

WILDLIFE LAW CALL

WINTER 2018-2019

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I. Endangered Species Act and Marine Mammal Protection Act

a. Red Wolf Coalition v. U.S. Fish & Wildlife Service

Amanda Chkir

The Red Wolf Coalition, Defenders of Wildlife, and the Animal Welfare Institute brought suit against the U.S. Fish and Wildlife Service (FWS) for alleged mishandling of the red wolf reintroduction program in North Carolina.¹ The U.S. District Court for the Eastern District of North Carolina found that FWS had in fact mismanaged the conservation of the red wolves in violation of the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA).² The Court granted a permanent injunction enjoining the FWS from granting lethal take authorizations without first showing that the wolf was a danger to human life or livestock. In addition, the Court issued a declaratory judgment that FWS had violated the ESA and NEPA.³

Red wolves were historically found in the southeastern United States, but were declared extinct in the wild in 1966. This prompted FWS in 1986 to institute a special rule under the ESA to reintroduce red wolves in North Carolina on the Alligator River National Wildlife Refuge.⁴ Along with a reintroduction program, the rule prohibited the taking of a red wolf except if in defense of a human life, or if the wolf was in the act of killing livestock or pets.⁵

To facilitate the program's success, FWS issued a series of guidelines in 1999 in anticipation of problems that might arise between wolves and people.⁶ These "1999 Guidelines" distinguished between *problem wolves*, and *non-problem wolves*; if a problem wolf was reported, FWS would respond within 48 hours and seek to capture and remove the problem wolf, or grant special permission for a

lethal take.⁷ In addition to setting up procedures for the anticipated human-wolf interactions, certain methods were used to ensure proper expansion of the red wolf population. For example, to prevent "coywolves" or coyote-wolf hybrids, FWS sterilized a number of coyotes in the reintroduction zone. Pup-fostering was also used, in which captive wolf pups were left at the dens of wild wolf parents. These methods worked to increase the red wolf population; in 2007, there were an estimated 130 wolves in the wild.⁸

In 2014, FWS issued its first lethal take authorization to a landowner for having been refused access to the property to attempt removal. Beginning in 2015, FWS discontinued coyote sterilizations, pup-fostering and red wolf release.⁹ A series of guidelines from 2015 no longer distinguished between problem wolves and non-problem wolves, and a second lethal take authorization was issued in 2015 for a non-problem, denning mother wolf. The red wolf population declined significantly, with only two or three breeding pairs left in the wild as of November 2017.¹⁰

The Court found that FWS management policies coincided with the decline in red wolves in the wild, and that allowing the wild population to continue to decline, "while having access to methodologies which were previously successful in increasing or maintaining the wild population of the species," amounted to a failure to "carry out conservation measures until conservation is no longer necessary."¹¹ This amounted to violation of the ESA "by failing to administer the red wolf recovery program in furtherance of the purposes of the ESA," and violation of NEPA "by failing to comply with NEPA requirements to determine the impacts of interpreting the take exemptions of the red wolf rule."¹²

At the time the case was decided, FWS stated that it would have a final rule in place by November 30, 2018, regarding revisions to its red wolf program. However, FWS issued a statement on November 29, announcing extension of the

¹ *Red Wolf Coalition v. U.S. Fish & Wildlife Service*, 2018 WL 5796262, *4 (E.D.N.C. Nov. 4, 2018).

² *Id.* at *8.

³ *Id.* at *9.

⁴ *Id.* at *1.

⁵ *Id.*

⁶ *Id.* at *2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at *3.

¹⁰ *Id.*

¹¹ *Id.* at *8.

¹² *Id.* at *9.

review to “fully evaluate the implications of the court decision.”¹³

—2018 WL 5796262 (E.D.N.C. Nov. 4, 2018).

b. Crow Indian Tribe v. United States

Elaina Cipicic

The Crow Indian Tribe, among other Native Tribes, environmental groups, and animal welfare groups sued the U. S. Fish and Wildlife Service (“FWS”) after FWS entered a Final Rule delisting the Greater Yellowstone grizzly bear under the Endangered Species Act (ESA).¹⁴ The issue was whether “the [Service] exceed[ed] its legal authority when it delisted the Greater Yellowstone grizzly bear.”¹⁵

Issuance of the Final Rule

The first rule delisting the Greater Yellowstone distinct population segment (DPS) issued in 2007 was ultimately vacated because inadequate regulatory mechanisms were in place and FWS did not review the decline of a food source for the grizzly bear.¹⁶ The U.S. Court of Appeals for the Ninth Circuit then found that adequate regulatory mechanisms were in place but affirmed on the issue of the grizzly bear’s food source.¹⁷ A Final Rule was issued on June 30, 2017.¹⁸ The D.C. Circuit then held in *Humane Society v. Zinke* that “FWS’s designation of distinct segment of gray wolf for purpose of delisting such segment under the ESA was arbitrary and capricious,” as was “FWS’s determination that segment of gray wolf population was no longer threatened or endangered throughout all or a significant portion of its current range.”¹⁹ This decision prompted FWS to open a comment period for any potential impacts the Final Rule may have on the Greater Yellowstone population.²⁰ The Service then



found that no modification to the Final Rule was necessary.²¹ Lawsuits were filed shortly after the Final Rule was issued, and a 14-day temporary restraining order, along with a 14-day extension, were issued to postpone the hunting of grizzly bears in Wyoming and Idaho.²²

Plaintiffs’ Arguments

Plaintiffs allege that the Final Rule ordering the delisting should be challenged as FWS did not evaluate how this delisting could affect the other grizzly bear populations of the lower 48 states and because “[FWS] acted arbitrarily and capriciously in its application of the five-factor threats analysis demanded by the ESA” by not using the best available science and by drawing an illogical conclusion based on only two studies.²³

Prior to European settlement, roughly 50,000 grizzly bears lived in the lower 48 continental states, but after European settlement grizzly numbers were drastically reduced by shooting, poisoning, or trapping.²⁴ By 1975, only six populations remained, and since 1982 “[FWS] has focused on fostering recovery in [those] six ecosystems.”²⁵ There is no known evidence of interbreeding as the different populations are isolated from each other, and even within a population of bears not every bear is capable of

¹³ U.S. Fish & Wildlife Serv., *Service extends red wolf review in North Carolina*, Nov. 29, 2018, <https://www.fws.gov/southeast/news/2018/11/service-extends-red-wolf-review-in-north-carolina/>.

¹⁴ *Crow Indian Tribe v. United States*, No. CV 17-89-M-DLC, 2018 WL 4568418, *1 (D. Mont. Sept. 24, 2018).

¹⁵ *Id.*

¹⁶ *Id.* at *3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 865 F.3d 585, 585 (D.C. Cir. 2017).

²⁰ *Crow Indian Tribe*, 2018 WL 4568418 at *3.

²¹ *Id.*

²² *Id.* at *4.

²³ *Id.* at *5.

²⁴ *Id.* at *2.

²⁵ *Id.*

breeding.²⁶ It takes many years for the population to increase as females reproduce in a small window of time starting at six years of age into their mid-20s and reproduce “a litter every 2.78 years.”²⁷

Under the ESA, agencies must “insure that any action authorized, funded, or carried out by such an agency . . . is not likely to jeopardize the continued existence of a listed species.”²⁸ Caution must be used and agencies cannot use a “distinct population segment to circumvent analysis of a species’ overall well-being” as “extinction is irreversible.”²⁹ The district court held that FWS did just that by stating that the Greater Yellowstone DPS was distinct from the other five populations and would not have an impact on their numbers.³⁰ FWS also stated that it was looking into delisting the Northern Continental Divide grizzly bear as well.³¹ If that delisting were to occur it would potentially leave only 156 grizzly bears in the lower 48.³² FWS also misinterpreted two studies, which led to the illogical conclusion that no new genetic material was essential to the long-term viability of the species.³³ Finally FWS recognized a need for a recalibration provision but chose to forego one in order to reach a deal with the States “to secure their participation in Conservation Strategy.”³⁴

As such, the Court held that the Service “failed to make a reasoned decision,” “failed to consider an issue of extreme importance,” and that the analysis conducted “was arbitrary and capricious.”³⁵ The Court vacated and remanded “the Final Rule delisting the Greater Yellowstone Ecosystem grizzly bear.”³⁶

—2018 WL 4568418 (D. Mont. Sept. 24, 2018).

c. Center for Biological Diversity v. U.S. Fish & Wildlife Service

Gabrielle Cunningham

The Pacific fisher has been considered for protection under the Endangered Species Act (ESA) three separate times since 1990.³⁷ The Pacific fisher is a “medium-sized brown mammal in the weasel family found only in North America. It has a long body with short legs and a long bushy tail.”³⁸ Only found in Washington, Oregon, and California, the historic range of the fisher has been compromised by logging, trapping, and wildlife.³⁹ An endangered species is defined as “any species which is in danger of extinction throughout all or a significant portion of its range,” pursuant to 16 U.S.C. § 1532(6), while a threatened species is defined as any species “which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range,” pursuant to 16 U.S.C. § 1532(20).⁴⁰

Center for Biological Diversity and other environmental non-governmental organizations (Plaintiffs) submitted the original petition to protect the Pacific fisher in 1990.⁴¹ The U.S. Fish and Wildlife Service (FWS) concluded in 1991 that a listing of endangered was not warranted at that time.⁴² Again in 1996, FWS rejected a petition to list the Pacific fisher as threatened due to lack of substantial information.⁴³ Plaintiffs again petitioned to list the Pacific fisher as endangered in 2000.⁴⁴ In response to Plaintiffs’ petition, FWS published a finding that listing the Pacific fisher was “warranted but precluded” in 2004.⁴⁵

In 2014, FWS proposed to list the Pacific fisher as threatened.⁴⁶ It concluded that the main threats were “habitat loss from wildfire and vegetation management;

²⁶ *Id.* at *3.

²⁷ *Id.*

²⁸ *Id.* at *10.

²⁹ *Id.* at *5, *10.

³⁰ *Id.* at *7.

³¹ *Id.* at *9.

³² *Id.*

³³ *Id.* at *14.

³⁴ *Id.* at *13.

³⁵ *Id.* at *17.

³⁶ *Id.*

³⁷ *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. C 16-06040, 2018 WL 4538622, at *2.

³⁸ *Id.* at *1.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at *2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

toxicants (including anticoagulant rodenticides); and the cumulative and synergistic effects of these and other stressors acting on small populations.”⁴⁷ In 2016, FWS withdrew the proposed listing due to new information that “led it ‘to conclude that the native populations will persist into the future . . . and that as a whole the [Pacific] fisher does not meet the definition of an endangered or threatened species[.]’”⁴⁸ The Service justified this decision by concluding that wildfires benefit the Pacific fisher by creating new habitats, that the native populations have “persisted” over time, and that some populations may be reintroduced.⁴⁹



U.S. FWS Reg. 5, [Flickr](#)

Plaintiffs argue that FWS’s reversal of the proposed listing was arbitrary and capricious with respect to its analyses of the threats of toxicants, small population size, and wildfires.⁵⁰ Plaintiffs requested that the District Court for the Northern District of California set aside the reversal,

reinstate the proposed listing, and issue an order requiring FWS to publish a new rule based solely on the best data available.⁵¹ In response, FWS stated that this is “a matter of difference in interpretation of the scientific evidence[.]”⁵²

To determine whether FWS’s reversal was arbitrary and capricious, the Court analyzed whether there was a “rational connection between the facts found and the choice made.”⁵³ A study found that from 2007 to 2011, the average annual death rate of Pacific fishers from toxicosis was 5.6 percent, and from 2012 to 2014, the death rate increased to 18.7 percent.⁵⁴ The Court found that the Service did not adequately address the findings of this study in its decision to reverse the proposed listing.⁵⁵ Further, FWS’s invocation of “scientific uncertainty” surrounding the effects of toxicosis did not justify declining to list the Pacific fisher instead of seeking an alternative course of action to comply with the ESA’s policy of “institutionalized caution.”⁵⁶

The Service relied on population trends to conclude that the Pacific fisher’s population was going to be maintained but did not apply the trends properly and misinterpreted the data.⁵⁷

Plaintiffs’ request for an order requiring FWS to publish a new rule within ninety days was denied, but the Court ordered FWS to prepare a new rule by March 22, 2019, six months from the date of the hearing.⁵⁸ —2018 WL 4538622 (N.D. Cal. 2018).

d. Natural Resources Defense Council v. Ross

Xavier Donajkowski

In the Mexican waters off the California coast lives a critically endangered species of porpoise called the vaquita.⁵⁹ The vaquita is the world’s smallest porpoise,

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at *3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at *4.

⁵⁵ *Id.*

⁵⁶ *Id.* at *7.

⁵⁷ *Id.* at *8.

⁵⁸ *Id.* at *10.

⁵⁹ *Nat. Res. Def. Council v. Ross*, 331 F.Supp.3d 1381, 1383 (Ct. Int’l Trade 2018).

weighing about one hundred pounds and measuring only five feet long.⁶⁰ Despite attention from conservationists and protective legislative efforts, the vaquita's population has been drastically reduced from 567 to 15 in the past thirty years, leaving it on the brink of extinction.⁶¹ The primary cause of this demise has been incidental catch by gillnets used for fishing; in fact, incidental catch by gillnet has had such a strong deleterious effect on the vaquita's population that "even one more bycatch death in the gillnets of fisheries in its range threatens the very existence of the species."⁶²

In reaction to the deleterious effect of gillnets on vaquita populations, the Natural Resources Defense Council, Center for Biological Diversity, and Animal Welfare Institute brought suit under the Marine Mammal Protection Act (MMPA) against several government agencies including the U.S. Department of Commerce.⁶³ The MMPA specifically requires "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels" and allows conditional bans on the import of fish and fish products when necessary to achieve this end.⁶⁴

In July 2018, the U.S. Court of International Trade granted this motion for a preliminary injunction, pending a final adjudication on the merits, requiring a federal ban on the import of shrimp, curvina, chano, and sierra fish products harvested by Mexican commercial fisheries using gillnets in the vaquita's range.⁶⁵ The Court made its decision on the merits on August 14, 2018.

