

Editor's Note

Welcome to the summer issue of NREEL Vista. In this edition, Lila Jones summarizes federal district court Judge Browning's 199-page opinion invalidating Mora County's ordinance banning oil and gas exploration. Next, we follow up on a topic presented in the Winter 2013 edition of Vista. Samantha Ruscavage-Barz provides an update on the existence, scope, and applicability of the Public Trust Doctrine in New Mexico after a recent Court of Appeals decision recognizing the atmosphere as a public trust resource. Finally, Kelsey Rader analyzes the effectiveness of the Endangered Species Act to address threats to species and their habitats brought by climate change.

We welcome submissions from our law student and attorney readers. If you would like to submit an article for the Winter 2016 edition of NREEL Vista, please contact me at kay.bonza@state.nm.us. Many thanks to NREEL Board Members Deana Bennett and Sean FitzPatrick for their editorial support. The views expressed in these articles are those of the authors alone and not the views of the NREEL Section. Thank you for your continued support of the NREEL Section of the State Bar.

Kay R. Bonza, Editor

Federal Court Invalidates Mora County Fracking Ban

*Lila C. Jones**

In January 2015, the United States District Court for the District of New Mexico invalidated Mora County, New Mexico's (the "County's") "Community Water Rights and Self-Governance Ordinance" ("Ordinance")¹ banning oil and gas production and storage.² The Ordinance, enacted on April 29, 2012, by a 2 to 1 County Commission vote,³ was based on a form ordinance authored by the Community Environmental Legal Defense Fund ("CELDF"),⁴ a Pennsylvania-based non-profit.⁵

THE ORDINANCE

The Ordinance, while a mere seven pages, attempted to re-write decades of legal precedent.⁶ Section 5, State-ments of Law, and its nine subsections contain the most controversial provisions. Here, the Ordinance stated: "It shall be unlawful for any corporation to engage in the extraction of oil, natural gas, or other hydrocarbons within Mora County."⁷ Section 5 banned the extraction of water for use in oil and gas extraction, banned fracking,⁸ prohibited storage for oil and gas, and prohibited the use or maintenance of infrastructure related to oil and gas extraction.⁹ Additionally, any corporations that violated

the Ordinance would not be afforded "the rights of 'persons'" under "the United States and New Mexico Constitutions nor...be afforded rights under the 1st or 5th amendments... or the commerce or contracts clauses within the United States Constitution."¹⁰

LITIGATION

On May 31, 2014, Shell Western Exploration Production Inc. ("SWEPI") filed suit in federal court against the County seeking to invalidate the Ordinance.¹¹ SWEPI asserted that the Ordinance violated the United States Constitution's Supremacy

Inside this Issue

Protecting the Atmosphere for Future Generations 5

A Brave New ESA: Incorporating Climate Change Considerations in the Endangered Species Act.. 9

News and Updates 12

Clause, SWEPI's substantive due-process rights, the Fifth Amendment's takings clause, the Fourteenth Amendment's equal protection clause, and the First Amendment. SWEPI also contended that the Ordinance was unenforceable on state land, that state law preempted the entire field of oil-and-gas regulation, and that the Ordinance conflicted with state law.¹²

The County responded to SWEPI's claims by asserting that SWEPI lacked standing to sue and that SWEPI's claims were not ripe for adjudication.¹³ The County argued that issues of fact remained, such as the threat to public health from drilling and whether SWEPI lost valuable property.¹⁴ The County challenged whether the Supremacy Clause creates a private cause of action and reasserted its right of local self-governance.¹⁵ The County dedicated a large portion of its defense to challenging several legal tenets relating to corporations. For example, the County argued that the Constitution should allow counties to protect their people from the actions of corporations, which are merely "creations of the state."¹⁶ Corporations, it argued, are property and should not be permitted to supersede the "collective rights of the people."¹⁷

THE OPINION

Judge James O. Browning's almost 200-page memorandum opinion ("Opinion") meticulously reviewed each of SWEPI's claims. Before reaching the merits, the court found that SWEPI had standing because SWEPI suffered a concrete injury through the "devaluation, or complete destruction of value in its leases,"¹⁸ a significant holding for the owners of oil and gas leases. Standing did not require a showing of demonstrated intent to drill; mere devaluation was sufficient.¹⁹ SWEPI had standing to pursue its First Amendment claim because Section 5.5 of the Ordinance attempted to nullify First Amendment rights, another concrete injury.²⁰ The court found each injury was directly caused by the Ordinance's prohibitions.²¹



As to ripeness, the court held SWEPI's takings claim was not ripe because SWEPI failed to utilize New Mexico's inverse condemnation statute to seek compensation for its economic losses.²² All of SWEPI's other claims survived the jurisdictional challenges.

