ASSOCIATION of FISH & WILDLIFE AGENCIES

CENTER FOR CONSERVATION EXCELLENCE

nwtf
National Wild Turkey Federation

WILDLIFE LAW CALL

SPRING 2022 | WILDLIFE LAW

THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION

Association of Fish & Wildlife Agencies

The North American Model of Wildlife Conservation is the world's most successful system of policies and laws to restore and safeguard fish, wildlife and their habitats through sound science and active management.

How does the Model work?

In the United States and Canada, the Model operates on seven interdependent principles:

1. Wildlife resources are conserved and held in trust for all citizens.
2. Commerce in dead wildlife is eliminated.
3. Wildlife is allocated according to democratic rule of law.
4. Wildlife may only be killed for a legitimate, non-frivolous purpose.
5. Wildlife is an international resource.
6. Every person has an equal opportunity under the law to participate in hunting and fishing.
7. Scientific management is the proper means for wildlife conservation.

The Association of Fish & Wildlife Agencies formally endorsed the North American Model of Wildlife Conservation at its 100-year anniversary meeting in September 2002 in Big Sky, Montana.[1]

PRINCIPLE 1: WILDLIFE IS A PUBLIC RESOURCE

ACCESS FOR ALL: THE PUBLIC TRUST DOCTRINE AND THE FREEDOM OF INFORMATION ACT

Tyler Armstrong

The Public Trust Doctrine – a key component of the North American Model of Wildlife Conservation – holds that "wildlife resources are conserved and held in trust for all citizens."[2] As can be predicted, the doctrine is subject to many interpretations. For those with a hunting heritage, the public trust is crucial in providing ample opportunities to pursue game based on scientific management and under democratic rule of law. To activists, the public trust is a means to wholly preserve, protect, and even assign humanistic legal rights to all species.

Theodore Roosevelt, one of North America's premier champions of wildlife and wildlands conservation, is credited with stating, "[o]ur duty to the whole, including the unborn generations, bids us to restrain an unprincipled present-day minority from wasting the heritage of these unborn generations."[3] Roosevelt was of course referring to the maintenance of wildlife populations in the United States and abroad, and spoke against the depletion of whole populations out of greed; seeing beyond his time, considering the future, unborn generations who would grow to appreciate the abundance of species around them. But what did Roosevelt have in mind when he advocated for everyone to be able to participate?

In late 2019, Humane Society International (HSI) submitted a Freedom of Information Act (FOIA) request to the U.S. Fish and Wildlife Service (FWS) regarding import and export data related to wildlife products harvested abroad.[4] Such information is found on Form 3-177, a specialized form issued by FWS that is required to be filled out by anyone seeking to import or export wildlife products.[5] HSI's request included all Form 3-177s spanning an eleven-year period.[6] FWS supplied the requested information but redacted importer/exporter names under applicable exemptions 6 and 7(C).[7] FWS further redacted the value of the wildlife products under FOIA exemption 4 – which the U.S. District Court for the District of Columbia ultimately held to be improper on appeal.[8] The court

[1] This entry comes from the Association of Fish & Wildlife Agencies' webpage on the North American Model of Wildlife Conservation. Found at: www.fishwildlife.org/landing/north-american-model-wildlife-conservation.
[2] *North American Model of Wildlife Conservation*, Association of Fish & Wildlife Agencies, www.fishwildlife.org/landing/north-american-model-wildlife-conservation (last visited Nov. 13, 2021).
[3] *The Public Trust Doctrine: Implications for Wildlife Management and Conversation in the United States and Canada*, The Wildlife Society (Sept. 2010), https://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf.
[4] John M. Simpson, *Bid By Humane Society International To Get Information On Sport Hunters Fails*, Animal Law Developments (Aug. 16, 2019), https://blogs.duanemorris.com/animallawdevelopments/2019/08/16/bid-by-humane-society-international-to-get-information-on-sport-hunters-fails/.
[5] *Id*.
[6] *Id*.
[7] *Id*.; *see also Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv*., 394 F. Supp. 3d (D.D.C. 2019).
[8] *Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv*., 2021 WL 1197726 (D.D.C. 2021).

relied upon new case law concerning when a government agency may withhold information from a FOIA request under Exemption 4.[9] The test holds that where the offered information is customarily kept private by the offering party, and where the receiving party offers some assurance that the information will be kept private, only then will the information be protected under Exemption 4.[10]

As to the first prong of the test, the court dismissed several pieces of evidence as inadmissible hearsay, and many others as deficient and devoid of probative value.[11] The court accepted evidence of BioVT, LLC and Oregon Health & Science University (OHSU) as two objectors who sufficiently treated data on wildlife imports and exports as private.[12] As for the second prong, the court found that no assurance was expressly given by FWS regarding the safeguarding of value information in wildlife exports.[13] Further, according to Humane Society International's evidentiary offering, FWS had historically released this information to other parties, and moreover, both BioVT and OHSU had not objected when other plaintiffs received this sort of information under other FOIA requests.[14] The court ultimately granted HSI's motion for summary judgment as to the proper application of Exemption 4 and the wildlife value data.[15]

Theodore Roosevelt in East Africa.[16]

The outcome of this case marked a win not for activists, nor for the hunting community, but for transparency. The court correctly decided this case in protecting the personal information of persons involved in the importation and exportation of wildlife, but in disclosing via FOIA request the value information that did not adequately fit under Exemption 4. The decision complements the public trust doctrine in providing access to wildlife information to any member of the general public who may rightfully seek it under the laws and regulations of the United States. Courts must remain vigilant and forward-thinking in their decisions involving wildlife access, including data on wildlife imports and exports. As transparency and cooperation abound, we may move forward with confidence, continuing to monitor and protect wildlife species to enjoy for generations, regardless of how each of us chooses to participate in the wildlife ecosystem.

Friends of Animals v. U.S. Bureau of Land Management & The Wild Free-Roaming Horses and Burros Act

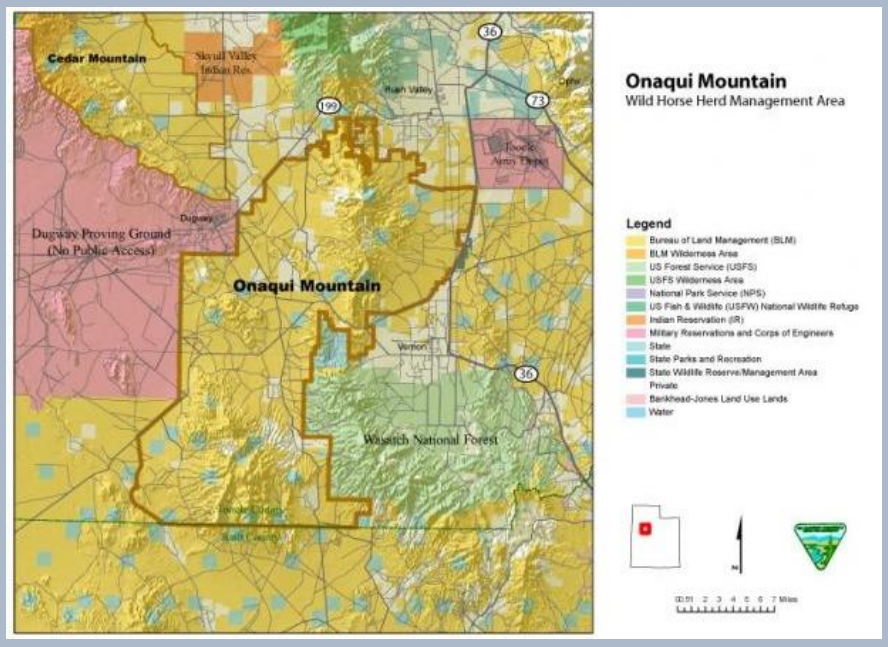
Angelica Kalogeridis

The Wild Free-Roaming Horses and Burros Act (WHA) was enacted in 1971 to protect the spirit of the West and the diverse animals that survive on our nation's public lands.[17] Through the Act, the Secretary of Interior and Bureau of Land Management (BLM or "Bureau") are tasked with overseeing wild horse and burro populations to maintain a balanced and natural ecosystem.[18] This discretion includes monitoring and taking inventory of the animals, setting appropriate management levels, and taking action to remove excess animals when needed.[19] Decisions to remove, destroy, sterilize, or naturally control animals are typically made by the Secretary of Interior in consultation with the U.S. Fish and Wildlife Service, relevant state wildlife agencies, and other individuals with expertise in wild horses and burros.[20] If a sick, old, or lame animal is to be removed, they are to be destroyed in the most humane means possible.[21] If overpopulation persists, additional animals are advised to be humanely captured and removed for private maintenance, adoption if eligible, and proper treatment and care.[22] If the matter still persists, only then can the animals be destroyed in the most humane and cost-efficient means possible.[23]

---

[9] *See Food Marketing Inst. v. Argus Leader Media*, 139 S.Ct. 2356 (2019) (holding that "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4").
[10] *Humane Soc'y Int'l*, 2021 WL 1197726 at 2.
[11] *Id.* at 4-5.
[12] *Id.* at 4.
[13] *Id.* at 5.
[14] *Id.* at 5-6.
[15] *Id.* at 6.
[16] Discover Uganda, https://kabiza.com/teddy-roosevelt-on-safari-guns-ablazing-shooting-everything-that-moved/.
[17] *Friends of Animals v. United States Bureau of Land Mgmt.*, 514 F. Supp. 3d 290, 292-293 (D.D.C. 2021) (quoting 16 U.S.C.S. § 1331).
[18] *Id.* at 292-93.
[19] *Id.*
[20] *Id.*
[21] *Id.* (quoting 16 U.S.C.S. § 1331).
[22] *Id.*
[23] *Id.*

The National Environmental Policy Act (NEPA) also applies, requiring federal agencies to take a "hard look" at any possible environmental consequences before carrying out any federal action.[24] NEPA specifically imposes two responsibilities on federal agencies to carry the burden of the decision-making[25]: to holistically consider significant aspects of any environmental impact of the proposed action; and the duty of the agency to inform the public of their considerations and the environmental concerns present in their decision-making process.[26] NEPA also requires a detailed statement to be submitted by the agency that describes the environmental impact surrounding the project and any alternative considerations.[27] The statement must also include a site-specific environmental analysis that meets all NEPA requirements.[28] Per the WHA, an authorized officer will then provide a review and comment on the NEPA document, providing a public answer within 30 days.[29]



[34]

Last July, the BLM prevailed in a case where their discretion was challenged on whether they should be able to gather and remove wild horses inside and adjacent to the Onaqui Mountain Herd Management Area to uphold an appropriate management level.[30] As of 2018, the BLM's plan was to conduct an initial gathering of the animals, and then return periodically for ten consecutive years to reevaluate and remove excess horses, all while administering a fertility control vaccine.[31] However, in 2020 the American West experienced a historic drought, with precipitation from April to June 2020 totaling less than an inch of rainfall.[32] Consequently, efforts to alleviate pressure on the herd and public land grew due to the little vegetation that was able to grow; the BLM planned to round up approximately 400 horses, returning about 100 with a vaccine for fertility control and permanently removing the remaining 300 horses.[33]

In August of 2018, Friends of Animals (FOA), an international non-profit organization that works to free animals from cruelty and institutionalized exploitation, brought action against the BLM, challenging the decision on the Onaqui area horses, as well as the ten-year plan to remove the animals on a need-basis.[35] FOA claimed that some of their members held a special interest in the horses in the Onaqui Mountain area and feared that their enjoyment in studying, photographing, and otherwise enjoying the herd would suffer as a result of the removal.[36] Their concerns also involved the general welfare of the animals, with concern that they might be inhumanely injured, euthanized, or held in pens and sold to slaughter.[37] FOA alleged that the 10-year removal decision was too permanent and violated NEPA, given the agency had no explanation for the extended period requested in their briefs and did not take a "hard look" at the environmental impact.[38]

After reviewing the case, the Court issued a memorandum opinion in January of 2021 denying both motions made by FOA to reconsider the BLM proposal and prevent the further removal of horses from the Onaqui area.[39] Unfortunately, the courts were unable to make judgment on the already removed horses as they were unaware of their current whereabouts,

[24] *Id*. at 294 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373-74, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)).
[25] *Friends of Animals*, *supra* note 17, at 294 (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 97, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983)).
[26] *Friends of Animals*, *supra* note 17, at 294.
[27] 42 U.S.C. § 4332(2)(C).
[28] *Friends of Animals*, *supra* note 17, at 294.
[29] *Id*. at 295.
[30] *Id*. at 290.
[31] *Id*.
[32] Becky Bollinger, *Historic drought deepens in the West as window for rain, snow closes*, The Washington Post (March 3, 2021, 2:07 PM), www.washingtonpost.com/weather/2021/03/03/drought-worsens-west/.
[33] *Friends of Animals*, *supra* note 17, at 298.
[34] Photo from: www.blm.gov/programs/wild-horse-and-burro/herd-management/herd-management-areas/utah/onaqui-mountain.
[35] *Friends of Animals*, *supra* note 17, at 298.
[36] *Id*. at 301-302.
[37] *Id*.
[38] *Id*.
[39] *Id*. at 292.

making their return to the range impossible.[40] However, given the environmental analysis on the current horses' health (most animals had lost between 200-300 pounds and they were in jeopardy of further deterioration in body condition due to the lack of forage), the Court felt pressed to reach a quick decision in order to allow the BLM to prevent further suffering.[41]

The Court pointed to the language of the statue, which states that the process may continue in stages *until* the goal of restoring a natural ecological balance is achieved.[42] If the Secretary of Interior were to delay the original proposal, they might be intervening on the purposes of the WHA to allow BLM to continue the humane treatment of the creatures it is specifically tasked with preserving.[43] The decision follows the precedent set forth in *Mayo v. Reynolds*, that the Court must consider whether any consequences by implementing the action were not considered in the earlier NEPA analysis.[44] The Court concluded that, while FOA was correct in identifying that the December 2018 action did not have an analysis of the exact gather contemplated, *Mayo* holds that an agency does not need to analyze the effects of each specific implementation step to satisfy NEPA.[45] Finally, the court acknowledged FOA's claim that a single environmental assessment cannot support the long-term 2018 decision, because the environmental conditions might change, so the BLM will be expected to conduct further analysis over the ten consecutive-year period.[46]

[47]

In conclusion, the Court's decision was driven by the welfare of the horses. The opinion finds, with or without an injunction, the horses in the Onaqui Mountain area are at risk and those who enjoy viewing, studying, and photographing the animals may have fewer opportunities to do so.[48] For this reason, the Court determined that allowing the horses to remain on the range could imperil their health and ecological well-being, and therefore FOA failed to carry its burden of demonstrating that it or its members will likely suffer irreparable harm if the Court failed to issue a preliminary injunction.[49]

PRIVATIZATION OF WILDLIFE

Rachel Ott

Principles of the North American Model of Wildlife Conservation include that wildlife should be conserved as a public trust resource and allocation of wildlife is by law.[50] Through legal enactments, wildlife is allocated by means such as "seasons, bag limits, methods, and protections."[51] An example of an act passed by the federal government to protect wildlife is the Animal Welfare Act (AWA), which includes regulations requiring the humane treatment of animals in captivity and authorizes monitoring procedures in an effort to protect all animals, including wild and exotic animals.[52] Through various licensing requirements, the AWA imposes regulations on the "transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use."[53]

One major threat to the Public Trust Doctrine is the privatization of wildlife.[54] By removing wildlife from the public trust and placing it into private ownership, the legal status of animals is altered and government authority to monitor and protect wildlife becomes limited.[55] Exotic animals remain a desired commodity and many owners deem those animals to be their private property. The AWA's licensing requirement is one way the government attempts to regulate ownership of these animals when they move from the "public

[40] *Id*. at 299-300.
[41] *Id*. at 302.
[42] *Friends of Animals*, *supra* note 17, at 294 (quoting 16 U.S.C. § 1333(b)(2)).
[43] *W. Rangeland Conservation Ass'n v. Zinke*, 265 F. Supp. 3d 1267, 1284 (D. Utah 2017).
[44] *Mayo v. Reynolds*, 875 F.3d 11, 433 U.S. App. D.C. 110. 113 (D.C. Cir. 2017).
[45] *Id*. at 113-114.
[46] *Friends of Animals*, *supra* note 17, at 305.
[47] Photo from: https://americanwildhorsecampaign.org/media/roundup-report-2021-onaqui-roundup.
[48] *Id*. at 303.
[49] *Id*. at 306.
[50] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlifeconservation.html (2018).
[51] John F. Organ, *The North American Model of Wildlife Conservation and the Public Trust Doctrine*, IN NORTH AMERICAN WILDLIFE POLICY AND LAW 125, 128 (Boone and Crocket Club, 2018).
[52] The AWA derives its federal authority through both the commerce clause and the property clause of the United States Constitution.
[53] 7 U.S.C.A. § 2131 (West).
[54] Technical Review Committee 10-01, *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada*, The Wildlife Society, Sept. 2010, at 15, https://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf.
[55] *Id*.

trust" on to private property. However, due to the benefits incurred by operating without a license, owners are continuously attempting to exempt themselves from AWA's licensing requirements. While a license obtained through the AWA costs only $120 for three years, registration draws federal attention and awareness to these owners and their exotic animals.[56] In order to maintain a valid license, an owner must comply with all AWA regulations, which include humane animal care and treatment in addition to federal monitoring to ensure compliance.[57] Owners who view their exotic animals as income-generating operations may opt for minimal animal care rather than complying with the AWA in an attempt to qualify their animal or business under one of the AWA's licensing exemptions. Their efforts are made as an attempt to continue operations absent federal regulation and monitoring.

Discussion

The AWA provides definitions and non-exhaustive lists to categorize farm animals, pet animals, wild animals, and exotic animals; however, only farm animals and pet animals are exempted from certain licensing requirements.[58] To determine whether a licensing exemption is applicable, a court may review the animal's classification in several steps.

