2018 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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NINTH CIRCUIT ENVIRONMENTAL REVIEW EDITOR'S NOTE

I am pleased to present the 2018–2019 Ninth Circuit Environmental Review. This review contains twenty-five summaries of decisions by the United States Court of Appeals for the Ninth Circuit. These opinions were issued between January 2018 and January 2019 and concern cases and questions of law impacting natural resources and the environment. Following these case summaries are two chapters authored by Ninth Circuit Review members that both examine circuit splits regarding a few of these important issues in depth.

In the first chapter, Rachel Jennings examines defenses to liability under the Comprehensive Environmental Response, Compensation, and Liability Act. This chapter argues that a circuit split has arisen regarding the types of contractual relationships that impute liability under the Act, following the Ninth Circuit's recent opinion in *California Department of Toxic Substances Control v. Westside Delivery*. After comparing the development of the case law between the Second Circuit and the Ninth Circuit, this chapter further argues that the Ninth Circuit's reasoning is correct. This chapter concludes that future decisions should implement the Ninth Circuit's approach, which applies the third-party liability defense narrowly in light of the purpose of the statute.

In the second chapter, Hannah Clements examines the jurisdiction of the Clean Water Act over groundwater. Reviewing the language of the statute and the development of divergent case law regarding its interpretation, this chapter contrasts the practical-textual approach taken by the Ninth Circuit and the Fourth Circuits with the hypertextualist approach employed by the Sixth Circuit. This chapter concludes with a firm rejection of rigid hypertexualism, arguing that courts should interpret environmental statutes in light of their broad protective purposes as well as the practical implications of protecting the environment.

The Ninth Circuit Review is made possible through the diligence of five members who are recruited from the ranks of *Environmental Law* each year. The research and case summaries that appear here are the results of their hard work and commitment to ensuring that practitioners, advocates, fellow law students, and anyone with a related interest receives an accurate review of the state of environmental law in the Ninth Circuit.

Thank you for reading.

ZESLIE A. ZABLAN
2018–2019 NINTH CIRCUIT
ENVIRONMENTAL REVIEW EDITOR

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CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Clean Water Act

1. Olympic Forest Coalition v. Coast Seafoods Co.*, 884 F.3d 901 (9th Cir. 2018).*

Olympic Forest Coalition (Olympic Forest), an environmental nonprofit organization, brought a Clean Water Act[1] (CWA) citizen suit against Coast Seafoods Company (Coast), which owns and operates a large cold-water oyster hatchery adjacent to Quilcene Bay in Washington State. Olympic Forest contended that pollutant discharges from the hatchery required a National Pollution Discharge Elimination System (NPDES) permit under the CWA. Coast moved to dismiss, arguing the hatchery could only be regulated as a "point source" requiring a NPDES permit if it was a "concentrated aquatic animal production facility" (CAAPF). The United States District Court for the District of Western Washington denied Coast's motion to dismiss, and Coast appealed.[2] The Ninth Circuit, reviewing de novo, affirmed and held that pipes, ditches, and channels that discharge pollutants from non-concentrated aquatic animal production facilities are point sources requiring a NPDES permit.

In 2013, Coast had hired a consulting firm to examine effluent discharged from the hatchery, resulting in a report which documented the presence of certain pollutants. Critically, the consulting firm did not test for the presence of chlorine. Relying on the report commissioned by Coast, Washington Department of Ecology (Ecology) advised Coast in 2013 that the hatchery did not require a NPDES permit to operate. On January 27, 2016, Olympic Forest filed a CWA citizen suit alleging that in the course of operation, the hatchery discharged various pollutants—including chlorine—through pipes, ditches, and channels into Quilcene Bay. Later in 2016, Coast asked Ecology whether, in light of the discharges documented by the consulting firm in 2013, the hatchery still did not require a NPDES permit. Ecology responded that the hatchery

[1] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2012).

[2] Olympic Forest Coal. v. Coast Seafoods Co., No. 3:16-CV-05068-RBL, 2019 WL 2602543, at *2 (W.D. Wash. June 25, 2019)

did not require a NPDES permit because the hatchery did not qualify as a CAAPF, and because an Ecology specialist had reviewed the 2013 report and agreed with its finding that discharges from the hatchery were unlikely to alter water quality in Quilcene Bay. Coast thus moved to dismiss Olympic Forest's complaint, arguing that it could only be required to obtain a NPDES permit if the hatchery was a CAAPF, because it otherwise would not be a "point source."

On appeal, the Ninth Circuit reviewed the district court's denial of Coast's motion to dismiss and its interpretation of the CWA. The Ninth Circuit began by looking to the text and context of the relevant provisions of the CWA, holding that it plainly requires NPDES permits for the discharge of pollutants through pipes, ditches, and channels into navigable waters, regardless of whether the pollutants originated at a non-concentrated aquatic animal production facility. "Point source" is defined as "*any* 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."[3] The Ninth Circuit noted the use of the word "any," which the Supreme Court has interpreted as being broad and all-encompassing. The Ninth Circuit then looked to the context of the statutory provision, noting that any exceptions or exemptions in the CWA are expressly provided, whereas the CWA does not exempt pipes, ditches, and channels that discharge pollutants from non-concentrated aquatic animal feeding operations.

The Ninth Circuit next addressed Coast's deference argument. Coast argued that the term "concentrated animal feeding operation" (CAFO) is ambiguous and that the Court should defer to the United States Environmental Protection Agency (EPA) regulations.[4] Coast argued that EPA's regulations required the Court to conclude that pipes, ditches, and channels are not point sources if they discharge pollutants from a non-concentrated aquatic animal production facility. The Ninth Circuit agreed that the terms "concentrated" and "operation" are ambiguous and that the regulations clarify what a CAFO is. However, the Ninth Circuit held that EPA's regulations do not address whether pipes, ditches, and channels that discharge effluent from non-concentrated aquatic animal production facilities are themselves point sources, and therefore cannot help answer the question at hand.

The Ninth Circuit next considered the practical implications of extending the NPDES permit requirement to the discharge of pollutants through pipes, ditches, and channels discharging pollutants from non-concentrated aquatic animal production facilities. Coast argued that where such a facility is not classified as a CAAPF, it necessarily is not a significant contributor of pollution. The Ninth Circuit disagreed, noting

[3] 33 U.S.C. § 1362(2014).

[4] *See* 40 C.F.R. § 122.23 (2012).

that in determining that the hatchery was not a CAAPF, Ecology relied on a report commissioned by Coast that had failed to test for chlorine. The Ninth Circuit concluded that any discharges of chlorine into Quilcene Bay from the hatchery through pipes, ditches, and channels require a NPDES permit. To hold otherwise, the Ninth Circuit reasoned, would allow such facilities to pollute freely.

Finally, the Ninth Circuit addressed Coast's argument that *Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc.*,[5] (APHETI), controlled the case at hand. In APHETI, the Ninth Circuit held that mussel-harvesting rafts did not require a NPDES permit. The Ninth Circuit explained that the mussels in that case were grown on ropes suspended from rafts and nourished by nutrients naturally present in the surrounding water.[6] The mussels released particulate matter, ammonium, and inorganic phosphate as natural byproducts of their metabolism.[7] The Ninth Circuit held in APHETI that those natural byproducts were not pollutants within the meaning of the CWA.[8] In the alternative, the Ninth Circuit held in APHETI that the mussel rafts were not CAAPFs and therefore were not point sources. The Ninth Circuit explained that an aquatic animal production facility could only itself be a point source if it was a CAAPF, and could not be regarded as another kind of point source facility such as a "vessel or other floating craft." The Ninth Circuit explained that this was so because the statutory definition of point sources covers both conduits, such as pipes, ditches, and channels; and facilities, such as CAFOs and vessels or other floating craft. The Ninth Circuit reasoned that because there were no conduits associated with the mussel rafts in APHETI, its decision in that case did not answer the question of this case.

In sum, the Ninth Circuit held that pipes, ditches, and channels that discharge pollutants from non-concentrated aquatic animal production facilities are point sources within the meaning of the CWA, and therefore require a NPDES permit. The Ninth Circuit thus affirmed the district court in denying Coast's motion to dismiss.

2. Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).*

Hawai'i Wildlife Fund and other environmental groups[9] (collectively, Wildlife Fund) brought suit against the County of Maui (County) for violations of the Clean Water Act[10] (CWA). Wildlife Fund

[5] 299 F.3d 1007, 1019 (9th Cir. 2002)

[6] *Id.* at 1010.

[7] *Id.*

[8] *Id.* at 1018.

[9] The other groups were Sierra Club—Maui Group, Surfrider Foundation, and West Maui Preservation Association.

[10] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2012).

alleged that the County violated the CWA when it discharged pollutants from its wells into the Pacific Ocean. The United States District Court for the District of Hawai'i entered partial summary judgment in favor of Wildlife Fund. The district court found that the County was liable for discharging pollutants into the ocean in violation of the CWA and had fair notice of what was prohibited under the statute.[11] On appeal, the Ninth Circuit affirmed the district court's rulings.

The County owns and operates four wells at the Lahaina Wastewater Reclamation Facility (LWRF), where the County treats approximately four million gallons of sewage per day. The wells serve as the County's primary means of effluent disposal, injecting approximately three to five million gallons of treated wastewater per day into the groundwater. A multi-agency[12] study concluded that 63 percent of treated wastewater injected into Wells 3 and 4 entered the coastal waters of West Maui. The County conceded that injections into Wells 1 and 2 were also traceable in the ocean.

The CWA prohibits the discharge of any pollutants into navigable waters from a point source without a National Pollutant Discharge Elimination System (NPDES) permit.[13] A "point source" within the meaning of the CWA includes, but is not limited to, any well from which pollutants "are or may be discharged."[14] Moreover, the CWA permits the EPA to delegate authority to a state to administer its own permit program and issue NPDES permits for discharges.[15]

The Ninth Circuit reviewed the district court's rulings on the motions for summary judgment de novo. First, the Court analyzed the County's argument that the district court erred in concluding that it was liable under the CWA as to its wells. The County contended that a NPDES permit is required only when a point source discharges pollutants directly into navigable waters. It asserted that because the wells discharged effluent into the groundwater, and then indirectly into the Pacific Ocean, CWA liability did not attach. The Ninth Circuit disposed of this argument, citing to cases where entities had violated the CWA for discharging effluents into the ground that made its way into navigable waters.[16] Moreover, the Court cited to decisions in other circuits holding that CWA liability attaches to indirect discharges from a point source to a navigable water.[17] The Ninth Circuit emphasized

11 Haw. Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980, 1005 (D. Haw. 2014).

12 The agencies and groups taking part in the study included the United States Environmental Protection Agency (EPA), Hawaii Department of Health, U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii.

13 33 U.S.C. §§ 1311(a), 1342(a)(1).

14 *Id.* § 1362(14).

15 *Id.* § 1342(b).

16 Trustees for Alaska v. U.S. Envtl. Prot. Agency, 749 F. 2d 549 (9th Cir. 1984); Greater Yellowstone Coal. v. Lewis, 628 F. 3d 1143 (9th Cir. 2010).

17 Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114 (2nd Cir. 1994); Sierra Club v. Abston Constr., 620 F.2d 41 (5th Cir. 1980); Peconic Baykeeper, Inc. v. Suffolk Cty., 600 F.3d 180 (2nd Cir. 2010).

that nowhere on the face of the CWA must an entity directly discharge effluents into navigable waters from a point source to violate the statute. Accordingly, the Court concluded that the County was liable under the CWA because the County discharged pollutants from a point source, which were traceable from the point source to navigable water, and that the pollutant levels were not *de minimis*.

The Court next analyzed the County's argument that its effluent injections were not discharges into navigable waters but rather disposals of pollutants into wells. Specifically, the County argued that the CWA categorically exempts well disposals from permitting requirements because the state is not obliged to set permitting requirements for well disposals. The Court rejected this argument, explaining that a permit is required for well disposals when such wells discharge pollutants into navigable waters. Moreover, the County argued that only the state has authority to regulate well disposals. The Ninth Circuit disagreed, reasoning that the CWA does not create exclusive authority to determine CWA violations in the state agency or EPA. The County also argued that a provision of the CWA categorizes well disposals as nonpoint sources, and therefore exempts them from permitting requirements.[18] The Court also rejected this argument, explaining that the provision lists well disposals as a circumstance constituting nonpoint source pollution, but that in circumstances where the well is the discrete source of pollutants that are discharged into navigable waters, the well disposal constitutes a point source.

Finally, the Court addressed the County's assertion that it did not have fair notice of the violations. The County contended that it is plausible to read the relevant provision of the CWA as excluding wells from the NPDES requirements, and therefore it could not have had fair notice of what the CWA prohibited. The Ninth Circuit rejected this argument. The Court explained that a difference of opinions as to the exact meaning of the CWA is not enough to render the provision in violation of due process. The County also argued that it did not have fair notice because the state agency maintained the position that NPDES permits are not required for wells. The Court found that the County's characterization of the state agency's position was inaccurate. The Hawai'i Department of Health stated in a letter that it was still in the process of determining whether the permitting requirement applied to wells. The Court explained that this did not solidify any particular position of the agency on the issue. Therefore, the Court concluded that the County could not argue that it did not have fair notice of the substantive requirements under the CWA.

In sum, the Ninth Circuit upheld the district court's summary judgment orders. The Court found that the County's wells were liable for discharging pollutants to navigable waters in violation of the CWA.

[18] 33 U.S.C. § 1342(b)(1)(D).

Moreover, the Court found that the County had fair notice of the prohibitions under the statute.

3. Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018).*

The Friends of Santa Clara and the Santa Clarita Organization for Planning the Environment (collectively, "SCOPE") challenged the Army Corps of Engineers' (Corps) issuance of a Clean Water Act[19] (CWA) Section 404 permit to Newhall Land and Farming[20] (Newhall Land). SCOPE asserted violations of the CWA, the Endangered Species Act[21] (ESA), and the National Environmental Policy Act[22] (NEPA). The United States District Court for the Central District of California granted summary judgment in favor of the Corps, and SCOPE appealed.[23] The Ninth Circuit affirmed, holding that the Corps complied with the requirements prescribed by each individual statute.

Pursuant to the CWA, discharges of dredged or fill material into waters of the United States must be accompanied by a Section 404 permit.[24] In deciding whether to issue a permit, the Corps is required to analyze any practicable alternatives to determine the least environmentally damaging option.[25] The Corps' decision must also comply with NEPA and the ESA. Under NEPA, the Corps must consider environmental impacts of a proposed action and provide a detailed statement addressing the environmental impact, potential unavoidable adverse environmental effects, and any alternatives.[26] NEPA also requires that the Corps prepare an environmental impact statement (EIS) in preparation for a decision on the permit application. Under the ESA, the Corps must ensure a project "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" of such

19 *Id.* §§ 1251–1388.

20 Four other initial plaintiffs to this litigation—the Center for Biological Diversity, Wishtoyo Foundation, Ventura Coastkeeper, and Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation—reached a settlement with the Corps and Newhall Land and thus were voluntarily dismissed from the case.

21 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

22 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

23 Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs, No. CV 14-1667 PSG (CWX), 2015 WL 12659937, at *27 (C.D. Cal. June 30, 2015).

24 33 U.S.C. § 1344. The Corps evaluates whether to grant a permit application pursuant to the Section 404(b)(1) Guidelines (Guidelines) promulgated by EPA and the Corps. 40 C.F.R. § 230 (2017); *see* 33 C.F.R. § 320.2(f) (2017); *see also* 33 U.S.C. § 1344(b).

25 40 C.F.R. § 230.10(a). To determine whether an alternative is practicable, the Corps first determines the overall project purpose. Additionally, if the Corps determines a project is not "water dependent," the Corps must overcome the presumption that practicable alternatives are available that do not involve the special aquatic site.

26 *See* 42 U.S.C. § 4332(C).

species.[27] Thus, in this case, the Corps was required to review Newhall Land's permit application for such potential impact.[28]

At issue in this case is the Newhall Ranch Project (Project), planned and developed by Newhall Land.[29] The Project is a large-scale residential, commercial, and industrial development, which would encompass approximately 12,000 acres, including 5.5 linear miles of the Santa Clara River and its tributaries. In the early 1990s, Newhall Land developed a land use plan (Specific Plan), which resulted in a published environmental impact report[30] (EIR). Newhall Land subsequently applied for a Section 404 permit from the Corps in order to proceed with the necessary development authorized by the Specific Plan. After considering public comments on a draft version, the Corps prepared a final combined EIS/EIR for the Project. The EIS/EIR discussed the Project's water discharges into the Santa Clara River and the potential impacts on the Southern California steelhead, an endangered species. Although the Corps determined the Project area itself was not part of the steelhead's critical habitat, the Corps considered the potential effect of increased stormwater discharges on steelhead downstream of the Project. Specifically, there is a portion of the Santa Clara River in between the Project area and the downstream steelhead areas that is dry most of the year (Dry Gap). When there is sufficient rainfall, stormwater discharge from the Project may flow through the Dry Gap and reach the steelhead downstream. However, the Corps determined that the Project would not have a substantial adverse effect on the southern steelhead because the dissolved-copper concentrations in the discharge would be less than the existing concentration in the River and less than the limit set by the EPA.[31] In 2011, the Corps issued a Record of Decision (ROD) and a provisional Section 404(b) permit to Newhall Land.[32] The Corps also determined that while the purpose of the Project

[27] Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2012).

[28] If the Corps determines that there will be an adverse impact, as outlined by Section 7 of the ESA, they are required to "initiate formal consultation procedures with the United States Fish and Wildlife Service or National Marine Fisheries Service." 33 C.F.R. § 325.2(b)(5).

[29] Newhall Land is a land management company.

[30] Los Angeles County held public hearings on the Specific Plan and ultimately approved it. The County's approval of the Specific Plan was initially challenged in state court by various environmental groups. The state court ordered the County to vacate the project approval and conduct further environmental analysis, which eventually resulted in the County's adoption of a revised Specific Plan in May of 2003.

[31] The Corps concluded that the Project's total discharges would have a dissolved-copper concentration of 9.0 micrograms-per-liter. The California Toxics Rule (CTR), an EPA-promulgated regulation, sets the dissolved copper limit at 32 micrograms-per-liter for the Santa Clara River. Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California, 65 Fed. Reg. 31,682, 31,682 (May 18, 2000) (codified at 40 C.F.R. § 131).

[32] The ROD addressed public comments the Corps received on the EIS/EIR and demonstrated that additional stormwater retention measures were going to be incorporated into the Project to further reduce the dissolved-copper concentrations in the Project's stormwater discharges.

is not "water dependent," no practicable alternatives were available that did not involve the Santa Clara River. Of eight potential alternatives, the Corps selected Alternative 3, which reduced permanent and temporary impacts to waters of the United States in comparison to Newhall Land's preferred alternative.

SCOPE's complaint against the Corps alleged violations of the CWA, the ESA, and NEPA. On appeal, the Ninth Circuit discussed the Corps' obligations and actions under each statute in turn. The Ninth Circuit reviewed the district court's grant of summary judgment de novo to determine whether the Corps' final agency determination was arbitrary or capricious under the Administrative Procedure Act.[33]

The Ninth Circuit began by finding that SCOPE had standing to bring their claims. Because the asserted violations were that of a procedural right conferred by a federal statute, a relaxed standard for standing applied. Under this relaxed standard, SCOPE only had to show that "'the challenged [agency] action will threaten their concrete interests,' not that the alleged procedural deficiency will threaten such interests."[34] Here, the Court noted, SCOPE must show that the issuance of the Section 404 permit will affect their interest in recreation and aesthetics in the Project area. SCOPE did not have to show that the Corps' inadequate analysis of the Project's impact on steelhead itself will affect their interests.

Moving on to the merits of the case, the Ninth Circuit first considered SCOPE's CWA claim. SCOPE asserted that the Corps failed to select the least environmentally damaging practicable alternative when they issued the Section 404(b) permit. By incorporating Newhall Land's project objectives and the County's Specific Plan objectives, SCOPE argued that the Corps relied on an "overly specific purpose," which "unduly narrowed the range of available alternatives." The Ninth Circuit refuted this contention, finding that the Corps *must* consider Newhall Land's project objectives and Specific Plan objectives, and thus could reject alternatives which failed to meet those objectives. SCOPE also challenged various elements of the Corps' cost analysis in assessing the practicable alternatives. The Court found that the various ways in which the Corps considered and evaluated cost were reasonable pursuant to the relevant regulations.[35]

Second, the Ninth Circuit discussed SCOPE's ESA claim. SCOPE argued that the Corps erred in determining that the amount of dissolved copper in the Project's potential stormwater discharges would not affect the southern steelhead, a listed species. Thus, the Corps was required to consult with NMFS on the Project's potential impacts. The Court

[33] Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

[34] Friends of Santa Clara River v. U.S. Army Corps of Eng'rs, 887 F.3d 906, 919 (9th Cir. 2018) (quoting Ctr. for Food Safety v. Vilsack, 636 F.3d 1166, 1171 (9th Cir. 2011) (alteration in original)).

[35] *See* 40 C.F.R. § 230.10(a)(2).

disagreed, as the concentrations of dissolved copper established in the EIS/EIR are within the background range already observed in the river as well as below the CTR's criterion. Further, the Corps' consideration of the CTR criteria was reasonable.

SCOPE also argues that the Corps failed to use "the best scientific and commercial data available" [36] because it did not consider a memorandum published by NMFS (NMFS Memorandum), which established that the dissolved-copper in the Project's discharges would have serious impacts on steelhead smolt.[37] Again, the Court rejected SCOPE's claim, as government agencies are afforded deference in determining what constitutes the "best scientific data available." In this case, the Corps could have reasonably concluded that the NMFS Memorandum was not the best scientific data available for the Project. Thus, the Corp's conclusion that the Project's dissolved copper discharges would not affect steelhead was reasonable, and it was not required to consult with NMFS.

