RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. ENDANGERED SPECIES ACT

Defenders of Wildlife v. Salazar, Nos. CV 09-77-M-DNM, CV 09-82-M-DWM, 2010 WL 3084194 (D. Mont. Aug. 5, 2010)

In *Defenders of Wildlife v. Salazar*, the United States District Court for the District of Montana held that the Endangered Species Act (ESA) does not allow the United States Fish and Wildlife Service (FWS or Service) to subdivide and protect only a portion of a distinct population

segment (DPS). Nos. CV 09-77-M-DWM, CV 09-82-M-DWM, 2010 WL 3084194, at *2 (D. Mont. Aug. 5, 2010). Therefore, the Service's delisting of gray wolves from ESA protections in Montana and Idaho, while maintaining protections in Wyoming, was contrary to the ESA because all areas are within the same northern Rocky Mountain DPS. *Id.* at *18.

While gray wolves were once abundant throughout North America, a well-executed government eradication program eliminated them from most of their range by the 1930s. *Id.* at *3 (citing Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,123, 15,123 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17) [hereinafter 2009 Final Rule]). In 1994, two nonessential experimental populations of gray wolves were designated in portions of Idaho, Montana, and Wyoming under section 10(j) of the ESA. *Id.* (citing 2009 Final Rule, 74 Fed. Reg. at 15,124). Through this "nonessential" designation, the Service was able to reintroduce gray wolves back into central Idaho and the greater Yellowstone area. An environmental impact statement (EIS) created for the reintroduction efforts predicted that thirty or more breeding pairs of wolves comprising a population of at least 300 in a "metapopulation . . . with genetic exchange between subpopulations should have a high probability of long-term persistence." *Id.* at *4 (quoting 2009 Final Rule, 74 Fed. Reg. at 15,130-31).

By 2007, the number of wolves in the northern Rocky Mountain (NRM) area had reached the population goal of 300 individuals for eight consecutive years. In February 2008, the Service issued a Final Rule (2008 Final Rule) that identified the gray wolves of the NRM area as a DPS and simultaneously delisted them from ESA protections. The NRM DPS included "all of Montana, Idaho, and Wyoming, as well as parts of eastern Washington, eastern Oregon, and northern Utah." *Id.* (citing Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 10,514, 10,518 (Feb. 27, 2008) (to be codified at 50 C.F.R. pt. 17)).

In July 2008, a motion to enjoin the delisting of NRM wolves was granted by the United States District Court for the District of Montana. *Id.* (citing Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008)). The court found the Service likely acted arbitrarily and capriciously by delisting the NRM wolves (1) without adequate evidence

of genetic exchange between the DPS's sub-populations, and (2) in reliance on the Wyoming state wolf management plan, which would not have ensured the survival of at least fifteen breeding pairs within the state. *Id.* (citing *Defenders of Wildlife*, 565 F. Supp. 2d at 1163).

After reopening the comment period, the FWS released the 2009 Final Rule on April 2, 2009. *Id.* at *5. This Rule largely mimicked the 2008 Final Rule, yet it also asserted proper genetic exchange between the NRM DPS sub-populations, and it acknowledged the insufficiencies in Wyoming's state wolf management plan. Because of Wyoming's inadequate regulatory mechanisms, the Service did not remove ESA protections in that state. *Id.* (citing 2009 Final Rule, 74 Fed. Reg. 15,123, 15,123 (Apr. 2, 2009)). The Service did, however, remove ESA protections from the remainder of the NRM DPS. Following the 2009 Final Rule, Idaho and Montana authorized public wolf hunts. In August 2009, the United States District Court for the District of Montana denied a motion to reinstate ESA protections for the NRM DPS, reasoning that the limited hunting quotas would not cause "irreparable harm." *Id.* (citing Defenders of Wildlife v. Salazar, No. 9:09-cv-00077-DWM, slip op. at 7 (D. Mont. Sept. 9, 2009)).

The Defenders of Wildlife (Defenders) and twelve other advocacy organizations, with the Greater Yellowstone Coalition, filed suit to challenge the Service's 2009 Final Rule. *Id.* at *2, *4. In their complaint, Defenders listed nine causes of action, yet the court was able to strike down the 2009 Final Rule by analyzing the Defenders' first claim that the Service violated the ESA by only partially protecting a listed species. *Id.* at *2, *12.

The ESA defines a "species" to include "any *distinct population segment* of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* at *5 (emphasis added) (citing 16 U.S.C. § 1532(16) (2006)). A "species" is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *Id.* at *10 (citing 16 U.S.C. § 1532(6)). Once listed as endangered, a species cannot be delisted from ESA protections unless the best scientific and commercial data available "substantiate that it is neither endangered nor threatened." *Id.* at *6 (citing 50 C.F.R. § 424.11 (2010)).

Defenders claimed that the Service contradicted the plain meaning of the ESA by sub-dividing the DPS. *Id.* at *8. The Service countered this "plain meaning" interpretation with an assertion that the statute was ambiguous as to whether the Service could make a listing below that of a DPS. *Id.* Therefore, the court's primary focus was on deciding whether the 2009 Final Rule was entitled to deference under *Chevron v. Natural*

Resources Defense Council, 467 U.S. 837 (1984). Under *Chevron*, if a statute is susceptible to multiple interpretations, then "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." 467 U.S. at 843-44. These regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Defenders argued that the plain meaning of "species" in the ESA included "distinct population segments" and that Congress clearly intended the DPS to be the smallest apportionment as a "species." Defenders of Wildlife, 2010 WL 3084194, at *9. The Service's interpretation would require "endangered species" to mean members of a DPS that are "in danger throughout . . . a significant portion of the [DPS's] range." *Id.* The necessity to add terms in order to understand the Service's construction of the statute illustrated the departure from the plain terms of the ESA. The Service countered this reliance on "plain meaning" by arguing that the term "significant portion of its range" was ambiguous. Under this assertion of ambiguity, then, the ESA is ambiguous as to what is endangered under the statute. As such, "there is no plain statutory language requiring an entire species (including subspecies or DPS) to be protected as an endangered species." *Id.* The court did not find the Service's argument persuasive, stating that it "turn[ed] the statute grammatically on its head" and that the ambiguity of "significant portion of its range" should not be conflated with the definition of "species." *Id.* The Service attempted several other claims relating to the phrase "significant portion of its range" in its attempt to highlight the ambiguity of the statute. The court found these claims unavailing because they involved the addition of terms to support the Service's position, and "neither the Court nor the agency" was allowed to add or subtract terms to "change what Congress has written." *Id.* at *10.

Next, the Service claimed that the "or" in the phrase "in danger throughout all or a significant portion of its range" is rendered superfluous when given a "plain" reading. *Id.* However, the court, referring to legislative history, struck down its argument because, in 1973, Congress added "or a significant portion of its range" to ensure that a species could receive protection if not threatened worldwide. *Id.* (citing Defenders of Wildlife, 258 F.3d 1136, 1141-42 (9th Cir. 2001)).

Finally, the Service argued that the Secretary's publishing requirement within the ESA points to an ambiguity that gives the Service authority to remove protections from part of a DPS. *Id.* at *11. Section 4(c)(1) of the ESA requires the Secretary to "specify with respect to each such species over what *portion of its range* it is endangered or

threatened." *Id.* (citing Endangered Species Act § 4(c)(1), 16 U.S.C. § 1533(c)(1) (2006)). The Service claimed that this provision leaves an ambiguity as to whether an endangered species, or a DPS, must be protected as a whole. The court found this argument unpersuasive for two reasons. First, the publishing requirement comes *after* the determination as to whether a species is endangered or not. The publishing requirement, therefore, would not alter when a species is endangered or what protections would be afforded to it. Second, the term "range" here serves as a way for the Secretary to discuss a species below the taxonomic level. If it was read to infer that protections can be below the level of the species, then that reading "would also prevent the Service from being able to list something below the taxonomic level."

The court, having struck down all of the Service's arguments as to statutory construction, held that the Service had improperly interpreted the plain meaning of the ESA. The court stated that "[t]he words used in the ESA make *clear* that 'species' excludes distinctions below that of a DPS." *Id.* at *12 (emphasis added). This definition of "species" applies with equal force throughout the ESA. The Service's readings of the ESA would require differing definitions of "species" throughout the statute. Further, the Service had not offered a "reason to reject Congress' intent to give 'species' the same meaning throughout the statute." *Id.* Therefore, "[b]y listing and/or protecting something less than a DPS, the Service violated the plain terms of the ESA." *Id.* Because the "plain terms" of the ESA were clear and unambiguous, the court did not defer to the agency's interpretation under *Chevron* and invalidated the 2009 Final Rule. *Id.* at *13.