The first exemption is dependent upon the animal's species, which may provide some exotic animal owners with a loophole. Due to the absence of an exhaustive list specifying exempted animals, owners may argue their animal is either a domestic species of a listed animal or serves a similar purpose. In *Knapp v. U.S. Dept. of Agriculture*, Bodie Knapp had previously obtained a license in accordance with AWA requirements to operate a public exhibit of wild and exotic animals.[59] However, his failure to bring his exhibit into compliance with AWA regulations – after several violations – led to his license being revoked and numerous cease and desist orders prohibiting him from further violations.[60] Despite no longer having a license, Knapp continued his operations and "'offered for sale, delivered for transportation, transported, sold, or negotiated the purchase or sale' of 429 animals in thirty separate transactions."[61]

In an effort to avoid any penalties for continuing transactions without a license, Knapp classified several of his animals included in the complaint as "farm animals."[62] The Court permitted Knapp to categorize cattle, sheep, swine, goats, and llamas as "farm animals" in accordance with the Department's definition[63], specifically exempting those species.[64] However, Knapp's camel failed to meet any listed "farm animal" requirement based on its species, and consequently, required Knapp to obtain a license in order to purchase and sell camels.[65]

[66]

If a court determines an "exotic" animal may actually be classified as a "farm animal" based on its species, the court must also look to the animal's purpose or intended use. For instance, a "farm animal" must not only meet the species requirement, but must also be "used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber."[67] Knapp argued several of his animals, including aoudad, alpaca, and a miniature donkey, should be classified as "farm animals" because they served numerous purposes listed.[68] In a prior hearing, the ALJ permitted Knapp to classify his aoudad and alpaca as "farm animals," even though they were not specifically listed, due to their characteristics and the purposes they serve.[69] His classifications were based upon the reasoning that "aoudad 'are goats which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food, hunting, and breeding purposes,'" and alpaca

[56] *Questions and Answers: Three-Year Animal Welfare Act (AWA) License*, United States Dept. of Agriculture, July 2020, at 1, www.aphis.usda.gov/animal_welfare/downloads/awa/amendments/3-year-licensing-faq.pdf.
[57] Animal Inspection and Plant Health Inspection Service, 9 C.F.R. § 2.126 (2020).
[58] Animal and Plant Health Inspection Service, 9 C.F.R. § 2.1 (2020).
[59] *Knapp v. U.S. Dept. of Agric.*, 796 F.3d 445, 452 (5th Cir. 2015).
[60] *Id*.
[61] *Id*.
[62] *Id*. at 458-59.
[63] The U.S. Department of Agriculture defines "farm animal" as including "any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States.
[64] *Knapp*, *supra* note 59 at 458.
[65] *Id.* at 459.
[66] Photo from https://www.marylandzoo.org/animal/alpaca/.
[67] *Knapp* 796 F.3d at 458 (quoting Animal and Plant Health Inspection Service, 9 C.F.R. § 1.1 (2020)).
[68] *Id*.
[69] *Id.* at 459; In a prior hearing, the ALJ permitted the categorization of aoudad and alpaca as "farm animals," but in a consecutive hearing, the Judicial Officer overturned the ALJ's ruling and determined that aoudad, alpaca, and miniature donkeys are not "farm animals" and therefore, violated the AWA. *Id*. The reviewing court in this case remanded the animals' classification due to a lack of reasoning provided by the Judicial Officer. *Id*.

exist "in significant numbers on farms in the United States and are raised for ... wool, food, work and breeding purposes."[70]

An exotic animal owner may attempt to exploit another exemption included in the AWA's licensing requirement and argue their animal is for "personal use."[71] Knapp once again attempted to alleviate his "exotic animals" from licensing requirements by arguing that despite selling *other* animals, the ones not sold were purchased for "personal use" and therefore, did not require a license.[72] The Department of Agriculture's "Animal Care Resource Guide, Dealer Inspection Guide" states the personal use exemption may apply only to "'persons' who 'do not sell or exhibit animals,'" which disqualifies a person who sells *any* animal from receiving this exemption, regardless if they have purchased other animals for "personal use."[73]

The use or intended use of animals may also be utilized to categorize business operations involving exotic animals in a way to alleviate owners of imposed licensing regulations. In *ZooCats, Inc. v. U.S. Dept. of Agriculture*, a business exhibiting exotic animals had not used nor intended to use the animals in any research within ten years.[74] *ZooCats* was consequently stripped of its "research facility" label, which maintained different regulatory requirements than an exhibitor.[75]

Conclusion

In order to preserve allocation of wildlife by law, wildlife cannot be completely privatized. The allocation of wildlife by law provides protection and restricts access to certain animals. Once animals are transferred from the public trust to private land, the ability to protect and preserve wildlife is significantly reduced. Unfortunately, the profit associated with operations involving exotic animals may encourage some owners to maximize their profit and opt for minimal animal care. Without government regulation and supervision, these owners face little opposition to their inhumane treatment of the animals. This incentivizes owners to argue their animals were exempt from the AWA's licensing requirements altogether only after violating the AWA and losing their license or attempting operations without applying for a license at all.

PRINCIPLE 3: ALLOCATION OF WILDLIFE BY LAW

ALLOCATION OF WILDLIFE BY LAW AND THE IMPACT OF FEDERAL TREATIES WITH TRIBES

Ryan Hurst

The *State of Oregon v. Begay*[76] presents a unique conflict between a core tenet of the North American Model of Wildlife Conservation – the allocation of wildlife by law – and federal treaties with tribes throughout the northwestern United States. Begay, a tribal member of the Yakama Nation, was accused of unlawfully killing a deer on a parcel of privately owned property in April 2017.[77] As a defense to the illegal taking, Begay intended to argue that the Treaty of 1855 between his tribe and the United States provided a right for tribal members to hunt on "open and unclaimed land."[78] This is because neither states nor private property owners may bar tribal access to areas subject to treaty hunting, fishing, and gathering rights.[79] Begay alleged that the land did not possess visible signs of ownership and therefore when he killed the deer he was under the impression that it was on open land subject to the 1855 treaty protections.[80] The trial court did not allow Begay to raise the defense, leading to a conviction and subsequent appeal to the Oregon Court of Appeals.[81]

The court first had to consider the circumstances around which Begay killed the deer before deciding whether the treaty protection could apply.[82] Begay testified that there were no fences and that he did not cross a fence when hunting.[83] Signs claiming the property was private or that trespassing was prohibited were also absent from the site of the killing.[84] Buildings were also absent from the parcel of land, though there was a silo in the far distance.[85] The court found that the conditions on the land were such that Begay could have thought the land was unclaimed.[86]

The court then turned to an interpretation of the 1855 treaty between the tribe and the United States government to determine the meaning of "open and unclaimed land."[87] The interpretation of treaties with tribes differs from that of ordinary contract interpretation due to the unique history

[70] *Id.* (quoting *In re Knapp*, AWA Docket No. 09-0175, 2011 WL 4946791, at *10).
[71] The Department described the "personal use" exemption as "any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals or is not otherwise required to obtain a license." Animal and Plant Health Inspection Service, 9 C.F.R. § 2.1(a)(3)(viii) (2020).
[72] *Id.* at 457 (quoting Animal and Plant Health Inspection Service, 9 C.F.R. § 2.1(a)(3)(viii) (2020)).
[73] *Knapp*, *supra* note 59 (quoting 9 C.F.R. § 2.1(a)(3)(viii)).
[74] *ZooCats, Inc. v. U.S. Dept. of Agric.*, 417 Fed. Appx. 378, 382–83 (5th Cir. 2011).
[75] *Id.* at 378.
[76] *See State of Oregon v. Begay*, 312 Ore. App. 647 (Or. Ct. App. 2021).
[77] *Id.* at 648.
[78] *See id.*
[79] *See id.* at 662.
[80] *See id.* at 651.
[81] *See id.* at 648.
[82] *See id.*
[83] *Id.* at 650-51.
[84] *See id.*
[85] *See id.*
[86] *See id.* at 663.
[87] *See id.* at 655.

surrounding tribes and the federal government.[88] In interpreting a treaty between tribes and the United States, the court will construe it liberally in favor of the tribe.[89] Any ambiguous language in the treaty will be read in favor of the tribal members and language will be interpreted in the sense in which its provisions would be understood by tribal members.[90] This is because treaties were a grant of rights from the tribes and reflects the inequality in bargaining power that existed between the tribes and the federal government.[91]

[92]

The court had to determine the meaning of "open and unclaimed land" as used in the 1855 treaty. Key to the treaty language was the repeated use of the term "occupied."[93] It found that a tribal member would not have associated occupied land with the traditional Western concept of paper title.[94] Rather, the traditional understanding of occupied land would likely mean lands bearing some indication of actual physical occupation or use, such as fences, houses, or outbuildings.[95] Thus, the definition of open and unclaimed lands in the 1855 treaty would have been understood to be lands bearing no indication of actual physical occupation.[96]

Given the court's interpretation of the treaty and their obligation to evaluate the evidence in the light most favorable to Begay, the court found that there was sufficient evidence for Begay to raise the defense that he perceived the private land to be open and unclaimed.[97] Specifically, the fact that the land was an open field, was not planted, had no fences on it or enclosing it, and the absence of a home or parked vehicles.[98] This could potentially bring the taking of the deer within coverage of the 1855 treaty and make the criminal charge of unlawfully killing a deer on private land inapplicable to Begay. Therefore, the case was sent back to the trial court to allow Begay to raise the treaty as a defense to killing the deer.[99]

The *State of Oregon v. Begay* shows that the contours of wildlife management are not so rigid. Not only is there the potential for conflict between the states and the federal government in managing the taking of wildlife, but also the potential for conflict based on treaties negotiated between the United States and tribes located throughout the country. As this case illustrates, this can make the application of wildlife regulations difficult for states with diverse populations of stakeholders. Nevertheless, it is important that the allocation of wildlife by law continue and that there be a recognition that the law is not limited to state regulations and federal statutes, but also includes treaties between the United States and tribes.

PRINCIPLE 4: KILLING FOR LEGITIMATE PURPOSES

WHAT CONSTITUTES A TAKING? *STATE V. 5 STAR FEEDLOT*

Kayla Hobby

The first principle of the North American Model for Wildlife Conservation ("North American Model") provides that wildlife resources are a public trust and that it is the duty of the government to protect wildlife for the public and future generations.[100] The U.S. Supreme Court applied the Public Trust Doctrine in the 1842 case, *Martin v. Waddell*.[101] Then in 1896, in the Court applied the concept of a public trust to wildlife in *Geer v. Connecticut*.[102] It is this doctrine of state ownership that gives states the primary authority to manage wildlife.

To effectively manage wildlife resources, takings are heavily regulated.[103] Generally, a taking of wildlife means to "pursue, hunt, shoot, wound, kill, trap, capture, or collect."[104] However, the definition of take can vary, and controversy often arises over whether accidental takings should be included in the definition of take.[105] Moreover, the fourth principle of the North American Model states that wildlife can only be killed

[88] *See id.* at 653.
[89] *See id.*
[90] *See id.*
[91] *See id.* at 654.
[92] Photo from: https://www.yakama.com/.
[93] *Begay*, *supra* note 76, at 659.
[94] *See id.* at 661.
[95] *See id.* at 662.
[96] *See id.* at 663.
[97] *See id.* at 665.
[98] *See id.*
[99] *See id*.
[100] John F. Organ, *The North American Model of Wildlife Conservation and the Public Trust Doctrine*, IN NORTH AMERICAN WILDLIFE POLICY AND LAW 125, 126 (Boone and Crockett Club, 2018).
[101] *Martin v. Waddell*, 41 U.S. 367 (1842).
[102] *Geer v. Connecticut*, 161 U.S. 519 (1896).
[103] Organ, *supra* note 100, at 129.
[104] Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1918).
[105] *Definition of Take and Taking*, ASS'N OF FISH & WILDLIFE AGENCIES (2019), www.fishwildlife.org/search?search_paths%5B%5D=&query=definition+of+take&submit=Search.

for legitimate purposes; frivolous takings are not allowed under the Model.[106] The Colorado Supreme Court was recently challenged with questions surrounding the definition of take in the 2021 case *State Department of Natural Resources v. 5 Star Feedlot, Incorporated*.[107]

In the spring of 2015, a severe, three-day rainstorm inundated eastern Colorado with over six inches of rain near the South Fork of the Republican River, where 5 Star Feedlot Incorporated ("5 Star") runs a cattle feedlot operation.[108] The feedlot is just three miles from the South Fork, where the southernmost population of the threatened fish species, the Brassy Minnow, and other rare fish species live.[109] The heavy rainfall caused an overflow and partial breach in one of 5 Star's wastewater containment ponds.[110] As a result, roughly 500,000 gallons of wastewater made its way into the Republican River, killing approximately 15,000 fish.[111]


[112]

On June 27, 2016, the Colorado Division of Parks and Wildlife Resources (the "State") brought a civil action against 5 Star to recover the value of the dead fish.[113] The State claimed that 5 Star "violated the [State's] taking statutory provisions, which make it unlawful to 'take' protected wildlife."[114] In response, 5 Star filed a motion to dismiss, claiming that they had not taken any wildlife[115] and arguing that under the statute the State "was required to prove that 5 Star both acted with the culpable mental state of *knowingly* and preformed an unlawful voluntary act."[116] On the contrary, the State filed for summary judgment arguing that the fish had died and 5 Star was strictly liable.[117] In September of 2016, the district court sided with the State and ordered 5 Star to pay damages in the amount of $625,755.[118]

On appeal, 5 Star maintained its argument that it was not liable because it had "neither acted with the culpable mental state of *knowingly* nor performed an unlawful voluntary act that killed or otherwise acquired possession of or control over the fish."[119] The appellate court agreed with 5 Star, concluding that the plain language of the takings statute requires that the State establish the elements of culpability, meaning that the State had to show that 5 Star acted *knowingly* and with intent to take the fish.[120] Finding that the State had failed to show any such evidence, the appellate court reversed the district court's holding,[121] and the State petitioned for review.[122]

In 2021, the Supreme Court of Colorado heard the case and ultimately sided with 5 Star in a 4 to 3 decision.[123] The plurality ruled that the district court had misinterpreted the takings statutory provisions, and that the State was required "to prove that 5 Star, consciously and as a result of effort or determination, performed a voluntary act by which it killed or otherwise acquired possession of or control over the fish without authorization."[124] The Court noted that the State failed to present evidence of any voluntary, illegal conduct on 5 Star's behalf.[125] The feedlot's longstanding containment ponds were built and maintained in compliance with State laws and regulations.[126] As such, the discharge of wastewater was not done "consciously as a result of effort or determination" by 5 Star.[127] It was simply the result of a severe, once-in-a-half-century rainstorm, and 5 Star was found not liable.[128]

The holding in *State Department of Natural Resources v. 5 Star Feedlot, Inc.* established that accidental takings are not included in Colorado's definition of take.[129] In order for the State to collect damages, it has to prove that the culprit acted *with knowledge*.[130] Applied broadly, this means that industrial polluters are less likely to be held liable for the unpermitted taking of wildlife when accidents occur as they did in *5 Star*.[131]

Due to these high stakes, the outcome of *5 Star* was closely monitored by Colorado agriculturists and state wildlife

---

[106] Organ, *supra* note 100, at 129.
[107] *State, Dep't of Nat. Res. v. 5 Star Feedlot, Inc*., 486 P.3d 250 (Colo. 2021).
[108] *Id.* at 253.
[109] *Id*.
[110] *Id*.
[111] *Id.* at 252-53.
[112] Sam Brasch, *Yes, Cow Poop May Have Killed Thousands Of Fish. But A Court Says This Feedlot Isn't To Blame*, CPR NEWS (Oct. 5, 2019), www.cpr.org/2019/10/25/yes-cow-poop-may-have-killed-thousands-of-fish-but-a-court-says-this-feedlot-isnt-to-blame/.
[113] *Co Div. of Parks & Wildlife v. 5 Star Feedlot, Inc.*, No. 2016CV30022, 2016 LEXIS 1529 (D. Colo. 2016).
[114] *State, Dep't of Nat. Res*., *supra* note 107, at 254.
[115] *Co Div. of Parks & Wildlife*, *supra* note 113.
[116] *State, Dep't of Nat. Res., supra* note 107, at 254 (emphasis added).
[117] *Id*.
[118] *Id*.
[119] *State, Dep't of Nat. Res., supra* note 107, at 254 (emphasis added).
[120] *State v. 5 Star Feedlot Inc.*, 487 P.3d 1183 (Colo. App. 2019).
[121] *Id*.
[122] *State, Dep't of Nat. Res*., *supra* note 107, at 255.
[123] *Id*.
[124] *Id.* at 253.
[125] *Id*.
[126] *Id*.
[127] *Id.* at 257.
[128] *Id.* at 253.
[129] *See id.*
[130] *See id.*
[131] *See id.*

managers.[132] Colorado's agricultural industry feared that a holding in the State's favor would open the door to never-ending liability, meaning that every time a state official found a dead animal near a farming operation, the business would be financially liable.[133] On the other side, more than 70 percent of Colorado's Parks and Wildlife fund comes from fishing and hunting licenses, habitat stamps, and taxes on hunting and fishing equipment.[134] As such, wildlife managers see the loss of wildlife as a loss of revenue for conservation efforts, for which the State must be compensated.[135] The case holding also leaves wildlife managers questioning how they are to effectively manage wildlife resources if liability for unauthorized takings is so limited.[136] Such relief may only come if the State decides to amend its definition of take to include accidental takings.

Invasive Barred Owl (left) & Northern Spotted Owl (right) [142]

FRIENDS OF ANIMALS V. SHEEHAN

Joshua Makkonen

There are times when reasonable minds may differ regarding whether a government conservation policy serves a net benefit to the species it seeks to protect. *Friends of Animals v. Sheehan*[137] emerged out of such a challenge to a Fish and Wildlife Service (FWS) policy that authorized some incidental take[138] of the Northern Spotted Owl, which is listed as threatened under the Endangered Species Act (ESA)[139]. This challenge sought to secure private and state cooperation with a FWS conservation experiment pertaining to the species. The central dispute was whether FWS properly evaluated the effect of permitting some incidental killing of the Owl and resulting destruction of some of its potentially viable habitat.