On the merits, the court found in favor of several of SWEPI's claims. The Opinion held four subsections of Section 5 violated the Supremacy Clause, specifically the provisions asserting that corporations lack rights under the First and Fifth Amendments and the Commerce and Contracts Clauses.²³ Further, the court reasoned that purporting to prevent or limit legal challenges to the Ordinance also contradicted

federal law.²⁴ As the Opinion stated: "If a county could declare under what conditions federal law preempts its law, federal law would not be preemptive at all."²⁵

The County prevailed on several claims. As to the due process challenge, the court applied rational basis review because no fundamental rights were at issue.²⁶ The court looked to the democratic process of the Ordinance's enactment and held "it is rational that defendants would ban corporations but not individuals from...hydrocarbon exploration and extraction"²⁷ because such activities are almost exclusively undertaken by corporations. While acknowledging ambiguities in this argument, the court drew reasonable inferences in the County's favor.²⁸

The County also prevailed on the equal protection claim. Again, the court held that rational basis review applied because SWEPI is not a member of a protected class.²⁹ The distinction between corporations and individuals was not arbitrary because, as noted in the due process analysis, corporations engage in oil and gas extraction far more often than individuals.³⁰ Further, the court reasoned that protecting the County's water supply is not a purpose based on unlawful animus.³¹ Significantly, this holding indicates that unequal treatment of individuals and corporations with regard to oil and gas activities is not *per*

se an equal protection violation.

STATE LAW PREEMPTION

The Opinion's analysis of SWEPI's state law claims is likely of the greatest import for future local government actions. First, the Opinion held that the County has no authority to enforce a zoning ordinance on state lands.³² Second, it held New Mexico law impliedly preempts the Ordinance based on conflict preemption, which applies when a local law prohibits something that state law expressly allows.³³ In this case, state and local law directly conflicted because the oil and gas activities the Ordinance banned are explicitly allowed under state law.³⁴ The Opinion's scope, however, is limited because it made clear that while a complete ban impermissibly infringes upon state law, room remains for local oil and gas regulation.³⁵

AFTERMATH AND IMPLICATIONS

Some commentators were not surprised that the strongly worded Ordinance ran afoul of both federal and state law.³⁶ Others paint a picture of a small county defeated in its fight against corporations seeking to ruin its land and water³⁷ or as another example of an out-of-state corporation taking advantage of a small county to use it as a test case.³⁸ New Mexico's neighbors seem to have taken notice. While they have not specifically mentioned Mora County, both Texas³⁹ and Oklahoma⁴⁰ recently enacted laws expressly preempting cities and counties from enacting bans similar to the Ordinance.⁴¹

The Opinion's full implications are not yet clear. Both Santa Fe and San Miguel Counties have oil and gas extraction ordinances. A primary difference between these ordinances and Mora County's is that both can be characterized as permitting and environmental regulation ordinances⁴² as opposed to absolute bans.⁴³ Characterized as "strict,"⁴⁴ these ordinances have not been challenged in court, possibly because while rich in resources, these counties are not as plentiful in oil and gas as other areas of New Mexico. Additionally, regulatory programs that do



not prohibit oil and gas activities entirely are less likely to encounter preemption challenges. As the Opinion notes, New Mexico has not preempted the entire field of oil and gas regulation. The Opinion outlines for local governments the contours of an ordinance that at least one federal court would find acceptable. Following the court's guidance, New Mexico cities and counties may turn to the democratic process to draft ordinances that may serve their interest in self-governance and also survive judicial scrutiny.

Endnotes

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¹ Mora County, New Mexico, Ordinance 2013-01, http://celdf.org/downloads/Mora_Co_Community_Rights_Ordinance_042913.pdf.

² *SWEPI, LP v. Mora County, N.M.*, Case No. CIV 14-0035 JB/SCY, 2015 WL 365923 (D.N.M. 2015).

³ Rob Nikolewski, *Get Ready for Law Suits after Mora County Passes Oil and Gas Ban* (May 3, 2013), <http://www.capitolreportnewmexico.com/2013/05/get-ready-for-lawsuits-after-mora-county-passes-oil-and-gas-ban/>.

⁴ *Id.* The County's political climate at the time was resistance to any exploitation of the land other than for farming and ranching. For video excerpts from public meetings, see *Rooted Lands - Tierras Arraigadas*, available at <http://www.celdf.org/rooted-lands---tierras-arraigadas--a-film-about-the-rising-up-of-mora-county-new-mexicans-against-the-oil--gas-industry-view-the-trailer-here>.

⁵ Community Environmental Legal Defense Fund, *About Us, Mission Statement* (2015), <http://www.celdf.org/mission-statement>.

⁶ *SWEPI*, 2015 WL 365923, at 80.

⁷ Ordinance, *supra* note 1, Section 5.

⁸ Fracking, or hydraulic fracturing, is a type of drilling in which a well is drilled horizontally, perforated and then water with additives such as sand and other chemicals are pumped through the perforations creating small fractures in the rock. *What is Fracking?*, <http://www.what-is-fracking.com/what-is-hydraulic-fracturing/>.