Finally, the Court addressed SCOPE's NEPA claims. SCOPE, presenting a similar argument, asserted that the Final EIS/EIR inadequately analyzed the cumulative impacts of the Project's dissolved copper discharges on southern steelhead. The Court reiterated that the Corps did not err in deciding not to rely on the NMFS Memorandum. Because the Final EIS/EIR sufficiently discussed why the Project would not result in significant cumulative water quality impacts to steelhead, the Corps satisfied NEPA's requirements.[38] SCOPE also argued that the Corps violated NEPA by failing to include the full May 2011 Supplemental Analysis in the Final EIS/EIR when it was provided for public comment.[39] However, because the Supplemental Analysis merely confirmed the Corps' conclusion and did not contain "significant new information," the Court found it was appropriate for the Corps to incorporate the document by reference.[40]

Thus, the Ninth Circuit concluded that the Corps' practicable alternatives analysis complied with the CWA, its determination that Southern California steelhead would not be affected by the Project was proper under the ESA, and its assessment and discussion of the Project's potential impacts to the steelhead was also proper under NEPA.

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[36] Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2012).

[37] *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., AN OVERVIEW OF SENSORY EFFECTS TO JUVENILE SALMONIDS EXPOSED TO DISSOLVED COPPER: APPLYING BENCHMARK CONCENTRATION APPROACH TO EVALUATE SUBLETHAL NEUROBEHAVIORAL TOXICITY (2007).

[38] 40 C.F.R. § 1502.2(b) (2017).

[39] The Corps reference the Supplemental Analysis in its response to comments on the Final EIS/EIR.

[40] California *ex rel.* Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior, 767 F.3d 781, 794 (9th Cir. 2014); *see also* 40 C.F.R. § 1502.9(c)(1)(ii).

4. Tin Cup, L.L.C. v. U.S. Army Corps of Engineers*, 904 F.3d 1068 (9th Cir. 2018).*

Tin Cup L.L.C., which sought to develop land in North Pole, Alaska, sued the United States Army Corps of Engineers (the Corps) under the Clean Water Act[41] (CWA). The Corps had granted Tin Cup a permit to excavate an area of permafrost and lay down gravel, subject to strict mitigation requirements, after determining that 351 of 455 acres of the project area qualified as wetland under the Corps' Alaska regional supplement to its wetland delineation manuals. Tin Cup challenged the permit requirements, arguing that a 1993 appropriations act required the Corps to use an earlier wetland delineation manual and forbade the use of the regional supplement in determining whether an area qualified as wetland. The United States District Court for the District of Alaska granted summary judgment to the Corps.[42] The Ninth Circuit affirmed, holding that the 1993 appropriations act did not change substantive law beyond the 1993 fiscal year, because the pertinent provision lacked a clear statement of futurity.

Tin Cup owns a 455-acre parcel in North Pole, Alaska, which it holds for its parent corporation, Flowline Alaska. Flowline is engaged in pipeline projects and sought to use the parcel of land to store pipeline materials. Tin Cup obtained a permit from the Corps in 2004 in order to excavate and lay down gravel material. Tin Cup cleared approximately 130 acres but did not commence excavation or fill placement during the duration of its permit. Tin Cup submitted a new permit application in 2008. In 2010, the Corps determined that wetlands were present on 351 acres of the site, including approximately 200 acres of permafrost.

Tin Cup appealed the Corps' jurisdictional determination, arguing that the permafrost could not qualify as wetlands under the Corps' 1987 Wetlands Delineation Manual (1987 Manual). Under the 1987 Manual, an area qualifies as wetland only if it has a growing season, which it defines as a season in which soil temperature at 19.7 inches below ground is at or above five degrees Celsius. In 1989, the Corps adopted a new manual (1989 Manual) to supersede the 1987 Manual, under which more areas would be designated as wetlands. In 1992, Congress passed the 1993 Budget Act, which prohibited the use of funds to delineate wetlands under the 1989 Manual, "or any subsequent manual adopted without notice and public comment." [43] In the second pertinent paragraph, the 1993 Budget Act further provided that the Corps "will continue to use the [1987 Manual] . . . until a final wetlands manual is adopted." [44] Following recommendations from EPA and the National

41 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2012).

42 Tin Cup v. U.S. Army Corps of Eng'rs, 2017 WL 6550635, at *9 (D. Alaska Sep. 26, 2017).

43 Energy and Water Development Appropriations Act of 1993, Pub. L. No. 102–377, 106 Stat. 1315 (Oct. 2, 1992).

44 *Id.*

Academy of Sciences, the Corps adopted a series of regional supplements to the 1987 Manual without notice and comment rulemaking, to provide region-specific criteria for wetland delineation. The Alaska Supplement utilized "vegetation green-up, growth, and maintenance" as indicators of wetland, rather than soil temperature.

The Corps rejected Tin Cup's administrative appeal, upholding the jurisdictional determination and ruling that soil temperature at 19.7 inches below surface "is essentially irrelevant to determining the growing season in Alaska."[45] In 2012, the Corps issued an initial proffered permit to Tin Cup, which would allow Tin Cup to fill 118 acres of wetlands out of the requested 165 acres, and imposing mitigation requirements. After Tin Cup unsuccessfully appealed, the Corps proffered a final permit to Tin Cup with the same requirements in 2013, which it affirmed on another administrative appeal in March 2015.

Tin Cup brought suit in 2016, arguing that the 1993 Budget Act continues to require that the Corps use the 1987 Manual without considering the Alaska Supplement. The Court granted summary judgment to the Corps, holding that the 1993 Budget Act was limited to the use of funds appropriated that year. Tin Cup appealed. The Ninth Circuit reviewed the district court's grant of summary judgment de novo.

Tin Cup argued that the 1993 Budget Act mandated the continued use of the 1987 Manual, under which the project area would not qualify as wetlands. The Ninth Circuit disagreed, citing the "very strong presumption" that appropriations acts only change substantive law for the fiscal year for which it was passed,[46] rebutted only where the act contains a "clear statement of 'futurity' such as 'hereafter.'"[47] The Ninth Circuit found that the 1993 Budget Act did not contain a clear statement of futurity. The Ninth Circuit noted that the pertinent portion of the Act did not use the word "hereafter," while other portions identifying the continuing availability of certain appropriations did.

Tin Cup argued that the use of the words "will" and "until" in the provision's second paragraph constituted words of futurity. The Ninth Circuit disagreed, finding no precedent that these words, without more, indicate futurity in an appropriations bill. Tin Cup argued further that the second paragraph would be superfluous if these words were not construed as words of futurity. The Ninth Circuit again disagreed, finding that the paragraphs could be interpreted as complementary. The Court reasoned that the first paragraph is a command about what the Corps could not do in fiscal year 1993, while the second paragraph describes what Congress expected it to do instead. The Court observed that the second paragraph was phrased as a descriptive "will"

[45] Tin Cup, L.L.C. v. U.S. Army Corps of Eng'rs, 904 F.3d 1068, 1072 (9th Cir. 2018).

[46] Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269, 273 (D.C. Cir. 1992).

[47] Nat. Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 806 (9th Cir. 2005).

statement, in contrast to the mandatory "shall" statement of the first paragraph.

Tin Cup argued that the structure of the paragraphs in the 1993 Budget Act implied that the second paragraph constitutes a statement of futurity, because it was a separate paragraph from the preceding provision on appropriations for fiscal year 1993 and therefore should be read as unexacting an unrelated and permanent change in the law. The Ninth Circuit disagreed, reasoning that because the two paragraphs were closely related in content, the second paragraph is better read as a descriptive clarification of the first paragraph. Tin Cup also argued that, because the 1993 Budget Act used did not use paragraph breaks in other provisions restricting uses of funds appropriated in 1993, the paragraph break in the pertinent provision suggests that the second paragraph is independent. The Ninth Circuit disagreed, noting that in the examples that Tin Cup cited, the second provision used the mandatory "shall" to set a limitation on how appropriations in the first paragraph was to be used. The Ninth Circuit also declined to evaluate the legislative history in interpreting the pertinent provisions, given that a clear statement of futurity is required in order for a substantive change of the law in an appropriations bill to have permanent effect.

In sum, the Ninth Circuit held that the 1993 Budget Act did not require the Corps to use its 1987 Manual in determining the presence of wetland in project areas. On this basis, the Ninth Circuit affirmed the district court in granting summary judgment to the Corps and upholding the Corps' proffered permit to Tin Cup.

B. Clean Air Act

1. American Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018).*

American Fuel and Petrochemical Manufacturers, American Trucking Associations, and Consumer Energy Alliance (collectively, American Fuel) brought suit against officials of the Oregon Department of Environmental Quality (ODEQ) and Oregon Environmental Quality Commission (OEQC) (collectively, Oregon defendants). Additionally, several conservation organizations[48] (the Conservation intervenors), the California Air Resource Board (CARB) and the State of Washington (collectively, the State intervenors) intervened. The complaint alleged that the Oregon Clean Fuels Program (Program), which regulates the production and sale of transportation fuels based on greenhouse gas emissions, violated the Commerce Clause [49] or alternatively, was

[48] These parties included the Oregon Environmental Council, Sierra Club, Environmental Defense Fund, Climate Solutions, and the Natural Resources Defense Council.

[49] U.S. CONST. art. I, § 8, cl. 3.

preempted by Section 211(c) of the Clean Air Act[50] (CAA). The United States District Court for the District of Oregon dismissed the complaint,[51] and the Ninth Circuit affirmed.

Pursuant to the Program, OEQC promulgated rules to reduce greenhouse gas emission from transportation fuels in Oregon.[52] The rules aim to lower emissions to 10% lower than 2010 levels by 2025. To achieve this end, a regulated party is required to keep the average carbon intensity of all transportation fuels used in Oregon below an annual limit. This is implemented through a credit program.[53]

The Ninth Circuit reviewed the district court's judgment de novo and addressed each of American Fuel's claims, starting with the Commerce Clause claim and then turning to the issue of preemption under the CAA.

First, the Ninth Circuit turned to American Fuel's challenges under the Commerce Clause,[54] looking first at the claim alleging facial discrimination. The Court rejected American Fuel's claim that the Program facially discriminated against out-of-state fuels by assigning petroleum and Midwest ethanol higher carbon intensities than Oregon biofuels. Because the Program discriminates against fuels based on lifecycle greenhouse gas emissions (carbon intensity), and not state of origin, the Court held it is not discriminatory.[55] Furthermore, labeling fuels by state of origin does not make the Program discriminatory because the labels do not dictate differential treatment.

Continuing the Commerce Clause analysis, the Ninth Circuit then considered whether the Program has a discriminatory purpose. The stated purpose of the Program is to "reduce Oregon's contribution to the global levels of greenhouse gas emission and the impacts of those missions in Oregon" and to "reduce the amount of lifecycle greenhouse gas emission per unit of energy by a minimum of 10% below 2010 levels

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[50] Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

[51] Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 134 F. Supp. 3d 1270, 1290 (D. Or. 2015).

[52] The Program instructed OEQC "to adopt rules to decrease lifecycle greenhouse gas emissions from transportation fuels produced in or imported into Oregon." OR. REV. STAT. §§ 468A.266–268 (2018).

[53] Under the credit program, a party "must generate carbon intensity "credits" greater than or equal to their "deficits" on an annual basis." A "regulated party may demonstrate compliance in each compliance period either by producing or importing fuel that in the aggregate meets the [carbon intensity] standard or by obtaining sufficient credits to offset the deficits it has incurred for such fuel produced or imported into Oregon." OR. ADMIN. R. 340-253-0100(6) (2019).

[54] The Commerce Clause gives Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. The Dormant Commerce Clause doctrine restricts States from unduly discriminating against or burdening interstate commerce. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 98 (1994).

[55] The Court relied on *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1090 (9th Cir. 2013).

by 2025."[56] Relying on statements by former Oregon Governor John Kitzhaber and various Oregon legislatures, American Fuel alleged that the Program was actually enacted to favor Oregon biofuels production over existing out-of-state fuel producers. The Court upheld the district court's finding that the statements cited by American Fuel do not undermine the legislature's objectives and goals of the Program.[57]

Next, the Ninth Circuit addressed whether the Program has a discriminatory effect such that it benefits in-state interests at the expense of out-of-state interests. On this point, the Court first addressed American Fuel's argument that the Program unduly burdens out-of-state producers, importers of petroleum, and Midwest ethanol (who must purchase credits) while benefiting Oregon biofuel producers (who can generate and sell credits). Because the Program assigns credits and deficits based on carbon intensity, and not on their origin, the Court held that it is not discriminatory. Furthermore, American Fuel's claims regarding the alleged burden on out-of-state producers were not plausible; some out-of-state producers can generate credits and fare well in the Program scheme. Second, the Court refuted the argument that Oregon biofuel producers are impermissibly benefitted. In fact, Oregon producers are only benefited because of the relatively low carbon intensity of their products and biofuels are not a "uniquely local industry."[58] Third, the Court considered the "*Pike* Analysis," which provides that a regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[59] Here, American Fuel failed to plausibly allege that the burden is "clearly excessive" in light of the state's interest in mitigating the effects of greenhouse gas emissions.

The Ninth Circuit then addressed whether the Program has an impermissible extraterritorial effect. Under the Dormant Commerce Clause, a state's regulation of conduct that "takes place wholly outside of [its] borders" is prohibited.[60] The Court rejected American Fuel's claim that it does, emphasizing that the Program only expressly applies to fuels sold in, imported to, or exported from Oregon.

Finally, the Ninth Circuit turned to the preemption claim under the CAA. Under Section 211 of the CAA, states are preempted from regulating a fuel or fuel component if the EPA Administrator has declared regulation unnecessary.[61] American Fuel argued that the EPA had found regulation of methane unnecessary under the CAA, because methane has low reactivity and is excluded from the definition of volatile organic compounds under Section 211(k) of the CAA.[62] However,

56 OR. ADMIN. R. 340-253-0000(1), (2) (2019).
57 Again, the Court relied on *Rocky Mountain Farmers Union*, 730 F.3d at 1097–98.
58 *Id.* at 1100.
59 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
60 Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1323 (9th Cir. 2015).
61 Clean Air Act, 42 U.S.C. § 7545 (2012).
62 *Id.* § 7545(k) (2012).

in order to invoke Section 211(c) preemption, the administrator must find that "no control or prohibition . . . under" Section 211(c) is necessary. Not regulating methane under Section 211(k) is not a finding under Section 211(c). Thus, there is no preemptive effect.

In conclusion, the Ninth Circuit affirmed the judgment of the district court, dismissing the complaint.

Judge N.R. Smith dissented, arguing that the Program does impermissibly favor in-state interests at the expense of those out-of-state. Taking all factual allegations and reasonable inferences in the light most favorable to American Fuel, Judge Smith found that American Fuel properly alleged that the Program's practical effect is discriminatory. The Program benefits in-state producers, because it allows all in-state fuel producers to generate credits while out-of-state fuel producers generate deficits. For this reason, Judge Smith would find that American Fuel's allegations plausibly demonstrate that out-of-state entities are unduly burdened by the Program. Furthermore, Oregon could achieve its purpose of combating global warming by nondiscriminatory means, such as through a per unit tax. For these reasons, Judge Smith would deny the motion to dismiss American Fuel's complaint.

2. In re Volkswagon "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 894 F.3d 1030 (9th Cir. 2018).*

Ronald Fleshman, a Virginia citizen and owner of a Volkswagen vehicle, moved to intervene in an enforcement action brought by the United States against Volkswagen, AG and several of its subsidiaries (collectively, VW).[63] The intervention sought to challenge a consent decree filed by the government. Fleshman alleged that the consent decree would violate federal and state law because it did not require rescission of sale for all VW vehicles that were improperly installed with "defeat devices."[64] Fleshman further argued that because Virginia's state implementation plan (SIP) prohibits owners of such vehicles from driving them,[65] the consent decree should require a mandatory buy-back program. The United States District Court for the Northern District of California denied Fleshman's motion to intervene.[66] The Ninth Circuit

[63] Defendant–appellees also included Volkswagen Group of America, Inc; Audi, AG; Audi of America, L.L.C.; Porsche Cars North American, Inc.; Robert Bosch GMBH; and Robert Bosch, L.L.C.

[64] The "defeat device" altered the engine performance of an impacted vehicle so that it would omit permissible levels of nitrogen oxide when it sensed the driving conditions of an emissions compliance test.

[65] The specific provision Fleshman relied on reads: "No motor vehicle or engine shall be operated with the motor vehicle pollution control system or device removed or otherwise rendered inoperable." 9 VA. ADMIN. CODE § 5-40-5670(A)(3) (2019).

[66] *In re* Volkswagen, MDL No. 2672 CRB (JSC), 2016 WL 5793336, at *7 (N.D. Cal. Oct. 4, 2016).

affirmed the district court's ruling, holding that Fleshman was not entitled to intervene.

In 2014, the United States Environmental Protection Agency (EPA) learned that two of VW's "lighter diesel" vehicle models emitted significantly higher levels of pollutants during normal road operation than during emissions tests. In response to agency threats to withhold certificates of conformity, VW admitted that it had installed "defeat devices" on certain light diesel models (impacted vehicles), which allowed those vehicles to cheat emissions compliance tests. This admission was reported by news sources across the country and resulted in multiple lawsuits against VW, including a civil enforcement action filed by the United States. These actions were transferred to the district court for consolidated pretrial proceedings and settlement negotiations.

The United States' civil enforcement action alleged four violations of the Clean Air Act[67] (CAA). In its complaint, the United States alleged that VW committed acts prohibited by CAA Section 7522, including:
1) selling vehicles not covered by a certificate of conformity;
2) manufacturing and selling vehicles equipped with "defeat devices;"
3) tampering; and 4) failing to report the "defeat devices." The United States sought injunctive relief, steps to mitigate the extent of emissions caused by the violation, and civil penalties.

While the parties to the enforcement action and the class action were engaged in settlement negotiations, Fleshman brought suit against VW in state court. During settlement negotiations, the United States proposed a consent decree that would require VW to either buy back, permit the termination of the leases of, or perform modifications on the emissions systems of all vehicles at issue. At the close of settlement negotiations, Fleshman moved to intervene in the United States' enforcement action, invoking Federal Rules of Civil Procedure Rule 24(a).[68] The district court denied his motion and later entered the United States' proposed consent decree. Fleshman appealed the district court's decision to deny his motion.

On appeal, the Ninth Circuit reviewed Fleshman's assertion that both subsections of Rule 24(a) entitled him to intervene. First, the Court reviewed whether Fleshman was entitled to intervene under Rule 24(a)(1). The Court analyzed Fleshman's argument that the CAA's citizen-suit provision[69] granted him an "unconditional right" to intervene in the enforcement action. The Court explained that the

67 42 U.S.C. §§ 7401-7671q.

68 "On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a).

69 This provision grants individuals the right to bring a civil action "against any person . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation under this chapter or . . . an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C § 7604(a).

"diligent prosecution" bar prevents a citizen from bringing suit against an alleged violator of the CAA under Section 7604(a) if the government has already commenced an enforcement action against that individual for violation of the same standard, limitation, or order.[70] However, any person barred from bringing suit because of contemporaneous "diligent prosecution" may intervene in the enforcement action as a matter of right.[71] The Court found, though, that Fleshman was not entitled to intervene as of right under the CAA because the United States was not seeking to enforce a "standard, limitation, or order;" rather it was suing VW for violation of statutory provisions under Section 7522. Moreover, Fleshman's initial complaint sought to enforce a Virginia SIP provision instead of a standard, limitation, or order pursuant to the CAA. His amended complaint also did not allege any violations of the provisions under Section 7522. Therefore, Fleshman was not entitled to intervene in the enforcement action "as of right" under the CAA. He was entitled to bring his own citizen suit alleging his claims because the "diligent prosecution" bar did not preclude them. However, because the CAA did not grant Fleshman the right to intervene, the Court concluded that Fleshman was not entitled to intervene under Rule 24(a)(1).

Second, the Ninth Circuit analyzed Fleshman's argument that Rule 24(a)(2) granted him the right to intervene in order to protect his interest in the proper enforcement of the CAA and Virginia's SIP. The Court explained that Rule 24(a)(2) intervention as of right requires "Article III standing in order to pursue relief that is different from that which is sought by a party with standing."[72] Fleshman sought full rescission of all impacted vehicle sales, in contrast to the relief sought by the United States. He claimed that full rescission was necessary to ensure that owners of the impacted cars would not face liability for their non-SIP and non-CAA compliant cars. The court found that Fleshman lacked standing to assert this relief. Specifically, the Court stated that Fleshman was required to show that an impending and substantial risk of harm would occur if the Court did not grant him such relief. The Court explained that in Fleshman's case, such harm was avoidable and speculative because Fleshman was aware of the risk of liability and had the option to have VW buy back or modify the emissions system of his vehicle. Therefore, he had the opportunity to avoid liability without the sought relief. Moreover, the Court found Fleshman's claim regarding the EPA or other state agency's ability to subject owners of unmodified vehicles to such liability entirely speculative. Finally, the Court stated that Fleshman's awareness of future liability did not entitle him to seek full rescission of all impacted vehicles belonging to third parties. That is, there is a disjunction between the relief Fleshman sought—the rescission of all the sales of impacted vehicles—and the potential future injuries to himself. Thus, the Court concluded that Fleshman did not

70 *Id.* § 7604(b)(1).

71 *Id.*

72 Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017).

have the requisite standing for the relief he sought, and thereby may not have intervened as of right under Rule 24(a)(2).

In sum, the Court found that Fleshman could not intervene under Rule 24(a)(1) because the CAA did not grant him an "unconditional right" to intervene. In addition, Fleshman was not allowed to intervene under Rule 24(a)(2) because he lacked standing to the pursue the relief in his complaint.

3. Montana Environmental Information Center v. Thomas*, 902 F.3d 971 (2018).*

Montana Environmental Information Center (Information Center) sought review of the United States Environmental Protection Agency's (EPA) approval of Montana's revised State Implementation Plan (SIP) before the Ninth Circuit.[73] Information Center argued that the SIP inadequately regulated emissions in contravention of the Clean Air Act[74] (CAA), and EPA's approval was thus arbitrary and capricious. The Ninth Circuit denied Information Center's petition for review. The Court found that EPA's interpretation of ambiguous terms in an Implementation Plan was owed deference.