While the court recognized that the Service's attempt to segment protections within the DPS was a "pragmatic" solution, it was also one based primarily on political reasons. *See id.* at *18. Because the court did not reach the merits of Defenders' many nonstatutory claims, Wyoming's reluctance to establish a sustainable wolf management plan is the only current impediment to the delisting of the NRM wolves. If Wyoming succumbs to political pressure and makes a good faith effort to revise its state wolf management plan, then the gray wolf delisting battle will wage on. However, for now, the gray wolves of Montana and Idaho are spared from the 2010 hunting season.

Brittany Baker

Cape Hatteras Access Preservation Alliance v. U.S. Department of the Interior,
Civil Action No. 09-0236, 2010 WL 3238848
(D.D.C. Aug. 17, 2010)

In 2001, the U.S. Department of the Interior published a final rule under the Endangered Species Act (ESA) designating the coast of North Carolina as critical habitat for the wintering piping plover, a small shorebird that nests and roosts in the sandy beaches of North Carolina. *See* Final Determination of Critical Habitat for Wintering Piping Plovers, 66 Fed. Reg. 36,038 (July 10, 2001) [hereinafter 2001 Final Rule]. In 2004, however, that critical habitat designation was vacated in *Cape Hatteras Access Preservation Alliance v. U.S. Department of the Interior* (*CHAPA I*), 344 F. Supp. 2d 108 (D.D.C. 2004). On October 21, 2008, the Department of the Interior published a revised final rule that corrected certain errors in the 2001 Final Rule that were responsible for its revocation. *See* Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover (Charadrius melodus) in North Carolina, 73 Fed. Reg. 62,816 (Oct. 21, 2008) (to be codified at 50 C.F.R. pt. 17) [hereinafter 2008 Revised Final Rule]. The 2008 Revised Final Rule designated 2053 acres in Dare and Hyde Counties in North Carolina as critical habitat under the ESA for the wintering piping plover.

In *Cape Hatteras Access Preservation Alliance v. U.S. Department of the Interior*, plaintiffs included the Cape Hatteras Access Preservation Alliance, which is a coalition established for the purpose of "preserving and protecting a lifestyle and way of life historically prevalent" along the coast of North Carolina—namely, the use of off-road vehicles on North Carolina beaches. Civil Action No. 09-0236, 2010 WL 3238848, at *2 (D.D.C. Aug. 17, 2010) (*CHAPA II*). North Carolina's Hyde and Dare Counties, where much of the critical habitat designation lies, were also plaintiffs in this case. Defendants were the U.S. Department of the Interior, the U.S. Fish and Wildlife Service (FWS), as well as the National Audubon Society and Defenders of Wildlife as defendant-intervenors. *Id.* at *3.

The court in *CHAPA II* held that the FWS's critical habitat designations in the 2008 Revised Final Rule did not violate the ESA, the National Environmental Policy Act (NEPA), or the court's orders in *CHAPA I*. *Id.* at *1. On cross motions for summary judgment the court granted summary judgment in favor of the defendant federal agencies and the defendant-intervenor environmental organizations.

The court first concluded that the FWS met its statutory duty under the ESA to determine that the areas it designates as critical habitat contain Primary Constituent Elements (PCEs), "which may require special management considerations or protection." *Id.* at *9. The ESA requires that once the FWS determines a particular area is suitable for critical habitat designation, it must then determine that "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection" are found in the critical habitat areas. 16 U.S.C. § 1532(5)(A)(i) (2006). These "physical or biological features" are also known as PCEs. The court reasoned that the FWS satisfied its statutory mandate by describing and analyzing the PCEs in each critical habitat unit and by analyzing the impact that reduced critical habitat designation might have on those PCEs. *See CHAPA II*, 2010 WL 3238848, at *9.

Next, the court dismissed the plaintiffs' challenge to the FWS's reliance on a federal district court case opinion, which held that if an area of land is already subject to a conservation management plan, then that land necessarily satisfies the criteria for critical habitat designation. *Id.* at *10. In *Center for Biological Diversity v. Norton*, the court invalidated a critical habitat designation for the Mexican spotted owl. 240 F. Supp. 2d 1090, 1097-1103 (D. Ariz. 2003). The critical habitat designation excluded certain areas of owl habitat, which would otherwise have qualified as habitat suitable for critical habitat designation, because those areas were managed under a different species conservation plan and thus did not meet the definition of critical habitat. The court in *Center for Biological Diversity* reasoned that the very existence of a species conservation management plan in a particular area is demonstrative evidence of the need for critical habitat designation there, because it evinces a true need for species protection. In *CHAPA II*, the FWS initially withheld critical habitat designation on certain segments of the North Carolina coastline, because it found they were adequately protected by other management plans. *See* 2010 WL 3238848, at *10. However, after learning of the court's decision in *Center for Biological Diversity*, the FWS altered course and decided that the previously excluded areas would in fact be designated as critical habitat in the 2008 Revised Final Rule. The court concluded that because the FWS did not blindly follow the *Center for Biological Diversity* opinion, but rather offered "adequate factual reasons, independent of the [*Center for Biological Diversity*] decision, for changing its mind to include the previously excluded areas," its decision was not arbitrary. *Id.*

The court then rejected the plaintiffs' claim that the FWS was required to consider a National Park Service conservation plan, which regulated off-road vehicle use on public beaches to conserve the piping plover, in making its critical habitat designation. *Id.* at *11. The ESA requires the FWS to "tak[e] into consideration the economic impact, the impact on national security, *and any other relevant impact*, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (2006) (emphasis added). The court reasoned that the FWS has wide discretion to define what it considers to be "relevant impact." *CHAPA II*, 2010 WL 3238848, at *11. Furthermore, the National Park Service plan was deficient in a number of important ways: it was temporary, it did not address the wintering piping plover, and it did not address all recreational uses. Consequently, the court concluded that the FWS's decision was reasonable given its wide discretion and the deficiency of the National Park Service plan.

Next, the court rejected the plaintiffs' claim that the FWS abused its discretion by failing to exclude any areas deemed appropriate for critical habitat designation from its final designation. *Id.* at *12. Under the ESA the FWS

> may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2). The court reasoned that, absent a showing that the critical habitat designation will cause the extinction of the piping plover, the FWS has unreviewable discretion to exclude any area from critical habitat designation. *CHAPA II*, 2010 WL 3238848, at *12. The FWS's decision not to exclude any such area was therefore not an improper exercise of agency discretion.

The court then concluded that the FWS adequately considered economic impacts in designating the critical habitat. *Id.* at *14. As discussed above, the ESA requires the FWS to take into consideration the economic impacts of its critical habitat designations. *See* 16 U.S.C. § 1533(b)(2). The FWS used a "baseline" approach to determining the economic impacts of its wintering piping plover critical habitat designation. *CHAPA II*, 2010 WL 3238848, at *14. The baseline approach requires the FWS to consider the economic impacts that would not have occurred but for the critical habitat designation. *Id.* at *13. Plaintiffs challenged the adequacy of the FWS's economic analysis. The court held, however, that the FWS properly applied its baseline analysis

and, using the best data available, made a critical habitat decision that was rationally related to the facts and information available. *Id.* at *14. Finally, the court held that the FWS's environmental assessment (EA), performed under the National Environmental Policy Act, was sufficient. *Id.* at *19. The court concluded that in deciding to perform an EA instead of the more comprehensive environmental impact statement (EIS), the FWS accurately examined the environmental concern at issue and made a convincing case that the impacts were not significant enough to require an EIS.

CHAPA II strikes a delicate balance between judicial deference to executive agency action and substantive judicial evaluation of agency explanation. The 2008 Revised Final Rule designating wintering piping plover critical habitat is indeed supported by scientific and environmental findings, but the court was persuaded less by their mere existence than by their substantive content. By upholding the FWS's critical habitat designation, *CHAPA II* marks a victory for the wintering piping plover, the endurance of which only time will tell.

Michael Heagerty

II. MIGRATORY BIRD TREATY ACT

Apollo Energies, Inc. v. United States, 611 F.3d 679 (10th Cir. 2010)

In *Apollo Energies, Inc. v. United States*, the United States Court of Appeals for the Tenth Circuit held that the taking of a bird protected by the Migratory Bird Treaty Act (MBTA or Act) is a strict liability misdemeanor requiring the federal government to prove that (1) persons charged proximately caused the taking, and (2) such taking was reasonably foreseeable. 611 F.3d 679, 691 (10th Cir. 2010).

