, 393 F. Supp. 3d. at 1095; 16 U.S.C. § 6591a(b).

<sup>346</sup> *Wild Watershed*, 393 F. Supp. 3d. at 1091.

<sup>347</sup> *Id.* at 1093.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 1092 (citing *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1226 (10th Cir. 2011); *Native Ecosystems Council v. Erickson*, 330 F.Supp.3d 1218, 1228 (D. Mont. 2018)).

<sup>350</sup> *Id.* (quoting *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001) and citing 5 U.S.C. § 706(2)(A)-(D)).

<sup>351</sup> *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>352</sup> *Id.* at 1092-93 (quoting *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011)).

<sup>353</sup> *Id.* at 1095.

<sup>354</sup> *Id.* at 1093.

<sup>355</sup> 330 F.Supp.3d 1218, 1235 (D. Mont. 2018).

<sup>356</sup> *Wild Watershed*, 393 F. Supp. 3d. at 1094.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 1095.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

already “been found to have no significant individual or cumulative effects on the environment.”<sup>362</sup> However, the court stated, when an agency adopts a categorical exclusion, USFS must review each proposed action (or project) “for extraordinary circumstances in which a normally excluded action may have a significant effect.”<sup>363</sup> Plaintiffs argued USFS should have reviewed the Projects for extraordinary circumstances because they were part of a larger strategy for USFS to modify forest conditions.<sup>364</sup> Therefore, plaintiffs claimed, USFS failed to review the projects for extraordinary circumstances within the cumulative impacts assessments of the larger forest modification strategy.<sup>365</sup> The court, however, found the categorical exclusion did not require extraordinary circumstances review because the plain language of HFRA does not refer to extraordinary circumstances.<sup>366</sup> Furthermore, HFRA explicitly lists circumstances in which it requires extraordinary circumstances review, and the Projects did not fall within those express categories.<sup>367</sup>

Finally, the court found that USFS properly designated the land under HFRA, and USFS properly approved the Projects without preparing an EIS pursuant to NEPA’s statutory requirements. Therefore, the court found USFS did not act arbitrarily or capriciously, and its agency actions were within accordance of law and the APA.<sup>368</sup>

Plaintiffs appealed the court’s decision. This case aligns with the tenet of the North American Model of Wildlife Conservation that science is the proper tool to make wildlife policy. USFS used its authority to designate land and establish the Projects based on scientific data to prevent damage from fires, disease, and insect infestation.

—393 F.Supp. 3d 1086 (D.N.M. 2019).

<sup>362</sup> *Id.* (citing 40 C.F.R. § 1508).

<sup>363</sup> *Id.* (citing 40 C.F.R. § 1508).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 1096.

<sup>367</sup> *Id.* at 1097.

<sup>368</sup> *Id.* at 1101. The court reviewed USFS’s decision to approve the Hyde Park and Pacheco Canyon Projects based on categorical exclusion and NEPA requirements and categorical exclusion requirements under HFRA (old growth management, best available scientific information, species concerns, public health) in greater detail that is not provided in this brief. *Id.* at 1095-1101.

## c. *American Stewards of Liberty v. U.S. Department of the Interior*

Jessica Chapman

The bone cave harvestman (“harvestman”) is a “tiny, pale, orange, eyeless . . . spider-like species that spends its entire life underground” and is endemic only to Travis County and Williamson County in Texas.<sup>369</sup> The U.S. Fish and Wildlife Service (FWS) listed the harvestman as endangered under the Endangered Species Act (ESA)<sup>370</sup> in 1993 because of its “limited population and fragile nature.”<sup>371</sup>



Gallifer Cave, Travis County, TX  
© 2011 Blais Hendrix

### Endangered Species Act Procedures

When an “interested person” petitions FWS to remove a species from the ESA’s endangered species list, FWS must make a finding to determine whether the petition, based on available information, “presents substantial scientific or commercial information<sup>372</sup> indicating that the petitioned

<sup>369</sup> *Am. Stewards of Liberty v. Dep’t of Interior*, 370 F. Supp. 3d 711, 716 (W.D. Tex. 2019).

