

form recovery or study plans, or undertake certain rulemakings. Courts may also reassess the longstanding prioritization of certain public uses (such as navigation and commerce in streams and rivers) over others (recreational fisheries). How far will *Illinois Central's* substantial impairment standard stretch if applied to a claim that certain wildlife species or populations are unlawfully protected at the expense of others? Or habitat? Or public access?

California alone has seen at least five cases citing *CBD v. FPL Group* for its public trust reasoning since 2008<sup>138</sup>, and there are certainly more where those came from.

As Professor Sax wrote in 1980, “[t]he function of the public trust as a legal doctrine is to protect...public expectations against destabilizing changes, just as we protect conventional private property from such changes.” While the PTD seems generally well-suited toward this goal of public policy, especially with respect to cut-and-dry takings claims and development near traditionally protected water resources, the doctrine itself may not be protected from profound changes at its margins.

### III. ARTICLE: THE NORTHEAST CANYONS AND SEAMOUNTS MARINE NATIONAL MONUMENT AND OUTER CONTINENTAL SHELF ENERGY DEVELOPMENT

Michelle Castaline

If the Northeast Canyons and Seamounts Marine National Monument loses its monument designation, companies will still face obstacles if they want to use the area for offshore energy development. Loss of the

designation or reduction in area will not just benefit offshore energy developers however, “It’s . . . the fishermen. It’s all the bait dealers, the mechanics and the marinas and all the businesses that only exist because there’s a commercial fishing industry” that will be effected.<sup>139</sup>

The Antiquities Act of 1906 gives Presidents and Congress the power to designate special natural, historical and cultural areas as national monuments.<sup>140</sup> Under the antiquities act, Presidents have taken the initiative to designate marine national monuments such as Papahānaumokuākea, and Marianas Trench.<sup>141</sup>

On September 15, 2016, former president Barack Obama designated the Northeast Canyons and Seamounts off the coast of New England as a marine national monument.<sup>142</sup> It is the first monument to be designated in the Atlantic Ocean and it covers 4,913 square miles of marine ecosystems.<sup>143</sup> The area comprises three underwater canyons and four underwater mountains—biodiversity hotspots that serve as home to numerous rare and endangered species of marine life.<sup>144</sup> Among those species are Kemp Ridley’s Sea Turtles, Sperm Whales, Fin Whales and sei whales.<sup>145</sup>

#### a. *Mass. Lobstermen's Ass’n v. Ross*

In designating the Northeast Canyons and Seamounts as a marine monument, President Obama also set forth regulations giving commercial fishing operators 60 days to transition away from the monument area.<sup>146</sup> In response to these regulations, on March 7, 2017, five commercial fishing organizations brought suit in *Massachusetts Lobstermen's Association v. Ross*.<sup>147</sup> These organizations challenge the designation under the claim that creation of marine national monuments exceeds the power granted to

*Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL’Y 633, 667-68 (2016) (discussing the role of courts in remedying “severe breakdown[s] of agency performance” in institutional litigation across a wide variety of legal practice areas).

<sup>138</sup> *San Francisco Baykeeper, Inc. v. Ca. State Lands Cmm’n*, 194 Cal. Rptr.3d 880, 904-05 (Cal. App. 4th 2015); *Ctr. for Biological Diversity v. Ca. Dep’t of Forestry & Fire Protec.*, 182 Cal. Rptr.3d 1, 19 (Cal. App. 4th 2014); *Light v. State Water Res. Control Bd.*, 173 Cal. Rptr.3d 200, 212 (Cal. App. 4th 2014); *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 169 Cal. Rptr.3d 413, 449-50 (Cal. App. 4th 2014); *Citizens for East Shore Parks v. Ca. State Lands Cmm’n*, 136 Cal. Rptr.3d 162, 187-88 (Cal. App. 4th 2011).

<sup>139</sup> Kathy Hoekstra, *Is The Ocean 'Land Owned or Controlled' by Feds' Antiquities Act Lawsuit Aims to Find Out* (Mar. 24, 2017) <http://watchdog.org/291720/291720/>.

<sup>140</sup> 54 U.S.C. §320301 (2012).

<sup>141</sup> Nat’l Oceanic and Atmospheric Admin., *Marine National Monument Program*, [http://www.fpir.noaa.gov/MNM/mnm\\_index.html](http://www.fpir.noaa.gov/MNM/mnm_index.html) (last visited June 7, 2017).