The MBTA provides that "it shall be unlawful at any time, by any means or in any manner, to . . . take [or] attempt to take . . . any migratory bird" protected under certain treaties between the United States, Mexico, Great Britain, Japan, and the U.S.S.R. 16 U.S.C. § 703 (2006). Regulations created pursuant to the Act define "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (2010). Moreover, the MBTA provides that "any person, association, partnership, or corporation" that violates "any provision[]" of the Act "shall be deemed guilty of a misdemeanor." 16 U.S.C. § 707(a). Any person convicted of a misdemeanor under the MBTA faces a fine not more than $15,000, imprisonment for up to six months, or both. *Id.*

In *Apollo Energies, Inc.*, two Kansas oil producers, Apollo Energies (Apollo) and Dale Walker (Walker), were convicted of misdemeanor violations of the MBTA for allowing protected birds to get trapped and die in their heater-treaters. 611 F.3d at 682. "Heater-treaters" are cylindrical devices used to separate oil from water when oil is pumped from the ground. They can be up to twenty feet tall, and they have vertical exhaust pipes approximately nine inches in diameter. Some heater-treaters also have movable louvers that can be opened to access heating equipment at the base of the device. Birds can crawl into a heater-treater's exhaust pipes or louvers to nest, and they can easily get trapped inside. *Id.*

In December 2005, acting on an anonymous tip, the United States Fish & Wildlife Service (FWS or Service) inspected Apollo's heater-treater facilities for the remains of MBTA-protected species. It found bird carcasses in half of the heater-treaters it inspected. As a result of the investigation, the FWS began a public education campaign in 2006 to alert Kansas oil producers of the heater-treater's risk to birds. The Service sent letters to thirty-six oil companies including Apollo (but excluding Walker), distributed posters to oil supply companies, made a presentation to the Kansas Independent Oil and Gas Association, and ran stories on a Kansas television station and with the Associated Press. *Id.* at 682-83. Moreover, oil producers enjoyed a grace period of one year from 2006 to 2007, during which the FWS did not recommend for prosecution any heater-treater-related violations of the MBTA. *Id.* at 683.

In April 2007, the FWS inspected Apollo and Walker's facilities to ensure MBTA compliance. *Id.* It found one bird carcass in Apollo's heater-treaters and four in Walker's. In April 2008, the FWS inspected Walker's facilities a second time. Although Walker had placed caps on his heater-treater exhaust pipes and the FWS found no birds inside them, the inspection turned up one bird carcass inside a heater-treater's louvre. Apollo was subsequently convicted for the 2007 violation of the MBTA and fined $1500, and Walker was convicted for the 2007 and 2008 violations and fined $250 for each. Both producers challenged the convictions, claiming (1) that the taking of an MBTA-protected bird is not a strict liability crime, and (2) that even if it is a strict liability crime, the Act unconstitutionally violated their due process. *Id.* at 682.

The Tenth Circuit first held that the MBTA imposes strict liability on violators. *Id.* at 684. Finding that the plain language of §§ 703 and 707 are silent regarding a mens rea requirement, the court first examined circuit precedent for guidance. *Id.* at 684-85. The Tenth Circuit's own

precedent in *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997), held that the MBTA did not require the United States to prove that violators had specific intent or guilty knowledge in order to make a prima facie showing of guilt. *Id.* at 805. The *Corrow* court declined to find an implied mens rea, reasoning that courts do not presume that Congress intended to create a mens rea requirement for "regulatory" crimes, where "the penalties are small and there is 'no grave harm to an offender's reputation.'" *Id.* Additionally, the court in *Apollo* examined similar decisions in at least seven other United States Circuit Courts holding that § 707 of the MBTA did not impose a mens rea requirement. 611 F.3d at 685.

The Tenth Circuit next examined the legislative history of the MBTA, finding that Congress had intended to waive any mens rea requirement for misdemeanor violations. *Id.* at 686. Citing *Staples v. United States*, 511 U.S. 600 (1994), which held that strict liability crimes are "generally disfavored," the Tenth Circuit suggested that a court may only dispense with a mens rea requirement if it finds express or implied congressional intent to do so. *Apollo Energies, Inc.*, 611 F.3d at 685-86. The court found that the MBTA's silence indicated congressional intent to impose strict liability for misdemeanors, reasoning that Congress's decision to include a mens rea requirement in the Act's felony provisions when it created them in 1986, while leaving the language of the misdemeanor provisions unaltered, demonstrated Congress's intent to create a strict liability crime. *Id.* at 686 (citing S. REP. NO. 99-445, at 15 (1986), *reprinted in* 1986 U.S.S.C.A.N. 6113, 6128 ("Nothing in this amendment [to create the MBTA felony offense] is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has been upheld in many Federal court decisions.")). The Tenth Circuit therefore held that § 703 of the MBTA imposes strict liability on violators. *Id.* at 686.

The court next addressed the oil producers' second argument that the MBTA violated their right to due process of law because (1) it did not give them fair notice of what conduct is criminal, and (2) it criminalized acts that the defendants did not directly cause. *Id.* at 687. The court first addressed whether the MBTA is unconstitutionally vague because of the "multiplicity of actions that the statute's language criminalizes." *Id.* at 689. Applying the void-for-vagueness doctrine, which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," the Tenth Circuit concluded that while "[t]he actions criminalized

by the MBTA may be legion . . . they are not vague." *Id.* 688-89 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). Moreover, it found that the Act's terms "are capable of definition without turning to the subjective judgment of government officers." *Id.* at 689 The Tenth Circuit thus found the MBTA to give proper notice of what conduct falls within its purview.

Applying a very similar analysis, the court next discussed whether the MBTA impermissibly criminalizes innocuous predicate acts that cause the taking of protected birds. *Id.* Reasoning that "[t]he inquiries regarding whether a defendant was *on notice* that an innocuous predicate act would lead to a crime, and whether a defendant *caused* a crime in a legally meaningful sense, are analytically indistinct," the Tenth Circuit found that the MBTA's penalties only extend to acts that proximately cause the taking of protected birds. *Id.* at 689-90. The court relied on *United States v. Moon Lake Electrical Ass'n*, a case in which the United States District Court for the District of Colorado held a power company liable under the MBTA for bird deaths caused by overhead power lines, reasoning that liability attaches where the harm "might be *reasonably anticipated or foreseen as a natural consequence of the wrongful act*." 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999). Under the reasoning of *Moon Lake*, the Tenth Circuit concluded that foreseeability was the central due process requirement when considering whether a predicate act leading to the taking of a protected bird was punishable. *Apollo Energies, Inc.*, 611 F.3d at 690. The court therefore held that a defendant must proximately cause the statute's violation, and such violation must be reasonably foreseeable in order for the Act's application to be constitutional. *Id.*

The Tenth Circuit concluded its opinion by determining whether the MBTA was unconstitutional as it applied to Apollo and Walker because it was not reasonably foreseeable that MBTA-protected birds would get caught in their heater-treaters. *Id.* at 691. The court affirmed Apollo's conviction, holding that Apollo had been put on notice of the heater-treater problem nearly a year-and-a-half before the bird death that resulted in its conviction. The court reasoned that because "Apollo knew its equipment was a bird trap that could kill," it had not been deprived of its constitutional right to due process. The court next affirmed Walker's conviction for the April 2008 bird death, reasoning that "once [he] was alerted to protected birds' proclivity to crawl into the heater-treaters' exhaust pipes, it was reasonably foreseeable protected birds would become trapped in other of the heater-treaters' cavities." *Id.* However, the Tenth Circuit reversed Walker's conviction for the April 2007 deaths, finding that prior to the April 2007 inspection, he was not aware of the

problems of heater-treaters because he was not alerted to the problem through the FWS's educational campaign. The court reasoned that "no reasonable person [under Walker's circumstances] would conclude that the exhaust pipes of a heater-treater would lead to the deaths of migratory birds." *Id.*

Apollo Energies, Inc. reaffirms the well-established rule that energy companies face strict liability misdemeanor charges under the MBTA for takings caused by their equipment or facilities. The MBTA is thus a strong and fair tool in avian species protection, encouraging careful planning and industry responsiveness to known and reasonably foreseeable problems.

At the same time, *Apollo*'s interpretation of the MBTA has the potential to stifle the development of green energy alternatives. For example, wind turbines have long been known to be particularly deadly to birds, and unlike the Endangered Species Act, 16 U.S.C. § 1539 (2006), the MBTA does not authorize the issuance of permits for takings incidental to otherwise lawful activities. Wind developers therefore face potential liability in the same manner as the oil companies in *Apollo* and the power company in *Moon Lake*. For now, the Department of Justice has elected not to prosecute wind farms for MBTA bird deaths under its "longstanding charging policy" not to "criminalize actors solely on the basis of their construction or use of structures with which avian collisions may occur." U.S. FISH & WILDLIFE SERV. WIND TURBINE GUIDELINES ADVISORY COMM., COMMITTEE POLICY RECOMMENDATIONS, app. B at B20 n.51 (2010), *available at* http://www.fws.gov/habitatconservation/windpower/Wind_Turbine_Guidelines_Advisory_Committee_Recommendations_Secretary.pdf.

