RETAIL CANYON: THE FAILURE OF ENVIRONMENTAL LAW WITHIN AN AMERICAN TREASURE

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I. INTRODUCTION

"The wonders of the Grand Canyon cannot be adequately represented in symbols of speech, nor by speech itself. The resources of the graphic art are taxed beyond their powers in attempting to portray its features. Language and illustration must fail."[1]

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* I would like to thank Professor Gabriel Eckstein for inspiring me to pursue my passion for water law, and for his profound wisdom and invaluable guidance during the writing of this article.

[1] John W. Powell, *The Scientific Explorer*, *in* THE GRAND CANYON OF ARIZONA 18, 32

These poignant words from John Wesley Powell eloquently describe the powerful emotions many visitors to the Grand Canyon experience. Anyone who has seen the Canyon with his or her own eyes is intimately aware of just how breathtaking it truly is. Certainly, the Canyon is one of America's most treasured landmarks.[2] When President Theodore Roosevelt traveled to the Canyon in 1903 to consider whether or not it should be declared a national monument, he was awestruck by its glory and warned Arizonians to "[l]eave it as it is. You cannot improve on it."[3] For more than a century, Americans have heeded President Roosevelt's warning. Since Roosevelt's visit to the Grand Canyon, the United States has made phenomenal strides in advancing environmental protection efforts. In recent decades, Congress has passed numerous laws and crafted comprehensive regulations with the goal of protecting our most precious and sensitive resources.[4] In fact, the Grand Canyon and surrounding area has become some of the most protected land on the planet.[5] However, while these well-intended laws have undoubtedly advanced the cause of protecting our nation's most precious and sensitive resources, they are fundamentally flawed and in dire need of reinforcement. Indeed, they fail to adequately address the harms of mass environmental tourism, as well as pollution generated by the development of tourist attractions within the boundaries of sovereign American Indian tribes.

For example, in spite of these numerous federal environmental protection laws and regulations, the Grand Canyon and the Colorado River may soon face an unprecedented threat from Confluence Partners L.L.C., a Scottsdale Arizona based developer, acting in coordination with a small number of Navajo tribe members.[6] Confluence Partners has proposed a development plan entitled "Grand Canyon Escalade."[7] This development seeks to build hotels, shops, restaurants, and a museum

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(Santa Fe Ry. ed., 1909).

[2] *See generally* THEODORE ROOSEVELT, *At Grand Canyon, Arizona (May 6, 1903)*, *in* PRESIDENTIAL ADDRESSES AND STATE PAPERS OF THEODORE ROOSEVELT, 369, 369–72 (1910).

[3] *Id.* at 370.

[4] *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1388 (1977); Endangered Species Act, 16 U.S.C. §§ 1531–44 (1973); National Environmental Policy Act, 42 U.S.C. §§ 4331–70(h) (1970).

[5] *See* Adam Nagourney, *Where 2 Rivers Meet, Visions for Grand Canyon Clash*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/us/where-2-rivers-meet-visions-for-grand-canyon-clash.html?_r=1 (quoting David Uberuaga, Grand Canyon National Park Superintendent).

[6] *See* Ariz. Corp. Comm., Confluence Partners L.L.C., File No. L17178095 (2012) (Confluence Partners L.L.C. is currently active and in good standing at the time of this Comment's publication); Keith Lamparter, *Navajo Supporters of Grand Canyon Escalade Speak*, GRAND CANYON ESCALADE (Nov. 15, 2014), http://grandcanyonescalade.com/navajo-supporters-of-grand-canyon-escalade-speak; Keith Lamparter, *Open Letter from Escalade's Navajo Partners*, GRAND CANYON ESCALADE (Oct. 9, 2012), http://grandcanyonescalade.com/news-advisory-confluence-partners-navajo-members-letter/.

[7] David Roberts, *Who Can Save the Grand Canyon?*, SMITHSONIAN MAG. (Mar. 2015), http://www.smithsonianmag.com/arts-culture/who-can-save-the-grand-canyon-

along the rim and inside of the canyon, as well as a tramway called the "Grand Canyon Gondola," which may carry up to ten-thousand tourists to the floor of the canyon and along the delicate banks of the Colorado River each day.[8] Additionally, Confluence Partners intends to construct an elevated river walk, giving tourists unprecedented access to the Colorado River, as well as a terraced amphitheater, so the Grand Canyon can function as an entertainment venue instead of a cherished landmark.[9]

The National Park System was established with the creation of Yellowstone National Park in 1872, to preserve the environmental quality of the land for use and enjoyment of all people.[10] In 1916, President Woodrow Wilson signed the Organic Act of 1916, which established the National Park Service and charged it with the duty to administer and protect National Parks and Monuments.[11] However, the proposed Escalade development is outside the jurisdiction of the National Park Service because it would lie entirely within the sovereign boundaries of the Navajo Nation, the largest of 566 federally recognized sovereign American Indian tribes.[12] These tribes enjoy substantial sovereign immunity, but that immunity can be waived by either the United States Congress or the tribe itself.[13] While the Escalade project might fall within the scope of some federal environmental protection laws where Congress has effectively waived sovereign immunity,[14] none of the United States' flagship environmental legislation appears capable of effectively

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[8] *Id.*

[9] Eric Betz, *Controversy at the Confluence*, ARIZ. DAILY SUN (Oct. 22, 2013), http://azdailysun.com/news/local/controversy-at-the-confluence/article_31377a0e-3955-11e3-bdd8-0019bb2963f4.html; Julie Cart, *National Park Service Calls Development Plans a Threat to Grand Canyon*, L.A. TIMES (July 6, 2014), http://www.latimes.com/nation/la-na-grand-canyon-20140706-story.html; *see also* Keith Lamparter, *Master Land Use Plan*, GRAND CANYON ESCALADE (Apr. 27, 2012), http://grandcanyonescalade.com/master-land-use-plan.

[10] *See* 16 U.S.C. §§ 21–22 (2015) (originally enacted as Yellowstone Act of Mar. 1, 1872, 17 Stat. 32); *see also* 54 U.S.C. § 100101 (2014) (discussing the history of Yellowstone as the first national park).

[11] Organic Act of 1916, 16 U.S.C. §1, *repealed by* Title 54—National Park Service and Related Programs Enactment, Pub. L. No. 113–287, 128 Stat. 3094 (2014). Note that originally National Park regulations were codified under Title 16, but Congress has transferred much of Title 16 to Title 54. *See* NAT'L PARK SERV., NOTES ON TITLE 54 OF THE UNITED STATES CODE (Mar. 15, 2016), https://www.nps.gov/subjects/historicpreservation/upload/title54notes.pdf.

[12] BUREAU OF INDIAN AFFAIRS, *Frequently Asked Questions*, http://www.bia.gov/FAQs/ (last visited Sept. 19, 2015).

[13] *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940); *see also* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 401–02 (2009).

[14] *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1388 (1977); Endangered Species Act, 16 U.S.C. §§ 1531–44 (1973); National Environmental Policy Act, 42 U.S.C. §§ 4331–70(h) (1970).

regulating the future Grand Canyon Escalade development.

This is the Grand Canyon, universally regarded as one of the natural wonders of the world, the sacred jewel of the American Southwest, an iconic and beloved destination for explorers from around the globe.[15] Yet, our current laws and regulatory scheme have left the cherished and delicate canyon vulnerable to the unencumbered development of what essentially amounts to a strip mall and entertainment venue. How is this possible? The short and obvious answer is that this proposed development is an incredibly unique situation, which was never contemplated by the United States Congress. Now, Congress must take legislative notice. If Confluence Partners L.L.C. successfully develops the tribal portion of the Grand Canyon, this unique situation could be repeated in numerous other popular endangered areas where corporate interest may prey upon vulnerable and impoverished tribal governments.[16] For example, the Blackfoot Indian Reservation abuts Glacier National Park, the Zuni Indian Reservation borders Petrified Forrest National Park, and the Wind River Indian Reservation neighbors Yellowstone National Park. These, of course, are merely a small sample of potential areas of concern.

Thus, the overarching purpose of this Comment is to use the proposed Grand Canyon Escalade project as an example to reveal key inadequacies of certain well-known and oft cited environmental laws. Through the prism of the Grand Canyon Escalade development this Comment will establish that the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act are incapable of protecting certain sensitive environments from the harms caused by mass environmental tourism, particularly within tribal boundaries.

This Comment will first demonstrate the harmful environmental impact of unchecked tourism and survey previous incidents of harm to highlight a small sample of specific environmental threats posed by mass tourism. Then, it will demonstrate that the Escalade project is probably outside the effective regulatory reach of the Clean Water Act. Moreover, because the Clean Water Act alone should be more than enough to protect the Colorado River within the Grand Canyon, I will show—via an examination of case law—that pervasive ambiguity and absurd interpretations prevent the Act from functioning as Congress indented. Next, this Comment will survey the potential applicability of the National Environmental Policy Act, and illustrate how it also fails to offer any significant environmental protection. Finally, this Comment will discuss the function and narrow applicability of the Endangered Species Act to show that it too is insufficient. Throughout the discussion of each of the aforementioned laws this Comment will examine the underlying issue of tribal sovereign immunity. This Comment is not intended to be an exhaustive study of environmental policy; rather the intent is to simply demonstrate that in

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[15] *See Seven Natural Wonders of the World*, SEVEN WONDERS, http://sevennaturalwonders.org/world (last visited Jan 25, 2017); *Seven Wonders of the Natural World – in Pictures*, THE GUARDIAN (Nov. 10, 2011), http://www.theguardian.com/environment/gallery/2011/nov/10/seven-wonders-natural-world-in-pictures.