The Ninth Circuit reviewed EPA's SIP approval to determine whether it was arbitrary, capricious, an abuse of discretion, or contrary to law.[75] This analysis rested on whether EPA articulated a rational connection between the facts found and the choices made.[76] The Ninth Circuit noted that Congress has given EPA rulemaking authority under the CAA, which grants the agency high deference.[77]

Under the CAA, the federal government sets minimum air quality standards and partners with states to meet those standards. States formulate SIPs, which are then approved by EPA upon a showing of compliance with the CAA. The specific provision at issue here is the Prevention of Significant Deterioration program (PSD). The PSD program is designed to prevent major sources of air pollution from degrading areas that meet air quality standards or areas that are otherwise unclassifiable. PSD is instituted through the issuance of permits for construction of new sources or modifications to existing sources that will result in a significant increase in emissions. This increase is calculated by taking actual emissions compared to projected

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[73] Petitions for review of EPA's approval of a SIP may only be filed in the United States Court of Appeals for the relevant circuit. 42 U.S.C. § 7607(b)(1).

[74] Clean Air Act, 42 U.S.C. §§ 7406-7671q (2012).

[75] This proceeding arose under the Administrative Procedure Act because Information Center was challenging the EPA's approval of the SIP. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

[76] Comm. for a Better Arvin v. U.S. Envtl. Prot. Agency, 786 F.3d 1169, 1174–75 (9th Cir. 2015); *see also* Hall v. U.S. Envtl. Prot. Agency, 273 F.3d 1146, 1155 (9th Cir, 2001).

[77] 42 U.S.C. § 7601(a)(1); Sierra Club v. U.S. Envtl. Prot. Agency, 671 F.3d 955, 962 (9th Cir. 2012).

emissions.[78] The CAA requires each SIP to contain a permitting process that will comply with PSD but does not require the verbatim adoption of PSD. States are free to deviate from the specific CAA provisions as long as the state can specifically demonstrate that its deviations are at least as stringent as the CAA.

Montana submitted a revised SIP in 1994 which included a definition of actual emissions that largely mirrored the definition of actual emissions used by EPA in its 1980 regulations. Montana's 1994 plan was approved by EPA in 1995. EPA's update of air quality standards in 2012 triggered an obligation for states to update their SIPs in order to comply with the CAA. Montana submitted its proposed revisions in 2015. This SIP contained the same definition of actual emissions as the SIP approved in 1995. EPA provided notice and comment opportunities on the proposed revisions. Information Center submitted a comment that the actual emissions definition was now less stringent than required by PSD and was thus in violation of the CAA. Information Center based its comment on statements made by DEQ in unrelated litigation.[79] In that case, Information Center and EPA interpreted the time period of actual emissions contrarily to DEQ.[80] DEQ argued that EPA should not be given deference because EPA's definition was inconsistent with the language of the CAA rule. EPA declined to decide the proper definition at that time, stating the structure of the 2015 SIP met the relevant requirements of the CAA for approval. EPA made a distinction between approval of the plan and implementation of the plan, stating it would evaluate the merits of Information Center's implementation claim in a future proceeding.[81]

Information Center argued that the revised SIP did not comply with the CAA because DEQ interpreted actual emissions less stringently than EPA.[82] Information Center further argued that DEQ and EPA interpreted the 24-month period for actual emissions differently, which indicated the language was ambiguous. The Ninth Circuit held that once the SIP was approved by EPA, it became federal law and was binding on the State. Once approved, DEQ's policy interpretations did not carry the force of law and DEQ did not have the

78 "Actual emissions," as defined by EPA in its formal definition of "baseline actual emissions" are calculated differently for steam power plants and non-steam sources. For steam plants, actual emissions are the average rate of pollution actually emitted during any consecutive 24-month period within the last five years before actual construction of the project with the 24-month period to be selected by the owner or operator of the plant. Similarly, non-steam plant actual emissions are omissions occurring during any consecutive 24-month period within the last ten years before construction. 40 C.F.R. § 51.166(b)(47)(i)–(ii).

79 Sierra Club & MEIC v. Talen Mont., L.L.C., CV13-32-BLG-DLC-JCL, 2015 WL 13714343, at *13 (D. Mont. Dec. 31, 2015).

80 Information Center and EPA interpreted the definition to be "the" 24-month period before construction while DEQ interpreted the definition to be "a" 24-month period.

81 Mont. Envtl. Info. Ctr. v. Thomas, 902 F.3d 971, 976–77 (9th Cir. 2018).

82 This assertion is based on DEQ's allowance of "a" 24-month period prior to construction rather than EPA's interpretation of "the" 24-month period prior.

authority to unilaterally alter its legal responsibilities under a SIP. DEQ's interpretation of actual emissions was thus insufficient to void the SIP. The Court further noted that EPA's approval of the SIP amounted to its official interpretation of a vague regulatory statement, to which the Court defers.

The Ninth Circuit agreed with EPA that Information Center's comment raised questions regarding implementation rather than approval of the plan. The Court noted that making a determination on implementation was premature as it was unknown whether DEQ would adhere to its interpretation of the plan's language. DEQ's contrary interpretation had no effect on EPA's SIP approval process, and because EPA is afforded deference for plan approval, Information Center's comment would be better addressed at a later stage.

Ultimately, the Ninth Circuit declined to review EPA's approval of Montana's revised SIP because an agency's reasonable interpretation of ambiguous text is given deference and EPA's interpretation was not arbitrary or capricious.

C. Comprehensive Environmental Response, Compensation, and Liability Act

1. California Department of Toxic Substances Control v. Westside Delivery*, 888 F.3d 1085 (9th Cir. 2018).*

The State of California Department of Toxic Substances Control (Department) brought suit in the United States District Court for the Central District of California under the Comprehensive Environmental Response, Compensation, and Liability Act[83] (CERCLA) for recovery of cleanup costs against defendant Westside Delivery (Westside). The Department conducted cleanup efforts at the contaminated Davis Chemical Company facility, which was subsequently purchased by defendant through a tax-delinquent property sale. The Department argued that under CERCLA's strict liability structure, the current owner of any contaminated property cleaned up by the state is liable for cleanup costs regardless of causation. Westside relied on the language of CERCLA and previous circuit court holdings to argue that it was not liable. Westside argued it lacked the requisite contractual relationship with the previous owners and potentially responsible parties (PRPs) to the pollution because the property was purchased at a tax sale.[84] The

[83] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

[84] Importantly, CERCLA contains a defense for current landowners known as the third-party defense to liability. *Id.* § 9607(b)(3). This exempts facility owners from liability for existing contamination if a third party caused the contamination as long as the owner does not have a contractual relationship with the third party. A "contractual relationship" is defined under the Superfund Amendments and Reauthorization Act of 1986 to include, "land contracts, deeds, easements, leases, or other instruments transferring title or

district court agreed with Westside and concluded it did not possess the requisite contractual relationship and could not be held liable under the statute.[85] The district court granted Westside's motion for summary judgment. The Ninth Circuit reversed and remanded the district court's holding, finding the tax deed did create the requisite contractual relationship.

This case involves a contaminated chemical recycling facility purchased by the current owner, Westside, through a state tax sale. The previous owner, Davis Chemical Co. (Davis), was responsible for hazardous waste contamination at the facility. In 1990, the Department ordered Davis to cease and desist all hazardous-waste-related activities. After EPA conducted a preliminary investigation and determined there was significant contamination at the facility, the Department undertook extensive cleanup efforts at the site. Meanwhile, Davis failed to pay property taxes resulting in the seizure and sale of the property at auction under California's tax-sale system.[86] The purchaser of a "tax-defaulted property" is issued a deed to the property under a grant from the state and thus assumes legal ownership. Under CERCLA, the Department has a cause of action against any PRP for cleanup cost recovery.[87] The current owner of a contaminated facility is considered a PRP unless it can prove it qualifies for the third-party liability defense.[88] Under this defense, the current owner may escape liability if the contamination did not occur in connection with a contractual relationship, existing directly or indirectly, with the previous owner of the facility.[89] A contractual relationship can be found in the chain of title of the contaminated facility.[90] Here, Westside did not purchase the facility from Davis, the previous owner and operator, but rather from the state at the tax sale. Thus, the issue arose as to whether the deed from the tax sale created a contractual relationship between Westside and Davis such that Westside could be held liable under CERCLA. The Ninth Circuit reviewed the district court's grant of summary judgment in favor of Westside and reviewed its interpretation of CERCLA de novo.

The Ninth Circuit noted that the key question in this case is whether Westside had the requisite contractual relationship with Davis by virtue of the tax sale. The Department argued that, under its tax sale system, the state does not hold title or possessory interest in the

possession . . ." *Id.* § 9601(35)(A). The definition of "contractual relationship" created a specific carveout, the "innocent landowner defense," for landowners who performed due diligence regarding the presence of contamination on the prospective property, purchased the property, and subsequently discovered the contamination. *Id.* § 9607(b)(3).

85 Cal. Dep't of Toxic Substances Control v. Westside Delivery L.L.C., No. 215CV07786SVWJPR, 2016 WL 7665414, at *6 (C.D. Cal. Sept. 12, 2016).

86 CAL. REV. & TAX. CODE §§ 126, 3436, 3691(a)(1)(A) (West 2019); Cal. Dept. of Toxic Substances Control v. Westside Delivery, 888 F.3d 1085, 1093 (9th Cir. 2018).

87 42 U.S.C. § 9607(a)(4)(A).

88 *Id.* § 9607(b)(3).

89 *Id.*

90 *Id.* § 9601(35)(A).

property. Thus, it could not be considered a traditional owner in the chain of title. Westside argued that it did not belong in the chain of title with Davis, but rather with the state through the tax deed. The Ninth Circuit analyzed this issue from both standpoints, starting with whether the tax deed represented a single transaction or two transactions. In beginning its analysis, the Court held that the term "contractual relationship" is to be construed broadly. The language of the statute indicated Congress intended to capture any instrument reflecting a voluntary or involuntary transaction resulting in a change of ownership or possession.

Under the single transaction analysis, the Court held that the tax deed fit into the definition of "contractual relationship" because it is an instrument that transferred possession of the property. Because the state never took a possessory interest in the property, the deed reflected the transfer of the legal right of possession from Davis to Westside. The Court stated that it did not matter that the transfer was effectuated through the tax system. This fact only rendered Davis's transaction involuntary but involuntary transfers are properly included in the definition.

The Court next analyzed the transaction as if it were two separate transactions. Under this view, the tax deed constituted a direct contractual relationship between Westside and the state. The state's acquisition of the property from Davis through tax delinquency constituted an involuntary transfer from Davis to the state. Because the state acquired the property involuntarily, it did not become liable as an owner.[91] Because the state did not become liable under the involuntary transfer from Davis, the contractual relationship of the deed existed only between Davis and Westside. The Court thus concluded that under either view, a contractual relationship existed between Davis and Westside such that Westside would be liable under CERCLA as a current owner.

Westside argued that it could not be in a contractual relationship with Davis because it was never in any relationship with Davis. The Court noted that this argument might have weight if Congress had not defined the term in the statute. Because it had, the definition in the statute controlled and Westside satisfied the requirement of "contractual relationship."[92]

Westside next argued that the "contractual relationship" did not apply because it obtained a new title from the government when it

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[91] 42 U.S.C. § 9601(35)(A)(ii), read as a whole, is targeted at situations in which the government acquires property through methods that only the government can employ, such as through tax-default. The purpose is to protect the government from liability when it involuntarily acquires contaminated property.

[92] The court interpreted the definition of "contractual relationship" with regards to the purpose of the statute as a whole and concluded that the proper interpretation would hold a tax-sale purchaser such as Westside to be in a contractual relationship with the pre-tax-sale private owner such as Davis.

purchased the facility at the tax sale. Because the title was furnished by the state, Davis was no longer part of the chain of title. The Court held this argument invalid because the chain of title doctrine under state law was not controlling. Under federal law, a break in the chain of title did not defeat the "contractual relationship."

Finally, Westside argued that applying a "contractual relationship" to purchasers at a tax sale would render the third-party defense meaningless. For this argument, Westside relied on Second Circuit precedent that held in part that the contract between the current owner and the third party must relate to the contamination.[93] The Ninth Circuit held that this interpretation of the defense was inaccurate because the traditional third-party defense applied to contamination that occurred after the purchase of the property, not before. The Court reasoned that reading the phrase "in connection with" to mean the contractual relationship must be in connection with the acts or omissions that contaminated the property would allow nearly any purchaser to assert the third party defense. This would render the addition of the "innocent landowner" defense unnecessary because any innocent landowner would automatically fall under the third party defense. The Court stated that it seemed doubtful Congress would go through the trouble of creating a defense no one would need.

The Court disagreed with the Department that the "in connection with" condition should not apply where a current owner is seeking to avoid liability for contamination caused by the previous owner. Just as the Court disagreed with Westside's extremely narrow interpretation of the condition, it did not find it appropriate to conclude the phrase should be ignored either. The Court held that the proper interpretation of the "in connection with" condition was that the contamination occur in connection with the previous owner's status as the landowner. Because the contamination occurred in connection with Davis's operations of the chemical company, Westside's contractual relationship with Davis satisfied that condition. Westside was thus not entitled to assert the third party defense.

Ultimately, the Court reversed the district court's grant of Westside's motion for summary judgment and remanded. In complete contradiction with the Second Circuit, the Ninth Circuit found that construing the "in connection with" requirement as narrowly as prior Circuit precedent instructed, a defendant–purchaser could successfully assert the third-party defense in all cases in which the relevant land contract, deed, or other instrument did not relate to hazardous substances. The Ninth Circuit found this conclusion would render Congress's express creation of the innocent-landowner defense largely superfluous.[94]

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[93] *Westside Delivery*, 888 F.3d 1085, 1100 (9th Cir. 2018) (citing Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 964 F.2d 85, 91–92 (2nd Cir. 1992)); New York v. Lashins Arcade Co., 91 F.3d 353, 360 (2nd Cir. 1996) (reaffirming the *Westwood* rule).

[94] *Id.*

2. Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018).*

The Confederated Tribes of Colville Reservation[95] (Tribes) brought suit against Teck Cominco Metals, Ltd. (Teck) in the United States District Court for the Eastern District of Washington under the Comprehensive Environmental Response, Compensation, and Liability Act [96] (CERCLA). The Tribes sought to enforce a unilateral administrative order that the United States Environmental Protection Agency (EPA) issued against Teck to direct them to conduct a remedial investigation and feasibility study (RI/FS) under CERCLA. The Tribes sought various forms of relief under CERCLA and moved for partial summary judgment on Teck's divisibility defense. The district court granted the motion for summary judgment on Teck's divisibility defense, awarded the Tribes investigative expenses, attorney's fees and prejudgment interest, and directed entry of judgment on Teck's liability for response costs. Finding jurisdiction was proper, the Ninth Circuit affirmed.

In the district court, Teck argued that CERCLA does not apply to its activities in Canada and moved to dismiss. The district court denied Teck's motion to dismiss and certified the issues for immediate appeal.[97] While the appeal was pending, EPA and Teck entered into a settlement agreement to withdraw EPA's order and commit Teck to funding and conducting the RI/FS. The settlement agreement between Teck and EPA does not discuss Teck's responsibility for site cleanup. The Ninth Circuit accepted Teck's interlocutory appeal, affirming the district court's denial of Teck's motion to dismiss, and holding that Teck could be liable under CERCLA because the pollution had "come to be located" in the United States.[98] In this case, the Ninth Circuit reviewed the district court's conclusions upon remand.

Teck Metals is a Canadian lead and zinc smelter operation located in British Columbia, ten miles from the U.S. border. For years, Teck discharged solid and liquid smelter wastes into the Columbia River. At least 8.7 million tons of Teck's wastes settled downstream in the Upper Columbia River, where the water pools in a reservoir behind the Grand Coulee Dam. The Upper Columbia River is historically significant to the Tribes, who continue to use the River for fishing and recreation. The Tribes also hold equitable title to the riverbed. The Tribes petitioned EPA to assess the River's contamination in 1999, prompting EPA to issue a unilateral order against Teck. In 2004, the Tribes funded a CERCLA citizen suit to enforce EPA's order. After several phases of

95 The Tribes were joined by the State of Washington as a plaintiff–intervenor.

96 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

97 28 U.S.C. § 1292(b) (2012); Pakootas v. Teck Cominco Metals, Ltd., 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

98 Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006).

trial, Teck appealed the district court's summary judgment order and partial judgment.

Teck challenged the district court's partial judgment, claiming the Tribes' response costs claim fell under a single CERCLA claim.[99] However, the Ninth Circuit found that the Tribes' claims for response costs and natural resource damages were separate because each required factual showings not required by the other. Reviewing the district court's decision for abuse of discretion and finding none, the Ninth Circuit held the district court's partial judgment was appropriate.

Additionally, Teck challenged the district court's personal jurisdiction. The Ninth Circuit found that the "effects" test for personal jurisdiction under *Calder v. Jones*,[100] was appropriate because Teck purposely directed its activities toward Washington. The Ninth Circuit found that personal jurisdiction over Teck exists in Washington, since Teck knew that its wastes were aimed at Washington.

Next, Teck alleged that CERCLA does not allow the Tribes to recover investigation or attorney's fees costs. The Ninth Circuit reviewed the district court's award de novo. CERCLA creates liability for "all costs of removal or remedial action incurred by the U.S. Government or a state or an Indian tribe not inconsistent with the national contingency plan."[101] The Ninth Circuit found that the Tribes' data collection and analysis costs during investigation satisfied the definition of "removal" because they closely related to cleanup. Further, the Ninth Circuit read CERCLA's cost recovery section to make no distinction between cleanup and investigatory costs, holding that the Tribes could recover for activities that helped with both cleanup and litigation. The Ninth Circuit also found that the Tribes were entitled to reasonable attorney's fees under CERCLA[102] and that the district court reasonably awarded the Tribes $4.86 million for attorney's fees.

Lastly, Teck challenged the district court's grant of summary judgment on Teck's divisibility defense to joint and several liability. The Ninth Circuit reviewed this issue de novo. Teck's argument relied on a report from a divisibility expert, estimating contributions from six heavy metals found in the Upper Columbia River from Teck's smelter. CERCLA liability is joint and several unless the defendant can show the environmental harm is capable of apportionment, as well as a reasonable basis for apportionment. In a summary judgment motion, the plaintiff must show that the defendant did not produce enough evidence in support of the divisibility defense to create a genuine issue of material fact. Teck claimed that its burden of production was limited

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99 Federal Rule of Civil Procedure 54(b) authorizes partial judgment on one or more claims while others remain unadjudicated. FED. R. CIV. P. 54(b).

100 465 U.S. 783 (1984).

101 42 U.S.C. § 9607(a)(4)(A).

102 The Court cited *United States v. Chapman,* 146 F.3d 1166 (9th Cir. 1998), for the proposition that use of the term "all costs" in Section 107(a)(4)(A) creates "very broad cost recovery rights" for the government.

to the six substances allegedly from the smelter operation. However, the Ninth Circuit found that the six pollutants identified in the complaints merely establish liability, and do not limit the scope of environmental harm. Teck's analysis of environmental harm overlooked important factors such as the mixing of pollutants, which can lead to hotspots with greater harm than the sum of individual pollutants. Thus, the Ninth Circuit found that Teck did not present evidence to create a genuine issue of material fact to defeat summary judgment. Moreover, the Ninth Circuit concluded that Teck did not show a reasonable basis for apportioning liability because it did not present evidence to show a relationship between waste volume and environmental harm at the site.

In conclusion, the Ninth Circuit found that jurisdiction was proper and affirmed the district court's judgment holding Teck jointly and severally liable for the Tribes' response costs.

D. Pesticides

1. League of United Latin American Citizens v. Wheeler*, 899 F.3d 814 (9th Cir. 2018).*

Various organizations [103] (collectively, plaintiffs) sought judicial review of an order denying a petition to the United States Environmental Protection Agency (EPA) to revoke tolerances for the pesticide chlorpyrifos under the Federal Food, Drug, and Cosmetic Act [104] (FFDCA). In 2007, plaintiffs [105] petitioned the EPA to revoke limited allowances for the pesticide on food products, alleging that residues were not "safe" as required for EPA to leave tolerances in effect. EPA initially ignored the petition, despite its own paper that concluded chlorpyrifos "likely played a role" in delayed infant mental development. In 2012, plaintiffs petitioned the Ninth Circuit for a writ of mandamus, asking to proceed directly to the Ninth Circuit to force the EPA to make a decision on the petition, but the Ninth Circuit dismissed because the EPA had a "concrete timeline" for action. EPA failed to respond by September 2014, and plaintiffs petitioned again, prompting the Ninth Circuit to find the delay "egregious." In November 2015, the EPA issued a proposed rule to revoke tolerances, but delayed in taking final action. The Ninth Circuit ordered the EPA to take final action on

[103] Plaintiffs included League of United Latin American Citizens, Pesticide Action Network North America, Natural Resources Defense Council, California Rural Legal Assistance Foundation, Farmworkers Association of Florida, Farmworker Justice GreenLatinos, Labor Council for Latin American Advancement, Learning Disabilities Association of America, National Hispanic Medical Association, Pineros y Campesinos Unidos Del Noroeste, and United Farm Workers. Intervenors include State of New York, State of Maryland, State of Vermont, State of Washington, Commonwealth of Massachusetts, District of Columbia, State of California, and State of Hawaii.

[104] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–397 (2012).

[105] Pesticide Action Network North America and Natural Resources Defense Council filed the petition.

the proposed rule by March 2017.[106] The EPA then reversed its position, claiming agency discretion over the schedule for reviewing chlorpyrifos tolerances. In this case, the Ninth Circuit reviewed the EPA's Order denying the 2007 Petition. The Ninth Circuit granted the petition for review and vacated EPA's Order with directions to revoke chlorpyrifos tolerances and cancel registrations of the pesticide within 60 days.

Rather than defending the suit on the merits, EPA argued that the FFDCA prohibits judicial review until EPA issues a response to plaintiffs' administrative objections. The question was whether the statutory restriction was jurisdictional or merely a claim-processing rule that does not govern the court's ability to review. Finding the statute to be a restriction on plaintiffs' ability to bring suit rather than a limit on the courts to hear the suit, the Ninth Circuit determined the provision to be a claim-processing rule. Therefore, plaintiffs were not precluded from judicial review and the Ninth Circuit reviewed the Order on the merits.