⁹ Ordinance, *supra* note 1, Section 5.

¹⁰ *Id.*

¹¹ *SWEPI*, 2015 WL 365923, at 1-13.

¹² *Id.* at 1.

¹³ *Id.* at 14.

¹⁴ *Id.* at 18.

¹⁵ *Id.* at 19-20.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 58.

¹⁹ *Id.* at 58-59.

²⁰ *Id.* at 64.

²¹ *Id.* at 66-67.

²² *Id.* at 68.

²³ *Id.* at 78.

²⁴ *Id.* at 79.

²⁵ *Id.*

²⁶ *Id.* at 81.

²⁷ *Id.* at 83.

²⁸ *Id.* at 85.

²⁹ *Id.* at 86.

³⁰ *Id.* at 87.

³¹ *Id.* at 90. The court declined to extend the “rational basis with bite” test here because the animus doctrine has not been applied outside of cases involving discrimination against homosexuals. *Id.*

³² *Id.* at 95. The Opinion bolsters this assertion by pointing out that despite the almost two years since the Ordinance’s enactment the legislature had made no such grant of authority.

³³ *Id.* at 96-97.

³⁴ *Id.* at 100-101. The court also reasoned that a complete ban creates a conflict by “creating waste and not recognizing correlative rights,” quoting University of New Mexico Professor Alex Ritchie’s recently published article, Alex Ritchie, *On Local Fracking Bans: Policy and Preemption in New Mexico*, 54 Nat. Res. J. 255, 317 n. 349 (2014).

³⁵ Here, the Opinion cited a New Mexico Court of Appeals opinion, which noted the “room for concurrent regulation” between county and state regulation. *Id.* at 103-05. The court also rejected the County’s argument that the severability clause saved portions of the Ordinance because when the court invalidated all provisions having the force of law (namely, Section 5), nothing of substance remained and the Ordinance was left “an empty shell.” *SWEPI*, 2015 WL 365923, at 113.

³⁶ Nikolewski, *supra* note 3.

³⁷ See Ernie Atencio, *The Man Behind a New Mexico County’s Fracking Ban* (June 24, 2014), <http://www.hcn.org/issues/46.11/the-man-behind-a-new-mexico-countys-fracking-ban>; see also Staci Matlock, *World is watching Mora County battle vs. fracking*, *The New Mexican* (Nov. 23, 2013), http://www.santafenewmexican.com/news/local_news/world-is-watching-mora-county-battle-vs-fracking/article_edc8353d-3c1e-5ce1-ba74-d8c12d-682fab.html.

³⁸ Nikolewski, *supra* note 3.

³⁹ Reuters in Houston, *Texas Governor Bans Cities and Towns from Banning Fracking* (May 19, 2015), <http://www.theguardian.com/us-news/2015/may/19/fracking-texas-governor-stops-cities-and-towns-banning-hydraulic-gas-mining>.

⁴⁰ Sean Murphy, *Oklahoma Joins Texas with Law Preventing Cities, Towns from Banning Oil and Gas Operations* (May 29, 2015), <http://www.usnews.com/news/business/articles/2015/05/29/oklahoma-is-latest-state-to-prevent-local-fracking-bans>.

⁴¹ Oklahoma’s stated intent was to preempt any county ordinances to the contrary. Ari Phillips, *Oklahoma Lawmakers Vote To Outlaw Fracking Bans As Earthquakes In The State Spike* (Apr. 23, 2015), <http://thinkprogress.org/climate/2015/04/23/3650316/oklahoma-local-drilling-bans/>.

⁴² Santa Fe County, New Mexico, Ordinance §§ 5, 9, 11, 12. San Miguel County, New Mexico, Ordinance §§ 2106.3, 2106.5.1.

⁴³ Ordinance, *supra* note 1.

⁴⁴ Associated Press, *San Miguel County OKs Strict Drilling Rules* (Nov. 13, 2014), <http://www.abqjournal.com/495108/news/san-miguel-county-to-consider-drilling-ordinance.html>.

Protecting the Atmosphere For Future Generations: The Public Trust Doctrine in New Mexico Law

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On March 12, 2015, the New Mexico Court of Appeals issued an important ruling in *Sanders-Reed v. Martinez* explicitly recognizing for the first time the existence of the Public Trust Doctrine in New Mexico.¹ Under the Public Trust Doctrine, states hold the natural resources within their boundaries in trust for their citizens and, as trustees, states must manage trust resources so as not to substantially impair their citizens' interests in these resources.² Prior to *Sanders-Reed v. Martinez*, New Mexico state courts had not been asked to adjudicate issues related to the Public Trust Doctrine and its application to natural resources in New Mexico, even though public trust principles were inherent in New Mexico law. The New Mexico legislature has implicitly recognized the State's duty as trustee³ with respect to surface water, groundwater, moisture in the atmosphere, and salt lakes.⁴ Public trust principles are also implicitly expressed in the New Mexico Constitution.⁵ Judicial recognition that the Public Trust Doctrine is operative in New Mexico confirms the State's role as trustee of its natural resources. The Court of Appeals also recognized that the atmosphere is a public trust resource, subject to the Doctrine's protection.⁶ Finally, the Court of Appeals held that a plaintiff cannot assert her right under the Doctrine for protection of the atmosphere in the courts without first having raised the issue before the administrative board charged with adopting regulations to protect the atmosphere under the New Mexico Air Quality Control Act.⁷



