

NOTE

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Assimilation, Enclaves, and Take: How States Might Protect Wildlife on Federal Reservations

| | | |
|---|-----|---|
| I. State and Federal Wildlife Law | 386 | R |
| II. Federal Enclave Law | 391 | R |
| A. Reservation of State or Local Authority | 392 | R |
| B. Residual State and Local Jurisdiction | 392 | R |
| C. Federal Retrocession of Jurisdiction | 392 | R |
| D. Explicit Congressional Provision for Specific State or Local Laws | 393 | R |
| III. Nature and Background of the Assimilative Crimes Act | 394 | R |
| A. Tests for Assimilation | 397 | R |
| B. Application of the Assimilative Crimes Act ... | 399 | R |
| IV. Jurisdiction of the Assimilative Crimes Act | 402 | R |
| A. Methods of Obtaining Federal Legislative Jurisdiction | 403 | R |
| B. Legislative History | 404 | R |
| C. Analysis of 18 U.S.C. § 7(3) | 405 | R |
| V. State Endangered Species Acts as Criminal Laws | 406 | R |

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| | | |
|--|-----|---|
| VI. Assimilation of State Wildlife Laws..... | 410 | R |
| VII. Conclusion..... | 412 | R |

On the broad windswept expanse of the Columbian Steppe near the town of Boardman, Oregon, a small brown figure emerges from a tangle of rock and sagebrush. Light white spots dot its back in such a way that, even at eight inches, it makes a striking figure. This small denizen of the desert is the Washington ground squirrel, *Spermophilus washingtoni*, a species found only within the shrub-steppe habitat of the Columbia Basin ecosystem of Oregon and Washington. Agriculture, development, and the spread of nonnative grass species threaten the only soil types used by the squirrels. The result is a sporadic distribution, significant fragmentation, and loss of entire colonies.

While it receives no federal protection, the squirrel is listed as an endangered species by the State of Oregon.¹ This particular squirrel makes its home on a federal enclave: the Boardman Naval Weapons Training Facility (Facility). The Facility has been described as “[t]he most contiguous, least-disturbed expanse of suitable Washington ground squirrel habitat within the species’ range.”² The Facility is also an area of exclusive federal jurisdiction—thus the protections of Oregon’s Endangered Species Act do not directly apply. In the absence of any federal protection, there appears to be nothing preventing the Department of Defense from converting the squirrel’s last stronghold back to its original use—a bombing range.³

The Washington ground squirrel is just one of a number of species protected by a state but not protected by the federal govern-

¹ OR. ADMIN. R. 635-100-0125 (2007). See also County of Morrow v. Dep’t of Fish & Wildlife, 37 P.3d 180, 181-83 (Or. App. 2001) (discussing the listing determination and status of the squirrel).

² Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 71 Fed. Reg. 53,756, 53,778 (Sept. 12, 2006) (codified at 50 C.F.R. pt. 17).

³ For instance, there is a current proposal to construct and operate four new live-fire weapons ranges in the middle of the facility. See OR. MILITARY DEP’T, BOARDMAN BOMBING RANGE COMPLEX NEW WEAPONS TRAINING RANGES: DRAFT ENVIRONMENTAL ASSESSMENT i (2006), available at http://www.mil.state.or.us/AGI-E/PublicReview/BBRC_DEA.pdf. Weapons used on the range would include light and heavy machine guns, 25-millimeter tank guns, 120-millimeter cannons, and missiles. *Id.* at 8.

ment.⁴ It should come as no surprise that the best remaining squirrel habitat is on a military reservation.⁵ But state efforts to recover and protect species can be compromised by federal actions and jurisdiction. The federal Endangered Species Act⁶ (ESA) was created, in part, because of unwillingness among states to preemptively protect species within their borders.⁷ Meanwhile, federal constitutional clauses have been interpreted to give Congress the “power to protect wildlife on the public lands, state law notwithstanding.”⁸ This jurisdictional agreement has created a situation where a state wishing to protect a species can do so against everyone but the federal government. In such a situation, there is a real need for states to undertake creative problem solving.

This Note proposes a novel theory. Simply put, the take prohibitions found in many state endangered species acts apply to federal lands, including military bases and other enclaves, by function of the Assimilative Crimes Act. These prohibitions are incorporated as federal law and as such, are enforceable. If accepted, this theory represents a new and innovative way around traditional supremacy and preemption problems that stop many state challenges to federal decisions affecting wildlife.

Part I of this Note briefly discusses the interrelationship between state and federal regulation of wildlife and the constitutional constraints. Part II provides a primer on federal enclave law. Part III discusses the background and application of the Assimilative Crimes Act. Part IV discusses exclusive and concurrent jurisdiction. Part V discusses state endangered species acts as criminal laws. Part VI walks through the assimilation of a state wildlife law. Finally, Part VII concludes with some of the challenges of enforcing state prohibitions. The goal of this Note

⁴ See SUSAN GEORGE ET AL., STATE ENDANGERED SPECIES ACTS: PAST, PRESENT, AND FUTURE § 3, pt. 2 (1998) (on file with author).

⁵ Over 300 plants and animals placed on the federal endangered species list are located on military installations. U.S. GEN. ACCOUNTING OFFICE, GAO-02-614, MILITARY TRAINING: DOD LACKS A COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES 6 (2002), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-02-614>.

⁶ Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006).

⁷ *Endangered Species: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries*, 93d Cong. 204-05 (1973) (statement of Hon. Nathaniel P. Reed, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior).

⁸ *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976).

is not to challenge federal authority over wildlife generally, but rather, to ensure there are alternatives available if the federal government is not living up to its stewardship responsibilities.

I

STATE AND FEDERAL WILDLIFE LAW

Recent decisions of the federal courts, Congress, and the Executive Branch have resulted in reductions in federal authority to take actions to protect the environment. This new federal direction, in turn, has inspired some state and local governments to take steps to supplement federal environmental protection measures with their own initiatives.⁹ While “new federalism” decisions of the Supreme Court have largely resulted in a narrowing of federal regulatory power,¹⁰ at the same time, “courts have used various doctrines to restrict the scope of state and local authority to control [these same] activities.”¹¹ Examples include invalidation of state or local environmental regulations because they violate the dormant Commerce Clause,¹² are preempted,¹³ or amount to takings without just compensation.¹⁴

⁹ Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 778 (2006).

¹⁰ *Id.* at 755. See generally Stephen R. McAllister & Robert L. Glicksman, *Federal Environmental Law in the “New” Federalism Era*, 30 ENVTL. L. REP. 11,122 (2000); Stephen R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court’s “New” Federalism*, 29 ENVTL. L. REP. 10,665 (1999).

¹¹ Glicksman, *supra* note 9, at 786.

¹² See, e.g., *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394-95 (1994); *Or. Waste Sys., Inc. v. Or. Dep’t of Env’tl. Quality*, 511 U.S. 93, 107 (1994); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344-46 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001); *Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 787 (4th Cir. 1996); *Wendover City v. W. Wendover City*, 404 F. Supp. 2d 1324, 1331 (D. Utah 2005); *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1184, 1187 (D. Colo. 2001); *Blue Circle Cement, Inc. v. Bd. of County Comm’rs*, 917 F. Supp. 1514, 1522-23 (N.D. Okla. 1995).

¹³ See, e.g., *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-75 (2000); *S.D. Mining Ass’n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998); *Se. Fisheries Ass’n v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992); *Vietnamese Fishermen Ass’n of Am. v. Cal. Dep’t of Fish & Game*, 816 F. Supp. 1468, 1476 (N.D. Cal. 1993).

¹⁴ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-31 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841-42 (1987).

Wildlife in particular are dealt a one-two punch. On one hand, the federal government seemingly cannot or will not conserve some species. On the other hand, the states may no longer be allowed to exercise their traditional stewardship role. This sort of conflict becomes most apparent in the context of managing wildlife on federal lands.¹⁵ Historically, federal courts were willing to give deference to state authority over wildlife management.¹⁶ More recent cases have used the Constitution to limit the role that states play in wildlife management.¹⁷

Kleppe v. New Mexico, a prominent Property Clause case, represented a substantial shift in the way public resources could be managed.¹⁸ *Kleppe* involved a challenge to the constitutionality of the Wild Free-Roaming Horses and Burros Act which protected all unbranded and unclaimed horses and burros on public lands of the United States from capture, branding, harassment, or death. New Mexico challenged the statute on the grounds that it conflicted with traditional doctrines concerning wild animals and was in excess of Congress' power under the Property Clause.¹⁹ The Supreme Court held that Congress retained the power to enact legislation respecting federal lands and necessarily over the wildlife on those lands.²⁰ This power is not the same as exclusive legislative jurisdiction, so the state was free to enforce its civil and criminal laws.²¹ But where state laws conflict

¹⁵ *E.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (holding that the Property Clause empowers Congress to preempt state law managing feral horses and burros on the public lands); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 852 (9th Cir. 2002) (state statutes banning certain leghold traps preempted by the ESA); *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002) (holding that the Fish and Wildlife Service's refusal to permit the state to vaccinate elk on National Wildlife Refuge to prevent brucellosis did not violate the Tenth Amendment).