Such a policy casts doubt on the Tenth Circuit's conclusion that the MBTA's terms are capable of definition without encouraging arbitrary or discriminatory enforcement. The effects of wind turbines on birds are well known and therefore reasonably foreseeable; moreover, the erection of wind turbines proximately causes the deaths of birds that collide with their blades. Wind turbines are "bird trap[s] that could kill," and are equally or more deadly than heater-treaters to avian species. The MBTA's continued application as a (mostly) strict liability crime thus illuminates the growing conflict between species protection and the need for green energy solutions. Perhaps for now prosecutorial discretion is the best compromise, but in coming years, all energy producers should be expected to uphold their MBTA duty to preserve migratory bird species.

Rachel Mathews

III. CLEAN WATER ACT

Miccosukee Tribe of Indians v. United States, 706 F. Supp. 2d 1296 (S.D. Fla. 2010)

In April 2010, after decades of failed enforcement of numeric water quality standards in Florida's Everglades, Judge Alan S. Gold issued an Order requiring the South Florida Water Management District (SFWMD), the Florida Department of Environmental Protection (FDEP), and the Environmental Protection Agency (EPA) to comply with the Clean Water Act and his July 2008 Summary Judgment Order in *Miccosukee Tribe of Indians v. United States*, 706 F. Supp. 2d 1296 (S.D. Fla. 2010). The Order forced immediate action from the SFWMD and the EPA, and required the EPA Administrator to appear personally in Judge Gold's chambers. The EPA is currently fighting the controversial Order.

A. Background

The 1994 Everglades Forever Act (EFA) authorized the construction of six man-made treatment wetlands called Stormwater Treatment Areas (STAs) designed to filter nutrients from urban and agricultural runoff flowing into the Everglades. FLA. STAT. § 373.4592(4)(a) (1994). The EFA's goal was to reduce dramatically toxic phosphorus levels in the Everglades. The STA project encompasses over 40,000 acres, and is the largest cleanup and restoration program of its type ever attempted. *Id.* § 373.4592(1)(h).

Pursuant to section (4)(e)(2) of the EFA, a numeric standard of ten parts per billion (10 ppb) phosphorus for discharges into the Everglades came into effect on December 31, 2003. This was a water quality based effluent limitation (WQBEL) under the Clean Water Act. *See* 33 U.S.C. § 1251 (2006). Accordingly, after December 31, 2003, each STA should have discharged in compliance with the 10 ppb standard. However, a host of statutory loopholes, extended deadlines, administrative orders, and creative rulemaking subverted this standard entirely.

In fact, in the sixteen years since the STA project began, excessive phosphorus in the Everglades has actually increased ecosystem destruction. *Miccosukee Tribe*, 706 F. Supp. 2d at 1299-1300. No effluent limitations are in effect for four of the six STAs, and the remaining two STAs are subject to a significantly relaxed standard. *Id.* None of the STAs meet the 10 ppb standard envisioned by the EFA. Indeed, the STAs discharge into the Everglades at an average of 39.5 ppb phosphorus. *Id.* at 1299.

On July 29, 2008, the United States District Court for the Southern District of Florida resurrected the 10 ppb water quality standard when Judge Alan S. Gold granted summary judgment to the plaintiffs in *Miccosukee Tribe of Indians v. United States* and called for immediate enforcement of the 10 ppb standard. Order Granting Summary Judgment; Closing Case, Miccosukee Tribe of Indians v. United States, No. 04-21448-CIV, 2008 WL 2967654, at *43 (S.D. Fla. July 29, 2008). Judge Gold decided that the State of Florida could not circumvent the 10 ppb water quality standard with creative legislation or rulemaking and issued an injunction prohibiting the FDEP and the SFWMD from issuing or enforcing permits that did not comply with the 10 ppb standard. Additionally, Judge Gold stated that the EPA "shall require the State of Florida to meet the requirements of the Clean Water Act, and its implementing regulations, in a manner consistent with this Order." *Id.*

B. Judge Gold's 2010 Compliance Order

Twenty months after the April 2008 Summary Judgment Order, the plaintiffs in *Miccosukee Tribe* filed motions for contempt or to otherwise compel the EPA and the State of Florida to comply with the 2008 Summary Judgment Order. 706 F. Supp. 2d at 1297-98. Judge Gold granted the plaintiffs' motion in part and imposed further equitable relief. *Id.* at 1298.

Judge Gold's eighty-page Order contained a litany of condemnations directed at the EPA and the State of Florida. The Judge first expressed his concern about the condition of the Everglades, writing that "the rate of destruction of the Everglades due to excessive phosphorus discharge is significant, grave, and unacceptable." *Id.* at 1299-1300. He then found that the EPA had not complied with his 2008 Summary Judgment Order, stating:

> I unambiguously ordered the EPA to require the State of Florida to comply with the Clean Water Act in a manner consistent with the [Summary Judgment] Order . . . . Instead, the EPA has chosen to read the [Summary Judgment] Order in the narrowest possible of terms by picking and choosing isolated phrases. The EPA then relies on its own narrow interpretation of these phrases to avoid compliance. I express in the strongest possible terms my frustration and disappointment.

Id. at 1302.

The Judge emphasized that even without his 2008 Summary Judgment Order, the Clean Water Act itself requires EPA to develop a water quality standard when a state fails to develop and enforce a

reasonable WQBEL, noting that "[t]here is nothing optional about these provisions." *Id.*

Specifically, Judge Gold focused on actions taken, and not taken, by the EPA and the FDEP in response to his 2008 Summary Judgment Order. For example, the EPA issued a Determination on November 4, 2009 that invalidated Florida's legislative and administrative loopholes allowing noncompliance with the 10 ppb standard, but stated "there is no need for the state of Florida or USEPA to take any further action pursuant to CWA section 303(c)." *Id.* at 1305-06. Judge Gold wrote, "To say that there is no need for the State of Florida or the EPA to take any further action under the CWA is to abrogate all responsibility under the CWA . . . . The EPA's most recent 2009 Determination now leaves the situation in the Everglades 'rudderless.'" *Id.* at 1306.

Additionally, in 2009, the FDEP issued new NPDES permits to the STAs which included the 10 ppb standard, but then supplemented these new permits with Administrative Orders that allowed discharges above 50 ppb and relied on a seven-year compliance schedule to reach the 10 ppb standard. *Id.* at 1306-11. Judge Gold found these Administrative Orders "in direct conflict with my injunction against FDEP." *Id.* at 1309.

Ultimately, Judge Gold's 2010 Order imposed a schedule of mile markers for the EPA and the State of Florida, including dates by which the State must initiate processes to close the legislative and administrative loopholes used to legalize noncompliance with the 10 ppb standard. *Id.* at 1323-25. He required the EPA to inform the State of Florida that it was out of compliance with water quality standards, and mandated that the EPA "provide clear, specific and comprehensive instructions to the State of Florida on the manner and method to obtain enforceable WQBELS." *Id.* at 1323-24.

Notably, Judge Gold also required the EPA Administrator Lisa Jackson to personally appear in his chambers "to report to the Court on compliance with this Order" on October 7, 2010, along with the EPA Regional Administrator for Region IV, and the Executive Director of the FDEP. *Id.* at 1324-25. He stated:

> The Defendants are hereby placed on notice that failure to comply with the terms of this Order will not be tolerated, and that in the event of such a failure, the Court will promptly issue an Order to Show Cause why the EPA and FDEP Administrators should not be held in civil contempt and subjected to appropriate sanctions.

Id. at 1324.

C. Reaction to the 2010 Order

In September of 2010, the EPA Administrator Lisa Jackson requested that an EPA representative appear before the district court in her place. Omnibus Order Denying Defendants' Motion Requesting Leave to Substitute the Appearance of the Assistant Administrator for Water for the Appearance of the Administrator at the October 7 Hearing [ECF No. 460]; Denying Ore Tenus Motion to Stay, No. 04-21448-CIV, 2010 WL 3860712, at *1 (S.D. Fla. Sept. 21, 2010). On September 21, Judge Gold officially denied the EPA's request, writing that, "[t]his Court has a right to pose direct questions to Defendants regarding whether the strategies outlined in the Amended Determination are a sincere commitment or merely an empty shell . . . . Defendants have had ample time, nearly half a year, to prepare and make arrangements for attendance at the October 7, 2010 hearing." *Id.* at *4.

On September 22, 2010, the EPA filed for appeal. Christine Stapleton, *Top Environmental Official Appeals U.S. Judge's Order that She Testify in Everglades Cleanup Case*, THE PALM BEACH POST, Sept. 24, 2010, *available at* http://www.palmbeachpost.com/news/state/top-environmental-official-appeals-u-s-judges-order-935692.html.

On September 30, 2010, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit ruled that Administrator Jackson did not need to appear before the Florida District Court personally because of her busy schedule. Curtis Morgan, *EPA Chief Averts Order to Testify on Everglades*, THE MIAMI HERALD, Oct. 1, 2010, *available at* http://www.miamiherald.com/2010/10/01/1851422/epas-chief-averts-order-to-testify.html#ixzz120XjqM6x. As of October 15, 2010, the EPA's appeal of Judge Gold's Order is ongoing.