The government challenged the granting of the injunction on two bases, both of which the court rejected. First, the government questioned whether the injunction was meant to apply to imports of shrimp and chano caught by gillnets, which is already an illegal activity.⁶⁶ This argument arose

out of the fact that MMPA does not specifically govern the regulation of illegal fishing activities.⁶⁷ Rather, the MMPA governs incidental catch connected with "commercial fishing operations," and defines "commercial fishing operations" as those that are lawfully harvested.⁶⁸ On this issue, the court held that the applicable provision of the MMPA applies to "legal and illegal fisheries" alike.⁶⁹



NOAA Fisheries, [Flickr](#)

Second, the government argued that "the preliminary injunction cannot include imports of shrimp and chano caught in gillnets contrary to Mexican law, because the Lacey Act and the Magnuson-Stevens Act statutorily ban fish harvested in violation of foreign law and impose steeper penalties than the MMPA."⁷⁰ The Court held to the contrary, stating that federal statutes do not render overlapping statutes inoperative.⁷¹ Further, the Court noted that neither act claims to be the sole federal authority for regulating the importation of fish products.⁷²

Finding a proper application of the MMPA, and finding that neither the Lacey Act, nor the Magnuson-Stevens Act prevented issuance of a preliminary injunction, the Court upheld the injunction against the importation of products from shrimp, curvina, chano, and sierra fisheries engaged

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1384.

⁶⁴ *Id.* at 1383-84.

⁶⁵ *Id.* at 1384.

⁶⁶ *Id.* at 1385.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1386.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1386-87.

⁷¹ *Id.* at 1387.

⁷² *Id.*

in gillnet fishing in the vaquita's range.⁷³ The government appealed this order on August 31, 2018.

—331 F.Supp. 3d 1381 (Ct. Int'l Trade 2018).

e. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*

Kaitlin Mee

In 2016 the U.S. Court of Appeals for the Fifth Circuit held that the Endangered Species Act (ESA) imposed no limitations on the Secretary of the Interior in designating critical habitat and the Secretary's actions pertaining critical habitat were not subject to judicial review.⁷⁴ The Supreme Court granted *certiorari* to review 1) whether "critical habitat" under the ESA must be habitat for the listed species; and 2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation.⁷⁵

The dusky gopher frog spends most of its time underground.⁷⁶ The frog has been found in Louisiana, Mississippi, and Alabama, however, today there are approximately only 100 living adult frogs, isolated in Mississippi due to urban development.⁷⁷ The U.S. Fish & Wildlife Service (FWS), in the course of listing the frog, proposed to designate 1,544 acres of land in St. Tammany Parish, Louisiana as unoccupied critical habitat (the site is called Unit 1).⁷⁸ The Service determined that while Unit 1 is not currently home to the dusky gopher frog, the high-quality breeding ponds and the distance from current populations made Unit 1 critical for conservation.⁷⁹ Petitioners own and lease the land designated as Unit 1 for its timber operation; the Service's economic impact statement showed that the critical habitat designation did

not affect Petitioners' timber operation, but Petitioner had already invested in development of the site.⁸⁰

Petitioners sought to vacate the district court's decision that Unit 1 satisfied the statutory definition of an unoccupied critical habitat and argued that Unit 1 cannot be designated as a critical habitat because the frog would not survive there.⁸¹ Petitioners further argued that the Service failed to weigh the benefits of the designation against the economic impact.⁸² The Fifth Circuit affirmed, rejecting the Petitioners' habitability argument.

Critical Habitat

The Supreme Court analyzed "critical habitat" according to the term's use in statute. The relevant provision states that when the Secretary lists a species as endangered he or she must also designate any critical habitat of the species.⁸³ The Court reasoned that only the habitat of the species is eligible for critical habitat designation.⁸⁴ Because the Fifth Circuit did not interpret "habitat" per 16 U.S.C. §1533(a)(3)(A)(i) or assess FWS's administrative findings on Unit 1, the Supreme Court vacated the Fifth Circuit's conclusion that it could not review FWS's decision not to exclude Unit 1, and remanded.⁸⁵

Judicial Review

Additionally, Petitioners argued that even if Unit 1 fell within the statutory definition of critical habitat, it should have been excluded under ESA section 4(b)(2), which requires the Secretary to consider the economic impact of designation.⁸⁶ Petitioners contend that FWS did not fully consider the cost of replacing timber trees, maintaining an open canopy, and tax revenue that would be lost if the area could not be developed.⁸⁷ Relying on a textual analysis and

⁷³ *Id.* at 1388.

⁷⁴ *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 586 U.S. 1 slip op. (2018).

⁷⁵ *Id.* at 8.

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 2-3.

⁷⁸ *Id.* at 5.

⁷⁹ *Id.*

⁸⁰ *Id.* at 5-6.

⁸¹ *Id.* at 6-7.

⁸² *Id.* at 7.

⁸³ 16 U. S. C. §1533(a)(3)(A)(i); *Weyerhaeuser*, 585 U.S. 1, 8 (2018).

⁸⁴ *Id.* at 9 (2018).

⁸⁵ *Id.* at 10.

⁸⁶ *Weyerhaeuser*, 585 U.S. 1, 10 (2018).

⁸⁷ *Id.* at 11.

the Court’s holding in *Bennett v. Spear*, 520 U.S. 154 (1997), the Court found that FWS followed both the categorical requirement and the procedural requirement of 16 U.S.C. §1533(b)(2), but FWS diminished the importance of the language of *Bennett v. Spear*, which held that “the Secretary’s ‘ultimate decision’ to designate or exclude, which he ‘arriv[es] at’ after considering economic and other impacts, is reviewable ‘for abuse of discretion.’”⁸⁸.

The Supreme Court remanded to the Fifth Circuit on whether FWS’s assessment of the costs and benefits was flawed.⁸⁹ The Fifth Circuit did not consider FWS’s assessment because it had determined that the decision to exclude was committed to agency discretion.

—585 U.S. 1 slip op. (2018).

f. *Center for Biological Diversity v. Zinke*

Milan Spampinato

In August 2018, the U.S. Court of Appeals for the Ninth Circuit examined a challenge to the U.S. Fish and Wildlife Service’s (FWS) decision to not list the Upper Missouri River Valley Distinct Population Segment (DPS) of Arctic grayling as an endangered or threatened species under the Endangered Species Act (ESA).⁹⁰ The U.S. District Court for the District of Montana entered summary judgment in FWS’s favor.⁹¹ Center for Biological Diversity (CBD) appealed to the Ninth Circuit, contending that FWS erred in using the incorrect definition of “range” when contemplating whether the Arctic grayling is extinct or is threatened to become extinct “in a significant portion of its range.”⁹²

The court begins by discussing how the adaptive, fluvial population of Arctic grayling is considered essential to the survival of the species.⁹³ Due to threats to the Arctic grayling’s habitat, the Arctic grayling now only exists in the

Upper Missouri River Basin in Montana.⁹⁴ The populations in this area are important to the species because of their unique adaptation to warmer temperatures.⁹⁵



U.S. FWS, [Flickr](#)

The Ninth Circuit continues with a discussion of the ESA requirements that FWS must follow. Under the ESA, the Secretary of the Interior must determine whether a species should be listed as “threatened” or “endangered.”⁹⁶ FWS must base its listing on “the best scientific and commercial data available.”⁹⁷ In April 2007, FWS concluded that the Arctic grayling could not be listed as an endangered or threatened species because it did not warrant protection, as it was not a distinct population segment.⁹⁸ CBD challenged the 2007 listing in 2010, and FWS provided a revised listing decision that it was a distinct population segment, but the listing was “warranted but precluded” by

⁸⁸ *Id.* at 14 (citing *Bennett v. Spear*, 520 U.S. 154, 172 (1997)).

⁸⁹ *Id.* at 15.

⁹⁰ *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1058 (9th Cir. 2018).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1059.

⁹⁶ *Id.* See 16 U.S.C. § 1533.

⁹⁷ *Id.* at 1060. See 16 U.S.C. § 1533(b)(1)(A).

⁹⁸ *Id.* at 1061.

higher priority actions.⁹⁹ When analyzing the curtailment of the Arctic grayling's range, FWS considered its historical range, habitat fragmentation, and the effect of man-made disturbances.¹⁰⁰ In February 2015, CBD challenged the negative listing decision in the District Court for the District of Montana.¹⁰¹ Ultimately, the district court held in favor of FWS and CBD appealed.¹⁰²

The question before the Ninth Circuit is whether FWS erred in considering only the "current range" of the Arctic grayling when determining whether it was in danger of extinction "in all of a significant portion of its range."¹⁰³ The Ninth Circuit held that FWS did not err because the term "range" was ambiguous under ESA.¹⁰⁴ Traditional tools of statutory construction did not persuade the court that "range" unambiguously means "historical range."¹⁰⁵ Next, the court looks to the statutory framework of the ESA and other uses of the word "range" throughout the entire statute.¹⁰⁶ Agreeing with the D.C. Circuit, the Ninth Circuit explains that "range" in the ESA does not compel the conclusion that range should be read to unambiguously mean "historical range," even if some statutory construction tools may interpret "range" as a "historical range."¹⁰⁷

Since "range" is ambiguous, the court reasoned that FWS's interpretation of "range" as "current range" under 16 U.S.C. § 1532(6) and (20) is entitled to *Chevron* deference.¹⁰⁸ While the ESA's statutory framework provides some support for the interpretation of "range" to mean "current range[.]" the SPR policy still requires FWS

to consider "historical range" in evaluating the other aspects of the listing decision.¹⁰⁹

In addition to the court's holding that the term "range" in the ESA was ambiguous and entitled to *Chevron* deference, the court further held (1) FWS's failure to rely on the best scientific data available was arbitrary and capricious; (2) FWS did not act in an arbitrary and capricious manner when failing to address state monitoring data that documented the increasing Arctic grayling population; (3) FWS did not act in an arbitrary and capricious manner in reversing the previous decision determining cold water thermal refugia insufficient to mitigate warm water temperatures; and (4) FWS did not act in an arbitrary and capricious manner when determining the limited population size did not pose risk to the genes of the Arctic grayling.¹¹⁰

The Ninth Circuit concluded that FWS acted in an arbitrary and capricious manner and reversed the district court's order for summary judgment and remanded for FWS's further consideration of the Arctic grayling listing.¹¹¹

—900 F.3d 1053 (9th Cir. 2018).

g. *Western Watersheds Project v. Grimm*

Noelle Thompson

On January 4, 2018, five nonprofit wildlife advocacy organizations sued to seek review of the U.S. Department of Agriculture's (USDA) Division of Wildlife Services' (WS) 2011 decision to expand its wolf control program in Idaho.¹¹² The nonprofit organizations include Western

⁹⁹ *Id.* The 2010 finding was based on a variety of threats facing the Arctic grayling, such as downward population trends, climate change, and genetic unviability. *Id.* FWS released another decision in 2014, finding the listing of the Arctic grayling as threatened or endangered as not warranted; however, conclusions in the 2014 decision were incompatible with the 2010 decision. *Id.* at 1062.

¹⁰⁰ *Id.* at 1062.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1064-66.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1067. Although the tools of statutory construction provide support for "range" to mean "historical range,"

Congress did not express this in an unambiguous manner. *Id.*

¹⁰⁶ *Id.* at 1066.

¹⁰⁷ *Id.* at 1065-66.

¹⁰⁸ *Id.* Under *Chevron*, federal courts defer to agencies' reasonable interpretations of ambiguous statutes. *See generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁰⁹ *Id.* at 1067.

¹¹⁰ *Id.* at 1063-75.

¹¹¹ *Id.*

¹¹² *Western Watersheds Project v. Grimm*, 283 F. Supp. 3d 925 (D. Idaho 2018).

Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense. These organizations alleged that USDA-WS did not properly consider the environmental impacts of expanding the wolf control program, therefore violating the National Environmental Policy Act (NEPA).¹¹³

History

In 2012, USDA-WS expanded the wolf control program in Idaho. This decision is among the latest in a long regulatory history of the Idaho grey wolf population.¹¹⁴

In 1974, the U.S. Fish and Wildlife Service (FWS) listed the Northern Rocky Mountain grey wolf (*Canis lupus*) as an endangered species under the Endangered Species Act (ESA).¹¹⁵ Following its listing, USDA-WS assisted with wolf management and protection programs at both the state (Idaho Department of Fish and Game (IDFG)) and federal (FWS) level to reduce human-wolf conflict.¹¹⁶

In 1987, FWS approved the Northern Rocky Mountain (NRM) Wolf Recovery Plan which outlines the steps necessary for the recovery of the grey wolf populations inhabiting the NRM region.¹¹⁷ The goal for this plan was to achieve delisting after re-establishing the populations in each of the three identified recovery areas, one of which is located within central Idaho (Idaho wolf population).¹¹⁸ The Service reaffirmed this 1987 plan in a final Environmental Impact Statement (EIS) issued in 1994.¹¹⁹

A wolf reintroduction program began in central Idaho in January 1995. In the following year, 35 wolves inhabited the recovery area.¹²⁰ By 2000, FWS estimated that each recovery area had reached its goal of maintaining 30 breeding pairs of wolves as stated in the NRM Wolf Recovery Plan. Subsequently, FWS requested the development of wolf management plans by Idaho, Montana, and Wyoming in preparation of the wolves being delisted.¹²¹

In February 2007, FWS delisted the NRM-region wolf populations.¹²² However, in 2008, the U.S. District Court for the District of Montana retracted the delisting on grounds that FWS lacked evidence of genetic exchange between the populations in each of the three recovery areas.¹²³ In April 2009, FWS reissued the delisting for

wolves in two of the three areas after estimating over 30 breeding pairs in the Montana and Idaho populations.¹²⁴ The Wyoming population was estimated to have only twenty-two pairs of wolves and, therefore, continued to receive federal protection. The Service determined that genetic exchange is difficult to prove and is not required to verify the sustainability of wolf populations. The

decision also indicated that Idaho and Montana agreed to use management strategies that promote genetic diversity, such as human-assisted migration management to ensure genetic diversity.¹²⁵

Between the 2009 delisting and 2011, the District Court in Montana retracted the delisting once more, but the



¹¹³ *Id.* at 928.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 929.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 929-30.

¹¹⁸ *Id.* at 930.

¹¹⁹ *Id.* at 930-31.

¹²⁰ *Id.* at 931.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008).

¹²⁴ 283 F. Supp. 3d at 931.