Background

The Northern Spotted Owl inhabits the Pacific Northwest and faces two threats; (1) deforestation through the industrial harvest of lumber and (2) competition from the Barred Owl, a larger, invasive species of owl.[140] The Barred Owl is not subject to ESA protection and has been known to attack Northern Spotted Owls.[141]

The critical habitat of the Northern Spotted Owl and the surrounding environment is described by the court as being held in "a 'checkerboard' ownership pattern, interspersing federal lands with privately held parcels and state-owned timber lots."[143] As a result of that ownership pattern, developing land management policy that would meaningfully affect the population of Northern Spotted Owls depended upon the cooperation of neighboring state and private land owners. The FWS sought cooperation through issuing permits to landowners that designated "baseline" areas of their land and "non-baseline" areas. The former category includes portions of their lands where Northern Spotted Owls were known to reside after a 3 year period of FWS observation whereas the latter were areas where the Northern Spotted Owl is not known to reside after the same period of observation.[144] Compliant landowners would be granted liability protection from the ESA regarding incidental take that occurred in non-baseline areas on their property in the form of Safe Harbor Agreements (SHAs).[145] This process served to allow the FWS to enter these private and state-held lands for purposes of their surveys, depopulate the Barred Owl in the region to the fullest extent practicable[146], and allowed the FWS to engage in continued monitoring of Northern Spotted Owl to see if their population rebounds.[147] From the landowners' perspective, the agreements allowed for harvest of lumber in non-baseline areas without

---

[132] Brasch, *supra* note 112.
[133] *Id*.
[134] *Join Colorado Parks and Wildlife in celebrating National Hunting and Fishing Day*, COLORADO PARKS & WILDLIFE (Sept. 24, 2020), https://cpw.state.co.us/aboutus/Pages/News-Release-Details.aspx?NewsID=7599.
[135] Brasch, *supra* note 112.
[136] *Id*.
[137] *Friends of Animals v. Sheehan*, No. 6:17-CV-00860-AA, 2021 WL 150011 (D. Or. Jan. 15, 2021).
[138] "Incidental take" in this context means unintended killing of the protected species that occurs as a consequence of an otherwise lawful use of the land on which the killing occurs.
[139] U.S. Fish & Wildlife Service, *Northern Spotted Owl*, www.fws.gov/arcata/es/birds/nso/ns_owl.html (last updated Nov. 2, 2020).
[140] *Friends of Animals v. Sheehan*, *supra* note 137, at 1.
[141] *Id*.
[142] Sage Marshall, *Study Finds Shooting Barred Owls may be the Key to Saving Spotted Owls*, FIELD & STREAM (Jul. 23, 2021) www.fieldandstream.com/conservation/study-invasive-barred-owls.
[143] *Id*.
[144] *Id.* at 2.
[145] *Id.* at 1.
[146] This plaintiff made prior failed challenges to the Barred Owl depopulation under the Migratory Bird Treaty Act that were captured in the opinions of *Friends of Animals v. Jewell*, No. 13-CV-02034 JAM-CKD, 2014 WL 3837233 (E.D. Cal. Aug. 1, 2014), and *Friends of Animals v. United States Fish & Wildlife Serv.*, 879 F.3d 1000 (9th Cir. 2018).
[147] *Friends of Animals v. Sheehan*, *supra* note 137, at 1.

need for concern from ESA violations occurring as a result of the likely Northern Spotted Owl population rebound. Prior to granting SHAs, the FWS published Biological Opinions in each case as required by the ESA and found that the anticipated reduction of habitat was small compared to the total Northern Spotted Owl habitat available.[148]

Discussion

The ESA permits the Secretary of the Department of the Interior to prescribe exemptions to the activities ordinarily prohibited by the ESA "for scientific purposes or to enhance the propagation or survival of the affected species".[149] Validly-issued SHAs need to abide by the following six criteria:

1. they only protect incidental take during otherwise lawful activity in compliance with the terms of the SHA;
2. implementation of the terms of the SHA must be "reasonably expected to provide a net conservation benefit" and otherwise comply with the department's SHA policy;
3. probable effects of authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of the species;
4. implementation must be consistent with other applicable state, federal, or tribal law;
5. implementation may not conflict with other conservation or recovery programs for an ESA-listed species; and
6. applicants must show capability for and commitment to all terms of the SHA.[150]

Whether the SHAs were validly created depends largely on the considerations raised by the criteria described in points 2 and 3, which employ ambiguous criteria through their call for evaluative judgements.[151] In cases of statutory ambiguity in the ESA, the FWS' determinations are controlling except where "plainly erroneous or inconsistent with the regulation."[152]

FWS prefers to use SHAs and permits when securing cooperation from private landowners.[153] In arguing against a net conservation benefit derived from the policy, the plaintiff contended: (1) FWS' gaining information about the Northern Spotted Owl did not boost its population; (2) recipients of the SHAs were not engaged in wildlife management activities; and (3) the effects of the SHAs were unlikely to be felt over the term of those agreements.[154] The court viewed the informational benefit as a way of providing the FWS with additional information on how the Northern Spotted Owl's population is affected by the removal of Barred Owls; additionally, the court viewed the information as a means of facilitating the development of new and innovative conservation strategies, which were contemplated by the FWS SHA policy.[155] The court accordingly found that the informational benefit alone may be valid grounds for finding a net conservation benefit justifying SHAs in the context of a conservation experiment.[156] The court found that in light of the benefits granted through the experiment and the removal of the Barred Owls, landowners granting access to the FWS for their experiments conferred sufficient benefit on the animals to qualify as a "management activity" required under FWS policy for SHA approval. In turn, the court found in favor of the FWS on that argument.[157]

The Plaintiff further alleged that the FWS failed to consider the effect on the critical habitat of the Northern Spotted Owl that would result from the usage of non-baseline property in accordance with the terms of the SHAs.[158] The court found only one instance of resultant loss of critical habitat in the administrative history of the SHAs in question, regarding lands owned by the Oregon Department of Forestry, which prompted the FWS to revise its approving Biological Opinion to mention that less than a half a percent of the critical habitat was threatened by that action.[159] The plaintiff then complained about the sufficiency of that analysis by arguing that the FWS failed to account for the resulting damage to "the foraging, transience, and colonization value of the affected critical habitat", but the court found that the FWS had sufficiently addressed each topic. The court found for the FWS on all claims brought against it.[160]

Conclusion

This case demonstrates the tension that exists between the development of innovative conservation strategies and pragmatic measures taken to make such strategies possible. Those pragmatic measures necessarily involve trade-offs and where those occur, there is room for disagreement as to if they are wisely undertaken. Informational benefit can be enough to justify such an experiment, but the underlying rules of SHA agreements are still fact-sensitive and laced with ambiguity.

THE BIG CAT PUBLIC SAFETY ACT

Rebecca Sutton

The Netflix documentary series "Tiger King," released in 2020, exhibited the pitfalls in private ownership of big cats.[161] It also

[148] *Id.* at 2.
[149] 16 U.S.C.A. § 1539 (1988 West).
[150] *Friends of Animals v. Sheehan*, *supra* note 137, at 4. Derived from 50 C.F.R. § 17.32(c)(2).
[151] *Friends of Animals v. Sheehan*, *supra* note 137, at 4.
[152] *Id.* at 5.
[153] *Id.* at 3.
[154] *Id.* at 5.
[155] *Id.* at 5-6.
[156] *Id.* at 6.
[157] *Id*.
[158] *Id*. at 11.
[159] *Id*. at 12.
[160] *Id*. at 14.
[161] TIGER KING (Netflix 2020).

fueled the public's awareness and interest in conservation of big cats, spurring a desire to pass legislation aimed at prohibiting ownership and inhumane treatment of these animals. The Big Cat Public Safety Act (the Act), originally introduced by Rep. Mike Quigley on Feb. 26, 2019, was passed in the House of Representatives on Dec. 3, 2020.[162] The Act would amend the Lacey Act Amendments of 1981[163] to clarify provisions enacted by the Captive Wildlife Safety Act[164] and prohibit private individuals from possessing lions, tigers, leopards, cheetahs, jaguars, cougars, or any hybrid of these species, as well as prohibit public petting, playing with, feeding, and photo opportunities with cubs.[165] The bill was not taken up by the Senate before the 116th Congress closed; however, it was reintroduced in the House, again by Rep. Mike Quigley, on Jan. 11, 2021.[166]

The Act would revise the requirements that govern the trade of big cats, specifically revising restrictions on the possession and exhibition of big cats.[167] However, zoos, universities, and bona fide sanctuaries would be exempt from this prohibition, therefore allowing zoos and others listed to operate normally.[168] Further, the Act would not be retroactive, meaning that current pet owners would be grandfathered in and would simply be required to register their animals with the U.S. Fish and Wildlife Service.[169] This registration would serve as a safety measure to ensure that first responders and animal control officers are aware of the presence of such animals in their communities.[170]

A plethora of recent court cases reflect the public's widespread concern for the safety and welfare of big cats. One such case is *PETA v. Wildlife in Need*, where Wildlife in Need and Wildlife in Deed (WIN) was operating a non-profit exotic animal zoo in Indiana, that included possession of big cats.[171] People for the Ethical Treatment of Animals, Inc. (PETA) sought a permanent injunction against WIN, which would require WIN to cease possession of the big cats. PETA alleged that WIN harmed, harassed, and wounded various species of lions, tigers, and hybrids in violation of the Endangered Species Act (ESA) by declawing them, prematurely separating them from their mothers, and using them in hands-on, public interactions.[172]

 [173]

Similarly, in *United States v. Lowe*, Jeff Lowe and Lauren Lowe, along with Greater Wynnewood Exotic Animal Park (the Exotic Animal Park), operated a roadside zoo in Wynnewood, Oklahoma.[174] Reports from inspections of the facility conducted by the Animal and Plant Health Inspection Services documented numerous instances of animals at the facility being provided inadequate food, shelter, and veterinary care in violation of the Animal Welfare Act (AWA).[175] Following the inspections, the United States filed a complaint declaring the defendants violated both the AWA and ESA and sought an order requiring defendants to relinquish possession of all ESA protected animals.[176]

Under the ESA, it is unlawful for any person to "take" an endangered "species of fish or wildlife."[177] For purposes of the ESA, to "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[178] The term "harm" is defined by regulation as "an act which actually kills or injures wildlife."[179] Whereas the term "harass" requires only an "act or omission which creates the likelihood of injury to the wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[180]

The *PETA v. Wildlife in Need* court concluded that declawing the big cats constituted a take under the ESA.[181] Further, the big cats were harassed and harmed by WIN through premature

[162] Big Cat Public Safety Act, H.R. 1380, 116th Cong. (2020).
[163] The Lacey Act was the first federal law to address wildlife protection nationwide and was further amended in 1981 to expand protection to rare plant species. The Lacey Act Amendments of 1981 prohibited individuals from attempting to, assisting with, or actively participating in the import, export, transport, purchase or sale of fish, wildlife or plants taken or possessed in violation of federal, state, or tribal law. Lacey Act Amendments of 1981, 16 U.S.C. § 337 (1981).
[164] The Captive Wildlife Safety Act, signed into law in 2003, expanded the Lacey Act Amendments to include big game cats, such as lions and tigers. It did not, however, prohibit ownership of big cats as pets or public contact with cubs. Captive Wildlife Safety Act, Public Law 108-191 (2003).
[165] Big Cat Public Safety Act, H.R. 1380, 116th Cong. (2020).
[166] Big Cat Public Safety Act, H.R. 263, 117th Cong. (2020).
[167] Big Cat Public Safety Act, H.R. 263, 117th Cong. (2020).
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] *People for Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc*., 476 F. Supp. 3d 765, 769 (S.D. Ind. 2020).
[172] *Id.* at 765.
[173] Photo from https://awionline.org/legislation/big-cat-public-safety-act.
[174] *United States v. Lowe*, 2021 WL 149838 (E.D. Okla. Jan. 15, 2021) at 1.
[175] *Id*.
[176] *Id.* at 2.
[177] 16 U.S.C.A. § 1532.
[178] *People for Ethical Treatment of Animals*, *supra* note 171.
[179] *Id.* at 776.
[180] *Id*.
[181] *Id*.

separation of cubs from their mothers.[182] This separation was a routine practice in order to involve the cubs in a program titled "Tiger Baby Playtime," in which members of the public were allowed to have hands-on encounters with the cubs in exchange for a monetary donation.[183] The court found that Tiger Baby Playtime subjected the big cats to extreme stress and conditions that constitute harming and harassing under the ESA.[184] Given the aforementioned holdings, PETA was granted a permanent injunction against WIN.[185]

Following the case, in June 2021, the owner of WIN, Tom Stark, was ordered by a federal judge to pay $733,997.70 to PETA to cover attorney fees and other expenses related to the case.[186] As a result of PETA's successful lawsuit, twenty-five big cats were transferred from WIN's possession and to accredited sanctuaries.[187]

The *Lowe* court similarly found that maintaining animals in inadequate, unsafe, or unsanitary conditions, as well as physical mistreatment constitute harassment under the ESA because such conditions might create the likelihood of injury or sickness.[188] Therefore, the unsanitary conditions of the enclosures the big cats were kept in, coupled with the inadequate nutrition of their diet, constituted harassment in violation of the ESA.[189]

The court also found that the Lowes were exhibiting animals without a valid license in violation of the AWA.[190] Under the AWA, "exhibitor" means "any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation," and the term includes "carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not."[191] The U.S. Department of Agriculture has determined that a person acts as an exhibitor "simply by making animals available to the public."[192]

It was held that the Lowes made their animals available to the public by displaying them through online platforms for compensation and by permitting filming of Tiger King Park for a Netflix documentary series.[193] Given this, the court found that the Lowes were exhibiting animals without a valid license in violation of the AWA.[194] Ultimately, the court held that the defendants had to immediately cease exhibiting animals protected by the ESA and the AWA without a valid exhibitor's license, as well as immediately relinquish all big cats one-year-old or younger, along with their respective mothers, to the United States for transfer to reputable facilities.[195]

With these two, as well as other cases[196], the Act is likely to gain higher public approval as it makes its way through the 117th Congress. The Act responds to the necessity of protecting the country's wildlife and prevent its taking and killing for illegitimate, frivolous reasons.[197]

PRINCIPLE 6: DEMOCRACY OF HUNTING

EXPANDING "HARASSMENT" TO SILENCE OPPOSITION TO HUNTING

Briana Nirenberg

Every state in the country has a "hunter harassment" law prohibiting, in various iterations, interference with the legal taking of fish or wildlife.[198] Despite the frequency of such provisions, interference rising to the level of a statutory violation is not a common issue and there are relatively few cases on the matter.[199] However, this may be changing in the near future, as the scope of these statutes appears to be continuously expanding.[200]

---

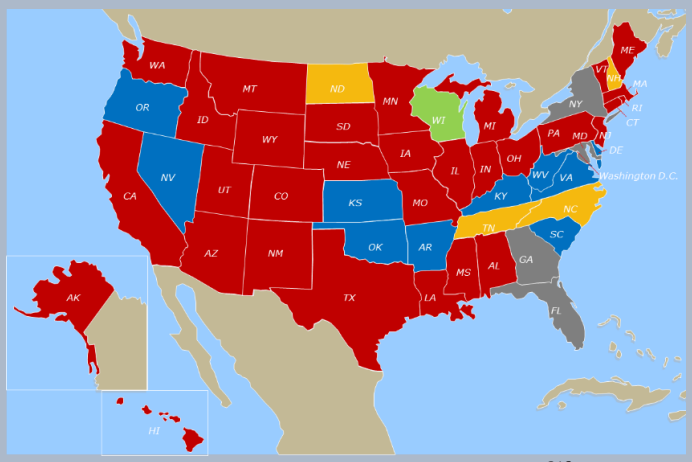
[182] *Id.* at 782.
[183] *Id.* at 769.
[184] *Id.* at 784.
[185] *Id.* at 785.
[186] Billy Kobin, *Federal judge orders Wildlife in Need's Tim Stark to pay PETA over $750,000 in legal fees*, LOUISVILLE COURIER J. (June 15, 2021), www.courier-journal.com/story/news/local/indiana/clark/2021/06/15/federal-judge-wildlife-need-tim-stark-must-pay-peta-lawsuit-fees/7700027002/.
[187] *Id.*
[188] *Id.* at 11.
[189] *Id.*
[190] *Id.*
[191] *Id.* at 12.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.* at 17.
[196] *See also State v. DeFrancesco*, 235 Conn. 426 (1995) (defendant was convicted of possession of potentially dangerous animals, including a Bengal cat, jungle cat, and hybrid), *People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, Inc*., 424 F. Supp. 3d 404 (D. Md. 2019) (defendant zoological park harmed and harassed lions and tigers in its possession in violation of the ESA), *Animal Legal Def. Fund v. State, Dep't of Wildlife & Fisheries*, 2012-0971 (La. App. 1 Cir. 4/25/13) (defendant illegally possessed a potentially dangerous tiger on display at a truck stop).
[197] U.S Fish and Wildlife Service, North American Model of Wildlife Conservation Official Web Page of the U.S. Fish and Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html.
[198] For a list of statutes, and additional pieces of literature on the matter, *see* Animal Legal & Historical Center, *Hunter Harassment*, MICH. STATE UNIV. COLLEGE OF L., www.animallaw.info/topics/hunter-harassment. The few states—California, Colorado, and New York—that do not appear on the referenced list have similar hunter harassment statues as well. CAL. FISH & GAME CODE § 2009 (West).; COLO. REV. STAT. § 33-6-115.5.; and N.Y. ENV LAW § 11-0110.
[199] *See Commonwealth v. Haagensen*, 900 A.2d 468 (Pa. Commw. Ct. 2006) (hunter harassment conviction for warning hunters near property line not to trespass and illegality of hunting near public road) (conviction reversed); *Shuger v. State*, 859 N.E.2d 1226 (Ind. Ct. App. 2007) (hunter harassment conviction arising from driving by the hunters, honking horns, "allowing" dogs to bark) (conviction affirmed).
[200] *See Brown v. Kemp*, 506 F. Supp. 3d 649, 652 (W.D. Wis. 2020).

Wisconsin's hunter harassment statute, §29.083, was originally adopted in 1990.[201] In this particular instance, the purpose was not to protect hunters as a class from threat of non-hunters, but rather to resolve conflict with the local Chippewa tribe regarding the exercise of hunting rights granted to the tribe via treaty.[202] The statute's subsequent amendment in 2015, however, saw a different purpose, with expansion explicitly intended to protect hunters in the state from a wide array of "infringing" behavior by those opposed to hunting.[203] In addition to the traditional prohibitions of hunter harassment statutes,[204] as of 2015, the Wisconsin law also uniquely bans engagement in two or more of the following activities: "maintaining a visual or physical proximity to the [hunter], approaching or confronting the [hunter], photographing, videotaping, audiotaping, or [recording] through other electronic means….and causing a[nother] person to engage in any of the acts described."[205] Foreseeing constitutional concerns, the statute contains both a requirement of intent to interfere in the taking, as well as the affirmative defense of freedom of speech.[206]

Brown v. Kemp

The plaintiffs involved in *Brown v. Kemp* challenged the constitutionality of §29.083, and at no point were any of the parties convicted or even charged with hunter harassment in violation of the statute.[207] Rather, the plaintiffs consisted of a journalist, a professor/filmmaker, and a member of Wolf Patrol,[208] an organization that monitors and provides information on hunting to the public, who were afraid of the possibility of criminal liability should their work ever be deemed to be within the provision's scope.[209]

Citing lack of actual injury, the Court determined that any damage suffered by the plaintiffs was either the result of conduct performed by hunters emboldened by the statute's provisions or mere speculation regarding potential means of enforcement, neither of which is sufficient to support legal action.[210] Because none of the plaintiffs were ever formally charged under the statute, plaintiffs lacked standing to challenge the constitutionality of the statute as applied.[211] The Court's only option was to analyze its constitutionality under pre-enforcement review for overbreadth and vagueness, which can be raised regardless of whether an actual injury occurred.[212] Overbreadth refers to instances in which a statute prohibits behavior—in this case speech/expressive conduct—that the legislature does not have the constitutional authority to prohibit.[213] Vagueness pertains to statutory construction, that the statute is constructed in such a way that the average person could not discern what kind of behavior is prohibited and what kind is allowed.[214] Both of these challenges were unsuccessful due to the requirement of intent to interfere with and/or prevent a legal taking of fish or wildlife, which sufficiently narrowed and clarified the scope of application.[215]



Map of Hunter Harassment Laws by State[216]

Blue: general statutes prohibiting interference/obstruction of a lawful take

Red: statutes that expressly prohibit affecting the behavior of or influencing, distracting, or driving away game

Yellow: prohibitions related to drone surveillance

Green: prohibits photography and video recording hunters

Gray: statutes are present, but are more nuanced and exceed the scope of this article

Currently, Wisconsin is the only state that explicitly includes photographing and video recording hunters within the conduct prohibited by its hunter harassment statute. Laws in other states vary, with some forbidding only general interference in or obstruction of a legal taking,[217] banning the drone surveillance

[201] *Id.* at 652. The vast majority of hunter harassment statutes were adopted around this time period, beginning, with some exceptions, in the mid-1980s. *See supra* note 198.
[202] *Id.* at 652–53. First noteworthy example of enforcement was against three individuals for interfering with spearfishing conducted by members of the Chippewa Tribe. *See State v. Bagley*, 164 Wis. 2d 235 (Wis. Ct. App. 1991).
[203] The expansion of the statute's scope corresponded to the allowance of wolf hunting in the state, which first began in 2012. *Id.* at 653.
[204] *See supra* note 198 for examples, similarities between the examples provided.
[205] Wis. Stat. Ann. § 29.083 (LexisNexis, Lexis Advance through Act 80 of the 2021-2022 Legislative Session).
[206] *Id.* at 654.
[207] *Id.* at 658.
[208] *Id.* at 652.
[209] *Id.* at 654.
[210] *Id.* at 654–55.
[211] *Id.* at 659.
[212] *Id.* at 659.
[213] *Id.* at 660–61.
[214] *Id.* at 662.
[215] *Id.* at 661–62. *Compare Dorman v. Satti*, 678 F. Supp. 375 (D.C. Conn. 1988), in which Connecticut's hunter harassment statute was held unconstitutionally vague for failure to include an intent to interfere requirement.
[216] Compiled by Author from data at *supra* note 198.
[217] *See e.g.*, Ky. Rev. Stat. Ann. §150.71.; Nev. Rev. Stat. § 503.015.; Or Rev. Stat. § 496.994.; and Va. Code Ann. § 29.1-521.1.

of a hunt[218], and most including a range of conduct that would affect the behavior of game or drive the game away from hunters.[219]

For reasons similar to those seen in *Brown v. Kemp*, all hunter harassment laws require that the violator *intend* to interfere with the taking for sanctions to be triggered. The case is currently pending appeal before the Seventh Circuit Court of Appeals challenging the Districts Court's ruling on both of the pre-enforcement claims.[220]

PRINCIPLE 7: SCIENTIFIC MANAGEMENT

PROTECTION OF GRAY WOLVES: *DEFENDERS OF WILDLIFE V. U.S. FISH AND WILDLIFE SERVICE*

Echo Aloe

Gray Wolf, National Geographic Kids[221]

The gray wolf (*Canis lupus*) has again taken center stage in the field of conservation law. With the renewed debate over whether gray wolves should remain protected under the Endangered Species Act (ESA), comes a necessary conversation regarding two principles of the North American Model of Wildlife Conservation (Model): killing wildlife for legitimate purposes and science as the proper tool for management. According to the Model, wildlife should only be killed for legitimate purposes.[222] Legitimate purposes include food, fur, self-defense, and protection of property, and at the heart of this principle are the ideas of fair chase and non-frivolous use of wildlife resources. [223] State game laws engage with these ideas by setting limits on when, where, and how many animals may be taken.