<sup>370</sup> Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved” and to “provide a program for the conservation of . . . endangered species.” *Id.* at 717; 16 U.S.C. § 1531(b). Endangered species are those that are “in danger of extinction throughout all or a significant portion of its range.” *Id.* at § 1532(6).

<sup>371</sup> *Am. Stewards of Liberty*, 370 F. Supp. 3d. at 716-17.

<sup>372</sup> Substantial information is defined as “information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” *Id.* at 717; 50 C.F.R. § 424.14(B)(1).

action may be warranted.”<sup>373</sup> FWS must review the petition for the following: a “detailed narrative justification” for the delisting; a “description of the ‘numbers and distribution of the species involved’”; threats to the species; and whether the petition includes information about the species’ status within its overall range or a “significant portion of its range.”<sup>374</sup> According to the ESA, FWS must respond to the petition by publishing its findings in a “listing determination” based on five factors:

- (A) the present or threatened destruction, modification, or curtailment of [the species’] habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting [the species’] continued existence.<sup>375</sup>

If FWS determines a delisting *may* be warranted, it will conduct a 12-month review and publish its findings.<sup>376</sup>

American Stewards of Liberty (petitioner) petitioned FWS to delist the harvestman in 2014.<sup>377</sup> Petitioner claimed that the harvestman’s overall range and number of habitats increased, the harvestman’s threats decreased compared to its threats when FWS listed the species in 1988, and local and state conservation programs have helped the harvestman’s populations recover.<sup>378</sup> FWS completed its petition finding in 2017, and determined the harvestman’s delisting was not warranted.<sup>379</sup> Petitioners challenged FWS’s 2017 finding through this action.<sup>380</sup>

## Standard of Review

Petitioner challenged FWS’s findings under the Administrative Procedure Act (APA), which meant the findings were subject to judicial review because FWS found delisting the harvestman was not warranted.<sup>381</sup> The court noted it would set aside FWS’s decision and determine the decision was unlawful if it found FWS’s findings were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or if the findings were “in excess of [FWS’s] statutory jurisdiction, authority, or limitations, or . . . without observance of procedure required by law.”<sup>382</sup> The court would then determine whether FWS’s findings were arbitrary and capricious based on whether FWS “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>383</sup>

## Discussion

The court found FWS’s findings that the harvestman’s delisting was not warranted were “arbitrary, capricious, and not in accordance with law.”<sup>384</sup> The court found FWS violated its statutory authority because it required petitioners to present more evidence than FWS could prove was “available or attainable,” which conflicted with the ESA’s requirement that the petitioners must base the petition on the best *available* data.<sup>385</sup> The court determined FWS required “an unlawfully high quantum of evidence” because it stated petitioners did not include information that fulfilled the five evaluation standards, even though that information was impossible to attain or approximate.<sup>386</sup> The court found FWS’s denial of the petition went beyond the ESA’s statutory requirements.<sup>387</sup> Therefore, the court concluded that FWS’s actions were arbitrary and capricious and were not in accordance with

<sup>373</sup> *Am. Stewards of Liberty*, 370 F. Supp. 3d. at 717; 16 U.S.C. § 1533(b)(3)(A).

<sup>374</sup> *Am. Stewards of Liberty*, 370 F. Supp. 3d. at 717; 50 C.F.R. at § 424.14(b)(2).

<sup>375</sup> *Am. Stewards of Liberty*, 370 F. Supp. 3d. at 717-18; 16 U.S.C. § 1533(a)(1).

<sup>376</sup> *Am. Stewards of Liberty*, 370 F. Supp. 3d. at 718; *See* 16 U.S.C. § 1553(b)(3)(B), and 50 C.F.R. § 424.11(d)(1)-(3).

<sup>377</sup> *Am. Stewards of Liberty*, 370 F. Supp. 3d. at 719.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 719-20 (citing 82 Fed. Reg. 20,861-02 (May 4, 2017)). FWS completed a finding in 2015, however, it failed to review

certain reference materials before making its decision, and so, conducted a new petition evaluation in 2017. *Id.* at 719 (citing 80 Fed. Reg. 30,990 (June 1, 2015)).