¹²⁵ *Id.*

delisting was reinstated for a third time in May 2011, which gave IDFG primary responsibility for managing the wolves in the NRM region.¹²⁶ Wolves began to be managed as big game animals by IDFG to maintain populations at recovery levels.¹²⁷

Current Case

Plaintiffs claimed that the 2011 delisting violated NEPA for three reasons: 1) a “hard look” analysis required by NEPA was not performed; 2) USDA-WS did not prepare an EIS; and 3) a supplemental NEPA analysis should have been prepared as new information and circumstances have arisen since the 2011 decision to delist the NRM grey wolf.¹²⁸

In response USDA-WS stated: 1) the sought-after relief would not redress the alleged injuries; 2) environmental impacts were properly examined prior to making the decision to delist the wolf populations; 3) the decision made was not arbitrary or impulsive; and 4) the decision to not prepare a supplemental analysis following new information is entitled to deference.¹²⁹ USDA-WS explained that Plaintiffs failed to demonstrate redressability because IDFG has sufficient resources to take over the management of wolf populations in Idaho if USDA-WS is barred from doing so.¹³⁰ Second, wolf management is conducted by USDA-WS within an adaptive management framework that is described within a strategic plan developed in 2011, indicating that this was not an arbitrary decision.¹³¹

Decision

The court agreed with USDA-WS that the relief sought by Plaintiffs could not address their alleged injuries.¹³² If

USDA-WS stopped the lethal management of wolves in Idaho, the same number of wolves would still be eliminated by IDFG and/or other individuals or parties authorized to conduct lethal undertakings. Furthermore, IDFG can increase the number of permits sold to the public for sport hunting each year to make up for lethal management no longer being conducted by USDA-WS.¹³³

In effect, if the court’s decision was in Plaintiffs’ favor, the decision would have had little to no impact on the lethal control of grey wolves in Idaho. Following the court’s decision, the grey wolf population remains delisted in Idaho. IDFG maintains authority over the management of these populations and USDA-WS assists in population management when assistance is requested.¹³⁴

—283 F. Supp. 3d 925 (D. Idaho 2018).

g. *Center for Biological Diversity v. Ross*

Claire Webb

In this case, currently in the discovery phase, plaintiffs are seeking to obtain extra-record evidence pursuant to their claims under sections 7 and 9 the Endangered Species Act (ESA).¹³⁵ The North Atlantic right whale is one of the most endangered mammals.¹³⁶ Because of its migratory patterns, an area from Maine to Florida is designated as habitat.¹³⁷ The right whale is highly susceptible to fishing gear¹³⁸ and can immediately drown when caught.¹³⁹ Unfortunately, right whales swim in many of the same areas as lobsters, which causes competition between lobster fishing and protecting right whales.¹⁴⁰

The right whale is protected under both the ESA and the Marine Mammal Protection Act (MMPA).¹⁴¹ The Secretary of Commerce is responsible for administering the MMPA

¹²⁶ *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

¹²⁷ 283 F. Supp. 3d at 932.

¹²⁸ *Id.* at 936.

¹²⁹ *Id.* at 937-38.

¹³⁰ *Id.* at 938-39.

¹³¹ *Id.* at 940-41.

¹³² *Id.* at 941.

¹³³ *Id.* at 941-42.

¹³⁴ *Id.* at 942.

¹³⁵ *Ctr. for Biological Diversity v. Ross*, 2018 U.S. Dist. LEXIS 171667 (D.D.C.).

¹³⁶ *Id.* at 123.

¹³⁷ *Id.* at 124.

¹³⁸ *Id.* at 123.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 124.

through the National Marine Fisheries Service (NMFS).¹⁴² Under the ESA and MMPA, agencies must engage in consultations and produce biological opinions (“BiOps”) to determine the effects of federal actions on endangered species.¹⁴³ A BiOp was written and filed by NMFS.¹⁴⁴ Believing that the BiOp did not properly comply with the ESA or the MMPA, the Center for Biological Diversity (CBD) and other nongovernmental organizations sued.¹⁴⁵

Plaintiffs alleged that because their claim is “forward looking”, their discovery claims should not be constrained to only the administrative record.¹⁴⁶ Plaintiffs also alleged that not granting discovery would ensure that the government would prevail, as Plaintiffs have the burden of proof.¹⁴⁷ The Court did not agree with Plaintiffs that all extra-record evidence should be available but it did agree that extra-record evidence was not necessarily precluded from discovery.¹⁴⁸

Plaintiffs claimed that NMFS’s ongoing authorization of lobster fishing violates NMFS’s section 7 duty to avoid jeopardizing the right whale¹⁴⁹, and offered examples of evidence contained in the extra-record that they may need, including additional expert testimony¹⁵⁰ and “new scientific information showing right whales have declined.”¹⁵¹ The government argued that there is no need for additional expert testimony and that Plaintiffs’ requested material would appear in the record, but the Court was unpersuaded.¹⁵²

Plaintiffs also argued that their section 9 claims of present and future unlawful take also require extra-record discovery because their claims are future looking there is no administrative record of the specific evidence they need to prove their claim.¹⁵³ The Court ultimately found this persuasive.

The court ordered extra-record discovery so that Plaintiffs can evaluate present and future impacts to the whales from lobster fishery.¹⁵⁴ This case is still awaiting a decision on the merits. Such a decision could have substantial impacts on the lobster industry, the economies of the states on the East Coast, the population of the right whale, and on the duties of NMFS.

—2018 U.S. Dist. LEXIS 171667 (D.D.C.).

h. Ivory Education Institute v. Department of Fish & Wildlife

Shelby Devuyst

California Assembly Bill No. 96, imposing tough new restrictions on the sale and importation of ivory and rhinoceros horn, was passed in 2015 and became operative July 1, 2016. The Ivory Education Institute (the Institute) sued the California Department of Fish and Wildlife (CDFW) to block its implementation, arguing that it was unconstitutional due to vagueness, preemption, and the takings and commerce clauses. On appeal, the Institute limited its challenge to the void-for-vagueness doctrine.

Since 1970, California’s Penal Code Section 6530 has prohibited importation and sale of various animals’ body parts. However, an uncodified provision of that section later exempted elephant ivory imported before June 1, 1977, and placed the burden of proving the importation date on the defendants. Due to concern of difficulties in proving the importation date, and the loophole to the law that it may present, Assembly Bill No. 96 enacted Section 2022 (prohibition against purchase, sale, or import of ivory or rhinoceros horn; criminal penalties; administrative penalties; reward).

Section 2022(b) states that it is “unlawful to purchase, sell, offer for sale, possess with intent to sell, or import with

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 13

¹⁴⁹ *Id.* at 14.

¹⁵⁰ *Id.* at 15.

¹⁵¹ *Id.* at 14

¹⁵² *Id.* at 15

¹⁵³ *Id.* at 21-22.

¹⁵⁴ *Id.* at 26.

intent to sell ivory or rhinoceros horn.” Section 2022(c) provides exceptions to that statement:

- (2) An activity that is authorized by an exemption or permit under federal law or that is otherwise expressly authorized under federal law.
- (3) Ivory or rhinoceros horn that is part of a musical instrument, including, but not limited to, a string or wind instrument or piano, and that is less than 20 percent by volume of the instrument, if the owner or seller provides historical documentation demonstrating provenance and showing the item was manufactured no later than 1975.
- (4) Ivory or rhinoceros horn that is part of a bona fide antique and that is less than five percent by volume of the antique, if the antique status is established by the owner or seller of the antique with historical documentation demonstrating provenance and showing the antique [is] not less than 100 years old.

The void-for-vagueness doctrine is a constitutional requirement of due process of law, preventing the government from enforcing a provision that a reasonable person would have to guess or assume the meaning and application of. There is a strong presumption that statutes are to be upheld unless unconstitutionality is “clear, positive, and unmistakable” and statutory language is not impermissibly vague if the meaning can be fairly ascertained by reference to other sources. Furthermore, the challenge only considers the text at hand, and not the application to an individual’s circumstances.

The Institution claims that Section 2022 is unconstitutionally vague because (1) while it allows for the sale or import of ivory insofar as it is allowed by federal law, differences in what federal law allows make it nearly impossible to tell what would qualify for the exemption provided by 2022(c)(2); and (2) there are no guidelines by which to determine the permissible volume of ivory in either musical instruments ((c)(3)) or antiques ((c)(4)).



Both of the Institute’s challenges failed. Because of the federal Endangered Species Act and CITES, as well as the state and association implementation of the regulations, there are conflicting rules. However, the first contention is resolved because existing federal law clarifies the meaning of Section 2022. Because federal statutes and other overlapping provisions can be ascertained, the exception for activities authorized by the federal government is not vague on its face. Furthermore, the Institute’s challenge to the exceptions for musical instruments and antiques based on the volume of the object failed because the specified volumes are just that—specific.

Therefore the California Court of Appeal for the Second District affirmed the lower court’s holding that the statute is not facially vague.

—28 Cal. App. 5th 975 (2018).

II. Federal Land and Resource Management

a. *Native Ecosystems Council v. Erickson* Gage Allan Bowman

In 2018, the U.S. District Court for the District of Montana, Missoula Division, considered three separate motions brought by plaintiffs Native Ecosystems Council and Alliance for the Wild Rockies, challenging decisions made by the U.S. Forest Service (USFS) and U.S. Fish and

Wildlife Service (FWS).¹⁵⁵ Plaintiffs alleged that the agencies' actions violated the Administrative Procedures Act (APA), Endangered Species Act (ESA), Healthy Forests Restoration Act (HFRA), National Environmental Policy Act (NEPA), and the National Forest Management Act (NFMA).¹⁵⁶ The decisions at issue concerned the following projects: the Montana Landscape Designation (for the purposes of classifying portions of National Forests as at risk of disease or insect infestation and needing protection); the Smith Shields Forest Health Project (covering the Crazy Mountains and implemented for the same purpose as the Montana Designation); and the Gallatin Forest Plan Clean Up Amendment (which revised the previous Plan and changed several definitions and standards pertaining to forest and wildlife management).¹⁵⁷

The first decision the plaintiffs took issue with was a 2014 Farm Bill amendment to HFRA.¹⁵⁸ passed in response to the threat of disease, insect, or other pest infestation of National Forests.¹⁵⁹ The amendment allowed USFS to designate areas of forest as needing special protection.¹⁶⁰ Here Plaintiffs challenged the designation of 4,955,159 acres of Montana forests.¹⁶¹ Because of its scale, Plaintiffs argued this should have triggered an environmental impact statement (EIS) under NEPA.¹⁶² The Court disagreed, stating that because the designation was not a "final agency action", plaintiff's claim was too speculative in its future effects, and several more



USFS, [Flickr](#)

procedural steps remained to be completed before the designation could be considered "final".¹⁶³

Plaintiffs were further concerned about the HFRA designation's impact on the "habitat connectivity" of the native lynx population, centering on the Crazy Mountains range.¹⁶⁴ Plaintiffs argued that USFS and FWS violated HFRA by not considering the "best available science" as required by statute.¹⁶⁵ The Court disagreed for the following reasons: that USFS and FWS jointly considered the effects on native habitats of their policy decisions; had access to a Biological Assessment of the lynx population in the Crazy Mountains, and considered appropriate conservation measures.¹⁶⁶ Indeed, the agencies concluded

that there was no critical habitat for lynx in the Crazy Mountains, since it was home to "transitory" populations centered in a small area, and the Court agreed with the agencies' interpretation.¹⁶⁷ The Court also disagreed with Plaintiffs that an EA was required, since, again, there was no critical habitat at issue, and such habitat that did exist would not be impacted in any significant

way, due to the small habitat size, the lack of effects on natural shelter or tree cover, and the retention of natural corridors for the lynx to come and go in the Crazy Mountain range.¹⁶⁸

Plaintiffs also took issue with the Gallatin Forest Plan Clean Up Amendment, passed in 2015.¹⁶⁹ The original

¹⁵⁵ *Native Ecosystems Council v. Erickson*, 330 F.Supp.3d 1218, United States District Court, D. Montana, Missoula Division (2018).

¹⁵⁶ *Native Ecosystems Council*, 330 F.Supp.3d at 1226.

¹⁵⁷ *Id.* at 1226-7.

¹⁵⁸ P.L. 113-79; 16 U.S.C. §§ 6591a, 6591b.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Native Ecosystems Council*, 330 F.Supp.3d at 1234.

¹⁶² *Id.* 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11

¹⁶³ *Id.* at 1235.

¹⁶⁴ *Id.*

¹⁶⁵ 16 U.S.C. § 6591b(b)(1)(B).

¹⁶⁶ *Native Ecosystems Council*, 330 F.Supp.3d at 1236.

¹⁶⁷ *Id.* at 1235-36.

¹⁶⁸ *Id.* at 1237.

¹⁶⁹ *Id.*

Forest Plan was promulgated in 1987, and the Amendment had modified, revised, or removed over 56 provisions of the original Plan.¹⁷⁰ Plaintiffs were concerned with two provisions of that Amendment relating to natural foliage cover for big game species and old growth forest, respectively.¹⁷¹ Plaintiffs argued that the agencies did not use the “best available science” or conduct a proper analysis of the Amendment’s effects and therefore threatened the critical habitat of the native elk population.¹⁷² This is somewhat unusual because one amended standard appeared to contain more detail in elk habitat specifics.¹⁷³ Most of Plaintiffs’ other arguments revolved around definitions of terms such as “good cover” and “total area”, arguing that the Amended Standard defined these terms to make them less favorable to elk habitat.¹⁷⁴ Plaintiffs were also concerned that new measurements of old growth forest would leave wildlife with inadequate protection.¹⁷⁵ The Court noted that the agencies had relied on the latest data and reports compiled by their experts, and because Courts must generally defer to agency expertise, the Court saw no reason why it should not do so here.¹⁷⁶ The Court also disagreed with Plaintiff’s arguments regarding the definitions in the Amended Standard, holding that in light of the agencies’ findings most of these terms and the measurements used to calculate them ended up producing the same result, and would have little adverse impact on the local elk population.¹⁷⁷ The Court also held that the agencies’ new standard for old growth forest would leave a requisite amount, and that the agencies did not require a new EIS.¹⁷⁸

Therefore the Court held that USFS and FWS had not violated any of the major environmental acts, that their actions did not pose a risk to local wildlife habitats, and

that the new or revised standards adequately protected Montana forests.¹⁷⁹

—330 F.Supp. 3d 1218 (D. Mont. 2018).

b. Alliance for the Wild Rockies v. Savage

Gabrielle Cunningham

The U.S. Forest Service (USFS) and Fish and Wildlife Service (FWS) plan to implement a land management program, the East Reservoir Project (Project), on the Kootenai National Forest in Montana.¹⁸⁰ The Project includes logging, thinning, and road construction in an area where threatened species, such as the Canada lynx and the Cabinet-Yaak grizzly bear, reside.¹⁸¹

Alliance for the Wild Rockies (Plaintiff) filed this lawsuit against USFS and the FWS to enjoin the Project. Plaintiff alleged that USFS’s approval of the Project was arbitrary and capricious because it relied on the Northern Rocky Mountain Lynx Management Direction (Amendment) to determine the impact the Project would have on the lynx’s habitat.¹⁸² Plaintiff argued that USFS should have consulted with FWS instead of relying on the Amendment, pursuant to section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2).¹⁸³ USFS began consultation with FWS while this appeal was pending, rendering that issue moot in this case.¹⁸⁴ Second, Plaintiff alleged that USFS acted arbitrarily and capriciously in approving the Project without complying with the Motorized Vehicle Access Amendments (Access Amendments).¹⁸⁵ The Access Amendments create guidelines and standards for USFS lands with grizzly bear populations.¹⁸⁶ Plaintiff alleged that

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1238.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1239-43.

