I. FEDERAL LITIGATION

Michelle Castaline

a. *Defenders of Wildlife v. Zinke*

NextLight Renewable Power LLC (NextLight) sought to construct two solar power facilities, Silver State North and Silver State South.[1] The proposed sites of the two solar power facilities fell within the Eastern Mojave Recovery Unit, part of which has been designated as a critical habitat for the desert tortoise, listed as threatened under the Endangered Species Act (ESA).[2] In reviewing the right of way application submitted by NextLight to the Bureau of Land Management (BLM), BLM deferred approval of the South site.[3] Despite avoiding critical habitat, the proposed South fell within a corridor between Silver State North and the Lucy Gray Mountains containing a geographical linkage point[4]—an area "providing the most reliable potential for continued population connectivity throughout the Ivanpah Valley."[5] BLM contacted the U.S. Fish and Wildlife Service (FWS) and BLM issued a draft supplemental environmental impact statement (SEIS).[6] Based on FWS's recommendations, BLM initiated formal consultation with a new proposal that 1) minimized reduction of the corridor between Silver State North and the Lucy Gray Mountains, and 2) minimized adverse effects on the desert tortoise.[7] Silver State South also agreed to fund a monitoring program to track the regional desert tortoise population for changes in demographic and genetic stability.[8] FWS issued a Biological Opinion (BiOp), finding that Silver State South would likely not produce a large adverse effect on the tortoise, its habitat, or its long term recovery.[9] BLM subsequently approved Silver State South.[10]

Shortly thereafter, Defenders of Wildlife (Defenders) sued to enjoin construction on the grounds that FWS's determination of "no jeopardy" and conclusion of "no adverse modification" were arbitrary and capricious.[11]

First, Defenders argued that the no-jeopardy finding "impermissibly relied upon unspecified remedial measures."[12] Defenders drew this argument from the BiOp's conclusion, which it interpreted to state itself "dependent on the ability [of Defenders] to detect future demographic or genetic degradation and implement remedial measures."[13] This argument failed because the BiOp did not rely on mitigation measures and precedent does not require FWS to supply specifics regarding mitigation measures that target uncertain future harms.[14] Rather, specifics are only required when a mitigation measure targets certain or existing harms.[15]

Second, Defenders argued that the BiOp's inclusion of critical habitat within Silver State South's "action area" "expressly conceded that there would be an effect on critical habitat, which should have obligated the FWS to conduct an adverse modification analysis in the BiOp."[16] The court rejected this argument, reasoning that if the action agency (BLM) and the consulting agency (FWS) are in agreement that there are unlikely to be adverse effects on critical habitat and no formal consultation is required.[17]

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[1] *Defenders of Wildlife v. Zinke*, No. 15-55806, 2017 WL 2174546, at *3 (9th Cir. May 18, 2017).

[2] *Id.*

[3] *Id.* at *4.

[4] *Id.* At *3.

[5] *Id.*

[6] *Id.* At *4.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *5.

[10] *Id.*

[11] *Id.* at *6.

[12] *Id.*

[13] *Id.*

[14] *Id.* at *7.

[15] *Id.*

[16] *Id.*

[17] *Id.* at *8.

Third, Defenders argued that the BiOp needed an adverse modification analysis because Silver State South would reduce the geographical linkage area and adversely affect the connectivity of the desert tortoise as it impacts the critical habitat's recovery value.[18] The court found that this reduction in area did not constitute adverse modification because the construction wouldn't result in alteration to critical habitat.[19]

No. 15-55806, 2017 WL 2174546 (9th Cir. May 18, 2017).

b. *Ellis v. Housenger*

The U.S. Environmental Protection Agency (EPA) registered pesticides containing clothianidin and thiamethoxam.[20] Plaintiffs argue that clothianidin and thiamethoxam can adversely impact the survival, growth and health of honey bees and other pollinators.[21]