I. BACKGROUND

A. The Public Trust Doctrine

The Public Trust Doctrine is “[a]n ancient doctrine of common law [that] restricts the sovereign’s ability to dispose of resources held in public trust.”⁸ “The genesis of this principle is found in Roman jurisprudence, which held that ‘by the law of nature’ ‘the air, running water, the sea, and consequently the shores of the sea’ were ‘common to mankind.’”⁹ The Public Trust Doctrine developed through English common law and was incorporated into the first American colonial charters.¹⁰ Following the American Revolution, the Public Trust Doctrine became part of American common law. More than a century ago, in what has become the seminal public trust case, the U.S. Supreme Court recognized the Public Trust Doctrine was needed as a bulwark to protect resources too valuable to be disposed of at the whim of the legislature.¹¹ Since then,

various state courts have defined the Public Trust Doctrine as imposing an affirmative, inalienable obligation on states to protect public trust resources, and not to use the asset in a manner that causes injury to present and future trust beneficiaries.¹²

B. Air as a Public Trust Resource

The U.S. Supreme Court case *Illinois Central Railroad Company v. Illinois* established the principle that a public trust resource is any “property of a special character” that presents “a subject of public concern to the whole people of a state.”¹³ Over time, courts have expanded the Public Trust Doctrine beyond original societal concerns of commerce and navigation to other modern concerns such as biodiversity, wildlife, and recreation.¹⁴ Indeed, courts have “perceiv[ed] the public trust doctrine, not to be ‘fixed or static,’ but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit.”¹⁵ Whether a particular natural resource is part of the public trust is typically treated as a question of state law.¹⁶

Consistent with *Illinois Central*, the idea that the air or atmosphere is subject to the protections of the Public Trust Doctrine stems from the belief that the atmosphere is a shared resource “vital to human welfare and survival.”¹⁷ Simply put, state citizens have an interest in seeing their airshed managed in a manner that will prevent substantial impairment to air quality and climate. Climate impairment results from allowing unlimited levels of greenhouse gas emissions into the atmosphere, and was the impetus for *Sanders-Reed* as well as for similar public trust cases filed in several other states and in federal court.¹⁸

Although the question of whether the atmosphere is a public trust resource is an issue of first impression in New Mexico, a handful of other states have generally recognized the applicability of the Public Trust Doctrine to air in their case law and constitutions.¹⁹ In a recent case similar to *Sanders-Reed*, Texas Judge Gisela Triana held that all natural resources, including the atmosphere, are protected under the Public Trust Doctrine and the Texas constitution.²⁰ However, other state courts have been reluctant to extend the Doctrine to the atmosphere, choosing either to limit public trust protections to water resources or to circumvent the question entirely by dismissing cases for lack of jurisdiction.²¹

C. The District Court Case

On May 4, 2011, 16-year-old Akilah Sanders-Reed and the environmental organization WildEarth Guardians filed a lawsuit in the First Judicial District against Governor Susana Martinez and the State of New Mexico (“the State”) to enforce the State’s duty to protect the atmosphere from the effects of greenhouse gases that drive climate change and to hold this vital natural resource in “trust” for present and future generations of New Mexicans.²² The case relied on the long-established common law Public Trust Doctrine. Plaintiffs alleged that as a natural resource the “atmosphere” was subject to the Doctrine’s protections, and should be managed to prevent substantial impairment caused by unlimited greenhouse gas emissions from sources in New Mexico. These claims represented issues of first impression in New Mexico. The State twice moved to dismiss the case, but the district court allowed the case to go forward to summary judgment.²³ The district court granted summary judgment in favor of the State, and held that the Public Trust Doctrine did not apply because (1) the Legislature had established a statutory and regulatory scheme for protecting the atmosphere; (2) the Environmental Improvement Board (“EIB”) had determined that greenhouse gas regulation was unnecessary; and (3) the political process leading to the EIB’s decision was not tainted.²⁴

II. THE COURT OF APPEALS CASE

The issues on appeal were all questions of law related to the existence, scope, and applicability of the Public Trust Doctrine in New Mexico. Appellants raised three issues on appeal: (1) whether the Public Trust Doctrine is operative in New Mexico; (2) whether the atmosphere is a public trust resource; and (3) whether the district court erred as a matter of law by conditioning application of the Doctrine on a showing that the political process for protecting the atmosphere had gone astray.²⁵ The Court of Appeals reframed the third issue as a two-part question of whether the Public Trust Doctrine “provides an alternative process, separate from” the Air Quality Control Act for addressing control of greenhouse gas emissions, and if so, whether a court decision that differed from an EIB decision “would take precedence over the EIB’s decision.”²⁶

The Court of Appeals agreed with Appellants that “our state constitution recognizes that a public trust duty exists for the protection of New Mexico’s natural resources,

including the atmosphere, for the benefit of the people of this state.”²⁷ In so holding, the New Mexico Court of Appeals is the first state court to explicitly recognize the atmosphere as a public trust resource.