¹⁷⁵ *Id.* at 1243.

¹⁷⁶ *Id.* at 1239.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1243-44.

¹⁷⁹ *Id.* at 1246.

¹⁸⁰ *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1028 (9th Cir. 2018).

¹⁸¹ *Id.*

¹⁸² *Id.* at 1029.

¹⁸³ *Id.*; This issue was previously addressed in *Cottonwood Environment Law Center v. U.S. Forest Service*, 789 F. 3d 1075, where the Ninth Circuit held that USFS was required to reinitiate consultation with FWS before determining the Project’s impact. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

“the total road maintenance and construction in an area in which the Cabinet-Yaak grizzly bears are found exceeds the total road mileage ‘baseline’ standard’ by the Access Amendments and a[] . . . Grizzly Bear Recovery Plan.”¹⁸⁷

Before approving the Project, USFS conducted a biological assessment of the Project’s impact on threatened species, such as the Canada lynx and Cabinet-Yaak grizzly bear.¹⁸⁸ From this assessment, USFS determined that the Project “may affect, [but] is not likely to adversely affect” either species.¹⁸⁹ After consultation with FWS, USFS published an Environmental Impact Statement (EIS), as required by the National Environmental Policy Act (NEPA).¹⁹⁰

The Ninth Circuit determined that Plaintiff’s first claim of a violation of ESA § 7 was moot because of USFS’s consultation with FWS while the appeal was pending.¹⁹¹ The district court granted the agencies summary judgment on this claim, which the Ninth Circuit vacated and remanded with instruction to dismiss the claim as moot.¹⁹²

Plaintiff further argued that the agencies’ conclusion that the Project would not increase total road miles over the maximum allowed in the Access Amendments was arbitrary and capricious.¹⁹³ The Ninth Circuit reviewed the district court’s decision to grant summary judgment de novo.¹⁹⁴ The agencies alleged that Plaintiff waived its claim on this matter by failing to raise the argument during earlier proceedings.¹⁹⁵ While Plaintiff did not file an objection in a timely manner, USFS failed to disclose its plans for the area involving the Cabinet-Yaak grizzly bear’s habitat.¹⁹⁶ Due to this failure, Plaintiff raised its claim at the earliest possible opportunity, and therefore did not waive its claim.¹⁹⁷

Within the Kootenai National Forest, there are designated “recovery zones,” specified in the Grizzly Bear Recovery Plan (Recovery Plan).¹⁹⁸ These zones aim to restore the population in the area to at least one hundred bears.¹⁹⁹ The Recovery Plan “also designates areas outside the recovery zones that grizzly bears sometimes frequent, called ‘Bears Outside of Recovery Zones’ or ‘BORZ polygons.’”²⁰⁰ The Project overlaps with the Tobacco BORZ polygon in some areas.²⁰¹ USFS concluded that there would be a total reduction of 0.3 miles of road in the Tobacco BORZ polygon, based on construction, decommissioning, and assigning road numbers to roads in the area.²⁰² The Ninth Circuit determined that this analysis does not comply with the Access Amendments’ requirement for USFS to examine whether the Project will exceed the baseline established for the BORZ polygon.²⁰³ Finally, USFS committed clear error by failing to include the undetermined roads in its calculation of total road mileage.²⁰⁴

In conclusion, Plaintiff should have been granted summary judgment by the district court on its claims that the agencies acted arbitrarily and capriciously.²⁰⁵ The Ninth Circuit reversed and remanded this claim.²⁰⁶ Plaintiff’s claim involving the lynx consultation was vacated by the Ninth Circuit, and remanded with instructions to dismiss the claim as moot.

—897 F.3d 1025 (9th Cir. 2018).

c. In re Big Thorne Project

Emily Michienzi

In May 2017, the Ninth Circuit Court of Appeals was asked to review the District Court for the District of Alaska’s determination that the Forest Service (USFS) did not act arbitrarily and capriciously in concluding that the Tongass

¹⁸⁷ *Id.* at 1029-030.

¹⁸⁸ *Id.* at 1030.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1031.

¹⁹² *Id.* at 1032.

¹⁹³ *Id.* at 1033.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1034.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1035.

²⁰² *Id.*

²⁰³ *Id.* at 1036.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1037.

²⁰⁶ *Id.*

National Forest plan satisfied the agency's obligation under the National Forest Management Act (NFMA). The NFMA requires the USFS to develop a Forest Management Plan (Forest Plan) that will maintain viable populations of native and desirable non-native vertebrates.²⁰⁷ In addition, the NFMA requires the agency to find that projects, like The Big Thorne logging project, comply with the Forest Plan before the agency approves it.²⁰⁸ The Big Thorne Project is expected to log more than 6,200 acres and create over 80 miles of roads on the island.²⁰⁹

On the Prince of Wales Island, an old growth rain forest the size of Delaware and off the coast of Alaska, a small population of wolves lives off the deer population.²¹⁰ In 2008, the USFS declined to list the wolves under the Endangered Species Act, but prepared an assessment of the wolves and the island's ability to support the wolf population.²¹¹ This assessment stated that there were not enough deer on the island to support a stable wolf population and that there were too many roads on the island, which allowed hunters to access the deer populations further inland.²¹² Despite these findings, USFS approved the Big Thorne Project, which planned to increase logging and road construction on the island.²¹³

NFMA

The first issue of the case is whether USFS "unlawfully concluded that its forest plan would ensure the continued and well distributed existence of the Alexander Archipelago wolf."²¹⁴ The court found that USFS met its obligation under the National Forest Management Act (NFMA) to maintain the native population because NFMA is about managing competing interests, rather than

specifically protecting endangered animals like the Endangered Species Act.²¹⁵ The Service met its obligation when it created the wolf assessment, and the methods by which the Service attempts to maintain the wolves on the island are discretionary given NFMA's balancing of competing interests.²¹⁶

Big Thorne Project

In application to the Big Thorne Project, the Court found that since NFMA allows the Service to weigh competing interests, such as maintenance of a viable wolf population against increasing the number of jobs available, the project was in line with the forest plan.²¹⁷ As long as the wolf population remains viable on the island, the Forest service has the discretion to choose to increase the logging and road construction on the island.²¹⁸ In addition, the Court found that the USFS did not act arbitrarily and capriciously.²¹⁹ The USFS rationally connected the studies surrounding the project's impact on the wolves, to its decision to allow the increased logging and road construction given the competing interests.²²⁰

Conclusion

The Court affirmed the lower court's decision that the USFS met its legal obligations under the NFMA and rationally explained its decision to allow the Big Thorne Project.

—857 F.3d 968 (9th Cir. 2017).

²⁰⁷ *In re Big Thorne Project*, 857 F.3d 968, 973 (9th Cir. 2017).

The NFMA requires the Forest Service to create a Forest Plan that sets the land use and resources goals for each national park. New projects in the national parks must comply with the Forest Plan for that park. The NFMA regulations require the Forest Plans to maintain viable of the native and desirable non-native vertebrates. The provisions concerning wolves were added to the Tongass National Forest Plan in 2008.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 972.

²¹⁰ *Id.* at 973. The wolf population on this island is known as the Alexander Archipelago wolf.

²¹¹ *Id.* at 973-74.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 974.

²¹⁵ *Id.* at 976.

²¹⁶ *Id.*

²¹⁷ *Id.* at 976-77.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 975.

d. *Native Ecosystems Council v. Marten*

Milan Spampinato

In April 2018, environmental groups brought suit in the United States District Court for the District of Montana against the U.S. Forest Service (USFS) and U.S. Fish and Wildlife Service, alleging that these agencies failed to conduct a consultation on a forest plan amendment (“Amendment 51”) despite its effect on threatened lynx species, in violation of the Endangered Species Act (ESA).²²¹

The pending case involves the USFS’s North Hebgen Project in the Custer-Gallatin National Forest.²²² The Custer-Gallatin National Forest spans from south central Montana to northwestern South Dakota.²²³ Plaintiffs alleged that Amendment 51 replaced the previous standard requiring 30% retention of “old growth” forest with a lesser standard relating to “over-mature” forest, which would ultimately allow the North Hebgen Project to comply with the prescribed forest plan.²²⁴ Plaintiffs explain their concern that the replacement of the “old growth” standard with the “over-mature” standard has the potential to affect wildlife that is normally associated with “old growth.” In a statement in Amendment 21, USFS conceded that lynx are commonly associated with “old growth” forest; therefore, Amendment 51 has the potential to affect lynx.²²⁵ USFS also conceded that Amendment 51 might have a beneficial effect on lynx and other animals.²²⁶

Ultimately, plaintiffs sought a preliminary injunction against the North Hebgen Project while the court determines whether defendants failed to conduct ESA Section 7 consultation on Amendment 51 in regard to whether the plan will affect lynx or lynx critical habitat.²²⁷

First, on June 29, 2018, the court denied the agencies’ motion to strike the extra-record submissions (that lynx are an “old growth” species) and acknowledged the court’s discretion to allow the supplementation of the administrative record to add that lynx are an “old growth” associated species, although plaintiffs failed to raise any arguments requiring supplementation of the record.²²⁸

Second, the court addressed the required elements for a preliminary injunction.²²⁹ Typically, a party seeking a preliminary injunction must establish: 1) it is likely to succeed on the merits; 2) it is likely to suffer irreparable harm without preliminary relief; 3) the balance of equities tips in the moving party’s favor; and 4) the preliminary injunction is in the public interest.²³⁰ However, the preliminary injunction test is altered for ESA in favor of protected species for the balance of equities and public interest factors.²³¹ Regarding the likelihood of success on the merits, the court held that plaintiffs established “fair ground for litigation and thus for more deliberate investigation” into whether Amendment 51 has the potential to affect lynx.²³² The court highlighted how certainty and probability of success is not necessary, as the question merely involves an inquiry of the “fair chance of success on the merits.”²³³ Any agency actions that may affect species or critical habitat must require some consultation under the ESA, even if it is later determined that the species will not be affected.²³⁴ The court also addressed the agencies’ concession that Amendment 51 could have a “potential effect on wildlife associate with old growth.”²³⁵ The court reasoned that because lynx may be present in areas near the project, the project activities should not proceed in a manner that would diminish the “old growth” forest habitat of the snowshoe hares and lynx.²³⁶

²²¹ *Native Ecosystems Council v. Marten*, No. CV 18-87-M-DLC, 2018 WL 3831339, *1, *1 (D. Mont. Aug. 13, 2018).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at *2.

²²⁸ *Id.*

²²⁹ *Id.* at *3.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at *5.

²³³ *Id.* at *4.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at *5.

Regarding irreparable injury, Ninth Circuit precedent states “irreparable injury should not be an onerous task for plaintiffs.”²³⁷ Michael Garrity of the Alliance for the Wild Rockies (AWR) stated that members have an interest in viewing the species in the “old growth” habitat.²³⁸ Garrity also stated that, if logging occurs, there will be irreparable harm to the habitat.²³⁹ However, the agencies argued that (1) plaintiffs failed to demonstrate that irreparable harm will occur solely from the North Hebgen project; (2) plaintiffs’ delay in seeking relief demonstrated a lack of urgency; and (3) plaintiffs’ injunction, if any, should be limited only to the portions of the Project that could affect the lynx habitat.²⁴⁰ The court dismissed the agencies’ arguments because the establishment of irreparable harm is a non-onerous task in ESA cases, the delay of months does not affect plaintiffs’ request, and the reduction of old growth forest may affect potentially present lynx in surrounding areas.²⁴¹

Ultimately, plaintiffs’ motion for a preliminary injunction was granted and the agencies are enjoined from any further action on the North Hebgen Project until the case is decided on the merits.²⁴²

—2018 WL 3831339 (D. Mont. Aug. 13, 2018).

e. *Western Watersheds Project v. USDA-APHIS Wildlife Services*

Xavier Donajkowski

The U.S. Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS), through its Wildlife Services program, provides protections to farmers against wildlife predators that threaten livestock.²⁴³ After years of performing these services for Idaho farmers, Wildlife Services endeavored to expand its activities to killing and removing predators classified as game animals and protected species.²⁴⁴ In this case, Western Watersheds

Project and other environmental agencies sued to compel Wildlife Services to produce an Environmental Impact Statement (EIS) for these activities.

Wildlife Services has not prepared a new EIS for its activities in Idaho, instead carrying out its duties under Environmental Assessments (EA) drafted in 1992 and 2002.²⁴⁵ In 2015, Wildlife Services solicited comments and published a draft of a new EA to update its alternatives for predator damage management.²⁴⁶ The proposed EA contained five alternatives to the established methods, including the “preferred method” of expanding its existing activities to encompass killing predators to protect game animals and protected species.²⁴⁷

The Bureau of Land Management and Forest Service both expressed concern that the draft EA (1) did not present an objective analysis of environmental impacts; (2) presented no guarantee of the success of PDM in protecting agricultural lands; (3) failed to “evaluate...likely environmental effects;” and (4) ignored the influence of site-specific factors on the efficacy of predator removal.²⁴⁸ Despite this opposition, Wildlife Services submitted its draft EA without amendments and issued a Decision and Finding of No Significant Impact in November 2016, without filing an EIS.²⁴⁹

An agency taking “major Federal actions significantly affecting the quality of the human environment,” agencies, including Wildlife Services, must execute an EIS.²⁵⁰ An action’s status as “significant” depends on context (local, regional, or national) and intensity, or severity.²⁵¹ In *Western Watersheds Project*, the court focused on determining whether Wildlife Services’ draft EA described an action that required an EIS.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at *5-*6.

²⁴¹ *Id.*

²⁴² *Id.* at *6.

²⁴³ *Western Watersheds Project v. USDA APHIS Wildlife Services*, 320 F.Supp.3d 1137, 1139 (2018).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1140.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1141-42.

²⁴⁹ *Id.* at 1146.