¹⁶ *See Toomer v. Witsell*, 334 U.S. 385, 402 (1948); *Lacoste v. Dep't of Conservation*, 263 U.S. 545, 549 (1924); *Geer v. Connecticut*, 161 U.S. 519, 528 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979).

¹⁷ *See Hughes*, 441 U.S. at 338-39 (explicitly overturning the state ownership doctrine but recognizing a state's right to the wildlife within its borders); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 385-86 (1978) (a state's right to control wildlife within its borders must yield to the federal government's proper exercise of its power).

¹⁸ *Kleppe*, 426 U.S. 529. *Kleppe* noted that the Court, in previous cases, had warned that state powers over wildlife only exist insofar as they are not incompatible with the federal government. *Id.* at 545 (quoting *Geer*, 161 U.S. at 528; *Missouri v. Holland*, 252 U.S. 416, 434 (1920)). Nevertheless, this decision caught many in the West by surprise.

¹⁹ *Kleppe*, 426 U.S. at 534-35.

²⁰ *Id.* at 543.

²¹ *Id.*

with federal legislation, the state laws preempt under the Supremacy Clause.²² Notwithstanding the traditional trustee and police powers of the state, the federal government clearly possesses power over wildlife on the public lands simply by virtue of their situs.²³

The *Kleppe* authority over wildlife on federal lands has been strengthened in other recent cases involving national wildlife refuges. In November of 1997, the State of Wyoming requested permission from the United States Fish and Wildlife Service (USFWS) to vaccinate elk for brucellosis on the National Elk Refuge (NER) in order to diminish the chance of spreading the disease from elk on the NER to elk and cattle off the refuge.²⁴ The USFWS rejected the State's request, claiming there was not enough information to find the vaccine "safe and effective."²⁵ Perhaps even more frustrating to the State, the USFWS failed to propose any alternative plans to quell the spread of the disease.²⁶

Wyoming promptly filed suit in federal district court under the Tenth Amendment and the Refuge Improvement Act, claiming that the USFWS interfered with the State's right to manage wildlife within the State.²⁷ The district court granted the United States' motion to dismiss on all counts, and Wyoming subsequently filed an appeal.²⁸ The Tenth Circuit affirmed in part and reversed in part, holding that the Tenth Amendment does not reserve to the states the right to manage wildlife "regardless of the circumstances"²⁹ and that the National Wildlife Refuge System Improvement Act (NWRISA) granted the USFWS authority to determine whether the vaccination of elk on the NER conflicted with the goals of the NWRISA.³⁰

²² *Id.*

²³ *Id.* at 546. The Secretary argued that the statute was sustainable under the Commerce Clause as well, but the Court did not reach the commerce issue because it found authority under the Property Clause. *Id.* at 535 n.6.

²⁴ Wyoming v. United States, 279 F.3d 1214, 1221 (10th Cir. 2002).

²⁵ *Id.* at 1221-22.

²⁶ Wyoming v. United States, 61 F. Supp. 2d 1209, 1222-23 (D. Wyo. 1999) ("The Court is sorry that this patchwork of federal law gives the Secretary room to play out his stalling game while doing nothing."), *aff'd in part and rev'd in part*, 279 F.3d 1214, 1241 ("We are faced with a situation where the program, or lack thereof, by one sovereign allegedly impairs the meaningful accomplishment of another sovereign's responsibilities.").

²⁷ Wyoming, 279 F.3d at 1222-23.

²⁸ *Id.* at 1223-24.

²⁹ *Id.* at 1227.

³⁰ *Id.* at 1235.

In a third recent case, *National Audubon Society, Inc. v. Davis*, a Ninth Circuit panel held that a California statute banning the use of certain traps to kill or capture certain wildlife was preempted by ESA and the NWRSA.³¹ The USFWS was concerned that it would be prevented from trapping foxes that were preying on endangered shorebirds.³² Because the California statute did not provide an exception for federal employees protecting endangered species, the court held that ESA preempted the state statute.³³ The court also found that because the National Wildlife Refuge was federal land, Congress had authority under the Property Clause to preempt state action.³⁴ Congress preempted the state with respect to wildlife management via the NWRSA.³⁵ As such, *Kleppe, Wyoming*, and *Davis* stand for the proposition that the federal government may assert near-total control of wildlife on federal reservations.

Those recent court battles occurred at the same time the federal government made efforts to remove substantive constraints on its ability to pursue activities potentially harmful to wildlife. A prominent example was the military's effort to exempt activities related to natural security matters from environmental laws.³⁶ In a fiscal year 2003 appropriations bill, Congress amended the Migratory Bird Treaty Act³⁷ by directing the Secretary of the Interior, with the concurrence of the Secretary of Defense, to issue regulations allowing the "incidental taking" of migratory birds during "training and operations of the Armed Forces that relate to combat" and during the testing of military equipment and weapons.³⁸

³¹ Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 852-54 (9th Cir. 2002).

³² *Id.* at 844.

³³ *Id.* at 852-53.

³⁴ *Id.* at 854.

³⁵ *Id.*

³⁶ One such initiative, sponsored by the Pentagon, was the Readiness and Range Preservation Initiative, which included proposals to amend the Clean Air Act; Resource Conservation and Recovery Act; Comprehensive Environmental Response, Compensation, and Liability Act; ESA; Marine Mammal Protection Act; and Migratory Bird Treaty Act to exempt certain military activities from those laws. See Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 1-2 (2005).

³⁷ Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2006).

³⁸ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 315(d), (f)(1), 116 Stat. 2458, 2509-10 (2002) (codified as amended at 16 U.S.C. § 703 (Supp. III 2003)).

Congress also resorted to appropriations legislation to water down the ESA's application to certain military activities and to narrow the activities deemed to constitute improper harassment of animals under the Marine Mammal Protection Act for military readiness activities. Section 318 of the National Defense Authorization Act for Fiscal Year 2004 amended section 4(a)(3) of the ESA to prevent the Secretary of the Interior from designating Department of Defense land as critical habitat if the land had a written integrated natural resource management plan under the Sikes Act.³⁹ It also added "impact on national security" to the Secretary's considerations under ESA section 4(b)(2).⁴⁰ Section 319 changed the Marine Mammal Protection Act's definition of "harassment" for military readiness activities⁴¹ and added an exemption provision for actions "necessary for national defense."⁴² It also authorized increased incidental takings in military readiness activities.⁴³

Currently, military exemptions exist under ESA,⁴⁴ Resource Conservation and Recovery Act,⁴⁵ Clean Water Act,⁴⁶ Clean Air Act,⁴⁷ and the Toxic Substances Control Act.⁴⁸

Recent federal decisions have resulted in reductions in environmental protections. At the same time, states have been stymied from stepping up and protecting wildlife, particularly on federal lands. Nowhere has this been more obvious than in the military context. Exemptions from federal protections combined with the unique jurisdictional nature of many military reservations make it particularly difficult for states to protect wildlife located on these areas.

³⁹ See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318(a)(3), 117 Stat. 1392, 1433 (2003) (codified as amended at 16 U.S.C. § 1533(a)(3)). See also Sikes Act, 16 U.S.C. §§ 670-670o (describing the requirements of an integrated natural resource management plan).

⁴⁰ National Defense Authorization Act for Fiscal Year 2004, § 318(b), 117 Stat. at 1433 (codified as amended at 16 U.S.C. § 1533(b)(2)).

⁴¹ *Id.* § 319(a), 117 Stat. at 1433 (codified as amended at 16 U.S.C. § 1362(18)).

⁴² *Id.* § 319(b), 117 Stat. at 1434 (codified as amended at 16 U.S.C. § 1371(f)).

⁴³ *Id.* § 319(c), 117 Stat. at 1434-35 (codified as amended at 16 U.S.C. § 1371(a)(5)).

⁴⁴ See 16 U.S.C. § 1536(j).

⁴⁵ See 42 U.S.C. § 6961(a) (2006).

⁴⁶ See 33 U.S.C. § 1323(a) (2006).

⁴⁷ 42 U.S.C. § 7418(b).

⁴⁸ 15 U.S.C. § 2621 (2006).

II**FEDERAL ENCLAVE LAW**

Article I, Section 8 of the U.S. Constitution provides in relevant part that:

Congress shall have the power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia], and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings⁴⁹

These reservations, known as federal enclaves, make up around six percent of the federal land base and may be found scattered throughout all categories of federal land including some military bases, post offices, and national parks.⁵⁰

When the federal government acquires property for the purposes specified in the Federal Enclave Clause and if the state has consented to federal jurisdiction, the power to legislate within the enclave rests exclusively with Congress.⁵¹ Exclusive federal legislative powers mean that state or local laws that have not been adopted directly or impliedly by the United States are not effective to regulate property or persons on that federal enclave,⁵² even if the state or local laws do not conflict with federal law or interfere with a federal function.⁵³ Since February 1, 1940, the United States acquired jurisdiction over federal lands in a state only through formal acceptance of jurisdiction by the federal agency or department.⁵⁴

In four circumstances, however, the exclusive nature of Congress' jurisdiction over federal enclaves may be limited:

- 1) If the state, in its consent to federal jurisdiction has reserved the authority of the state or local government to legislate;⁵⁵

⁴⁹ U.S. CONST. art. I, § 8, cl. 17.