<sup>380</sup> *Id.* at 720.

<sup>381</sup> *Id.* at 723 (citing 16 U.S.C. § 1533(b)(3)(C)(ii)).

<sup>382</sup> *Id.* at 723-24 (citing 5 U.S.C. § 706(2)(A)-(D)).

<sup>383</sup> *Id.* at 724 (internal quotations omitted).

<sup>384</sup> *Id.* at 736.

<sup>385</sup> *Id.* at 725.

<sup>386</sup> *Id.* at 725-26.

<sup>387</sup> *Id.* at 726.

the ESA because it did not base its decision on a standard of best *available* data but rather one that required petitioner to provide evidence that was not available to anyone.<sup>388</sup> In reaching this conclusion, the court set aside FWS's finding.<sup>389</sup> The court further ordered FWS to publish a new finding based on the best available information.<sup>390</sup>

This case aligns with the Public Trust Doctrine of the North American Model of Wildlife Conservation principle that science is the proper tool to discharge wildlife policy. The court found the FWS did not effectively use all available scientific data to determine whether the harvestman's endangered species status warranted delisting under the ESA.

—370 F.Supp. 3d 711 (W.D. Tex. 2019).

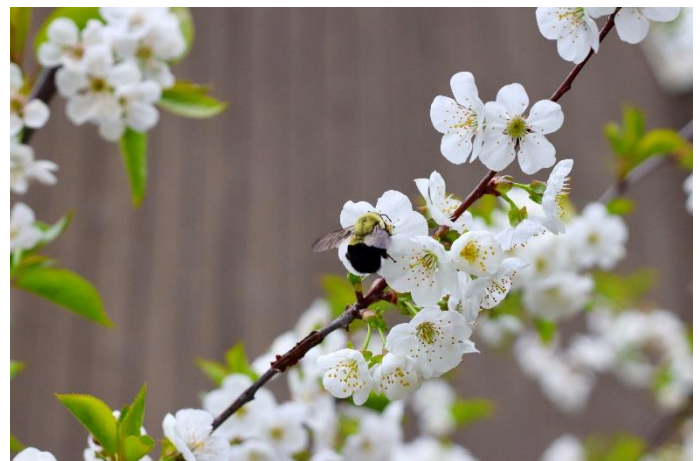
### **d. Defenders of Wildlife v. U.S. Department of the Interior**

**Steffen Mammen**

The Endangered Species Act (ESA) requires federal agencies undertaking construction projects to consult with the U.S. Fish and Wildlife Service (FWS) which will issue a Biological Opinion (BiOp) addressing whether or not the continued existence of any species listed under the ESA will be jeopardized by said project.<sup>391</sup> If it is determined that the project will not jeopardize the species, but will result in incidental takings, the FWS must issue an incidental take statement (ITS) which limits the quantity that may be taken.<sup>392</sup>

This case revolves around the proposed Atlantic Coast Pipeline which is planned to carry natural gas from West Virginia to Virginia and North Carolina.<sup>393</sup> The project would disturb 11,776 acres of land and include additional disruption resulting from the construction process.<sup>394</sup> The pipeline's approval by the Federal Energy Regulatory

Commission (FERC) was conditional on all other federal authorizations, including that of the FWS.<sup>395</sup> The FWS issued a BiOp which noted that the pipeline would not jeopardize four listed species, the rusty patched bumble bee, the clubshell mussel, the Indiana bat, and the Madison Cave isopod.<sup>396</sup> The Defenders of Wildlife, Sierra Club, and Virginia Wilderness Committee challenged the BiOp's conclusion that the pipeline would not jeopardize the bumble bee and clubshell, and additionally, they challenged the take limits set on the bat and the isopod.<sup>397</sup> The U.S. Court of Appeals for the Fourth Circuit accordingly sought to determine whether the conclusions of the BiOp were arbitrary or capricious on the part of the FWS.<sup>398</sup> To do this, the court looks at whether the FWS used "the best scientific and commercial data available."<sup>399</sup> With this standard in place, the court analyzed each species individually.<sup>400</sup>