Regulation of wolves returned to the states in January 2020, after the U.S. Fish and Wildlife Services (FWS) removed gray wolves from the endangered species list.[224] The change in administrations has not upset the rule; the Biden administration "is sticking by the decision [of the Trump administration]. . . to lift protections for gray wolves."[225] However, the Biden administration is concerned with how some states have decided to manage wolves through adoption of aggressive wolf hunting seasons.[226]

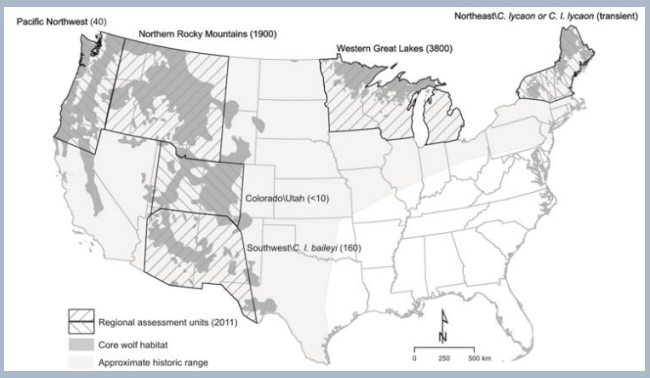
Removal prompted several states to hold wolf hunts in 2021. In Wisconsin, the state planned to allow hunters to take 119 wolves during the month of February, however, three days into the season, hunters had shot and trapped 218 wolves.[227] Notably, when accounting for illegal poaching, it is estimated that one third of the total wolf population in Wisconsin was consequently taken in a single season.[228] In other states, the proposed wolf hunting regulations allow methods that resemble the aggressive eradication policies from a century earlier.[229] In fact, one member of Montana's Fish and Wildlife Commission raised concerns that Montana's new wolf hunting regulations, including the use of neck snares, threatened principles of fair chase.[230]

A main concern raised by these policies and results is whether *all* populations of gray wolves are robust enough to withstand the impact that wolf hunts may have on the species. According to the North American Model of Wildlife Conservation, "the best science available [should be] used to make critical decisions on natural resource management,"[231] which is mirrored by the ESA. Notably, when it comes to wolves, it

[218] N.H. Rev. Stat. 207:57.; N.C. Gen. Stat. § 113-295.; N.D. Cent. Code § 20.1-01-31.; and Tenn. Code Ann. § 70-4-302.
[219] *See e.g.*, Cal. Fish & Game Code § 2009 (West).; Colo. Rev. Stat. § 33-6-115.5; 720 Ill. Comp. Stat. §5/48-3.; Ind. Code § 14-22-37-2.; Mich. Comp. Laws § 324.40112.; and Minn. Stat. § 97A.037.
[220] *See* Brief and Short Appendix of Plaintiffs-Appellants, *Brown v. Kemp*, No. 21-1042 (7th Cir. filed Feb. 26, 2021).
[221] *Gray Wolf*, NATIONAL GEOGRAPHIC KIDS (last visited Nov. 22, 2021) https://kids.nationalgeographic.com/animals/mammals/facts/gray-wolf.
[222] U.S. Fish and Wildlife Services, *North American Model of Wildlife Conservation* (Sept. 19, 2018).
[223] Boone and Crockett Club, *North American Model of Wildlife Conservation* (last visited Nov. 5, 2021) www.boone-crockett.org/north-american-model-wildlife-conservation.
[224] Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69, 778 (Nov. 3, 2020).
[225] Biden Backs the End of Protections for Wolves. But Worries About Hunting Grows, NPR (Aug. 20, 2021) www.npr.org/2021/08/20/1029854797/biden-gray-wolves-endangered-species-protections-hunting.
[226] *Id*.
[227] Douglas Main, A Third of Wisconsin's Wolves Killed after Losing Protection This Year, Study Says NATIONAL GEOGRAPHIC (July 9, 2021).
[228] *Id*.
[229] Nick Mott, *Montana Adopts 'Aggressive' Wolf Hunting Regulations*, MONTANA PUBLIC RADIO (Aug. 24, 2021).
[230] *Id*.
[231] Boone and Crockett Club, *North American Model of Wildlife Conservation* (last visited Nov. 5, 2021) www.boone-crockett.org/north-american-model-wildlife-conservation.

appears that various stakeholders cannot agree on *which* science should be the basis for wolf regulation.

The 2020 delisting rule was challenged in court as being arbitrary and capricious.[232] Petitioners, Defenders of Wildlife and other non-profit organizations, asked the court to vacate the rule and return, at least some, gray wolves to the endangered species list.[233] Oral arguments were heard in the Northern District Court of California in November of last year, but Judge Jeffery White did not issue a ruling from the bench, and he did not give any signs on which way he was leaning.[234]



Map of regional assessment units used in the 2008-2011 national wolf strategy process.[235]

The crux of Petitioners' argument was that FWS violated the ESA by failing to rely on the best available science in making its decision to delist *all* gray wolves. The complaint alleges that FWS violated the ESA by failing to "analyze the conservation status of the full listed species."[236] The ESA requires that a delisting decision apply the "full, five factor threats analysis" to the species to prevent "FWS from restricting its analysis of extinction risk based on arterially confided considerations that systematically under-protect listed…species."[237] Rather, Petitioners alleged that for the 2020 delisting rule, FWS relied on wolves in the Great Lakes states and the Northern Rockies to analyze risk factors for *all* wolves in the lower 48 states.[238]

The ESA allows FWS to list, or delist, distinct population segments (DPS) of a species; this allows a subsect to be treated differently than the whole species.[239] In 2008, FWS justified delisting only the Northern Rockies wolves by determining that the Pacific Coast wolves *were sufficiently distinct*.[240] Yet, according to the complaint, FWS's 2020 rule "arbitrarily and unlawfully grafted Pacific Coast wolves onto [this] already delisted segment of [Northern Rockies] wolves for the purpose of its analysis," despite the fact that the best available science indicates that these wolves represent "a 'coastal ecotype' that is 'genetically and morphologically distinct, and display[s] distinct habitat and prey preference, despite relatively close proximity' to other wolves."[241] The agency provided no rationale for this reversal in the 2020 delisting rule.[242] Rather, FWS attempted to make these wolves "invisible for the purposes of its ESA delisting analysis" in 2019, and in so doing, it failed to consider specific threats to the Pacific Coast wolves.[243]

Finally, petitioners alleged that FWS's 2020 delisting rule was contrary to the ESA because the agency dismissed the importance of recovery in a significant portion of the gray wolf's range.[244] The final rule stated the FWS "assessed 'significance' based on whether the portion of the range contributed meaningfully to the resiliency, redundancy, or representation of the gray wolf entity being evaluated without prescribing a specific threshold."[245] "Significance" was interpreted using any reasonable determination.[246] Providing no further information, or an attempt to interpret "significant portion," the complaint alleged that the public and court have no means to evaluate FWS's approach, which provides ground for a remand.[247]

In sum, petitioners concluded that the 2020 delisting rule was contrary to the best available science, making it arbitrary and capricious and that it should be vacated under the Administrative Procedure Act.[248]

As of February 10, 2022, the U.S. District Court for the Northern District of California vacated and remanded the FWS's rule that delisted certain gray wolf "entities," holding that the rule violated the ESA and the APA in a variety of

---

[232] *Defenders of Wildlife, et al v. U.S. Fish and Wildlife Services*, No. 4:21-cv-00344-jsw (N.D. Cal. July 16, 2021) [hereinafter *Defenders of Wildlife*].
[233] *Id.* at 47-49.
[234] John Myers, *Federal Wolf Lawsuit Gets Hearing in California*, BRAINERD DISPATCH: NORTHERN OUTDOORS (Nov. 12, 2021, 3:58 PM).
[235] Carlos Carroll et al., *Wolf Delisting Challenges Demonstrate Need for an Improved Framework for Conserving Intraspecific Variation Under the Endangered Species Act*, 71 BioScience 1, 73-84, 74 (Jan. 2021) https://doi.org/10.1093/biosci/biaa125.
[236] *Defenders of Wildlife*, *supra* note 232, at 10.
[237] *Id.*
[238] *Id.* at 11. (The complaint points out that FWS using these two populations of wolves to make general delisting rules is not new; a rule based off this limited scope was struck down in 2011 by the D.C. Circuit Court. In the 2013 rule, which also attempted to use the Great Lakes states and Northern Rockies wolves to delist wolves outside these areas was struck down in *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 602 (D.C. Cir. 2017), with the court noting that FWS could not use a backdoor route to the *de facto* delisting of a protected species and that the agency could not "delist an already-protected species by balkanization.").
[239] *See Defenders of Wildlife*, at 3 (citing *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 598 (D.C. Cir. 2017) ("This reflects 'Congress's intent to target the Act's provisions where needed, rather than to require the woodenly undeferential treatment of all members of a taxonomic species regardless of how their actual status and condition might change over time.'")).
[240] *Id.* at 14.
[241] *Id.* at 13.
[242] *Id*. Making it an arbitrary and capricious decision because when an agency changes positions it is required to provide a reasoned explanation for disregarding facts and circumstances that supported the prior policy.
[243] *Id*. at 18.
[244] *Id*. at 19.
[245] *Id*. at 21.
[246] *Id.*
[247] *Id*. at 22.
[248] *Id*. at 47.

ways.[249] The Court concluded that FWS "could not delist an entity solely because it determined the listed entity no longer met the definition of a species under the ESA and that FWS must instead apply the ESA's explicit standards for delisting."[250] The court determined that FWS had "not offered a reasonable construction of the phrase *significant portion of its range*," which is provided in the ESA's definitions of "endangered species" and "threatened species."[251]

THE NATIONAL ENVIRONMENTAL POLICY ACT'S "NON-DISCRIMINATION" EXEMPTION

Matthew DeSafety

The National Environmental Policy Act (NEPA) was signed into law in 1970 with the goal of improving environmental protections and oversight as well as increasing transparency between federal environmental agencies and their decision-making process with the public.[252] NEPA pre-dates and applies a far broader set of activities than the North American Model of Wildlife Conservation (North American Model or Model), but shares the principle of science governing wildlife management.[253] The Model proposes that scientific inquiry and analysis should be the means by which decision makers conduct wildlife conservation.[254]

In accordance with the NEPA, when federal agencies decide to undertake "major federal actions" that will affect the environment, the agency must first complete an Environmental Impact Statement (hereinafter EIS), that describes the environmental impact of the action, unavoidable adverse environmental effects, and any available alternatives to the action.[255] EISs help foster government transparency by allowing the public to be fully aware of the "major federal action" that will be undertaken and to engage in public comment on the EIS prior to the commencement of the action.[256] Note that a "major federal action" is an action which will have a significant effect on the environment and is potentially subject to federal control and responsibility.[257] By meeting the extensive requirements of the NEPA, any significant environmental impact brought about by major federal actions can be accounted for, measured, and mitigated prior to the commencement of the actions.[258]

Recent changes to the regulations implementing NEPA stated that NEPA is not applied to federal actions that are *non-discretionary*, meaning actions that the agency is required to undertake in accordance with federal law.[259] Environmental analysis of non-discretionary actions "would serve no purpose" as the action must be completed by the agency in question, regardless of the findings within an EIS analysis.[260] What is and what is not a "non-discretionary" action is a frequent topic of litigation.[261] *Natural Resources Defense Council v. McCarthy*, a case from the Tenth Circuit, helps to further define a non-discretionary action that is not subject to NEPA.[262]

Natural Resources Defense Council v. McCarthy

In *Natural Resources Defense Council v. McCarthy*, a lawsuit was brought to prevent the U.S. Bureau of Land Management (BLM) in Utah from opening a previously closed Wright's Fishhook Cactus conservation area to off-highway vehicles (OHVs) prior to the BLM undertaking environmental analysis as required by NEPA.[263] In 2006, BLM had previously closed a portion of the Factory Butte, Utah area from OHV traffic due to the adverse impact OHVs had on the endangered Wright's Fishhook Cactus.[264]

 [265]

BLM's authority for temporarily closing and reopening the area for OHV use stems from 43 C.F.R. § 8341.2(a)[266] or the Off-Road Vehicles statute, a part of a federal regulation which dictates special rules regarding the use of OHVs on federal land. The specific provision of §8341.2(a) states that an agency must close wildlife areas to OHV traffic where said traffic will have adverse impacts on the environment.[267] The areas are only to be reopened when the agency officer determines that the

[249] Erin H. Ward, *U.S. District Court Vacates Gray Wolf Delisting Rule*, CONGRESSIONAL RESEARCH SERVICE LEGAL SIDEBAR (Feb. 18, 2022).
[250] *Id.*
[251] *Id*.
[252] The National Environmental Policy Act, 42 USC § 4321.
[253] *North American Model of Wildlife Conservation*, U.S. FISH AND WILDLIFE SERVICE, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (last visited Nov. 29, 2021).
[254] *Id*.
[255] *The Legal Framework of the National Environmental Policy Act*, CONGRESSIONAL RESEARCH SERVICE, https://sgp.fas.org/crs/misc/IF11549.pdf (last visited Nov. 29, 2021).
[256] *Id*.
[257] *Id*.; 40 CFR § 1508.18 - Major Federal action.
[258] *The Legal Framework*, *supra* note 255.
[259] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43304 (Jul. 16, 2020).
[260] *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).
[261] Update to the Regulations, *supra* note 259.
[262] *Natural Resources Defense Council v. McCarthy*, 993 F.3d 1243 (2021).
[263] *Id*.
[264] *Id*. at 1247-1248.
[265] *Wright's Fishhook Cactus*, PROJECT NOAH, www.projectnoah.org/spottings/7703154/fullscreen (last visited Nov. 29, 2021).
[266] *Natural Resources Defense Council v. McCarthy*, *supra* note 262, at 1247.
[267] Off Road Vehicles – Special Rules, 43 C.F.R. § 8341.2(a).

danger has been eliminated and measures implemented to prevent recurrence. The parties both agreed that the closing of the conservation area was non-discretionary and did not require NEPA analysis.[268]

In 2019, BLM sent a memorandum to the U.S. Fish and Wildlife Service (FWS) stating that BLM had complied with the requirements of a 2010 biological opinion issued by the Service regarding endangerment of the Fishhook Cactus and sought a concurring opinion from FWS.[269] FWS agreed and concluded that opening the Factory Butte area to OHVs would no longer have a negative environmental impact on the Wright Fishhook Cactus' habitat.[270] Following the concurrence of FWS, and under the belief that it had complied with the requirements in the Off-Road Vehicles federal regulations regarding the re-opening of previously closed areas to OHV traffic, BLM decided to end the temporary closure of the area to OHVs.[271] BLM did not conduct an environmental impact statement or provide an opportunity for public comment before reopening the area.[272]

Following the reopening of the enclosed area, Plaintiff brought its lawsuit and argued that BLM violated NEPA by opening the Factory Butte area to OHV use prior to conducting an EIS and fully analyzing the possible adverse impacts to the Cactus from OHV traffic.[273] BLM argued that its determination that the enclosure should be reopened, and the actual reopening of the area, were non-discretionary actions, and thus NEPA environmental analyses were not required prior to re-opening the area to OHVs.[274] The District Court agreed with BLM and found that its actions were non-discretionary.[275] Plaintiff then appealed to the Tenth Circuit, which stated that the case would turn on whether the BLM's decision to lift the temporary closure under 43 C.F.R. § 8341.2(a) was non-discretionary, and thus not subject to the requirements of the NEPA.[276]

[277]

The Tenth Circuit agreed with the lower court and held that both the lifting of a temporary closure order and the determination that federal law requirements had been met to lift the temporary closure order under 43 C.F.R. § 8341.2(a) were non-discretionary decisions, and thus not subject to NEPA regulations. [278] The Court specifically concluded that the use of "shall immediately close the area . . . until the adverse effects are eliminated" in 43 C.F.R. § 8341.2(a) was dispositive in finding that this provision of the statute was non-discretionary.[279] The Court reasoned that under a regular and previously established reading of the terms "shall" and "until", BLM must only close the area until the negative effects are negated and then are required ("shall is mandatory) to reopen the area.[280] The Court additionally stated that its previous holding in a prior case within jurisdiction that temporary closure of an OHV area was non-discretionary, then logically this can be applied to reopening the area as well.[281]