⁵⁰ GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCE LAW* 173 (5th ed. 2002). Indian reservations are also included as federal enclaves. This Note will not address application of the ACA or state law on Indian reservations.

⁵¹ *Paul v. United States*, 371 U.S. 245, 264 (1963).

⁵² *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 562-63 (1946).

⁵³ *Paul*, 371 U.S. at 263-64; *see also* *Miss. River Fuel Corp. v. Cocreham*, 382 F.2d 929, 937 (5th Cir. 1967).

⁵⁴ *See* 40 U.S.C. § 3112 (2006); *Adams v. United States*, 319 U.S. 312, 313-15 (1943).

⁵⁵ *See Paul*, 371 U.S. at 264-65.

- 2) If certain types of state or local laws existed at the time the state consented to federal jurisdiction and those laws or their basic schemes have continued to the current time;⁵⁶
- 3) If Congress has retroceded jurisdiction to the state in whole or in part;⁵⁷ or
- 4) If Congress explicitly provided for the applicability of specific state or local laws.⁵⁸

A. Reservation of State or Local Authority

Often, states retain jurisdictional rights when they consent to federal jurisdiction. These “consent to purchase” statutes typically only reserve the right to serve civil or criminal process.⁵⁹

B. Residual State and Local Jurisdiction

Exclusive federal jurisdiction may also be limited by certain state and local laws existing at the time a state cedes jurisdiction to the United States. This is referred to as the doctrine of residual jurisdiction.⁶⁰ When exclusive jurisdiction is transferred from a state to the federal government, the then-existing state laws that are intended for the protection of private rights and are not inconsistent with federal use of the enclave become assimilated as federal law until abrogated.⁶¹ This process assures that no area, however small, will be left without a developed legal system.⁶² However, the doctrine of residual jurisdiction traditionally has been limited to the protection of private rights,⁶³ that is, laws affecting the use, possession, and transfer of property or designed to secure order and promote health.⁶⁴

C. Federal Retrocession of Jurisdiction

The United States may also retrocede jurisdiction over a federal enclave to a state.⁶⁵ When the land in question is a federal

⁵⁶ See *id.* at 268-69.

⁵⁷ Thiele v. City of Chi., 145 N.E.2d 637, 639 (Ill. 1957).

⁵⁸ See *Paul*, 371 U.S. at 263.

⁵⁹ See, e.g., OR. REV. STAT. § 272.030 (2005).

⁶⁰ *Miss. River Fuel Corp. v. Cocreham*, 382 F.2d 929, 939 (5th Cir. 1967).

⁶¹ *Id.*

⁶² *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99-100 (1940).

⁶³ *Miss. River Fuel Corp.*, 382 F.2d at 939.

⁶⁴ *Chi., Rock Island & Pac. Ry. Co. v. McGlenn*, 114 U.S. 542, 546 (1885).

⁶⁵ Authority to cede back federal legislative jurisdiction exists for the Director of the National Park Service, 16 U.S.C. § 1a-3 (2006), the Secretary of Agriculture, 7 U.S.C. § 2268 (2006), the Secretary of Defense, 10 U.S.C. § 2683(a) (2006), the Secretary of Commerce, 15 U.S.C. § 1529 (2006), the Secretary of the Interior, 16

enclave under the exclusive jurisdiction of the United States, “either action or authorization by Congress is essential to retrocession so long as the United States retains the land.”⁶⁶ Without retrocession of jurisdiction, the mere inclusion of language in a lease or license granted for use of federal enclave property does not retrocede federal jurisdiction over that property to that state.⁶⁷ Therefore, the provision in a license that requires compliance with all applicable state and local laws would not *by itself* make any particular state or local laws applicable.⁶⁸

One of the best known retrocessions of federal jurisdiction to the states is the Assimilative Crimes Act (ACA).⁶⁹ The ACA makes state law applicable to conduct occurring on lands reserved or acquired by the federal government as provided by statute,⁷⁰ when the act or omission is not punishable by an enactment of Congress, irrespective of when the property became a federal enclave.⁷¹ Prosecutions under this statute do not enforce state law, but rather assimilate the state law and enforce it as a federal law adopted by reference.⁷²

D. Explicit Congressional Provision for Specific State or Local Laws

Congress may also explicitly authorize the application of particular state or local laws on a federal enclave, but such authorization must be unambiguous.⁷³ For instance, 10 U.S.C. § 2671(a)(1) requires that all “hunting, fishing and trapping at

U.S.C. §§ 425k(b), 430g-5, 742m (2006), the Secretary of Veterans Affairs, 38 U.S.C. § 8112 (2006), and the National Aeronautics and Space Administrator, 42 U.S.C. § 2459k (2006). *See also* 16 U.S.C. § 251l (2006) (retroceding exclusive and concurrent jurisdiction over certain lands to the state of Washington); *id.* § 403h-17 (Tennessee); *id.* § 430uu-3 (Montana); *id.* § 460hh-5 (Oklahoma).

⁶⁶ Thiele v. City of Chi., 145 N.E.2d 637, 639 (Ill. 1957).

⁶⁷ *See* Humble Pipe Line Co. v. Waggoner, 376 U.S. 369, 374 (1964).

⁶⁸ Host-tenant real estate agreements commonly require compliance with all applicable federal, state and local laws, ordinances and regulations where the premises are located. *See, e.g.*, 3 ALVIN L. ARNOLD & MYRON KOVE, MODERN REAL ESTATE PRACTICE FORMS & COMMENTARY § 86:39 (2006).

⁶⁹ 18 U.S.C. § 13 (2006).

⁷⁰ “Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.” *Id.* § 7(3).

⁷¹ *Id.* § 13(a).

⁷² Puerto Rico v. Shell Co., 302 U.S. 253, 266 (1937).

⁷³ *See* Paul v. United States, 371 U.S. 245, 263 (1963).

[an] installation or facility be in accordance with the fish and game laws of the state in which it is located.”⁷⁴ A limited waiver of authority exists if such laws could result in undesirable consequences for public health or safety on the enclave.⁷⁵ Similar to the ACA, violations are punished on the enclave as they would be in the state.⁷⁶ The requirement that congressional authorization for state regulation of federal installations be “clear and unambiguous” has led the courts to strictly construe the terms of federal laws that seemingly waive federal sovereignty.⁷⁷

III

NATURE AND BACKGROUND OF THE ASSIMILATIVE CRIMES ACT

With an understanding that the general rule on federal enclaves is that federal jurisdiction is absolute, we now turn to the exception.

The Assimilative Crimes Act (ACA) provides in part:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in [within the special maritime and territorial jurisdiction of the United States], or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.⁷⁸

The special maritime and territorial jurisdiction of the United States, in turn, includes:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.⁷⁹

⁷⁴ 10 U.S.C. § 2671(a)(1) (2006).

⁷⁵ *Id.* § 2671(b)(1).

⁷⁶ *Id.* § 2671(c).

⁷⁷ *Envtl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 211 (1976).

⁷⁸ 18 U.S.C. § 13(a).

⁷⁹ *Id.* § 7(3).

That is to say, it includes federal enclaves and other reservations under the exclusive or concurrent jurisdiction of the United States. There will be more discussion on the jurisdictional reach of the ACA in Part IV below.

The ACA is designed to establish uniformity in a state's prohibitory laws where such conduct is not made penal by federal statutes.⁸⁰ Its "basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves."⁸¹ But the ACA is not intended to make federal enclaves subject to the entirety of the criminal law of the state in which the enclave is located. It thus makes applicable only those state criminal laws that make punishable acts or omissions that have not been made punishable "by any enactment of Congress."⁸² Though the ACA does not apply to state offenses that have already been made punishable under federal law, the ACA nevertheless "promotes the even-handed application of state law to local conduct that the federal law does not punish and, but for the site being a federal enclave, would qualify as a local offense."⁸³

The ACA assimilates more than the jurisdiction's criminal laws existing on the date of the ACA's enactment. By referring to "the laws thereof in force at the time of such act or omission[.]" the ACA also assimilates future changes in a jurisdiction's criminal law as of the date of an alleged criminal act or omission.⁸⁴ This prospective incorporation of state law has been upheld by the Supreme Court.⁸⁵ As previously mentioned, prosecutions under the ACA do not enforce state law, but rather assimilate state law and enforce it as a federal law adopted by reference.⁸⁶

⁸⁰ *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977).

⁸¹ *Lewis v. United States*, 523 U.S. 155, 160 (1998) (citing *United States v. Sharpnack*, 355 U.S. 286, 289 (1958); *Williams v. United States*, 327 U.S. 711, 718-19 (1946); *United States v. Press Publ'g Co.*, 219 U.S. 1, 9-10 (1911); and *Franklin v. United States*, 216 U.S. 559, 568 (1910)).

⁸² 18 U.S.C. § 13(a).