Plaintiffs sued, arguing first that EPA violated the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) by failing to grant plaintiffs' request for an emergency suspension of the registration of the pesticides at issue.[22] Plaintiffs also argued that, in making the decision to withhold an emergency suspension, EPA arbitrarily and capriciously failed to consider their supplemental filings.[23] The court rejected these arguments because there is no duty to grant an emergency suspension absent an imminent hazard or harm.[24] Plaintiffs did not address in their petition whether there was an imminent hazard or show that the harms of the pesticides outweighed the benefits.[25] Plaintiffs failed to cite evidence such as an article or study to show that the use of the pesticides would adversely affect the chance of an endangered or threatened species survival.[26] The fact that EPA did not consider plaintiffs' supplemental filings has no effect on the courts' findings because these supplemental filings did not contain evidence of an imminent hazard from use of the pesticides.[27]

Plaintiffs further argued that EPA violated FIFRA and the Administrative Procedure Act (APA) by permitting the registration of products containing clothianidin or thiamethoxam without providing notice in the Federal Register.[28] The court finds that EPA did not commit a violation because the notice requirement only concerns registration of pesticide products for new uses.[29] The uses of the pesticides in question here had all previously been registered and announced in the Federal Register so there was no need to provide notice again.[30]

Finally, plaintiffs argued that EPA violated the Endangered Species Act (ESA) by failing to consult with the U.S. Fish and Wildlife Service (FWS).[31] EPA argues that of the 68 pesticides at issue, eleven are not agency actions.[32] An agency action is present when, "the agency affirmatively authorized, funded, or carried out the underlying activity, and . . . the agency had some discretion to influence or change the activity for the benefit of a protected species."[33] Ultimately, the court agrees that nine of them are not agency actions.[34] Of the 59 remaining pesticides, third party defendants and the EPA argued that most of the claims were prohibited by the collateral attack doctrine.[35] The Court found that the collateral attack doctrine did not bar the remaining claims under Ninth Circuit precedent that "the collateral attack doctrine does not bar a claim that the EPA failed to consult when it registered a pesticide product."[36] The court agreed with plaintiffs that EPA violated ESA by failing to

[18] *Id.* at *9.

[19] *Id.* at *10.

[20] *Ellis v. Housenger*, No. 13-cv-01266-MMC, 2017 WL 1833189, at *1 (N.D. Cal. May 8, 2017).

[21] *Id.* at *1.

[22] *Id.*

[23] *Id.*

[24] *Id.* at *4 – 5.

[25] *Id.* at *5.

[26] *Id.* at *4.

[27] *Id.* at *6.

[28] *Id.* at *1.

[29] *Id.* at *9.

[30] *Id.*

[31] *Id.* at *1.

[32] *Id.* at *14.

[33] *Id.*

[34] *Id.*

[35] *Id.* at *18.

[36] *Id.*

consult with FWS regarding approval of the pesticides, and granted summary judgment on these claims.[37]

No. 13-cv-01266-MMC, 2017 WL 1833189 (N.D. Cal. May 8, 2017).

c. Western Exploration, LLC v. U.S. Dep't of Interior

In 2010 the U.S. Fish and Wildlife Service (FWS) issued a finding that listing the greater sage-grouse under the Endangered Species Act (ESA) is warranted but precluded by higher-priority listing actions.[38] FWS reviewed other federal agencies' protection programs and found they had inadequate protection programs for sage-grouse species.[39] In response the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), and other federal agencies began to implement sage-grouse protection measures into their land management plans.[40]

Plaintiffs sued the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS), arguing that their land management plans would violate the National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLPMA), National Forest Management Act (NFMA), and Small Business Administration Regulatory Flexibility act (SBREFA).[41] On appeal, plaintiffs' motion did not address their previous SBREFA claim, so the court found that plaintiffs waived assertion of these claims.[42]