The Court devoted the remainder of the opinion to articulating the process by which a citizen beneficiary could bring a public trust claim against the State. The Court held that a plaintiff could not assert a “separate common law cause of action under the public trust doctrine” and “raise arguments concerning the duty to protect the atmosphere” in the courts without first availing themselves of the EIB’s administrative process for seeking such protection.²⁸ The Court provided three reasons for this holding. First, citing New Mexico Supreme Court precedent for the proposition that “the common law does not apply to the extent the subject matter of the duty or right asserted is covered by constitution, statute or rule,” the Court determined that the common law Public Trust Doctrine had been superseded by the New Mexico Constitution and the Air Quality Control Act.²⁹

Second, the Court cited various provisions of the Air Quality Control Act as evidence the Legislature had delegated protection of the atmosphere to the EIB in the first instance, and provided a process for citizens to participate in that process.³⁰ Because Appellants did not avail themselves of this regulatory process, nor did they argue that the process “is inconsistent with public trust principles for implementing the protections set forth in Article XX, Section 21 of the Constitution,” Appellants could not bring a cause of action under the Public Trust Doctrine.³¹

Finally, the Court determined that allowing a common law public trust claim without first raising public trust issues before the EIB would violate separation of powers principles because independent action by the judicial branch would ignore and supplant the procedures established by the Air Quality Control Act.³² In their Amended Complaint in district court, Plaintiffs: (1) requested declaratory relief on several legal issues pertaining to the Public Trust Doctrine, (2) asked the court to order the State to produce within a reasonable timeframe an assessment of the degree of impairment to the atmosphere from current greenhouse gas levels in New Mexico, and (3) requested the court to order the State to prepare a plan for redressing and preventing further atmospheric impairment from greenhouse gas emissions, including measures for mitigating climate change impacts to New Mexico’s trust resources. The Court of Appeals believed

that even though Appellants had not requested that the district court overturn the EIB’s earlier decision repealing greenhouse gas regulation, the “practical effect” of the requested relief “would be to reverse the EIB’s action” thereby violating separation of powers principles.³³

III. CONCLUSION

Sanders-Reed v. Martinez established the State’s responsibility to protect the atmosphere as a public trust resource for citizen beneficiaries, including future generations of New Mexicans. This is a highly significant ruling because it is the first time that any state appellate court has recognized the atmosphere as a public trust resource. However, by rejecting a separate common law cause of action under the Public Trust Doctrine and, instead, requiring citizen beneficiaries to first assert their trust rights through the EIB’s administrative process, the Court of Appeals relegated the Doctrine to a procedural statute akin to the National Environmental Policy Act that simply requires agency decision-making to follow proper procedures, rather than recognizing the Public Trust Doctrine for what it is—a substantive legal doctrine that allows citizen beneficiaries to hold the State accountable for its management of public trust resources.

Endnotes

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¹ *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, No. 33,110, 2015 WL 1120403 (N.M. Ct. App. Mar. 12, 2015).

² See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

³ A state’s duty as trustee of its natural resources has been defined as: “the duty to ensure the continued availability and existence of... [trust] resources for present and future generations,” and “incorporates the duty to promote the development and utilization of... [trust] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the state.” *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1003 (Haw. 2006).

⁴ See N.M. Stat. Ann. §§ 72-1-1 (1941), 72-12-1 (2012), 75-3-3 (1965), 72-11-1 (1854).

⁵ See Article XX, § 21 of the New Mexico Constitution (“The protection of the state’s beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare.”).

⁶ *Sanders-Reed v. Martinez*, 2015 WL 1120403, at *4.

⁷ *Id.*

⁸ *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 166 (Ariz. Ct. App. 1991).

⁹ *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 360 (N.J. 1984) (quoting J. Inst. 2.1.1 (T. Sandars trans. 1st Am. Ed. 1876)).

¹⁰ See *Martin v. Waddell*, 41 U.S. 367, 413 (1842) (discussing the public trust doctrine in colonial charters).

¹¹ See *Illinois Central*, 146 U.S. at 453 (“The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

¹² See, e.g., *Nat’l Audubon Soc’y v. Super. Ct. of Alpine County*, 658 P.2d 709, 728 (Cal. 1983); *N.J. Dep’t of Env’tl. Prot. v. Jersey Cent. Power & Light Co.*, 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) (“The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.”).

¹³ *Illinois Central*, 146 U.S. at 453-454.