The court first analyzed in detail the process behind the FWS's no-jeopardy determination for the rusty patched bumble bee.<sup>401</sup> It then presented the supplementary data and counter-arguments presented by the Petitioners.<sup>402</sup> The court found that the FWS relied on arbitrary population estimations, that they arrived at a conclusion contrary to their own data, and that they failed to consider how the pipeline project would affect recovery.<sup>403</sup> The

<sup>388</sup> *Id.* at 727.

<sup>389</sup> *Id.* at 728.

<sup>390</sup> *Id.* at 729.

<sup>391</sup> *Def. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 343 (4th Cir. 2019).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 344.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 344-45.

<sup>398</sup> *Id.* 345.

<sup>399</sup> *Id.* (quoting 16 U.S.C.S. § 1536(a)(2)).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 346-48.

<sup>402</sup> *Id.* at 349-54.

<sup>403</sup> *Id.* at 354.

court thus found that the FWS acted arbitrarily and capriciously in its determination that the bumble bee would not be jeopardized by the pipeline.<sup>404</sup>

Regarding the clubshell, the court pointed out several flaws in the FWS's reasoning, including FWS not considering that their findings of significant population reduction would put the clubshell in jeopardy.<sup>405</sup> The FWS also relied on recovery criteria established in 1994 which they admitted were out of date, as well as a 1993 study the court determined FWS failed to justify as the "best available science."<sup>406</sup> These scientific failures led the court to once again conclude that the no-jeopardy determination was arbitrary and capricious.<sup>407</sup>

The court took a slightly different approach when addressing the take limits for the Indiana bat and the Madison Cave isopod.<sup>408</sup> Both challenges revolved around the take limit being determined as a habitat surrogate.<sup>409</sup> Habitat surrogate take limits are used when numerical take limits are impractical, but the FWS is obligated to explain this determination.<sup>410</sup> In the case of the bat, the FWS failed to explain why its surrogate determination was causally linked to a taking.<sup>411</sup> For the isopod, the court examined evidence that the habitat surrogate does not account for nearly 2,000 acres of isopod habitat which the pipeline and its construction will intrude on.<sup>412</sup> Because of these shortcomings, the court found that the ITSs were deficient.<sup>413</sup>

Before vacating the BiOp and the ITSs as arbitrary and capricious, the court noted that FWS only took 19 days to issue them.<sup>414</sup> The court remarked that, "[i]n fast-tracking

its decisions, the agency appears to have lost sight of its mandate under the ESA: 'to protect and conserve endangered and threatened species and their habitat.'"<sup>415</sup>

—931 F.3d 339 (4th Cir. 2019).

## e. Interactions between humans and bears in Colorado

### Steven Mudel

The last fatal bear attack in Colorado was in 2009.<sup>416</sup> But despite the resulting outreach efforts by wildlife officers, and communities requiring bear proof trashcans, interactions between bears and humans have not changed much in the last decade.<sup>417</sup> In 2019, there were at least seven incidents where bears attacked people in Colorado alone.<sup>418</sup> Two of these attacks involved bears coming out of trash bins and surprising humans, others involved bears wandering into campgrounds and tents, and one resulted in a woman even losing her leg running on a trail.<sup>419</sup> Human behavior in failing to take care of food and surroundings even led to at least two bears not hibernating last year.<sup>420</sup>

This year, wildlife officers continued exhaustive efforts including the use of graphic photos of the bears officers have had to put down as well, some of which included the content of their stomachs.<sup>421</sup> Officers also chose to try to change the bears behaviors including use of an app recording incidents of all bear interactions in the state.<sup>422</sup> By October of this year, officers had recorded nearly 5,000 incidents where bears interacted with humans, their property, or their food sources alone.<sup>423</sup> These issues have

<https://www.thedenverchannel.com/news/local-news/fatal-bear-attacks-are-rare-in-colorado-but-possible>.