²⁵⁰ *Id.*

²⁵¹ *Id.*

First, the court considered whether the federal action was “controversial,” in that it raised “substantial question[s] as to whether a project may cause significant degradation of some human environmental factor” or whether there is “a substantial dispute” about the action’s “size nature, or effect.”²⁵² Second, the court considered whether “uncertainty may be resolved by further collection of data.”²⁵³ On these factors, the court held that the Wildlife Services’ responses and data were insufficient to allay concerns, thus holding these factors in favor of the creation of an EIS.²⁵⁴ Third, the court considered whether the activity takes place in lands with unique geographic characteristics.²⁵⁵ On this factor, the court held that because Wildlife Services predicted that there was a high probability that it would operate in a Wilderness Study Area and an Area of Critical Concern, this factor also favored the creation of an EIS.²⁵⁶

In conclusion, the court, unconvinced by Wildlife Services’ responses to concerns made by credible and experienced federal agencies, concluded that Wildlife Services improperly failed to create an EIS and granted summary judgment in favor of Western Watershed Council.²⁵⁷

—320 F.Supp. 3d 1137 (D. Idaho 2018).

f. *Kathrens v. Zinke*

Victoria Nelson

In August 2018 the U.S. District Court of for the District of Montana decided a case brought by Ginger Kathrens and The Cloud Foundation, an animal rights organization.²⁵⁸ The case was brought against Ryan Zinke, the Department of the Interior, and the Bureau of Land Management (BLM) over the BLM’s plan to remove 17 wild horses from public land in the Pryor Mountain Wild Horse Range.²⁵⁹ Plaintiffs alleged that the removal of some of these horses from the range violated the Wild Free-Roaming Horses

and Burros Act (WHA) and National Environmental Policy Act (NEPA).²⁶⁰ They sought a temporary restraining order and preliminary injunction.²⁶¹

BLM’s plan to remove these horses is predicated on its goal of keeping the herd at a responsible level so as not to overpopulate the available range.²⁶² The population goal for the range as set forth in 2009 is between 90 and 120 horses.²⁶³ Currently, there are 154 horses on the land, which BLM worries is causing damage to the range for future generations of wild horses.²⁶⁴ To address these concerns, BLM decided to begin removing horses from the herd, and through informal rulemaking, which included a notice and comment period, decided that the best way to thin the herd was to remove 17 select horses aged one to four and to implement certain modifications to the on-going fertility program.²⁶⁵

Part of BLM’s duty is to protect the genetic diversity of the herd, including ancient blood lines and certain abnormal colors and markings.²⁶⁶ Plaintiffs assert, much as they did



BLM, [Flickr](#)

²⁵² *Id.*

²⁵³ *Id.* at 1146-47.

²⁵⁴ *Id.* at 1147-50.

²⁵⁵ *Id.* at 1147.

²⁵⁶ *Id.* at 1150.

²⁵⁷ *Id.* at 1147, 1150.

²⁵⁸ *Kathrens v. Zinke*, 323 F. Supp.3d 1142, 1144 (2018).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 1145.

²⁶³ *Id.*

²⁶⁴ *Id.* at 1146.

²⁶⁵ *Id.* at 1147.

²⁶⁶ *Id.* at 1151.

in their comment to the proposed rules, that some of the 17 horses selected will cause certain male blood lines to disappear as well as some distinctive markings and colors, in violation of the WHA and NEPA.²⁶⁷ The Court found that because BLM did not evaluate all factors, including some congressionally mandated factors, and did not give an adequate explanation, the agency's decision was arbitrary and capricious.²⁶⁸ The Court also found that the BLM's reliance on the population levels from 2009 was arbitrary and capricious.²⁶⁹

Based on these findings, the judge determined that plaintiffs had raised serious questions about BLM's actions under WHA and therefore declined to address the NEPA claims.²⁷⁰ The Court next considered whether, due to these serious questions, it should issue a temporary restraining order in favor of plaintiffs.²⁷¹ The Court found that the balance favored plaintiffs because the potential harms were great and irreparable and the government's burden was mostly an increase in inconvenience.²⁷² The Court also held that there were serious questions on the merits and that if the relief was not granted then there could be great harm to the environment through the loss of certain characteristics and bloodlines in these horses.²⁷³

Therefore the Court issued a temporary restraining order until a later hearing could be held to determine the fate of the injunction sought by plaintiffs.²⁷⁴

—323 F. Supp. 3d 1142 (D. Mont. 2018).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1152-53.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1153.

²⁷¹ *Id.* at 1553-54.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 1155.

III. Energy, Mining and Other Environmental Permitting

a. *American Rivers v. Federal Energy Regulatory Commission*

Gage Allan Bowman

This case concerned the Coosa River, which flows over 10,161 square miles in Alabama, Georgia, and Tennessee.²⁷⁵ There are nine hydroelectric plants along the river, seven of which are operated by the Alabama Power Company.²⁷⁶ The Federal Energy Regulatory Commission (FERC) grants licenses for these plants.²⁷⁷ Before granting a license, FERC must decide whether the recipient of the license will most efficiently operate the plant.²⁷⁸ In addition, FERC must also consider the environmental impact of federal actions, including the granting of the license to operate the plant.²⁷⁹

Under the National Environmental Policy Act (NEPA), the agency must conduct an Environmental Assessment (EA) when ecological effects are likely to result from federal action.²⁸⁰ If the effects will not be significant, the agency must explain why; if the effects likely will be significant, the agency must conduct an Environmental Impact Statement (EIS) to explore alternatives and explain how the agency's decision will follow existing law.²⁸¹

The other Act at issue in this case is the Endangered Species Act (ESA), implemented by the U.S. Fish and Wildlife Service (FWS), which must ensure that other agencies take into consideration how their actions will impact protected wildlife.²⁸² The Service will then issue a "biological opinion" describing the likely impact of the agency action on listed species; even if the listed species is threatened with total disappearance from the affected area, the opinion must still explain the likelihood of

²⁷⁵ *American Rivers v. Federal Energy Regulatory Commission*, 895 F.3d 32 (D.C. Cir. 2018).

²⁷⁶ *Id.* at 38.

²⁷⁷ *Id.* at 37.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 37-38.

²⁸⁰ 42 U.S.C. § 4321, 40 C.F.R. §§ 1501.4; 1508.13.

²⁸¹ 42 U.S.C. § 4332(C).

²⁸² 16 U.S.C. § 1531, 50 C.F.R. § 402.01(b).

incidental takings of the listed species, how these takings will affect the continued existence of the species, and what can be done to mitigate the effects of such takings.²⁸³

In 2007 licenses for Alabama Power's Coosa River plants were set to expire, and two years beforehand Alabama Power reapplied for a new, consolidated license for all of its projects.²⁸⁴ FERC published Alabama Power's application in the Federal Register.²⁸⁵ Several conservation organizations opined on the process, among them American Rivers.²⁸⁶ About a year and half later, FERC issued its EA for the application, concluding that it was not a "major federal action significantly affecting the environment."²⁸⁷ In 2012, FWS issued a Biological Opinion ("BiOp") concluding that the newly licensed project would not threaten any of the nine listed species or critical habitats in the Coosa River.²⁸⁸ In 2013 FERC granted Alabama Power a new, 30-year license to operate the Coosa Project.²⁸⁹ Although Alabama Power had certain environmental responsibilities, such as maintaining water quality through aeration to ensure certain dissolved oxygen levels in the water, FERC actually weakened these responsibilities in its newly issued license, since Alabama Power only had to maintain the designated water quality standards while the plants were generating electricity.²⁹⁰ American Rivers took issue with this, and in 2016 filed a petition for review of the Licensing Order and the BiOp, claiming that they violated the Federal Power Act, NEPA, and the ESA.²⁹¹

Defendants had claimed that plaintiffs lacked standing to sue, so the Court briefly addressed standing. The Court held that American Rivers had suffered an injury-in-fact from the licensing (i.e., impaired enjoyment of the Coosa River due to environmental degradation), that causation

could be established between the injury and the licensing of the plant, and that the injury could be redressed by nullifying the licensing order.²⁹² This gave American Rivers associational standing.²⁹³

The Court then proceeded to the issues on the merits.²⁹⁴ American Rivers took issue with the BiOp issued by FWS, and as per § 706 of the Administrative Procedure Act, the



Court must review agency decisions under the "arbitrary and capricious" standard.²⁹⁵ The Court noted that the Opinion itself described the long history of industrial development on the Coosa River and the gradual, degrading effect this had on the environment.²⁹⁶ However, despite acknowledging the history of degradation to the Coosa River, FWS did not factor this historical impact into its analysis.²⁹⁷ The agency did not consider the "aggregate effects of the factors analyzed under 'environmental baseline,'" as stated in the FWS handbook.²⁹⁸ Further, the BiOp had noted the "precarious" state of certain wildlife

²⁸³ 50 C.F.R. § 402.14(g)(4), 16 U.S.C. § § 1536(a)(2), 1536(b)(4)(C).

²⁸⁴ *American Rivers*, 895 F.3d at 39.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 40.

²⁹¹ *Id.*

²⁹² *Id.* at 40-43.

²⁹³ *Id.* at 42.

²⁹⁴ *Id.* at 44.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 46.

²⁹⁷ *Id.* at 46.

²⁹⁸ *Id.* at 46

species, and enumerated several contributory factors such as a lack of dissolved oxygen, increased sedimentation, and loss of habitat that could all affect wildlife species living in the Coosa River.²⁹⁹

Finally, the Court noted that the BiOp had somewhat breezily passed over the Incidental Take requirement, without providing an actual number of how many organisms would need to be taken before re-consultation could take effect.³⁰⁰ Because FWS had all these factors under consideration in its BiOp, but then proceeded to state that there would be no adverse impact on the Coosa River environment, the Court held that the agency's decision was arbitrary and capricious.³⁰¹ Because FERC had relied heavily on FWS's BiOp in making its own EIS, the Court applied much the same analysis.³⁰² FERC differed in its conclusions from the FWS, since it determined that relicensing the project for 30 years would have no adverse environmental effect after conducting no field studies, relying on scientific decade from over a decade before the case at hand, and considered high fish mortality rates to be normal.³⁰³ Therefore, the Court held the Commission did not meet its NEPA requirements.³⁰⁴

The Court ultimately granted Plaintiff's petition, and vacated and remanded the FERC's decision.³⁰⁵

—895 F.3d 32 (D.C. Cir. 2018).

b. League of Conservation Voters v. Trump

Elaina Cipic

The Outer Continental Shelf Lands Act (OCSLA) was enacted to “define[] the OCS as all submerged lands lying seaward of state coastal waters (3 miles offshore) which are under U.S. jurisdiction,” and “provides guidelines for

implementing an OCS oil and gas exploration and development program.”³⁰⁶ Under OCSLA, President Barack Obama withdrew 128 million acres of the Beaufort and Chukchi Seas from oil and gas leasing to provide “subsistence for Alaska Natives” and to “protect marine mammals and other wildlife” as “[s]eismic surveys use loud, frequent pulses” which can result in hearing loss and death in various species of fish and marine mammals.³⁰⁷ League of Conservation Voters and other environmental groups brought a claim against the federal government alleging that Executive Order 13795 signed by President Donald Trump “violated the separation of powers doctrine, and constituted an ultra vires action” as it allowed these previously withdrawn and protected areas of the Beaufort and Chukchi Seas to again be used for oil and gas leasing.³⁰⁸ Plaintiffs allege that “[n]either OCSLA nor any other statute authorizes the President to re-open to for disposition areas withdrawn under OCSLA section 12(a).”³⁰⁹

Defendants Donald Trump, Ryan Zinke, Wilbur Ross, and Intervenor Defendants American Petroleum Institute (API) and State of Alaska filed motions to dismiss, first claiming sovereign immunity.³¹⁰ The U.S. District Court for the District of Alaska held that because Plaintiffs are claiming that the President did not act within the powers delegated to him, sovereign immunity does not apply.³¹¹ As such, no waiver of sovereign immunity is required, and Plaintiffs are allowed to bring the case.³¹² Second, Defendants alleged that Plaintiffs lack a private cause of action and identified no statute providing them a right of action to enforce OCSLA or the Property Clause.³¹³ The Court held that because Plaintiffs are not attempting to enforce a federal law through their claim, a specific statute

²⁹⁹ *Id.* at 46-47.

³⁰⁰ *Id.* at 48.

³⁰¹ *Id.* at 47.

³⁰² *Id.* at 55.

³⁰³ *Id.* at 51-53.

³⁰⁴ *Id.* at 55.

³⁰⁵ *Id.*

³⁰⁶ Bureau of Ocean Energy Management, *OCS Lands Act History*, <https://www.boem.gov/OCS-Lands-Act-History/> (last visited Dec. 25, 2018).

³⁰⁷ *League of Conservation Voters v. Trump*, 303 F.Supp.3d 985, 990-91 (D. Alaska 2018).

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 991.

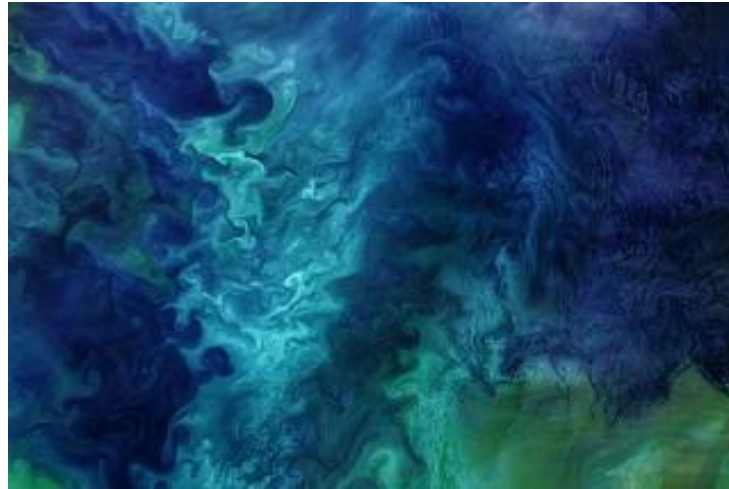
³¹⁰ *Id.* at 989, 993.

³¹¹ *Id.* at 994.