The FFDCA requires the Administrator to "modify or revoke a tolerance if the Administrator determines it is not safe."[107] A tolerance is only safe when there is "a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue."[108] Plaintiffs alleged that EPA's decision to maintain chlorpyrifos tolerances was inconsistent with the FFDCA because of scientific evidence that residues on food cause neurodevelopmental damage to children. In a 2016 Risk Assessment, the EPA concluded that consumption of existing tolerances were in excess of what was acceptable for all population groups, especially children. The EPA Risk Assessment further stated that "expected residues of chlorpyrifos on most individual food crops exceed the 'reasonable certainty of no harm' safety standard." The EPA's 2017 Order declining to revoke tolerances did not make a finding that the tolerances were safe. Rather, it cited "significant uncertainty" of chlorpyrifos' health effects. The Ninth Circuit found that this was at odds with a finding of "reasonable certainty" of safety, which violated FFDCA.

In conclusion, the Ninth Circuit granted plaintiffs' petition for review, and vacated the EPA's 2017 Order maintaining chlorpyrifos tolerances. Moreover, the Ninth Circuit directed the EPA to revoke tolerances and cancel chlorpyrifos registrations within 60 days.

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106 The EPA requested a six-month extension of an initial December 2016 deadline, but the Ninth Circuit instead granted the EPA a three-month extension to March 2017. *In re* PANNA, 840 F.3d 1014, 1015 (9th Cir. 2016).

107 21 U.S.C. § 346a(b)(2)(A)(i).

108 *Id.* § 346a(b)(2)(A)(ii).

II. Natural Resources

A. Endangered Species Act

1. Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025 (9th Cir. 2018).*

Alliance for the Wild Rockies[109] (Alliance) brought suit against the United States Forest Service, Forest Service officials, and the United States Fish and Wildlife Service (FWS) (collectively, Federal defendants) in the United States District Court for the District of Montana. Alliance sued under the National Forest Management Act[110] (NFMA), seeking to enjoin the East Reservoir Project (Project) in the Kootenai National Forest in Montana, asserting that the Forest Service acted arbitrarily and capriciously by approving the Project. Alliance also claimed that the Forest Service failed to request reconsultation of the Northern Rocky Mountains Lynx Management Direction (Lynx Amendment) in violation of the Endangered Species Act[111] (ESA). Rejecting Alliance's arguments, the district court granted summary judgment to the Federal defendants and Alliance appealed.[112] While the appeal was pending, the Forest Service completed the reconsultation, rendering the ESA claim moot. Reviewing the district court's grant of summary judgment de novo, the Ninth Circuit vacated summary judgment on the ESA claim and remanded with instructions to dismiss as moot. The Ninth Circuit then reversed and remanded the district court's grant of summary judgment to defendants on the NFMA claim.

On the ESA claim, Alliance claimed that the Project violated the ESA because it relied on the Lynx Amendment for determining the impact of the Project on lynx habitat. The Forest Service did not request reconsultation on the Lynx Amendment after FWS designated areas of critical habitat within the Kootenai National Forest. In *Cottonwood Environmental Law Center v. U.S. Forest Service*,[113] the court held that the Forest Service was required to reinitiate consultation on the Lynx Amendment, and the Forest Service completed the consultation while the appeal in this case was pending. The parties thus agreed the claim was now moot, and the Ninth Circuit dismissed with instructions to vacate this part of its summary judgment. The Ninth Circuit found vacatur proper because mootness was not caused by the party seeking vacatur.

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109 Petitioner Alliance for the Wild Rockies is an environmental-advocacy organization.

110 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

111 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

112 All. for the Wild Rockies v. Savage, 209 F. Supp. 3d 1181 (D. Mont. 2016).

113 789 F.3d 1075 (9th Cir. 2015).

As for the NFMA claim, NFMA requires the Forest Service to implement the approved forest plan by approving or denying site-specific projects. The Kootenai National Forest Plan includes the Motorized Vehicle Access Amendments (Access Amendments), which set a total road mileage baseline for grizzly bear habitat on Forest Service land. A project in accordance with the forest plan may not exceed this road mileage baseline. Alliance argued that Federal defendants acted in an arbitrary and capricious manner when they concluded the Project would not exceed the total mileage cap. Federal defendants first claimed that Alliance waived its claim on this issue by failing to raise the argument in a timely manner. Alliance contended that their objection came later because the Forest Service did not disclose this aspect of the Project until the Final Environmental Impact Statement. The Ninth Circuit held the claim was not waived because Alliance's objection was raised at the first available opportunity.

The Project included plans for new road construction and the decommissioning of both National Forest and some "undetermined" roads. Additionally, the Project included plans to incorporate some "undetermined" roads into National Forest roads. The Forest Service concluded that the Project would not increase the total road mileage. They argued that decommissioning National Forest and "undetermined" roads would offset the new road construction. Additionally, they found that incorporating "undetermined" roads would not affect the total road mileage because those roads already existed. The Ninth Circuit found the Forest Service's assessment "plainly insufficient." Particularly, the Forest Service did not assess whether the "undetermined" roads it measured were included in the Access Amendments baseline. Because this assessment was lacking, the Ninth Circuit said it was impossible to determine whether the Forest Service complied with the Access Amendments. Thus, the Ninth Circuit found the Forest Service's determination arbitrary and capricious, reversed the grant of summary judgment, and remanded the issue.

In sum, the Ninth Circuit vacated the district court's summary judgment on Alliance's lynx reconsultation claim because it was moot. The Ninth Circuit held that Alliance was entitled to summary judgment on its claim that Federal defendants acted arbitrarily and capriciously in concluding the Project would not exceed the Access Amendments' mileage cap. Thus, the Ninth Circuit reversed and remanded the district court's decision.

2. Center for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018).*

Center for Biological Diversity,[114] Western Watersheds Project,[115] George Wuerthner,[116] and Pat Munday[117] (collectively, the Center)

[114] Center for Biological Diversity is a nonprofit-membership organization known for its work protecting endangered species through legal action, scientific petitions, creative media and grassroots activism.

challenged the United States Fish and Wildlife Service's (FWS) decision not to list the arctic grayling as an endangered or threatened species under the Endangered Species Act[118] (ESA). The Center brought suit arguing that FWS erred in using an incorrect definition of "range" in determining whether the arctic grayling is extinct or in threat of becoming extinct "in a significant portion of its range."[119] The Center argued FWS's listing decision was arbitrary and capricious and not in conformity with ESA's requirements, including the requirement that FWS utilize the "best scientific and commercial data available."[120] The United States District Court for the District of Montana granted summary judgment in favor of FWS on all of the Center's claims, dismissing the case.[121] The Center appealed and the Ninth Circuit reversed the district court's grant of summary judgment in part, with instructions to remand to FWS to reassess faulty findings.

The arctic grayling is a cold-water fish with an historic range that included parts of Montana, Wyoming, and Michigan. Today, it exists in only a fraction of its historic range in the Upper Missouri River Basin in Montana. These grayling populations are considered "biogeographically important to the species" because they have adapted to warmer water temperatures in contrast to populations outside of the region. These populations, however, continue to face threats to their continued existence, especially from the increased warming effects of climate change.[122]

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115 Western Watersheds Project (WWP) is a nonprofit environmental conservation group known for its work protecting and restoring western watersheds and wildlife through education, public policy initiatives, and legal advocacy.

116 George Weurthner, WWP's Oregon Director, is an ecologist, longtime wildlands activist, and wilderness visionary with interests in conservation history and conservation biology.

117 Pat Munday is an American environmentalist, writer, Fulbright Scholar, and college professor living in Butte, Montana.

118 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012). The ESA sets forth certain requirements that FWS must follow when deciding whether or not to list a species as endangered or threatened. The ESA charges the Secretary of the Interior with determining whether particular species should be listed as "threatened" or "endangered." An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(20). A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). FWS must base its listing decision on "the best scientific and commercial data available" and cannot ignore available biological information. *Id.* § 1533(b)(1)(A); *see also* Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988).

119 16 U.S.C. §§ 1532(6), 1532(20).

120 *Id.* § 1533(b)(1)(A). FWS is also required to consider available biological data and must acknowledge whether it is choosing among differing experts in considering available data. *See Conner*, 848 F.2d at 1454.

121 Ctr. for Biological Diversity v. Jewell, No. CV 15-4-BU-SEH, 2016 WL 4592199, at *11 (D. Mont. Sept. 2, 2016).

122 Arctic grayling suffer physiological stress and impaired biological functions, such as breeding issues, when water temperatures increase.

FWS considered whether to list the arctic grayling as an endangered or threated species and declined to do so in 1982. FWS's declinations were challenged and revised in 1994, 2003, 2007, and 2010. FWS's 2010 Finding concluded that listing arctic grayling was "warranted but precluded" due to higher priority actions.[123] After further challenges, FWS agreed to issue revised findings by 2014. This action arises out of those findings. The Center challenged FWS's 2014 Finding using three distinct arguments. First, that FWS arbitrarily relied on unsupported population increases to conclude that the arctic grayling is not threatened by small population size. Second, that FWS did not properly evaluate whether the arctic grayling is threatened by lack of water in streams and high water temperatures, which will only be exacerbated by global warming. And third, that FWS did not properly analyze whether lost historical range constitutes a "significant portion" of the arctic grayling's range.

The Ninth Circuit reviewed the district court's summary judgment ruling de novo. The Ninth Circuit reviewed FWS's decision not to list arctic grayling pursuant to the ESA under the Administrative Procedure Act[124] (APA).

The Ninth Circuit first analyzed whether FWS erred in considering only the arctic grayling's current range when determining whether it was in danger of extinction "in all or a significant portion of its range."[125] The Center argued that "range" as used in the ESA, based on binding precedent, unambiguously meant "historical range," not only "current range," as interpreted by FWS.[126] FWS argued that the meaning of "range" is ambiguous as written in the statute and the agency should therefore be given deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[127] Considering the prior precedents cited by the Center, traditional tools of statutory construction, and the overall statutory framework, the Ninth Circuit found "range" to be ambiguous. The Ninth Circuit then held that FWS's interpretation of "range" as "current range" was reasonable, agreeing with the district court.

Next, the Center argued that the 2014 Finding arbitrarily found the arctic grayling population to be increasing because FWS did not rely on the "best scientific and commercial data available."[128] The Center further argued that FWS did not provide an adequate explanation for

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123 Importantly, the 2010 Finding was based on a variety of threats facing arctic grayling at that time.

124 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

125 16 U.S.C. § 1532(6), (20).

126 Defs. of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001); Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870 (9th Cir. 2009).

127 467 U.S. 837 (1984). FWS argued that, given appropriate deference, its interpretation and application of the term "range" as only current range was permissible. *See id.* at 842–43.

128 16 U.S.C. § 1533(b)(1)(A).

why it chose to rely on certain experts but ignore others. The Ninth Circuit concluded that in ignoring available data, FWS acted in an arbitrary and capricious manner. The Ninth Circuit further stated that, because FWS did not provide a reason to credit one expert while ignoring another, the court was precluded from undertaking meaningful judicial review.

The Center further argued that FWS's 2014 Finding arbitrarily dismissed threats of low stream flows and high stream temperatures in the Big Hole River, the Centennial Valley, and the Madison River. The Center disputed the conclusion that arctic grayling seek refuge in coldwater tributaries because FWS lacked adequate evidence and tributaries frequently exceeded the appropriate temperature range for grayling. The Ninth Circuit noted a discrepancy between FWS's 2010 and 2014 Findings. The 2010 Finding referenced the same study as the 2014 Finding, yet the 2010 Finding stated these water temperatures were sufficiently high to warrant listing. The 2014 Finding stated the ability of arctic grayling to migrate made listing unnecessary without providing any additional evidence. Thus, the Ninth Circuit held that FWS was required to provide a reasoned explanation as to FWS's change in position between the 2010 and 2014 Findings relating to the Big Hole River. The Ninth Circuit, however, further held that any error in FWS's findings of "cold water refugia" was limited to the Big Hole River analysis. Therefore, the Ninth Circuit upheld the district court's grant of summary judgment as to the Centennial Valley and Madison River analyses.

The Center also argued that FWS disregarded the additive effects of climate change. The Center argued that FWS arbitrarily relied on uncertainty to avoid making any determination on this threat. On this point, the Ninth Circuit held that FWS acted in an arbitrary and capricious manner by failing to explain why uncertainty justified its conclusion.

Finally, the Center argued that FWS acted arbitrarily by dismissing the threat of small population size. First, the Center argued that FWS did not provide a basis for its determination on the impact of low populations. FWS argued that its 2014 Finding showed adequate genetic diversity such that diversity was not a short-term threat to arctic grayling. The Ninth Circuit held that FWS's determination was not arbitrary and capricious because FWS provided a reasoned explanation for its position. The Ninth Circuit concluded that a difference of opinion does not warrant a contrary conclusion and affirmed the district court's ruling on this issue.

Secondly, the Center argued that FWS irrationally concluded that random events would not threaten arctic grayling despite small populations. FWS argued that, based on an analysis of a specific breeding population, there was no longer a concern because of the increased number of breeding individuals. On this issue, the Ninth Circuit found that FWS arbitrarily relied on a single population to show

that breeding individuals were increasing. The Ninth Circuit pointed out that FWS's finding contradicted FWS's own criteria for judging genetic viability, which requires a minimum of ten years of monitoring data. Further, FWS's 2010 Finding noted that at least five to ten more years of monitoring would be needed. The Ninth Circuit therefore reversed the district court on this issue.

Ultimately, the Ninth Circuit found that the 2014 Finding's decision to not list the arctic grayling was arbitrary and capricious because it ignored available evidence and instead heavily relied on a contrary finding; FWS did not provide a reasoned explanation for relying on the existence of cold water refugia in the Big Hole River; FWS failed to consider the effects of climate change solely because of "uncertainty"; and FWS concluded that a breeding population was viable based on data collected over a shorter period than that underlying the 2010 Finding and FWS's own established criteria for viability. The Ninth Circuit therefore reversed the district court's grant of summary judgment with directions to remand to FWS to reassess the 2014 Finding in light of the court's opinion.

3. Native Ecosystems Council v. Marten*, 883 F.3d 783 (9th Cir. 2018).*

Native Ecosystems Council[129] (Council) filed suit against the United States Forest Service[130] (Forest Service) in the United States District Court for the District of Montana. The suit challenged the Forest Service's proposed vegetation management project in the Gallatin National Forest in Montana. Council alleged that the project violates the Endangered Species Act[131] (ESA), the National Forest Management Act[132] (NFMA), the National Environmental Policy Act[133] (NEPA), and the Administrative Procedure Act[134] (APA). The Ninth Circuit affirmed the district court's grant of partial summary judgment to the Forest Service and its order dissolving the initial injunction against the project.

Under the ESA, federal agencies must ensure that their actions are not "likely to jeopardize the continued existence of any endangered . . . or threatened species."[135] Agencies must use the "best scientific and commercial data available" as a basis for their actions.[136] Moreover, all

[129] Plaintiff–appellants also included the Alliance for the Wild Rockies. Both plaintiff–appellants are environmental groups.

[130] Defendant–appellees also include Leanne Marten, Regional Forester of Region One of the U.S. Forest Service, and the U.S. Fish and Wildlife Service.

[131] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

[132] National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

[133] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

[134] Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

[135] 16 U.S.C. § 1536(a)(2) (2012).

[136] *Id.*

national forests must operate under "land and resource management plans,"[137] or "Forest Plans," and all individual management actions must be "consistent with each forest's overall management plan."[138] Furthermore, agencies must prepare an Environmental Impact Statement (EIS) for proposed actions that "significantly affect the quality of the human environment,"[139] taking a "hard look" at the environmental consequences thereof.[140]

The Forest Service developed the Lonesome Wood Vegetation Management 2 Project[141] (Lonesome Wood 2 or Project) to reduce the threat of wildfire near Hebgen Lake in the Gallatin National Forest. According to the Forest Service, the buildup of fuel in the forest presents a serious risk to private homes, campgrounds, and recreational areas near the lake. In 2013, Council brought this challenge.[142] The parties filed cross-motions for summary judgment. The district court granted partial summary judgment to Council on its ESA claim and initially enjoined the project.[143] The district court later dissolved the injunction, concluding that a subsequent Biological Opinion (BiOp) rendered the project in compliance with the ESA.[144] Council appealed the district court's grant of partial summary judgment to the Forest Service and the order to dissolve the injunction.

The Ninth Circuit reviewed the Forest Service's compliance with the ESA, NFMA, and NEPA under the "arbitrary and capricious" standard of the APA. Moreover, it reviewed the district court's rulings on summary judgment, and the order dissolving the injunction, de novo. On the first issue, Council argued that an exemption contained in the "Lynx Amendments"[145] to the Forest Plan was not based on the "best scientific . . . data available." Council contended that a thesis on the subject of Canada Lynx reproduction compelled the Forest Service to revise or eliminate the exemption. The Forest Service responded that

137 *Id.* § 1604(a) (2012).

138 Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1249 (9th Cir. 2005).

139 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2012).

140 Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005) (quoting Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004)).

141 The project consists of a plan to thin just over 2,500 acres of forest land, including 495 acres of old forest growth.

142 This suit is Council's second challenge of the project. Council first challenged the project in January 2009. The Court did not rule on the challenge, however, because grizzly bears were relisted as threatened species under the ESA during the proceedings. Hence, the Forest Service was required to withdraw its previous documents and prepare an EIS to comply with different consultation and management criteria. In December 2012, a Record of Decision (ROD) approving Lonesome Wood 2 was issued after the Forest Service met the appropriate criteria.

143 The district court granted partial summary judgment to the Forest Service on all remaining claims. Native Ecosystems Council v. Krueger, 63 F. Supp. 3d 1246, 1259 (D. Mont. 2018).

144 Native Ecosystems Council v. Marten, 883 F.3d 783, 788 (9th Cir. 2018).

145 The Amendments permit the Forest Service to implement fuel treatment projects in certain circumstances.

the thesis did not change the status of the project. The Court held that, giving deference to the agency's expertise,[146] and in light of a BiOp analyzing the effect of Lonesome Wood 2 on the Canada Lynx, the Forest Service's determination did not violate the ESA.

The Ninth Circuit next considered Council's NFMA claim. Council argued that the Forest Service is in violation of the provisions of the Forest Plan. Agencies must continue to comply with rescinded regulations that were incorporated into overall Forest Plans.[147] Council contended that provisions of the Gallatin Forest Plan incorporate rescinded regulations, and that the Forest Service is in non-compliance with those rescinded regulations. Therefore, Council argued, Lonesome Wood 2 is unlawful. The Court explained that required actions under the Forest Plan are not final agency actions, and therefore not subject to challenge. However, those actions are subject to challenge if they are connected to a specific final agency action. Therefore, the lawfulness of final agency actions, in part, depends on compliance with the rescinded regulations.

The Ninth Circuit thus examined the Forest Service's compliance with each of the relevant provisions of the rescinded regulations. First, the Court considered Council's argument that the Forest Service failed to comply with a Forest Plan obligation to ensure species viability. Council contended that Lonesome Wood 2 is incompatible with this goal, and that the goal incorporates an earlier regulation providing for a more expansive species viability. The Forest Service argued that the goals are merely an aspiration and not binding. The Court disagreed with the Forest Service's contention that the goals impose no obligations. However, the Court held that Lonesome Wood 2 does not violate the goals here. The Court reasoned that the Forest Plan's definition of "goals" provide for flexibility in the manner and timing of their achievement, and that the Forest Plan did not incorporate the earlier regulation. Second, the Court considered Council's argument that the Forest Service failed to sufficiently monitor population trends for goshawk and pine martins, as required by the Forest Plan. The Court concluded that the Forest Plan fulfilled its obligation under the Forest Plan, reasoning that the Forest Service assessments of both species were sufficient.

Lastly, the Ninth Circuit analyzed Council's NEPA claim. Council argued that the Final Environmental Impact Statement (FEIS) for Lonesome Wood 2 is misleading or inaccurate and therefore violates the Act. First, Council contended that the FEIS mischaracterized a description of a peer reviewed article on goshawk population trends. Council complained that the FEIS did not include the title of the article and did not indicate that the article was peer reviewed. Further, Council complained that the FEIS criticizes the article by relying on an analysis

146 San Luis & Delta–Mendota Water Auth. v. Jewell, 747 F.3d. 581, 602 (9th Cir. 2014).

147 *See In re* Big Thorne Project, 857 F.3d 968, 974 n.3 (9th Cir. 2017).

in an unpublished, non-peer reviewed memorandum prepared by a Forest Service employee, and that the FEIS did not reveal that the memorandum was prepared by a Forest Service employee. Additionally, Council complained that the FEIS ignored the fact that the article made findings that the goshawk population was declining more rapidly in logged areas. The Forest Service responded that it was not required to provide a more detailed description of the article and the memorandum. The Forest Service also contended that the goshawk population analyzed in the article corresponds to a national forest with distinguishable characteristics from the Gallatin. Second, Council contended that the FEIS misstated an unpublished report prepared by a Forest Service employee, which projected that the moose population is more stable than in reality. The Forest Service responded that Council misread the report, arguing that the author's own conclusions were consistent with the ROD's statements. Third, Council contended that the ROD inaccurately labeled the goshawk and pine marten populations in the Gallatin as "stable to increasing."

The Court disagreed with Council's first and second arguments, but agreed with Council's third point regarding the labeling of the goshawk and pine marten populations as "stable to increasing." The Court explained that the Forest Service did not act arbitrarily or capriciously in the manner in which it treated the article or report. However, the court concluded that the Forest Service's "stable to increasing" statement was wrong. The Court explained, however, that the misstatement was not a significant factor in the approval of Lonesome Wood 2. Therefore, the Court concluded that the Forest Service fulfilled the "hard look" requirement. In sum, the Court upheld the district court's summary judgment order and the order to dissolve the injunction.