¹⁴ See, e.g., *Nat’l Audubon Soc’y*, 658 P.2d at 719; *Ctr. for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 599 (Cal. Ct. App. 2008); *Matthews*, 471 A.2d at 363.

¹⁵ *Matthews*, 471 A.2d at 365.

¹⁶ See *Montana v. United States*, 450 U.S. 544, 551 (1981).

¹⁷ Mary Wood, *Atmospheric Trust Litigation* in *Adjudicating Climate Change: Sub-National, National, and Supra-National Approached* (William C.G. Burns & Hari M. Osofsky, eds.) (2009, Cambridge University Press).

¹⁸ See <http://ourchildrenstrust.org/legal> for overviews and status of all atmospheric trust state cases and the federal case. All of these cases were brought by youth plain-

tiffs, along with their parents, motivated by government inaction on climate change. Legal efforts were coordinated by Our Children’s Trust, a non-profit organization dedicated to protecting the Earth’s natural systems for current and future generations. See <http://ourchildrenstrust.org/> about.

¹⁹ See *Nat’l Audubon Soc’y*, 658 P.2d at 720 (recognizing that the “purity of air” is protected by the public trust); *Majesty v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989) (public trust includes air, water and other natural resources); Haw. Const. art. XI, § 1; Pa. Const. art. I, § 27.

²⁰ *Angela Bonser-Lain v. Tex. Comm’n on Env’tl. Quality*, No. D-1-GN-11-002194 (Tex. Dist. Ct. 2012).

²¹ See, e.g., *Arnow v. Minnesota*, No. 62-CV-11-3952 (Minn. Ct. App. 2012); *Chernaik v. Kitzhaber*, No. 16-11-09273 (Or. Dist. Ct. 2012).

²² *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, No. D-101-CV-2011-1514 (N.M. Dist. Ct. 2012).

²³ The district court proceedings related to the motions to dismiss are discussed in *The Public Trust Doctrine and Climate Change in New Mexico*, VISTA (State Bar of N.M. Nat. Resources, Energy and Env’tl L. Sec.), Winter 2013.

²⁴ *Sanders-Reed v. Martinez*, 2015 WL 1120403, at *2.

²⁵ *Id.* at *3.

²⁶ *Id.*

²⁷ *Id.* at *4. See also *id.* at *5 (holding “Article XX, Section 21 of our constitution recognizes the duty to protect the atmosphere and other natural resources, and it delegates the implementation of that specific duty to the Legislature.”).

²⁸ *Id.* at *4.

²⁹ *Id.* at *5.

³⁰ *Id.* The Court included references to the statutory provision allowing for judicial review of EIB decisions and the standard of review at N.M. Stat. Ann. §§ 74-2-9(A)-(C) (1992).

³¹ *Id.*

³² *Id.* at *6.

³³ *Id.*

A Brave New ESA: Incorporating Climate Change Considerations in the Endangered Species Act

Kelsey Rader*

I. INTRODUCTION

With climate change on the rise, conservationists and species across the country are scrambling to adapt to this new, troubling reality. The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2014) (“ESA” or “Act”), the “pit bull” of federal environmental statutes, may be used to halt actions harmful to species and their habitats, and its power entices environmentalists to use its Section 9 take prohibition as a weapon to mitigate the climate change consequences of carbon emissions.¹ However, many lawyers agree this approach is shortsighted and offers slim chances of success; instead, many are looking to employ the ESA to develop adaptive methods to help transition species through the inevitable rise of Earth’s global average temperature. This article analyzes this new role for the ESA. It summarizes the main statutory provisions of the ESA, describes how the Act has been used to respond to threats to species from climate change, and identifies the larger policy considerations climate change presents to traditional conservation methods under the ESA.

II. THE ESA AND ADAPTIVE STRATEGIES FOR CLIMATE CHANGE

A. Section 4 Listing, Critical Habitat Designation, Recovery Plans, and Special 4(d) Rules

Listing is the critical decision under the ESA. Until a species is listed as endangered or threatened, the Act does not afford any legal protections.² Section 4 requires that the listing of species must be based on the “best available science.”³ Factors that make a species eligible for listing include “natural or manmade factors affecting its continued existence,” which has helped open the ESA



to address climate change issues.⁴ Incorporating climate change in listing decisions occurred most famously in the 2008 listing of the polar bear as a threatened species, due in part to the destruction of its habitat by global warming.⁵ The Department of the Interior (“DOI”) has also stated in its Department Manual that it will incorporate climate change as a part of the best available science standard; however, the manual does not purport to establish legally binding obligations.⁶