³¹² *Id.*

³¹³ *Id.* at 993-94.

is not required to bring a claim alleging that the President exceeded his authority.³¹⁴ Third, Defendants alleged that “a court cannot issue declaratory relief against the President of the United States.”³¹⁵ However, Plaintiffs were only asking for a declaration that he exceeded his authority, not seeking an injunction against the President directly.³¹⁶ By receiving that declaration, Plaintiffs could then seek an injunction against other officials.³¹⁷



NASA. Flickr

Finally, Defendants alleged that “Plaintiffs lack Article III standing” for lack of a harm that is imminent, geographically specific, and particularized.³¹⁸ The Court disagreed.³¹⁹ For imminence, Plaintiffs were able to show that many companies were already interested in participating in conducting seismic surveys even though no oil leases were approved at that time.³²⁰ Plaintiffs were also able to show that the government would be quick to grant permits for the seismic surveying to those that applied for them.³²¹ For geographic specificity, the “degree of specificity required depends on the size of the area that is impacted by the government action.”³²² Defendants claim that listing an area of 128 million acres is not specific enough to meet this standard.³²³ The Court found that Plaintiffs were able to define the area despite its size when stating, “that they visit or otherwise use and enjoy the Atlantic Ocean, including near deepwater canyons, the Chukchi and Beaufort Seas, and coastal regions adjacent to those waters.”³²⁴ This description also lends itself to the

particularized element of this standard. Plaintiffs cannot allege an injury or harm to the environment; they must be able to show an injury or harm to themselves.³²⁵ Because oil exploration and seismic surveying in this area would affect the habitats and ecosystems of the wildlife that live there, it would also have an impact on how Plaintiffs use that area as mentioned

above.³²⁶ The Court thus found a particularized injury to Plaintiffs.³²⁷

In a separate motion, Intervenor-Defendant API also alleged that claims made under OCSLA must be reviewed by the U.S. Court of Appeals for the D.C. Circuit.³²⁸ However, because Plaintiffs are not bringing a claim challenging a leasing plan under § 1344 pursuant to § 1329(c)(1)” the District of Alaska has jurisdiction.³²⁹

Defendants’ motions to dismiss were denied and the Parties then filed motions for summary judgment, followed by oral argument on Nov. 9, 2018.

—303 F.Supp. 3d 985 (D. Alaska 2018).

c. Sierra Club v. U.S. Department of Interior **Shelby Devuyst**

The Defenders of Wildlife, the Sierra Club, and the Virginia Wilderness Committee (“Petitioners”) challenged (1) an Incidental Take Statement (ITS) issued by the U.S. Fish and Wildlife Service (FWS) that authorized the Atlantic

³¹⁴ *Id.* at 994.

³¹⁵ *Id.* at 993.

³¹⁶ *Id.* at 995.

³¹⁷ *Id.*

³¹⁸ *Id.* at 993, 995.

³¹⁹ *Id.* at 1001.

³²⁰ *Id.* 998-99.

³²¹ *Id.* at 997.

³²² *Id.* at 1000.

³²³ *Id.* at 999.

³²⁴ *Id.* at 1000.

³²⁵ *Id.*

³²⁶ *Id.* at 1001

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 1002.

Coast Pipeline (ACP) to “take” five species that are listed as threatened or endangered; and (2) a right-of-way granted by the National Park Service (NPS) for the pipeline to drill and pass beneath Blue Ridge Parkway and carve a path through the nearby forest.

These challenges were consolidated, but the focus of this brief is on the ITS challenge.

To “take” a species means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” (16 U.S.C. § 1532(19)). However, Congress created a narrow exception to the prohibition against take under the language of § 1539(a)(1)(B) that applies when “such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” Building the ACP implicates the ESA by requiring assurance that the construction will not jeopardize continued existence or result in habitat destruction for listed species.

To satisfy this requirement, the Federal Energy Regulatory Commission (FERC) consulted with FWS because the pipeline may affect listed species or critical habitat. FWS provided a Biological Opinion that addressed six threatened and endangered non-plant species, but concluded that the pipeline as a whole would not jeopardize their continued existence. However, since the pipeline would adversely affect individuals from each species, FWS issued an ITS to set an “amount or extent” of the anticipated take. Petitioners challenged the take limit for five of the species.

The Service declined to set numeric limits but instead used habitat surrogates, a way of defining take by the amount of adversely affected habitat rather than by the number of individuals harassed or killed, for the five species. Petitioners argue that FWS did not establish that a numeric take limit was impractical, that FWS did not establish a causal link between the pipeline and the habitat selected

for some of the species, and that the surrogate limits adopted are unenforceable because they set vague take limits (i.e. “small percent” or a “majority”).

The Fourth Circuit agreed with Petitioners’ argument that these take limits were arbitrary and capricious, with its analysis differing slightly for each species.

—899 F.3d 260 (4th Cir. 2018).

d. National Wildlife Federation v. National Marine Fisheries Service

Nicole Walker

Several environmental organizations (Plaintiffs) sued to challenge the National Marine Fisheries Service’s (NMFS) Endangered Species Act (ESA) biological opinion (“BiOp”) regarding salmonid species located in the Federal Columbia River Power System (FCRPS).³³⁰ Several Indian Tribes and the states of Washington, Montana, and Idaho intervened as defendants.³³¹ After several rounds of appeals and remands, a district court found several violations of the ESA, Administrative Procedure Act (APA), and National Environmental Policy Act (NEPA). Plaintiffs moved for injunctive relief, succeeding in part.³³² Defendants appealed.

Injunctive relief analysis

When seeking injunctive relief, a plaintiff is required to show likelihood of irreparable harm if preliminary relief is not granted.³³³

Irreparable harm is determined with reference to the purposes of the statute being enforced, in this case the ESA.³³⁴ Under the ESA, it is assumed that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction.³³⁵

³³⁰ *Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 806 (9th Cir. 2018).

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 817.

³³⁴ *Id.*

³³⁵ *Id.*



To accomplish its purpose of species conservation, the ESA takes steps to halt or reverse species extinction, which include protecting the remaining members of the species.³³⁶ For an injunction to require listing under the ESA, a plaintiff is not required to show an extinction level threat; instead, a “definitive threat of future harm to protected species” is required.³³⁷

Another requirement for injunctive relief requires that a sufficient causal connection exist between the irreparable harm and the activity to be enjoined.³³⁸ A causal

connection can be established by showing that the requested injunction would forestall the harm.³³⁹

Ninth Circuit’s findings

On review, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s finding of irreparable harm sufficient for injunctive relief.³⁴⁰ The lower court properly concluded that the FCRPS dam operations were likely to cause harm to the salmonids and that plaintiffs adequately showed personal harm as a result.

Dam operations account for most of the salmonid deaths as they migrate through the FCRPS.³⁴¹ Salmonid populations remain vulnerable to extinction from shock events and climate change.³⁴² Absent conservation efforts beyond those already in place, the listed species will remain in a “precarious” state.³⁴³ Because the FCRPS dam operations have degraded the critical habitat of the salmonids, the migration corridors no longer serve conservation efforts.³⁴⁴ A showing of significant improvement to the salmonids’ habitat does establish an absence of harm.³⁴⁵ Therefore, even though steps have been taken to improve salmonid habitat and ecosystem, that does not mean the harm has been eliminated.

Additionally, the district court properly concluded that plaintiffs showed irreparable harm to their own interests as a result of the harm to the listed species.³⁴⁶ To demonstrate personal irreparable harm, plaintiffs provided a declaration that an individual’s “recreational and aesthetic pursuits on Idaho’s rivers” depended on the salmonids’ health.³⁴⁷ The individual stated: “Fewer salmon mean fewer opportunities to see them, and because healthy salmon and steelhead populations are essential to my ability to completely enjoy the wonders of Idaho’s river, fewer salmon directly harm my enjoyment of these activities.”³⁴⁸

³³⁶ *Id.* at 818.

³³⁷ *Id.*

³³⁸ *Id.* at 819.

³³⁹ *Id.*

³⁴⁰ *Id.* at 820.

³⁴¹ *Id.* at 821.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 820.

³⁴⁶ *Id.* at 822.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

Conclusion

Plaintiffs demonstrated sufficient irreparable harm to support injunctive relief. Although there has been improvement to salmonid populations, a definitive threat of harm still exists. Because of the threat to the salmonids migration patterns, the Ninth Circuit also found that plaintiffs provided sufficient evidence of harm to an individual's personal enjoyment. Based on these findings, injunctive relief was proper.

—886 F.3d 803 (9th Cir. 2018).

e. *Bohmker v. Oregon*

Nicole Walker

In a challenge to an Oregon Senate bill temporarily prohibiting instream mining in state waters containing native salmon habitats, individuals sued Oregon's Attorney General and Director of the Oregon Department of State Lands.³⁴⁹ Plaintiffs sought an injunction to restrain the state from enforcing the law,³⁵⁰ arguing preemption by federal law.³⁵¹ Upon review, the U.S. Court of Appeals for the Ninth Circuit held that the law was not preempted by nor did it conflict with federal mining laws.

Senate Bill 3

In an effort to protect threatened fish populations, Oregon enacted Senate Bill 3 to prohibit the use of motorized mining equipment in rivers and streams containing essential habitat for indigenous anadromous salmon.³⁵² These permanent restrictions apply throughout Oregon and include rivers and streams located on federal lands.³⁵³

Federal Laws at Issue

1. Mining

Generally, federal mining law is designed “to encourage individual prospecting, exploration, and development of the public domain.”³⁵⁴ The Mining Act of 1872 allows for U.S. citizens to acquire mining claims by discovering mineral resources on federal lands.³⁵⁵ However, the Act also provides that their claims must be made in accordance with State laws.³⁵⁶

Individuals have exclusive control and dominion over public lands with a patented mining claim. However, Congress soon recognized that individuals were abusing federal mining laws by seeking mining claims on public lands with a purpose other than legitimate mining activity.³⁵⁷ There was increased concern over access to water for grazing, lands used for recreational activities, and improper management of lands with game and fish resources.³⁵⁸ To minimize such abuse, Congress enacted the Surface Resources and Multiple Use Act.³⁵⁹ This Act prohibited individuals from establishing a mining claim for purposes other than mining.³⁶⁰ This legislation sought to “encourage mining activity on public lands compatible with utilization, management, and conservation of surface resources.”³⁶¹

Later, Congress adopted the Mining and Minerals Policy Act which adopted a policy of developing the mining industry subject to environmental needs.³⁶²

2. National Forest

Federal laws governing national forests require the Secretary of Agriculture to protect national forests from destruction and depletion.³⁶³ Additionally, federal law requires that the Secretary of the Interior protect and prevent the unnecessary and undue degradation of public

³⁴⁹ *Bohmker v. Oregon*, 903 F.3d 1029, 1031 (9th Cir. 2018).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 1033.

³⁵³ *Id.*

³⁵⁴ *Id.* at 1034

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 1035.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 1036.

³⁶² *Id.*

³⁶³ *Id.* at 1038.

lands.³⁶⁴ Both the Secretary of Agriculture and Secretary of the Interior can protect national forests by imposing rules and regulations that govern land use of national forests.³⁶⁵

3. Granite Rock Decision

In *California Coastal Commission v. Granite Rock Co.*, the U.S. Supreme Court identified two ways for state law to be preempted.³⁶⁶ State law can be preempted if evidence exists that Congress intended “to occupy a given field[.]”³⁶⁷ Additionally, state law can be preempted to the extent that it conflicts with a federal law. Where it is impossible to comply with both state and federal law, or where state law creates an obstacle to accomplish congressional purposes and objectives, state law is preempted.³⁶⁸

The *Granite Rock* decision also distinguished between “land use planning” and “environmental planning.” Although no express definition was given, the decision provided guidance on how the two should be distinguished. “Land use planning” provides for a particular use of land whereas “environmental regulation” requires that no matter how land is used, the damage to the environment “is kept within prescribed limits.”³⁶⁹

The Court also assumed that state land use plans are to be preempted with respect to mining claims whereas state environmental regulations are not.³⁷⁰ Where a state has prohibited mining, this constitutes a “state land use plan” and is therefore preempted.³⁷¹ If the state imposes an environmental regulation whose “true purpose” is to prohibit or ban mining, then it is also preempted.³⁷²

Court Findings

Plaintiffs advanced several arguments for preemption including: 1) the Bill constitutes state land use planning; 2)

the Bill is prohibitory, not regulatory; and 3) the Bill is not a reasonable state environmental regulation.³⁷³

Applying *Granite Rock*, the Ninth Circuit held that Senate Bill 3 is an environmental regulation and therefore not preempted.³⁷⁴ The intended purpose of the Bill is to protect sensitive fish habitat, not to mandate land use.³⁷⁵ The Bill does not choose or mandate a particular use of the land; rather, the Bill limits one method of mining. The restricted mining method poses significant risks to the state’s natural resources, including fish and other wildlife.³⁷⁶ When looking at the intended purpose of the Bill, it is clear that regulation is efficient and structured to protect environmental interests.³⁷⁷

Next the Court stressed that it was unclear how to determine whether the Bill is prohibitory or regulatory in nature.³⁷⁸ Rather, the Court suggested that the Bill is both prohibitory and regulatory, agreeing with the federal government in its amicus brief that “in the process of identifying where its prohibitions apply it seems regulatory in nature.”³⁷⁹ Furthermore, the Court found that a state environmental regulation is permissible “so long as it does not pose an obstacle to Congressional purposes or make compliance with federal law impossible.”³⁸⁰

In addressing plaintiffs’ claim that the Bill is unreasonable, the Court agreed with the federal government that “[a] state law such as [Senate Bill 3] that is clearly intended to protect the natural environment by prohibiting the use of particular mining methods or equipment in carefully designated locations is not so at odds with Congress’s purposes that it is preempted by federal law.”³⁸¹

Conclusion

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* (citing 40 U.S. 572 (1987)).

³⁶⁷ *Id.* at 1039.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 1040.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1042.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 1045.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.* at 1051.

Relying primarily on federal mining law, national forest law, and the *Granite Rock* decision, the Ninth Circuit found that the district court properly rejected plaintiffs' claim; thus, Senate Bill 3 is not preempted by federal law.