4. National Wildlife Federation v. National Marine Fisheries Service*, 886 F.3d 803 (9th Cir. 2018).*

National Wildlife Federation (NWF) and other environmental organizations [148] brought an action against the National Marine Fisheries Service (NMFS) and other federal agencies [149] under the Endangered Species Act[150] (ESA), challenging NMFS' Biological Opinion (BiOp) concerning impacts of the Federal Columbia River Power System

[148] The other organizations included Idaho Wildlife Federation, Washington Wildlife Federation, Sierra Club, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Idaho Rivers United, Idaho Steelhead and Salmon United, Northwest Sport Fishing Industry Association, Salmon for All, Columbia Riverkeeper, NW Energy Coalition, Federation of Fly Fishers, and American Rivers.

[149] The other federal agency defendants included the U.S. Army Corps of Engineers (the Corps) and U.S. Bureau of Reclamation (Reclamation).

[150] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

(FCRPS) dams on listed salmonid species.[151] The State of Oregon intervened as a plaintiff, while the states of Washington, Montana, and Idaho, and Indian Tribes[152] and other interested groups[153] intervened as defendants. After several rounds of appeals and remands to the relevant agencies, the United States District Court for the District of Oregon found that NMFS violated the ESA, Administrative Procedure Act[154] (APA), and National Environmental Policy Act[155] (NEPA), and granted in part and denied in part plaintiffs' motions for injunctive relief.[156] Defendants and defendant–intervenors appealed. The Ninth Circuit affirmed in part and dismissed in part.

This case is the latest iteration in the Ninth Circuit of a long-running dispute over impacts of dams and related facilities in the FCRPS on federally listed salmon and steelhead species. Salmon and steelhead migrate up the Columbia and Snake Rivers every year, spawning in fresh water before dying. The next generation of young salmon and steelhead migrate downstream into the Pacific Ocean and repeat this lifecycle. Turbines in FCRPS dams cause a high fatality during fish passage, and so each dam has a bypass system.

The most recent BiOp for the FCRPS, issued in 2014, concluded that operation of the FCRPS dams would jeopardize listed species and adversely modify critical habitat, but proposed a reasonable and prudent alternative (RPA) consisting of 64 actions over a ten-year period from 2008 to 2018.[157] The plaintiffs filed complaints challenging the 2014 BiOp under the ESA,[158] APA, and NEPA.[159] The district court

151 FCRPS include eight dams, reservoirs, and related facilities on the mainstem Columbia and Snake Rivers. FCRPS is managed by the Corps, Reclamation, and the Bonneville Power Administration (Bonneville).

152 The tribal intervenor–defendants included Kootenai Tribe of Idaho, and the Confederated Salish and Kootenai Tribes.

153 The other intervenor–defendant groups included Inland Ports and Navigation Group, Northwest River Partners, Northwest Irrigation Utilities, Public Power Council, and Columbia-Snake River Irrigators Association.

154 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

155 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

156 Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. 3:01-cv-0640-SI, 2017 WL 1829588, at *16 (D. Or. Apr. 3, 2017).

157 The RPA included modifications to system operations and structures at the dam to improve fish passage and migration conditions; actions to reduce salmonid predation; actions to restore salmonid habitat; hatchery management; and research, monitoring, and evaluation of salmonids. The RPA also included some spill through the dams to enhance the survival of juvenile salmonids migrating downstream.

158 Under Section 7 of the ESA, federal agencies are required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of such species' designated critical habitat. Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2012). If a proposed federal action may jeopardize listed species or adversely modify designated critical habitat, that agency must consult with a "consulting agency." In the case of anadromous fish like salmon and steelhead, that agency is NMFS. The consulting agency sets forth its conclusions of whether the proposed action will affect a listed species or its designated critical habitat in

granted partial summary judgment to the plaintiffs, concluding that NMFS violated the ESA and APA in determining that the RPA did not itself jeopardize listed species, and the Corps and Reclamation violated NEPA by failing to prepare an adequate EIS.[160] The district court remanded to NMFS to issue a new BiOp, and retained jurisdiction over the litigation to ensure the agencies develop mitigation measures to avoid jeopardy in the interim, and prepare an adequate BiOp and EIS.[161] The plaintiffs then sought several injunctions, including one ordering the Corps to increase spill at the eight dams to the maximum level that meets state water quality standards. Oregon sought a separate injunction ordering the agencies to operate juvenile bypass facilities and Passive Integrated Transponder (PIT) tag detection systems at the dams. NWF sought an injunction under NEPA prohibiting the Corps from making significant capital expenditures at certain FCRPS dams while the new EIS was being prepared.

The district court entered another amended order, granting in part and denying in part the plaintiffs' injunction motions. The district court granted the motions for injunctive relief under the ESA, holding that it was stripped of discretion to weigh other traditional equitable factors and that plaintiffs were not required to show that operating without the increased spill during the remand period would pose an imminent threat at the species level, or that the RPA's spill-related operations specifically caused irreparable harm. On the evidence in the record, the district court found irreparable harm sufficient to sustain an order increasing spill, but delayed the new spill operations until a year after the date requested by plaintiffs and ordered the agencies to produce a spill plan and proposed injunction order in collaboration with the plaintiffs and regional experts. The district court also granted the PIT tag monitoring injunction but delayed its implementation by a year. The district court denied NWF's motion, finding that the balance of hardships and considerations of public interest favored allowing some expenditures.

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a BiOp. Where the consulting agency finds that the proposed action is likely to jeopardize a listed species or adversely modify its critical habitat (jeopardy finding), it sets forth in the BiOp any reasonable and prudent alternative (RPA) to the action that is not likely to jeopardize the species or adversely modify its critical habitat. Where the consulting agency makes a jeopardy finding but sets forth an RPA, the proposed action may proceed under the terms of the RPA.

159 NEPA requires that federal agencies complete an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In addition to evaluating the proposed action, the EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a) (2012).

160 Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. (*NWF V*), 184 F. Supp. 3d 861 (D. Or. 2016).

161 The district court subsequently amended its order approving a five-year schedule for preparation of the EIS, extended the deadline for issuing a new BiOp, and directed the agencies to keep the 2014 BiOp in place and continue implementing the RPA until the new BiOp was issued.

Defendants appealed. The Ninth Circuit reviewed legal conclusions underlying the grant or denial of injunctions de novo, factual findings underlying the grant or denial of injunctions for clear error, and the scope of injunctions under an abuse of discretion standard.

First, defendants argued that the district court analyzed the requests for injunctive relief under the wrong framework, because it did not focus on extinction-level risks to the species during the remand period. The Ninth Circuit disagreed, holding that the district court was not required to find a short-term extinction-level threat to listed species in order to find likely irreparable harm for purposes of an ESA injunction. The Ninth Circuit explained that irreparable harm is determined by reference to the purposes of the statute being enforced, and one of the ESA's central purposes is to conserve species, which it accomplishes in incremental steps. Thus, a threat of harm to members of a listed species not rising to the level of an imminent extinction threat may nevertheless support an injunction where that threat is definite. The Ninth Circuit also explained that the fact that BiOps may permit incidental take of listed species does not mean that harm to individual members cannot be irreparable, because incidental take is permissible only where NMFS has determined in a valid BiOp that the level of incidental take complies with the ESA. The Ninth Circuit reasoned that this condition is absent where the BiOp violates the ESA.

The defendants next argued that the district court erred by considering harms from the operation of the FCRPS dams as a whole, rather than the harms from only the spill-related components of the RPA during the remaining remand period. The Ninth Circuit disagreed, holding that irreparable harm may be caused by activities broader than those sought to be enjoined. The Ninth Circuit reasoned that the effects of the spill regime on listed species "cannot be cleanly divorced" from the effects of FCRPS dam operations taken as a whole, and salmonids are exposed to the combined operation of the entire system. Thus, the Ninth Circuit concluded that the district court did not abuse its discretion by basing the spill injunction on a finding of irreparable harm from the operation of the FCRPS dams as a whole.[162]

Defendants argued further that the injunction order did not support a finding that any listed species faced a threat of extinction in the short term, because the findings in *NWF V* and the district court's subsequent order concerned only recovery of listed species. *NWF V* and the subsequent order relied on data from the 2014 BiOp, which summarized a five-year status review of listed species. The Ninth Circuit held that

[162] The state intervenor–defendants argued that the district court erred by issuing the PIT tag monitoring injunction without finding irreparable harm from the absence of PIT tag monitoring specifically, and that the injunction was not based on findings in the record. The Ninth Circuit disagreed, holding that it was evaluated using the same modified injunction standard which it upheld for evaluating the spill injunction. The Ninth Circuit further held that the district court's factual findings were based on expert testimony and not clearly erroneous.

the district court properly concluded on this record that operation of the FCRPS dams would cause irreparable harm to listed salmonids. The Ninth Circuit explained that even if the district court were required to focus only on imminent extinction, the district court did not commit clear error in finding the continued low abundance of the species made them vulnerable to extinction, or in finding that NMFS failed to adequately analyze how climate change increased the chances of "shock events" catastrophic for the species' survival given their sustained low abundance.[163]

The Defendants argued that the injunction was an abuse of discretion because it was not narrowly tailored to the irreparable harm. The Ninth Circuit disagreed, holding that the injunction was sufficiently narrowly tailored and need not completely prevent the irreparable harm identified. The Ninth Circuit explained that a plaintiff is not required to show that the action sought to be enjoined is the exclusive cause of the injury, only that a sufficient causal connection exists between the harm and the activity to be enjoined.

The defendants argued that the plaintiffs identified only vague and hypothetical survival benefits from increased spill at the dams. The Ninth Circuit disagreed, noting that Oregon had presented expert declarations attesting that increased spill would improve juvenile survival, supported by decades of studies showing spill volumes higher than those in the RPA would lead to higher survival of juvenile salmonids. The Ninth Circuit reasoned that at most the defendants established uncertainty about the benefits of increased spill, but the existence of any such uncertainty did not render the district court's findings clearly erroneous.

Finally, the defendants argued that the scope of the spill injunction was an abuse of discretion, because it intruded on functions of the federal agencies. The Ninth Circuit held that the district court's order did not constitute an "unbounded" or unduly intrusive exercise of discretion, because it gave the agencies ample time to conduct tests, evaluate problems, and make adjustments in the timeframe it had given for developing a spill operation plan.

In sum, the Ninth Circuit held: 1) the district court was not required to find a short-term extinction-level threat to listed species in order to find irreparable harm for purposes of an ESA injunction; 2) the district court did not err in considering operation of the FCRPS as a whole rather than only the spill-related components of the RPA; 3) the

163 The defendants also argued that there was a "mismatch" between *NWF V*'s conclusions on the RPA and the findings of irreparable harm in its order for injunctive relief. The Ninth Circuit held that the finding of irreparable harm was not clearly erroneous. The Ninth Circuit recalled that although *NWF V* did not hold that NMFS' determination that the RPA is not likely to adversely modify critical habitat was not arbitrary and capricious, it nevertheless did find that the critical habitat was degraded and did not serve a functional conservation role. The Ninth Circuit reasoned that the *NWF V*'s finding that the RPA would lead to significant improvements to the mainstem habitat established only an incremental improvement and did not establish an absence of harm.

record before the district court supported its finding that operation of the FCRPS dams would cause irreparable harm to species absent an injunction; 4) the finding of irreparable harm under the RPA was not incompatible with *NWF V*'s finding that the RPA would lead to significant improvements to salmonid habitat; 5) the injunction was sufficiently narrowly tailored; 6) the benefits from increased spill at the dams were not vague or hypothetical; and 7) the injunctions did not constitute an unbounded exercise of discretion or intrude upon the administrative province. On these bases, the Ninth Circuit affirmed in part and dismissed in part.

5. United States v. Charette*, 893 F.3d 1169 (9th Cir. 2018).*

The United States charged Brian Charette for unlawfully killing a grizzly bear near his home in Montana. Grizzly bears are listed as threatened under the Endangered Species Act[164] (ESA), and unlawfully taking a grizzly bear is a violation of the ESA and its regulations.[165] Charette claimed that he shot and killed the bear when it chased his dogs toward him. A United States magistrate judge convicted Charette of taking the grizzly bear in violation of the ESA, and the United States District Court for the District of Montana affirmed. [166] Charette appealed, arguing that the lower courts erred by 1) holding that there was insufficient evidence to infer that Charette lacked a permit to shoot the bear, 2) denying his request for a jury trial, and 3) wrongly assessing his self-defense claim under an objective rather than subjective standard. The Ninth Circuit affirmed in part, reversed in part, vacated Charette's conviction, and remanded the case for retrial.

On May 11, 2014, Charette spotted an adult grizzly bear with two yearlings in a pasture adjacent to the yard behind his home. Charette observed the bears chasing his horses and went outside with a .270-caliber rifle. According to his now ex-wife, Jessica, Charette shot one of the bears after it stood on its hind legs near the fence. Charette's stepfather testified that he heard two "warning shots," saw a bear chasing a dog toward the house, and then saw the bear killed by a final third shot. Charette and a friend drove the other bears off, then dragged the dead bear to a field away from the property. Charette did not report the shooting because he wanted to "avoid the hassle."

In December 2014, Jessica's then-boyfriend reported the incident to law enforcement. On December 8, a Tribal Investigator, a Montana Game Warden, and a U.S. Fish and Wildlife Service (FWS) Special Agent interviewed Charette. Charette initially denied shooting the bear, but later in the interview admitted to it. Neither Charette nor the investigators raised the question of whether the shooting was in self-defense. In an affidavit after a subsequent interview, Charette averred

164 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).
165 *Id.* §§ 1538(a)(1)(G), 1540(b)(1); 50 C.F.R. § 17.40(b)(1)(i)(A) (2018).
166 United States v. Charette, 242 F. Supp. 3d 1125 (D. Mont. 2017).

that the bears initially chased the horses, but then began to chase his dogs. According to his affidavit, Charette shot the bear when it followed his dogs into the yard.

The United States charged Charette with unlawfully taking a threatened species, in violation of the ESA and FWS' grizzly bear take regulations. Charette attempted twice to change his plea to guilty and admitted that he had no permit to kill a grizzly, but the magistrate refused to accept Charette's plea because he continued to allege self-defense. The magistrate judge found Charette guilty after a bench trial, and Charette filed a motion for acquittal. The magistrate judge summarily denied Charette's motion, and Charette appealed to the district court. The district court affirmed the magistrate judge's ruling. Charette appealed, and the Ninth Circuit reviewed the district court's ruling de novo.

Charette first argued that there was insufficient evidence to prove beyond a reasonable doubt that he did not possess a taking permit at the time of the shooting. The Ninth Circuit assumed without deciding that the district court erred when it inferred that Charette lacked a taking permit, but reasoned that this error was harmless if the Government was not required to prove that Charette lacked a permit. The Ninth Circuit recalled that in *United States v. Clavette*,[167] the court stated that to establish the crime of unlawfully taking a grizzly bear, the Government must prove beyond a reasonable doubt that 1) the defendant knowingly killed a bear, 2) the bear was a grizzly, 3) the defendant had no permit from FWS to kill a grizzly bear, and 4) the defendant did not act in self-defense or in the defense of others. However, because the existence of a valid permit was not at issue in *Clavette*, the Ninth Circuit reasoned that its inclusion of a defendant's lack of a permit as an element of the crime of taking a grizzly bear was "mere dicta." Rather, the Ninth Circuit held that the plain language establishes that a defendant violates the grizzly bear taking prohibition if they 1) knowingly 2) take a grizzly bear 3) in the fourty-eight conterminous states of the United States.[168]

Second, the Ninth Circuit addressed whether the government or Charette bore the burden of proving whether Charette possessed a permit. The ESA mandates that "any person claiming the benefit of any exemption or permit under [the ESA] shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation."[169] The Ninth Circuit found that this provision expressly places the burden on the defendant to show that a defense based on a permit is applicable. The Ninth Circuit found further support in the legislative history of the ESA for placing the burden on the defendant to show the existence of an

167 135 F.3d 1308, 1311 (9th Cir. 1998).

168 50 C.F.R. § 17.40(b)(1)(i)(A) ("no person shall take any grizzly bear in the 48 conterminous states of the United States").

169 16 U.S.C. § 1539(g).

applicable permit.[170] Therefore, the Ninth Circuit declined to reverse on this issue because Charette presented no evidence at trial that he possessed an applicable permit.

Third, the Ninth Circuit considered Charette's contention that his right to a jury trial under the Sixth Amendment was violated. Charette argued that, because the penalties were so severe, he deserved a jury trial notwithstanding that taking a grizzly bear is presumptively a petty offense. The Ninth Circuit found that this question was already settled in *Clavette* and reaffirmed in a later case,[171] where the court held that a defendant is not entitled to a jury trial for a charge of taking a grizzly bear. Therefore, the Ninth Circuit affirmed the lower court in ruling that Charette was not entitled to a jury trial.

Finally, the Ninth Circuit addressed Charette's argument that the trial court erred when it analyzed his self-defense argument under an "objectively reasonable" rather than a "subjectively reasonable" standard. The ESA provides that self-defense or defense of others may be a defense if the defendant acted "based on a good faith belief that he was acting to protect himself … or any other individual, from bodily harm from any endangered or threatened species."[172] The Ninth Circuit recalled that in *United States v. Wallen*, it interpreted this provision as requiring only a subjective belief, which "is satisfied when a defendant actually, even if unreasonably, believes his actions are necessary to protect himself or others from perceived danger from a grizzly bear."[173] The Ninth Circuit therefore held that the lower court erred in applying an objective reasonableness standard to Charette's self-defense claim. The Ninth Circuit further held that this error was not harmless. The Ninth Circuit reasoned that because the lower court had stated that an objective reasonableness standard would govern, defense counsel advised Charette that the court would not consider his subjective belief in the need for self-defense. Upon this advice, Charette elected not to testify concerning his subjective belief.

In sum, the Ninth Circuit held that Charette had the burden of showing that he held a valid permit, and that Charette presented no such evidence at trial. The Ninth Circuit also held that Charette was not entitled to a jury trial. However, the Ninth Circuit held that the trial court erred by analyzing Charette's self-defense argument under a standard of objective reasonableness. On this basis, the Ninth Circuit affirmed in part, reversed in part, vacated Charette's conviction, and remanded the case for retrial.

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170 H.R. REP. NO. 94-823, at 6 (1976).

171 United States v. Wallen, 874 F.3d 620, 626–27 (9th Cir. 2017).

172 16 U.S.C. § 1540(b)(3).

173 *Wallen*, 874 F.3d at 623.

B. Marine Mammal Protection Act

1. California Sea Urchin Commission v. Bean*, 883 F.3d 1173 (9th Cir. 2018).*

Various fishing industry groups[174] (plaintiffs) brought two separate suits under the Administrative Procedure Act[175] (APA) in the United States District Court for the Central District of California. Plaintiffs challenged the United States Fish and Wildlife Service's (Service) ending of a 1987 sea otter translocation program. Plaintiffs alleged the Service did not have authority to end the program and that the Service's interpretation should be rejected on constitutional avoidance grounds. These two separate suits were consolidated upon appeal to the Ninth Circuit. The district court in both cases found the Service's decision reasonable and granted summary judgment for the Service. [176] Reviewing the claims in the consolidated case de novo, the Ninth Circuit affirmed both district court rulings.

In 1986, Congress gave the Service authority to establish a program to create a reserve population of southern sea otters, a species listed as endangered under the Endangered Species Act [177] (ESA). A reserve colony of otters would protect the species if an environmental catastrophe were to threaten the main population. In 1987, the Service created an experimental translocation program, adopting certain failure conditions that, if met, would lead to termination of the program.[178] Public Law No. 99-625[179] required the Service to create a management zone around the reserve population, in which liability under the Marine Mammal Protection Act [180] (MMPA) and ESA would be lessened. Specifically, incidental takings occurring in the management zone would not be violations of either act. Public Law No. 99-625 declared the purpose of the management zone was to facilitate sea otter management and prevent conflict with other fishery resources. In 2012, upon finding one of the failure conditions satisfied, the Service terminated the program, ending exemptions from incidental take liability. In these consolidated cases, the Ninth Circuit determined whether plaintiffs had

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174 Plaintiffs included the California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara.

175 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

176 Cal. Sea Urchin Comm'n v. Bean, 239 F. Supp. 3d 1200 (C.D. Cal. 2017); Cal. Sea Urchin Comm'n v. Bean, No. CV 14-8499-JFW (CWX), 2015 WL 5737899, at *1 (C.D. Cal. Sept. 18, 2015).

177 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

178 Endangered and Threatened Wildlife and Plants; Establishment of an Experimental Population of Southern Sea Otters, 52 Fed. Reg. 29,754, 29,772 (Aug. 11, 1987) (to be codified at 50 C.F.R. pt. 17).

179 Act of Nov. 7, 1986, Pub. L. No. 99-625, 100 Stat. 3500.

180 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421h (2012).

standing and whether the Service had authority to terminate the program.

The Ninth Circuit began by analyzing standing.[181] Plaintiffs' first theory of standing was based on the potential liability they faced from the removal of incidental take exemptions in the management zone. The Ninth Circuit rejected this theory because a potential risk of prosecution does not show that the threat of prosecution is "genuine."[182] Under their second theory of standing, plaintiffs asserted harms suffered due to sea otter predation of shellfish. The Ninth Circuit found this harm was concrete and particularized because sea otters have significantly reduced shellfish populations within the management zone. The Ninth Circuit held that plaintiffs had standing because the requested relief would remove legal roadblocks to removing sea otters from the management zone.

The Ninth Circuit next determined whether the Service was authorized to terminate the translocation program under the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[183] Under *Chevron*, a court first determines if "Congress has directly spoken to the precise question at issue."[184] If Congress is silent or ambiguous, *Chevron* requires the court to determine "whether the agency's answer is based on a permissible construction of the statute."[185] Plaintiffs alleged that the statutory language unambiguously only gives the Service authority to implement the program. The Service contended that the presence of discretionary provisions and the description of the plan as "experimental" create unambiguous authority to end the program.[186] Because the statute is silent on the issue of termination, the Ninth Circuit determined whether the agency's interpretation was reasonable. The plaintiffs' construction of the statute would require the Service to continue the program even if it harmed the endangered species. The Ninth Circuit found this construction unworkable. Instead, the Service's actions comported with the ESA's requirement that the Service protect endangered species. Because the Service determined the program was failing, it fulfilled the statutory purpose to end the program. The Ninth Circuit found the Service's decision to terminate the program reasonable, and thus authorized by the statute.