⁸³ *United States v. Waites*, 198 F.3d 1123, 1127 (9th Cir. 2000).

⁸⁴ David B. Sweet, Annotation, *Validity, Construction, and Application of Assimilative Crimes Act (ACA) (18 U.S.C. § 13 and Similar Predecessor Provisions) Making Applicable to Federal Enclave Some Criminal Laws of State, Territory, Possession, or District in Which Enclave Is Located—Supreme Court Cases*, 140 L. Ed. 2d 1123, *2a (2006).

⁸⁵ *Sharpnack*, 355 U.S. at 297.

⁸⁶ *Puerto Rico v. Shell Co.*, 302 U.S. 253, 266 (1937).

State law is assimilated only when no “enactment of Congress” covers the conduct. This distinction is important because a federal law prohibiting the conduct will prevent the assimilation of the state law. For example, if a species were listed under the federal ESA, it is unlikely that state ESA take prohibitions would be assimilated. Provisions of the U.S. Code naturally qualify as enactments of Congress. Because of its universal applicability, however, the Uniform Code of Military Justice⁸⁷ is not an “enactment of Congress” within the meaning of 18 U.S.C. § 13.⁸⁸ Federal agency regulations, violations of which are made criminal by statute, have been held to preclude assimilation of state law.⁸⁹ Regulations enforceable as laws and promulgated pursuant to a specific congressional delegation “qualify under the exception in the ACA as acts or omissions ‘made punishable by any enactment of Congress.’”⁹⁰ Thus, an “enactment of Congress” is broader than a literal reading might suggest. A careful search for “any enactment of Congress” which might preclude assimilation will require inquiry among various sources of law.

Further, the ACA does not assimilate all laws. For example, the ACA does not assimilate the penal provisions of state regulatory schemes⁹¹ nor does it incorporate state administrative penalties, such as license suspensions.⁹² The test for determining whether a state statute can be assimilated is whether the statutory scheme is considered prohibitory rather than regulatory.⁹³

United States v. Marcyes, the lead case on this subject, involved a challenge to convictions against the operators of a fireworks stand on an Indian reservation for possessing fireworks in violation of Washington state law, which was assimilated under the ACA.⁹⁴ In upholding the convictions, the Ninth Circuit made an important distinction between regulatory and prohibitory laws.⁹⁵ The court noted that a strong argument exists that Congress did

⁸⁷ 10 U.S.C. §§ 801-946 (2006).

⁸⁸ *United States v. Walker*, 552 F.2d 566, 568 n.3 (4th Cir. 1977).

⁸⁹ *United States v. Adams*, 502 F. Supp. 21, 25 (S.D. Fla. 1980). *See also* *United States v. Waites*, 198 F.3d 1123, 1129 (9th Cir. 2000) (finding a federal regulation an enactment of Congress).

⁹⁰ *Adams*, 502 F. Supp. at 25 (quoting 40 U.S.C. § 318c (1976)).

⁹¹ *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977).

⁹² *See United States v. Best*, 573 F.2d 1095, 1101 (9th Cir. 1978).

⁹³ *Marcyes*, 557 F.2d at 1364 (holding that a Washington fireworks law was prohibitory rather than regulatory).

⁹⁴ *Id.* at 1363.

⁹⁵ *Id.* at 1364.

not intend to include the penal provisions of a state regulatory system within the ACA.⁹⁶ The court was concerned that a state could enforce its regulatory system on the federal jurisdiction by making criminal any failure to comply with those regulations.⁹⁷ But that argument fails if a statutory scheme is considered prohibitory rather than regulatory.⁹⁸

In concluding that Washington's fireworks law was prohibitory rather than a regulatory law, the court looked primarily at the intent of the law.⁹⁹ Because the intent of the law was to prohibit the general possession or sale of dangerous fireworks, despite limited exceptions, it was not a licensing law.¹⁰⁰ Licensing laws regulate the described conduct and are used to generate revenues, whereas prohibitory laws are those laws which prohibit general use and possession.¹⁰¹ Moreover, the court was concerned that allowing prohibited conduct in federal enclaves would entirely circumvent Washington's determination that the possession of fireworks is dangerous to the general welfare of its citizens.¹⁰² Thus, the decision in *Marcy* ensured a uniform application of Washington's prohibitory laws to all citizens.¹⁰³

A. *Tests for Assimilation*

Early cases argued that the ACA does not assimilate state laws that are inconsistent with federal policies expressed in federal statutes.¹⁰⁴ *Johnson v. Yellow Cab Transit Co.* previously provided a three-part framework to analyze whether a given state law may be considered assimilated: First, is the law in conflict with federal policies as expressed by other acts of Congress or by valid administrative regulations which have the force of law?¹⁰⁵ Second, is the statute or law so designed that it can be

⁹⁶ *Id.* (citing *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 389 n.8 (1944)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1364-65.

¹⁰⁴ See *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 389-90 (1944); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103 (1940) (holding that authority of state laws or their administration may not interfere with the carrying out of a national purpose).

¹⁰⁵ *Johnson*, 321 U.S. at 389-90.

adopted?¹⁰⁶ Third, does the law make penal the transaction alleged to have taken place?¹⁰⁷

However, in *Lewis v. United States*, the United States Supreme Court recently established a two-part test for analyzing whether a particular state criminal law is properly incorporated into federal law under the ACA.¹⁰⁸ The first part of the test is whether the “act or omission . . . [is] made punishable by *any* enactment of Congress.”¹⁰⁹ If not, then the ACA presumably will assimilate the state statute.¹¹⁰ If some federal enactment does punish the specified conduct, the second part of the test is whether the federal enactment that applies to the “act or omission” would preclude application of the state law in question.¹¹¹ *Lewis* teaches that the primary inquiry in deciding whether the ACA assimilates a state statute is “one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant’s to the exclusion of the particular state statute at issue?”¹¹² The state statute will not be assimilated if, for example: (1) its application would conflict with federal policy;¹¹³ (2) it would effectively rewrite an offense definition that Congress carefully considered;¹¹⁴ or (3) the federal statutes reveal an intent to occupy so much of a field as to exclude use of the particular state statute.¹¹⁵

While there is no general test to answer this second prong, it seems fairly obvious that the ACA will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional or other technical considerations, or where differences amount only to those of name, definitional language, or punishment.¹¹⁶ Where both state and

¹⁰⁶ *Id.* at 389.

¹⁰⁷ *Id.* at 390.

¹⁰⁸ *Lewis v. United States*, 523 U.S. 155, 164 (1998); *see also* *United States v. Souza*, 392 F.3d 1050, 1053-54 (9th Cir. 2004).

¹⁰⁹ *Lewis*, 523 U.S. at 164 (quoting 18 U.S.C. § 13(a) (1994) (emphasis in original)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 166.

¹¹³ *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 389-90 (1944).

¹¹⁴ *Williams v. United States*, 327 U.S. 711, 718 (1946).

¹¹⁵ *Id.* at 724.

¹¹⁶ *Lewis*, 523 U.S. at 165 (citing *United States v. Adams*, 502 F. Supp. 21, 25 (S.D. Fla. 1980)).

federal statutes seek to punish approximately the same wrongful behavior, it seems the ACA will not apply.¹¹⁷

Because there is no gap to be filled in the federal enclave law by the state statute in such a case, the intent to exclude application of state law is obvious, and the state law is not assimilated.¹¹⁸

It is worth noting that a split exists among the circuits as to whether a court looks to state or federal law in interpreting an assimilated statute.¹¹⁹ Some circuits have held that, when looking at assimilated statutes, they are not bound by state court interpretations but rather are free to interpret the statute as if they were interpreting any federal statute.¹²⁰ Other circuits incorporate the entire substantive criminal law of the state, including laws related to the definition and scope of an offense.¹²¹ Like so many other elements in this body of law, deciding which law applies will require site-specific analysis.

B. Application of the Assimilative Crimes Act

The ACA has been used to prosecute a host of criminal activities: purposefully pointing a pistol,¹²² reckless assault,¹²³ battery,¹²⁴ burglary,¹²⁵ disorderly conduct,¹²⁶ driving while intoxicated,¹²⁷ embezzlement,¹²⁸ firearm possession,¹²⁹ for-

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Even within circuits there are varying levels of deference to state law. For example, the Tenth Circuit does not apply state law prescribing parole terms when sentencing a defendant convicted under the ACA, *United States v. Pinto*, 755 F.2d 150, 154 (10th Cir. 1985), but does not apply federal special assessments as they would be contrary to the ACA principle of conformity to state criminal law. *United States v. Mayberry*, 774 F.2d 1018, 1021-22 (10th Cir. 1985) (citing *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977)).

¹²⁰ *See, e.g.*, *United States v. White*, 145 F. App'x 786, 789 (3d Cir. 2005); *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982) (citing *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 391 (1944)).

¹²¹ *See, e.g.*, *United States v. Pierce*, 75 F.3d 173, 176 (4th Cir. 1996); *United States v. King*, 824 F.2d 313, 315 (4th Cir. 1987).

¹²² *United States v. Kaufman*, 862 F.2d 236 (9th Cir. 1988).