[16] *See* Katherine Peralta, *Native Americans Left Behind in the Economic Recovery*, U.S. NEWS (Nov. 27, 2014, 7:00 AM), http://www.usnews.com/news/articles/2014/11/27/native-americans-left-behind-in-the-economic-recovery.

spite of well-intended environmental legislation, the Grand Canyon, along with other sensitive areas, remain subject to preventable harm and will continue to be subject to such harm without congressional intervention.

II. TOURISM—A DOUBLE EDGED SWORD

Tourism within America's breathtaking landscapes and geographic wonders is not inherently troublesome. In fact, tourism ought to be encouraged, because seeing these picturesque features first hand often helps ordinary citizens understand why conservation efforts are of the utmost importance. This was certainly my own experience. I will never forget the moment I reached the high point of the Blue Mesa Trail in Petrified Forrest National Park, just outside of Holbrook, Arizona, and first glimpsed the truly astonishing and indescribable beauty of the Painted Desert. Then, seconds later, I saw a rusty and weathered soda can stuck between two rocks, a plastic bag hanging from a prickly pear, and a discarded shoe littering the immaculate landscape. In that moment, I realized how susceptible our most precious ecosystems are to careless human interaction.

My anecdotal experience is not unique. Each year, reckless behavior by tourists wreaks havoc within America's national parks. For the past fifteen years volunteers have organized an annual "Facelift" event inside Yosemite National Park, where they comb the park's popular trails and meadows to collect loose trash left behind by absent minded visitors.[17] In 2014 alone, Facelift volunteers picked up an astonishing 14,000 pounds of liter in just four days.[18] Similarly, volunteers with the "Trash Tracker " program operating on Lake Powell in the Glen Canyon National Recreation Area, collect tons of trash from the lake's shoreline each year.[19] In Yellowstone National Park, hot springs and thermal pools, which naturally look deep blue in color, are turning gold, orange, and green from the mountains of coins and trash that throngs of tourists have intentionally and carelessly discarded in them.[20] In Joshua Tree National Park, graffiti vandals routinely deface ancient rock formations.[21]

While responsible ecotourism should be encouraged, there is no realistic method of filtering out potentially harmful tourists amongst the multitudes that visit our na-

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[17] Rich Ibarra, *Hundreds of Volunteers Clear Litter from Yosemite National Park*, CAPITAL PUB. RADIO (Sept. 22, 2015), http://www.capradio.org/articles/2015/09/22/hundreds-of-volunteers-clear-litter-from-yosemite-national-park/.

[18] *Id.*

[19] NAT'L PARKS SERV., *Glen Canyon National Recreation Area Trash Tracker Program*, http://www.nps.gov/glca/getinvolved/supportyourpark/trashtracker.htm (last visited Feb. 10, 2017).

[20] *See* Patrick J. Kiger, *Yellowstone Thermal Pools Colored by Pollution*, DISCOVERY NEWS (Dec. 22, 2014), http://news.discovery.com/earth/yellowstone-thermal-pools-colored-by-pollution-141222.htm.

[21] *See* Jim Steinberg, *Graffiti a Growing Concern at Joshua Tree National Park*, SAN BERNARDINO SUN (May 10, 2015, 5:54 PM), http://www.sbsun.com/environment-and-nature/20150510/graffiti-a-growing-concern-at-joshua-tree-national-park.

tional parks and other protected areas each year. Moreover, the threat posed by caviler tourists to America's national parks and other protected areas is unquestionably enhanced by the development of tourist attractions within the parks and surrounding areas.[22]

A. Specific Environmental Threats

1. Plastics

Since 1960, plastic production has increased by an astonishing 2,400 percent worldwide.[23] While there are numerous recycling and responsible waste programs across the globe, approximately twenty-five percent of all newly manufactured plastic remains unaccounted for, meaning that it is not disposed of via municipal waste systems or recycled by industry.[24] This "missing" plastic equates to roughly twelve tons of new potential litter each year.[25] The plastic pollution problem is so wildly out of control that scientists studying the Los Angeles and San Gabriel rivers observed that over a three-day period sixty tons of plastic (roughly 2.3 billion pieces of trash) passed through the river systems and into the Pacific Ocean.[26]

Today, plastics comprise between sixty and eighty percent of all marine litter.[27] The immediate threat of such litter is ingestion by wildlife.[28] For example, forty-four percent of seabird species have been observed ingesting plastic waste.[29] Moreover, some environmental biologists believe that widespread plastic accumulation detrimentally alters the chemistry of marine ecosystems, threatening future biodiversity.[30] The long-term impacts of abundant plastic pollution may be far worse than projected. First, plastics themselves introduce a direct chemical threat to marine environments, most notably phenanthrene, polyethylene, polypropylene, and polyvinyl chloride.[31] Second, environmental scientists now know that plastics attract and retain toxic hydrophobic pollutants, though we do not yet fully understand the long-term implications of tons of slowly degrading trash in our waterways.[32] Should the Grand Canyon Escalade project come to fruition thousands of

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[22] *See* Bill Briggs, *National Parks Feel the Effects of Human, Environmental Threats*, NBC NEWS (Aug. 30, 2010, 11:35 AM), http://www.nbcnews.com/id/38883753/ns/travel-active_travel/t/national-parks-feel-effects-human-environmental-threats.

[23] Charles James Moore, *Synthetic Polymers in the Marine Environment: A Rapidly Increasing, Long-term Threat*, 108 ENVTL. RES. 2, 131 (2008).

[24] *Id.* at 135.

[25] *Id.*

[26] *Id.* at 134–35.

[27] *Id.* at 135.

[28] *Id.* at 134.

[29] *Id.*

[30] *See id.*

[31] *See* Emma L. Teuten et al., *Potential for Plastics to Transport Hydrophobic Contaminants*, 41 ENVTL. SCI. & TECH. 7759, 7759 (2007).

[32] *See id.* at 7761–62 (suggesting that not enough time has passed since the boom in plastic pollution for scientists to accurately study the effects of this pollution on our environment

well-meaning—but plastic-loving—tourists will be chauffeured to the banks of the Colorado River within the currently pristine canyon each year, posing a demonstrable threat to the river.[33]

2. Storm Water Runoff and Eroded Sediment

Construction by its very nature necessitates the use of chemicals and raw materials. The Grand Canyon Escalade project will be constructed mere meters from the Colorado River,[34] which presents a substantial threat that some of these chemicals (including acids, solvents, pesticides, and paint) and raw materials (such as uncured concrete or concrete dust) will end up in the river as a result of storm water runoff or unintentional over spraying.[35]

Moreover, infrastructure development directly disturbs the land, creating the likelihood for increased sediment runoff into river basins.[36] This poses a serious problem because the soil throughout the Colorado River basin contains high levels of mercury and selenium, both of which are extremely toxic heavy metals.[37] The Colorado River already has alarmingly high levels of mercury and selenium, which exacerbates the potential for heavy metal toxicity caused by sediment.[38] The influx of heavy metal-laden sediment discharged into an already endangered river would likely have a negative impact on the chemistry and ecology of the aquatic ecosystem. Unfortunately, scientists will have difficulty ascertaining the extent of the damage until after the fact because heavy metal content varies drastically throughout soil, making it difficult to accurately forecast exactly how much will be added via sediment runoff.[39] The United States Congress has passed seemingly robust environmental legislation to mitigate these environmental threats; however, these laws are marred with ambiguity and easily exploitable administrative loopholes.

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in the long-term).

[33] *See* Roberts, *supra* note 7.

[34] *See* Betz, *supra* note 9; Cart, *supra* note 9; *see also* Lamparter, *Master Land Use Plan*, *supra* note 9.

[35] *See generally* David E. Merrell, *Civil Fines Up to $32,500 Per Day for Storm Water Pollution*, 50 ADVOCATE 15, 16 (2007) (showing that corporate development in the area continues to have a drastic, concerning impact on the environment).

[36] D.E. Walling, *Human Impact on Land–Ocean Sediment Transfer by the World's Rivers*, 79 GEOMORPHOLOGY 196, 197 (2006).

[37] David M. Walters et al., *Mercury and Selenium Accumulation in the Colorado River Food Web, Grand Canyon, USA*, 34 ENVTL. TOXICOLOGY & CHEMISTRY 2385, 2390–92 (2015); *see also* ENVTL. PROT. AGENCY, *A Preliminary Assessment of Mercury Pollution in Navajo Reservoir*, ch. 5 (1971); *see generally* Loren Potter et al., *Mercury Levels in Lake Powell*, 9 ENVTL. SCI. & TECH. 41, 41–46 (1975).

