A. The APA and Judicial Review

1. Barriers to Judicial Review: The Procedural Obstacle Course

Before the modern era, sovereign immunity was employed with some frequency in public land cases. *See generally* Antonin Scalia, (yes, that Scalia), *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public Lands Cases*, 68 Mich. L.Rev. 867 (1970).

Prof. Richard J. Pierce, Jr. has stated that "[m]odern standing law is closer to a part of the political system than to a part of the legal system. It is characterized by numerous malleable doctrines and numerous inconsistent precedents. Judges regularly manipulate the doctrines and rely on selective citation of precedents to further their own political preferences." *Is Standing Law or Politics?*, 77 N.C. L.REV. 1741, 1786 (1999).

Bennett v Spear, while broadening the zone of interests test, may also have broadened the second prong of constitutional standing by distinguishing traceable causation from the more limited, common-law proximate causation. See Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. STATE L.REV. 869.

Procedural standing became easier to establish following Federal Election Commission v. Akins, 524 U.S. 11 (1998), where plaintiffs obtained standing to challenge an agency failure to make certain records public pursuant to election law. The Court held that the plaintiffs' "injury in fact" was their "inability to obtain information" required by statute. 524 U.S. at 21.

A survey of more recent cases is Bradford C. Mank, *Informational Standing After* Summers, 39 BOSTON COLLEGE ENVIRONMENTAL AFFAIRS L. REV. 1 (2012).

Mausolf v. Babbitt (125 F.3d 661 (8th Cir. 1997) explores the prospect of third party public interest groups as intervenors appealing decisions unfavorable to the government--even when the government decides not to appeal. For an analysis of this case, see Michael K. Horn, *Standing in When the Government Bows Out: Mausolf v. Babbitt*, 3 GREAT PLAINS NAT. RESOURCES J. 72 (1998).

For a comparison and summary of administrative appeals systems, see Bradley C. Bobertz and Robert L. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L.REV. 372 (1993). Forest Service administrative appeals were reformed by legislation in 1994 (106 Stat. 1419) and substantially modified in 2003. *See* Healthy Forests Restoration Act, 117 Stat. 1887 (codified at 16 U.S.C. § 6501 et seq.); 68 Fed. Reg. 33581 (2003).

Bret Birdsong argues that, by Scalia's "reckoning, the discretion how to achieve the object…becomes discretion not to achieve it—at least, so far as a court is concerned." Bret C. Birdsong, Justice Scalia's Footprints on the Public Lands, 83 DENV. U. L.REV. 259 (2005). Professor Birdsong notes that Justice Scalia wrote extensively on public lands issues as a young professor. Professor Birdsong explores the apparent paradox that Professor Scalia seemed to favor judicial review of public lands matters, while Justice Scalia seems to abhor it. Or as Birdsong put it: "Justice Scalia's footprints on the public lands led in 1970 to the door of the federal courthouse. Today they lead away from it." Professor Birdsong argues Professor Scalia was defending the right of public lands users with property-like claims to seek judicial review of agency action; Justice Scalia has tried to limit the scope of judicial review when sought by representatives of the broader public interest—private attorneys general without property claims. More broadly, Justice Scalia has used the public lands context to mount a counter-

reformation to the celebrated "reformation" of administrative law—a reform that opened it to broader judicial review—fashioned by courts and commentators in the 1970s.

2. The Scope of Judicial Review

See generally Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497 (2005); Peter Strauss, *When the Judge is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L.REV. 321 (1990). For other interesting observations about agency expertise, congressional delegation, and *Chevron* deference, see Elena Kagan, *Presidential Administration*, 114 Harv. L.Rev. 2245, 2372–84 (2001).

Courts deciding whether manuals are binding look at both substantive and procedural aspects of the administrative material. The substantive dimension is the content of the manual policy. It is concerned with whether the policy encodes, through particular standards, methods, and binding language, duties an agency must meet. The procedural dimension is the manner in which the agency promulgates the manual provision. Robert L. Fischman, *From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENVTL. L.J. 77 (2007).

B. The National Environmental Policy Act (NEPA)

1. Timing and Scope of NEPA Analyses

The reported NEPA decisions and commentary on them are voluminous. For general reference, see Daniel Mandelker, NEPA Law and Litigation (periodic updates).

The Supreme Court's extensive record of interpreting NEPA narrowly is thoroughly analyzed in Richard J. Lazarus, The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court, 2012 U. Ill. L. Rev. 231 (2012).

A recent GAO report found that concrete data on the number and type of NEPA analyses, as well as data on the costs and benefits of completing such analyses is not readily available. U.S. Gen. Accounting Office, *GAO-14-370, National Environmental Policy Act: Little Information Exists on NEPA Analyses* (2014).

Is NEPA just an example of proliferating paperwork and red tape that contributes to governmental inefficiency and frustration of citizens' legitimate aims? *See, e.g.*, Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 Okla. L.Rev. 239, 239 (1973) ("I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of the administrative decisions. I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil").

There are numerous examples where NEPA prompted the government to think more broadly and deeply about environmental consequences and values. See NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government (2010 Envtl. L. Inst.).

2. What Must an Adequate EIS Discuss

Climate change has proved to be a new challenge for NEPA analyses. The Columbia Law School Center for Climate Change Law conducted a systematic analysis of how the Environmental Impact Statements (EISs) required under NEPA, and under

state law NEPA analogs, treat the issue of climate change. See http://web.law.columbia.edu/climate-change/resources/nepa-and-state-nepa-eis-resource-center

3. Mitigated FONSIs

The CEQ's non-binding 2011 guidance, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, is a good summary of current practice in this widely used NEPA tool. You can view it and other helpful CEQ materials on NEPA at:
http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html
On the role agency comments play in NEPA litigation, see Michael C. Blumm & Marla Nelson, Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation, 37 Vermont L.Rev. 5 (2012).