D. Analysis

Florida courts have good reason to be frustrated with the EPA and the FDEP. These agencies have failed to enforce any water quality standard in the Everglades for the past twenty-four years. *Miccosukee Tribe*, 706 F. Supp. 2d at 1305. While the STA program was an innovative idea in 1994, the past sixteen years have proven that man-made wetlands cannot reduce industrial and agricultural runoff to 10 ppb phosphorus without additional measures. To meaningfully reduce phosphorus pollution in the Everglades, Florida must reduce phosphorus concentrations in the runoff flowing *into* the STAs. Politically, the State of Florida may be reluctant to initiate legislation that, unlike the EFA, obligates industry and farmers to significantly reduce their nutrient

runoff. However, the Everglades simply cannot withstand more time spent subverting the Clean Water Act to pacify Florida's agriculture and industry.

Over the past two years, Judge Gold has pursued the most aggressive tactics to enforce a reasonable water quality standard in the Everglades. Like several Florida judges before him, he has yet come up short. In light of the EPA's resistance to his Orders, one must ask if Florida courts have become powerless to enforce the Clean Water Act. Unmistakably, while government agencies fight over who must assume the cost of enforcing the law, the true cost is a unique ecosystem, and an irreplaceable national park.

Erin McCarthy

IV. FIFTH AMENDMENT

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S. Ct. 2592 (2010)

On June 17, 2010, the Supreme Court of the United States unanimously held in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* that the prior decision of the Florida Supreme Court did not constitute a taking of Petitioner's established private property rights in violation of the Fifth and Fourteenth Amendments. 130 S. Ct. 2592, 2613 (2010). Stop the Beach Renourishment (STBR), a nonprofit corporation of private littoral property owners (members), challenged the Florida Supreme Court's holding that a state-approved beach restoration project that proposed the addition of approximately seventy-five feet of state-owned dry sand between members' property and the water did not constitute a taking of members' established property rights. *Id.* at 2600. Although unanimously holding that no taking existed in this case, the justices split 4-4 on the issue of whether a court's decision can ever amount to such a "judicial taking." Justice Kennedy (joined by Justice Sotomayor) and Justice Breyer (joined by Justice Ginsburg), concurring in part and in the judgment, wrote separately.

The Supreme Court began its analysis with the recognition that "state law defines property interests, including property rights in navigable waters and the lands underneath them." *Id.* at 2597 (citations omitted). The Supreme Court thus used Florida property law principles to guide its decision. Pursuant to Florida's constitution, the state owns in trust for the public submerged land that is below navigable waterways

and that spreads from the low-tide line to the mean high-water line. *Id.* at 2598 (citing FLA. CONST., art. X, § 11). Littoral owners (property owners whose property abuts an ocean, sea or lake) not only share public rights to the water, but also have "the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property." *Id.*

Generally, the term "accretion" refers to additions of deposits such as sand, while "reliction" refers to once water-covered land that becomes dry as a result of the water's recession. *Id.* Classification of land as the result of accretion or reliction requires "gradual[] and imperceptibl[e]" change. Contrarily, if an addition (or loss) of land is the result of a more sudden or perceptible change, this change is classified as the result of "avulsion." Unlike the automatic title to added land that results from the processes of accretion or reliction, littoral owners do not automatically take title to newly dry land resulting from an avulsive event. Rather, the boundary between land owned by the sovereign and that owned by the littoral property owner remains the same—the mean high-water line existing before the avulsive event. *Id.* at 2599.

In 1961, Florida's legislature enacted the Beach and Shore Preservation Act, one of the purposes of which was to define procedures for "beach restoration and nourishment projects." *Id.* (quoting FLA. STAT. § 161.088) (internal quotation marks omitted). The Act established a board entrusted with authorizing restoration projects only after the board set an "erosion control line," which "replaces the fluctuating mean high-water line as the boundary between privately owned littoral property and state property." *Id.* (citing FLA. STAT. § 161.191(1)). Establishment of the erosion control line triggers cessation of common law principles as applied to additions of land. Therefore, land ordinarily added to littoral owners' property by accretion does not extend the owners' property to that point, but maintains the boundary at the erosion control line. *Id.*

In this case, STBR alleged that the Florida Supreme Court's decision was effectively a "taking," because it had declared nonexistent two previously established rights of members: the right to future accretions, and the right to maintain littoral contact with the water. *Id.* at 2600. The Supreme Court rejected STBR's allegations because members had not shown these rights existed prior to the Florida Supreme Court's decision. *Id.* at 2610-11. Regarding the alleged right to future accretion under Florida property law, the state owns submerged land that abuts littoral property and has the right to fill this land as long as it does not interfere with landowners' rights. *Id.* Although property owners

maintain the right to future accretions, the state considers filling land for the purpose of coastal restoration to be avulsion, not accretion. *Id.* at 2611. Thus, the state does not interfere with landowners' established right to future accretion, because there was no accreted land in this case. The Supreme Court refused to carve out an exception to Florida's avulsion rule that would treat state-created avulsion differently from other avulsive events, such as hurricanes, stating "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Id.* at 2612. Therefore, under Florida law, the state retained ownership of the previously submerged land seaward of the littoral property, even if the landowner's contact with the water was cut off. As for the members' alleged right to contact with the water, the Supreme Court denied that they had an established right of contact independent of their right to access the water.

A plurality of the Supreme Court held that takings analysis should focus on whether a state actor has recharacterized private property as public, and not on the particular government actor. *Id.* at 2601. After all, "[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches." *Id.* Thus, a court decision itself could constitute a taking if it "declares that what was once an established right of private property no longer exists." *Id.* at 2602. Justice Scalia disagreed with the opinion of Justices Breyer and Kennedy, which stated that the Court need not reach the question of whether a court can ever effect a taking. *See id.* at 2602-06. Justice Scalia suggested that to hold that the Florida Supreme Court's decision had not constituted a taking required the Court to establish a standard for determining a taking. *Id.* at 2604.

The plurality rejected STBR's request that the Supreme Court use an "unpredictability test" to determine the existence of a judicial taking. *Id.* at 2610. Under this test, a judicial taking would exist where a state court decision is unpredictable or results in a sudden change from state court precedent. The plurality found the test to be inappropriate for takings analysis, because whether a state court decision constitutes a taking should focus not on a change from precedent, but on whether the allegedly taken property right had been established prior to the decision.

Justice Kennedy preferred the use of the Due Process Clause rather than the Takings Clause to protect property interests from state court decisions, noting the "usual due process constraint [to be] that courts cannot abandon settled principles." *Id.* at 2615. Justice Kennedy worried that if the takings clause were used against a state court, a state court judge could knowingly issue "a sweeping new rule to adjust the

rights of property owners in the context of changing social needs," because he would know that the "resulting ruling would be a taking," the plaintiff would be awarded damages, and the courts could still "go ahead with their projects." *Id.* at 2616. Additionally, Justice Breyer was concerned about an increase in federal takings claims on primarily state law matters, which could lead federal judges to shape state property law. *Id.* at 2619.

Although the Supreme Court lacked a fifth vote to decide on the constitutionality of a "judicial taking" in this case, Justice Scalia's plurality suggests that the Court will soon decide the matter. Currently, the Supreme Court defers to state property law principles when analyzing a takings claim, suggesting that states can continue to coordinate and authorize beach restoration projects so long as state law and constitutional law principles support the projects.

Rebecca Fromer

Miccosukee Tribe of Indians of Florida v. United States,
No. 08-23001-CIV, 2010 WL 2730095 (S.D. Fla. July 12, 2010)

In *Miccosukee Tribe of Indians of Florida v. United States*, the United States District Court for the Southern District of Florida determined that water management actions taken by the Army Corps of Engineers (Corps) did not violate the Miccosukee Tribe's equal protection rights when said actions caused increased water levels on land held by the Tribe in perpetual leasehold. No. 08-23001-CIV, 2010 WL 2730095 (S.D. Fla. July 12, 2010). The district court held that there was a rational basis for the Corps' decision to delay the opening of a gate controlling the release of water out of the water conservation area (WCA) where the Tribe's land was located, and for its decision to deny the Tribe's subsequent request to leave the gate open past the scheduled closing date. *Id.* at *14. Accordingly, the district court granted the federal defendants' motion for summary judgment. *Id.* at *15.

The Miccosukee Tribe (the Tribe) is a federally recognized Indian Tribe that lives on a 189,000 acre piece of land in and near the Everglades National Park in Florida. *Id.* at *1. The Tribe's land is located in Water Conservation Area 3A (WCA 3A), which forms a part of the Central and Southern Florida Project for Flood Control and Other Purposes (C & F Project). Run by the Corps, the C&F Project controls water flows and levels in Southern Florida and the Everglades. Water flows from Lake Okechobee to the Everglades pass through WCA 3A and the Tribe's land. Several water management structures, or gates,

control the release of water from WCA 3A. The C & F Project manages water levels in WCA 3A by following a regulation schedule that governs the opening and closing dates of each gate.