The Court additionally held that BLM's agency requirement of formulating measures for protecting the cactus and in deciding that negative environmental effects were mitigated, was not determinative as to whether its subsequent conclusion that the park should be re-opened for OHV was discretionary.[282] Instead, the Court, using prior non-discretionary jurisprudence as a guide, concluded that the Off Road Vehicles statute does not allow BLM to decide on when or how to act and does not charge BLM with creating criteria for when to open the closures (this is dictated by the statute), indicating that BLM's determination that the area should be opened to OHV enclosures is closer to a required judgment of how to undertake the action, and not born out of autonomous discretion as to whether the action must be taken.[283] Thus, determining that the

[268] *Id.*
[269] *Natural Resources Defense Council v. McCarthy*, *supra* note 262, at 1248-49.
[270] *Id.*
[271] *Id.* at 1249.
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.* at 1250.
[276] *Id.* at 1250-51.
[277] *Factory Butte – Torrey, Utah*, ATLASOBSCURA.COM, www.atlasobscura.com/places/factory-butte (last visited Nov. 29, 2021).
[278] *Natural Resources Defense Council v. McCarthy*, *supra* note 262, at 1251-52.
[279] *Id.* at 1252.
[280] *Id.*
[281] *Id.* at 1249.
[282] *Id.* at 1254-55.
[283] *Id.* at 1252-55.

area should be reopened falls under the "non-discretion exemption", meaning that conforming with NEPA was not required prior to ending the Factory Butte temporary closure to OHV traffic.[284]

Conclusion

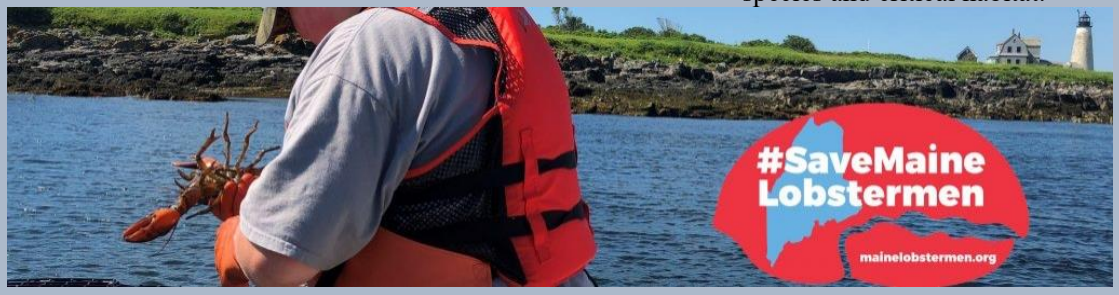
The case represents a gap in NEPA and its ability to facilitate regulatory oversight of agency decisions that have a significant impact on the environment. The exemption prevents NEPA from being applied to an entire category of major federal environmental actions. The non-discretionary exemption has been used in a number of previous cases where NEPA analysis was not conducted for the following environmental concerns: cross border truck crossings at the U.S.-Mexico border and their effect on the environment, the impact of the use of railroad trains on walkable trails, and when considering whether to accept or reject Clean Water Act oil spill response plans.[285] Completion of an EIS and other environmental analysis required by NEPA would have enabled the agency actions in each of the cases, as well as the case at hand, to have additional scientific support, regulatory oversight, and transparency through public comment. This exemption also creates a public policy dilemma where legislators and lobbyists seeking to rein in regulatory oversight and avoid NEPA requirements can draft legislation using terms that courts consider to be non-discretionary (such as "must", "shall", and "until"), forcing agencies into non-discretionary actions without further environmental analysis from an EIS. Finally, the non-discretionary exemption sits in tension with the North American Model and its principle that scientific inquiry must be utilized to make informed conservation decisions.[286]

MAINE LOBSTERMEN'S ASSOCIATION V. NATIONAL MARINE FISHERIES SERVICE

Alex Tolzman

The National Oceanic and Atmospheric Administration ("NOAA") of the Department of Commerce is an agency of the federal government focusing on a scientific approach to a variety of topics from "daily weather forecasts, severe storm warnings, and climate monitoring to fisheries management, coastal restoration and supporting marine commerce."[287] NOAA Fisheries, also known as the National Marine Fisheries Service, is an office within the NOAA which is "responsible for the stewardship of the nation's ocean resources and their habitat."[288] Operating under the Marine Mammal Protection Act and the Endangered Species Act, NOAA Fisheries works to recover and safeguard protected marine species without curtailing economic and recreational opportunities.[289] NOAA Fisheries is specifically responsible for implementing the Endangered Species Act (ESA) with regard to endangered or threatened marine and anadromous species.[290]

Under Section 7 of the ESA, federal agencies are required to consult with the U.S. Fish and Wildlife Service ("FWS") and/or NOAA Fisheries on any activities that may affect species listed on the ESA.[291] Specifically, federal agencies are required to consult to insure that actions are not likely to jeopardize the continued existence of any endangered species.[292] In response to federal agencies' proposed activities, NOAA Fisheries issues a Biological Opinion ("BiOp") "to document [their] opinions on how federal agencies' actions affect ESA-listed species and critical habitat."[293]



On May 27, 2021, NOAA Fisheries issued its Section 7 BiOp on authorization to eight federal fisheries, including the NOAA Fisheries, the Greater Atlantic Regional Fisheries Office, and the American

[284] *Id.* at 1256.
[285] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43304 (Jul. 16, 2020).
[286] *North American Model of Wildlife Conservation*, U.S. Fish and Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (last visited Nov. 29, 2021).
[287] *About our Agency*, NAT'L ATMOSPHERIC ADMIN., www.noaa.gov/about-our-agency (last visited Nov. 17, 2021).
[288] *About Us Overview*, NOAA FISHERIES, www.fisheries.noaa.gov/about-us#overview (last visited Nov. 19, 2021).
[289] *See id.* ("The resilience of our marine ecosystem and coastal communities depend on healthy marine species, including protected species such as whales, sea turtles, corals, and salmon.").
[290] *Law & Policies: Endangered Species Act*, NOAA FISHERIES, www.fisheries.noaa.gov/topic/laws-policies#endangered-species-act (last visited Nov. 12, 2021); *see also What does anadromous mean?*, NOAA FISHERIES, www.fisheries.noaa.gov/node/8071 (last visited Nov. 12, 2021) ("Anadromous is the term that describes fish born in freshwater who spend most of their lives in saltwater and return to freshwater to spawn, such as salmon and some species of surgeon.").
[291] 16 U.S.C. § 1531; *see also Endangered Species Conservation Biological Opinions*, NOAA FISHERIES, www.fisheries.noaa.gov/national/endangered-species-conservation/biological-opinions (last visited Nov. 18, 2021) ("These inter-agency consultations are designed to help federal agencies in fulfilling their duty to ensure that their actions do not jeopardize the continued existence of a species, or destroy or adversely modify designated critical habitat.").
[292] 16 U.S.C. § 1536(a)(2).
[293] *See Endangered Species Conservation Biological Opinions Issued by NOAA Fisheries' Office of Protected Resources,* www.fisheries.noaa.gov/national/endangered-species-conservation/biological-opinions-issued-noaa-fisheries-office-protected (last visited Nov. 16, 2021).

Lobster Fishery.[294] The BiOp evaluated the impact of these eight fisheries' management plans on the North Atlantic right whale ("right whale").[295] The right whale is one of the most endangered species of whale, with only about 400 whales remaining, and as a result the BiOp concluded that morality and serious injury of the right whale needs to be further reduced.[296] One of the most pressing threats against the right whale is entanglement in fishing gear.[297] And therefore, the BiOp mandates that fixed gear fisheries, which use fishing gear that is stationary after it is deployed, must introduce additional efforts to reduce right whale deaths and serious injuries.[298]

Maine Lobstermen's Association v. National Marine Fisheries Service

In response to the 2021 BiOp, the Maine Lobstermen's Association ("MLA") filed suit in the U.S. District Court for the District of Columbia seeking relief (against NOAA Fisheries[299] The MLA is the oldest and largest fishing industry association on the east coast, researching and working on a variety of issues "including lobster management, bait, habitat, deep sea coral management, and dredging."[300]

The MLA's complaint, filed September 27, 2021, challenges the BiOp, calling the Opinion a "draconian and fundamentally flawed 10-year whale protection plan that will all but eliminate the Maine lobster fishery, yet still fail to save the endangered right whales."[301] The complaint alleges that the BiOp's mandate "ignores the reality that the Maine lobster fishery *already* has an extremely low incidence of interactions with right whales, due in part, to a suite of mitigation measures" that the MLA has had implemented for many years.[302] The complaint further alleges that Maine lobster fisheries have long had a desire to "conserve and coexist" with the right whale.[303] In furtherance of the MLA's desire to coexist with the right whale, the fisheries have implemented several measures to reduce risks, including "drastic reductions in vertical lines, gear modifications, and effort reductions."[304]

To attempt to restrain the implementation of the BiOp's requirements, the MLA argues that its efforts to reduce risks to the right whale have been successful.[305] According to the MLA, "there has not been a *single* known North Atlantic [right] whale entanglement with Maine lobster gear in *almost two decades*," and "there has *never* been a known North Atlantic right whale serious injury or mortality interaction associated with Maine lobster gear."[306] The MLA argues that the BiOp's mandates will provide no appreciable benefit to the right whale while simultaneously eliminating the Maine lobster fishery.[307] Additionally, the MLA argues that the NMFS's approval of the BiOp is an unlawful violation of the ESA and the Administrative Procedure Act because NMFS "did not rely on the best available scientific information, made erroneous and arbitrary assumptions unsupported and contradicted by data and evidence, relied on outdated and flawed methodology to model projections of the right whale population."[308]

This is not the first time that an American lobster fishery has challenged NMFS's regulation of commercial lobster fisheries.[309] In 2014 NMFS issued a BiOp regulating commercial lobster fisheries, again to ensure the protection of

---

[294] *See Endangered Species Act Section 7 Consultation Biological* Opinion, NOAA FISHERIES (May 27, 2021) www.greateratlantic.fisheries.noaa.gov/public/nema/PRD/Final%20Fisheries%20BiOp_05_28_21.pdf.

[295] Complaint for Declaratory and Injunctive Relief at 2, Me. Lobstermen's Assoc. v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.C. Cir. filed Sept. 27, 2021).

[296] *See Species Directory North Atlantic Right Whale*, NOAA FISHERIES, www.fisheries.noaa.gov/species/north-atlantic-right-whale (last visited Nov. 18, 2021); *see Endangered Species Act Section 7 Consultation Biological Opinion*, NOAA FISHERIES, at 473 (May 27, 2021) www.greateratlantic.fisheries.noaa.gov/public/nema/PRD/Final%20Fisheries%20BiOp_05_28_21.pdf; *see also* Antonina, *NMFS releases Biological Opinion*, ME. LOBSTERMEN'S ASSOC. (May 27, 2021) mainelobstermen.org/2021/05/27/5-27-21-nmfs-releases-biological-opinion/.

[297] *Species Directory North Atlantic Right Whale*, NOAA FISHERIES, www.fisheries.noaa.gov/species/north-atlantic-right-whale (last visited Nov. 18, 2021) ("NOAA fisheries and our partners estimate that over 85 percent of right whales have been entangled in fishing gear at least once. Fishing gear can cut into a whale's body, cause serious injuries, and result in infections and mortality."); *See Endangered Species Act Section 7 Consultation Biological* Opinion, NOAA FISHERIES, at 474 (May 27, 2021) ("Primary threats to the species include climate change, entanglement in fishing gear, and vessel strikes.").

[298] *See Endangered Species Act Section 7 Consultation Biological* Opinion, NOAA FISHERIES, at 482 (May 27, 2021); *see* Complaint for Declaratory and Injunctive Relief at 2 ¶3, Me. Lobstermen's Assoc. v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.C. Cir. filed Sept. 27, 2021) ("[The BiOp] mandates that U.S. fixed gear fisheries implement *more* conservation measures to achieve an *additional 98%* reduction in the incidence of 'serious injury and morality' interactions between this fishing gear and North Atlantic right whales over the next 10 years."); *see also Fisheries Glossary – Voices of the Bay*, NOAA FISHERIES https://sanctuaries.noaa.gov/education/voicesofthebay/glossary.html (defining fixed gear as "[f]ishing gear that is stationary after it is deployed (unlike trawl or troll gear which is moving when it is actively fishing)") (last visited Nov. 19, 2021).

[299] *See generally* Complaint for Declaratory and Injunctive Relief, Me. Lobstermen's Assoc. v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Cir. filed Sept. 27, 2021); *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court order commanding or preventing an action."); *Declaratory Judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court's final determination of the rights and obligations of the parties in a case.").

[300] *See About Us*, ME. LOBSTERMEN'S ASSOC., https://mainelobstermen.org/about-mla/ (last visited Nov. 19, 2021).

[301] Complaint for Declaratory and Injunctive Relief at 2 ¶5, Me. Lobstermen's Assoc. v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Cir. filed Sept. 27, 2021).

[302] *Id.* at 2 ¶4.

[303] *Id.* at 3 ¶6.

[304] *Id.*

[305] *See generally Our History*, ME. LOBSTERMEN'S ASSOC., https://mainelobstermen.org/about-mla/ (last visited Nov. 19, 2021).

[306] Complaint for Declaratory and Injunctive Relief at 3 ¶6, Me. Lobstermen's Assoc. v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.C. Cir. filed Sept. 27, 2021).

[307] *Id.* at 4 ¶10.

[308] *Id.* at 5 ¶11; *see also* Denise Devaney, *Maine Lobstermen's Association files lawsuit against new regulations*, COURIER-GAZETTE (Sept. 27, 2021).

[309] *See generally Ctr. for Biological Diversity et al., v. Ross*, 480 F.Supp.3d 236 (D.C. 2020).

right whales.[310] The Center for Biological Diversity and the Massachusetts Lobstermen's Association brought suit challenging the BiOp, namely that NMFS did not follow the ESA, thus rendering the 2014 BiOp invalid.[311] The District Court agreed, noting that without a valid BiOp, the NMFS could not lawfully authorize the fishery under the ESA and a new BiOp would need to be completed.[312]

North American Model of Wildlife Conservation

A core principle of the North American Model of Wildlife Conservation is that science is the proper tool for the discharge of wildlife policy.[313] According to this principle, "[i]n order to manage wildlife as a shared resource fairly, objectively, and knowledgeably, decisions must be based on sound science."[314] The NOAA BiOp theoretically aligns with this principle that science is the proper tool for managing wildlife. However, we will have to wait and see if the District Court's opinion relies on the science and research conducted by the NMFS in its 2021 BiOp or whether the Court agrees with the MLA's assertion that the BiOp did not rely on the best available scientific information. Currently, the MLA's suit is in the pleading stage of litigation. As of this writing the complaint is pending before Judge James E. Boasberg, the same judge who heard the *Center for Biological Diversity et al. v. Ross* case in 2020, with Defendants' answer due in December 2021.[315] The MLA suit has also been consolidated with another pending suit challenging the BiOp, *Center for Biological Diversity et al. v. Raimondo*.[316]

SAVE THE BULL TROUT V. WILLIAMS

Joseph Weigel

Decided in June of 2021, *Save the Bull Trout v. Williams* involved three environmental groups challenging the adequacy of the Bull Trout Recovery Plan issued by the U.S. Fish and Wildlife Service (FWS) pursuant to Section 4(f) of the Endangered Species Act (ESA).[317] Section 4(f) of the ESA explains how "recovery plans" should be developed and implemented for the conservation and survival of endangered and threatened species.[318]

Background

Found in the waters of western North America, bull trout are native salmonids.[319] FWS decided to list the species as threatened under the ESA in 1999, as declines in the bull trout population resulting from human activities, habitat loss and fragmentation, interaction with nonnative species, and blockage of migratory corridors caused the species to be eradicated from about 60 percent of their historical range.[320] In 2002 and 2004, FWS completed draft recovery plans to address bull trout recovery, but those plans were not finalized nor adopted.[321] In 2015, FWS issued a final recovery plan for the species.[322] The following year, the Alliance for the Wild Rockies and Friends of Wild Swan filed a suit challenging the adequacy of the final recovery plan under the Administrative Procedure Act (APA) and the ESA, but the District Court dismissed the APA claim with prejudice and dismissed the ESA claims with leave to amend.[323] In November of 2019, Save the Bull Trout, Friends of the Wild Swan, and Alliance for the Wild Rockies challenged the adequacy of the recovery plans once again (Plaintiffs of *Save the Bull Trout v. Williams*).[324]

[325]

Arguments

The three environmental groups, as Plaintiffs, argued that FWS "effectively managed" recovery criterion was neither objective nor measurable.[326] The groups insisted that the criteria relied on extremely broad threat areas that are categorized into extremely subjective categories.[327] FWS, on the other hand, asserted that objective and measurable delisting criteria are clearly discernable from the face of the recovery plan.[328] FWS pointed to the plan's incorporation of the Threat Assessment Tool, numerical threshold criteria, and a species status assessment process that "considered available scientific and commercial information involving the bull trout's

---

[310] *Ctr. for Biological Diversity et al., v. Ross*, No. 18-112, 2020 WL 4816458, at 1 (D.C. Aug. 19, 2020).
[311] *Id.* at 2.
[312] *Ross, supra* note 309, at 240.
[313] North American Model of Wildlife Conservation, U.S. Fish & Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlifeconservation.html (2018).
[314] *Id.*
[315] *Me. Lobstermen's Assoc. v. Nat'l Marine Fisheries Serv*., No. 1:21-cv-2509 (Bloomberg, Court Dockets).
[316] *Id.*
[317] *Save the Bull Trout v. Williams*, 2021 U.S. Dist. LEXIS 116496, 2021 WL 2551412.
[318] Endangered Species Act of 1973, www.fws.gov/endangered/esa-library/pdf/ESAall.pdf.
[319] 2021 U.S. Dist. LEXIS 116496 at 1.
[320] *Id.* at 2.
[321] *Id.*
[322] *Id.*
[323] *Id.* at 2-3.
[324] *Id.* at 3.
[325] Illustration of a Bull Trout. Photo from: www.fws.gov/fisheries/freshwater-fish-of-america/bull_trout.html.
[326] *Id.* at 16.
[327] *Id.*
[328] *Id.* at 17.

representation, redundancy, and resilience."[329] By using these criteria, FWS argued that such utilization would allow FWS to objectively evaluate the status of threats to bull trout, as well as determine whether the species is being effectively managed at the core area level.[330]

Analysis

In the case, the Court noted that few courts have determined what constitutes objective, measurable criteria under Section 4(f).[331] One case the Court cited was *Strahan v. Linnon*, where "the court found the agency properly included objective, measurable criteria in the recovery plan for the Northern Right whale. The court based its findings on the plan's stated recovery goal of 7000 animals."[332] The court also cited a case on the flip side of the argument, where FWS failed to include objective, measurable criteria.[333] This other case, *Center for Biological Diversity v. Zinke*, determined that FWS failed to include such objective, measurable criteria addressing primary threats to the Mexican gray wolf.[334] In *Zinke*, the court reasoned that "it would be error for the agency to identify a primary threat affecting the species' recovery only to forgo addressing the threat in the recovery plan."[335] In the case of discussion, the Court noted that FWS should be awarded a great deal of deference, since "determining how to provide for the conservation and survival of [bull trout] requires the fusion of technical knowledge and skills with judgment which is the hallmark of duties which are discretionary."[336]

The Court sided with FWS and granted its cross-motion for summary judgment, effectively dismissing the case.[337] One main reason why the Court sided with FWS is that it determined the recovery plan was detailed and set forth objective, measurable criteria.[338] The Court highlighted the fact that the plan "requires primary threats to bull trout to be effectively managed in core area by either 75 or 100 percent, depending on the recovery unit … the number of core areas and local populations where the threats must be effectively managed have been predetermined by FWS, as have the numeric minimum thresholds for attaining 75 or 100 percent effective management."[339] In other words, within the 20 total core areas of bull trout, the primary threats of the bull trout must be effectively managed in at least 15 (75%) of those core areas, which also equates to effectively managing at least 63 (75%) of the 84 total local populations of bull trout.[340] The Court also highlighted the relevance of FWS's employment of the Threat Assessment Tool, which helps determine whether threats have been effectively managed.[341]

The Plaintiffs argued that the 75% threshold set by the recovery plan was not scientifically based, but the Court concluded that FWS "is not required to base the recovery plan on the best scientific and commercial data available."[342] Plaintiffs also argued that FWS failed to incorporate recovery criteria that address the five statutory delisting factors, but the Court reached the conclusion that this argument failed because Section 4(f) does not impose a mandate on FWS to address such delisting factors in its criteria.[343] In conclusion, the final recovery plan from FWS was deemed adequate because it set forth a detailed recovery plan containing objective, measurable criteria, it provided an explanation of how the primary threats it identified would objectively be deemed effectively managed, it set forth guidance to aid bull trout experts in the consideration of threat severity and management effectiveness, and it included objective criteria for FWS assessment of whether threats are effectively managed.[344]

It is important to note that science is the proper tool for discharging wildlife policy. This scientific management principle seems to be followed by the court in the above case. The court acknowledged that the recovery plan for the bull trout included guidance to aid bull trout experts and it provided objective criteria for assessing whether threats are effectively managed. The court also pointed out the usage of the Threat Assessment Tool that helps FWS take an objective approach over a subjective one.