—903 F.3d 1029 (9th Cir. 2018).

f. Pollinator Stewardship Council v. U.S. Environmental Protection Agency

Tedda Hughes

Pollinator Stewardship Council v. U.S. EPA is a case in which the court examined new guidelines the Environmental Protection Agency (EPA) used to register some pesticides.³⁸² Sulfoxaflor, manufactured by Dow Agrosciences LLC (Dow), was created to protect crops from injurious pests, and, being a neonicotinoid, also posed a risk to pollinators that safeguard crop survival.³⁸³ Based on the updated analytical process EPA developed for neonicotinoids, the registration of Sulfoxaflor was



premature.³⁸⁴ The case is an example of how courts approach new esoteric Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) questions.³⁸⁵

Under the FIFRA, it is unlawful to sell a pesticide that has not been registered and approved by EPA.³⁸⁶ Dow applied for approval of three products containing sulfoxaflor as their main ingredient in 2010.³⁸⁷ Per the norm, Dow submitted its research on the effects of sulfoxaflor with its application.³⁸⁸ In accordance with the FIFRA, EPA typically uses a cost-benefit analysis to review new pesticides for approval.³⁸⁹ However, EPA had recently implemented new guidelines for studying the effects of neonicotinoids on bees, as the pollinator populations began to plummet.³⁹⁰ Sulfoxaflor is a sulfoximine, which is a subclass of neonicotinoid.³⁹¹ Neonicotinoids are highly toxic to bees because they destroy an insect's nervous system, that is, if the insect is unfortunate enough to survive the original spraying.³⁹²

Initially, in January 2013, EPA conditionally approved sulfoxaflor with a maximum application rate limitation, in anticipation of more data to be collected and analyzed.³⁹³ This approval was based on Tier 1 and Tier 2 sulfoxaflor research Dow submitted with its application.³⁹⁴ Tier 1 data analyses the measured toxic effect of a pesticide on individual bees.³⁹⁵ Tier 2 research analyses the effect of pesticides on a colony of bees, because bees perform distinct duties and interact in various ways within the natural system.³⁹⁶ Dow erratically and inadequately conducted the Tier 2 research, leaving too many unanswered questions.³⁹⁷ In May 2013, EPA approved sulfoxaflor unconditionally although Dow had not conducted and submitted more research.³⁹⁸ The approval and registration required that Dow follow stringent

³⁸² *Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520 (9th Cir. 2015).

³⁸³ *Id.* at 526.

³⁸⁴ *Id.*

³⁸⁵ *NRDC v. United States EPA*, 857 F.3d 1030 (9th Cir. 2017), *Rohm & Haas Co. v. EPA*, 525 F. Supp. 921 (E.D. Pa. 1981).

³⁸⁶ 7 U.S.C.S. § 136.

³⁸⁷ *Id.* at 523.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 524.

³⁹¹ *Id.* at 525, 7 U.S.C.S. § 136a(a).

³⁹² *Id.* at 523.

³⁹³ *Id.* at 524. The rate limitation was 0.133 pounds of active ingredient per acre per application with a range of minimum days between applications.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 533.

³⁹⁸ *Id.* at 524.

application protocols, though EPA was confident that sulfoxaflor use would not have a catastrophic effect on bee populations.³⁹⁹ The plaintiff, disagreeing, brought an action to reverse EPA’s registration of sulfoxaflor.⁴⁰⁰ The 9th Circuit Court’s decision set the standard for interpreting EPA’s latest guidelines on neonicotinoids.

The circuit court vacated Dow’s unconditional registration of sulfoxaflor and remanded the matter for additional research, reasoning that there was not enough evidence to support EPA’s cost-benefit analysis results.⁴⁰¹ In his opinion, Judge Schroeder took care to decide on the data and specifically not the registration by stating “[m]oreover, on remand, a different result may be reached. Once EPA obtains adequate Tier 2 studies, it may conclude that a lower maximum application rate of sulfoxaflor is warranted, or that sulfoxaflor cannot be registered at all because of its effects on brood development and long-term colony strength.”⁴⁰² EPA must make decisions based on the perennially updated, sometimes conflicting, research of others. This requires updating requirements and analysis. Focusing on applicants’ data regarding neonicotinoids allows courts and the to make sound decisions.⁴⁰³

—806 F.3d 520 (9th Cir. 2015).

IV. Migratory Birds

a. *Turtle Island Restoration Network v. U.S. Department of Commerce* Emily Michienzi

In December 2017 the U.S. Court of Appeals for the Ninth Circuit was asked to determine whether the U.S. Fish and Wildlife Service (FWS) acted arbitrarily and capriciously in granting a special purpose permit under the Migratory Bird Treaty Act (MBTA) to the National Marine Fisheries Service (NMFS) that allowed for the incidental take of

migratory birds by commercial swordfish companies.⁴⁰⁴ In addition, the Court was asked to determine if NMFS acted properly when it determined that the loggerhead and leatherback sea turtles were in no jeopardy from extinction, as required by the Endangered Species Act (ESA) when it allowed the continuation of the shallow set longlining fishing practice in Hawaii.⁴⁰⁵

To catch swordfish in Hawaii, fisheries place a long line out in the ocean with many smaller fishing lines with hooks attached to the longline.⁴⁰⁶ This longline system accidentally ensnares sea turtles and various birds as bycatch.⁴⁰⁷ Originally, to deal with the bycatch of protected species, the agency placed strict limits on the amount of bycatch and on the number of lines the company could have.⁴⁰⁸ However, NMFS issued a final rule that raised the number of sea turtles and birds that could be accidentally caught and allowed for the continued operation of shallow set longlining, despite the practice’s negative impact on endangered turtles and birds.⁴⁰⁹ In addition, NMFS approved a permit to allow incidental take of seabirds that are trapped in the shallow set longlining, despite the negative impact this take would have on the seabird populations.⁴¹⁰

MBTA-Special Purpose Permit

First, the Court found that FWS’s decision to grant the NMFS a special purpose permit allowing the incidental taking of birds for a purpose not set out in the MBTA was arbitrary and capricious.⁴¹¹ FWS may issue a special purpose permit where activities are “related to migratory birds, [and] where the applicant makes a sufficient showing that the activity would be of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”⁴¹² The Court reasoned that

³⁹⁹ *Id.* at 528.

⁴⁰⁰ *Id.* at 523.

⁴⁰¹ *Id.* at 533.

⁴⁰² *Id.*

⁴⁰³ E.g. *NRDC v. U.S. EPA*, 857 F.3d 1030 (9th Cir. 2017).

⁴⁰⁴ *Turtle Island Restoration Network v. US Department of Commerce*, 878 F. 3d 725, 730 (9th Cir. 2017)

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 730-31.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 732.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 734.

⁴¹² 50 C.F.R. § 21.27(a).

FWS's interpretation of the regulation did not conform to the intent or plain language of the MBTA.⁴¹³ The phrase "other compelling justification" must be interpreted in relation to the words before it.⁴¹⁴ The Court found that while longline fishing does kill some migratory birds, it does not "relate to migratory birds" in a way that is beneficial to the birds, concerns research, or is of human concern for the birds.⁴¹⁵

ESA-Loggerhead Turtles

Under the ESA, the court found that the agency did not demonstrate a rational connection between the "no jeopardy" conclusion and the best available science indicating that climate change was threatening the loggerhead sea turtles.⁴¹⁶ "The ESA permits federal agencies to authorize actions that will result in the taking of endangered or threatened species only if the projected take 'is not likely to jeopardize the continued existence of any listed species.'"⁴¹⁷ The Court stated that since the turtles were already being threatened with extinction due to climate change and other environmental factors, the agency should not have only focused on the small number of turtles harmed by the fishing system itself.⁴¹⁸ Instead, NFMS should have shown a rational connection between its "no jeopardy" finding and the best available science, which stated that the turtles were in jeopardy.⁴¹⁹

ESA-Leatherback Turtles

The Court found that NMFS did not act arbitrarily or capriciously when it determined that the science relating to climate change's impact on leatherback turtles was insufficient to make a determination.⁴²⁰ Unlike with the loggerhead turtles, the agency did show a rational connection between its "no jeopardy finding" and the best available science as it relates to leatherback turtles.⁴²¹



U.S. FWS, [Flickr](#)

In addition, the court also found that the agency had a valid reason to limit the temporal scope of the science that it examined to twenty-five years.⁴²² While the agency must look at the best available science, it was within its discretion to limit the science to a reasonable number of years and to rely on science that was limited to the twenty-five year range.⁴²³

Conclusion

The Court reversed the district court's finding that the special purpose permit was not arbitrary and capricious. In addition, the Court reversed the district court's finding that the agency's determination that the loggerhead turtles were in no jeopardy was not arbitrary and capricious. This Court affirmed the district court's finding that the agency determination that the leatherback turtles were in no jeopardy was not arbitrary and capricious. The Court then remanded the case for judgment consistent with the opinion.

—878 F.3d 725 (9th Cir. 2017).

⁴¹³ *Turtle Island Restoration Network*, *supra* note 404, at 735.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 736.

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 739.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

b. *United States v. Obendorf*

Victoria Nelson

In July 2018 the U.S. Court of Appeals for the Ninth Circuit affirmed the conviction of Gregory Obendorf for violation of, and conspiracy to violate, the Migratory Bird Treaty Act (MBTA) by illegally baiting ducks.⁴²⁴ The Court held that the trial court had incorrectly applied jury instruction to Obendorf's case, but that the error was harmless.⁴²⁵

The investigation into Obendorf began in 2013 when a joint operation between the U.S. Fish and Wildlife Service (FWS) and Idaho Department of Fish and Game (IDFG) began to investigate several tips that Obendorf was baiting ducks on his farm land.⁴²⁶ Officers found over a two-year investigation that Obendorf was regularly leaving vast amounts of leftover corn on just one 15-acre section of his farmland and referred to this section as his "duck field".⁴²⁷ This was the only section of Obendorf's farmland that was not neatly combined and harvested, indicating that he was purposefully baiting ducks in violation of the MBTA.⁴²⁸ After multiple witness interviews, surveillance taping of the land, and a tour of the land by the defendant, Obendorf was charged with two counts of criminal activity: federal conspiracy under 18 U.S.C. § 371, and violation of 16 U.S.C. § 704(b)(2) by baiting the duck field in 2013 to facilitate duck hunting.⁴²⁹ These two charges are both Class A misdemeanors.⁴³⁰

The issue on appeal was over a mistake the district court made during Obendorf's initial trial when it introduced a certain exception to prosecution under the MBTA.⁴³¹ This exception was the "agricultural practice exception" or "safe haven exception" whereby under some circumstances farmers are immune from criminal prosecution if birds happened to be attracted to their fields due to normal farming practices.⁴³² However, this exception applies to

unlawful taking, but not unlawful baiting, and thus could not have immunized the defendant's conduct in unlawfully baiting migratory birds.⁴³³ The Ninth Circuit reviewed the error of including the exception in a jury instruction under a *de novo* standard of review,⁴³⁴ finding that even though the district court applied this "agricultural practice exception" incorrectly both in jury instructions and through evidentiary issues, that neither of these errors was anything but harmless because ample evidence was presented that Obendorf was attempting to bait ducks onto his property using techniques that the average farmer would consider wasteful and abnormal.⁴³⁵ Because the Ninth Circuit found these errors harmless, Obendorf's convictions were affirmed.⁴³⁶

—894 F.3d 1094 (9th Cir. 2018).

V. Deer and Chronic Wasting Disease

a. *Western Watersheds Project v. Christiansen*

Kaitlin Mee

The Jackson elk herd is one of the largest groups of elk in North America.⁴³⁷ Over the course of the year, the herd migrates across several borders including the Bridger-Teton National Forest, Grand Teton National Park, and the National Elk Refuge.⁴³⁸ In 2013 the herd's population was approximately 11,600, with less than ten percent interchange with adjacent herds. Elk herd movement is influenced by a variety of factors.⁴³⁹ Since 1998, wolves have influenced the herd's movement in the Gros Ventre drainage.⁴⁴⁰ As a result, the large group of elk collected in one feeding ground. States like Wyoming started providing

⁴²⁴ *U.S. v. Obendorf*, 894 F.3d 1094, 1094-95 (9th Cir. 2018).

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* at 1096.

⁴³² *Id.* at 1100.

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 1002 - 1104.

⁴³⁶ *Id.* 1104.

⁴³⁷ *Western Watersheds Project v. Christiansen*, No. 17-CV-202-NDF, 2018 U.S. Dist. at 5 (D. Wyo. Sept. 14, 2018).

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

supplemental food dating back to the 1900s to prevent die-offs.⁴⁴¹ Other benefits of the feeding include a reduction in damage to haystacks, winter pastures on private lands, and prevention and reduction of brucellosis.⁴⁴²

Alkali Creek Feedground is located 12 miles from the National Elk Refuge and includes 91 acres of National Forest System (NFS) lands, elk corrals, horse corrals, a tack shed, a haystack yard, a water facility, and a feeding ground.⁴⁴³ The Alkali Creek Feedground is at the bottom of a topographic bottleneck and prevents or limits the elk movement onto Refuge and private lands.⁴⁴⁴

Chronic Wasting Disease

Chronic Wasting Disease (CWD), similar to mad cow disease, is easily transmitted and can contaminate a population for a long period of time.⁴⁴⁵ Challenges in detecting and combatting CWD include: clinical signs that are not diagnostic; a long incubation period; no available treatment; no preventative measures such as vaccination; and fatality after symptoms present.⁴⁴⁶ One of the most well-known ways that CWD spreads is through feeding grounds.⁴⁴⁷ As of this writing, CWD has not infected the Jackson herd, but it is widespread in Wyoming and Colorado.⁴⁴⁸



Wyoming Game and Fish Department's Special Use Permit

In 2008 Wyoming Game and Fish Department (WGFD) asked to extend its operation on NFS land.⁴⁴⁹ Three of WGFD's feedgrounds provide supplemental food to the Jackson elk herd.⁴⁵⁰ In response to the request, the U.S. Forest Service (USFS) considered three alternatives: "a no action alternative denying the special

use request; a mid-range action authorizing only the requested feedgrounds but not the expansion of Patrol Cabin; and an action fully granting the permit as requested."⁴⁵¹

Petitioners' Arguments

Petitioners challenged USFS's approval of a special use permit on the basis of the Service's analysis of CWD. Petitioners allege that the Final Supplemental Environmental Impact Statement (SEIS), Record of Decision, and special use permit for Alkali Creek Feedground were contrary to the National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA).⁴⁵² The Service decided to grant the permit for a few of the locations and delayed a decision on Alkali Creek Feedground.⁴⁵³ The Service's final SEIS in 2015 ruled out one alternative of eliminating all elk feeding. The Service also created a "Literature Review Technical Report" to address the spread of CWD.⁴⁵⁴ Finally in December 2015

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.* at 6.

⁴⁴⁴ *Western Watersheds Project*, No. 17-CV-202-NDF, 2018 U.S. Dist. at 6.

⁴⁴⁵ *Id.* at 7.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 8.

⁴⁴⁹ *Id.* at 10.

⁴⁵⁰ *Id.*

⁴⁵¹ *Western Watersheds Project*, No. 17-CV-202-NDF, 2018 U.S. Dist. at 10-11.