¹²³ *United States v. Griffith*, 864 F.2d 421 (6th Cir. 1988).

¹²⁴ *United States v. Guardia*, 10 F. Supp. 2d 1237 (D.N.M. 1998).

¹²⁵ *United States v. Vaughan*, 682 F.2d 290 (2d Cir. 1982); *United States v. Johnson*, 426 F.2d 1112 (7th Cir. 1970).

¹²⁶ *United States v. Woodard*, 376 F.2d 136 (7th Cir. 1967); *United States v. Jones*, 244 F. Supp. 181 (S.D.N.Y. 1965).

¹²⁷ *United States v. Doyle*, 237 F.3d 950 (8th Cir. 2001); *United States v. Fox*, 60 F.3d 181 (4th Cir. 1995); *United States v. Palmer*, 956 F.2d 189 (9th Cir. 1992); *United States v. Clark*, 361 F. Supp. 2d 502 (E.D. Va. 2005); *United States v. Fulker-*

400 J. ENVTL. LAW AND LITIGATION [Vol. 22, 383

gery,¹³⁰ gambling law violations,¹³¹ kidnapping,¹³² sodomy,¹³³ reckless driving,¹³⁴ speeding,¹³⁵ uttering bad checks,¹³⁶ horse-stealing,¹³⁷ attempted extortion,¹³⁸ vehicular battery,¹³⁹ first-degree wanton endangerment,¹⁴⁰ drug possession,¹⁴¹ unauthorized practice of law,¹⁴² and eluding police.¹⁴³ In the wildlife arena, the statute has been used to prosecute game violations on federal reserves generally¹⁴⁴ and specifically, game violations on military reservations.¹⁴⁵

In addition to being used as a sword by federal prosecutors, the ACA has been used as a shield in civil litigation. In *Nash v. Air Terminal Services, Inc.*, a black woman sought damage from a concessionaire because she was refused service in the dining room and coffee shop at Washington National Airport (a federal enclave).¹⁴⁶ At that time, Virginia statutorily mandated segregation in public places, and thus, the ACA applied the law as a federal crime just as it would have been a state crime in Virginia.¹⁴⁷ The court concluded that on the date of the events, segregation was a mandatory requirement of the federal law prevailing on the airport, by virtue of the ACA, and the defen-

son, 631 F. Supp. 319 (D. Haw. 1986); *United States v. Barner*, 195 F. Supp. 103 (N.D. Cal. 1961).

¹²⁸ *United States v. Armata*, 193 F. Supp. 624 (D. Mass. 1961).

¹²⁹ *United States v. Parker*, 362 F.3d 1279 (10th Cir. 2004).

¹³⁰ *United States v. Burland*, 441 F.2d 1199 (9th Cir. 1971).

¹³¹ *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950); *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986).

¹³² *United States v. Picotte*, 30 C.M.R. 196 (1961); *United States v. Harkcom*, 30 C.M.R. 257 (1961).

¹³³ *United States v. Smith*, 574 F.2d 988 (9th Cir. 1978); *United States v. Brewer*, 363 F. Supp. 606 (M.D. Pa. 1973), *aff'd without opinion*, 491 F.2d 751 (3d Cir. 1973).

¹³⁴ *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948).

¹³⁵ *United States v. Dreos*, 156 F. Supp. 200 (D. Md. 1957).

¹³⁶ *United States v. Frazier*, 444 F.2d 235 (5th Cir. 1971); *Owens v. United States*, 383 F. Supp. 780 (M.D. Pa. 1974), *aff'd without opinion*, 515 F.2d 507 (3d Cir. 1975).

¹³⁷ *United States v. Pridgeon*, 153 U.S. 48 (1894).

¹³⁸ *United States v. Teplin*, 775 F.2d 1261 (4th Cir. 1985).

¹³⁹ *United States v. Allard*, 164 F.3d 1146 (8th Cir. 1999).

¹⁴⁰ *United States v. Howard*, 218 F.3d 556 (6th Cir. 2000).

¹⁴¹ *United States v. Broadnax*, 688 F. Supp. 1080 (E.D. Va. 1988); *United States v. Chapman*, 321 F. Supp. 767 (E.D. Va. 1971).

¹⁴² *United States v. Clark*, 195 F.3d 446 (9th Cir. 1999).

¹⁴³ *United States v. Kline*, 15 M.J. 805 (1983).

¹⁴⁴ *See United States v. Dowden*, 139 F. Supp. 781 (D. La. 1956).

¹⁴⁵ *See United States v. Fishel*, 12 M.J. 602 (1981).

¹⁴⁶ *Nash v. Air Terminal Servs., Inc.*, 85 F. Supp. 545, 547 (E.D. Va. 1949).

¹⁴⁷ *Id.* at 547-48.

2007]

Assimilation, Enclaves, and Take

401

dant's failure to enforce segregation would have subjected it to the penalties of the ACA.¹⁴⁸

However, not all uses of the ACA in civil litigation have been successful. In a pre-*Lewis* case, the Ninth Circuit affirmed a dismissal in an action for damages under the Federal Tort Claims Act (FTCA).¹⁴⁹ The dispute concerned a plaintiff who dove off of a bridge in a national park and was rendered a quadriplegic.¹⁵⁰ The plaintiff argued "that the government was required to comply with the California River Resort Act," which was incorporated pursuant to the ACA.¹⁵¹ The River Resort Act would have required sounding of the river, a warning sign, and safety ropes.¹⁵² This incorporation, "in turn, established a mandatory duty under federal law for the [National Park Service] to comply with . . . for purposes of the FTCA."¹⁵³ The court rejected the argument on four independent bases. First, the ACA does not constitute a waiver of federal sovereign immunity, subjecting the United States to prosecution for violations of state criminal statutes.¹⁵⁴ Second, application of the California statute "would violate the Supremacy Clause by constituting a direct and intrusive regulation by the State of the Federal Government's operation of its property."¹⁵⁵ Third, the requirements of the state statute "would do violence to the main purposes and objectives underlying the National Park System" by "destroy[ing] the visual beauty and riparian environment of the park Finally, the Resort Act conflict[ed] with federal policy and therefore [could not] be incorporated into federal law pursuant to the ACA."¹⁵⁶

¹⁴⁸ *Id.* at 548. Note that these events ended up with a much happier ending: following promulgation of a prohibition on segregation by the Administer of Civil Aeronautics, the court refused to enjoin enforcement of the regulation and explicitly denied the ACA defense. *Air Terminal Servs., Inc. v. Rentzel*, 81 F. Supp. 611, 612 (E.D. Va. 1949). The court found that "[t]he fundamental purpose of the [ACA] was to provide each [f]ederal reservation a criminal code for its local government," but not "to override other 'federal policies as expressed by Acts of Congress' or by valid administrative orders." *Id.* (quoting *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 384, 390 (1944)).

¹⁴⁹ *Blackburn v. United States*, 100 F.3d 1426, 1428 (9th Cir. 1996).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1435.

¹⁵² *Id.* (quoting CAL. HEALTH & SAFETY CODE §§ 24051-53 (1991)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

IV**JURISDICTION OF THE ASSIMILATIVE CRIMES ACT**

Determining which law applies to federal enclaves (state, federal, or some combination thereof) continues to be a challenge.¹⁵⁷ This challenge arises, in large part, because the law of federal enclaves depends heavily on how, and when, the federal government received jurisdiction.¹⁵⁸

In general, three types of jurisdiction exist on federal land: exclusive, concurrent, and partial.¹⁵⁹ “Exclusive jurisdiction” is the same as “exclusive legislation,” at least as that term is used in the federal enclave clause.¹⁶⁰ Care should be taken not to confuse legislative jurisdiction with a proprietary interest from which the government exercises independent authority under the Property Clause to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹⁶¹

“Exclusive legislative jurisdiction” exists in situations wherein the federal government has received, by consent of purchase, cession, or reservation, all the authority of the state, with no reservation made to the state “except the right to serve process resulting from activities . . . which occurred off the land.”¹⁶² The term “concurrent legislative jurisdiction” applies to those instances where, in granting the United States authority that would otherwise amount to exclusive legislative jurisdiction over an area, the state reserves to itself the right to exercise, concurrently with the United States, all of the same authority.¹⁶³ Finally, the term “partial legislative jurisdiction” applies when the federal government has been granted some legislative jurisdiction over

¹⁵⁷ Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 113-14 (1997).

¹⁵⁸ *Id.* at 116.

¹⁵⁹ *Id.*

¹⁶⁰ *Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930).

¹⁶¹ U.S. CONST. art. IV, § 3, cl. 2. State attempts to regulate activities on federal land frequently come afoul of this clause and the related Supremacy Clause, *id.* art. VI, cl. 2. Assimilation seems to provide one way around these constitutional hurdles since state law becomes federal law and preemption doctrines are thusly inapplicable.

¹⁶² Castlen & Block, *supra* note 157, at 116. *See also* INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES pt. II, 11 (1957), available at <http://www.supremelaw.org/rsrc/fedjur/fedjur2.htm>.