<sup>142</sup> Proclamation No. 9496, 81 Fed. Reg. 65159 (Sept. 21, 2016).

<sup>143</sup> Fact Sheet from the Office of the Press Secretary, The White House, *Obama to Continue Global Leadership in Combatting Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean* (Sept. 15, 2016) (on file with author).

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

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

<sup>146</sup> *Id.*

<sup>147</sup> *Massachusetts Lobstermen's Ass’n v. Ross*, No. 1:17-cv-00406 (D.D.C. filed Mar. 7, 2017) <https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2017cv00406/184865>.

the President under the Antiquities Act.<sup>148</sup> Plaintiffs argue that the Antiquities Act gives Presidents and Congress the power to designate areas of land as monuments but not areas of ocean.<sup>149</sup> The case is currently under stay as the parties wait for Secretary of the Interior Ryan Zinke to review all national monuments designated since January of 1996 per President Donald Trump's executive order.<sup>150</sup> If the case proceeds, plaintiffs will seek to have the court strip the Northeast Canyons and Seamounts of its monument designation.

## **b. Applicable laws:**

### **i. Outer Continental Shelf Lands Act**

The Northeast Canyons and Seamounts are outer continental shelf (OCS). OCS contains "all submerged land lying seaward and outside of the area of lands beneath navigable waters."<sup>151</sup> The Submerged Land Act designates navigable coastal area up to three miles offshore as belonging to the coastal state, but OCS outside of the three-mile boundary belongs to the federal government.<sup>152</sup> If the Northeast Canyons and Seamounts Marine National Monument loses its designation, pursuant to the Outer Continental Shelves Land Act (OCSLA), the federal government would have the power to lease the land for offshore energy development.<sup>153</sup>

Offshore energy development includes extraction of oil and coal, as well as harnessing of wind, tidal and wave energy. Leasing of OCS land for all types of offshore energy development is overseen by the Bureau of Ocean Energy Management (BOEM), an agency in the Department of the Interior.<sup>154</sup> The OCS oil-and-gas leasing program was

created pursuant to OCSLA.<sup>155</sup> Congress approved leasing of OCS lands for renewable energy in the Energy Policy Act of 2005 and former President Obama and former Secretary of the Interior Ken Salazar finalized the regulations in 2009.<sup>156</sup>

### **ii. National Environmental Policy Act**

Absent designation, the Northeast Canyons and Seamounts will still enjoy the protections built into the two offshore energy programs. Before the Northeast Canyons and Seamounts could be leased for energy development, pursuant to the OCSLA, possible environmental impacts would need to be assessed.<sup>157</sup> Depending on the results of environmental studies, an environmental impact statement (EIS) may be required under the National Environmental Policy Act (NEPA).<sup>158</sup> If it is determined

that commencing or continuing activity will cause serious harm to marine life, leases may be cancelled.<sup>159</sup> In the event that a lease for offshore oil and coal production is approved, a spill fund must be developed before work can be done.<sup>160</sup>

A number of other protections supplement those provided by OCSLA.

### **iii. Endangered Species Act**

Companies pursuing leases within the Northeast Canyons and Seamounts, should it lose its designation, will also have to follow the regulations set forth by the Endangered Species Act (ESA).<sup>161</sup> The ESA requires that agencies ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of

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Absent designation, the Northeast Canyons and Seamounts will still enjoy the protections built into offshore energy programs.

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

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

<sup>151</sup> Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (2012).

<sup>152</sup> U.S. Submerged Land Act of 1953, 43 U.S.C. §§ 1301–15 (2012).

<sup>153</sup> Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (2012).

<sup>154</sup> Bureau of Ocean Management, *Frequently Asked Questions* <https://www.boem.gov/FAQ/> (last visited June, 7 2017).

<sup>155</sup> Bureau of Ocean Energy Management, *OCS Lands Act History* (last visited June 7, 2017) <https://www.boem.gov/ocs-lands-act-history/>.

<sup>156</sup> Bureau of Ocean Energy Management, *Renewable Energy on the Outer Continental Shelf* <https://www.boem.gov/uploadedFiles/Fact%20Sheet%20BOEM%20Renewable%20Energy.pdf> (last visited June 7, 2017).

<sup>157</sup> Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (2012).

<sup>158</sup> Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (2012); National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (2012).