⁴⁵² *Id.* at 1.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

USFS amended the special use permit to allow winter elk feeding at Alkali Creek Feedground.⁴⁵⁵

Petitioners first claim that the Service failed to examine reasonable alternatives, violating NEPA. Petitioners argue that the Service did not properly analyze the no-action alternative or the permit alternative, and did not provide an explanation for the refusal to consider phasing out feeding.⁴⁵⁶ The Service contends that it reasonably eliminated the alternatives because it lacked jurisdiction to stop winter feeding.⁴⁵⁷ The Court dismisses USFS's jurisdictional argument and conducts a "rule of reason" analysis and held that the Service's analysis was reasonable.⁴⁵⁸

Petitioners next argue that USFS failed to take a "hard look" at the consequences of artificial feeding.⁴⁵⁹ Petitioners contend that the literature review did not prove a meaningful analysis and that USFS did not use the methods used in scientific literature to quantify the impacts of CWD.⁴⁶⁰ WGFD and USFS responded similarly to the Petitioners' claim, and contend that USFS took the requisite hard look. However, the Court held that USFS failed to consider a reasonable range of alternatives, to assess the relationship between a phase-out approach and the productivity of the resources, and to look at the irreversible effects of its resource commitments.⁴⁶¹ The Court explained that the Service only looked at the long-term use of the site as a feedground and did not examine all the considerations required by 42 U.S.C. § 4332(C).⁴⁶²

Petitioners' third argument is that USFS did not analyze the cumulative impacts of the feedgrounds by only looking at the impacts from Alkali and no other nearby feedgrounds.⁴⁶³ The Service argued that it performed a cumulative analysis in 2008 and was not required to redo

it, specifically there is no scientific framework addressing this issue and thus the Service could not accurately consider all impacts.⁴⁶⁴ The Court held that USFS did not need to wait for a specific framework and should have reexamined the 2008 FEIS, thus agreeing with the Petitioners.⁴⁶⁵

Lastly, Petitioners argue that the special use permit violated the APA.⁴⁶⁶ The Court held that because USFS failed to comply with the requirement of NEPA the Service violated the APA.⁴⁶⁷

Conclusion

With that, the Court vacated USFS's decision to amend the 2008 special use permit to allow for use of NFS lands for elk feedground activity.⁴⁶⁸

—No. 17-CV-202-NDF, 2018 U.S. Dist. At *5 (D. Wyo. Sept. 14, 2018).

b. *United States v. Donaldson*

Noelle Thompson

In October 2012 Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) placed a quarantine on Turkey Trot, a captive cervid facility owned by Edward Donaldson and John Oertling in Forrest County, Mississippi. This decision was based on the illegal importing of six deer from three facilities in Pennsylvania, one deer of which was later found by Pennsylvania Department of Agriculture to have been exposed to chronic wasting disease (CWD).⁴⁶⁹ This decision follows a prior case in which Donaldson and Oertling pleaded guilty to conspiring to violate the Lacey Act by importing live white-tailed deer into Mississippi with the intent to use them for trophy hunting (18 U.S.C § 371).⁴⁷⁰

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 18.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Western Watersheds Project*, No. 17-CV-202-NDF, 2018 U.S. Dist. at 19-20.

⁴⁵⁹ *Id.* at 20.

⁴⁶⁰ *Id.* at 21.

⁴⁶¹ *Id.* at 21-25.

⁴⁶² *Id.* at 25.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 26.

⁴⁶⁵ *Id.* at 27.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *U.S. v. Donaldson*, 334 F. Supp. 3d 820, 822-23 (S.D. Miss. 2018).

⁴⁷⁰ 2017 WL 8354453 (Sept. 14, 2017).

MDWFP proposed a depopulation plan that consisted of complete depopulation within the facility with the intent to ensure that any risk of CWD is removed from Turkey Trot and to reduce potential spread of CWD, a debilitating disease for white-tailed deer populations, in Mississippi.⁴⁷¹

Defendants proposed two separate plans in response.⁴⁷² The first involved a 50% depopulation conducted by a private contractor followed by monitoring and testing of the remaining deer conducted by MDWFP for a five-year period. The second plan included no depopulation (or a 5-10% depopulation if the court deemed necessary) followed by a three-year monitoring and testing program conducted by a private contractor and supervised by MDWFP.⁴⁷³

The court determined that whole-facility depopulation was inconsistent with established MDWFP policy and the current science on CWD.⁴⁷⁴ As a result, Turkey Trot was spared from depopulation. However, the court ordered an immediate five-year quarantine during which twenty-two deer will be sampled and tested annually by MDWFP for CWD.⁴⁷⁵ In addition, all mortalities during this period will be tested for the disease. In the case of a positive test, the court will order the MDWFP to depopulate the facility.⁴⁷⁶ Donaldson and Oertling, together, will reimburse MDWFP a total of \$120,000, the amount of money it will cost the agency to sample and test the facility's deer for CWD over a five-year period.⁴⁷⁷ Last, the court denied the use of an independent contractor and reaffirmed that MDWFP has statutory authority over CWD management in addition to captive cervid facilities in Mississippi.⁴⁷⁸

—334 F. Supp. 3d 820 (S.D. Miss. 2018).

⁴⁷¹ 334 F. Supp. 3d at 823.

⁴⁷² *Id.*

⁴⁷³ *Id.* at 823-24.

⁴⁷⁴ *Id.* at 826.

⁴⁷⁵ *Id.* at 824.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 831.

⁴⁷⁸ *Id.* at 830-31.

VI. Tribal natural resource management

a. *United States v. Uintah Valley Shoshone Tribe*

Emily Wacyk Paski

In September 2018, the U.S. District Court for the Central District of Utah awarded the federal government summary judgment in its lawsuit against the Uintah Valley Shoshone Tribe (UVST).⁴⁷⁹ The government asserted that the UVST was selling hunting and fishing permits without authority for use on state, federal, or tribal lands of the Ute Indian Tribe of the Uintah and Ouray Reservation (“Ute Tribe”).⁴⁸⁰ The goal of the lawsuit was to declare this licensing scheme unlawful and permanently prevent UVST from continuing to issue the permits.⁴⁸¹

History

The Uintah and Ouray Reservation was set aside by Executive Order in 1861 with the purpose of “permanent settlement and exclusive occupation [by] the different tribes of Indians of said territory.”⁴⁸² The later Spanish Fork Treaty, which was never officially ratified, set aside “the entire valley of the Uintah River within Utah Territory” for exclusive use and occupation by the Uintah Valley Indians, which the UVST argues is evidence of its fishing and hunting rights in the region.⁴⁸³

Therefore, the Uintah Valley population was brought together by the federal government, and joined with the Utes to create the reservation lands in question today.⁴⁸⁴ In the 1930s, this Indian collective further unified by creating its own Constitution and increasing its self-governance.⁴⁸⁵ But Congress later separated the UVST from the Ute Tribe through the Ute Partition and Termination Act of 1954

⁴⁷⁹ This opinion has not yet been published in a report, but the slip opinion can be found at *U.S. v. Uintah Valley Shoshone Tribe*, 2018 WL 4222398 (D. Utah 2018).

⁴⁸⁰ *Id.* at *1.

⁴⁸¹ *Id.*

⁴⁸² See *Uintah and White River Band of Ute Indians v. U.S.*, 152 F. Supp. 953, 954 (Ct. Cl. 1957).

⁴⁸³ *Id.*

⁴⁸⁴ 2018 WL 4222398 at *3.

⁴⁸⁵ *Id.*

(“UPTA”). This statute determined that the UVST Indians were “Mixed-Blood members,” or Indians with less concentrated Ute blood quantum.⁴⁸⁶ The purpose was to set apart the “Mixed-Bloods” and end their relationship with the federal government, including the benefits and protections related to their property; the tribe has not yet regained federal recognition, like other tribes that were terminated in the same era.⁴⁸⁷ While the UVST continues many joint governing ventures with the Ute Tribe, the UVST maintains a distinct culture.⁴⁸⁸

Discussion and Holding

Understanding this history is vital because the main issue is whether the UVST ceded permitting power over hunting and fishing on these lands under the UPTA (and related agreements), or whether it retains this power inherently or through affirmations in treaties and federal legislation. Presently, the UVST agreed to stop issuing permits during this litigation.⁴⁸⁹ The permits were granted to remove wildlife anywhere within original reservation boundaries, which were limited by those initial Executive Orders of 1861 and 1882.⁴⁹⁰

The federal government asserted that, through UPTA and the agreements that followed, only the Ute Indian Fish and Wildlife Department has the ability to oversee hunting and fishing licensing on Tribal Trust Land.⁴⁹¹ This is an entity overseen by the Ute Tribal Business Committee and one designated representative from the UVST.⁴⁹² The UVST argued that the Executive Orders creating these reservation lands expressly affirmed the right to separately regulate, and that later documents are insufficient proof that the right was ever ceded.⁴⁹³

⁴⁸⁶ *Id.* at *1.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at *5.

⁴⁸⁹ *Id.* at *1.

⁴⁹⁰ *Id.* Currently this land is a combination of state, federal, tribal, private, and Ute Tribal Trust Lands.

⁴⁹¹ *Id.*

⁴⁹² *Id.* The Federal Government also argues that only the Federal Government, the Ute Tribe, and the State of Utah share regulatory power over the state, federal, and other trust lands within the original reservation boundaries.

The court interpreted the tribal Constitution and other agreements to state that the UVST “ceased to exist separately outside the Ute Tribe” and that both jurisdiction and ownership over the disputed tribal territory were transferred to the Ute Tribe.⁴⁹⁴ Because the Ute Tribe already has a body designated to manage licensing, the court held that the UVST did not also have authority to issue permits for the taking of wildlife.⁴⁹⁵

Current Status

The decision for partial summary judgment for the federal government is currently pending appeal at the Tenth Circuit.

—2018 WL 4222398 (D. Utah 2018).

b. *Mineral County v. Walker River Irrigation District*

Emily Wacyk Paski

Plaintiffs brought this suit in May 2018 to determine how the prior appropriation of water rights should interact with the public trust doctrine (PTD) when it comes to a possible Fifth Amendment “taking” or reallocation of water in Walker Lake.⁴⁹⁶

Background

This decision of the U.S. Court of Appeals for the Ninth Circuit follows ongoing litigation by the Walker River Paiute Tribe and the federal government—later joined by Mineral County—to establish water rights of the Tribe, County, and individuals in the Walker River Basin.⁴⁹⁷ The Walker River Basin covers about 4,000 square miles from

⁴⁹³ *Id.* at *5.

⁴⁹⁴ See *id.* at *4; See also *U.S. v. Von Murdoch*, 132 F.3d 534, 541 (10th Cir. 1997).

⁴⁹⁵ See 2018 WL 4222398 at *4; Ute Tribal Code §§ 8-8-1 to 8-1-24. See also 18 U.S.C. § 1343.

⁴⁹⁶ See *Mineral Cty. v. Walker River Irrigation District*, 900 F.3d 1027, 1028-29 (9th Cir. 2018).

⁴⁹⁷ *Id.* at 1029.

California into Walker Lake in Nevada.⁴⁹⁸ Today Walker Lake is a large body of water that has steadily lost more than half its surface area and 28 percent of its volume since 1882.⁴⁹⁹ It also has high concentrations of total dissolved solids (“TDS”), or high salt content and temperature, leaving it inhospitable to fish and eliminating the fishing industry.⁵⁰⁰ The lake’s degradation also threatens migratory bird populations, along with recreational tourism, and one cause for the decline is likely the upstream appropriations for those with rights to water in the Basin.⁵⁰¹ The primary issue in this case is whether the PTD can be used in Nevada to reallocate defendants’ pre-adjudicated water rights in order to guarantee minimum flows of water for Walker Lake.⁵⁰²

Posture

The case was first heard in federal court, as opposed to Nevada state court, owing to the federal court’s jurisdiction over the Walker River Basin.⁵⁰³ The lower court decided that “the [PTD] may factor into future allocations of water, but that using the doctrine to reallocate rights already adjudicated” to the defendants would constitute a Fifth Amendment taking.⁵⁰⁴

Discussion

The Ninth Circuit reviewed the conflict between the PTD and the prior appropriation doctrine.⁵⁰⁵ The Walker River Decree has been used since 1936 by the Nevada State Engineer to determine allocations of water rights and make any amendments.⁵⁰⁶ Defendants argued that under Nevada law, water rights settled by decree are final and conclusive.⁵⁰⁷ They say that their rights are vested by prior adjudication and cannot be disturbed by the plaintiffs’ present concern for Walker Lake.⁵⁰⁸ Further, defendants

argue that if they cannot receive the full benefit of their water rights because the PTD interest of preserving the lake can supersede them, then they are subject to just compensation.⁵⁰⁹

This is in direct conflict to plaintiffs’ argument that the PTD requires the State Engineer to “reconsider previous allocations” and reserve a minimum flow for Walker Lake.⁵¹⁰ Prior case law and the Nevada Constitution indicate that the PTD exists in Nevada and applies not only to navigation and commerce but also to recreation and fishing.⁵¹¹ However, the Court had to review whether the PTD has absolute supremacy over other doctrines.⁵¹²

Holding

The Ninth Circuit first pointed out a long history of prioritizing the public trust in Nevada, noting that it is the most fundamental aspect of state water law and that those vested with water rights don’t actually acquire title; rather, their right to use and occupy are subject to “public ownership.”⁵¹³ The court also looked to a prior decision in *National Audubon Society v. Superior Court*, where the California Supreme Court refused to declare one of the two competing doctrines superior and instead applied a case-by-case balancing test.⁵¹⁴

Because this balance has significant implications for Nevada water law, the Ninth Circuit declined to apply the test to these facts and instead requested that the Nevada Supreme Court decide 1) whether the PTD applies to rights already adjudicated, and 2) if so, and the settled rights can be reallocated, whether this constitutes a “taking.”⁵¹⁵

—900 F.3d 1027 (9th Cir. 2018).

⁴⁹⁸ *Id.* at 1028.

⁴⁹⁹ *Id.* at 1029.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.* at 1030.

⁵⁰³ *Id.* at 1028.

⁵⁰⁴ *Id.* at 1030-31.

⁵⁰⁵ *Id.* at 1032.

⁵⁰⁶ *Id.* at 1029, 1032.

⁵⁰⁷ *Id.* at 1032-33.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* at 1031.

⁵¹⁰ *Id.* at 1032.

⁵¹¹ *Id.* at 1031-32.

⁵¹² *Id.* at 1032.

⁵¹³ *Id.* at 1033.

⁵¹⁴ *Id.* (citing 33 Cal.3d 419 (1983)).

⁵¹⁵ *Id.* at 1034.

ABOUT THE WILDLIFE LAW CALL

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