[345]

[329] *Id.*
[330] *Id.*
[331] *Id.* at 18
[332] *Id.*
[333] *Id.*
[334] *Center for Biological Diversity v. Zinke*, 399 F.Supp. 3d 940, 949 (D.A.Z. 2019).
[335] 2021 U.S. Dist. LEXIS 116496 at 19.
[336] *Id.* at 19 (*citing Grand Canyon Trust*, 2006 U.S. Dist. LEXCIS 2375, 2006 WL 167560, *2 (D. Ariz. 2006) (quoting *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978).
[337] *Id.* at 31.
[338] *Id.* at 21.
[339] *Id.*
[340] *Id.*
[341] *Id.*
[342] *Id.* at 25.
[343] *Id.* at 26.
[344] *Id.* at 21-25.
[345] Laura Lundquist, *FWP hunts for bull trout in Rattlesnake Creek, hoping they can hang on*, MISSOULA CURRENT (Sept. 3, 2019) https://missoulacurrent.com/outdoors/2019/09/rattlesnake-creek/.

CURRENT EVENTS

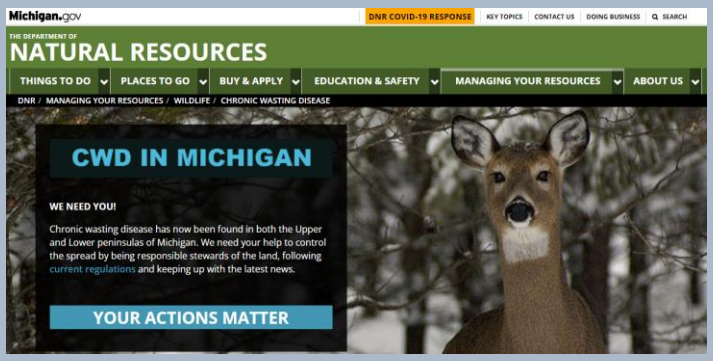
CHRONIC WASTING DISEASE

CWD: 2021 REGULATIONS AND FORTHCOMING MANAGEMENT TOOLS

Adriana Burkhart

The COVID-19 pandemic has forced many, individuals and agencies, to find creative and novel ways of doing more with less; the Department of Natural Resources of Michigan (MDNR) is no exception in their fight against the spread of chronic wasting disease (CWD). Even while battling funding restrictions and staff shortages[346], the MDNR has implemented new tools and strategies that could revolutionize the way agencies surveil and respond to wildlife diseases as a whole.

The MDNR has historically maintained a goal of reducing the threat and impact of disease on the wild deer population and on Michigan's economy.[347] CWD is a viciously fatal and contagious neurological disease that has been found in deer, elk, and moose across the United States since 2015.[348] According to the coordinator of CWD Alliance, Matt Dunfee, the challenge of presenting CWD-related information has always been a tri-pronged issue of accuracy, timeliness, and usability.[349] The 2021 season brings not only regulatory changes for deer hunters in certain areas of the state, but also new tools and data management techniques to address the leading concerns of managing CWD.



CWD Management Tools

Disease surveillance is essential to initiate effective disease response plans, but many questions continue to linger around CWD surveillance, including the location, amount, and initiation of CWD testing.[350] Michigan Public Act 207 (2018) funds research addressing high priority concerns related to managing CWD in Michigan.[351] Since its enactment, Michigan State University and the MDNR have jointly produced 19 different studies to examine various aspects of CWD.[352]

One of the most impactful and impressive projects began two years ago when Michigan State and Cornell Universities, with initial funding from the MDNR, teamed up to address the widely unmet technological demands of state agencies for CWD surveillance and response.[353] This ongoing project has been unveiled and, thus far, 21 states and 1 Canadian province have joined the program even though it remains in Phase I.[354]

Phase I of this project is the Surveillance Optimization Project for Chronic Wasting Disease ("SOP4CWD"). The SOP4CWD program has been meticulously created using various mathematical modeling and data science techniques to aggregate surveillance data, explore and rank sampling strategies, and "generate reports and recommendations for state agencies to target surveillance efforts and enhance early detection."[355] In short, this new technology gives agencies the ability to "sample smarter"[356] by allowing them to explore various sampling strategies, track progress of sampling goals, and provide real-time data summaries and reports during the hunting season.[357]

Phase II of this project, known as "The Dashboard," synthesizes these tools into a single online web space where users can interact with graphical versions of their data.[358] Phase III, called "The Data Warehouse" standardizes, curates, and stores this data from the participating states.[359] The end result is meant to address the long-standing needs, preferences, and barriers surrounding CWD data-sharing and surveillance management by state agencies.[360]

While the web-based app is currently being developed[361], current funding doesn't allow the desired level of development

[346] *Deer*, Mich. Dep't of Nat. Res., www.michigan.gov/dnr/0,4570,7-350-79119_79147_81438---,00.html (last visited November 29, 2021).
[347] *Deer Hunting Prospects*, Mich. Dep't of Nat. Res., www.michigan.gov/dnr/0,4570,7-350-79119_79147_81438-540672--,00.html (last visited November 29, 2021).
[348] *Id*.
[349] *CWD Surveillance Tools Released*, 75 Wildlife Mgmt. Inst. Outdoor News Bull. (2021), https://wildlifemanagement.institute/outdoor-news-bulletin/september-2021/cwd-surveillance-tools-released.
[350] *Surveillance Optimization Project for Chronic Wasting Disease (SOP4CWD)*, Cornell Wildlife Health Lab, https://cwhl.vet.cornell.edu/project/sop4cwd (last visited Nov. 29, 2021).
[351] Katie Ockert, *Researchers are Learning More About Chronic Wasting Disease*, MSU Extension (Oct. 6, 2021) www.canr.msu.edu/news/researchers-are-learning-more-about-chronic-wasting-disease.
[352] *Id*.
[353] *SOP4CWD, supra* note 350.
[354] An additional 9 states are either in the process or are considering joining. *Id*.
[355] *CWD Surveillance Tools Released*, *supra* note 349.
[356] Dr. John Fisher & Matt Dunfee, *In the Works: Recent and Ongoing CWD Research and Management Projects*, 19 (June 2021), http://cwd-info.org/wp-content/uploads/2021/06/CWD-RESEARCH-SUMMARIES-MASTER-6-29-21.pdf.
[357] *CWD Surveillance Tools Released*, *supra* note 349.
[358] *Id*.
[359] *Id*.
[360] *Id*.
[361] *SOP4CWD, supra* note 350.

that is desired by wildlife agencies.[362] In its current capacity, the app allows agencies to develop sampling quotas, explore sampling strategies, and compare quotas to previous years.[363] However, the end goal of the project is for the program to autonomously transfer the "informational baton" from field biologists to technological specialists, and then complete this loop back to agency decision makers and field biologists.[364]

This year, the CWD Alliance also unveiled its new ArcGIS hub account, which allows agencies to have unique access to edit and manage the data used to populate mapping applications showing CWD presence in North America. [365] This ArcGIS map, which has been implemented by the MDNR, gives data on total positive CWD cases by county, total deer tested, CWD Zones, and MDNR Service Centers.[366] However, this data is available only for 2015-2019 and thus is not current.[367]

These new and upcoming tools are essential to the fight against the spread of CWD. In an effort to gain more information and knowledge surrounding this deadly disease, hunting regulations in certain areas of the state have also been altered.

Hunting Regulations & Testing Availability[368]

Beginning this year, the MDNR is beginning a five-year process of "strategic, focused CWD surveillance around the state."[369] To accommodate the limited resources available and focus on problem areas, free testing for deer not exhibiting CWD symptoms has been limited to the CWD core area and CWD management zone.[370]

Core Area

The Natural Resource Commission (NRC) has requested the MDNR to evaluate the impact of antler point restrictions (APRs) on the prevalence and spread of CWD. [371] To do so, the MDNR began increasing antlerless harvest and decreasing deer population beginning in 2019 in the CWD "Core Area".

The Core Area can be found in the lower half of the upper peninsula[372] and is split into two sections with those sections given different APRs[373]:

- Mecosta, Montcalm, & Ionia County: only bucks with at least 4 points on one antler can be taken with a valid license
- Newaygo & Kent County: any buck with an antler greater than 3 inches in length can be taken with a valid license

The data collected and analyzed will include estimates on deer abundance and sex/age ratio changes, which are known factors contributing to overall CWD spread. Additionally, numbers on deer harvest, hunter numbers, and hunter perceptions of APRs are being collected.[374] The MDNR is set to present their findings to the NRC in the Fall of 2023, including recommendations on the efficacy of APR regulations as a tool for *managing* the prevalence and spread of CWD. [375] However, this data is not meant to provide estimates on the *actual* prevalence and spread of CWD because of the low CWD rates and slow spread of the disease.[376]

CWD Management Zone & the Rest of Michigan

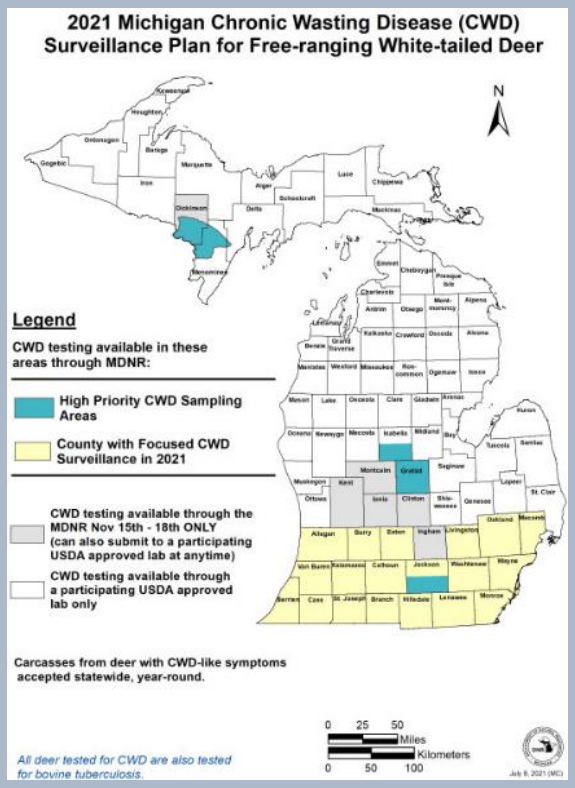
The CWD Management Zone is made up of the southernmost 3 tiers of Michigan Counties.[377] APRs have not been implemented in these areas, but the MDNR is asking for deer heads in these tiers be tested for CWD[378] to assist with their active surveillance goals. [379] In the upcoming four years, the remainder of the state will by systematically sampled to determine if CWD is present in parts of the state that have not yet been identified.[380]

To accommodate the staffing and financial shortages[381], free testing is available only in the active surveillance CWD areas.[382] Deer check station locations have been reduced along with days and hours of operation.[383] However, carcasses with CWD-like symptoms are accepted state-wide, year-round. The MDNR has stated the test results may take additional processing time this year.[384] If CWD is found in a submitted deer, the hunter is notified by phone. Otherwise, all negative test results are posted online.[385]

---

[362] Fisher & Dunfee, *supra* note 356.
[363] *SOP4CWD*, *supra* note 350.
[364] Fisher & Dunfee, *supra* note 356.
[365] *CWD Surveillance Tools Released*, *supra* note 349.
[366] *CWD Viewer*, Mich. Dep't. of Nat. Res., https://midnr.maps.arcgis.com/apps/webappviewer/index.html?id=b0d257e340b740c190f55c950cd3462a (last visited Nov. 29, 2021).
[367] *Id*.
[368] Baiting and feeding in the core CWD area is banned on both public and private lands. Baiting in the upper-peninsula, outside of the CWD Core Area, is allowed with certain exceptions; hunters should review those regulations prior to baiting. *2021 Michigan Hunting Digest*, Mich. Dep't of Nat. Res., 57 (2021), www.michigan.gov/documents/dnr/hunting_and_trapping_digest_461177_7.pdf#page=40. As of 2019, no baiting or feeding is allowed in the entire Lower Peninsula. *Hunters*, Mich. Dep't of Nat. Res., www.michigan.gov/dnr/0,4570,7-350-79136_79608_90516_90536---,00.html#comp_106159 (last visited Nov. 29, 2021).
[369] *Hunters*, *supra* note 368.
[370] *2021 Michigan Hunting Digest*, *supra* note 368.
[371] *Id*. at 56-57.
[372] *Id*. at 60.
[373] *Id*. at 56-57.
[374] *Id*.
[375] *Id*.
[376] *Id*.
[377] *Hunters*, *supra* note 368.
[378] *Id*.
[379] *2021 Michigan Hunting Digest*, *supra* note 368.
[380] *Hunters*, *supra* note 368.
[381] *Deer*, *supra* note 346.
[382] *2021 Michigan Hunting Digest*, *supra* note 368.
[383] *Deer*, *supra* note 346.
[384] *2021 Michigan Hunting Digest*, *supra* note 368.
[385] *Deer*, *supra* note 346.

The MDNR has worked scrupulously through unfounded pandemic conditions to maximize their CWD surveillance and management capabilities. The SOP4CWD project could be the key to gaining more control over CWD's effect on Michigan's wildlife and economy. Over the next several years, Michigan hunters should anticipate changes in regulation based on newly available data and prolonged research efforts.



[386]

CWD: *BAILEY V. SMITH*

Michael Kostuch

In 2019, the Third Court of Appeals for the State of Texas addressed the issue of common law property rights with regard to the captive cervid industry.[387] The Texas Parks and Wildlife Code ("the Code") forbade the "capture, transport, or transplant [of] any game animal or game bird from the wild" without a permit from the Texas Parks and Wildlife Department ("the Department").[388] Further, the Code also made it clear that a person may not "possess a live game animal . . . for any purpose not authorized by this code."[389] Through the reading of these two statutes, combined with the fact that the Texas Parks and Wildlife Code defined whitetail deer as "game animals," the court determined that a person cannot remove whitetail deer from the wild to be held in captivity without a permit.[390]

The Plaintiffs in *Bailey v. Smith* maintained that, through holding the permit for breeder deer, common law property ownership rights were afforded to the breeder or that the permit actually conveyed ownership of captive deer.[391] The court rejected this notion in that nothing within any chapter or subchapter of the Code afforded property rights to be bestowed on a breeder or arise in captive deer.[392] Instead, the court looked to the fact that the permit issued to a breeder is for a set amount of time and that "nothing in the statute contemplates that the breeder retain any rights over [captive] deer after the permit expires or is revoked by the Department."[393] The court further elaborated on the notion that private property rights do not come from the legislature in that if captive deer were considered private property, those rights would not be subject to the limits of a permit granted by the government.[394] In viewing the applicable statutes together with common law, the court held that captive deer are public property and, therefore, breeders are not afforded nor do they acquire common law property rights in them.[395] It should be noted that the court took the time in its decision to explain that its ruling does not affect lawful takings of deer, or other wild game, such as is the case in hunting and trapping, but only captive deer breeders who are subject to permits issued by the Department.[396]


A CWD infected deer.[397]

This dispute over the existence of private property ownership arose out of the need to protect wildlife, specifically with regards to disease. The Texas Parks and Wildlife Department is responsible for the protection of the fish and wildlife within the state.[398] Broadly, the Department issues permits for

[386] *CWD Testing Results for Deer Harvested in 2020*, Mich. Dep't. of Nat. Res., www.michigan.gov/dnr/0,4570,7-350-79136_79608_90516_90536-538324--,00.html (last visited Nov. 29, 2021).
[387] *Bailey v. Smith*, 581 S.W.3d 374, 389 (Tex. App. 2019).
[388] *See* Tex. Parks & Wild. Code § 43.061(a).
[389] *See* Tex. Parks & Wild. Code § 63.002.
[390] *Bailey v. Smith*, *supra* note 387, at 392.
[391] *Id*.
[392] *Id.* at 392-93.
[393] *Id*. at 393.
[394] *Id*.
[395] *Id*.
[396] *Id.* at 394.
[397] Photo from *Deer & Deer Hunting*, www.deeranddeerhunting.com/deer-scouting/deer-behavior/the-smoking-gun-does-cwd-drive-whitetail-population-declines.
[398] *Bailey v. Smith*, *supra* note 387, at 382.

captively breed deer which then allows breeders to transport, sell, transfer, etc. deer for profit.[399] Only deer that are considered and denoted as "healthy" by the Department may be transferred.[400] A Department prerequisite for the issuance of a deer transfer permit is to check for chronic wasting disease (CWD) in captive deer herds.[401] CWD is an always fatal and highly contagious neurodegenerative disease which affects cervid species, including whitetail deer.[402] As captive deer breeders make their profits through the sale and movement of captive deer, the Department issuing a herd as *movement qualified* is imperative for the success of their business.[403] However, a facility is only considered *movement qualified* when no CWD positive test results are found.[404] Three years after discovering CWD in free ranging deer within Texas, the Department confirmed a positive test for CWD in captive deer in the summer of 2015, and subsequently responded by implementing emergency rules for an increase in the testing of captive deer herds within the state.[405]

[406]

In *Bailey*, the Plaintiffs responded to the new emergency testing rules by filing for declaratory relief which would invalidate the rules based on the presumption that their herds were their own private property, and thus could not be tested under the emergency rules without violating due process rights.[407] As previously stated, the court determined that captive deer herds are public property held in trust by the state, thus allowing the government to take steps necessary to protect them, including increased emergency testing.[408]

This decision by the Third Court of Appeals for the State of Texas is especially important today. As of August of 2021, CWD has been detected in free ranging and captive cervids within at least twenty-five states.[409] While infection rate reports for free ranging deer continues to be relatively low, scientists note that infection rates within captive deer can, oftentimes, be as high as 79%.[410] The primary method of testing for CWD herds occurs only in deceased animals, however, live testing methods continue to be researched.[411] While live testing has not yet been approved for routine regulatory testing, there is hope that these methods could be used to test captive deer before they are shipped from a facility.[412] The live testing method has been around for more than ten years and has been used to detect some neurodegenerative diseases in humans.[413]

Captive deer are bred and shipped throughout the United States and CWD is not only a serious economic threat to business, but also an extreme threat to the sustainability of deer populations. While *Bailey* was the result of emergency testing due to CWD outbreaks within the state, the reasoning within the decision could be applied to other local and state governments once live testing is ready for deployment.