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181 Standing requires the plaintiff to demonstrate it has suffered an "injury in fact" that is "concrete and particularized," "actual or imminent," "fairly traceable to the challenged action," and is likely "that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000).

182 San Diego City Gun Rights Comm'n v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996).

183 467 U.S. 837 (1984).

184 *Id.* at 842.

185 *Id.* at 842–43.

186 *See* Pub. L. No. 99-625 § 1(b) (1986).

Plaintiffs also contended that the Service's interpretation violated the non-delegation doctrine[187] because the statute does not provide guidance for eliminating the management zone. However, the Ninth Circuit found that the same criteria given for implementing a program may apply to ending a program. Thus, the statute survived this challenge. Lastly, plaintiffs argued that a 1994 amendment[188] to the MMPA relaxing incidental take restrictions supported their position. Plaintiffs contended that rescinding the program and subjecting sea otters to the baseline MMPA rules would be disallowed under the statutory scheme. The Ninth Circuit disagreed. Congress was on notice of the Service's interpretation of Public Law No. 99-625 to permit the termination of the program and specifically noted that the amendment would not repeal it.[189]

In sum, the Court held that plaintiffs had standing to bring their claims and that the Service acted lawfully in terminating the relocation program. Thus, the Ninth Circuit affirmed both district court decisions.

C. Migratory Bird Treaty Act

1. Friends of Animals v. U.S. Fish and Wildlife Service*, 879 F.3d 1000 (9th Cir. 2018).*

Friends of Animals[190] (Friends), a non-profit animal advocacy organization, sued the United States Fish and Wildlife Service (FWS) alleging that the FWS violated the Migratory Bird Treaty Act[191] (MBTA or Act) by issuing a permit allowing the taking of one species of owl in order to protect another threatened species of owl. The United States District Court for the District of Oregon granted summary judgment for FWS and Friends appealed.[192] The Ninth Circuit affirmed, holding that the permitted taking of one species for scientific purposes that principally benefit a different species does not violate the MBTA.

The MBTA allows FWS to issue permits for the taking[193] of birds to be "used for scientific purposes."[194] Here, FWS, through the Oregon Fish and Wildlife Office, issued a permit for the taking of the barred owl in

187 A statute must provide an intelligible principle for promulgating associated regulations to survive the non-delegation doctrine. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

188 16 U.S.C. § 1387(a)(4).

189 *Id.* § 1387(a).

190 Friends of Animals filed suit in conjunction with Predator Defense, another non-profit animal-advocacy organization.

191 Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–715 (2004).

192 Friends of Animals v. U.S. Fish & Wildlife Serv., No. 6:14-CV-01449-AA, 2015 WL 4429147, at *12 (D. Or. July 16, 2015).

193 "To 'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 717 (1995).

194 50 C.F.R § 21.23 (2014).

an attempt to protect the northern spotted owl, which competes for the same habitat. The northern spotted owl is listed as a threatened species under the Endangered Species Act[195] (ESA). Competition with the barred owl is one of the principal factors contributing to northern spotted owl population declines.[196] In 2008, FWS constructed a recovery plan for the northern spotted owl, which in part, addressed the threat presented by the barred owl. Specifically, FWS proposed "large-scale control experiments in key spotted owl areas to assess the effects of barred owl removal on spotted owl site occupancy, reproduction, and survival."[197] This proposed study went through notice-and-comment, and eventually resulted in a plan to "issue a scientific collecting permit," pursuant to 50 C.F.R. § 21.23, to take 1,600 barred owls over four years.[198]

In this suit, Friends alleged violations of the National Environmental Policy Act[199] (NEPA) and the MBTA. The District Court for the District of Oregon granted FWS' motion for summary judgment on both the NEPA and MBTA claims, and Friends appealed on the MBTA claim. The Ninth Circuit reviewed this claim de novo.

The issue on appeal was whether the MBTA provision allowing the issuance of permits to take birds for scientific purposes only applies when those scientific purposes are to advance the conservation or scientific understanding of the very species being taken ("same-species theory"), and thus whether the FWS's permit to take the barred owl violated the MBTA.

The Ninth Circuit first analyzed Friends' primary support for their same-species theory: that the word "used," as it appears in Article II(A) of the Mexico Convention, implies a same-species limitation.[200] Friends asserted that the language in Article II(A), which allows the taking of birds during close seasons "when used for scientific purposes, for propagation or for museums," must comply with Friends' same-species theory, because "used" requires that a taken migratory bird be used

195 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

196 The barred owls' diets overlap with the spotted owls' diets by as much as 76%, and the barred owls' aggressive and adaptable nature gives it a distinct competitive advantage.

197 U.S. FISH AND WILDLIFE SERV., FINAL RECOVERY PLAN FOR THE NORTHERN SPOTTED OWL, *STRIX OCCIDENTALS CAURINA*, at 31, (2008).

198 *See* Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls; Final Environmental Impact Statement, 78 Fed. Reg. 44,588 (July 24, 2013). The permit initially authorized a total take of 3,600 barred owls, but this number was reduced in 2014 due to delays caused by funding issues.

199 National Environmental Policy Act of 1969, 42 U.S.C. § 4321–4370h (2012).

200 The basis for Friends' theory is not in the MBTA itself, but in the underlying conventions, which are also binding on the Service through the MBTA's "consistency" provision. 16 U.S.C. § 704(a); Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, U.S.–Mex., Feb. 7, 1936, 50 Stat. 1311.

directly for a scientific purpose.[201] The court pointed out an initial discrepancy in Friends' argument: a species may be taken and used directly for a scientific purpose, but that does not benefit the species conservation or understanding. This result would be consistent with the same-species limitation Friends found in Article II(A), but inconsistent with Friends' same-species theory that the taking must also benefit species' conservation. Thus, Friends' textual argument does not even support the same-species theory they initially asserted.

However, the Ninth Circuit went on to consider whether the same-species limitation derived from the text of Article II(A) could still invalidate FWS's actions. The court began by interpreting the meaning of "use" in accordance with its ordinary or natural meaning. The court found that the taking of a bird to use for a scientific purpose that the bird itself is not the subject of likely fits within the broad dictionary definitions of "use," which includes "to employ" or "to carry out." However, the court still found a degree of uncertainty relying on "used" in Article II(A) alone, and thus turned to the surrounding text and structure of the Mexico Convention for further instruction. Article I of the Mexico Convention, which sets out the principles which are to be implemented by Article II, supports a broad interpretation of "used."[202] The principles in Article I envision a broad use of protected birds, permitting use of birds as parties "may see fit." Additionally, the stated purpose of the provision is to prevent extermination of protected species. Thus, a party engaging in a scientific experiment to accomplish that very goal is acting within the scope of that provision.

The Ninth Circuit then turned to Friends' alternative argument: whether the *noscitur a sociis* canon of statutory construction compels the finding of a same-species limitation. *Noscitur a sociis* instructs that "words grouped in a list should be given related meaning." Article II(A)'s exception allows the taking of birds when "used for scientific purposes, for propagation or for museums." Friends argued that if a person takes a bird to use for propagation or museums the taken bird itself is being used, and thus "scientific purposes" should be limited in the same way. The Ninth Circuit rejected this analysis. First, the court pointed out that it is not even clear that the *noscitur* canon would apply to this list, because there is no clear common quality between the words. And second, even if applicable, Friends read "propagation" too narrowly in finding the same-species limitation to be inherent.[203]

The Ninth Circuit also rejected Friends' slippery slope argument in favor of FWS. Friends argued that the loose definition of scientific purposes invites the potential for the taking of species for any scientific

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201 Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, U.S.–Mex., Feb. 7, 1936, 50 Stat. 1311.

202 *Id.*

203 For example, another logical propagation use is to take a bird to clear the way for other birds to propagate.

basis, such as for pure-human economic gain. However, as FWS pointed out, the Mexico Convention includes language that requires that the parties "establish laws, regulations, and provisions" to assure that species covered by the MBTA "may not be exterminated."[204] This language acts as a backstop to any type of extreme-taking situation that Friends proposes, and also supports the idea that the Convention's conservation purposes can still be achieved even without a same-species limitation.

Finally, the Ninth Circuit rejected Friends' reliance on the Canada, Japan, and Russia Conventions for additional support for their same-species theory.[205] No language in these Conventions prevents the taking of a non-threatened protected species for use in a scientific experiment to protect a different threatened protected species, and furthermore, these Conventions do not cover owls.

In conclusion, the Ninth Circuit held that the MBTA provision, which allows the issuance of permits to take species for scientific purposes, does not compel a same-species limitation.[206]

2. United States v. Obendorf*, 894 F.3d 1094 (9th Cir. 2018).*

Defendant–appellant Gregory Obendorf (Obendorf) was convicted by the United States District Court for the District of Idaho of illegally baiting migratory ducks to facilitate hunting, in violation of the Migratory Bird Treaty Act[207] (MBTA), and conspiring to do the same.[208] Both offenses were Class A misdemeanors.[209] Obendorf appealed his convictions. He argued he was prejudiced by the district court's evidentiary ruling against certain cross-examination questions Obendorf sought to ask government witnesses. He further argued he was prejudiced by the district court's imposition of a "temporal" element to the presumably pertinent MBTA exception. The Ninth Circuit held that any error by the district court regarding both its evidentiary rulings and its jury instruction was harmless and upheld Obendorf's conviction.

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204 *Id.*

205 *See* Convention between the United States of America and the United Kingdom of Great Britain and Ireland for the Protection of Migratory Birds in the United States and Canada, U.K.–U.S., Aug. 16, 1916, 39 Stat. 1702, as amended by the Protocol of Dec. 5, 1995, S. Treaty Doc. No. 104-28; Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Jap.–U.S., Mar. 4, 1972, 25 U.S.T. 3329; Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, U.S.–U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647.

206 The Court found that the plain text of the MBTA supported this conclusion, and thus they did not need to consider deference to FWS's interpretation.

207 Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012); *see id.* § 704(b)(2) (the anti-baiting provision).

208 18 U.S.C. § 371 (2012) (the general federal conspiracy statute).

209 16 U.S.C. § 707(a), (c); 18 U.S.C. §§ 371, 3559(a)(6).

Obendorf is an Idaho corn farmer who resides just north of the Boise River. This area is also an annual migratory path for hundreds of thousands of ducks. Migrating ducks passing over Obendorf's fields are attracted to the corn scattered on the ground and tend to land among his fields. One particularly popular field is known as "the duck field." This field, and the area more generally, is routinely patrolled by the United States Fish and Wildlife Service (FWS) for signs of waterfoul baiting. On one fly-over patrol, Agent Scott Kabasa of FWS paid special attention to the duck field after receiving numerous tips that Obendorf was baiting ducks. Agent Kabasa observed that the duck field was harvested differently than Obendorf's other fields. The field contained large piles of loose corn kernels, several within "shot-shell range" of a hunting pit blind. The duck field was harvested in alternating rows, leaving rows of corn standing, while Obendorf's other corn fields were meticulously fully harvested. After this fly-over, Kabasa and a conservation officer with the Idaho Department of Fish and Game entered Obendorf's field to investigate. Kabasa testified that "the vastness of the corn that was on the ground was unbelievable."[210]

The investigation into Obendorf continued for approximately two years until Obendorf was charged with two counts: illegal baiting and conspiracy to do the same. The government alleged that Obendorf conspired over several years to bait the duck field and to lure ducks for hunting by instructing his employees to wastefully harvest the duck field in violation of the general federal conspiracy statute.[211] The government further alleged that Obendorf was baiting the duck field to facilitate hunting in the same fashion as alleged in the conspiracy charge, in violation of the anti-baiting provision of the MBTA.[212]

In order to prove that Obendorf was guilty of the baiting charge, the government had to show: 1) Obendorf baited or ordered others to bait the duck field, and 2) that he did so in order to facilitate hunting aided by baiting. At trial, Obendorf attempted to argue that he was not intentionally baiting ducks, but rather his farming practices placed him under "the agricultural practice exception."[213] This provision, as described by the district court, permits a farmer whose lands are not otherwise baited to scatter seeds or grains solely as the result of a normal agricultural planting, harvesting, or post-harvest manipulation. Obendorf argued that the large amounts of corn witnessed in the duck field fit this exception. There is one caveat to the exception. A farmer's manipulation or practice constitutes a "normal agricultural planting, harvesting, post-harvest manipulation" only if it is done according to the State Extension Service Specialists' official recommendations, whether

210 *Obendorf*, 894 F.3d 1094, 1096 (9th Cir. 2018).

211 18 U.S.C. § 371.

212 16 U.S.C. § 704(b)(2).

213 The government characterized this section as a potential "safe harbor" from an unlawful baiting conviction and the district court referred to it as "the agricultural practices exception." 50 C.F.R. § 20.21(i)(1)(i) (2018).

verbal or in writing. Based on this, Obendorf attempted to solicit testimony from three government witnesses on cross-examination to the effect that Obendorf's practices did constitute normal agricultural practices. The government objected to this line of questioning, arguing it was irrelevant and beyond the scope of the direct examination. The district court agreed and ruled that the agricultural practices exception does not apply unless the farmer obtained official recommendations before engaging in the practice. The district court instructed the jury to that effect. Obendorf was convicted on both counts and timely appealed.

On appeal, Obendorf argued that the district court misrepresented the agricultural practices exception by imposing the requirement that official recommendations must be obtained before engaging in the practice. The district court made this determination in both in its evidentiary ruling on Obendorf's cross-examination of the government witnesses and in its instruction on the exception to the jury.

The Ninth Circuit reviewed the district court's interpretation of the MBTA and regulations de novo. The Ninth Circuit also reviewed de novo whether the district court's jury instruction misstated the agricultural practices exception. The Ninth Circuit reviewed the district court's evidentiary rulings for an abuse of discretion. The Ninth Circuit stated that, even if it found error, it would affirm unless the erroneous evidentiary ruling more likely than not affected the verdict.

Obendorf argued that the district court misstated the agricultural practices exception by imposing the requirement that Obendorf receive official recommendations prior to engaging in those practices. This requirement was not mandated by the MBTA. For the first time on appeal, the government argued that any error by the district court on the exception was irrelevant because the exception itself did not apply to Obendorf's charges. [214] Rather, the government argued that the exception applied only to illegally taking migratory birds, not the unlawful baiting of migratory birds. Because Obendorf was convicted of baiting and not taking, the exception did not apply. The Ninth Circuit agreed and held that the agricultural practices exception had no role to play in Obendorf's case. The Ninth Circuit further stated that the erroneous application of the exception was harmless. The government bore the burden of proving the exception did not apply rather than Obendorf bearing the burden of proving it did.

Continuing its analysis of the agricultural practices exception, the Ninth Circuit reasoned that the plain language of 50 C.F.R. § 20.21 applied only to takings. The Ninth Circuit based this conclusion on the consideration that the overall concern of the section was the prohibition of hunting methods. The Ninth Circuit also noted that the legislative history of the MBTA showed that baiting was not originally a discrete

[214] The Ninth Circuit acknowledged that the government's argument was new but allowed it to go forward. The Court held, under its discretion, that because this new argument was purely legal and both parties had the opportunity to fully brief and argue the issue, allowing the argument would serve to clarify the law.

offense. When a discrete baiting offense was created, it did not include this exception. The Ninth Circuit concluded there was no agricultural practices exception to the baiting portion of the MBTA and thus was not relevant to the charges Obendorf faced. The Ninth Circuit ruled that the district court's jury instruction regarding the agricultural practices exception was harmless error. The two necessary elements of the baiting charge were dealt with separately from the agricultural practices exception, which ameliorated any confusion for the jury.

The Ninth Circuit next addressed Obendorf's argument that he was prejudiced by the district court's evidentiary ruling which barred him from eliciting opinions about his farming practices when cross-examining the government witnesses. The district court had ruled that Obendorf's line of questioning was inappropriate for cross-examination but available for his case-in-chief. The district court also ruled that Obendorf was not allowed to attempt to elicit official recommendations about his farming practices because those recommendations were required before the practices were undertaken. The Ninth Circuit held that the district court did not categorially prevent Obendorf from eliciting testimony regarding his farming practices in his case-in-chief and his failure to do so was not the result of any error on the district court's part.

On appeal, Obendorf stressed that he would have pursued an alternative defense strategy if he had known the agricultural practices exception did not apply to his charges. After analyzing the information presented to the jury at trial, the Ninth Circuit concluded that it could not see anything Obendorf could have possibly done differently. The Ninth Circuit held that the evidence establishing Obendorf's baiting activity was extremely strong and any erroneous application of the agricultural practices exception did not affect the verdict.

In sum, the Ninth Circuit definitively stated that the MBTA does not create an exception to the ban on unlawful baiting. Because Obendorf was charged with unlawful baiting, he was not immunized from any potential exception. The Ninth Circuit acknowledged that the parties had misapprehended the law but held that any error was harmless and ultimately affirmed Obendorf's conviction.

D. National Forest Management Act

1. Alliance for the Wild Rockies v. U.S. Forest Service*, 907 F.3d 1105 (9th Cir. 2018).*

The Alliance for the Wild Rockies, Idaho Sporting Congress, and Native Ecosystems Council (collectively, Alliance) alleged that certain actions taken by the United States Forest Service and specific employees of the Forest Service[215] (collectively, Forest Service) with

[215] The named individuals are Thomas Tidwell, Keith Lannom, and Nora Rasure.

regard to a restoration project violated the National Forest Management Act[216] (NFMA), the National Environmental Policy Act[217] (NEPA), and the Endangered Species Act[218] (ESA), and were thus arbitrary and capricious under the Administrative Procedure Act[219] (APA). The United States District Court for the District of Idaho granted summary judgment in favor of the Forest Service and intervenor–defendants Adams County and the Payette Forest Coalition (collectively, Adams County).[220] Plaintiffs appealed. The Ninth Circuit affirmed in part and reversed and remanded in part.

Under NFMA, the Forest Service is charged with managing national forest land, with respect to two levels: 1) the forest level, and 2) the individual project level. The Forest Service develops a Land and Resource Management Plan (Forest Plan) on the forest level, which contains broad, long-term plans and objectives for a particular forest. The Forest Plan is implemented at the project level, and any site-specific projects and activities must be consistent with an approved Forest Plan. Failure to comply with provisions of a Forest Plan is a violation of NFMA. NEPA contains procedural requirements, which require federal agencies to consider potential significant impacts of and alternatives to agency actions which may affect the environment. Under NEPA, agencies must take a "hard look" at the environmental consequences of their proposed actions.[221]

At issue is a project in the Payette National Forest, which pursuant to NFMA is managed in accordance with the 2003 Payette Forest Plan (Plan). The Plan divides the Payette Forest into fourteen sections, called "management areas" (MAs). The land within the MAs is then assigned to a Management Prescription Category[222] (MPC). Of relevance here are two MPCs: 5.1 and 5.2. MPC 5.1 emphasizes restoration in order to provide habitat diversity, reduced fire risk, and "sustainable resources for human use." MPC 5.2 encompasses forested land with an emphasis on achieving sustainable resources for commodity outputs, like timber production. In 2011, the Forest Service proposed amendments to the Plan in the Wildlife Conservation Strategy (WCS). Among these amendments was a proposal to delete MPC 5.2 (commodity production) and replace it with MPC 5.1 (restoration). The Forest Service released a draft environmental impact statement (WCS EIS) pursuant to NEPA,

216 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012) (amending the Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

217 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

218 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

219 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335 (2012).

220 All. for the Wild Rockies v. U.S. Forest Serv., No. 1:15-CV-00193-EJL, 2016 WL 4581404, at *20 (D. Idaho Aug. 31, 2016).

221 All. for the Wild Rockies v. Pena, 865 F.3d 1211, 1215 (9th Cir. 2017).

222 The MPCs range from "Wilderness" (MPC 1.0) to "Concentrated Development" (MPC 8.0).

but after a public comment period stopped the process, leaving the 2003 Plan in effect.

The specific project at issue in this lawsuit is the Lost Creek-Boulder Creek Landscape Restoration Project (Lost Creek Project or Project), which the Forest Service initiated in 2012. The Project's purpose, stated in the final environmental impact statement (FEIS), is "to move vegetation toward the Forest Plan's 'desired conditions,'" which are those conditions deemed desirable to achieve the specific purpose for each MPC.[223] The Project spans three MAs. The FEIS states that the Project is "consistent with the science in the Forest's [WCS DEIS]."[224] The Forest Service entered the final record of decision (ROD) in September of 2014.

On appeal, Alliance argued that the Forest Service violated NFMA by failing to adhere to requirements of the 2003 Plan, violated NEPA by improperly tiering to prior agency documents, and violated the ESA by failing to reinitiate consultation regarding effects on critical habitat for bull trout. The Ninth Circuit reviewed the district court's grant of summary judgment de novo to determine whether the Forest Service's final agency action was arbitrary or capricious under the APA.[225]

The Ninth Circuit first addressed Alliance's argument that the Project is inconsistent with the Payette Forest Plan's components, including standards, guidelines, and desired conditions. Alliance argued that the final ROD for the Lost Creek Project is arbitrary and capricious because replacing MPC 5.2 with MPC 5.1 effectively replaced MPC 5.2 with different Plan components. The court discussed each component in turn.

First, the Ninth Circuit discussed the Plan's standards, which are binding limitations aimed at preventing degradation of current resource conditions. The Project must comply with the standards in the Plan; any deviation requires amending the Plan. Replacing MPC 5.2 with MPC 5.1 eliminated a binding fire standard which prohibited wildland fire use. The court rejected the argument that the proposed fire prescriptions were effectively similar and declined to do a substantive comparison. Because standards are binding, the court held that the elimination of the old standard constituted a clear violation of NFMA. The Forest Service's failure to offer a rational explanation for the switch was arbitrary and capricious.

Second, the court turned to the Plan's guidelines. Guidelines advise a course of action with the aim to maintain or restore resource conditions or prevent resource degradation. Pursuant to the Plan, deviation from the guidelines does not require a Plan amendment, but does require that the explanation for such deviation be documented in the project decision document. Eliminating MPC 5.2 resulted in the loss

223 U.S. Dep't of Agric., Lost-Creek Boulder Creek Landscape Restoration Project; Final Environmental Impact Statement 15 (2014).