[38] Walters et al., *supra* note 37, at 2388; *see also* Osha G. Davidson, *Even the Bottom of the Grand Canyon is Now Contaminated*, NAT'L. GEOGRAPHIC (Aug. 31, 2015, 8:00 AM), http://news.nationalgeographic.com/2015/08/150831-grand-canyon-fish-mercury-selenium-toxic.

[39] *See generally* Davidson, *supra* note 38; Merrell, *supra* note 35, at 15.

III. THE CLEAN WATER ACT: ENFORCEMENT, APPLICABILITY, AND FAILINGS

This Section will discuss the limited applicability of the Clean Water Act ("CWA") to the proposed Grand Canyon Escalade project, demonstrate its regulatory shortcomings, and highlight the potential for absurdity when enforcing the Act. First, as a preliminary matter, note that Congress has expressly waived tribal sovereign immunity under the Clean Water Act by declaring that tribes shall be treated as states for purposes of the Law.[40]

When Congress passed the CWA in 1972 it was met with adulation and praise because never before had Congress so vigorously and comprehensively addressed industrial water pollution within the United States.[41] The seemingly robust Act established a regulatory regime, primarily enforced by a permit system, to govern the discharge of pollution into navigable waterways.[42] While the CWA was a tremendous step forward in regulating the direct "point source" discharge of pollutants into America's waterways, it failed to address the voluminous amount of indirect "nonpoint source" pollution.[43] "Point source" as defined by the Act means:

> [A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.[44]

Thus, nonpoint sources are logically anything that falls outside the explicit definition of point source.

Specifically at issue with regards to the Grand Canyon Escalade project, and any similar future projects, is the issue of independent human activity—particularly mass tourism—that currently falls outside of the CWA's "point source" regulatory arena.[45] In light of the demonstrable environmental harm caused by mass commercial tourism, the lack of any meaningful regulatory oversight for nonpoint source polluters is particularly troubling, especially considering the unique environment of the Grand Canyon. The Grand Canyon, though vast and imposing, is an entirely enclosed and complex ecosystem.[46] Unlike other vulnerable environments where

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[40] *See* 33 U.S.C. § 1377 (2014); *see generally* Montana v. U.S. Envtl. Prot. Agency, 137 F.3d 1135, 1138–39 (9th Cir. 1998).

[41] David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 268 (2009).

[42] Clean Water Act of 1972, Pub. L. No. 92-500 (codified as amended at 33 U.S.C. §§ 1251–1388 (2006)).

[43] Kristi Johnson, *The Mythical Giant: Clean Water Act Section 401 and Nonpoint Source Pollution*, 29 ENVTL. L. 417, 418–19 (1999).

[44] 33 U.S.C. § 1362 (2014).

[45] *See* United States v. Plaza Health Labs., Inc., 3 F.3d 643, 647 (2d Cir. 1993) (holding that an individual cannot be a point source under the Clean Water Act's definition).

[46] *See generally*, Nat'l Park Serv., *Grand Canyon Ecosystems* (Dec. 2011), http://www.nps.gov/grca/learn/education/upload/EcoArticle-Dec2011-12.pdf.

litter may be redistributed by wind, rain, and erosion, the Grand Canyon's enormous walls ensure that refuse remains within the canyon.[47] The only natural avenue for escape is the Colorado River.[48]

Should the Escalade project move forward, there would be up to an estimated ten thousand tourists per day shuttled to the floor of the Grand Canyon to attend concerts, shop, dine, and generally frolic.[49] In light of what we know about mass tourism's impact on the environment within national parks, it is no surprise that so many people familiar with the Canyon and the proposed development are deeply concerned about the potential negative environmental consequences.[50]

A. Clean Water Act Enforcement—Pollution Permits Required

The primary regulatory mechanism of the Clean Water Act is the requirement for point source polluters to obtain a National Pollutant Elimination Discharge System ("NPDES") permit before commencing any discharge into a navigable waterway.[51] The purpose of the permit is to ensure compliance with effluent limitations—limits on how much of a particular pollutant may be discharged at one time—as determined by the Environmental Protection Agency ("EPA").[52] The permit program is enforced and administered by the EPA.[53] However, the Act authorizes and encourages states to create their own programs and agencies to comply with and enforce the Act.[54] If they do, and the Environmental Protection Agency certifies the state program, the state may issue NPDES permits without going through the EPA.[55] Most states have met the certification standards,[56] but the Navajo Nation has not,[57] which is of critical importance because it allows the National Environmental Policy Act ("NEPA") to be enforced against the EPA before any potential permit is issued for the Grand Canyon Escalade project.[58] The specific application of NEPA is dis-

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[47] *See id.* (examining diagram of the Grand Canyon shows natural funnel effect and that it is inconceivable that trash on the floor would be able to travel up and out of the Canyon.).

[48] *See generally* SEYMOUR L. FISHBEIN, GRAND CANYON COUNTRY: IT'S MAJESTY AND IT'S LORE 10–11, 154–55 (Margery D. Dunn et al. eds., 1991) (showing photographic overview of the Grand Canyon, with limited commentary, and map of the Canyon's river systems).

[49] *See* Roberts, *supra* note 8.

[50] *See id.*

[51] 33 U.S.C. § 1342 (2014).

[52] *See* 33 U.S.C. §§ 1311–12 (2015).

[53] 33 U.S.C. § 1342.

[54] *See id.*

[55] *See id.*

[56] U.S. ENVTL. PROT. AGENCY, *NPDES State Program Information*, http://www.epa.gov/npdes/npdes-state-program-information (last visited Jan. 10, 2016).

[57] U.S. ENVTL. PROT. AGENCY, *Region 9 Tribal Program*, http://www2.epa.gov/tribal/region-9-tribal-program (last visited Mar. 29, 2017).

[58] *See generally* National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2015) (showing that in the absence of a state environmental program, the federal agency will be responsible for approaching issues of environmental concern).

cussed in Section IV of this Comment.[59]

B. *Nonpoint Source Transformation and Confusion*

In 2004 the Supreme Court decided *South Florida Water Management District v. Miccosukee Tribe of Indians*, which is occasionally overlooked.[60] However, this case is important because it interprets the CWA to determine whether or not a point source must actually discharge pollutants to fall within the purview of the Act.[61] There, the Miccosukee Tribe sued the State of Florida under the CWA after the State built flood control infrastructure.[62] This infrastructure included a canal and a pumping station, which moved water from a flood prone portion of the Everglades to a less flood prone area.[63] However, the water being pumped from the flood prone area was full of fertilizer run off, and the area where it was pumped to—the tribal land—had previously been protected from such runoff.[64] The Tribe sued, arguing that the State was required to obtain an NPDES permit prior to discharging the fertilizer-laden water.[65] In response, Florida argued that because the point source infrastructure was not the root source of the pollution, but merely relocated polluted water, it fell outside the scope of the CWA.[66]

Justice O'Connor, writing for an eight-member majority, held that because a "conveyance" falls within the Act's definition of "point source," a point source does not actually have to pollute to fall within the regulatory scope of the Act.[67] Therefore, a "conveyance," which does nothing more than relocate previously existing pollution into a navigable waterway, must comply with the Clean Water Act and obtain an NPDES permit prior to discharge.[68] At that point the case was resolved and the Court could have ended their analysis, but it went on to indicate that nonpoint sources are not explicitly exempt from the NPDES permitting process if they also fall within the definition of "point source."[69] Following the Court's logic in *Miccosukee*, nonpoint sources can possibly transform into point sources, which could potentially reinvigorate and expand the regulatory reach of the Clean Water Act. However, the Court did not offer any further guidance regarding the requirements or circumstances necessary for this transformation to take place.[70]

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[59] *See infra* Section IV.

[60] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

[61] *See id.*

[62] *Id.* at 95–96.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 96.

[67] *Id.*

[68] *Id.* (holding that a "conveyance," which relocates pollutant to navigable waters, is a point source requiring NPDES permit before discharge).

[69] *Id.* at 106 (finding that "[33 U.S.C.] § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the 'point source' definition").

[70] *Id.* at 106–07.

C. *Discharging Tourists*

If nonpoint sources are capable of becoming point sources, then the proposed tramway designed to shuttle tourists—along with restaurant and retail supplies—to the river bank on the canyon floor, has the potential to become a point source if and only if opponents of the project can show that it discharges pollutants into the river.[71] Unsurprisingly, Congress complicates that proposition by failing to explicitly define the term "discharge" as it is used within the Act.[72] Naturally, the ambiguity of the term sparked litigation and forced the Court to craft a definition.[73]

In *S.D. Warren Co. v. Maine Board of Environmental Protection*, a dam operator and Maine's environmental regulators disputed whether the dams impounding and rereleasing of water constituted a discharge, which would require Warren, the dam operator, to obtain an NPDES permit.[74] Warren argued that because the Act does not define "discharge" but does define, as a term of art, "discharge of pollutants," only a direct discharge of pollutants is subject to regulation.[75] The Court, with another eight-member majority, unequivocally rejected Warren's argument for such a narrow and limited reading of the term.[76] Instead, the Court found that an examination of congressional intent, dictionary definitions, and canons of interpretation, called for a broad common usage application of the term.[77] Ultimately, the Court settled on the definition used by Webster's New International Dictionary to determine that "discharge," as it relates to water, means, "flowing or issuing out . . . to give outlet to; to pour fourth . . . ."[78] It logically follows that the term should be given its common meaning in other contexts not directly related to water. Consider the proposed tramway, for example. One could argue that it will "pour fourth" and "give outlet to" throngs of harmful tourists by discharging them directly onto the banks of the Colorado River. Nevertheless, before the Court would even consider such a creative argument, opponents of the project would have to demonstrate that individuals or tourists in the aggregate somehow fit within the Act's definition of pollution.