¹⁶³ Castlen & Block, *supra* note 157, at 117.

an area in a state, but where the state reserves the right to exercise authority beyond the right to serve civil or criminal process in the area.¹⁶⁴

A. *Methods of Obtaining Federal Legislative Jurisdiction*

The United States may “retain or acquire legislative jurisdiction over property within a state by (1) reserving it upon granting statehood; (2) purchase with consent of the state; or (3) cession.”¹⁶⁵ First, legislative jurisdiction may be reserved upon statehood. When a state is admitted to the Union, it obtains legislative jurisdiction over all land except land the federal government expressly reserves.¹⁶⁶ The government is allowed to reserve or retain jurisdiction over particular sections of land.¹⁶⁷

Second, property may be purchased with the state’s consent. “The power of the [f]ederal [g]overnment to acquire land within a [s]tate by purchase or by condemnation without the consent of the [s]tate is well established.”¹⁶⁸ However, without the state’s “consent,” the United States does not gain legislative jurisdiction.¹⁶⁹ Consent often takes the form of a “consent to purchase” statute. Since 1940, Congress has required the United States to assent to the transfer of jurisdiction over the property, however it may be acquired.¹⁷⁰ Prior to 1940, the presumption was that the United States consented to legislative jurisdiction whenever it was offered.¹⁷¹ Finally, a state may cede legislative jurisdiction over a parcel of property some time after purchase.¹⁷²

For this Note’s purpose, special maritime and territorial jurisdiction is limited to that found in 18 U.S.C. § 7(3).¹⁷³ Recent federal court cases seem to have confused the reach of this juris-

¹⁶⁴ *Id.*

¹⁶⁵ *United States v. McCrickard*, 957 F. Supp. 1149, 1152 n.5 (E.D. Cal. 1996).

¹⁶⁶ *See Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 526 (1885).

¹⁶⁷ *Castlen & Block*, *supra* note 157, at 117-18.

¹⁶⁸ *Paul v. United States*, 371 U.S. 245, 264 (1963) (citing *Kohl v. United States*, 91 U.S. 367, 371 (1875)).

¹⁶⁹ *See James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937).

¹⁷⁰ 40 U.S.C. § 3112 (2006).

¹⁷¹ *United States v. McCrickard*, 957 F. Supp. 1149, 1152 n.5 (E.D. Cal. 1996).

¹⁷² *Castlen & Block*, *supra* note 157, at 117.

¹⁷³ 18 U.S.C. § 7(3) (2006). This provision also affords jurisdiction over, among other places, the high seas, registered vessels on the Great Lakes, and islands containing deposits of guano. *Id.* § 7.

dictional statute, so a brief history of the development of § 7(3) might be helpful.¹⁷⁴

B. Legislative History

Although § 7(3) in its present form dates to 1940, the statute can be traced back to several provisions of an act passed by the First Congress titled “An Act for the Punishment of Certain Crimes Against the United States” (1790 Act).¹⁷⁵ The 1790 Act did not establish a distinct jurisdictional provision but rather incorporated jurisdictional limits separately into the substantive definition of each offense.¹⁷⁶ The jurisdictional language of the 1790 Act was clearly based on Article I, Section 8, Clause 17 of the United States Constitution.¹⁷⁷

The 1790 antecedent of § 7(3) was codified and slightly amended in 1874¹⁷⁸ but remained substantially in effect until 1909, when the 60th Congress passed “An Act to Codify, Revise, and Amend the Penal Laws of the United States” (1909 Act).¹⁷⁹ The section defining jurisdiction differed only slightly from the present § 7(3) and provided that admiralty and maritime as well as the territorial jurisdiction of the United States included

any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United

¹⁷⁴ There appears to be some confusion or general ignorance over the reach of § 7(3). Federal courts have increasingly applied jurisdiction to all federal lands without attempting to determine whether exclusive or concurrent jurisdiction exists. *See, e.g., United States v. Faulkner*, 450 F.3d 466 (9th Cir. 2006) (upholding ACA charge on unreserved Bureau of Land Management land); *United States v. Verlin*, No. 97-40038-01-SAC, 1997 WL 630110, at *2 (D. Kan. Sept. 26, 1997, revised Oct. 16, 1997) (agreeing with the government’s contention that lands acquired by the United States for public use fall within the jurisdiction of the United States); *but see United States v. Grant*, 318 F. Supp. 2d 1042, 1046 (D. Mont. 2004) (distinguishing wildfire-suppression jurisdiction from criminal jurisdiction); *United States v. King*, 781 F. Supp. 315, 317 (D.N.J. 1991) (dismissing action for failure to establish federal criminal jurisdiction).

¹⁷⁵ An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790) [hereinafter 1790 Act].

¹⁷⁶ *United States v. Gatlin*, 216 F.3d 207, 216 (2d Cir. 2000) (quoting 1790 Act, § 3) (“[S]ection 3 of the 1790 Act provided ‘that if any person . . . shall, *within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States*, commit the crime of wilful murder, such person . . . shall suffer death.’”) (emphasis in original).

¹⁷⁷ *Id.* at 216 n.12.

¹⁷⁸ *See* 1873-74 Rev. Stat. § 5391 (1878).

¹⁷⁹ An Act to Codify, Revise, and Amend the Penal Laws of the United States, § 272, 35 Stat. 1088, 1143 (1909) [hereinafter 1909 Act].

States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building.¹⁸⁰

The 1909 Act was not altered by Congress until 1940, when the 76th Congress amended the 1909 Act and enacted what is now § 7(3).¹⁸¹ In doing so, Congress made two important changes. First, Congress deleted the word “exclusive” from the first phrase; therefore jurisdiction no longer requires that lands be reserved or acquired “for the exclusive use” of the United States.¹⁸² Second, Congress inserted the words “or concurrent” between “exclusive” and “jurisdiction” in the second phrase, so that jurisdiction now extends to “any lands reserved or acquired for the use of the United States, and under the exclusive *or concurrent* jurisdiction thereof.”¹⁸³ The purpose of the changes seems to have been a response to *James v. Dravo Contracting Co.* where the Supreme Court held for the first time that a state could retain concurrent jurisdiction over lands acquired by the United States with the consent of the state pursuant to Article I, Section 8, Clause 17 of the Constitution.¹⁸⁴

C. *Analysis of 18 U.S.C. § 7(3)*

The modern version of 18 U.S.C. § 7(3) can be best understood if it is broken down into two parts. The first part provides jurisdiction over “[a]ny lands reserved or acquired for the use of the United States, *and* under the exclusive or concurrent jurisdiction thereof.”¹⁸⁵ The first part of § 7(3) applies to lands generally, as distinct from “places ‘for the erection of a . . . building.’”¹⁸⁶ Further, those lands must be “reserved or acquired” by the United States.¹⁸⁷ This may be done *without* the consent of the state legislature in the event the federal government reserves jurisdiction before statehood.¹⁸⁸ Otherwise, this first portion of § 7(3) can

¹⁸⁰ 1909 Act, ch. 321, § 272, 35 Stat. at 1143.

¹⁸¹ See Act of June 11, 1940, ch. 323, 54 Stat. 304 (1940).

¹⁸² *Id.*

¹⁸³ *Id.* (emphasis added).

¹⁸⁴ *James v. Dravo Contracting Co.*, 302 U.S. 134, 148-49 (1937).

¹⁸⁵ 18 U.S.C. § 7(3) (2006) (emphasis added).

¹⁸⁶ Jordan J. Paust, *Non-Extraterritoriality of “Special Territorial Jurisdiction” of the United States: Forgotten History and the Errors of Erdos*, 24 YALE J. INT’L L. 305, 318 (1999) (quoting 18 U.S.C. § 7(3) (1994)).

¹⁸⁷ 18 U.S.C. § 7(3).

¹⁸⁸ See *supra* Part IV.a (discussing methods of obtaining federal legislative jurisdiction).

only reach additional “lands” subject to exclusive or concurrent jurisdiction of the United States via “consent to purchase” or state cession.¹⁸⁹

The second part applies to alternative lands which encompass “any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.”¹⁹⁰ If the United States acquires land within the borders of the state with the consent of the state legislature “by purchase or condemnation for any of the purposes mentioned in Art[icle] I, [Section] 8, [Clause] 17, or if the land is acquired without such consent and later the state gives its consent, the jurisdiction of the [f]ederal [g]overnment becomes exclusive.”¹⁹¹ A state may condition its consent upon its retention of jurisdiction over the lands consistent with the federal use.¹⁹² In any event, acquisition with consent for the purposes enumerated above is sufficient to gain special territorial jurisdiction regardless of what jurisdiction is retained by the state (i.e. partial jurisdiction as opposed to exclusive).

V

STATE ENDANGERED SPECIES ACTS AS CRIMINAL LAWS

Forty-five states have some version of their own Endangered Species Act.¹⁹³ The lists provided in those acts include many more species than those listed federally and prescribe a multitude of proscriptions for their protections. Often they include native species listed by the federal government up to the date of the state enactment.¹⁹⁴ Commonly, states will determine the addition of subsequent species on a case-by-case basis.¹⁹⁵

¹⁸⁹ *Id.*

¹⁹⁰ 18 U.S.C. § 7(3).

