

2025 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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I. ENDANGERED SPECIES AND WILDLIFE

1. *Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144 (9th Cir. 2024)

Defendant Scott Timber¹ sought review from the Ninth Circuit for the U.S. District Court for the District of Oregon's decision to permanently enjoin one of Scott Timber's logging operations. Plaintiff Cascadia Wildlands² alleged that Scott Timber's timber harvest would violate section 9 of the Endangered Species Act (ESA).³ This was the second time this case had reached the Ninth Circuit. The first time, the Ninth Circuit had reversed and remanded the district court's grant of a permanent injunction against Scott Timber. On remand, the district court had denied Defendant's motion to dismiss for lack of subject matter jurisdiction. The district court also had determined on remand that Defendant's project would result in ESA violations. Thus, the district court again granted a permanent injunction against Scott Timber; and Scott Timber subsequently appealed the district court's decision for a second time. In this case, the Ninth Circuit held that Scott Timber's proposed timber harvest would violate the ESA by resulting in a "take" of marbled murrelets. The Court also held that plaintiff Cascadia Wildland's notice to Scott Timber was adequate for the commencement of the citizen suit.

In 2014, Scott Timber acquired the Benson Ridge Tract from the State of Oregon. Until its auction, this piece of land had been part of Oregon's Elliot State Forest. In 2012, Cascadia Wildlands had sued Oregon's governor, alleging that state-sanctioned logging in the Elliot State Forest caused takes of marbled murrelets, in violation of the ESA. The marbled murrelet is a seabird in the Pacific Northwest that nests and lays its eggs in old-growth forest. Logging of old-growth forest in the Pacific Northwest has significantly reduced the bird's nesting habitat. As such, in 1992 the U.S. Fish and Wildlife Service listed the marbled murrelet as a threatened species under the ESA. In Cascadia Wildlands' suit against Oregon, the U.S. District Court found that Cascadia Wildlands was likely to win on the merits and issued a preliminary injunction to stop logging in the Elliot State Forest where marbled murrelet nested.⁴ Oregon then cancelled its logging operations in Elliot State Forest where there were marbled murrelets. The state also auctioned off the Benson Ridge Tract, which Scott Timber acquired at auction.

¹ Roseburg Resources Company and RLC Industries Company were also defendant-appellants.

² The Center for Biological Diversity and the Audubon Society of Portland were also plaintiff-appellees.

³ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2004).

⁴ *Cascadia Wildlands v. Kitzhaber*, No. 3:12-cv-00961, 2012 WL 5914255, at *2 (D. Or. Nov. 19, 2012).

However, the district court's decision to enjoin the state of Oregon had only provided that the Benson Ridge Tract *likely* contained marbled murrelets. The state had not surveyed the piece of land to conclusively determine the bird's presence. In May of 2014, surveyors from Coastal Range Forest Watch made three detections of marbled murrelets on the Benson Ridge Tract. Following that survey, in June 2014, Cascadia Wildlands sent an ESA citizen-suit notice letter to Scott Timber. The letter stated that because the Benson Ridge Tract likely contained marbled murrelets, logging of that area would violate section 9 of the ESA. The notice letter further stated that Cascadia Wildlands would sue Scott Timber if Scott Timber logged there. In, 2015 and 2016, Scott Timber employed its own surveyor to evaluate marbled murrelet presence on the Benson Ridge Tract. Then, in August 2016, Scott Timber notified the Oregon Department of Forestry of its intention to clear-cut 49 acres in the middle of the Benson Ridge Tract. That same month, Cascadia Wildlands sued Scott Timber for a single claim of violation of section 9 of the ESA.

This case raises two issues. The first issue is whether Cascadia Wildlands complied with the ESA citizen-suit notice requirement. The second issue is whether Scott Timber's logging in the Benson Ridge Tract would result in a "take" of marbled murrelets, as defined by the ESA. The Ninth Circuit reviewed the first issue *de novo*. On the second issue, the Ninth Circuit reviewed the district court's findings of fact for clear error and the district court's conclusions of law *de novo*.

As a threshold issue, Scott Timber had asserted that Cascadia Wildlands' notice letter was invalid because Cascadia Wildlands had submitted the letter two years prior to Cascadia Wildlands filing its case. In evaluating the adequacy of the notice letter, the Ninth Circuit evaluated three issues. These were whether the notice letter was jurisdictional, whether Scott Timber had forfeited its ability to object to the notice letter, and whether the notice letter provided adequate notice.