D. *Tourists as Pollution: A Novel, but Perhaps Logical Proposition*

While on the surface it may seem an absurd notion, the only feasible way the Grand Canyon gondola tram could be subject to regulation under the Act is if the tourists or the restaurant and retail supplies it discharges qualify as pollutants. The Act defines "pollutant" as:

[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage

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[71] 33 U.S.C. § 1342 (2014).
[72] *See* S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 375 (2006).
[73] *See id.* at 370.
[74] *Id* at 374–75.
[75] *Id.* at 370–71.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 376.

> sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water . . . .[79]

The only category tourists might fit into is "biological materials." Far-fetched as it initially seems, from a textualist and intentionalist perspective, the idea that humans fall within this definition is a logical conclusion. Humans consist of biological material, both in whole and in part. Admittedly, humanity is probably not what Congress had in mind when contemplating "biological materials." However, Congress passed the CWA for the express purpose of protecting America's waterways, and it is clear that unchecked mass tourism harms those waterways.[80] Thus, the question of whether or not tourists in the aggregate fall within the scope of pollutant—as biological material—is valid, and should be addressed by the courts until Congress offers clarification.

Of course, the idea that humans—in the form of environmental tourists—might fall within the definition of "biological material" has never been addressed by the courts, but in 2002 the Ninth Circuit declared the term "biological material" ambiguous within the scope of the Act.[81] Ambiguity is routinely resolved by an analysis of congressional intent.[82] Here, the congressional intent to protect America's waterways is so unmistakably clear that when faced with the problem of imminent harm to the Colorado River and the delicate canyon it flows through, it is not unrealistic to conclude that the EPA might attempt to stretch the ambiguity of "biological material" to encompass tourists.[83]

Finally, even if tourists are somehow declared pollutants and the tram transforms into a discharging point source, the Act will only apply if the tram loads of tourists actually interact with the river because the Act only regulates discharges into navigable waterways.[84] However, it is reasonable to speculate that when 10,000 tourists are transported each day to the bank of an internationally famous river and given access to an elevated river walk, a certain percentage of them will interact with the river.[85] Recall what happened at Yellowstone.[86] Millions of tourists were given decades of unrestricted access to Yellowstone's magnificent thermal pools, and after years of intentional pollution, the pools have now reached a point where they are unrecognizable and thoroughly contaminated.[87] The Colorado River of the Grand Canyon is not immune to the same dangers. The Environmental Protection

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[79] 33 U.S.C. § 1362 (2014).

[80] *See* 33 U.S.C. § 1251 (2015); *see also supra* Section II.

[81] Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1016–17 (9th Cir. 2002).

[82] *See S.D. Warren Co.*, 547 U.S. at 370; *see also Ass'n to Protect Hammersley, Eld & Totten Inlets*, 299 F.3d at 1016 (citing N.W. Forest Council v. Glickman, 82 F.3d 825, 834 (9th Cir. 1996)).

[83] 33 U.S.C. § 1251.

[84] 33 U.S.C. § 1342 (2015).

[85] Cart, *supra* note 9.

[86] Kiger, *supra* note 20.

[87] *Id.*

Agency should not have to speculate, grasp at creative interpretations of the law, or rely on ambiguity to carry out the clear intentions of a democratically elected congress.[88]

E. Absurdity Abounds

A second question brought to light by the *Miccosukee* decision is whether individuals, or tourists in the aggregate, are capable of transforming into point sources. The *Miccosukee* Court did not offer any limitation or further guidance on precisely when a nonpoint source becomes a point source.[89] The Court simply said it could happen when a nonpoint source behaves like a point source.[90] *Miccosukee* essentially authorizes a more liberal judicial interpretation of what is encompassed by the seemingly rigid definition of "point source." The issue of individuals as point source polluters has rarely been discussed or litigated. The general consensus remains that individuals cannot be point source polluters, but a unique and obscure circuit split highlights the utter absurdity of an outright prohibition on categorizing individuals as point sources.[91]

In *U.S. v. Plaza Health*, the Second Circuit held that an individual who poured vials of blood into the Hudson River could not be held criminally liable under the Clean Water Act because the Act did not apply to individual persons.[92] It is important to note that *Plaza Health* was decided eleven years before the Supreme Court muddied the waters with *Miccosukee* because we now know that there is a mechanism by which nonpoint source polluters can become point source polluters.[93] Perhaps, in the wake of *Miccosukee*, *Plaza Health* would be decided differently today. Nonetheless, three years after *Plaza Health*, the Third Circuit held that individuals who dumped rebar into a lagoon *could* be held criminally liable under the Act because they dumped the rebar from a boat, and the Act directly addresses "floating craft[s]."[94]

When read together, *Plaza Health* and *West Indies* highlight the absurd nature of CWA enforcement. Under the logic used by the Third Circuit, if the individual in *Plaza Health* had been on a "floating craft" or other "vessel" when he dumped medical waste into the Hudson River, he may have been subject to sanctions.[95] In-

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[88] 33 U.S.C. § 1251.

[89] *See* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 106 (2004) (noting that "[33 U.S.C.] § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition.").

[90] *Id.*

[91] *Compare* United States v. West Indies Trans., Inc., 127 F.3d 299 (3d Cir. 1997) (holding that individuals who dumped rebar into a lagoon from a boat were point sources), *with* United States v. Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993) (holding that an individual who poured medical waste into the Hudson River was not a point source).

[92] *Plaza Health Labs.*, 3 F.3d at 646.

[93] *Compare id.* (decided in 1993), *with Miccosukee*, 541 U.S. 95 (decided in 2004).

[94] *West Indies Trans., Inc.*, 127 F.3d at 304, 307–09.

[95] *Id.*

stead, because he happened to be standing on the shore—instead of floating on a vessel—he was immune from prosecution under the Act.[96]

Understanding this potential for absurdity is important. In the case of the Grand Canyon Escalade project, the proposed tram might be considered a "vessel" or a "conveyance" under the point source definition.[97] If it is, and if the tram allows pollutants to make their way into the Colorado River, the project should fall within the scope of the Act's original intent, to protect and preserve the river.[98] When Congress passed the Clean Water Act, the intent behind the statute was clear.[99] Yet, under the current interpretation of the Act, if an individual were to stand on the shoreline of any navigable waterway and pour gallons of used motor oil into it, there is nothing the Clean Water Act could do to hold them accountable.[100] However, if the individual poured that same oil into the same waterway but happened to be on some variety of floating craft they could very likely be held liable under the Act.[101] Assessing liability based on *how* an individual intentionally pollutes a body of water, instead of discerning whether or not they *did* intentionally pollute the body of water is absurd, and certainly is not what Congress envisioned when passing the Clean Water Act. Absurd interpretation for individual liability aside, there is some theoretical hope that the NPDES permitting process can mitigate some of the risk posed by the Escalade development.

F. NPDES–The Silver Lining?

In the wake of *Miccosukee*, the issue of whether or not tourists in the aggregate might be able to transform into point source polluters is up for debate. However, even if tourists in the aggregate are declared point sources based on their proclivity to discharge litter into protected bodies of water, it would be impossible to enforce the NPDES permitting process against an ever-changing group of individuals. Additionally, the NPDES permit analysis can, and should, be different from a *Plaza Health* style criminal analysis. The overarching idea proposed by this Comment is not that individuals should routinely be considered point sources for the purpose of doling out criminal sanctions. The law in that regard should be clarified, and individual liability under the CWA should be available for egregious and blatant offenders. However, attempting to hold millions of individual tourists liable for their small contribution to the degradation of waterways is unrealistic and would contribute to an already overwhelmed justice system. Rather, this Comment proposes

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[96] *Id.*

[97] 33 U.S.C. § 1362 (2014).

[98] 33 U.S.C. § 1251 (2015).

[99] *Id.*

[100] *See generally* United States v. Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993) (finding that a human being was not a "point source" subject to criminal liability under the Clean Water Act).

[101] *See generally* United States v. West Indies Trans., Inc., 127 F.3d 299 (3d Cir. 1997) (holding that defendants' ferrous barge was a "floating craft," and, therefore, a "point source" under the Clean Water Act).

that because throngs of tourists pose a demonstrable threat to the environment, the tram carrying the tourists to the river might, under the Court's *Miccosukee* analysis, be subject to the NPDES permitting process.[102] In *Plaza Health*, the subject of the criminal charge was an individual;[103] here the subject of any investigation would be the tram operation. Essentially, this Comment suggests is that if tourists in the aggregate might be point sources, then the tram transporting them might itself also be a point source, requiring an NPDES permit.