¹⁹¹ *Paul v. United States*, 371 U.S. 245, 264 (1963) (internal quotations omitted).

¹⁹² *James v. Dravo Contracting Co.*, 302 U.S. 134, 146-49 (1937).

¹⁹³ *GEORGE ET AL.*, *supra* note 4, at § 3 pt. 2.

¹⁹⁴ *E.g.*, OR. REV. STAT. § 496.176(1) (2005) (“The lists of threatened species or endangered species established pursuant to [section 496.172(2)] shall include: (a) [t]hose species of wildlife listed as of May 15, 1987, as a threatened species or an endangered species pursuant to the federal Endangered Species Act . . .”).

¹⁹⁵ *E.g.*, KAN. STAT. ANN. § 32-960(a) (2006) (enumerating a series of factors to consider when deciding whether to list species).

Much has already been written about the role of state endangered species acts, their history, shortcomings, and possible future.¹⁹⁶ However, this section will only try to address a common element inherent to all state endangered species acts: prohibitions and their application as criminal law.

Generally speaking, there are two categories of prohibitions: those that prohibit trade¹⁹⁷ and those that prohibit harming a listed species.¹⁹⁸ The term “take” itself varies a great deal from state to state. It may encompass harassment,¹⁹⁹ or be limited to harvest and capture.²⁰⁰ Some states follow the federal definition of take, which is to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁰¹ However, only one state includes “habitat modification” as a take,²⁰² similar to what is found in the regulatory definition of harm under the federal ESA.²⁰³ Consultation and

¹⁹⁶ See, e.g., Kevin Cassidy, *Endangered Species' Slippery Slope Back to the States: Existing Regulatory Mechanisms and Ongoing Conservation Efforts Under the Endangered Species Act*, 32 ENVTL. L. 175 (2002); Dale D. Goble et al., *Local and National Protection of Endangered Species: An Assessment*, 2 ENVTL. SCI. & POL'Y 43 (1999); GEORGE ET AL., *supra* note 4.

¹⁹⁷ E.g., DEL. CODE ANN. tit. 7, § 601 (2007). (“Notwithstanding any other provision of this title, the importation, transportation, possession or sale of any endangered species of fish or wildlife, or hides or other parts thereof, or the sale or possession with intent to sell any article made in whole or in part from the skin, hide or other parts of any endangered species of fish or wildlife is prohibited, except under license or permit from the Division of Fish and Wildlife.”)

¹⁹⁸ The Indiana Code prohibits “take” of listed species. IND. CODE § 14-22-34-12 (2007). Take is defined as to “harass, hunt, capture, or kill; or . . . attempt to harass, hunt, capture, or kill; wildlife.” *Id.* § 14-22-34-5.

¹⁹⁹ E.g., HAW. REV. STAT. § 195D-2 (2006) (defining take as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, injure, or possess endangered or threatened species of aquatic life or land plants, or to attempt to engage in any such conduct”).

²⁰⁰ E.g., ALASKA STAT. § 16.20.195 (2006) (“A species or subspecies of fish or wildlife listed as endangered under [section] 16.20.190(b) may not be harvested, captured, or propagated except under the terms of a special permit issued by the commissioner of fish and game for scientific or educational purposes, or for propagation in captivity for the purpose of preservation.”).

²⁰¹ 16 U.S.C. § 1532(19) (2006); see, e.g., MD. CODE ANN., NAT. RES. § 10-2A-01(k) (2007) (mirroring federal definition).

²⁰² MASS. GEN. LAWS ANN. ch. 131A, § 1 (2007) (defining take to include activities which “disrupt the nesting, breeding, feeding or migratory activity” of listed species).

²⁰³ 50 C.F.R. § 17.3 (2006) (harm in the definition of take may include the “significant[] impair[ment of] essential behavioral patterns, including breeding, feeding or sheltering”).

familiarity with specific ESA provisions in a particular state are paramount to understanding which activities may be prohibited.

Further, state ESAs are not universal in their application. Some only impose certain requirements on state agencies²⁰⁴ or expressly prohibit application outside of public lands.²⁰⁵

One of the most important questions to ask is who do the take prohibitions apply to? Most often, this is resolved by looking to the statutes that define “person.” Under the federal ESA, a person includes a litany of subjects which essentially exhausts who could be subject to the jurisdiction of the United States.²⁰⁶ State definitions are not always so inclusive. For instance, under the Oregon ESA, a “person” means a “natural person, individual, corporation, company, society, association, firm, partnership, cooperative, governmental or political subdivision or agency thereof”;²⁰⁷ whereas, under Vermont law, a person only includes a “principal, agent, employee, firm, partnership, corporation, and association” for purposes of its state ESA.²⁰⁸ However, criminal provisions in wildlife protection laws have been applied to officials responsible for agency action.²⁰⁹ Again, a state-specific inquiry will be necessary to see to whom any given state ESA applies.

Regardless of how one categorizes them, game laws are criminal laws.²¹⁰ As such they bring up traditional issues of criminal intent. For instance, the State of Oregon has decided that misdemeanor and felony violations of fish and game law require demonstration of a “culpable mental state.”²¹¹ Thus, it may not be enough to simply show that a taking occurred. In order to impose criminal punishment, the appropriate mental state will also have to be shown. Without strict liability for a taking, an under-

²⁰⁴ *E.g.*, OR. REV. STAT. § 496.182(8) (2005) (determining how state land managing agencies contribute to the conservation of a listed species).

²⁰⁵ *E.g.*, GA. CODE ANN. § 27-3-132(b) (2007) (“rules and regulations [protecting species] shall not affect rights in private property or in public or private streams, nor shall such rules and regulations impede construction of any nature”).

²⁰⁶ *See* 16 U.S.C. § 1532(13).

²⁰⁷ OR. ADMIN. R. 635-100-0100(9) (2007).

²⁰⁸ VT. STAT. ANN. tit. 10, § 4001(18) (2005).

²⁰⁹ *See, e.g.*, United States v. Vesterso, 828 F.2d 1234, 1242-44 (8th Cir. 1987).

²¹⁰ DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 805 (2002); *see also* State v. Chang Hwan Cho, 681 P.2d 1152, 1155 (Or. 1984) (wildlife offenses in Oregon are governed by the Oregon Criminal Code).

²¹¹ *Cho*, 681 P.2d at 1157; State v. Holt, 681 P.2d 1158, 1159 (Or. 1984) (citing *Cho*, 681 P.2d at 1157); *but see* State v. Miller, 788 P.2d 974, 978, 984 (Or. 1990) (concurring and dissenting opinions suggesting that *Cho* was wrongly decided).

standing of state criminal law will prove critical when applying an assimilated take statute.

Federal agencies have taken some notice of state ESAs. In a recent decision, the Interior Board of Land Appeals (Board) upheld a stipulation placing operational and timing restrictions on a mining authorization in order to protect a state-listed species.²¹² In a challenge to its decision, the Bureau of Land Management (BLM) contended that failing to respect burrowing owl habitat would result in a prohibited take and that the species must be accorded habitat protection by virtue of internal policy.²¹³ That internal policy provides that “state laws protecting [state listed] species will apply to all BLM programs and actions to the extent that they are consistent with the Federal Land Policy and Management Act and other [f]ederal laws.”²¹⁴ The Board upheld the BLM’s discretion to apply the restrictions despite the fact that Colorado’s take prohibitions did not require it.²¹⁵

Reliance on discretionary action or action that goes beyond state requirements is not enough. A state would not likely be able to successfully prosecute a federal agent for violating state law in carrying out an activity authorized by the federal government.²¹⁶ Thus, there continues to be a need for some hook to ensure that state endangered species take prohibitions are uniformly enforced.

²¹² Moffat County Rd. Dep’t, 158 I.B.L.A. 221, 231 (2003).

²¹³ *Id.* at 225.

²¹⁴ U.S. BUREAU OF LAND MGMT., No. 6840, SPECIAL STATUS SPECIES MANAGEMENT, § 6840.11(D) (2001), available at <http://www.blm.gov/nhp/efoia/wo/manual/6840.pdf>.

²¹⁵ *Moffat County*, 158 I.B.L.A. at 229. See also COLO. REV. STAT. § 33-1-102(43) (2006) (defining take as “to acquire possession of wildlife; but such term shall not include the accidental wounding or killing of wildlife by a motor vehicle, vessel, or train”). Colorado’s prohibition is one on trade generally, and not the broader take definition found in the federal ESA. See *supra* notes 197-198, 200 and accompanying text.

²¹⁶ See *Wyoming v. Livingston*, 443 F.3d 1211, 1230-31 (10th Cir. 2006), cert. denied, 127 S. Ct. 553 (2006) (barring state prosecution of federal agents for trespass because Supremacy Clause immunity extends to criminal liability of federal officials for alleged violations of state law committed in the course of their federal duties). See also *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890); *Idaho v. Horiuchi*, 253 F.3d 359, 377 (9th Cir. 2001) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001) (en banc); *In re McShane*, 235 F. Supp. 262, 275 (N.D. Miss. 1964).