The first principle of the North American Model of Wildlife Conservation holds that wildlife is a public resource and the government has a hand in protecting it.[414] *Bailey* aligns with this perfectly. The simple fact that captive breeder deer do not bring with them private property ownership or rights but are rather the property of the government to hold in trust could allow for more regulatory CWD testing in live deer moving forward. As a result, CWD testing could be seen as a pre-outbreak prevention method in live deer herds, rather than a post-outbreak mitigation effort in deceased populations.

WHY DO INITIATIVES TO REVOKE THE RIGHT TO HUNT STAND A BETTER CHANCE TODAY THAN EVER BEFORE?

Josh Pollack

The right to hunt is not guaranteed and is often reflective of public sentiment and beliefs of a state's people. The Second

[399] *Id*.
[400] *Id.* at 383.
[401] *Id.*; *Chronic Wasting Disease*, Texas Parks and Wildlife, https://tpwd.texas.gov/huntwild/wild/diseases/cwd/ (last visited Nov. 27, 2021).
[402] *Chronic Wasting Disease FAQ*, Chronic Wasting Disease Alliance, http://cwd-info.org/faq/ (last visited Nov. 27, 2021).
[403] *Bailey v. Smith*, *supra* note 387, at 383.
[404] *Id*.
[405] *Id*.
[406] N.C. Wildlife Resource Commission, *Deer Samples Needed for Testing*, THE ROBESONIAN (Dec. 24, 2021) www.robesonian.com/features/152795/deer-samples-needed-for-testing.
[407] *Bailey v. Smith*, *supra* note 387, at 383-84.
[408] *Id.* at 393.
[409] *Chronic Wasting Disease (CWD)*, Centers for Disease Control and Prevention, www.cdc.gov/prions/cwd/occurrence.html (last visited Nov. 27, 2021).
[410] *Id*.
[411] *Chronic Wasting Disease (CWD) "Testing"*, Animal and Plant Health Inspection Service, www.aphis.usda.gov/aphis/ourfocus/animalhealth/nvap/NVAP-Reference-Guide/Control-and-Eradication/Chronic-Wasting-Disease (June 2, 2020).
[412] *Id.*; Dan Gunderson, New chronic wasting disease test: Game-changer or unproven?, MPR News (Nov. 4, 2021) www.mprnews.org/story/2021/11/04/new-chronic-wasting-disease-test-gamechanger-or-unproven.
[413] *Id*.
[414] *North American Model of Wildlife Conservation*, U.S. Fish and Wildlife Service, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (last updated Sep. 19, 2018).

Amendment does not guarantee a right to hunt[415]; the Tenth Amendment reserves with states the primary power to regulate wildlife within the state[416]; and under the public trust doctrine, the state holds wildlife in trust to manage for the benefit of the people.[417] Thus, the extent of one's right to hunt "is the right which the state leaves to him, no more and no less."[418]

A primary tool for preserving such right within the state is to amend the state constitution to guarantee such right to the citizens. In every state but Delaware, a state constitution is only ratified if the citizens vote for it and pass it.[419] Only twenty-three states provide a constitutional provision that protects the right to hunt.[420]

A constitutional guarantee compels a state to regulate wildlife around the right to hunt. Hunting rights derived solely from legislation, in contrast, are merely a grant of a privilege which effectively allows the state to regulate whether you can hunt to meet the state's wildlife management goals. Preserving the right to hunt in the state constitution gives the right to hunt a defense against legislative action because to repeal the right to hunt, the state constitution would have to be amended first.

Thus, the right to hunt is highly dependent on public sentiment and if enough people are against hunting, or, if enough people do not support the right to hunt, it could simply disappear. Without the state constitutional guarantee, hunting is merely a privilege granted by the state, subject to political discourse.

 [421]

A state constitutional right to hunt protects against complacency. Psychologists have studied a phenomenon termed the "meat paradox."[422] What the meat paradox tells us is that most people enjoy eating meat, but that they do not want to be associated with the suffering of animals.[423] This body of psychology has found that the divergence between one's behavior and moral judgment causes a level of cognitive dissonance.[424] Cognitive dissonance causes one to try and reconcile their actions with their beliefs in one of three ways.[425] The three ways to resolve the conflict between one's preferred behavior and one's moral beliefs are: alter behavior to conform to beliefs, alter beliefs to conform to behavior, or compartmentalize and avoid the issue altogether.[426]

For someone who enjoys eating meat but does not like being associated with the harming of an animal, they will have to resolve the conflict in one of three ways by either (1) altering their behavior to eat less meat and conform with their morals of not harming animals; (2) alter their morals through better information to justify their preference for eating meat; or (3) avoid the topic altogether due to the discomfort felt by the tensions of their conflicting behaviors and morals.

The inconsistencies arising between one's moral belief and their consumptive behavior may pose the next biggest threat in addressing the anti-hunting movement taking place and the possibility of defunding wildlife conservation. The North American Model of Wildlife Conservation (the Model) is a science-based, principled approach to animal welfare and the perpetual existence of wildlife populations. Under the model's principles:

- (1) and (3): wildlife is a public resource and is managed by the government to ensure long-term sustainable practices are employed through legal mechanisms;
- (2) and (4) that markets for game are eliminated and that wildlife can only be killed for legitimate purposes;
- and (6) that conservation uses a science-based approach to ensure these goals are met.[427]

By informing people of how wildlife is conserved and monitored, moral judgment may be less susceptible to the deceptive practices engaged in by anti-hunting groups. Given that the right to hunt is derived from voters, those who prefer the act of harvesting their meat, often in opposition to factory

---

[415] *See Commonwealth v. Patsone*, 79 A. 928, 929 (Penn. 1911) (holding that "[t]he right to hunt game is but a privilege given by the Legislature, and is not an inherent right in the residents of the state.").
[416] U.S. Const. amend. X.
[417] *Geer v. State of Conn.*, 161 U.S. 519, 529 (1986) (overruled on other grounds by *Hughes v. Oklahoma*, 441 U.S. 322 (1979)).
[418] *See State v. Nergaard*, 102 N.W. 899, 901 (Wis. 1905); *see also Ex parte Maier*, 37 P. 402, 404 (Cal. 1894); *Magner v. People*, 97 Ill. 320, 333 (1881).
[419] Ballotpedia, *Amending State Constitutions*, https://ballotpedia.org/Amending_state_constitutions (last visited Nov. 8).
[420] Ballotpedia, *Right To Hunt And Fish Constitutional Amendments*, https://ballotpedia.org/Right_to_hunt_and_fish_constitutional_amendments (last visited Nov. 8, 2021).
[421] Photo from Missouri Department of Conservation.
[422] Festinger, 1957, *see* also Nora C.G. Benningstad and Jonas R. Kunst, *Dissociating Meat From its Animal Origins: A Systemic Literature Review*, 147 Appetite 104544 (2019).
[423] Julia Shaw, *What the Meat Paradox' Reveals About Moral Decision Making*, www.bbc.com/future/article/20190206-what-the-meat-paradox-reveals-about-moral-decision-making (last visited Nov. 9, 2021).
[424] *Id*.
[425] Psychology Today, *Cognitive Dissonance*, www.psychologytoday.com/us/basics/cognitive-dissonance (last visited Nov. 8, 2021).
[426] *Id*.
[427] U.S. Fish and Wildlife Services, *North American Model of Wildlife Conservation*, www.fws.gov/hunting/north-american-model-of-wildlife-conservation.html (last visited Nov. 16, 2021).

production, should be able to justify their behavior and support the right to hunt, otherwise it could easily be lost.

IP13

Consider Oregon, a state with no constitutional right to hunt and the current efforts by a group called End Animal Cruelty under initiative petition 13 (IP13), titled the *Abuse, Neglect, and Assault Exemption Modifications and Improvement Act*.[428] This petition is being circulated for signatures to get on the 2022 general election ballot where the people of Oregon will vote on whether to pass the initiative into Oregon law. The group leading the initiative markets it by stating that, "[i]f enacted, IP13 would remove some of the exemptions to our pre-existing animal cruelty laws that currently allow certain individuals to abuse, neglect, and sexually assault animals without penalty."[429]

Rhetoric like this is misleading and is likely to push people to accept this initiative without an informed basis since it addresses the moral philosophy of not harming animals without reference to the effects on the right to hunt, or behavior of eating meat. In reality, under the initiative, the intentional killing of an animal would be criminalized, and for people such as cattle ranchers, processing beef would only be permissible when the animal died of natural causes such as old age.[430] According to Congressional Sportsmen's Foundation:

> If passed, IP13 would end all hunting, fishing, and trapping, which would immediately impact Oregon's 940,000 sportsmen and women who participate in the outdoors in support of conservation efforts, food procurement, and tradition. The proposed initiative would also significantly impact the state's ability to manage and protect its natural resources, wildlife, and public lands. Without sportsmen-generated revenue through license and tag sales, along with excise the tax revenue generated through Pittman-Robertson for sporting-related purchases, ODFW would have their budget drastically cut by almost one half.[431]

If Oregon had a state constitutional right to hunt, initiatives such as IP13 would have a more difficult time misleading or deceiving people because amending the state constitution would need to happen before revoking the right to hunt could pass legislation like this. Activist groups could not simply rely on complacency or emotional appeals that cognitively disguise and obscure the true meaning of the initiative to merely override and revoke the statutory privilege of hunting in Oregon. Only 112,000 (6%)[432] signatures are needed for IP13 to be on the 2022 general elections ballot to reconsider the privilege of hunting in Oregon.[433]

The future of hunting depends on the beliefs of people within the state. To ensure people are making educated decisions, and not emotional reactions to misleading or deceptive anti-hunting campaigns, more should be done to teach people about where their rights to hunt are derived from and the science-based animal welfare approach employed under the North American Model of Wildlife Conservation to ensure that long term sustainable practices are employed so that we can maintain our relationship with wildlife in perpetuity. The current locavore movement is doing a good job of this because when people can harvest their own food or be close to where their own food comes from, they will often feel better eating it since they know where it came from and how the animal was treated.

The bottom line is that complacency, without state constitutional protections, may lead to the destruction of rights to hunt without a properly informed public that understands the partnership between hunting and conservation efforts. There are currently 27 states without a state constitutional right to hunt. If states like Oregon had a state constitutional right to hunt, initiatives such as IP 13 would not be able to move forward without first having a debate and vote over whether to amend the state constitution to revoke the right to hunt. Because Oregon does not have a state constitutional right to hunt, however, all that must be done to revoke the privilege of hunting within the state is to simply pass the initiative into legislation by a popular vote.

[428] Yes on IP13, *Ending Animal Cruelty*, www.yesonip13.org (last visited Nov. 8, 2021).
[429] *Id.*
[430] Yes on IP13, www.yesonip13.org/about (last visited Nov. 8, 2021).
[431] Congressional Sportsmen's Foundation, *Signature Gathering Underway on Oregon Initiative Petition 13 to End All Hunting and Fishing in Oregon*, https://congressionalsportsmen.org/the-media-room/news/signature-gathering-underway-on-oregons-initiative-petition-13-to-end-all-h (last visited Nov. 8, 2021).
[432] Or. Const. art. IV, §1, cl. 2(b) (Oregon requires signatures from 6% of voters based on the number of voters in the previous governor election for initiative to be on ballot.).
[433] Congressional Sportsmen's Foundation, *Signature Gathering Underway on Oregon Initiative Petition 13 to End All Hunting and Fishing in Oregon*, https://congressionalsportsmen.org/the-media-room/news/signature-gathering-underway-on-oregons-initiative-petition-13-to-end-all-h (last visited Nov. 8, 2021).

ANIMAL PERSONHOOD CONSIDERATIONS

POPULATING, POPULATING HIPPOS

Skylar Steel

Granting animals legal personhood status has been a long, unsuccessful road for animal rights activists in the United States. American law has long established that animals are considered property and, therefore, do not have many legal rights and protections.[434] Legal personhood typically refers to a human or *non-human* entity that, under the law, has legal standing to sue or be sued in a court of law.[435]

[436]

Descendants of Pablo Escobar's hippopotamuses have made U.S. history by being the first animals to receive recognition as legal persons in the U.S. by any court- though only as the U.S District Court for the Southern District of Ohio's acknowledgement of foreign law.[437] The Animal Legal Defense Fund (ALDF) asked the U.S. District Court for the Southern District of Ohio to review relevant documents in response to an ongoing lawsuit in Colombia regarding these animals.[438] ALDF filed an application to the court under a federal statute that governs assistance to foreign courts.[439] The statute allows any "interested person" in a foreign lawsuit to request a federal court to take U.S. depositions in support of a foreign litigation.[440] An interested person is "[a] person having a property right in or claim against a thing."[441] The U.S. Supreme Court has held there is "no doubt" that one of the parties to the foreign lawsuit, whether a plaintiff or defendant, qualifies as an "interested person" for purposes of this statute.[442] Therefore, ALDF was confident that since the hippos are the named plaintiffs in the Colombian lawsuit, they would meet the definition of "interested persons" under the statute.[443]

Colombia Lawsuit

In 1993, when Pablo Escobar was killed, Colombian officials left his four illegally imported hippopotamuses at his estate.[444] These animals broke free of Escobar's property, migrated to the Magdalena River, and now have repopulated to over 80 hippos.[445] Officials considered killing the hippos due to the negative impact they have had on its ecosystem.[446] In July, 2020, Luis Domingo Gómez Maldonado, a Colombian animal rights attorney, filed suit in Colombia on the hippos' behalf to prevent them from being killed.[447] Colombia law grants animals legal standing to bring lawsuits to protect their wellbeing.[448] Thus, the hippos are the plaintiffs in the Colombian lawsuit brought by the animal rights attorney. He is seeking a court order to provide a contraceptive, porcine zona pellucida (PZP), to the hippo population instead of killing them.[449] PZP has a long history of success in captive hippos and is recommended by an international organization that focuses on the sterilization of various species.[450]

On October 15, 2021, Colombian authorities announced that some of the hippo population had started to be treated with a contraceptive called GonaCon.[451] However, there is concern over its safety and effectiveness, and it is unclear how many hippos the authorities still intend to kill.[452]

United States' Involvement

ALDF filed the application on behalf of the "Community of Hippopotamuses Living in the Magdalena River" in the district

---

[434] *See* Lauren M. Sirous, Comment: Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages, 163 U. Penn. L. Rev. 1199, 1205-06 (2015) (discussing how U.S. laws have historically viewed animals as "things" that are valuable and useful for humans to obtain ownership over and as the owner's personal property).
[435] *See* Jon Garthoff, *Corporations, Animals, and Legal Personhood*, SCHOLARS STRATEGY NETWORK (May 30, 2018), https://scholars.org/brief/corporations-animals-and-legal-personhood.
[436] Photo from https://aldf.org/article/animals-recognized-as-legal-persons-for-the-first-time-in-u-s-court/.
[437] Garthoff, *supra* note 435.
[438] *Id*.
[439] *See* 28 U.S.C. § 1782.
[440] *Id*.
[441] *Interested Person*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[442] *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 256 (2004); see § 1782.
[443] Press Release, Animal Legal Defense Fund, Animals Recognized as Legal Pers. for the First Time in U.S. Ct. (Oct. 20, 2021) https://aldf.org/article/animals-recognized-as-legal-persons-for-the-first-time-in-u-s-court/.
[444] *See* David Moye, *Court Rules Pablo Escobar's Cocaine Hippos Are Legally People*, HUFF POST (Oct. 21, 2021), www.huffpost.com/entry/pablo-escobar-cocaine-hippos-legal-standing-aspeople_n_6171cee3e4b010d9330e81c8.
[445] *Id*.
[446] *Id*.
[447] *Id*.
[448] *Id*.
[449] *See* Press Release, Animal Legal Defense Fund, *supra* note 443.
[450] *Id*.; *see* J.F. Kirkpatrick, A. Rowan, N. Lamberski, R. Wallace, K. Frank & R. Lyda, *The Practical Side of Immunocontraception: Zona Proteins and Wildlife*, 83 J. REPROD. IMMUNOLOGY 151, 152 (2009) (discussing how PZP has been a very successful contraceptive for 80 different species of mammals, including hippos, both free-ranging and captive).
[451] *See* Press Release, Animal Legal Defense Fund, *supra* note 443.
[452] *Id*.

court on October 15, 2021.[453] It requested the court grant the application to subpoena Dr. Elizabeth Berkeley and Dr. Richard Berlinski to testify in support of the ongoing Colombia litigation.[454] If granted, the court could hear the testimony of these two wildlife experts regarding the use of contraceptives to prevent this population of hippos from continuing to reproduce.[455] The application included the urgency that "[w]ithout such evidence, the [hippos] are likely to be killed" by Colombian officials.[456] The application also discussed how all requirements of the applicable statute were met because the doctors to be deposed as witnesses both resided in the district in which the application was filed, and their testimony would be "for use" in the foreign litigation in Colombia.[457] Because the matter was time-sensitive, the application was filed *ex parte*, meaning the other party, in this case, the Colombian officials, were not given notice of the application[458]

On October 15, 2021, the same day the application was filed, the court granted the application and authorized ALDF to issue subpoenas to the wildlife experts.[459] The court also held it will maintain jurisdiction over the matter, meaning it will be the court to hear the depositions for the Colombian case.[460] Because the application was submitted on behalf of the hippos as the "interested persons" of the foreign lawsuit, in granting the application, the court recognized these hippos as legal persons for purposes of the statute.[461] ALDF planned to depose the wildlife experts to hear their testimony in support for the use of the PZP contraceptive, which will safely prevent this hippo population from procreating, negating the need to kill them.[462] However, within a few weeks, as of February 22, 2022, Colombia's government "plans to sign a document declaring the hippos an exotic invasive species" and coming up with a plan to control the population. [463]