Under FLPMA, plaintiffs argued that BLM "ignor[ed] consistency requirements and (2) fail[ed] to manage federal lands for multiple-use and sustained yield."[43] The Court rejected both arguments.[44] Under the consistency argument, plaintiffs contended that the BLM plan and local land use plans were not consistent with each other and that BLM did not offer a plan to reconcile the inconsistencies.[45] The Court found that FLPMA only required BLM to identify the inconsistencies brought to their attention and how BLM addressed them, but not that BLM must do this in detail.[46] Under the multiple use argument, plaintiffs argued that BLM's closing of millions of acres of land for multiple use failed to balance diverse resources uses based on the relative values of those resources.[47] The court found that BLM's net conservation gain strategy allows some degradation to public land for multiple-use purpose, and that any degradation of sage-grouse habitat can be counteracted and therefore does not violate FLPMA.[48] This is because net conservation gain strategy accounts for disturbances caused by multiple use by planning ahead for mitigation of sage-grouse habitat through restorative projects.[49]

Under NFMA, plaintiffs argued that USFS ignored the multiple-use mandate by placing restrictions on millions of acres of land.[50] The court, however, found that these restrictions are in place to conserve and enhance sage-grouse habitat and that USFS's restrictions USFS did sought to balance sustainable human use and adequate habitat conservation.[51] The court found that USFS did not violate NFMA.[52]

Finally, under NEPA, plaintiffs argued that a supplemental environmental impact statement (SEIS)

[37] *Id.* at *20.

[38] *W. Expl. LLC v. United States Dep't of the Interior*, No. 3:15-cv-00491-MMD-VPC, 2017 WL 1237971, at *2 (D. Nev. Mar. 31, 2017).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at *14.

[43] *Id.* at *16.

[44] *Id.*

[45] *Id.* at *17.

[46] *Id.*

[47] *Id.* at *18.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at *19.

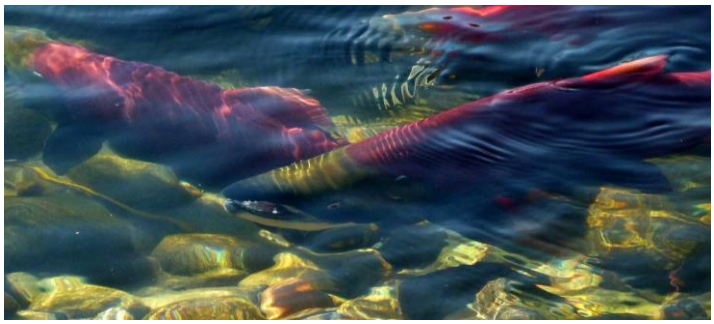
[52] *Id.*

needed to be prepared.[53] The court agreed that BLM and USFS were in violation of NEPA because an SEIS must be prepared when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[54] The changes made between the draft EIS and the final EIS, specifically the designation of 2.8 million acres of Focal Areas in Nevada, were significant enough to require a SEIS in order to provide a platform for commentary about the changes as provided for under NEPA.[55]

No. 3:15-cv-00491-MMC-VPC, 2017 WL 1237971 (D. Nev. Mar. 31, 2017).

d. Audubon Society of Portland v. U.S. Army Corps of Engineers

The Columbia River is home to salmonids who every year must attempt to survive their journey through the Federal Columbia River Power System (FCRPS), which consists of hydroelectric dams, powerhouses, and associated reservoirs.[56] Thirteen species of Columbia and Snake River salmonids have been listed as endangered or threatened under the Endangered Species Act (ESA).[57] Biological Opinions (BiOps) are released by the National Marine Fisheries Service (NMFS) evaluating the effect of the FCRPS on the salmonids and their habitats.[58] After the 2014 BiOp was challenged in court and found to be in violation of the ESA and National Environmental Policy Act (NEPA), NMFS determined that "reducing [Double-crested Cormorants (DCCO)] to the base period population level would reduce their predation on juvenile salmonids to the level that has been assumed in the 2008 BiOp."[59]