VI

ASSIMILATION OF STATE WILDLIFE LAWS

Lewis teaches us that the first inquiry to make when deciding whether a given law is assimilated is to ask if the defendant's "act or omission . . . [is] made punishable by *any* enactment of Congress."²¹⁷ A negative answer completes the inquiry; the ACA will presumably assimilate the statute.²¹⁸ Depending on the particular circumstances, numerous acts that protect wildlife could be considered in determining whether a state prohibition is assimilated. These include the Lacey Act Amendments of 1981,²¹⁹ Migratory Bird Treaty Act of 1918,²²⁰ Bald and Golden Eagle Protection Act,²²¹ federal ESA,²²² Marine Mammal Protection Act of 1972,²²³ Wild Free-Roaming Horses and Burros Act,²²⁴ and other federal agency statutes and regulations.²²⁵

Even if the take of a species is protected by one of these laws, the question remains whether the federal statutes that apply to the act or omission preclude application of the state law in question. Assimilation may be precluded because: (1) its application would interfere with the achievement of a federal policy; (2) the state law would effectively rewrite an offense definition that Congress carefully considered; and (3) the federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue.

For example, if a species were protected under the federal ESA, it might still be appropriate to assimilate state take protections. While it is true that the assimilation could be precluded because ESA preempts the field or assimilation would rewrite the federal "take" definition, it would not necessarily interfere

²¹⁷ *Lewis v. United States*, 523 U.S. 155, 164 (1998) (quoting 18 U.S.C. § 7(3) (1994) (emphasis in original)).

²¹⁸ *Id.* Despite careful searching this author has not been able to find any post-*Lewis* cases where there was no enactment of Congress and the law still was not assimilated.

²¹⁹ Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378 (2006).

²²⁰ Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2006).

²²¹ Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (2006).

²²² Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006).

²²³ Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1423h (2006).

²²⁴ Wild Free-Roaming Horses and Burros Act (Wild Horses Act) 16 U.S.C. §§ 1331-1340 (2006).

²²⁵ *E.g.*, 36 C.F.R. § 2.2(a)(1) (2006) (prohibition on taking wildlife in national parks); 50 C.F.R. § 70.4(c) (2006) (prohibition on killing wildlife at national fish hatcheries).

with federal policy. The federal ESA itself provides opportunities for states to participate in the process of protecting endangered or threatened species. First, ESA specifically mandates that the Secretary of the Interior, in implementing the statute, “cooperate to the maximum extent practicable with the [s]tates.”²²⁶ Second, it authorizes the Secretary to enter into agreements with states for the administration and management of any area established for the conservation of listed species and to enter cooperative agreements to establish and maintain “adequate and active” programs for such conservation.²²⁷ Finally, while ESA invalidates state laws and regulations aimed at certain conduct, it specifically reserves to states the authority to adopt laws or regulations that are otherwise intended to conserve fish or wildlife, and to adopt laws regulating the taking of listed species that are more restrictive than ESA’s provisions.²²⁸

Applying this test to the squirrel mentioned in the introduction of this article, the Boardman Naval Weapons Training Facility is a federal enclave. The land was largely acquired between 1941 and 1943.²²⁹ Sometime between 1942 and 1945, the federal government accepted exclusive jurisdiction over all lands acquired by it for military purposes within the State of Oregon.²³⁰ Thus, the Facility is an area of exclusive legislative jurisdiction and so the ACA will apply.

²²⁶ 16 U.S.C. § 1535(a) (2006). For a discussion of cooperative federalism under the ESA, see Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45 (2002). See also Robert L. Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 ENVTL. L. 451, 463 (2004) (concluding that “cooperative programs are bound to play an increasingly important role in ESA implementation in the near future”).

²²⁷ 16 U.S.C. § 1535(b)-(c).

²²⁸ *Id.* § 1535(f).

²²⁹ See GlobalSecurity.Org, Military: Boardman Range, <http://www.globalsecurity.org/military/facility/boardman.htm> (last visited Sept. 22, 2004). In the two years following a 1941 directive the Department of War, now the Department of Defense, acquired 58,662.90 acres of fee; 37,320.31 acres of public domain lands; and an easement for 2.30 acres—95,985.51 acres in total. *Id.* A November 22, 1960, transfer by the Air Force “divided the range into a checkerboard pattern that was not conducive for use as a modern bombing range.” *Id.* Several years of negotiation with the State of Oregon led to a decision to divide the former range in two. *Id.* “The Navy consolidated its operation on the eastern 47,722.07-acre half . . . and currently uses 37,320.31 acres of the public domain lands.” *Id.*

²³⁰ 22 Op. Or. Att’y Gen. 324 (1945).

Second, we find that the species is listed as endangered by the State of Oregon and that the state prohibits take²³¹ which is “to kill or obtain possession or control of any wildlife.”²³² Under the *Marcyes* test, this law is prohibitory because the law is designed not to generate revenue or regulate the conduct of a trade or business, but to prohibit an action. The law applies to all persons, which includes a “natural person, individual, corporation, company, society, association, firm, partnership, cooperative, governmental or political subdivision or agency thereof.”²³³ Thus, the take prohibition applies to both individuals and government agencies. A knowing violation of the take prohibition is a Class A misdemeanor.²³⁴ If a person acts “with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists,”²³⁵ the person could be sent to prison for up to one year.²³⁶

Third, we apply the *Lewis* test. Examining whether any enactment of Congress punishes the conduct, the species is not afforded protection under ESA, Migratory Bird Treaty Act, Marine Mammal Protection Act, Bald and Golden Eagle Protection Act, or any other federal statute. The Department of Defense has not promulgated any regulations, as defined by the state statute, which would prohibit take of the squirrel. The only regulations close to prohibiting take require that hunting wildlife be in accordance with state game laws.²³⁷ But, because the take prohibition punishes killing squirrels and not simply hunting them, it does not punish the same conduct. Thus, no enactment of Congress punishes the conduct, and so Oregon’s take prohibition would presumably be assimilated.

VII

CONCLUSION

In Parts V through VI, this Note showed how state ESA take prohibitions are criminal laws and may be assimilated into federal law through the ACA. But, barring some upstanding federal

²³¹ OR. REV. STAT. § 498.026(1) (2005).

²³² *Id.* § 496.004(16).

²³³ OR. ADMIN. R. 635-100-0100(9) (2007).

²³⁴ OR. REV. STAT. § 496.992(1).

²³⁵ *Id.* § 161.085(8).

²³⁶ *Id.* § 161.615(1).

²³⁷ *See* 10 U.S.C. § 2671(a)(1) (2006).

prosecutor who is willing to prosecute federal employees for violations of state statutes, what options are there to enforce a state ESA? Without some private group or state acting as a private attorney general, it seems likely that the federal government would do nothing to prevent these take violations from occurring.

The ACA itself does not constitute a waiver of federal sovereign immunity, subjecting the United States to prosecution for violations of state criminal statutes.²³⁸ Therefore, litigants must look for another source as a waiver. One source is the Administrative Procedure Act (APA).²³⁹ But could the APA be used to enjoin violation of an assimilated criminal statute? It is not unheard of for the federal government to be held liable for violating the APA's prohibition on agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁴⁰ Famous examples under the Migratory Bird Treaty Act abound.²⁴¹ However, issues of discretion²⁴² and final agency action²⁴³ are likely to come up.

Further, even if someone were to bring a challenge under the APA, there remains the question of the appropriate remedy. Because only the criminal and not the civil provisions of a state law are assimilated under the ACA, the court would have to enjoin the criminal activity. Enjoining criminal activity is something that courts have not traditionally done.²⁴⁴ However, unlike previous cases where the government was seeking to enjoin private action, here, the situation is such that a group which cannot resort to prosecution, is seeking to enjoin actions by the government which authorized criminal activity without any authority. Therefore, the traditional rationale for not issuing an injunction for criminal activity may not seem so persuasive.

If the federal government is concerned about its ability to use its property without restrictions from state endangered species, it

²³⁸ *Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996).

²³⁹ Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2006).

²⁴⁰ *Id.* § 706(2)(a).

²⁴¹ *See, e.g., Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000); *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

²⁴² 5 U.S.C. § 701(a)(2).

²⁴³ *Id.* § 704.

²⁴⁴ *See Sec. Exch. Comm'n v. Carriba Air, Inc.*, 681 F.2d 1318, 1321 (11th Cir. 1982).

has an easy solution: list them. The preclusive effect on assimilation is just one of the benefits of listing a species under the federal ESA. Further, the federal government would finally be living up to its stewardship responsibility.

In the alternative, the take prohibitions found in many state endangered species acts may be applied on certain federal lands. These prohibitions are incorporated as federal law and as such may even be enforceable by private groups and state attorneys general against the federal government. Hopefully, this alternative will prove fruitful in protecting species in areas that otherwise might not be protected, whether the federal government steps up to do so or whether citizens have to find a way to enforce their own laws. The ongoing threats to wildlife in the twenty-first century surely demonstrate that ignoring the problem will not make it go away.