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

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

<sup>161</sup> Endangered Species Act, 16 U.S.C. §§ 1531–44 (2012).

such species.<sup>162</sup> As mentioned above, the Northeast Canyons and Seamounts is home to endangered species so the lead federal agency must enter into consultation with the National Oceanic and Atmospheric Association (NOAA) or the Fish and Wildlife Service (FWS).<sup>163</sup> Consultation surrounding offshore energy primarily occurs with NOAA. Consultation can be informal or formal, and generally begins with the federal agency submitting a biological assessment (BA) or a biological evaluation (BE).<sup>164</sup> If endangered species or their critical habitat are found to be in jeopardy, alternatives are analyzed.<sup>165</sup> In some instances an incidental take permit (ITP) can be obtained.<sup>166</sup>

During consultation, FWS or NOAA will direct the federal agency to comply with the Marine Mammal Protection Act (MMPA). While the ESA prohibits the take of endangered species, the Marine Mammal Protection Act prohibits the take of all marine mammals.<sup>167</sup> Take is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."<sup>168</sup> Like under the ESA, ITPs can be obtained under the MMPA.<sup>169</sup> To obtain an ITP the applicant must demonstrate no more than a negligible impact and must produce no unmitigable adverse impact on the viability of the species or stock for subsistence uses.<sup>170</sup> "Most incidental take authorizations have been issued for activities that produce underwater sound" (as discussed further below).<sup>171</sup>

#### iv. Marine Protection, Research and Sanctuaries Act

Other regulations, including those outlined in the Marine Protection, Research and Sanctuaries Act (MPRSA), the Clean Air Act (CAA) and the Clean Water Act (CWA) may not shield the Northeast Canyons and Seamounts from offshore energy development completely,

but will provide some protections.<sup>172</sup> The MPRSA empowers the Environmental Protection Agency (EPA) to regulate ocean dumping of industrial wastes, sewage sludge and other wastes. Permit applications are evaluated to determine if dumping will "unreasonably degrade or endanger" human health, welfare, or the marine environment according to criteria set by the EPA.<sup>173</sup> These dumping provisions will help protect the Northeast Canyons and Seamounts' diverse marine habitats and endangered species from waste produced by potential offshore energy projects.

#### v. Clean Air and Clean Water Acts

The CAA sets standards for emission of air pollutants from industrial activities.<sup>174</sup> Companies seeking to participate in offshore energy development in the Arctic have not had to comply with the CAA since 2011 when the EPA requirement was revoked by a legislative rider attached to the Omnibus Appropriations Act. Control over air emissions in the arctic was transferred to DOI.<sup>175</sup> The CAA standards still must be complied with however in areas like the Northeast Canyons and Seamounts.<sup>176</sup> Similar to the CAA, the CWA sets regulates discharge of pollutants into the water.<sup>177</sup> Regulations for both the CAA and CWA are overseen and enforced by the EPA. As a result, spill prevention control and countermeasures plans are now required.<sup>178</sup>

#### c. Why is protection needed?

If the plaintiffs in *Massachusetts Lobstermen's Association* succeed and the Northeast Canyons and Seamounts loses its designation, the biodiversity hotspot's marine residents face OCS energy development. "Seismic airguns...used to explore the reserves of oil and gas deep beneath the ocean floor," can harm or disrupt marine

<sup>162</sup> *Id.*

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

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

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

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

<sup>167</sup> Marine Mammal Protection Act, 16 U.S.C. § 1361(13) (2012).

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

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

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

<sup>171</sup> NOAA Fisheries, *Incidental Take Authorizations Under the MMPA* (Sept. 2, 2016), <http://www.nmfs.noaa.gov/pr/permits/incidental/>.

<sup>172</sup> Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1434, 33 U.S.C. §§ 1401-1405 (2-12); Clean Air Act, 42 U.S.C. § 7401 (2012); Clean Water Act, 33 U.S.C. §§ 1251-1388 (2012).

<sup>173</sup> Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431-34, 33 U.S.C. §§ 1401-05 (2012).

<sup>174</sup> Clean Air Act, 42 U.S.C. § 7401 (2012).

<sup>175</sup> Michael Levine, Peter Van Tuyn, Lay la Hughes, *Oil and Gas in America's Arctic Ocean: Past Problems Counsel Precaution*, Seattle U.L. Rev., Summer 2014, 1271; Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 432, 125 Stat. 786, 1048 (2011).

<sup>176</sup> Michael Levine, Peter Van Tuyn, Lay la Hughes, *Oil and Gas in America's Arctic Ocean: Past Problems Counsel Precaution*, Seattle U.L. Rev., Summer 2014, 1271.