The U.S. Army Corps of Engineers (Corps) proceeded to draft an environmental impact statement (EIS) on a DCCO management plan that evaluated three alternatives to reducing DCCO predation on salmonids.[60] After the U.S. Fish and Wildlife Service (FWS) raised concerns, a fourth alterative was added to the final EIS which called for the killing of 10,912 adult DCCOs and oiling and destroying a total of 26,096 nests.[61] The U.S. Army Corps of Engineers (Corps) applied for a permit from FWS to kill DCCOs and FWS approved the permit.[62]

i. NEPA Claims

Plaintiffs sued the Corps and FWS, first arguing that they violated NEPA by not considering all reasonable alternatives.[63] The court agreed, finding that the Corps never considered an alternative to the culling of DCCOs, "such as alternatives to hydropower operations or other measures to increase salmon productivity."[64] They instead continuously reported that the culling was necessary because of the FCRPS.[65]

Plaintiffs also claimed a NEPA violation because the purpose and need statement was unreasonably narrow.[66] The court found no violation of NEPA in this circumstance, as great deference is given to agencies in drafting statements of purpose and need.[67]

Plaintiffs' final NEPA claim charged the agencies with failure to properly analyze the benefit to salmonid productivity.[68] The court did not find this an appropriate NEPA claim—though possibly an ESA claim.[69] Plaintiffs' argued that the benefit to the salmon that would come with

[53] *Id.*

[54] *Id.*

[55] *Id.* at *20.

[56] *Audubon Soc'y of Portland v. United States Army Corps of Eng'rs*, No. 3:15-cv-665-SI, 2016 WL 45770009, at *1 (D. Or. Aug. 31, 2016).

[57] *Id.*

[58] *Id.* at *2.

[59] *Id.*

[60] *Id.* at *3.

[61] *Id.*

[62] *Id.*

[63] *Id.* at *4.

[64] *Id.* at *8.

[65] *Id.*

[66] *Id.*

[67] *Id.* at *9.

[68] *Id.* at *10.

[69] *Id.*

of killing the DCCOs would not materialize which is a Section 7 challenge of the ESA.[70]

Despite finding that defendants violated NEPA by failing to assess reasonable alternatives, the court did not vacate the management plan because the plan benefits the salmonids which are ESA-listed, unlike the DCCOs, which are not listed.[71]

ii. Other Claims

Plaintiffs also argued that the Corps violated the Water Resources Development Act (WRDA) because, under WRDA, the Corps needed a management plan developed by FWS in order to reduce populations of avian predators and FWS did not develop the EIS or DCCO management plan.[72] The Court found that defendants did not violate the WRDA as the FWS was sufficiently involved in the development of the DCCO management plan and final EIS.[73] In addition FWS created a national DCCO management plan meeting the criteria under WRDA.[74]

Plaintiffs finally alleged that FWS violated the Migratory Bird Treaty Act (MBTA) because the total "take" of DCCOs reduced the population to a potentially unsustainable level and therefore potentially threatened the species.[75] The court disagreed with this argument, finding that determining the effect of the culling operation on DCCO populations is not an exact science and there is a rational connection between the facts on record and the decision made.[76]

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

e. Conservation Congress v. U.S. Forest Service

The U.S. Forest Service (USFS) began planning the Smokey Project in December 2009 "to administer fuel and vegetative treatments intended to further habitat and fire management goals in the Mendocino National Forest ("MNF") and contribute to the MNF's timber production goals."[77] The majority of the project was to take place in a region of MNF known as, Buttermilk LSR.[78] Portions of the proposed project were to be located in area designated as critical habitat for the northern spotted owl (NSO).[79]

USFS released a draft environmental assessment (EA) and consulted with the U.S. Fish and Wildlife Service

(FWS) about the project's possible impacts on endangered and threatened species.[80] The project was modified when root disease was found.[81] To address three substantive changes, USFS reopened scoping for the project in 2012.[82] FWS's BiOp found that the project was not likely to jeopardize the northern spotted owl (NSO).[83]Conservation Congress sued USFS, first arguing that USFS violated

[70] *Id.* at *11.

[71] *Id.* at *13.

[72] *Id.* at *4.

[73] *Id.* at *10.

[74] *Id.*

[75] *Id.* at *4.

[76] *Id.* at *15.