<sup>417</sup> Erin McIntyre and John Ingold, *People are effectively training bears to get into trouble, and Colorado wildlife officials are sick of it*, COLORADO SUN (Oct. 17, 2019), <https://coloradosun.com/2019/10/17/colorado-bear-attacks-reasons>.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> Breanna Sneeringer, *Trash-filled stomach of euthanized bear raises concerns in Colorado*, Out There Colorado (July 3, 2019), <https://www.outtherecolorado.com/trash-filled-stomach-of-euthanized-bear-raises-concern-in-colorado/>.

<sup>422</sup> McIntyre & Ingold, *supra* note 417.

<sup>423</sup> *Id.*

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<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 358.

<sup>406</sup> *Id.* at 358-59.

<sup>407</sup> *Id.* at 360.

<sup>408</sup> *Id.* at 360-65.

<sup>409</sup> *Id.* at 363 & 365

<sup>410</sup> *Id.* at 361.

<sup>411</sup> *Id.* at 363.

<sup>412</sup> *Id.* at 364.

<sup>413</sup> *Id.* at 363 & 365.

<sup>414</sup> *Id.* at 365-66

<sup>415</sup> *Id.* (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).)

<sup>416</sup> Robert Garrison, *Fatal bear attacks are rare in Colorado, but possible*, The Denver Channel (Jun. 6, 2018),

continued as food shortages leading to bears migrating to urban areas have caused over 400 bears in Colorado to be shot in the last three years.<sup>424</sup> In the past, officers have focused on relocating bears after they interact with a person by tagging them and moving them at least 50 miles away; but, they stress relocation is becoming harder due to human populations expanding throughout the state and a lack of viable food sources for the bears.<sup>425</sup>



While feeding bears is illegal and authorities have a difficult time punishing those who still do it in Colorado, this behavior is more socially frowned upon in recent years.<sup>426</sup> An equally or even larger problem than deliberate behavior is negligent behavior, such as when people continue to leave out bird feeders or not use bear proof containers to manage their food.<sup>427</sup> Many wildlife officers feel hesitant to simply write a ticket because they feel it is not enough on its own to change the behaviors of residents.<sup>428</sup> However, one resident was charged with a misdemeanor after negligently leaving out food despite warnings and shooting an aggressive bear that resulted in two orphaned cubs this year.<sup>429</sup>

Because of these things, new non-lethal bear management techniques such as rubber bullets are being employed more in an attempt to not have to put the bears down.<sup>430</sup>

Some techniques like stunning or tazing bears have had mixed results due to the desperation of some bears still wanting to return to the same area for food; but, others, like the use of bear hunting dogs to scare off bears, have had some success in permanent removal of the animal.<sup>431</sup> These efforts best reflect the scientific management portion of the North American Model of Wildlife Conservation benefitting all populations of life through study.<sup>432</sup> This perspective encourages stewardship, and allows animals to benefit and humans to appreciate the natural world around them.

## **f. *Western Watersheds Project v. Grimm***

**Jamileh Naboulsi**

Plaintiffs in this case, a group of environmental advocacy organizations, filed an action against defendants claiming their actions were arbitrary and capricious under the National Environmental Policy Act of 1969 (NEPA).<sup>433</sup> Historically, gray wolves inhabited the mountains of Idaho, Montana, and Wyoming.<sup>434</sup> The wolves were listed as endangered pursuant to the Endangered Species Act (ESA) in 1974 and the population grew steadily until 2011.<sup>435</sup> The wolves were delisted by the U.S. Fish and Wildlife Service (FWS) in 2011 after the Idaho Department of Fish and Game (IDFG) prepared a plan for the wolves.<sup>436</sup> The Idaho plan was meant to “address predation on livestock, domestic animals, and ungulates.”<sup>437</sup>

Initially, sport hunting was used to meet the objectives listed within the plan, primarily to lower the population to address livestock depredation, the critical habitat of elk, and other interactions with the local ecosystem.<sup>438</sup> Sport hunting was insufficient to address these issues, however, so the IDFG paid USDA APHIS Wildlife Services to lower the population out of a fund managed by the IDFG.<sup>439</sup> Wildlife Services was quite successful in lowering the wolf population mainly with aerial shooting operations that the IDFG did not reportedly have access to or training in.<sup>440</sup>

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> Sneeringer, *supra* note 421.