On May 15, 2008, a large fire started in Everglades National Park near a subpopulation of the Cape sable seaside Sparrow, an endangered species protected by the Endangered Species Act. *Id.* at *6, *14. In response to the fire, the Fish and Wildlife Service (FWS) asked the Corps to postpone the scheduled opening of one of the water management gates in WCA 3A, gate S-12A, to minimize the impact on the sparrows' habitat. *Id.* at *6. After finding five active sparrow nests in the area threatened by the fire, the Corps postponed the opening of the S-12A gate, originally scheduled for July 15, 2008, to July 24, 2008, in an effort to protect the nests and permit enough time for the fledging of the sparrows. On October 22, 2008, the Tribal Chairman of the Miccosukee Tribe requested that the Corps postpone the closing of the S-12A gate past the scheduled date of November 1 to compensate for the increase in water levels in WCA 3A caused by the delay in opening the gate in July. *Id.* at *10. The Corps denied the Tribe's request on October 31, 2008.

The Tribe subsequently filed suit against the federal government, alleging that the Corps' decisions to delay opening the S-12A gate and to close it on its originally scheduled date violated the Tribe's equal protection rights under the Fifth Amendment of the U.S. Constitution. *Id.* at *1. The Tribe argued that the Corps flooded WCA 3A in order to protect non-Indian lands from flooding. *Id.* at *5. The United States filed a motion for summary judgment on the Tribe's equal protection claim. *Id.* at *2.

The district court turned the bulk of its attention to what level of scrutiny would apply to the Tribe's claim in its constitutional analysis of the Corps' decision to postpone the opening of the S-12A gate and its refusal to leave it open past its scheduled closing date. *Id.* at *3. When reviewing an equal protection claim under the Fifth Amendment, courts apply strict scrutiny to suspect classifications that make explicit distinctions based on race or alienage. *Id.* at *3 (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003)). Facially neutral classifications, in which no explicit racial distinctions are drawn, are usually subjected to rational basis review. *Id.* at *5 (citing Hunt v. Cromartie, 526 U.S. 541, 549 (1999)). Strict scrutiny only applies to a facially neutral classification or action if the classification or action is racially motivated. *Id.* Because the Corps' decisions did not involve explicit classifications based on race, the district court proceeded to analyze whether either the

decision to delay opening the S-12A gate or the decision to stick to the originally scheduled closing date was taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," thus subjecting the Corps' actions to strict scrutiny review. *Id.* (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991)).

The district court looked first to the Corps' decision to postpone opening the S-12A gate for nine days, from July 15, 2008, to July 24, 2008. *Id.* at *6. Turning to the reasons offered by the Corps for its decision, the court noted that the Corps delayed opening the gate for the proper period of time based on the time necessary for the fledging of the sparrows. The court found that the Corps' decision was "narrowly tailored" to the goal of protecting the sparrows' nests, supporting the determination that the decision was based on that goal alone, and not on any underlying discriminatory purpose. Moreover, the district court found, based on the narrow tailoring of the Corps' decision to the asserted purpose of protecting the sparrows, that no less discriminatory option was available to the Corps. *Id.* at *9.

The court further found that the decision was not procedurally defective. *Id.* at *7. Procedural defects may signal an underlying racial motivation in facially neutral decisions. *Id.* at *5. The Corps argued that its decision to postpone opening the S-12A gate was a proper exercise of discretion under the WCA 3A regulation schedule, which stated that the S-12 gates must be closed from November 1 to July 15, but must only be "[o]pen full when permitted" between July 16 and October 31. *Id.* at *7, *8. The district court agreed with the Corps that its interpretation of the regulation schedule was reasonable under the circumstances, and that the Corps' failure not to seek a formal deviation from the schedule did not render its decision procedurally defective. *Id.* at *8.

Disparate impact on an identifiable group may also cast suspicion on a facially neutral decision. *Id.* at *5. Despite the increased water levels in WCA 3A caused by the Corps' decision to delay opening the S-12A gate, the district court found that, first, the impact was no greater on the Tribe than on any other group and, second, that the increase was so insignificant that, without more, the heightened water levels in WCA 3A did not support the conclusion that the Corps' actions were racially motivated. *Id.* at *8. Although the district court admitted that it was unknown whether any action was taken to increase flow from the other S-12 gates to make up for the prolonged closure of the S-12A gate, it noted that because water flow from the S-12A gate only represents ten percent of the flow from the S-12 gates, even if no action was taken to compensate for the closure, the increase would be de minimis. *Id.* at *9.

The court further found that, based on the facts available to the Corps at the time of its decision and on the slight impact of the prolonged closure of the gate, there were no grounds to believe that there was "any foreseeable or actual discriminatory impact" upon the Tribe. *Id.* at *10.

The district court also dismissed the Tribe's assertion that the long history of discrimination against Native Americans in the United States should factor into the court's decision whether the Corps' actions were racially motivated. *Id.* at *9. The court found no connection between the centuries-old mistreatment of Native Americans and the Corps' decision to delay closing the S-12A gate. The historical background behind a challenged decision may be relevant in determining whether the decision had a racial purpose, but the court disagreed that it could reach so far back in time as to impute such mistreatment to the Corps in its decision making process.

The district court concluded that the Tribe did not present a genuine issue of material fact that the Corps' decision to postpone opening the S-12A gate was motivated by a racially discriminatory purpose. *Id.* at *10. Therefore, it determined that rational basis review would apply to this decision. Before reviewing the constitutionality of the first decision, the district court turned to the Corps' refusal to leave the gate open past its scheduled closing date to determine whether the refusal was racially motivated, thus triggering strict scrutiny review. The court found some support in its analysis of the second challenged decision for the Tribe's claim that it was racially motivated. *Id.* at *11, *12. First, the court agreed with the Tribe's claim that the Corps decided to close the gate without first determining the structural integrity of the L-29 levee and the maximum water level the levee could support. *Id.* at *10-11. In its letter requesting a delay in closing the S-12A gate, the Tribe expressed concern over the safety of its members, who lived south of the L-29 levee. *Id.* at *10. The court conceded that there was no evidence that the Corps investigated what water levels the levee could support, and noted that this failure to investigate prior to closing the gate provided "at least a modicum of support" for the Tribe's assertion that the decision to close the gate was racially motivated. *Id.* at *11.

The court also agreed that the decision may have been procedurally defective because the Corps did not consult with the Tribal Chairman as it was required to do under the Interim Operation Plan (IOP) governing water regulation in WCA 3A. *Id.* at *12. Under the IOP, if the Tribe concludes that the health and safety of the Tribe is threatened by water conditions in WCA 3A and notifies the Corps of its concerns, the Corps must personally consult with the Tribal Chairman prior to taking further

action. The Corps did not consult with the Tribal Chairman before denying his request for a postponement. The Corps' failure to follow procedure, the district court found, lent further support for the Tribe's claim that the Corps' decision violated their equal protection rights.

Despite its finding of some support for the Tribe's allegation that the Corps' refusal to keep the S-12A gate open was racially motivated, the district court ultimately found that, all things considered, the decision was not racially motivated and determined that rational basis scrutiny would apply. The court rejected the Tribe's argument that the Corps did not give adequate consideration to the Tribe's request, and its argument that the decision had a discriminatory impact on the Tribe, due to the minimal impact on water levels caused by the Corps' decision. *Id.* at *12-13. The district court further concluded that there was neither a foreseeable nor actual discriminatory impact on the Tribe, that the historical background of the decision did not cast suspicion on the motivations behind the decision, and that no less discriminatory alternative existed. *Id.* at *14.

Applying rational basis scrutiny to the Corps' decisions to postpone the opening of the S-12A gate and to adhere to the originally scheduled closing date, the court found that the Corps was pursuing the legitimate goal of protecting the sparrows and offsetting the impact of the fire. The court further found that closing the gate was in keeping with the water regulation schedule, which aids the Corps in complying with its statutory obligations, including its obligations under the Endangered Species Act, which protects the sparrows threatened by the fire at issue. Because both decisions "directly furthered the goal of permitting the Corps to execute its water management obligations," the district court found that the Corps' actions satisfied rational basis scrutiny and granted the Government's motion for summary judgment.