[77] *Conservation Cong. v. United States Forest Serv.*, No. 2:13-cv-01977-JAM-DB, 2017 WL 661959, at *1 (E.D. Cal. Feb. 17, 2017).

[78] *Id.* at *6.

[79] *Id.*

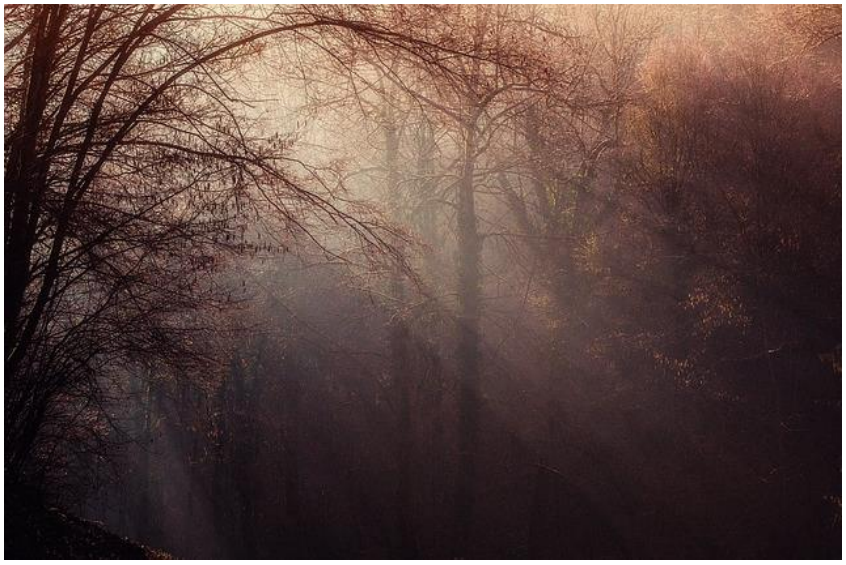
[80] *Id.* at *1.

[81] *Id.*

[82] *Id.*

[83] *Id.*

NEPA by "(1) failing to prepare an EIS; (2) failing to adequately assess cumulative impacts; (3) failing to evaluate alternatives; (4) failing to take a hard look at the Project's impacts; and (5) failing to prepare a supplemental environmental assessment (EA) or environmental impact Statement (EIS)."[84] The court found that USFS violated NEPA by failing to develop alternatives.[85] Conservation Congress raised alternatives during the collaborative process and USFS choose to not entertain these alternatives as required under NEPA.[86] In addition, the court found that USFS failed to take a hard look at the project as is required by NEPA.[87] USFS failed to adequately assess alternatives, and address past monitoring practices.[88] USFS also inconsistently stated the Limited Operating Period (LOP), in the BiOp, the supplemental BiOp's, the EA, and in a letter written by USFS.[89]



The court found that USFS did not need to prepare an EIS, as there was no indication that the project would cause significant degradation of a human environmental factor.[90] Subsequently, the Court did not feel it was necessary for USFS to prepare a supplemental EA or EIS[91], and that USFS adequately assessed the cumulative impacts of the project in the EA and underlying reports.[92]

Conservation Congress also argued that USFS violated the Endangered Species Act (ESA) by producing a BiOp that contradicted FWS's findings—specifically, that 1) the placement of activity centers was not rationally connected to NSO habitat needs, 2) USFS failed to assess the effect of the project on the Buttermilk LSR, and 3)that the LOP requirement had changed.[93] The court finds that a part of Conservation Congress' arguments regarding inconsistencies among USFS and FWS's findings are based on a recovery action from 2011, which is a non-regulatory and therefore non-binding document.[94] The court accordingly found that USFS's BiOp was consistent with FWS's findings.[95] The second part of Conservation Congress' argument picks on USFS's interpretation of available data.