<sup>428</sup> McIntyre & Ingold, *supra* note 417.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> See Mahoney, *supra* note 182, at 3.

<sup>433</sup> *Western Watersheds Project v. Grimm*, 921 F.3d 1141, 1143 (9<sup>th</sup> Cir. 2019).

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 1145.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

IDFG only killed wolves in 2013 but claimed it would be able to conduct removal operations on its own without the expertise of Wildlife Services despite not explaining how it would do so.<sup>441</sup> Plaintiffs sued on the basis that Wildlife Services violated NEPA, including a failure to provide required analyses between 2011 to 2015.<sup>442</sup>

The district court granted summary judgment to Wildlife Services holding that the plaintiffs lacked standing.<sup>443</sup> The court found their injuries would not clearly be redressable because there was no proof that IDFG would halt wolf-killing activities.<sup>444</sup> The court in this appeal, however, recognized that plaintiffs have a potential injury to their aesthetic and recreational interests in gray wolves.<sup>445</sup> Due to the fact that there is no guarantee that IDFG would be able to successfully remove as many wolves as Wildlife Services and no intent was stated to independently do so under a new plan, the court found an issue of redressability.<sup>446</sup> The court held that it is speculative to assume how many wolves would be killed under a new plan without Wildlife Services and found that plaintiffs' case was wrongly dismissed for lack of standing because speculation does not defeat standing.<sup>447</sup>

This case is most closely related to the North American Model of Wildlife Conservation principle that natural resources and wildlife should be managed by scientific methods.

—921 F.3d 1141 (9th Cir. 2019).

### **g. *Center for Biological Diversity v. Zinke*** **Tyler Steger**

One of the U.S. Fish and Wildlife Service's (FWS) many duties is to create a recovery plan for every animal that is listed as endangered under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*<sup>448</sup> The endangered animal in question in this case is the Mexican Grey Wolf, which is

native to the American South West and Mexico.<sup>449</sup> Over the years this wolf's numbers have struggled, going so low many believed it to be extinct in the wild.<sup>450</sup> The FWS added this wolf to the endangered species list under the ESA in 1976 and published a corresponding recovery plan in 1982.<sup>451</sup> However, this recovery plan became outdated in 1988 when new requirements for recovery plans were enacted by Congress, and as a result the FWS eventually put forward a new plan in 2017.<sup>452</sup>

The 1988 requirements necessitate the FWS to have three things in a recovery plan: a site specific description of management actions as necessary for the survival of the species; an "objective, measurable criteria" that would result in the species being removed from the list; and lastly, an estimate as to the time required and the costs that are associated with carrying out the plan.<sup>453</sup> The plaintiffs in this case alleged that the plan is reviewable by a court because it needs to not only address the issues, but to answer them.<sup>454</sup> Alternatively, the FWS as defendants claimed that as long as the plan contains any information relevant to the three elements the plan is unreviewable<sup>455</sup> and filed a motion to dismiss for lack of subject matter jurisdiction.<sup>456</sup>



<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 1146.

<sup>443</sup> 283 F.Supp.3d 925 (D. Id. 2018).

<sup>444</sup> 921 F.3d at 1146.

<sup>445</sup> *Id.* at 1147.

<sup>446</sup> *Id.* at 1147-48.

<sup>447</sup> *Id.* at 1148.

<sup>448</sup> *Ctr. For Biological Diversity v. Zinke*, 399 F. Supp. 3d 940, 944 (D. Ariz. 2019).

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* at 946.

<sup>454</sup> *Id.* at 947.

<sup>455</sup> *Id.* at 946-47.

<sup>456</sup> *Id.* at 943.