<sup>177</sup> Clean Water Act, 33 U.S.C. §§ 1251-1388 (2012).

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

life.<sup>179</sup> The Department of the Interior predicts 138,000 injuries of whales and dolphins may occur as a result of seismic blasts.<sup>180</sup> Whales and dolphins are not the only marine life that stand to be affected by seismic blasts. "Studies show that seismic airgun noise can reduce fish species – including tuna, marlin, swordfish, snapper and sea bass – by 40 to 80 percent."<sup>181</sup>

Short studies analyzing the effect of wind turbines on marine life have found that construction generally poses the biggest risk, but as an article on marine renewable energy installations (MREI) (i.e., wind, wave, and tidal) found, more studies must be performed to understand the long-term biological effects of these types of energy production.<sup>182</sup> Not only does existing research indicate that anthropogenic underwater noise vibrations from energy infrastructure installation may cause habitat loss<sup>183</sup>, but "[the] addition of novel structure to habitats may also provide substrate for invasive species."<sup>184</sup> More research is necessary to clarify what species are colonizing these areas and in what numbers they are doing so.<sup>185</sup>

Much like the 2006 Panera case where it was decided that a burrito is not a sandwich, if the stay on *Massachusetts Lobstermen's Association v. Ross* is lifted, the outcome will likely hinge on which side makes the best argument for the definition of land.<sup>186</sup> Protection of marine life and habitats within the Northeast Canyons and Seamounts may come down to regulations set by OCSLA, NEPA, ESA, MMPA, MPRSA, CAA, and CWA.

## IV. CRIMINAL LAW UPDATE

### a. *State v. Cruz*

The Washington Court of Appeals upheld Defendant Cruz's motion to suppress evidence after a Department of Fish and Wildlife ("DFW") officer searched his vehicle without a warrant. The State appealed and argued an officer safety or exigent circumstances exception covered the encounter and the three firearms recovered.

After observing Cruz illegally snag a Chinook salmon, a DFW officer arrested and handcuffed him, and performed a search incident to a valid arrest. The officer asked if Cruz had any firearms, and he "volunteered" he did in his vehicle. The officer instructed Cruz's companion to stand away from Cruz's vehicle and put Cruz in his patrol truck. The officer then removed three firearms from Cruz's truck and ran his name through dispatch. The results showed a prior felony charge, meaning Cruz could not possess firearms. The DFW officer retained the firearms as evidence and Cruz was later charged with three counts of unlawful possession in the second degree.

The Washington Court of Appeals found that since both Cruz and his companion complied with the officer's instructions during the encounter, no "dangerous" factor was present to justify extending the search to Cruz's vehicle. The court reiterated that mere possession of firearms does not "make him dangerous or justify intrusion into his private space." For similar reasons, the court found an exigent circumstances exception did not cover the encounter, because there was no true emergency or threat of destruction of evidence. Finally, the court posed several alternative actions the officer could have taken: obtain consent to retrieve the firearms, obtain Cruz's keys and lock the vehicle during the encounter, and instruct the companion to move further away from Cruz's vehicle. Affirmed.

195 Wash. App. 120 (2016).

### b. *United States v. Cline*

After several complaints from landowners of illegal hunting from vehicles in the area, officers set up a deer decoy to try to catch the violators. The officers observed a truck pull into a driveway and a van park behind. The driver of the truck fired at the decoy—the driver of the van, Defendant Cline, did not. Both vehicles left the scene. When officers turned on their lights and stopped the truck, the van rapidly backed away in the opposite direction, and was quickly pulled over by a second officer. The officer

<sup>179</sup> Vera Bergengruen, *No Atlantic Drilling for Now, but Seismic Airgun Blasts Might Go On* (Apr. 5, 2016 4:12 PM), <http://www.mcclatchydc.com/news/nation-world/national/article70080232.html>.

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

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

<sup>182</sup> M.J. Witt Et Al., *Assessing Wave Energy Effects on Biodiversity: the Wave Hub experience*, 370 *The Royal Soc'y* 502, 504 (2017).

<sup>183</sup> *Id.*

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

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

<sup>186</sup> *White City Shopping Ctr., LP v. PR Rest., LLC dba Bread Panera*, No. 2006196313, 2006 WL 3292641, at \*4 (Mass. Super. Ct. Oct. 31, 2006).