While the tram *might* require an NPDES permit, the construction of the development as a whole *will* require and NPDES permit.[104] As previously discussed in Section II(A)(2) of this Comment, water runoff from construction sites often contains hazardous materials such as solvents, acids, uncured concrete, pesticides, paint, and loose sediment.[105] Therefore, construction sites located in vulnerable areas near navigable waterways—like the Grand Canyon—must obtain an NPDES permit and comply with the CWA's effluent limitations.[106] Consequently, while the Clean Water Act may not currently prevent the inevitable destructive pollution caused by mass ecotourism, it will at least regulate the pollution caused by the initial construction of the tourist attractions,[107] as well as any associated wastewater treatment facility or other associated ongoing discharge.[108] Nevertheless, as it currently functions, the NPDES permitting process merely regulates how much and how often pollution may be discharged; it will not actually prevent the development or consequently avoid pollution.[109] In theory, it could prevent the development, as granting NPDES permit requests is fully within the EPA's discretion.[110] However, Region 9 of the EPA has not declined a single NPDES permit request within the past five years, which strongly indicates that they are unlikely to decline

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[102] *See generally* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 106 (2004) (noting that a point source need only convey the pollutant to navigable waters in order to require a permit).

[103] *Plaza Health Labs.*, 3 F.3d at 643.

[104] *See* 33 U.S.C. § 1342 (2014) (requiring NPDES permits for the discharge of pollutants); *see also* 33 U.S.C. § 1362(6) (2014) (defining pollutants); *see, e.g.*, Merrell, *supra* note 35, at 16 (describing examples of common pollutants routinely used in construction).

[105] *See, e.g.*, Merrell, *supra* note 35, at 16.

[106] 33 U.S.C. § 1311 (2014) (defining and describing effluent limitations); *see also* 33 U.S.C. § 1342 (2015) (requiring NPDES permits for pollutant discharges); *see, e.g.*, Merrell, *supra* note 35, at 15.

[107] *See* sources cited *supra* note 106.

[108] *See* 33 U.S.C. § 1311; *see also* Aaron Granillo, *Short Film Raises Concerns About Escalade Project*, KNAU ARIZ. PUB. RADIO (Feb. 12, 2016), http://knau.org/post/short-film-raises-concerns-about-escalade-project#stream/0 (noting Confluence Partners L.L.C. has not addressed how it will dispose of sewage and waste water created by up to 10,000 visitors a day to the Canyon floor).

[109] 33 U.S.C. § 1342; Freedom of Information Act ("FOIA") Request R9-2016-2170 Response Letter from EPA Region 9 to Shane Wright (Jan. 28, 2016) (on file with author) [hereinafter FOIA Request Response Letter] (stating that Region 9 of the EPA has not denied a single NPDES permit request within the last five years).

[110] 33 U.S.C. § 1342(a)(1) (noting that the administrator "*may*" issue permits).

permits in the near future.[111]

One final protection offered by the NPDES permitting process in this instance is that the EPA administers NPDES permits for the Navajo Nation.[112] This means that the EPA will have direct regulatory oversight of the Escalade project's construction sites that require an NPDES permit.[113] This is a crucial point. Any NPDES permit for the Grand Canyon Escalade project will be issued by the EPA—a federal agency—thus, the permitting process will be subject to the requirements of the National Environmental Policy Act[114] and the Endangered Species Act,[115] discussed in the next sections of this Comment.[116] However, this unique nexus between NPDES and other federal environmental laws cannot be relied upon in the future because the EPA has ceded permit issuing authority to almost every state. Nevertheless, the Navajo Nation has not been authorized to issue NPDES permits.[117]

Although the passage of the Clean Water Act represented a tremendous leap forward in protecting America's waterways, the law still needs to be clarified and reinforced before it can truly be effective. First, Congress should amend the Act to incorporate the Court's *Miccosukee* analysis, and define when and how a non-point source transforms into a point source. Second, Congress should amend the Act to regulate mass ecotourism by requiring tourist attractions that interact with navigable waterways to obtain NPDES permits. This alone would ensure that tourist attractions develop some mechanism to contain and control tourist-generated pollution. Finally, Congress should extend criminal liability under the Act to all individuals who intentionally and egregiously pollute a navigable waterway, regardless of whether that individual is on a floating vessel. Without these necessary amendments, the Colorado River—the living body of water that carved out the Grand Canyon—will remain vulnerable to untold pollution at the whim of private industry.

IV. NATIONAL ENVIRONMENTAL POLICY ACT: PROCEDURAL PROTECTION ONLY

On January 1, 1970, Congress rang in the New Year by passing the National Environmental Policy Act ("NEPA"), a law so revolutionary it has been dubbed the "Magna Carta of environmental law."[118] In fact, some scholars credit NEPA as being the catalyst that began the modern shift in public policy towards environmental

[111] FOIA Request Response Letter, *supra* note 109.

[112] U.S. ENVTL. PROT. AGENCY, *Region 9 Tribal Program*, *supra* note 57.

[113] *Id.*; 33 U.S.C. § 1342.

[114] 42 U.S.C. § 4331–70(h) (2015).

[115] 16 U.S.C. § 1531–44 (2012).

[116] *See infra* Sections IV–V.

[117] *See* 33 U.S.C. 1342(b) (describing the requirements for states to become authorized NPDES administrators); *see also* U.S. ENVTL. PROT. AGENCY, *NPDES State Program Information*, *supra* note 56.

[118] National Environmental Policy Act, 42 U.S.C. § 4331 (1970); Daniel R. Mandelker, *The National Environmental Policy Act: A Review of its Experience and Problems*, 32 WASH. U. J.L. & POL'Y 293 (2010).

sustainability and resource conservation.[119] In passing NEPA, Congress sought to establish a comprehensive nationwide framework to facilitate environmental protection and conservation.[120] Specifically, in Section 101 of the Act, Congress enumerated six overarching policy initiatives:

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[121]

In furtherance of these goals, NEPA instructs the federal government, in coordination with state and local governments, to "use all practical means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony..."[122] However, Section 101 lacks a mandate or any specific requirements; standing alone, Section 101 is little more than a Congressional suggestion.[123]

A. Procedural Requirements

Fortunately, Section 101's lofty initiatives are made actionable by Section 102 of the Act. Section 102 requires that federal agencies consult with other "expert" agencies in preparing written assessments of potential environmental consequences for any "major" federal actions that may have "significant" environmental "impacts."[124] If this initial environmental assessment shows that environmental harm is likely, Section 102 requires that the expert agency prepare a more thorough and detailed Environmental Impact Statement ("EIS") incorporating the policy initiatives of Section 101.[125] The EIS must be completed before the inquiring agency is authorized to issue a final decision on whether to move forward with their proposed action.[126] Further, the expert agency that prepares the EIS must discuss the likely environmental consequences of the proposed federal action and suggest ways to

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[119] James L. Connaughton, *Modernizing the National Environmental Policy Act: Back to the Future*, 12 N.Y.U. ENVTL. L.J. 1, 3 (2003).

[120] 42 U.S.C. § 4331.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2015); *see also* 40 C.F.R. § 1508.9 (1978) (discussing the requirements of the Environmental Assessment).

[125] 42 U.S.C. § 4332.

[126] *Id.*

mitigate the harm, if possible.[127] Finally, the general public must have access to the complete EIS.[128] Thus, the threshold issues, which trigger mandatory consultation, hinge on the determination of what constitutes a "major federal action" and what environmental "effects" are "significant."[129] To clarify this troublesome ambiguity, subsequent regulations were enacted to define these three terms.[130]

"Major federal action" is essentially any discretionary agency decision, such as choosing to fund programs, adopt new regulations, issue permits, or approve projects.[131] To determine "significance," the "context and intensity" of the proposed action must be considered.[132] This means that the severity of potential environmental consequences—beneficial or adverse—must be analyzed within the framework of their impact on society, the affected region, and local interest.[133] "Effects" and "impacts" as used within NEPA are synonymous and include the direct effects caused by the actual occurrence of a federal action. "Effects" and "impacts" also include indirect effects which are "reasonably foreseeable" and will likely occur in the future as a result of a federal action.[134]

What constitutes "major federal action" is particularly important because, although NEPA does not expressly waive tribal sovereign immunity, it applies to the Grand Canyon Escalade project due to its nexus with the Clean Water Act. As discussed in the preceding section of this Comment, Region 9 of the Environmental Protection Agency administers NPDES permits for the Navajo Reservation.[135] Under NEPA, permitting decisions constitute "major federal action."[136] Therefore, the EPA's decision regarding whether to issue an NPDES permit for the project falls within NEPA's regulatory reach and is outside the bounds of tribal sovereign immunity.[137]

B. Enforcement: Requiring Informed Destruction

In spite of NEPA's strong language regarding environmental protection, Congress failed to include a clear enforcement mechanism in the law.[138] Initially, this lack of a hard and fast enforcement provision led to skepticism of NEPA's applica-

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[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See* 40 C.F.R. § 1508.18 (1978) (defining "major federal action"); *see also* 40 C.F.R. § 1508.27 (1978) (defining "significantly"); 40 C.F.R. § 1508.8 (1978) (defining "effects").

[131] 40 C.F.R. § 1508.18.

[132] *Id.* § 1508.27.