ANIMAL LEGAL DEFENSE FUND V. VAUGHT

Alexis Weber

When it comes to standing, are two legs better than four?[464] Until recently, courts have avoided this question on whether to allow animals the same rights as humans.[465] Animal rights activists have been and continue filing lawsuits naming animals as plaintiffs hoping that courts will grant personhood status;[466] therefore, giving the animals standing[467] to file lawsuits on their behalf.[468] Statutes known as "ag-gag" laws, which are anti-whistleblower statutes that apply within the agricultural industry[469], are notorious for protecting many types of businesses to help them appear neutral in their compliance with industry standards.[470] These were created to criminalize undercover investigations and whistleblowing to lessen the public criticism of animal agriculture which will be discussed in the case below.[471]


[472]

In this case, *Animal Legal Defense Fund v. Vaught*, several animal advocacy organizations brought a successful suit alleging a statutory violation of their First Amendment freedom of speech to investigate Peco Foods's chicken slaughterhouses and Vaught's pig farm.[473] Peco Foods' chicken slaughterhouses and the Vaught's pig farm were both defendants in the suit. The two lead non-profit organizations were Animal Legal Defense Fund and Animal Equity[474] which

[453] S.D. Ohio Ex Parte Appl. of Community of Hippopotamuses Living in the Magdalena River for an Order Pursuant to 28 U.S.C. **§** 1782 to Conduct Disc. for Use in Foreign Proceeding, 1, Oct. 15, 2021.
[454] *Id*.
[455] *Id*.
[456] *Id*.
[457] *Id*.
[458] *Id*.; *see Ex Parte*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[459] S.D. Ohio Order Granting Appl. to Issue Subpoenas for the Taking of Deps. Pursuant to 28 U.S.C. § 1782, 1, Oct. 15, 2021.
[460] *Id*.
[461] *See* Press Release, Animal Legal Defense Fund, *supra* note 443.
[462] *Id*.
[463] CBS NEWS, *Colombia plans to declare Pablo Escobar's "cocaine hippos" an invasive species. Many locals worry the plan could harm the animals.* February 22, 2022.
[464] Kelsey Kobil, When It Comes to Standing, Two Legs Are Better Than Four, 120 Penn St. L. Rev. 621 (2015).
[465] *Id*.
[466] *Legal Personhood* enables the animal to have the necessary standing to file a lawsuit on its own behalf. Instead of being classified as property, they would hold the same legal rights as humans.
[467] *Standing* is the capacity of a party to bring a suit in court.
[468] Kobil, *supra* note 464.
[469] Chip Gibbons, *AG-Gag Across America*, Center for Constitutional Rights (2017), https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf.
[470] *Id*.
[471] *Id*.
[472] Photo from: www.reuters.com/legal/litigation/8th-circuit-revives-challenge-arkansas-ag-gag-law-2021-08-10/.
[473] *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 717 (8th Cir. 2021).
[474] Both organizations are plaintiffs.

are dedicated to reforming industrial animal agriculture within commercial poultry and pig farms.[475]

These organizations would send undercover investigators to seek employment within the slaughterhouses and the farm,[476] or through third parties who had access to these facilities.[477] Once these investigators were employed at defendants' facilities they would collect information via video footage, audio files, and personal observations.[478] This information would then be shared with the Center for Biological Diversity and Food Chain Workers Alliance to advocate against defendants' facilities.[479]

Plaintiffs claim that the statute prohibiting unauthorized access to private parties violates their right to free speech by prohibiting them from engaging in activities protected under the First Amendment.[480] The District Court concluded that the plaintiffs failed to adequately allege Article III standing[481], in other words, that their injury was too speculative.[482] The court reasoned that the investigators did not find any useful information regarding negative treatment in the slaughterhouses or at the farm.[483] The statute at issue prohibited plaintiffs from performing investigations as to the ethical treatment of animals like in the slaughterhouses and pig farms that are discussed in this case.[484] For example, farmers and other businesses may bring an action for as much as $5,000 per day if an undercover investigator records and shares information in a way that harms the businesses.[485]

Here, the issue is whether plaintiffs' have standing.[486] To establish an Article III standing plaintiffs, bear the burden to show 1) an injury in fact, 2) a causal relation between the injury and the challenged conduct, and 3) that a favorable decision will likely redress the injury.[487] The plaintiffs used the three-part *Lujan* test to show whether the plaintiffs allege an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."[488]

Upon review, the U.S. Court of Appeals for the Eighth Circuit found that the plaintiffs did establish the three primary elements under *Lujan*.[489] First, but for the statute plaintiffs allege that they would be engaging in constitutionally protected conduct by sending investigators to gather information in the facilities owned by Peco Foods and the Vaught's.[490] These results would further their advocacy and are arguably affected by a constitutional interest.[491] A constitutional interest is the type of interest that the law is intended to regulate or protect.[492] Second, the plaintiffs illustrated how their alleged course of conduct is arguably a violation of the statute.[493] Specifically, the statute prohibits anyone to "[c]apture or remove the employer's data, paper, [or] records," or "[r]ecord images or sound" to use that information "in a manner that damages the employer."[494] "By hiring investigators to obtain a job through the 'usual channels' and gather information in non-public areas of defendants would directly violate the statute."[495] Lastly, the complaint sufficiently alleges a credible threat of enforcement.[496] Defendants alleged that an investigator being hired by one of the defendants' facilities was merely speculative as they did not often hire employees, however, the plaintiffs' argument was bolstered by their prior engagement in successfully investigated conduct at similar facilities in the past.[497] Plaintiffs presented allegations that they would indeed be interested in documenting defendants' operation due to the condition of the pigs in what they described as nearly "immovable quarters," as well as the use of controversial slaughter methods.[498] Additionally, plaintiffs contended that the organizations have an interest in uncovering these conditions and activities that take place, regardless of what particular practices the farm employs.[499] Ironically, the named defendant, DeAnn Vaught, sponsored proposed legislation that wished to conceal these conditions and activities, and Plaintiffs contend that they have an important public interest in understanding how the defendants operate.[500]

This case illustrates the difficulty of balancing the rights of corporations and the humane conditions that organizations are fighting for.[501] If animals are allowed legal personhood they would ethically be treated better; however, this could open the floodgates for an immense number of lawsuits within the courts.[502]

---

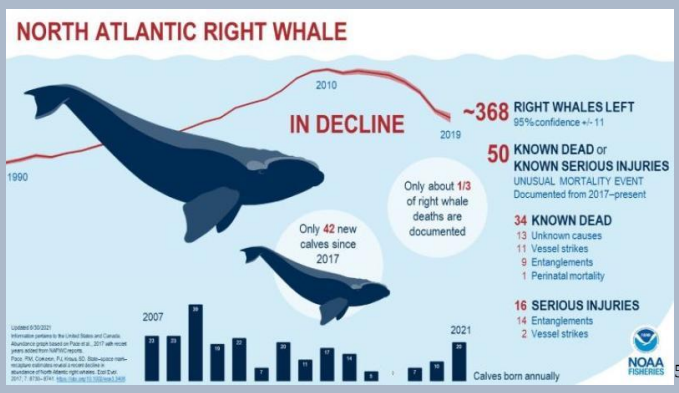
[475] *Animal Legal Def. Fund*, *supra* note 473, at 718.
[476] In this case and other slaughterhouses/farms in general.
[477] *Animal Legal Def. Fund*, *supra* note 473, at 717.
[478] *Id* at 718.
[479] *Id.*
[480] *Id.* at 717.
[481] Standing is the capacity of a party to bring a suit in court.
[482] *Animal Legal Def. Fund*, *supra* note 473, at 718.
[483] *Id.*
[484] *Id.*
[485] Barbara Grzinic, *8th Circuit revives challenge to Arkansas a-gag law* (August 10, 2021), www.reuters.com/legal/litigation/8th-circuit-revives-challenge-arkansas-ag-gag-law-2021-08-10/.
[486] *Animal Legal Def. Fund*, *supra* note 473, at 717.
[487] *Lujan v. Def. Wildlife*, 504 U.S. 555, 560 (1992).
[488] *Animal Legal Def. Fund*, *supra* note 473, at 718.
[489] *Id.*
[490] *Id.*
[491] *Id.*
[492] *Id.*
[493] *Id.* at 719.
[494] *Id.*; §16-118-113(c)(1)(2).
[495] *Animal Legal Def. Fund*, *supra* note 473, at 719.
[496] *Id.*
[497] *Id.*
[498] *Id.*
[499] *Id.*
[500] *Id.*
[501] *Id.*
[502] *Id.*

URGENT ACTION & ENDANGERED SPECIES: THE RIGHT WHALE

Chris Semrinec

Protecting endangered species and working to restore wildlife populations that have been significantly diminished is an ethical and moral responsibility, especially when human activities are the cause of a species' decline. The case of North Atlantic right whales is no exception. As one of the world's most endangered large whale species, scientists have seen a significant decline in their population, which is directly attributable to human activities, primarily the use of damaging fishing techniques and improper vessel regulations.[503] As of 2020 there are only 336 individual right whales in existence and fewer than 70 of those are reproductive females that may help restore the population.[504] Based on previously recorded data, this is an additional 8% decline in the population in only one year and is the lowest the population has reached in the last two decades.[505] This decline prompted the National Oceanic and Atmospheric Administration (NOAA) to declare the population drop an Unusual Mortality Event (UME).[506] According to the Marine Mammal Protection Act (MMPA), these types of events are appropriate when there has been "a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response."[507] As noted by NOAA Fisheries, based on the UME declaration in 2017, there have been 50 recorded deaths or serious injuries sustained by right whales, 36 of which are attributed to either vessel strikes or entanglements.[508]

Based on the increased awareness of the population decline and greater commitment to tracking the species' population, NOAA has started the process of instituting greater regulations on the primary causes of right whale deaths and injuries. However, these regulatory efforts have had their shortcomings and are scrutinized by concerned citizens and environmental organizations. For an overview of NOAA's efforts, see this NOAA YouTube Video.[509]



[510]

NOAA Efforts to Protect North Atlantic Right Whales

NOAA Fisheries estimates that over 85 percent of all right whales have become entangled in fishing gear at least once in their lives.[511] Not only do these entanglements often result in serious injury or death, but they have been known to negatively affect whales' stress level and their ability to feed and reproduce.[512] Aside from entanglements, vessel strikes are the primary cause of injury or death among right whales and are also the focal point of many debates regarding protections and increased regulations. The primary habitat and migratory routes for the species are concentrated along major ports and coastline in the Atlantic, and subsequently the whales are susceptible to colliding with shipping vessels and other watercraft.[513] When these collisions occur, propellers cut through skin and bones and cause significant injury that is often more severe when the vessels travel at greater speeds.[514]

Under current NOAA vessel speed restrictions, any vessel that is 65 feet or longer must travel at 10 knots or less if operating within a designated zone during a designated time of year.[515] These restrictions were implemented in 2008 in an effort to reduce the number of vessel strikes with right whales.[516] However, based on the current data over the last decade, groups have called for stricter guidelines, and lengthy rulemaking processes have ensued with wariness regarding their potential for success due to the prolonged delay in reaching a conclusion.

---

[503] North Atlantic Right Whale, NOAA, www.fisheries.noaa.gov/species/north-atlantic-right-whale (2020). 2021 marked one of the lowest recorded population sizes for Right Whales, but the species has long been considered declining and is reflected in the numerous relevant wildlife protection regulations. For example, the North Atlantic Right Whale is classified as "endangered" under the Endangered Species Act, "Appendix I" under the Convention on International Trade in Endangered Species, and "Depleted" under the Marine Mammal Protection Act (MMPA).

[504] Court Rejects Federal Attempt to Sink Right Whale Ship Strike Lawsuit, Defenders of Wildlife, https://defenders.org/newsroom/court-rejects-federal-attempt-sink-right-whale-ship-strike-lawsuit (Nov. 11, 2021).

[505] *See id.*

[506] 2017-2021 North Atlantic Right Whale Unusual Mortality Event, NOAA, www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event (Nov. 23, 2021).

[507] Marine Mammal Unusual Mortality Events, NOAA, www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-unusual-mortality-events (Aug. 16, 2021).

[508] 2017-2021 North Atlantic Right Whale Unusual Mortality Event, NOAA (Nov. 23, 2021).

[509] NOAA Fisheries, *Species in the Spotlight: North Atlantic Right Whale*, YouTube (May 11, 2020), www.youtube.com/watch?v=6Pjj094pfCQ.

[510] *See id.*

[511] North Atlantic Right Whale, NOAA (2020).

[512] *See id.*

[513] *See id.*

[514] *See id.*

[515] Reducing Vessel Strikes to North Atlantic Right Whales, NOAA, www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales (Nov. 23, 2021).

[516] *See id.*

Whale and Dolphin Conservation v. National Marine Fisheries Service

The rulemaking process to increase restrictions on vessel speeds ensued following two petition filings in 2012 and 2020 from several environmental groups, including Whale and Dolphin Conservation and the Center for Biological Diversity.[517] Primarily, the petitions request that NOAA Fisheries further expand the temporal and geographic areas that currently have speed restrictions, and that the restrictions also apply to vessels smaller than 65 feet.[518] The inaction that followed the petition filings led the same environmental groups to seek injunctive relief.[519]

 [520]

In analyzing the facts, the court noted that dismissing the case would be proper where it found that the NMFS replied to the petitions with a definitive statement describing whether they were accepting or denying the Plaintiffs' petitions.[521] With respect to the 2012 petition, the court held that the NMFS properly responded to the Plaintiffs by definitively stating that they "decline to take any additional action in response to the 2012 petition."[522] However, with respect to the 2020 petition, the NMFS merely sent a response letter to the Plaintiffs that directed them to a January 2021 study that was conducted by the NOAA, which concluded that the current speed restrictions were inadequate at properly protecting the North Atlantic right whale populations.[523] The court held that this response was inadequate because it merely notified the Plaintiffs that a study was conducted, but did not definitively state whether any action would or would not be taken based on the petition that was filed.[524] Therefore, the court held that the dismissal was proper for the 2012 petition, but that the 2020 petition was not adequately responded to and ordered the NMFS to properly respond to the Plaintiffs' petition on or before November 24, 2021.[525] Overall, while this ruling did not require the NMFS to conduct further rulemaking regarding the petition, it did recognize that a report did not constitute an action and that the Plaintiffs should be provided a proper response. This will require the NMFS to further consider the petition to impose further restrictions on vessel speeds.

Conclusion

The recent sharp decline in the North Atlantic right whale population is one of several ongoing endangered species issues in the world, and it requires urgent action to be taken. There is definitive evidence showing the correlation of human-related activities to the death and serious injury of this species, and the current administration has acknowledged that current restrictions are inadequate at addressing this decline. Therefore, it is imperative for the NOAA to conduct more proper and efficient rulemaking processes to impose further restrictions on vessel operations. If this is not done, the North Atlantic right whale population will face even greater pressure in the coming years.

[517] Court Rejects Federal Attempt to Sink Right Whale Ship Strike Lawsuit, Defenders of Wildlife (Nov. 11, 2021).
[518] *See id.*
[519] *Whale and Dolphin Conservation v. National Marine Fisheries Service*, 2021 WL 5231938 (D.D.C. Nov. 10, 2021).
[520] Complaint at 19, *Whale and Dolphin Conservation v. National Marine Fisheries Service*, 2021 WL 5231938 (D.D.C. Nov. 10, 2021).
[521] *Whale and Dolphin Conservation*, *supra* note 519, at 2.
[522] *Id.* at 3.
[523] *Id.*
[524] *Id.*
[525] *Id.* at 4.

MEET THE AUTHORS

TYLER ARMSTRONG grew up in Oregon, hunting mainly Roosevelt elk, black-tail deer, wild turkey, and waterfowl. After graduating with a bachelor's degree from Brigham Young University in Utah, Tyler decided to pursue a law degree and will graduate from the Michigan State University College of Law in May 2022. After graduation, Tyler will work as a Judicial Law Clerk for the U.S. Department of Justice's Executive Office for Immigration Review in Adelanto, California.

ADRIANA BURKHART is a third-year law student set to graduate in May of 2022, planning to practice immigration law in the Detroit, MI area. In her free time, she enjoys traveling, spoiling her pets, and spending time with her family in Northern Michigan.

KAYLA HOBBY is a third-year law student at MSU Law. After graduation, Kayla will be returning to her hometown of Muskegon, MI to practice at Parmenter Law.

BRIANA NIRENBERG is a second-year student at MSU College of Law. Growing up in a family of wildlife rehabilitators taught her to value animals as living beings rather than merely a resource for human consumption. She currently splits her time between Indiana & Cairo, Egypt, with hopes to go into advocacy either for animals and/or civil and political rights.

CHRIS SEMRINEC is a third-year law student at MSU College of Law with an interest in environmental & natural resource law and policy. Prior to law school, Chris earned a B.S. in Environmental Economics from MSU & a Master's in Sustainable Development in Madrid, Spain. With a passion for environmental conservation, Chris is planning on pursuing a career in environmental policy following graduation. In his free time, Chris enjoys fly-fishing, camping, and running.

BECCA SUTTON is a second-year student at MSU Law with hopes of practicing conservation or environmental law upon graduation. She is originally from Fredericksburg, VA and enjoys reading, photography, and hiking in her spare time.

The *Wildlife Law* students from the Fall 2021 semester took a class trip to The Demmer Center: Shooting Sports, Education, and Training Center in Lansing, Michigan. The students were instructed on firearm and archery safety, fundamentals, and shooting.

About the Wildlife Law Call

These case and current event briefs were composed by the students in the Fall 2021 semester of *Wildlife Law* at Michigan State University College of Law. The course is taught by Carol Frampton, Chief of Legal Services for the National Wild Turkey Federation (NWTF), assisted by Shelby DeVuyst, Assistant Director of the Center for Conservation Excellence (CCE), housed at the NWTF. The CCE is proud to oversee legal interns to teach them the intricacies of conservation law, and would like to thank Benjamin Jenkins from the University of South Carolina School of Law for his assistance in the editing of this publication.

The *Wildlife Law Call* is assembled and distributed by the CCE, with the support of the Association of Fish & Wildlife Agencies (AFWA). This publication was produced in part with funds from Multi-State Conservation Grant numbered F21AP00621 through the Wildlife and Sport Fish Restoration (WSFR) Program of the U.S. Fish and Wildlife Service. This newsletter does not report every recent case or issue, but we hope you will find these briefs, selected from recent fish- and wildlife-related decisions and emerging issues, interesting and informative.

NWTF is a nonprofit organization dedicated to the enhancement of wild turkey populations and habitat, and recruitment, retention, and reactivation of hunters. AFWA is a professional organization whose members are the fish and wildlife agencies of the 50 U.S. states as well as territories, several Canadian provinces and Mexican states, as well as some U.S. federal agencies.

ASSOCIATION of FISH & WILDLIFE AGENCIES

1100 1st Street, Suite 825
Washington, D.C. 20002
(202) 838 3460

The Voice of Fish & Wildlife Agencies

Post Office Box 530
770 Augusta Road
Edgefield, SC 29824
1.800.THE.NWTF
www.nwtf.org

nwtf®
National Wild Turkey Federation

Center for Conservation Excellence

info@centerforconservationexcellence.com