The court finds that deference must be given to USFS and that absent a showing of evidence that USFS should have considered but failed to do so, the court must find that the placement of activity centers were rationally connected.[96] The court also finds that there was no duty to evaluate the effect of the project on the function of Buttermilk LSR.[97] The court finds that to impose an obligation upon USFS to go beyond forming an opinion about the projects cumulative effects by asking USFS to evaluate the continuing function of Buttermilk LSR is unfounded.[98] Lastly, the court finds that the previous LOP was incorporated into the new LOP so the requirement has not changed.[99]

No. 2:13-cv-01977-JAM-DB, 2017 WL 661959 (E.D. Cal. Feb. 17, 2017).

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[84] Id. at *5.

[85] Id. at *12.

[86] *Id.*

[87] *Id.* at *16.

[88] *Id.* at *17.

[89] *Id.* at *16.

[90] *Id.*

[91] *Id.* at *17.

[92] *Id.* at *12.

[93] *Id.* at *18–20.

[94] *Id.* at *18.

[95] *Id.*

[96] *Id.* at *19.

[97] *Id.*

[98] *Id.*

[99] *Id.* t *20.

II. ARTICLE: SITUATING STATE OWNERSHIP OF WILDLIFE AMID A CHANGING PUBLIC TRUST DOCTRINE

Lane Kisonak

Introduction

The Public Trust Doctrine (PTD), as professionals in wildlife management and conservation know, governs state management of fish and wildlife resources for the benefit of all people in the United States.[100] In some states the PTD is enshrined in constitution[101]; in others, statute[102]; and in others it may appear most explicitly as part of the Interstate Compact on Wildlife Violators.[103] But in virtually every state the courts have come to rely on PTD in some form over the past two centuries, shaping and expanding it to resolve disputes over public waters, access to natural resources, and inform other legal frameworks, such as eminent domain, cooperative federalism, and substantive due process.[104]

In the 21st century, the public trust in water resources has continued to evolve in sometimes subtle, sometimes profound directions.

Over the past decade—and the past few years especially—the PTD has entered a state of flux, giving rise to a few persistent questions:

- Where are the limits on state impairment of public trust resources with respect to federal authority and multiple state uses of wildlife?
- What affirmative duties does a state have to protect public trust resources?
- Where do the public trusts in wildlife and non-wildlife resources overlap or diverge?
- In the near future, will the PTD empower or disempower state agencies in wildlife management?

To answer these questions, it is helpful to examine a few areas where things have changed in recent years, including ownership of public, private, and navigable waters, coastal development, and atmospheric trust litigation.

a. Private, Public, and Navigable Waters

Depending state of residence, an owner of private water resources may be bound by one of multiple doctrines. As the U.S. Supreme Court described in *U.S. v. Gerlach Live Stock*, riparian doctrine prevails in Eastern states with abundant water resources, and recognizes each riparian owner's right to the natural flow of water to their property.[105] In Western states, on the other hand, first in possession is best in title.[106]

As for public waters, the PTD finds its foundation in the landmark case of *Illinois Central Railroad Co. v. Illinois*, where the Supreme Court held that a grant by the state of Illinois to a railroad company of submerged land in Lake Michigan, including much of the Chicago shoreline, was a "substantial impairment" of the public trust.[107]

In the twenty-first century the public trust in water resources has continued to evolve in sometimes subtle, sometimes profound directions. In 2000, the Hawai'i Supreme Court, in a widely cited case, held for the first

[100] The Wildlife Soc'y, *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada*, Tech. Rev. 10-01, 9 (Sept. 2010), *available at* http://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf [hereinafter "TWS Technical Review"].

[101] *See, e.g.*, Alaska const. art. 8, §3: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

[102] *See, e.g.*, Ky. Rev. Stat. §150.015: State policy is to "protect and conserve the wildlife of the Commonwealth to insure a permanent and continued supply of the wildlife resources of this state for the purpose of furnishing sport and recreation for the present and future residents of this state."

[103] *See* §11: "The participating states find that wildlife resources are managed in trust by the respective states for the benefit of all their residents and visitors."

[104] TWS Technical Review, *supra* note 100, at 23.

[105] 339 U.S. 725, 743-44 (1950).

[106] *Id.* at 746.

[107] 146 U.S. 387, 453, 464 (1892).