[133] *Id.*

[134] *Id.* § 1508.8.

[135] U.S. ENVTL. PROT. AGENCY, *Region 9 Tribal Program*, *supra* note 57.

[136] 40 C.F.R. § 1508.18.

[137] *See supra* Section III(F) (discussing NPDES administration).

[138] Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3, 28 (2006).

bility.[139] However, in 1971, shortly after NEPA went into effect, Judge Skelly Wright famously held that the law's procedural requirements were not merely virtuous guidelines, but "inflexible" mandates.[140] It is now settled law that federal agencies must adhere to NEPA's procedural EIS protocol.[141] However, for all of its procedural requirements, NEPA still lacks a substantive mandate.[142] In *Robertson v. Methow Valley Citizens Council*, the Supreme Court held that once a proper EIS has been completed NEPA has been satisfied and there is no further obligation for the federal agency to actually consider the EIS in determining how to proceed with any federal action.[143] Thus, NEPA, for all of its lofty language, simply ensures that a federal agency is aware of the potential for environmental harm; it does nothing to ensure that the agency actually mitigates the harm.

Enforcement weaknesses aside, NEPA is still a robust tool for conservationists because the EIS disclosure mechanism informs the interested public of pending agency decisions and allows concerned citizens to comment on proposed agency actions.[144] Its mandatory disclosure provision ensures that concerned citizens have the opportunity to influence agency decisions by holding agency officials accountable for their actions.[145] However, although NEPA requires EIS disclosure, the Act does not contain a dedicated citizen suit provision to provide standing for citizens so that they can quickly and easily seek judicial intervention to hold non-complying agencies accountable.[146] Therefore, plaintiffs who wish to establish adequate standing must seek injunctive relief under Section 702 of the Administrative Procedure Act.[147] Plaintiffs face a high burden when seeking such an injunction because they must prove that without an EIS there is a high likelihood of irreparable environmental harm, which is a difficult task when agencies are not even required to adhere to the recommendations of the EIS.[148] Like the failure to include a substantive enforcement mechanism, the failure to include a citizen suit provision creates a

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[139] *See generally id.*; *see also*, Thomas A. Collins, *Environmental Law: The National Environmental Policy Act of 1969—The Influence of Agency Differences on Judicial Enforcement*, 52 TEX. L. REV. 1227 (1974).

[140] Czarnezki, *supra* note 138, at 6 (citing Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n, 449 F.2d 1109, 1119, 1122–26 (D.C. Cir. 1971)).

[141] *Id.*at 6, 9–12, 15, 25.

[142] *Id.*

[143] *Id.* at 12 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989)); *see also* Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENVTL. L.J. 317, 319 (2015) ("It is well established that NEPA is a procedural statute . . . .").

[144] Serassio, *supra* note 143, at 318–19.

[145] *Id.*

[146] 86 AM. JUR. 3D *Proof of Facts* § 99 (2005) (citing Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 422 U.S. 289 (1975)).

[147] *Id.; see also* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 913 (1990) (citing Administrative Procedures Act, 5 U.S.C. § 702 (1976)).

[148] *See* William S. Eubanks II, *Damage Done? The Status of NEPA After* Winter v. NRDC *and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 670 (2009); *see also* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

barrier between the Act's language and the reality of enforcing congressional intent.

The Congressional intent behind NEPA is made clear by the strong language of Section 101.[149] However, without congressional action NEPA will never live up to Congress's lofty goals. Therefore, Congress should amend NEPA and mandate that any mitigation measures suggested by the expert agency in the EIS be implemented. Further, Congress should explicitly waive tribal sovereign immunity and add a citizen suit provision to streamline the process of ensuring that federal agencies comply with the Act. Without these changes, projects like the Grand Canyon Escalade may become a regular occurrence within delicate ecosystems on tribal lands nationwide. In the next section, this Comment will address the narrow applicability of the Endangered Species Act, which like NEPA, suffers from the lack of a mandatory enforcement provision as well as administrative issues regarding its applicability to sovereign tribes.

V. ENDANGERED SPECIES ACT: THE FAILURE OF MANS BOUNDARIES

The Grand Canyon is more than just a geological masterpiece; it is also a rugged wilderness habitat for a litany of diverse species. A handful of these species have been declared threatened or endangered, and several others have been identified as candidates for classification as threatened or endangered under the Endangered Species Act ("ESA").[150] Two species of fish, the Humpback Chub and the Razorback Sucker, one amphibian, the Relict Leopard Frog, and seven bird species, the Brown Pelican, California Condor, American Bald Eagle, Yuma Clapper Rail, Mexican Spotted Owl, Southwestern Willow Flycatcher, and the Yellow Billed Cuckoo are all listed as endangered or threatened, or are candidates to be listed.[151] This Comment is particularly concerned with the two species of fish whose habitats may be directly threatened by the Grand Canyon Escalade development.[152] However, before analyzing the specific circumstances of the threatened species, it is important to understand how the ESA's operations are complicated by tribal sovereign immunity.

Congress crafted the Endangered Species Act in 1973 to conserve and protect threatened species and their habitats to preserve the scientific value of biodiversity.[153] The ESA, which is primarily enforced by the United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively "Service"), accomplishes this goal by prohibiting the "taking" of listed species by causing direct or indirect harm to endangered species or their "critical habitat."[154] A taking, as de-

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[149] National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (2016).

[150] Nat'l Park Serv., *Table of Endangered, Threatened, and Sensitive Wildlife of Potential Occurrence Along the Colorado River*, http://www.nps.gov/grca/learn/nature/upload/threat-endanger.pdf (last visited Jan. 15, 2016).

[151] *Id.*

[152] *See infra* Section V(A) (discussing the threatened species in detail).

[153] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2014).

[154] *Id.* § 1532, 1537(a) (charging the Fish and Wildlife Service with "scientific authority");

fined by the Act, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[155] Importantly, the Act remains virtually silent on its applicability to tribal governments.[156] However, the ESA does specifically exempt Native Alaskan tribes from the takings prohibition if the taking is for subsistence, which creates a strong inference that Congress intended for the Act to apply to American Indian Tribes.[157] Nevertheless, even without an express congressional waiver of tribal immunity, the ESA has been routinely federally enforced against the Tribes for decades.[158]

Although only Congress can truly clarify the applicability of the Act to sovereign tribes, the Secretaries of the Interior and Commerce (who are charged with implementing the Act) sought to clarify its applicability to American Indian tribes in order to alleviate some of the tribes' sovereignty concerns by issuing joint Secretarial Order 3206—which resulted from negotiations between tribal representatives and the Secretaries.[159] Order 3206 attempts to protect tribal sovereignty interests by instructing the Fish and Wildlife Service to avoid declaring tribal land as "critical habitat" unless the designation is absolutely necessary to ensure the conservation of a listed species.[160] Notwithstanding Order 3206, the lack of an express sovereign immunity waiver has also created an unsettled question of law as to whether the Eleventh Amendment prohibits a non-tribal citizen from using the ESA's citizen suit provision against a tribal government.[161]

In the Grand Canyon Escalade project, sovereign immunity issues should not arise under the ESA because Section Seven of the Act requires interagency cooperation when making regulatory decisions.[162] As with NEPA, the nexus between the EPA's NPDES administration responsibilities for the Navajo Nation and the ESA's interagency cooperation requirement will preempt a sovereign immunity challenge because any action commenced under the ESA would be against the EPA, not the

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Marren Sanders, *Implementing the Federal Endangered Species Act in Indian Country: The Promise and Reality of Secretarial Order 3206*, *in* JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS 5 (2007) (noting that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service carry out the Act through the authority of the Secretaries of the Interior and Commerce).

[155] Sanders, *supra* note 154, at 1.

[156] *Id.* (citing the Endangered Species Act, 16 U.S.C. §§ 1531–44 (2007)).

[157] *Id.* (citing 16 U.S.C. § 1539(e) (2007)).

[158] *Id.* at 1–2.

[159] *Id.* at 12–16; *see also* Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 383 (1998) (citing U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, U.S. DEP'T OF COMMERCE, SECRETARIAL ORDER 3206, AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT (June 5, 1997), *available at* http://www.fws.gov/southwest/es/arizona/Documents/MiscDocs/Sec%20Ord%203206.pdf [hereinafter SO 3206]).

[160] Sanders, *supra* note 154, at 17 (citing SO 3206, *supra* note 159, app. § 3(B)(4)).

[161] Michael P. O'Connell, *Citizen Suits Against Tribal Governments and Tribal Officials Under Federal Environmental Laws*, 36 TULSA L. REV. 335, 337 (2000).