224 *Id.*

225 5 U.S.C. § 706(2)(A) (2012).

of a fire guideline, which detailed when prescribed fires may be used. The Forest Service offered no explanation for this elimination and did not discuss a replacement provision. Because the Service essentially offered no explanation, the court held the elimination of the guideline was contrary to the Plan, violating NFMA. The failure to sufficiently explain the elimination of the guideline was also arbitrary and capricious.

Third, the court examined the change in conditions. Specifically, replacing MPC 5.2 with MPC 5.1 rendered the Project inconsistent with the desired vegetation conditions contained in the Plan concerning tree size class and canopy distribution. While recognizing the Forest Service's argument that some flexibility is allowed, the court held that the Service may not replace desired conditions with entirely different conditions without considering long term effects. The imposition of new vegetative conditions had the potential to alter the landscape and was thus inconsistent with the Plan.

The court turned to Alliance's second NFMA claim. Alliance alleged that the Project's definition of "old forest habitat" was inconsistent with the Plan's definition of "old forest" because the Project used criteria from the WCS amendments, rather than the Plan. With this change, the Project deviated from a standard in the Plan which aims to maintain large tree size classes to help species that are dependent on such trees. These changes affect the entire Project. Because the Project FEIS did not discuss the standard nor the change in definitions, the Forest Service's decision was arbitrary and capricious.

The Ninth Circuit next discussed Alliance's challenge to the Forest Service's designation of a minimum road system (MRS) on the grounds that it exceeded the number of miles recommended by the Forest Service's Travel Analysis Report for the Project area. The relevant Council for Environmental Quality (CEQ) rule requires that the Forest Service "identify the [MRS] needed for safe and efficient travel and for administration, utilization, and protection of the National Forest System lands." [226] Additionally, the Forest Service is required to designate roads for decommissioning. The result of the designation process is a "travel analysis report," which sets forth the recommended MRS. The Forest Service completed a travel analysis report (Report) for the Project, which resulted in various recommendations. Although the MRS the Forest Service adopted had more miles of road than was recommended by the Report, the court held that the Forest Service's designations satisfied the requirements in 36 C.F.R. § 212.5(b) and were not arbitrary and capricious. The Forest Service provided ample discussion of their decision and the potential impacts, and thus properly selected Alternative B as the MRS for the Project.

Next, the Ninth Circuit addressed whether the Project's FEIS violated NEPA by improperly incorporating, or "tiering," to the WCS

[226] 36 C.F.R. § 212.5(b)(1) (1998).

amendments. "Tiering" is when an agency "avoid[s] detailed discussion by referring to another document containing the required discussion."[227] Pursuant to 40 C.F.R. § 1502.20, agencies are permitted to tier to documents that have itself been the subject of NEPA review. Further, the Ninth Circuit has interpreted the CEQ regulations to only permit tiering to another EIS.[228] An agency may also incorporate material "by reference" pursuant to 40 C.F.R. § 1502.21. The ultimate inquiry is whether the agency performed the required NEPA analysis. Because the Project FEIS itself includes the required analyses using the information from the WCS as applied to the Project, the court held that the Forest Service did not violate NEPA.

Finally, the Ninth Circuit addressed Alliance's ESA claim. Pursuant to Section 7 of the ESA, Alliance challenged the Forest Service's failure to initiate consultation with the United States Fish and Wildlife Service regarding the endangered bull trout. Because the Forest Service decided to reinitiate consultation for the bull trout over its entire range, including the Payette National Forest, both parties agreed that the claim was moot. Accordingly, the court granted the Forest Service's motion to dismiss the ESA claim and vacated the relevant portion of the district court's decision.

In conclusion, the Ninth Circuit reversed in part, affirmed in part, and remanded in part. The court reversed the district court's findings that the Forest Service did not violate NFMA in approving the Project's replacement of MPC 5.2 with MPC 5.1 and the new definition of "old forest habitat." The court affirmed the district court's rulings regarding approval of the MRS and the FEIS improperly tiering to the WCS. The court vacated the district court's decision regarding the ESA claim. Finally, the court remanded to the district court with instructions to vacate the Forest Service's September 2014 final record of decision and then remand to the Forest Service.

E. Water Law

1. United States v. U.S. Board of Water Commissioners*, 893 F.3d 578 (9th Cir. 2018).*

A group of farmers and Water Commissioners located in the Walker River Basin[229] (collectively, Farmers) filed suit in the United States District Court for the District of Nevada against the Nevada State Engineer (Engineer) and the California State Water Resources Control Board (Board). Farmers objected to the state agencies' granting of applications by the National Fish and Wildlife Foundation (NFWF) and the Walker River Irrigation District (WRID) to change its allocated

227 Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002).

228 League of Wilderness Defs.–Blue Mountain Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1219 (9th Cir. 2008) (collecting cases).

229 Walker River Basin is shared by California and Nevada.

water use of the Walker River.[230] The change applications were submitted to implement the Walker Basin Restoration Program (WBRP).[231] Farmers argued that the granting of the change applications injured their water rights under the Walker River Decree (Decree). The district court[232] (Decree Court) found for Farmers and rejected the state agencies' approval of the change applications.[233] It found that the change applications would injure Farmers' water rights and that Walker Lake was located outside of the Walker River Basin.[234] The Ninth Circuit reversed, holding the district court erred in rejecting the state agencies' findings, and remanded back to the agencies with instructions to grant the change applications.

Allocation of water rights in the entire Walker River Basin is based on the historic Walker River Decree (the Decree). The Decree had its start in 1902 and was the result of years of factfinding and hearings. Because appropriative rights can be established only by reference to all competing rights, exclusive in rem jurisdiction was granted to the Nevada District Court (Decree Court) over the entire Walker River Basin. In 1919, WRID was established. The Decree was issued in final form in 1936.

In 2009, Congress created the WBRP, a voluntary water rights leasing program designed to restore and preserve Walker Lake. NFWF leases or purchases flow and storage rights from willing sellers within the Basin in order to feed Walker Lake. WRID regulates the leasing of rightsholders' claims for instream use. NFWF stipulated that the program waters would be limited to the decreed consumptive use portion, which represented the historical consumptive use portion. The non-consumptive use portion would be administered by the Water Commissioners to avoid conflict and injury to other water rights or other hydrologic loss. NFWF sought change applications in California and Nevada to its appropriative water rights to allow its decreed waters to flow into Walker Lake.

The Ninth Circuit reviewed the Decree Court's legal conclusions, interpretations of the Decree, and its review of state agencies de novo.

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230 Under Article X of the Decree, change applications must first be presented to the state agencies for approval. In Nevada, the appropriate state agency is the Nevada State Engineer. In California, the appropriate agency is the California Water Resources Control Board. Challenges following agency determinations on change applications are then taken to the Decree Court.

231 WBRP works similarly to other regulatory programs like emissions markets or hunting stamps and "proposes to employ free market forces to restore a natural balance between the competing demands of agriculture and conservation." United States v. U.S. Bd. of Water Comm'rs, 893 F.3d 578, 587 (2018). The primary purpose of the program is to restore and maintain Walker Lake.

232 The district court acts as the Decree Court per the Walker River Decree.

233 United States v. Walker River Irr. Dist., No. 3:73-CV-00128-RCJ, 2015 WL 3439122, at *10 (D. Nev. May 28, 2015).

234 The Decree permits a rightsholder to change its use as long as there is no resulting injury to any other rights. Article XIV of the Decree prohibits water from being sold or delivered outside the Walker River Basin.

The Ninth Circuit reviewed the Decree Court's own findings of fact for clear error.

Before the Nevada State Engineer,[235] Farmers objected to NFWF's change applications by arguing it would impermissibly injure their New Land Stored Water Rights (NLSWR)[236] and that Walker Lake was outside the Walker River Basin. The Engineer rejected both arguments and granted NFWF's application. The Engineer found that no party would suffer an injury to their rights because of NFWF's consumptive use stipulation. Because the Water Commissioners had the dedicated non-consumptive use portion to remedy any injury or loss caused by the change, the Engineer rejected Farmers' claimed injury. The Engineer then found that Walker Lake was included in the Walker River Basin.

Before the California Board, Farmers similarly objected to WRID's change applications. The Board found Farmers had failed to demonstrate that their rights would be injured by the proposed change. Under California law, changes in the flow of reservoir waters under WRID's control cannot give rise to an injury because only WRID holds the statutory and decreed rights to this water.[237] The Board further found that Walker Lake is located in the same hydrological drainage basin as the River, rejecting the argument that the change would violate the Decree.

Farmers brought their objections to the Decree Court. The Decree Court rejected both state agencies' rulings and refused to grant the change applications. It found that the Nevada change would injure Farmers' NLSWR because the change would impermissibly increase the overall consumptive portion. It remanded back to the Engineer for further consideration of water consumption. The Court found that the California change would also injure Farmers because it would reduce the amount of stored water available to users of the stored water rights. The Decree Court remanded to the Board for similar consumption considerations. The Decree Court also rejected both states' findings that Walker Lake was part of the Walker River Basin because it was not specifically named in the Decree.

On appeal, the Ninth Circuit focused on the appropriate level of deference that the Decree Court must show the state agencies.[238] The

[235] In Nevada, the appropriate state agency is the Nevada State Engineer. In California, the appropriate agency is the California Water Resources Control Board. Challenges following agency determinations are then taken to the Decree Court.

[236] These water rights are non-decreed rights to reservoir water, not appropriative flow or storage rights.

[237] Reservoir waters are considered stored waters. The release of stored waters constitutes an artificial rather than a natural flow. Downstream users do not have rights to the continued release of an artificial flow of stored waters. If the downstream user has no right to the continued flow, that user cannot be injured by changes in the release of those stored waters. *U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 593 (9th Cir. 2018).

[238] Farmers also argued that a remand order does not constitute an appealable final decision and thus the Ninth Circuit lacked jurisdiction. *See* Collord v. U.S. Dep't of Interior, 154 F.3d 933, 935 (9th Cir. 1998). The Ninth Circuit found the remand order to

Ninth Circuit stated that the Decree Court must afford the same level of deference that the state courts would afford their agencies. Under Nevada law, the Engineer's decision is presumed correct. The Ninth Circuit thus found that the Decree Court erred when it failed to defer to the findings of the Engineer. It further found that to the extent the Decree Court made its own findings, those findings constituted clear error. Contrary to the Decree Court's findings, the change sought by NFWF would not result in any increase in consumptive use.

California is similarly highly deferential to its state agencies. The Ninth Circuit likewise found the Decree Court erred when it rejected the Board's determination. The Ninth Circuit reiterated the Board's determination that downstream rightsholders do not have rights to the discharge of stored water. It further noted that there were no recognized rights to stored reservoir waters outside of the reservoir owner. Accordingly, farmers had no claim to an injury because they had no legal right to the water. The Ninth Circuit thus held it was error for the Decree Court to refuse to approve the Board's granting of the change application.

The Ninth Circuit concluded by finding that Walker Lake is clearly located within the Walker River Basin. It held that the Decree Court incorrectly relied on anecdotal evidence when concluding that only those waters named in the Decree were Basin waters. Based on the common understanding of "basin," the Decree, and Congress's apparent understanding of the hydrological area, the Ninth Circuit easily concluded Walker Lake was part of Walker River Basin. Thus, dedicating waters to Walker Lake was not a violation of the Decree.

Ultimately, the Ninth Circuit reversed the judgment of the Decree Court and remanded the case back to the state agencies with instructions to grant the change petitions and modify the Decree as necessary.

III. MISCELLANEOUS

A. Jurisdictional Issues

1. Center for Biological Diversity v. Export–Import Bank of the U.S.*, 894 F.3d 1005 (9th Cir. 2018).*

Multiple nonprofit environmental organizations[239] (collectively, "the Center") brought this action against Export–Import Bank of the U.S.[240]

be sufficiently final for review. *Id.* at 594–95. Farmers further argued that federal water law should apply. The Ninth Circuit noted that no such law exists, and the Decree presupposed state law would apply in both substance and procedure. Thus, the Ninth Circuit concluded that state water law controlled. *Id.* at 595.

239 The plaintiff organizations included the Center for Biological Diversity, Pacific Environment, and Turtle Island Restoration Network. These non-profit organizations are dedicated to promoting the protection of wildlife and wildlife habitats.

(Ex-Im Bank). The Center alleged that the decision of the Ex-Im Bank to authorize nearly $4.8 billion in financing for liquid natural gas (LNG) projects near the Great Barrier Reef in Australia without following procedures set forth by federal statute violated the Endangered Species Act[241] (ESA), the National Historic Preservation Act[242] (NHPA), and the Administrative Procedure Act[243] (APA). The Ex-Im Bank moved for summary judgment, arguing that the Center lacked standing. The United States District Court for the Northern District of California granted summary judgment for Ex-Im Bank.[244] The Center appealed. On appeal, Ex-Im Bank argued that the Center's action was moot because the loans were already disbursed, the Projects were completed, and one loan had already been fully repaid. The Ninth Circuit affirmed the district court's grant of summary judgment, holding that the action was not moot, but that the Center failed to show that performance of ESA and NHPA procedures could redress alleged environmental injury by Ex-Im Bank, as required for standing.

In May 2012, Ex-Im Bank authorized a $2.95 billion direct loan (the APLNG Loan) for the Australia Pacific LNG (APLNG) Project in interior Queensland. In December 2012, Ex-Im Bank authorized a $1.8 billion direct loan (the QCLNG Loan) for the Queensland Curtis LNG (QCLNG) Project on Curtis Island. Both projects (collectively, the Projects) involved upstream components consisting of wells, with pipelines to downstream components that included facilities for LNG production and shipping. The loans for the Projects only covered fractions of the respective downstream components, and did not cover any upstream components. The APLNG Loan covered approximately 10.5% of the overall APLNG Project costs, while the QCLNG Loan covered approximately 9% of the overall QCLNG Project costs.

The Projects are located within the Great Barrier Reef World Heritage Area. This area supports many threatened and endangered species, leading to its recognition on the World Heritage List in 1981. The World Heritage Committee in 2011 expressed "extreme concern" about LNG facility development within the QCLNG Project area in particular. The Australian government nevertheless approved both Projects after assessing the environmental impacts and effects of proposed mitigation measures. Thereafter, Ex-Im Bank conducted a

240 The Ex-Im Bank is an independent Executive Branch agency of the U.S. government, and the official export credit agency of the United States. The Ex-Im Bank offers financing to U.S.-based enterprises with the goal of keeping U.S. exporters competitive with foreign exporters. In addition to the Ex-Im Bank, Fred P. Hochberg was named as a defendant in his official capacity as Chairman and President of the Ex-Im Bank.

241 Endangered Species Act of 1973, 33 U.S.C. §§ 1531–1544 (2012).

242 National Historic Preservation Act, 54 U.S.C. §§ 300101–307108 (2012).

243 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

244 Ctr. for Biological Diversity v. Exp.–Imp. Bank of U.S., No. C 12-06325 SBA, 2016 WL 8230657, at *10 (N.D. Cal. Mar. 31, 2016).

review of the Projects' environmental impacts based on the same documents on which the Australian government had relied, as well as other unspecified documents. By the time Ex-Im Bank completed its review and approved financing of each Project, progress on the relevant components was substantially underway.

The Center filed suit on December 13, 2012, alleging that the Projects would contribute substantially to environmental degradation in the Great Barrier Reef area, and sought declaratory and injunctive relief compelling Ex-Im Bank to comply with the procedural requirements of the ESA and NHPA. Ex-Im Bank moved for summary judgment. The district court granted the Ex-Im Bank's motion on March 31, 2016, after finding that the Center failed to establish redressability necessary for standing, because the Center did not offer a sufficient basis to determine that there was a reasonable probability that the Projects would be halted if Ex-Im Bank's funding was vacated.

Construction of the Projects continued before and after the district court's summary judgment order. The relevant portion of the QCLNG Project was completed in November 2015; the QCLNG Loan was fully disbursed on December 15, 2015, and fully repaid on July 17, 2017. The APLNG Loan was fully disbursed on March 30, 2017, and the APLNG Project was completed on August 23, 2017. The Ninth Circuit reviewed the district court's grant of summary judgment de novo.

The Ninth Circuit began by evaluating whether the case was moot. Ex-Im Bank argued that the Center's claims were moot because the Projects were both completed, the loans had both been fully disbursed, and one loan had already been repaid. Ex-Im Bank argued that given these developments, it could do nothing to affect the environmental impact of the Projects. The Ninth Circuit disagreed, holding that the claims were not moot. The Ninth Circuit reasoned that although it "seems highly unlikely" that Ex-Im Bank could somehow affect the environmental impact of the Projects, it "seems possible" based on the limited record that Ex-Im Bank could relax or diminish remaining contractual duties owed to it in exchange for greater environmental remediation or reporting. Because a defendant arguing mootness must establish that relief is impossible rather than merely unlikely or conjectural,[245] the Ninth Circuit found that Ex-Im Bank failed to meet its burden.

The Ninth Circuit next analyzed whether the Center lacked standing.[246] The Center argued that the district court failed to apply the proper standard for cases involving a procedural injury, and that a favorable decision would redress the injuries it alleged because Ex-Im Bank had power to impose additional environmental conditions on the

[245] *See* Timbisha Shoshone Tribe v. U.S. Dep't of Interior, 824 F.3d 807, 811–12 (9th Cir. 2016).

[246] The irreducible elements of standing are 1) an injury that is 2) fairly traceable to the defendant's allegedly unlawful conduct, that is 3) likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 751 (1984).

projects. The Center pointed to evidence in the record showing that Ex-Im Bank had requested environmental information, reports, and updates from the Projects' proponents; Ex-Im Bank memoranda stating that Ex-Im Bank perceived its support to be needed for each Project; and the size of the loans in relation to cost of the corresponding project components. The Ninth Circuit disagreed, and held that the Center failed to show that the performance of additional procedures under the ESA or the NHPA could redress the injuries alleged. In reaching this conclusion, the court explained that even under the relaxed standard for redressability in the case of procedural injuries,[247] a claim lacks redressability if the plaintiff will suffer the injury even if the court rules in its favor. Because the funding contracts were not part of the record, the Ninth Circuit found that the Center could not point to any actions the Ex-Im Bank could take that would alter the Projects.

In finding that the Center had failed to show redressability necessary for standing, the Ninth Circuit reasoned further that because the projects were already underway by the time funding from the Ex-Im Bank was authorized, and nearly halfway complete in the case of the QCLNG Project, the Projects did not rely on Ex-Im Bank financing. The Ninth Circuit highlighted evidence in the record indicating that the Projects' joint venture partners possessed considerable financial resources, and that the Ex-Im Bank believed financing for the Projects would have been provided by foreign export credit agencies if it declined financing.

In sum, the Ninth Circuit held that the Center's claims were not moot because the evidence in the record did not show that it was impossible for a court to grant effective relief to the Center. However, the Ninth Circuit found that the Center lacked standing because it failed to show that the performance of additional procedures under the ESA or the NHPA could redress the injuries it had alleged. The Ninth Circuit thus affirmed the district court's grant of summary judgment in favor of the Ex-Im Bank.

2. Bohmker v. Oregon*, 903 F.3d 1029 (9th Cir. 2018).*

Twelve plaintiffs[248] with mining claims on federal land in Oregon (collectively, plaintiffs) sued the State of Oregon, seeking to restrain and have declared preempted a state moratorium on motorized mining in the beds and banks of waterways containing essential salmon habitat. The United States District Court for the District of Oregon ruled that

[247] As the Court explained, plaintiffs bringing procedural rights claims against government agencies can establish standing without needing to establish a likelihood that the agency would render a different decision after going through the proper procedural steps. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

[248] The plaintiffs were Joshua Caleb Bohmker, Larry Coon, Walter R. Evens, Galice Mining District, Jason Gill, Michael Hunter, Michael P. Lovett, Joel Grothe, Millennium Diggers, Willamette Valley Miners, Don Van Orman, and J.O.G. Mining L.L.C.

the moratorium was a reasonable environmental regulation and therefore not preempted.[249] Plaintiffs appealed, arguing that the lower court applied the incorrect preemption test. After briefing in the Ninth Circuit was complete, the Oregon legislature repealed the moratorium and imposed a permanent restriction on the use of motorized mining equipment in waters designated as essential salmon habitat. The Ninth Circuit affirmed, ruling that Senate Bill 3 was not preempted.

Plaintiffs hold mining claims on federal land in Oregon and use a form of motorized mining known as suction dredge mining to extract gold deposits from waterways. The Oregon legislature adopted Senate Bill 838 in 2013,[250] imposing a five-year moratorium on motorized mining in areas designated as essential salmon habitat, which was set to begin in 2016. Plaintiffs sued the State of Oregon in 2015, seeking an injunction restraining the State of Oregon from enforcing Senate Bill 838 and a declaration that Senate Bill 838 was preempted by federal law.[251] The district court granted the State's motion for summary judgment, ruling that Senate Bill 838 was a reasonable environmental regulation and thus not preempted.

Plaintiffs appealed, and after briefing to the Ninth Circuit was complete, the Oregon legislature repealed Senate Bill 838 and adopted Senate Bill 3,[252] which imposed a permanent restriction on motorized mining in waters designated as essential salmon habitat. The parties agreed by stipulation that the adoption of Senate Bill 3 did not moot plaintiffs' appeal. The Ninth Circuit reviewed the district court's ruling de novo.

Plaintiffs first argued that Senate Bill 3 is field preempted,[253] because it constitutes "land use planning" under the Supreme Court's decision in *California Coastal Commission v. Granite Rock Co.*[254] The Ninth Circuit disagreed, holding that Senate Bill constitutes an environmental regulation rather than a land use planning measure, and therefore is not field preempted by federal law governing mining claims on federal land. The Ninth Circuit reasoned that Senate Bill 3 does not choose or mandate land uses, has an express environmental purpose of protecting sensitive fish habitat, is not part of Oregon's land use system,

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249 Bohmker v. State, 172 F. Supp. 3d 1155, 1166 (D. Or. 2016).