Yet another example of the tension between Native Americans living on lands "given to them" by the federal government and the federal agencies charged with the protection of those lands, this case illustrates both the frustration of the Native American tribes whose concerns seem so often overlooked, and the difficulty faced by the government when faced with a conflict between statutory obligations and duties to protect the Native American inhabitants of federally managed land. Here, the Corps, along with the Fish and Wildlife Service and the management of the Everglades National Park, chose to uphold their statutory obligation under the Endangered Species Act to protect the Cape Sable Seaside Sparrow, at the expense of the Miccosukee Tribe. While the Corps' decisions do not appear to have too severely affected

the Tribe, the Corps did deviate from procedure, in failing to consult with the Tribe and in failing to investigate fully the integrity of the levee. Procedural defects alone do not sustain an equal protection claim under the Fifth Amendment, and the district court's decision is sound. However, such deviations are troubling insofar as future decisions affecting the Miccosukee Tribe and others may continue to be made without strict adherence to protocol, and may not have the minimal impact the instant decisions ultimately resulted in.

Caroline Milne

V. NON-PARTIES

DesertXpress Enterprises, LLC—Petition for Declaratory Order, Docket NO. FD 34914, Decision No. 40043 (STB May 7, 2010)

The recent push to develop high speed passenger rail in the United States has raised important questions about the extent to which state and local environmental regulations may affect such projects. In 2006, the federal Surface Transportation Board (Board) was approached by DesertXpress, LLC, which proposed to build a high speed passenger rail line from Las Vegas, Nevada to Victorville, California. *See* Desert Xpress Enterprises, LLC—Petition for Declaratory Order, Docket No. FD 34914, Decision No. 37656 (STB June 27, 2007) [hereinafter 2007 Decision], *available at* http://www.stb.dot.gov/decisions/readingroom.nsf/WebServiceDate?openform (search by Decision No. 37656) (last visited Oct. 21, 2010).

DesertXpress sought a declaratory order stating that the proposed project would not be subject to state and local environmental review due to the Interstate Commerce Act's (Act's) Federal preemption provision, 49 U.S.C. § 10501(b) (2006). *Id.* at 2. The Board commenced an investigation and found that the proposal constituted "transportation by rail carrier," and thus fell within its exclusive jurisdiction. *Id.* at 4. The Board granted DesertXpress' petition, exempting the project from state and local environmental regulation. *Id.* at 5.

The International Brotherhood of Teamsters Rail Conference submitted comments prior to the 2007 Decision in favor of the proposal. *Id.* at 2. The New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission also filed comments, asking the Board to refrain from issuing a declaratory order or enunciating any broad principles of federal preemption. The New Jersey commenters were concerned that Board guidance in the matter would be used by

proponents of future projects to justify an overly expansive reading of Federal preemption. DesertXpress replied to the New Jersey comments, stating that a declaratory order was imperative to clarify its obligations to state and local authorities. *Id.* at 2-3.

The Board first dismissed the New Jersey entities' concerns, holding that a declaratory order would remove legitimate regulatory uncertainties that were hindering the project's financing and development. *Id.* at 3. The Board also noted that its findings would be limited to the facts and circumstances at issue.

Turning to the merits of the petition, the Board found that DesertXpress fell squarely under 49 U.S.C. § 10501(b), which states that "the jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive." *Id.* at 3-4. The Board found that DesertXpress, which intended to offer interstate rail transportation to the general public, qualified as "transportation by a rail carrier." *Id.* at 4. Therefore, § 10501(b) applied and preempted state and local environmental laws. The Board did note that federal environmental statutes, such as National Environmental Policy Act, 42 U.S.C. § 4332 (2006), would afford state and local actors with ample opportunity to participate in the environmental impact statement process. *Id.* at 1.

Two years later in 2009, the California-Nevada Super Speed Train Commission and American Magline Group (collectively, CNIMP or Petitioners) petitioned the Board to reopen and reverse its finding. DesertXpress Enterprises, LLC—Petition for Declaratory Order, Docket No. FD 34914, Decision No. 40043 at 1 (STB May 7, 2010) [hereinafter 2010 Decision], *available at* http://www.stb.dot.gov/decisions/readingroom/nsf/WebServiceDate?openform (search by Decision No. 40043) (last visited Oct. 21, 2010). The Petitioners, a consortium that had been developing a competing proposal to build a magnetic levitation train largely along the same route as DesertXpress, argued that DesertXpress was not within the Board's jurisdiction. CNIMP's petition to reopen stated three claims: (1) changed circumstances, (2) newly available evidence, and (3) that the Board had committed a material error by exercising jurisdiction over the controversy. *Id.* at 4-5.

As a preliminary matter, the Board granted the Petitioners' request to intervene. *Id.* at 5. Because both CNIMP and DesertXpress sought to utilize the same corridor, CNIMP had a significant interest in the proceeding. DesertXpress urged the Board to deny the petition to reopen as untimely; however, the Board denied this request, noting that "subject matter jurisdictional issues generally can be raised in a petition to reopen," however untimely. *Id.* at 5-6.

Nonetheless, the Board stated that a petition to reopen would only be granted upon showing that the prior decision "involved material error or would be affected materially because of new evidence or changed circumstances." *Id.* at 6. The bulk of the Board's opinion focused on the charge of "material error". Preliminarily, however, it disposed of the "new evidence" and "changed circumstances" charges.

The Petitioners argued that increased congressional funding for CNIMP was a "changed circumstance" that justified reopening the 2007 Decision. The Board rejected this argument, noting that availability of funding for CNIMP affected neither the jurisdictional analysis nor the outcome of the 2007 Decision. *Id.*

The Petitioners also claimed that the Board, at the time of the 2007 Decision, was unaware that DesertXpress would not connect to any other existing rail lines. *Id.* at 7. This issue, a major part of the Petitioners' material error charge, concerned statutory language regarding the scope of the Board's exclusive jurisdiction. When offered as "new evidence," however, the Board dismissed the charge, stating that it had been fully aware of this lack of connectivity prior to drafting the 2007 Decision.

The Petitioners' material error charge alleged that some language in 49 U.S.C. § 10501(a)(2)(A) (2006) limited the Board's jurisdiction to railroads that physically connected with other railroads. *Id.* at 7-8. That statutory language states that the Board's jurisdiction extends to transportation between one place in "a State and a place in the same or another State as part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(A). Because DesertXpress would not connect with any other railroads, the Petitioners argued, it would not be part of the "interstate rail network" and thus not subject to Board jurisdiction.

The Board offered a twofold rationale for rejecting the material error charge. First, it found that the meaning of "as part of the interstate rail network" language was not defined in the Act, and was thus ambiguous. *Id.* Accordingly, the Board asserted its authority to interpret the term in a reasonable manner.

The Board interpreted the phrase "as part of the interstate rail network" to exempt only intrastate rail transportation *not* related to interstate commerce from its jurisdiction. Otherwise, the Board retained exclusive jurisdiction over all interstate rail transportation and intrastate rail transportation related to interstate commerce. *Id.* at 14 (citing City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998)).

Second, the Board noted that even under the Petitioners' erroneous reading of § 10501, DesertXpress would still fall within its jurisdiction. *Id.* at 8. If the "part of the interstate rail network" language did indeed

limit the Board's authority, it would nonetheless be inapplicable because DesertXpress would itself *be* an interstate rail network. *Id.*

Ultimately, the Board rejected the Petitioners' construction of the statute and affirmed its exclusive jurisdiction over DesertXpress. *Id.* at 17-18. In so concluding, the Board reiterated the public policy justification for its decision, namely preventing a patchwork of "contrasting and inconsistent regulation by the various states." *Id.* at 16. The Petitioners' request to reopen was denied. *Id.* at 18.

At the outset of this decision, the Board noted that "there are a number of significant proposals to upgrade our nation's passenger rail network, with the goal of higher-speed and more efficient transportation." *Id.* at 1. This decision concerns only one such project, but is likely to have national impacts, as the New Jersey commenters originally predicted. The Surface Transportation Board has reasserted its exclusive jurisdiction over the construction of passenger rail. Though this particular controversy was about federal preemption, DesertXpress' genuine uncertainty about the state of the law exposed it as a relatively *tabula rasa*. Until recently, the American "interstate rail network" has been shrinking; however, as we continue to seek "more efficient transportation," this trend is likely to reverse. This decision signals the Board's desire to facilitate the expeditious development of American passenger rail.

Matthew Barrison

South Carolina v. North Carolina, 130 S. Ct. 854 (2010)

In *South Carolina v. North Carolina*, the United States Supreme Court considered three nonstate parties' motions to intervene in an interstate water dispute concerning apportionment of the Catawba River. 130 S. Ct. 854, 858-59 (2010). The motions arose in a suit brought by South Carolina against North Carolina in the Supreme Court pursuant to the Court's original jurisdiction over interstate disputes. *See* U.S. CONST. art. III, § 2. South Carolina accused North Carolina of diverting more than its "equitable share" of the water in the Catawba River in violation of federal riparian common law. 130 S. Ct. at 859. Soon after the Court granted South Carolina leave to file its complaint against North Carolina, two entities filed motions for leave to intervene in the interstate dispute: the Catawba River Water Supply Project (CRWSP) and Duke Energy Carolinas, LLC (Duke Energy). *Id.* at 860. A month later, the City of Charlotte, North Carolina (Charlotte) also filed a motion for leave to

intervene. The Court appointed a Special Master and referred to her both the interstate water dispute and the three non-state parties' motions to intervene. *Id.* at 858-59. The Special Master held a hearing on the three motions to intervene and issued a First Interim Report in which she granted all three motions to intervene and set forth her reasons for doing so. *Id.* at 859.