C. The Endangered Species Act

1. Introduction and Overview

There is a huge volume of commentary on the Act. The most recent overview is an ABA book (part of the "Basic Practice Series") by Sam Kalen & Murray Feldman, ESA: Endangered Species Act (2d ed. 2012). Useful discussions can be found in Michael Bean and Melanie Rowland, The Evolution of National Wildlife Law 192–276 (3d ed. 1997); Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L.Rev. 278 (1993); Endangered Species Act: Law, Policy, and Perspectives (Donald Baur & Robert Irvin, eds. 2002); Symposium, *The Endangered Species Act Turns 30*, 34 Envtl. Law 287–744 (2004).

2. Section 4: Listing and Delisting Species

For a comparison between the ESA and Canada's approach to listing, *see* Waples et al., *A Tale of Two Acts: Endangered Species Listing Practices in Canada and the United States*, 63 BIOSCIENCE 723 (2013).
For all the Michigan fans, in 2013, federal biologists proposed listing the wolverine as a threatened species in the Lower 48 states. However, in 2014 the FWS determined that the wolverine did not warrant such a status change.
Candidate Conservation Agreements (CCAs) are voluntary conservation agreements between the U.S. Fish and Wildlife Service (Service) and one or more public or private parties. The Service works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness.
http://www.fws.gov/endangered/what-we-do/cca.html#ccaa
For decades, Congress has formally excluded questions about the economic value of species and the costs of their protection from agency decisions about whether a species should be listed under the ESA. Recently, however, a number of federal legislators have sought to incorporate their own ad hoc views about the value of individual species in peril, and the costs of protecting such species, into listing decisions. Zachary Bray, *The Hidden Rise of "Efficient' (De)listing*, 73 MD. L. REV. 389 (2014).

3. Section 7: The Action Agency's Duty to Consult

Climate Change. A helpful on-line model for down-scaling the effects of climate change to particular regions of United States is The Nature Conservancy's ClimateWizard: http://www.climatewizard.org/

Counterpart Regulations - Natural resources agencies frequently involved in consultation have begun adopting special rules called "counterpart regulations." Such regulations were contemplated by the original consultation rule adopted to implement the ESA in the 1970s, but were not developed for several decades. Notwithstanding arguments that informal consultation frequently involves interagency negotiations that produce commitments to adopt effective mitigation measures, the Bush Administration's "Healthy Forests" initiative led to 2003 counterpart regulations. The rules relaxed the general requirement that the wildlife agency provide written concurrence of action agency "not likely to adversely affect" findings for certain land management activities aimed at reducing fire loads on lands managed by the U.S. Forest Service and the BLM. 68 Fed. Reg. 68254 (2003). The ostensible goal was to make consultation more efficient in situations where prompt action is advisable to reduce fire danger, although the generic regulations governing consultation have long had an exception for emergencies. 50 C.F.R. § 402.05 (authorizing informal consultation through "alternative procedures" in "situations involving acts of God, disasters, casualties, national defense or security emergencies, etc." though formal consultation must follow "after the emergency is under control"). The counterpart regulations required the action agency to make the "not likely to adversely affect" decisions by the same standards that would apply to the FWS. Defenders of Wildlife v. Salazar, 842 F.Supp.2d 181 (D.D.C. 2012), overturned the "Healthy Forests" counterpart regulations. A similar rule waiving the concurrence requirement of a "not likely to adversely affect" determination by the EPA in its pesticide regulation program had also failed judicial review. Washington Toxics Coalition v. U.S. Dept. of the Interior, 457 F.Supp.2d 1158 (W.D.Wash.2006), found the concurrence role of the FWS to be essential to the framework of consultation established by the ESA.

4. Section 9: The "Take" Prohibition

Most of the early litigation under the ESA (such as TVA v. Hill) focused on § 7, but gradually § 9 "began to dig its way out of anonymity." Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L.REV. 109, 143 (1991).

The use of section 4(d) rules to provide incentives to participate in regional planning by exempting certain activities that fit within an approved plan is discussed in Fischman & Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUMBIA J. ENVTL. L. 45 (2002).

On application of the take prohibition, suppose that half of the natural stream flow of a river has long been diverted by a farmer with a water right valid under state law with a priority date of 1950. Forty percent of the water is being diverted by a city whose water right was perfected in 1980. Native fish in the stream are now listed as endangered, and need 15 percent of the flow in the river to survive. Whose diversion must be cut back in order to keep the fish alive? See James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law about Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595 (2003), and Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 INDIANA L.J. 661 (2008).

5. The Relationship Between Sections 9 and 7

D. Property and Contract Rights

1. Regulatory "Takings" in Connection with Public Natural Resources

On ownership of wild horses, see generally Michael C. Blumm and Lucus Ritchie, The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife, 35 ENVTL. L. 673, 718–19 (2005).

For a thorough review of the law dealing with takings from damage caused by wildlife, see John Echeverria and Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TULANE ENVTL. L.J. 331 (2003).

For a thorough exploration of the arguments pro and con for paying private property owners rather than regulating them in order to secure environmental protection, see John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND, RESOURCES & ENVTL. L. 1 (2005).

2. Private Property Rights in Federal Lands

3. Contract Rights

On the incentives on federal agencies to breach contracts, s*ee generally* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L.REV. 345 (2000).

On the "Sovereign Acts" doctrine, *see* Horowitz v. United States, 267 U.S. 458, 461 (1925); Edward A. Fitzgerald, *Conoco, Inc. v. United States: Sovereign Authority Undermined by Contractual Obligations on the Outer Continental Shelf*, 27 PUB. CONT. L.J. 755, 777–81 (1998).