[162] Endangered Species Act of 1973 § 7 (codified at 16 U.S.C. §§ 1535–36 (1988)).

tribe itself.[163] While this technicality is crucial for purposes of the Escalade project, it cannot be relied upon in the future because the EPA does not administer most NPDES programs.[164] Nevertheless, Order 3206 lowers the probability that the Fish and Wildlife Service will declare tribal land "critical habitat" or enforce restrictions on tribal land previously declared as "critical habitat."[165] Although the federal nexus alleviates the technical legal difficulties posed by sovereign immunity, the U.S. Fish and Wildlife Service may choose to ignore the nexus and use Order 3206 as a shield to construct artificial sovereign immunity where none actually exists.[166]

Sovereignty concerns aside, a review of the four relevant operative sections of the Act is imperative to understanding its potential applicability as well as its shortcomings. Section Four outlines the requirements for listing species,[167] Section Five authorizes the federal government to acquire land for the preservation of listed species,[168] Section Seven, as discussed above, requires interagency cooperation to—ideally—prevent any potentially harmful federal action,[169] and Section Nine creates liability against private parties who intentionally harm protected species or willfully destroy the species critical habitat.[170]

A. Determination of Endangered Species and Critical Habitat Complications

Section Four of the Act instructs the Secretaries of the Interior and Commerce (most commonly through the U.S. Fish and Wildlife Service) to identify and list species that are endangered because of habitat destruction, overutilization for commercial or recreational activities, disease, or other manmade factors that threaten the species' existence.[171] Once a species has been listed, the Service must devel-

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[163] *Id.*; U.S. ENVTL. PROT. AGENCY, *Region 9 Tribal Program*, *supra* note 57.

[164] *See* U.S. ENVTL. PROT. AGENCY, *NPDES State Program Information*, *supra* note 56.

[165] Sanders, *supra* note 154, at 16, 24–27.

[166] *See generally id.* (discussing the effectiveness of SO 3206 on lowering the likelihood of critical habitat designations on tribal land); *see e.g.*, Jason M. Patlis, *Paying Tribute to Joseph Heller with the Endangered Species Act: When Critical Habitat Isn't*, 20 STAN. ENVTL. L.J. 133, 137 (2001) (noting that the U.S. Fish and Wildlife Service has a long and illustrious history of intentionally failing to enforce the ESA). The Secretaries of the Interior and Commerce obviously do not have the authority to change the law. In fact, section 2 of SO 3206 explicitly acknowledges that the Order is merely an administrative guideline. SO 3206, *supra* note 159, § 2(A). However, the Fish and Wildlife Service has a long history of seeking any loophole or excuse to avoid declaring critical habitat on any land. *Id.* This history, together with SO 3206's instruction discouraging the designation of critical habitat on tribal land, makes clear that the Service may not use the legal fiction created by SO 3206 as faux sovereign immunity to avoid declaring or enforcing critical habitats.

[167] Endangered Species Act of 1973 § 4, 16 U.S.C. § 1533 (2003).

[168] *Id.* § 1534.

[169] *Id.* §§ 1535–36.

[170] *Id.* § 1538.

[171] *Id.* §§ 1531–44 (charging the Fish and Wildlife Service with "scientific authority"); Sanders, *supra* note 154, at 5 (indicating that the Fish and Wildlife Service enforces the Act).

op a recovery plan, discussing the factors that led to the species' decline and how the Service plans to mitigate or reverse those factors.[172] In developing the recovery plan, the Service is required to identify the "critical habitat" of such species if it is "determinable" and "prudent."[173] The Act defines "critical habitat" as:

> the specific areas within the geographical area occupied by the species, at the time it is listed ... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.[174]

The Service analyzes four basic categories when determining a species critical habitat: (1) the space needed for population growth, (2) the space needed to acquire food, water, air, and light, (3) the space requirements to maintain normal cover and shelter, and (4) the space needed to breed normally.[175] The Act requires that these determinations be made "solely on the basis of the best scientific and commercial data available . . . ."[176] Importantly, the Act forbids sweeping generalized designations of critical habitat without approval from the Secretary, and even then only in unusual circumstances.[177] In effect, this means that any designation of critical habitat will be narrow and geographically limited to the areas actually occupied by the endangered species.[178] One would expect this statutory framework to lead to the regular declaration of critical habitat after a species has been listed, but that is often not the case.[179]

In the past, in spite of the statutory requirement to designate critical habitat, the Fish and Wildlife Service routinely failed to do so without judicial intervention.[180] The Service often argued that listing species on its own fulfilled the Congressional intent of the law, and therefore the process of designating a critical habitat was unduly burdensome and expensive.[181] Congress scolded the Service for this view and instructed the Service to fulfill its statutory duties.[182] Despite this Congressional admonishment, the Service still regularly declines to designate critical habitat by simply stating that such habitat is not "determinable," a permissive exception al-

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[172] 16 U.S.C. § 1533(f) (2003).

[173] *Id.* § 1533(a)(3).

[174] 16 U.S.C. § 1532(5) (1988).

[175] 50 C.F.R. § 424.12(b) (2016).

[176] 16 U.S.C. § 1533(b)(1)(A)(i) (2003).

[177] 16 U.S.C. § 1532(5)(C) (1988).

[178] Otay Mesa Prop., L.P. v. U.S. Dept. of Interior, 646 F.3d 914, 915, 916 (D.C. Cir. 2011) (finding that the Service lacked substantial evidence to declare critical habitat); *see generally* Patlis, *supra* note 166, at 145–163 (discussing the general procedure and difficulty of declaring critical habitat).

[179] Patlis, *supra* note 166, at 137.

[180] *Id.*

[181] *Id.* at 137–38.

[182] *Id.* at 158 (citing H.R. Rep. No. 97-567, at 19–20 (1982)).

lowed under Section Four.[183] Moreover, Secretarial Order 3206 reinforces the Service's apparent disdain for identifying critical habitat by specifically instructing them to avoid designating tribal land as critical habitat.[184]

Here, the Razorback Sucker and the Humpback Chub are the endangered species most likely to be threatened by the development of the Grand Canyon Escalade project because their only known breeding ground, and primary habitat, is the confluence of the Little Colorado River and the Colorado River.[185] This area is where Confluence Partners, L.L.C. intends to build.[186] Initially, in conformity with the status quo, the Service declined to identify critical habitat for either species.[187] However, after the Sierra Club threatened to sue, the Service fulfilled their statutory obligation and declared a large portion of both rivers, including the confluence, to be critical habitat for both species.[188] Importantly, this designation took place before Order 3206 was issued.[189] It is unclear whether the Service would have chosen to move forward with the designation had the Order been in effect.[190]

The biggest threat contributing to the decline of both species is the alteration of water quality, particularly changing temperatures, caused by water infrastructure projects such as dams and diversion mechanisms.[191] However, pollution and pesti-

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[183] *Id.* at 176–77; 16 U.S.C. § 1533(a)(3) (2003).

[184] SO 3206, *supra* note 159, app. § 3(B)(4).

[185] U.S. NAT'L PARK SERV., *Humpback Chub (Gila cypha)*, http://www.nps.gov/grca/learn/nature/fish-humpback-chub.htm (last visited Feb. 11, 2016); ARIZ. GAME & FISH DEPT., *Preserving Humpback Chub from Extinction*, http://www.azgfd.gov/w_c/research_humpback_chub.shtml (last visited Feb. 11, 2016); *see also* COLO. RIVER FISHES RECOVERY TEAM, U.S. FISH & WILDLIFE SERV., HUMPBACK CHUB 2ND REVISED RECOVERY PLAN (1990), https://www.fws.gov/southwest/es/Documents/R2ES/BonytailChub.pdf.

[186] Katherine Locke, *Developers Say Escalade Project at Colorado River Confluence on Track*, NAVAJO-HOPI OBSERVER (June 3, 2014), http://www.nhonews.com/news/2014/jun/03/developers-say-escalade-project-at-colorado-river/; *see also* Nagourney, *supra* note 5; *but see* Keith Lamparter, *FAQ's on Escalade—Are There Really Sacred Sites? Really?*, GRAND CANYON ESCALADE (July 9, 2014), http://grandcanyonescalade.com/faqs-on-escalade-like-are-there-really-sacred-sites-really (explaining that supporters of the project claim the proposed development is merely "near" the confluence).

[187] Endangered and Threatened Wildlife and Plants: Determination of Critical Habitat for the Colorado River Endangered Fishes: Razorback Sucker, Colorado Squawfish, Humpback Chub, and Bonytail Chub, 59 Fed. Reg. 13376–13377 (Mar. 21, 1994) [hereinafter Initial Designation Report].

[188] 50 C.F.R § 17.95(e), pt.1, pt. 3 (2015); *see also* Initial Designation Report, *supra* note 187, at 13374–400 (codified in scattered sections of 50 C.F.R. § 17). Readers may find it easier to refer to the Federal Register in this case because multiple critical habitats were declared simultaneously and the respective regulations were scattered throughout 50 C.F.R. § 17, but the final rule was published in its entirety in the above cited Federal Register. *See id.*

[189] *Compare* SO 3206, *supra* note 159, *with* Initial Designation Report, *supra* note 187.

[190] *See generally* Sanders, *supra* note 154, at 16, 23–27 (discussing the general effectiveness of SO 3206).