250 S.B. 838-B, ch. 738, § 1, 77th Legis. Assemb., Reg. Sess. (Or. 2013).

251 The laws that the plaintiffs argued preempted Senate Bill 838 were the Mining Act of 1872, 30 U.S.C. §§ 22–42 (2012); the Surface Resources and Multiple Use Act of 1955, 30 U.S.C. §§ 611–614 (2012); the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (2012); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2012); the Multiple-Use and Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012); the National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (2012); and the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2012).

252 S.B. 3, ch. 300, § 4(2), 79th Legis. Assemb., Reg. Sess. (Or. 2017).

253 A state law is field preempted, when it falls within a field that Congress has "evidence[d] an intent to occupy." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

254 480 U.S. 572 (1987) (holding reasonable state environmental regulations are not preempted by federal land use statutes or regulations, but land use regulations may be).

and is carefully tailored to achieve its environmental purpose without unduly interfering with mining.

Plaintiffs next contended that Senate Bill 3 is conflict preempted[255] because it is "prohibitory, not regulatory, in its fundamental character." The Ninth Circuit disagreed, holding that Senate Bill 3 is not conflict preempted because of its "fundamental character." The Ninth Circuit reasoned that the federal statutes regulating mining do not evince a congressional purpose of categorically preempting state environmental regulations that are "prohibitory" in their "fundamental character." The Ninth Circuit further explained that the distinction between "prohibitory" and "regulatory" regulations is not workable or grounded in the relevant federal statutes. In so holding, the Ninth Circuit distinguished the Eighth Circuit's decision in *South Dakota Mining Ass'n v. Lawrence County*,[256] reasoning that Senate Bill 3 has a valid environmental purpose and compliments federal mining law, whereas the ordinance in *South Dakota Mining* was an attempt by county voters to overrule federal land use decisions.

Third, plaintiffs argued that Senate Bill 3 does not constitute "reasonable state environmental regulation" because it prohibits a particular method of mining in designated habitat rather than imposing a prescribed limit or pollution limit, and therefore is conflict preempted. The Ninth Circuit disagreed, reiterating that the preemption analysis does not turn on a formalistic distinction between measures that are "prohibitory" or "regulatory." The Ninth Circuit explained that unreasonable, excessive, or pretextual state laws interfering unnecessarily with mining development on federal land might be conflict preempted, but held that Senate Bill 3 did not cross that line.

Finally, plaintiffs urged that unspecified issues of material fact precluded entry of summary judgment for the State. The Ninth Circuit disagreed, explaining that it had viewed the evidence in the light most favorable to plaintiffs and assumed that Senate Bill 3 would have a significant adverse impact on plaintiffs' mining operations. Thus, assuming such impact, the only material dispute was the question of whether Senate Bill 3 was preempted. Explaining that this question was one of law, the Ninth Circuit held that summary judgment was appropriate.

In sum, the Ninth Circuit held that Oregon Senate Bill 3 was neither field preempted nor conflict preempted by federal mining laws, and that no genuine issue of material fact precluded entry of summary judgment. On this basis, the Ninth Circuit affirmed the district court in granting summary judgment for the State of Oregon.

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255 A state law "not entirely displaced . . . is still preempted to the extent it actually conflicts with [federal] law." *Silkwood*, 464 U.S. at 248.

256 155 F.3d 1005 (8th Cir. 1998).

B. Tribal Law

1. United States v. Walker River Irrigation District*, 890 F.3d 1161 (9th Cir. 2018).*

This case is one part of a long-running dispute over water rights in the Walker River Basin.[257] The Walker River Paiute Tribe (the Tribe)[258] and the United States filed counterclaims against the Nevada Walker River Irrigation District (WRID) and other parties[259] asserting various new water rights. At issue on appeal was the District Court for the District of Nevada's sua sponte dismissal of the Tribe's and the United States' counterclaims on res judicata grounds.[260] The Ninth Circuit held that the district court erred in dismissing the claims on res judicata grounds without giving the parties the opportunity to brief the matter, reversing and remanding for reassignment to a different district judge. The Ninth Circuit reviewed the district court's dismissal of the counterclaims de novo. The Ninth Circuit also reviewed the district court's interpretation of the judicial decree de novo.

This case stems from conflicting claims to water rights in the Walker River Basin. In 1991, WRID petitioned for the court's continuing jurisdiction over the Walker River.[261] The Tribe answered WRID's petition in 1992 (amended in 1997) by filing three counterclaims. The first involved the Tribe's right to store water in the Weber Reservoir. The second involved the Tribe's right to use water or lands restored to the reservation pursuant to the Act of June 22, 1936 (1936 Decree or Decree).[262] The third asserted the Tribe's right to use groundwater underlying and adjacent to the Reservation lands. Separately, the United States filed counterclaims asserting eleven claims. These claims fell into three categories: 1) claims on behalf of the Tribe; 2) claims on behalf of various other Indian tribes and Indian individuals in the Walker River Basin; and 3) claims for several federal properties.

In 2011, the case was reassigned from Judge Reed to Judge Jones. In 2013, the district court scheduled briefing on potential motions to dismiss the counterclaims and Judge Jones instructed the parties that the first round of motions should address jurisdiction only, but should

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257 In 1924, the United States filed suit on behalf of the Walker River Paiute Tribe to establish water rights in the Walker River Basin. In 1936, the court entered a decree awarding water rights to the Tribe and other claimants (referred to as the "1936 Decree" or "Decree"). In 1940 the district court modified the decree, retaining jurisdiction over it.

258 The Walker River Paiute Reservation is located in the Walker River Basin southeast of Reno, Nevada. The Reservation was established for the benefit of the Tribe in 1859.

259 Other parties include: 1) Lyon County, Nevada, 2) Mono County, California, and 3) ranching entities, ranchers, and other individuals.

260 United States v. Walker River Irr. Dist., No. 3:73-CV-00127-RCJ, 2015 WL 3439106, at *6 (D. Nev. May 28, 2015).

261 The petition was in response to a decision by the California State Water Resources Control Board to restrict WRID's California water licenses.

262 *See* Act of June 22, 1936, 49 Stat. 1806–07.

not address other jurisdictional issues, like res judicata. WRID's motion to dismiss under Rule 12(b)(1) argued that the court lacked continuing jurisdiction to adjudicate new claims for water rights, and that the United States and Tribe must file a new action. Pursuant to Judge Jones' instruction, the parties did not brief the issue of res judicata. In 2015, the district court granted WRID's motion to dismiss all counterclaims as being barred by res judicata, or laches, or for lack of jurisdiction. Although the court concluded it had jurisdiction, it held that the present actions were a new action, thus precluding the claims.[263] The court relied on *Nevada v. United States*[264] and the language of the 1936 Decree in reaching its conclusion.

First, the Ninth Circuit addressed whether, pursuant to the 1936 Decree, the district court had continuing jurisdiction to hear the counterclaims. The district court was correct in finding it retained jurisdiction to modify water rights, but erred in finding that the counterclaims were a "new action." Looking at the language of the Decree, the Ninth Circuit agreed with the district court's broader reading of "correcting or modifying", finding that "modify" includes the right for the court to adjudicate yet-unlitigated claims to water rights. On the other hand, the district court erred in its reasoning for finding the counterclaims were a new action. The district court's rationale behind its characterization was the fact that the Judge Reed had assigned the counterclaims to a subfile, thus giving them "their own administrative existence."[265] Refuting this rationale, the Ninth Circuit said that a subfile designation is actually a logical indication that it is part of a larger case, not a new action. Furthermore, in Judge Reed's denial of an earlier motion to dismiss, he rejected an argument that the counterclaims were part of a new action. Thus the Ninth Circuit held that the counterclaims were not a new action.

Next, the Ninth Circuit turned to the res judicata issue. Relying on prior Ninth Circuit precedent, the court said that it would not uphold dismissal on res judicata grounds when parties were not given an opportunity to brief the issues. This conclusion is further supported by the fact that the district court explicitly told the parties not to brief the res judicata issues. Additionally, because the counterclaims were not a new action, the court noted that traditional preclusion principles do not apply. In this case, the counterclaims are "subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated."[266]

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263 The Court found the counterclaims were a new action for two reasons. One, the 1936 Decree "prevents the United States (like all parties) from claiming any additional rights beyond those adjudicated therein." *Walker River Irr. Dist.*, 2015 WL 3439106, at *6. And two, "[t]he Sub-files were given their own administrative existences, so they are independent cases at least in form." *Id.*

264 463 U.S. 110 (1983).

265 *Walker River Irr. Dist.*, 2015 WL 3439106, at *6.

266 Arizona v. California, 460 U.S. 605, 619 (1983).

Finally, the Ninth Circuit requested that the case be reassigned to a different district court judge. The court concluded that reassignment was appropriate for two reasons.[267] The first reason was because of the substantial difficulty Judge Jones would face in putting out of his mind the previously expressed views about the federal government and its attorneys. The second reason was because reassignment would preserve the appearance of justice. The reassignment order was applied to all of the Walker River Basin water rights case pending in the District of Nevada.

In conclusion, the Ninth Circuit reversed and remanded, reassigning the case to a different district court judge. The district correctly held that it retained jurisdiction to modify the Decree, but erred in finding the counterclaims were part of a new action and erred in sua sponte dismissing the counterclaims on res judicata grounds.

2. Cachil Dehe Band of Wintun Indians of Colusa Indian Community. v. Zinke*, 889 F.3d 584 (9th Cir. 2018).*

The Colusa Indian Community (Colusa) and various citizens' groups and individuals [268] (collectively, plaintiffs) filed complaints against the Secretary of the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA), challenging the DOI's trust acquisition of land for the benefit of the Estom Maidu Tribe of the Enterprise Rancheria, California (Enterprise). Enterprise had requested that DOI take lands into trust so that Enterprise could develop an off-reservation casino and hotel in Yuba County, California. Plaintiffs contended that the land acquisition was invalid because 1) DOI lacked statutory authority to take land into trust for Enterprise, and 2) DOI failed to meet several requirements under the Indian Gaming Regulatory Act[269] (IGRA) and the National Environmental Policy Act [270] (NEPA). The United States District Court for the Eastern District of California granted DOI's motion for summary judgment responding to the complaints.[271] On appeal, the Ninth Circuit affirmed the district court's decision, holding that the trust acquisition was valid.

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[267] The reasons given are based on three factors used to determine whether reassignment is appropriate: 1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, 2) whether reassignment is advisable to preserve the appearance of justice, and 3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness.
United States v. Rivera, 682 F.3d 1123, 1127 (9th Cir. 2012).

[268] Plaintiffs include: Citizens for a Better Way; Stand Up for California!; Grass Valley Neighbors; William J. Connelly; James M. Gallagher; Andy Vasquez; Dan Logue; Roberto's Restaurant; and Robert Edwards.

[269] An Act to regulate gaming on Indian lands, 25 U.S.C. §§ 2701–2721 (2012).

[270] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

[271] Citizens for a Better Way v. U.S. Dep't of Interior, No. 2:12-cv-3021-TLN-AC, 2015 WL 5648925 at *24 (E.D. Cal. Sept. 24, 2015).

In 2002, Enterprise submitted a fee-to-trust application with DOI pursuant to the Indian Reorganization Act[272] (IRA), triggering the following events. First, Enterprise retained Analytical Environmental Services (AES) to submit a draft Environmental Assessment (EA). AES submitted a draft EA to the BIA, which reviewed the draft EA and suggested several revisions. The BIA sent a copy of the finalized EA to Colusa for public review and comment. Second, AES prepared an Environmental Impact Statement (EIS) pursuant to an agreement with the BIA. Under the BIA's supervision, AES prepared a draft EIS (DEIS) that analyzed five potential alternatives to the regulatory action. The BIA made the DEIS available for review and comment. Third, DOI consulted with State and local officials within a twenty-five-mile radius of the proposed site and received concurrence from California Governor Jerry Brown. Fourth, the BIA completed the final EIS (FEIS), containing the same five alternatives as in the DEIS. Finally, the BIA issued a Record of Decision under the IRA (IRA ROD) favoring the trust acquisition of the site in Yuba County.

The IRA authorizes DOI to take land into trust for the purpose of providing lands for Indians. The IRA defines Indians as persons of Indian descent who are members of a recognizable Indian tribe that was under Federal jurisdiction at the time of the IRA's enactment.[273] The implementing regulations for the IRA provide that DOI must specify the need for the subject trust acquisition before taking regulatory action.

IGRA prohibits gaming on lands which DOI takes into trust for an Indian tribe after 1988, unless the proposed regulatory action passes the four-step Secretarial Determination test. First, DOI must consult with nearby Indian tribes. Second, DOI must determine that the proposed site is in the best interest of the tribe which will engage in the gaming. Third, DOI must determine that the proposed site will not be detrimental to the surrounding community. Fourth, DOI must receive concurrence from the Governor of the affected state with respect to the proposed regulatory action.

Plaintiffs filed separate actions against DOI with respect to the proposed trust acquisition, which the district court consolidated into a single case. Plaintiffs moved for injunctive relief to prevent DOI from taking the land into trust for Enterprise. The district court denied the plaintiffs' motion for injunctive relief, and the Yuba site was taken into trust in 2013. The lawsuit continued, and the parties cross-moved for summary judgment. In its motion for summary judgment, Colusa submitted a declaration by Alan Meister and an attached study ("Meister Declaration"), dated 2014, alleging the devasting economic impact of Enterprise's proposed casino on Colusa. DOI moved to strike

272 An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes, 25 U.S.C. §§ 5101–5144 (2012).

273 *Id.* § 5129.

the Meister Declaration from the Record. The district court granted DOI's motion to strike the Meister Declaration, on the grounds that it post-dated the Agency decision, and further granted DOI's motion for summary judgement.

On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment de novo and its order to strike the Meister Declaration for abuse of discretion. Moreover, the Court used the standard of review under the Administrative Procedure Act,[274] which provides that an agency's action may be reversed only if it was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.[275]

First, the Ninth Circuit analyzed the various arguments made by plaintiffs under the IRA. Citizens argued that the DOI failed to establish that Enterprise was an Indian Tribe under federal jurisdiction the year the IRA was passed. Citizens' contention relied on the argument that although Indians consisting of the ancestors of Enterprise lived on the reservation at that time, they were not part of a single, recognized tribe. The Court rejected this argument because the IRA contains an expansive definition of tribes, which includes Indians residing on one reservation. Moreover, Colusa argued that the regulatory action failed to meet the "need" requirement under the IRA because the parcel was not essential for Enterprise's economic development. The Court disposed of this argument because it was unsupported by any case law and it is unclear how any parcel would meet the need requirement if an alternative parcel existed. Furthermore, the Court rejected the argument that the error in the Federal Register notice describing the forty-acre parcel as eighty acres rendered the final ROD arbitrary and capricious, reasoning that the mistaken description was a trivial error.

Second, the Ninth Circuit analyzed the challenges made by plaintiffs under IGRA. Colusa argued that the BIA erred when it failed to consult Colusa with respect to the first step of the Secretarial Determination. The Court rejected this argument, pointing to evidence that the BIA responded to Colusa's complaint relating to Colusa's exclusion from the process and offered Colusa the opportunity to submit comments. Moreover, Colusa brought a facial and as-applied challenge to the twenty-five-mile regulation. The Court disposed of this challenge because Colusa failed to 1) explain why in all circumstance the definition of "nearby" meaning within twenty-five miles is arbitrary and capricious or 2) show that the regulation was invalid as applied to them.

Colusa further argued that the district court abused it discretion when it struck the Meister Declaration because it was necessary to explain technical matters and was not essential for the agency to

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[274] Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

[275] Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States, 384 F.3d 721, 727 (9th Cir. 2004).

determine all relevant factors. The Court rejected these arguments because the Meister Declaration failed to proffer new factors or explain terms.

Citizens also argued that the DOI's determination that the proposed project would not cause detrimental harm to the surrounding community was arbitrary and capricious. To support this argument, Citizens asserted that the mitigation measures to which Enterprise agreed were unenforceable. As a matter of first impression, the Court found that it was within the agency's discretion to determine the likelihood that required mitigation measures will be followed. The Court reasoned that, under the arbitrary and capricious standard, a court should refrain from substituting its judgment for that of the agency.

Finally, the Ninth Circuit analyzed the challenges made by plaintiffs under NEPA. Colusa argued that the FEIS's "purpose and need" statement was artificially limited and led to a deficient analysis of the possible alternatives. The Court disagreed, explaining that the BIA considered five possible alternatives. In addition, Colusa argued that the FEIS should have analyzed two additional sites. The Court rejected this argument, reasoning that because Colusa failed to propose these two sites, Colusa waived its objection to the FEIS with respect to failing to consider the additional sites. Next, Colusa argued that the biological data in the FEIS was outdated. The Court disagreed, explaining that only two appendices among the many contained in the FEIS used data older than 2006.

Furthermore, Colusa challenged the adequacy of the economic data used. However, the Court disposed of this argument by reasoning that economic harm data is outside of the scope of NEPA's interest. Colusa also argued that the FEIS failed to take a hard look at the air quality impact of the proposed casino and hotel and the potential harm to six species of fish. The Court determined that Colusa waived the first argument for failure to develop it and disposed of the second argument because Colusa failed to provide any evidence that undermined the FEIS statement that the six fish species did not live near the project site.

Lastly, Colusa argued that the oversight of the FEIS was fatally flawed. Colusa's contention was based on two arguments: 1) Enterprise, rather than the BIA, chose AES as the contractor for the creation of the EIS, and 2) AES had an impermissible financial interest in the outcome of the project. The Court disposed of the first argument, explaining that Enterprise contracted with AES under the BIA's supervision to create a draft EA. The Court then disposed of the second argument because Colusa failed to show that there existed an impermissible conflict of interest. Moreover, the Court explained that a conflict of interest determination is deferred to the relevant regulatory agency.

In sum, the Ninth Circuit held that the trust acquisition complied with relevant regulatory requirements and was valid. The Court concluded that Enterprise was a tribe for whom the DOI could acquire

land in trust, and that the DOI properly considered Enterprise's need for the land. Moreover, the Court concluded that plaintiffs failed to proffer any evidence suggesting that the proposed action was procedurally flawed.

C. Constitutional Rights and Climate Change

1. In re United States*, 884 F.3d 830 (9th Cir. 2018).*

Twenty-one youth plaintiffs[276] brought suit against the United States, the President, and several Executive Branch officials[277] and agencies[278] (collectively, "defendants") in the United States District Court for the District of Oregon, claiming defendants have violated plaintiffs' constitutional rights by contributing to climate change. Plaintiffs alleged that defendants have known that burning fossil fuels causes carbon dioxide emissions that lead to climate change, and that defendants have nevertheless continued to enable fossil fuel usage through government policies. They contend that these policies have allowed atmospheric carbon dioxide concentrations to reach unprecedented levels, and that they are injured by the resulting change in climate in violation of their constitutional rights. The defendants moved to dismiss the suit, but the district court denied the motion, holding that plaintiffs plausibly alleged standing, did not raise non-justiciable political questions, and asserted plausible claims.[279] The defendants also moved to stay the litigation and certify an order for interlocutory appeal, which the district court denied. The defendants then petitioned the Ninth Circuit for a writ of mandamus and asked for a stay of the litigation. The Ninth Circuit granted the request for stay, and found the petition for mandamus premature and denied it without prejudice.

When deciding whether to grant a writ of mandamus, the court is guided by five factors from *Bauman v. United States District Court.*[280] First, whether the petitioner has no other means than the petition for obtaining the desired relief. Second, whether the petitioner will be damaged in a way that could not be corrected by appeal. Third, whether

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276 Plaintiffs included a group of young people between the ages of eight and nineteen; Earth Guardians, an association of young environmental activists; and Dr. James Hansen, a guardian for future generations.

277 Officials included Christy Goldfuss, Shaun Donovan, John Holdren, Ernest Moniz, Sally Jewell, Anthony Foxx, Thomas J. Vilsack, Penny Pritzker, Ashton Carter, John Kerry, and Gina McCarthy.

278 The agencies included the United States Department of Interior, United States Department of Transportation, United States Department of Agriculture, United States Department of Commerce, United States Department of Defense, United States Department of State, United States Environmental Protection Agency, and United States Department of Energy.

279 Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

280 557 F.2d 650 (9th Cir. 1977).

the district court's order was clearly erroneous. Fourth, whether the district court's order was an oft repeated error. Lastly, the whether the district court's order raises issues of first impression that would evade appellate review. The Ninth Circuit noted that these factors may not be relevant to every case, and that mandamus review is discretionary even when all the factors are satisfied.

For the first factor, defendants claimed that mandamus was their only means of obtaining relief from possibly burdensome discovery. However, the district court had not yet issued any discovery orders, nor had the plaintiffs filed any motions to compel discovery. Further, defendants have the opportunity to challenge a specific discovery request based on privilege or relevance. The Ninth Circuit found that mandamus relief was inappropriate absent any district court order concerning discovery. For the second factor, defendants argued that allowing trial on the plaintiffs' claims would threaten separation of powers. The defendants claimed that defending the litigation would unnecessarily burden the President, and that he had been named unnecessarily. The defendants had not moved to dismiss the President as a party, which caused the Ninth Circuit to deem the argument premature. Noting that litigation burdens are part of our legal system, the Ninth Circuit found that the errors asserted may be corrected through the ordinary course of litigation and the second factor was not satisfied.

Third, as to whether the district court's order was clearly erroneous, the defendants conceded that there is no controlling precedent on the plaintiffs' theories. Without controlling precedent, the Ninth Circuit declined to find clear error at such an early stage. Fourth, the Ninth Circuit found no oft repeated error or disregard of federal rules. Fifth, while the legal theories at hand were issues of first impression, the Ninth Circuit found that they were not the type that would evade appellate review. The defendants did not satisfy any of the factors the court considers when deciding a writ of mandamus. The Ninth Circuit acknowledged that some of the plaintiffs' claims are very broad, but concluded that the district court would need to consider them further in the first instance to develop a record for appellate review.

In conclusion, the Ninth Circuit denied the defendants' petition for a writ of mandamus at this stage in the litigation.