South Carolina presented exceptions to the findings of the Special Master, so the Supreme Court heard oral argument on South Carolina's exceptions. Justice Alito, joined by Justices Stevens, Scalia, Kennedy, and Breyer, held that CRWSP and Duke Energy would be permitted to intervene in South Carolina's suit against North Carolina, but that Charlotte would not be permitted to intervene under the doctrine of parens patriae and the public policies supporting that doctrine. *Id.* at 867-88. Chief Justice Roberts issued a separate opinion, joined by Justices Thomas, Ginsburg, and Sotomayor, in which he concurred with the majority that Charlotte should be denied leave to intervene, and dissented on the grounds that the Court also should have denied CRWSP and Duke Energy leave to intervene. *Id.* at 868-69 (Roberts, C.J., dissenting).

In dismissing Charlotte's motion to intervene, both the majority and dissenting opinions relied heavily upon the Court's holding in a similar water dispute between the State of New Jersey and the State of New York decided almost sixty years ago. *See* New Jersey v. New York, 345 U.S. 369 (1953) (per curiam). Amidst a dispute between the two states about their diversions from the Delaware River, the Commonwealth of Pennsylvania petitioned the Court for leave to intervene, which the Court granted. *Id.* at 370-71. The City of Philadelphia, Pennsylvania (Philadelphia) separately petitioned the Court for leave to intervene because of its own use of the Delaware River and Pennsylvania's recent grant to Philadelphia of its own Home Rule Charter. *Id.* at 372. New Jersey, New York, and Pennsylvania opposed Philadelphia's intervention on the grounds that such intervention would violate the doctrine of parens patriae. The doctrine of parens patriae is a "recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens." *Id.* (internal quotation marks and citations omitted). The Court explained that the doctrine is supported by two separate public policy considerations: (1) the "necessary recognition of sovereign dignity," and (2) the need for "good judicial administration." *Id.* at 373. The threat to sovereign dignity of allowing nonstate entities to intervene in interstate disputes arises from the possibility that a state might be "judicially

impeached" by its own citizens or municipalities on issues of state public policy. *Id.* The Court viewed the parens patriae doctrine as a mechanism for providing for judicial economy because it effectively limits participation in interstate disputes to semi-sovereigns and the federal government, saving the court time and resources it might otherwise expend deciding upon which citizens within a state may intervene, and it prevents the court from becoming involved in intrastate disputes over the distribution of a particular state resource such as water. The Court's analysis of the parens patriae doctrine led it to announce a general rule for when nonstate entities may intervene in an interstate dispute: "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* The Court held that (1) Philadelphia had failed to demonstrate a compelling interest apart from its interest as a municipality within the political subdivision of Pennsylvania, and that (2) Pennsylvania would properly represent its interest as a party to the interstate dispute, and thus the Court did not permit Philadelphia to intervene. *Id.* at 373-74.

No doubt cognizant of the high burden that the *New Jersey v. New York* holding imposes upon would-be nonstate intervenors in an interstate dispute, each of the three nonstate parties in the instant case alleged both a compelling interest and the inability of South Carolina and North Carolina to properly represent their interests in the water dispute. 130 S. Ct. 854, 860-61 (2010). CRWSP asserted that it had a compelling interest in the litigation because it was a bi-state entity that was jointly owned and regulated by counties in both South Carolina and North Carolina, and that its interests could not be adequately represented by either state. *Id.* at 860. Duke Energy asserted that it had a compelling interest in the litigation because of its financial interest in eleven dams and reservoirs along the Catawba River, its interest in a fifty-year hydroelectric power supply license, and its role in negotiating a multistakeholder Comprehensive Relicensing Agreement (CRA) involving entities from both states. It asserted that its "particular amalgam of federal, state and private interests" prevented either state from fully representing its interests. *Id.* (internal citations omitted). Finally, Charlotte asserted that it had a compelling interest in the litigation as the holder of a thirty-three million-gallon-per-day (33 mgd) permit to transfer water from the Catawba River—"the largest single transfer identified in the complaint"—and that the State of North Carolina, which had an obligation to represent all users in North Carolina

(not all of which supported Charlotte's use of the Catawba River), could not adequately represent its unique municipal interests. *Id.* at 860-61.

The Court found CRWSP's interest in the litigation both compelling and not properly represented by South Carolina or North Carolina. *Id.* at 864-66. The Court focused on the "unusual municipal" nature of CRWSP in finding that it had a compelling interest in the litigation: it was established as a joint venture of Union County, North Carolina and Lancaster County, South Carolina with the approval of regulatory authorities in both states, it served roughly the same number of people in each state, its diversion of water was dually licensed by regulatory authorities in both states, and the two counties that it served had split the cost of investing $30 million in its plant and infrastructure. *Id.* at 864-65. The court held that neither state could properly represent CRWSP's interest in the litigation because South Carolina had explicitly named CRWSP's diversion of Catawba River water to North Carolina in its complaint as part of the harm South Carolina was suffering as a result of North Carolina's diversion above its equitable share. *Id.* at 865. Also, North Carolina had admitted at oral argument that "it [could not] represent the interests of the joint venture." *Id.* Thus, because CRWSP had a compelling interest in the litigation that neither state could properly represent, the Court allowed CRWSP to intervene as a party and overruled South Carolina's exception as to CRWSP. *Id.* at 865-66.

The Court also found Duke Energy's interest in the litigation both compelling and not properly represented by South Carolina or North Carolina. *Id.* at 866-67. The Court focused on Duke Energy's economic interest in the Catawba River water, and more specifically, its investment-backed expectations that were contingent upon a minimum flow of water in the Catawba River in finding that it had a compelling interest. For example, Duke Energy operated eleven dams and reservoirs in both states, a drought in 2002 forced it to reduce its hydroelectric power generation from the Catawba River dramatically, and it had a unique interest in "protecting the terms of its existing FERC license and the CRA that form[ed] the basis of [its] pending [fifty-year] renewal application." *Id.* at 866. The court also found that there was no other similarly situated entity on the Catawba River, such that its interest in the litigation was "apart from the class of all other citizens of the States." *Id.* Thus, the Court held that Duke Energy had a compelling interest in the litigation. *Id.* at 867. The Court also held that neither South Carolina nor North Carolina would sufficiently represent Duke Energy's interests, because neither state had ratified the CRA or defended its terms in the

litigation thus far. Therefore, the Court permitted Duke Energy to intervene and overruled South Carolina's exception as to Duke Energy.

Finally, the Court found that Charlotte was barred from intervening due to the application of the parens patriae doctrine. *Id.* at 867-88. Because Charlotte's interest was "solely as a user of North Carolina's share of the Catawba River's water," it "occupie[d] a class of affected North Carolina users of water," which is a death knell finding under the compelling interest prong of the court's two-step nonstate intervenor test. *Id.* at 867; *see, e.g.*, New Jersey v. New York, 345 U.S. 369, 373 (1953) (per curiam) (stating "an intervener . . . should have the burden of showing some compelling interest in his own right, *apart from his interest in a class with all other citizens and creatures of the state*, which interest is not properly represented by the state" (emphasis added)). The Court supported its finding that parens patriae barred a finding of Charlotte's compelling interest based on one of the public policies behind the doctrine. *South Carolina*, 130 S. Ct. at 867-68. The Court noted that it would offend North Carolina's sovereignty to allow Charlotte to intervene, and indeed North Carolina opposed Charlotte's intervention equally with South Carolina. The Court also used North Carolina's statement that it would defend Charlotte's 33 mgd withdrawal from the Catawba River to find that North Carolina would properly represent Charlotte's interest in the litigation. *Id.* at 868. Thus, the Court did not permit Charlotte to intervene, and sustained South Carolina's exception as to Charlotte.

The Court's decision not to allow Charlotte to intervene is no surprise based on the general rule it announced in *New Jersey v. New York*, which set a high bar for non-state entities desiring to intervene in interstate disputes, and based on its holding in that case that Philadelphia could not intervene where the Commonwealth of Pennsylvania had already intervened. However, the Court's holding that both CRWSP and Duke Energy could intervene was a complete surprise. As the dissenting opinion points out, "this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never." *Id.* at 869 (Roberts, C.J., dissenting). Thus, *South Carolina v. North Carolina* might represent the Court's lowering of the bar to would-be nonstate intervenors in interstate disputes, except in the case of citizens or political subdivisions of a state that is already a party to the litigation, whose intervention is still barred under the doctrine of parens patriae.

Thomas W. Davis