[191] COLO. RIVER FISHES RECOVERY TEAM, *supra* note 185, at 10, 19; U.S. FISH & WILDLIFE SERVICE, RAZORBACK SUCKER (*XYRAUCHEN TEXANUS*) RECOVERY PLAN, iv, 9, 18 (1998).

cides have also been linked to the decline of the Humpback Chub.[192] Confluence Partners L.L.C. has not disclosed how it intends to deal with pest control or garbage removal for the development, or how it will handle wastewater generated by visitors to the canyon floor, but with up to 10,000 visitors expected each day these concerns must eventually be addressed and disclosed.[193] Once Confluence Partners L.L.C. reveals their waste and wastewater strategy, the Fish and Wildlife Service is statutorily required to carefully review whether the already existing critical habitat will be impacted and inform the EPA's NPDES analysis accordingly.[194] However, the Service has a history of failing to uphold its statutory obligations, and Order 3206 discourages them from doing so.[195] Thus, there is no way to discern whether the Service will adhere to statutory protocol. Nonetheless, a review of Section Seven's interagency cooperation requirement is prudent to understand how the ESA *should* function.

B. Interagency Cooperation

One of the primary policy goals of the ESA is to ensure that federal agencies do not unwittingly cause harm to listed species.[196] Thus, under Section Seven when a federal agency suspects that a potential action or regulatory decision may "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . ." the agency must consult with the Fish and Wildlife Service to determine the probable impact of its contemplated action on listed species.[197] This jeopardy test essentially examines whether proposed agency conduct will negatively impact any of the four pillars of a listed species' "critical habitat" as discussed in the previous subsection.[198]

Once a federal agency submits a written request for consultation, the Service determines the possible and probable consequences of the agency's proposed action, and issues a recommendation on how the agency should proceed.[199] This evaluation process is a key exploitable weakness of the Endangered Species Act because the findings and recommendations of the Service are not binding.[200] The Act only

[192] COLO. RIVER FISHES RECOVERY TEAM, *supra* note 185, at 11–12.

[193] Aaron Granillo, *Short Film Raises Concerns About Escalade Project*, KNAU ARIZ. PUB. RADIO (Feb. 12, 2016), http://knau.org/post/short-film-raises-concerns-about-escalade-project#stream/0.

[194] Endangered Species Act, 16 U.S.C. §§ 1535–36 (1988).

[195] *See generally* Patlis, *supra* note 166; SO 3206, *supra* note 159, app. § 3(B)(4).

[196] 16 U.S.C. §§ 1531, 1536 (1988).

[197] *Id.* §§ 1536(a)(2), (4) (charging the Fish and Wildlife Service with "scientific authority"); Sanders, *supra* note 154, at 5 (indicating that the Fish and Wildlife Service enforces the Act).

[198] *See* Patlis, *supra* note 166, at 191–93.

[199] 16 U.S.C. §§ 1533, 1536 (1988).

[200] Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 371 (5th Cir. 1976) (holding that the ESA only requires consultation, it does not require implementation of recommended mitigation).

mandates that the concerned agency consult with the Fish and Wildlife Service and give good faith consideration to their findings; the ultimate decision of whether or not to proceed with any potentially harmful action rests solely with the agency itself.[201] With regard to the Grand Canyon Escalade, it is unlikely that the EPA would ignore the findings of the Fish and Wildlife Service, but it is disconcerting that the EPA could do so with impunity.[202]

Although an amendment requiring compliance with the Service's recommendations would significantly strengthen the Act, the Act is still a powerful tool in its current from. Notwithstanding the non-binding nature of the Service's evaluation, Section Seven's interagency cooperation requirement provides a legal basis for federal agencies to avoid harmful conduct,[203] albeit at the agencies' discretion.[204] In fact, the EPA has entered into a Memorandum of Agreement to coordinate with the Service when considering NPDES permit requests to ensure that the statutory obligations of the CWA and ESA are reconciled with each other during the permitting process.[205] Since the EPA is the NPDES permitting agency for the Navajo Reservation,[206] and there are numerous listed endangered species within the Grand Canyon as well as preexisting critical habitat,[207] the agency will certainly consult with the Fish and Wildlife Service before issuing a permit.[208] It is not clear how Order 3206 will impact the consultation,[209] but it is important to remember that EPA Region 9 has not declined to issue a permit in the last five years.[210] If history is any guide, an NPDES permit will likely be issued for the Grand Canyon Escalade development.

C. *Takings Prohibitions, and the Narrow Applicability of the Endangered Species Act*

Section Five of the Endangered Species Act authorizes and instructs the Secretaries of the Interior and Agriculture to acquire land as needed for the preservation of endangered species.[211] This acquisition is either made via the federal purchase of

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[201] *Id.*; *see also* Sanders, *supra* note 154, at 7 ("A federal agency proposing an action, however, is not bound by the findings of the service's biological opinion or its final conclusion as it pertains to the proposed action.").

[202] *See Coleman*, 529 F.2d at 371.

[203] 16 U.S.C. §§ 1535–36 (1988).

[204] *Coleman*, 529 F.2d at 371.

[205] Roger Fleming, *Does the Clean Water Act Protect Endangered Species? The Case of Maine's Wild Atlantic Salmon*, 7 OCEAN & COASTAL L.J. 259, 263 (2002) (citing Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11, 202 (Feb. 22, 2001)).

[206] U.S. ENVTL. PROT. AGENCY, *Region 9 Tribal Program*, *supra* note 57.

[207] NAT'L PARK SERV., *supra* note 150; Initial Designation Report, *supra* note 187.

[208] Fleming, *supra* note 205, at 263.

[209] SO 3206, *supra* note 159, at 3–4.

[210] FOIA Request R9-2016-2170, *supra* note 109.

[211] Endangered Species Act, 16 U.S.C. § 1534(a) (2014).

private land or by reallocating control of federal land.[212] However, tribal land is not ordinary federal land, rather it is held in trust by the federal government for the benefit of the sovereign tribes.[213] Secretarial Order 3206 succinctly states this principal:

> The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes . . . .[214]

Therefore, Section Five cannot be used to acquire tribal lands for the purpose of preserving endangered species.[215] An attempt to halt the Grand Canyon Escalade project under the ESA is almost certain to fail because federal acquisition of tribal land is prohibited, declaring land unoccupied by listed species as critical habitat is generally prohibited,[216] and Secretarial Order 3206 narrowed the Act's applicability to tribes.[217]

Finally, Section Nine of the Act, which establishes liability for individuals who "take" a listed species, will not sufficiently protect the Colorado River or the surrounding canyon.[218] First, Section Nine only provides liability for harm that has already occurred; it does nothing to actually prevent harm.[219] Second, regular enforcement of Section Nine's individual liability provision would be just as unrealistic as enforcing an individual liability provision under the Clean Water Act.[220] Enforcing individual liability against every tourist who harms critical habitat would be an insurmountable burden on the justice system. Only the most egregious cases are likely to be prosecuted, which would do nothing to mitigate the harmful cumulative effect of mass tourism. Lastly, routine enforcement federal criminal laws within the Navajo Reservation will undoubtedly raise very serious and complex sovereignty concerns.[221]

The Endangered Species Act is a powerful law, but the manner in which it is currently administered prevents meaningful enforcement within tribal boundaries.[222] Tribal sovereign immunity is a time honored and important function of American jurisprudence,[223] however tribal boundaries are a function of man, not nature. En-

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[212] *Id.*

[213] SO 3206, *supra* note 159, § 5, princ. 2, at 4.

[214] *Id.*

[215] *Id.*

[216] 16 U.S.C. § 1532(5)(C) (1988); Otay Mesa Prop., L.P. v. U.S. Dept. of Interior, 646 F.3d 914, 915–16 (D.C. Cir. 2011).

[217] SO 3206, *supra* note 159, app. § 3(B)(4) at 10.

[218] Endangered Species Act, 16 U.S.C. § 1538 (1988).

[219] *Id.*

[220] *See supra* Section III(F) (discussing individual liability under the CWA).

[221] *See generally* Kunesh, *supra* note 13, at 401 (discussing the tension between federal law and sovereign immunity).

[222] Sanders, *supra* note 154, at 17 (citing SO 3206, *supra* note 159).

[223] *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940); *see* Kunesh, *su-*

dangered species do not delineate between ordinary land and tribal land when choosing habitat. Neither should the law. Therefore, Congress should amend the Endangered Species Act to expressly waive tribal sovereign immunity. Congress should also advise the Department of the Interior and the Fish and Wildlife Service that Secretarial Order 3206 should not circumvent the enforcement of the Endangered Species Act. Finally, like with NEPA, Congress should amend the ESA to require that federal agencies implement reasonable mitigation measures suggested by the EIS and add a citizen suit provision to ensure speedy access to justice for concerned citizens.

VI. CONCLUSION

Due to the inadequacy of even the most prominent environmental legislation in the United States, the Grand Canyon and other sensitive ecosystems within tribal boundaries are under imminent threat of environmental harm caused by the unchecked development of harmful tourist attractions and mass tourism. The Grand Canyon Escalade project highlights the inadequacy of this flagship environmental legislation. This unique situation was not contemplated by the legislature and has been overlooked by federal regulatory regimes. These governing bodies must address this looming situation as soon as possible because while development in the Grand Canyon is unique, the Escalade project is likely to incentivize other developments. If Confluence Partners L.L.C. is successful in this endeavor, an untold number of other corporations could use the Grand Canyon Escalade development as a template for building massive tourist traps in other vulnerable regions thereby exploiting the unique nature of tribal land.

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pra note 13, at 401–02.