Once a species is listed, Section 4 requires designation of critical habitat for that species “to the maximum extent prudent and determinable.”⁷ Critical habitat is the habitat that the U.S. Fish and Wildlife Service (“FWS”)⁸ decides is necessary for the survival of the listed species; FWS makes the determination on the basis of the best available science while taking into consideration the designation’s impact on national security and economic costs.⁹ In terms of incorporating climate change reform, environmental groups have urged agencies to anticipate habitat shifts due to climate change when designating critical habitat.¹⁰ Proactively designating critical habitat could provide species with survival opportunities, as listed species will be able to survive the shift and change of

habitats within their range.¹¹ Responding to this demand, the DOI Manual has suggested that it will “anticipate and prepare for shifting wildlife movement patterns.”¹²

Section 4 also directs FWS to implement management plans tailored to the particular needs of each listed species. Section 4(f) requires FWS to develop and implement “recovery plans” that set specific goals and detail the steps necessary to achieve the species’ recovery.¹³ Recovery plans are not binding on federal agencies but instead are suggestions to guide agency action. These plans are also prioritized around the species with the greatest chance to benefit from a recovery plan.¹⁴ Recovery plans can be used to guide collaboration with local and state agencies to help protect species from harms brought on by climate change.¹⁵ Additionally, in anticipation of structural redevelopment to cope with global warming, recovery plans offer agencies a means to anticipate and plan for species protection.¹⁶

If a species is listed as “threatened” as opposed to “endangered,” FWS has the power to bypass some of the mandatory provisions attached to endangered species and promulgate what is known as a “special 4(d) rule.” The rule is intended to give more discretion to FWS in developing conservation plans that have a more individualized approach by limiting or heightening the take prohibition as it applies to the listed species under Section 9.¹⁷ Like a recovery plan, a special 4(d) rule can help FWS “identify and regulate specific effects of human adaptation to climate change” that may have adverse effects on threatened species.¹⁸ FWS has already discussed the effects of climate change in promulgating a special 4(d) rule. After listing the polar bear, FWS issued a special 4(d) rule that exempted the agency from regulating activities responsible for greenhouse gas emissions and oil developments unless, perhaps, they were within the actual range of the species and a direct causal link was shown to exist between greenhouse gas emissions and the listed species or critical habitat.¹⁹ Environmentalists criticized the rule as undermining the protection of polar bears; however, a special 4(d) rule can also swing in the other direction and create enhanced take prohibitions specifically tailored to a species.²⁰

B. Section 7 Agency Consultations and Jeopardy Prohibitions

Section 7 protects species from certain agency actions, and its protections have the potential to incorporate climate change considerations. Before a federal agency engages in any action affecting land use in an area that may contain endangered species, the agency must consult with FWS to ensure any action it funds or carries out does not in any way jeopardize the existence of a listed species or adversely modify the critical habitat of the species.²¹ If a listed species in the area might be affected by the action, the agency performs a biological assessment consultation to determine whether the proposed process might adversely affect the species.²² If a potential adverse effect is discovered, FWS will draft a biological opinion.²³ The biological opinion assesses the impact the action will have on the listed species and then suggests “reasonable and prudent” alternatives to the action proposed to mitigate its effect on the species.²⁴ The alternatives provided in the biological opinion give the agency guidelines to prevent jeopardizing the species or adversely modifying the designated critical habitat. So long as the action does not jeopardize the species, the biological opinion can authorize incidental “takes” of individual members of the protected species. At least one federal district court has determined that agencies are obligated to consider climate change within the biological opinion, but these cases have not decided to what degree climate change must be considered.²⁵ Specifically, courts have required FWS to consider climate change as part of the background set of stressors for species regardless of whether the proposed federal action itself contributes to climate change.²⁶

III. LIMITATIONS OF THE ESA TO ADDRESS CLIMATE CHANGE, AND POLICY CONSIDERATIONS

FWS has incorporated climate change considerations in its regulations implementing the ESA. This approach allows the agency flexibility to make individualized decisions based on the needs of each species. It also allows the agency to rely on the “best available science” standard in implementing climate change decisions. However, as with all potential methods discussed in this article, FWS has yet to incorporate in the ESA, a legally binding obligation by agencies and private developers to consider climate change. Additionally, courts have not clearly de-

fined for FWS to what degree it must address climate change in biological opinions or in any other decisions.²⁷ These omissions leave the ESA without clear or uniform guidance on how to manage species affected by climate change. The absence of legally binding obligations to address climate change also undermines the ability of private citizens or courts to ensure FWS is properly addressing climate change under the ambiguous best science standard.

Climate change shakes the very foundation of U.S. conservation policy. The idea that ecosystems are relatively stable is now challenged by the reality that promises drastic and inevitable change. Even more troubling is that preservation of “native” ecosystems in trust for future generations may now be unattainable, or at least impracticable, as the effects of climate change become more certain. These realizations present lawmakers with pressing questions, and expose some very serious limitations to the ESA’s ability to protect species in light of climate change. With its costly species-specific approach and dependency on potentially unattainable ecological baselines, the ESA may not be the right tool for the job. Whether we reshape the tool we have or develop an entirely new regulatory method to address species protection in the coming years is a question we will have to answer sooner rather than later. Unfortunately, time is not on our side, nor on the side of our endangered species.