The plaintiffs disagreed with the “conclusions and scientific underpinnings” reached by the USFWS in the recovery plan.<sup>457</sup> The plaintiffs’ alleged that the recovery plan fails because it does not meet ESA standards by: “(1) failing to base its population and genetic goals on the best available science, and setting population and genetic goals that are unlikely to provide for species’ conservation and survival;” and “(2) disregarding the best available science identifying suitable Mexican wolf recovery habitat in the United States, and unreasonably relying on recovery efforts in Mexico, despite the evidence that Mexico lacks suitable habitat and management to ensure a self-sustaining population.”<sup>458</sup>

The plaintiffs also alleged that the recovery plan pointed out that illegal killing is a large problem in the management of the wolves, yet it failed to address how to solve the problem.<sup>459</sup> This allegation is different than the first two because it is not a disagreement as to what the best available science is, but rather points out that the FWS recognized a problem but failed to give a solution in the recovery plan.<sup>460</sup>

The court noted in its decision that recovery plans are not binding and the FWS has no duty to follow a plan once it is published.<sup>461</sup> The court also held that these disputes are disagreements as to what the best available science is, the determination of which is within the agency’s discretion and is unreviewable.<sup>462</sup> Nevertheless, the Court quoted *Fund for Animals v. Babbitt*, 903 F. Supp. at 108, stating: “A recovery plan that recognizes specific threats to conservation and survival of threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action, would not meet the ESA’s standard.”<sup>463</sup> Because this was not a disagreement over the science of management, but a problem with measurement criteria and lack of identified strategies for a specific threat, plaintiff had standing to bring this case under the ESA’s citizen suit provision.<sup>464</sup> Ultimately, the court granted defendants’ motion to dismiss in part (with respect to plaintiffs’ Administrative Procedure Act (APA) claim), but

also denied it in part (with respect to plaintiffs’ ESA citizen suit).<sup>465</sup>

This case revolves around the seventh pillar of the North American Model of Wildlife Conservation—that science should be the driving factor in how wildlife is managed.

—399 F.Supp. 3d 940 (D. Ariz. 2019).

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## ABOUT THE WILDLIFE LAW CALL

These case briefs were composed by students of the Fall 2019 wildlife law course at the Michigan State University (MSU) College of Law.

**Amanda Anderson** is a second-year law student studying conservation and business law at MSU’s College of Law. In the Fall 2019 semester, she completed an externship with the Michigan



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**Raechel Broek** is a 3L student at Michigan State University College of Law. She is a

candidate for graduation in May of 2020.

**Jessica Chapman** is a third year law student at Michigan State University College of Law. She plans to dedicate her legal career to animal law and wildlife conservation. She has worked with the Center for



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<sup>457</sup> *Id.* at 949

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 949-50.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 950.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

Biological Diversity, Animal Legal Defense Fund, and MSU College of Law's Animal Welfare Clinic.

**Chelsea Lenard** attends Michigan State University College of Law. She is currently a third year law student set to graduate in May of 2020. Animals have always been a passion of hers. Learning about how the law and wildlife intersect was extremely fulfilling.



**Jamileh Naboulsi** is a third-year from Michigan State University College of Law. She is from the Greater Detroit area.



**Steffen Mammen** is a proud Michigander—born and raised in the Great Lakes State. He earned a B.S. in Environmental Geosciences with a concentration in Science,

Technology, and Environmental Public Policy from Michigan State University's Lyman Briggs College. He is an Eagle Scout, an avid hiker, and a published photographer. He hopes to use his law degree to strengthen the bridge between science and policy.

**The Wildlife Law Call does not report every recent case or issue**, but we hope you will find these briefs, selected from recent fish- and wildlife-related decisions, interesting and informative.

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, some U.S. federal agencies, and a number of conservation-focused organizations. NWTF is a nonprofit organization dedicated to the enhancement of wild turkey populations and habitat, and recruitment, retention, and reactivation of hunters.

**Steven Mudel** is a 2L originally from Troy, MI. He is very interested in all aspects of the law involving the world around us, as well as tax and intellectual property. When he is not at the school, he can usually be found spending time with his family.