Endnotes

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¹ A “take” means a listed species of fish or wildlife may not be killed, removed from its habitat, or its habitat may not be destroyed or altered in such a way that it may threaten the species’ survival. 16 U.S.C. §1531 (2014); *see also Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 702 (1995) (habitat destruction can also be considered a taking if it results in the killing of members of a protected species).

² The take prohibition of Section 9 only applies to species listed as endangered; the Department of the Interior has the power to extend protections to threatened species at its discretion under Section 4(d). 16 U.S.C. §§ 1538(a)(1)(b), 1533(d) (2015).

³ 16 U.S.C. § 1533(b)(1)(a) (2015).

⁴ 16 U.S.C. § 1533(a)(1) (2015).

⁵ Dave Owen, *Endangered Species Act*, in *GLOBAL CLIMATE CHANGE AND U.S. LAW* 189 (Michael B. Gerrard & Jody Freeman eds., 2014).

⁶ DEPARTMENT OF THE INTERIOR, DEPARTMENT MANUAL: CLIMATE CHANGE ADAPTATION (2012), *available at* <http://elips.doi.gov/elips/0/doc/3741/Page1.aspx>.

⁷ 16 U.S.C. § 1533(a)(3)(A)(i) (2015).

⁸ U.S. Fish and Wildlife Service is the agency under the DOI charged with administering the ESA. *See* 50 C.F.R. § 402.02 (2015) (definitions of “Director” and “Service”).

⁹ 16 U.S.C. § 1533(b)(2) (2015).

¹⁰ Owen, *supra* note 5, at 190.

¹¹ *Id.*

¹² DOI, *supra* note 6, at 3.

¹³ 16 U.S.C. § 1533(f)(1) (2015).

¹⁴ 16 U.S.C. § 1533(f)(1)(A) (2015).

¹⁵ J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U.L. REV. 1, 37-38 (2008).

¹⁶ *Id.*

¹⁷ Owen, *supra* note 5, at 185.

¹⁸ Ruhl, *supra* note 15, at 36.

¹⁹ Special Rule for the Polar Bear, 73 Fed. Reg. 76,249, 76,266 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt.17).

²⁰ Madeline June Kass, *Threatened Extinction of Plain Vanilla 4(d) Rules*, 16 NAT. RESOURCES & ENV’T. 78, 78-79 (2001).

²¹ 16 U.S.C. § 1536 (2015).

²² Owen, *supra* note 5, at 185.

²³ *Id.*

²⁴ *Id.*

²⁵ *See Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322 (2007).

²⁶ Owen, *supra* note 5, at 192.

²⁷ *See Kempthorne*, 506 F. Supp. 2d 322 (2007).



News and Updates

October 2015 State Bar of New Mexico Annual Meeting—Bench and Bar Conference: National Parks and Native American Communities

On Thursday, October 1, 2015, the NREEL Section and the Indian Law Section will co-sponsor a presentation at the State Bar of New Mexico 2015 Annual Meeting, taking place at The Broadmoor in Colorado Springs, Colorado. Our speaker for the presentation will be UNM School of Law Professor Jeanette Wolfley, who will discuss "National Parks and the Collaborative Process with Native American Communities: Then and Now." For more information, visit the State Bar website at www.nmbar.org or contact the State Bar at (505)797-6000.

2015 Annual Winter NREEL CLE: Public Lands

On Friday, December 18, 2015, the NREEL Section will sponsor its annual winter CLE event, which will focus on the issue of public lands. The all-day event will take place at the State Bar Center; attendance by video will be available. Look out for e-mails from the State Bar as the event draws closer.



From left: Kelsey Rader, Lila Jones, and Dave Nezzie of the UNM School of Law Environmental Moot Court Team

UNM School of Law Environmental Moot Court Team

The UNM School of Law Environmental Law Moot Court team, under the tutelage of Samantha Ruscavage-Barz, competed this past February at Pace Law School in New York. This year's assigned problem involved issues pertaining to the Clean Water Act, Resource Conservation and Recovery Act, the Public Trust Doctrine, and admissibility of evidence obtained through trespass. Of the 62 teams that competed this year, the UNM Team was one of 27 teams that advanced to the quarterfinal round. Team member Lila Jones won Best Oralist – Honorable Mention in the overall competition. The students learned immensely from the experience; many thanks to the lawyers who volunteered to help prepare these students for the competition.

Spring NREEL Section Mixer in Santa Fe

On April 30, the NREEL Section hosted a mixer at the Cowgirl Hall of Fame restaurant in Santa Fe. Over 35 NREEL Section members enjoyed getting together for food and drink and good conversation. The well-attended mixer included judicial clerks, private and public sector practitioners, and law school faculty meeting and mingling in a casual setting. Thanks to all who attended. ***We hope to see you at the next NREEL mixer planned for October in Albuquerque. Keep an eye out for the announcement.***



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