The Ninth Circuit first determined that the ESA citizen-suit notice requirement was a mandatory claims-processing rule and not a jurisdictional issue. In reaching this decision, the Ninth Circuit overturned its own precedent from *Save the Yaak Comm. v. Block*.⁵ In reversing this precedent, the Ninth Circuit relied on the Supreme Court's *Arbaugh* line of cases. The *Arbaugh* cases demand a clear statement from Congress for statutory requirements to be jurisdictional.⁶ Using this rule from the Supreme Court, the Ninth Circuit found that the text of the ESA did not provide such a clear statement. Section 1540(g)(2)(A)(i), which creates the notice requirement, is not labeled jurisdictional nor is it in a jurisdiction-granting section of the statute.⁷

⁵ *Save the Yaak Comm. v. Block*, 840 F.2d 714 (9th Cir. 1988).

⁶ *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), *Reed Elsevier, Inc v. Muchnick*, 559 U.S. 154 (2010).

⁷ 16 U.S.C. § 1540(g)(2)(A)(i).

The Ninth Circuit then exercised its discretion to review the adequacy of Cascadia Wildlands' notice letter. In doing so, the Ninth Circuit overlooked the fact that Scott Timber had not raised the adequacy of the notice letter on its first appeal to the Ninth Circuit. The Ninth Circuit could have considered the issue waived since it had not been raised on the first appeal, the Court recognized that Scott Timber may have understood Ninth Circuit precedent to permit Scott Timber to raise the adequacy of notice at any stage in the litigation. The Ninth Circuit proceeded to evaluate the "overall sufficiency" of the notice letter. In doing so, the Ninth Circuit examined both the notice document itself and Scott Timber's actions to see if Scott Timber understood the notice or reasonably should have understood the notice. The Ninth Circuit first noted that Scott Timber had been aware of the section 9 injunction on the Benson Ridge Tract before Scott Timber's acquisition of that property. As such, the Court determined that Scott Timber was on notice that any logging on the Benson Ridge Tract could be alleged an ESA violation. Further, the Court pointed out that after Scott Timber received the 2014 notice, Scott Timber had hired its own surveyors to look for marbled murrelet on the Benson Ridge Tract. Finally, the Ninth Circuit determined that the anticipatory nature of Cascadia Wildlands' notice was not relevant. The Court declined to adopt a bright line rule on anticipatory notices. The Ninth Circuit ultimately determined that Cascadia Wildlands' notice letter to Scott Timber was adequate.

The Ninth Circuit then evaluated whether the Scott Timber's proposed logging harvest would result in a take of marbled murrelets. In considering this issue, the Ninth Circuit examined whether Scott Timber's proposed timber harvest would cause actual harm to marbled murrelets and whether Cascadia Wildlands had established proximate causation. The Ninth Circuit first found that Scott Timber's harvest would cause actual harm to marbled murrelets. The Court noted Ninth Circuit precedent establishing that habitat modifications that impair the breeding and sheltering of a protected species amount to harm under the ESA.⁸ Scott Timber argued that to evaluate actual injury, the Court should find that the habitat was "essential" to the marbled murrelets survival. The Court disagreed with this argument, instead stating that the Ninth Circuit had never used that heightened standard. Moreover, the Ninth Circuit found the district court's reliance on the PSG Protocol suitable for surveying to find marbled murrelet presence. The Ninth Circuit upheld the district court's determination that Scott Timber's harvest would directly damage and fragment occupied marbled murrelet breeding habitat. These impacts, the Ninth Circuit said, amounted to actual harm under the ESA.

The Ninth Circuit also found that Scott Timber's activities would be the proximate cause of the harm sustained by the marbled murrelet. On this issue, the Court upheld the district court's causation analysis. The district court had found that there were marbled murrelet in the Benson

⁸ *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996).

Ridge Tract, that the logging would eliminate 49 acres of marbled murrelet habitat, and that the logging would destroy nests and impede marbled murrelet breeding. Further, the Ninth Circuit found that the district court's use of expert testimony on this issue was appropriate. The Ninth Circuit affirmed the district court's finding that Scott Timber was the proximate cause of the harm to the marbled murrelet.

In sum, the Court held that Cascadia Wildlands' notice letter was sufficient to commence its citizen suit and that Scott Timber's proposed logging would result in the take of marbled murrelets. As such, the Court upheld the district court's grant of a permanent injunction against Scott Timber.

2. *Alaska Wildlife All. v. United States Fish & Wildlife Serv.*,
No. 23- 35299, 2024 WL 1169411 (9th Cir. Mar. 19, 2024)

Environmental groups, including the Alaska Wildlife Alliance, Alaska Wilderness League, and the Defenders of Wildlife (collectively, AWA) sued the U.S. Fish and Wildlife Service (FWS) over its 2021 Incidental Take Regulation (ITR) under the Marine Mammal Protection Act (MMPA).⁹ The ITR allowed oil and gas companies operating in the Beaufort Sea region to "take," including "harass" or "disturb," polar bears over a five-year period during oil and gas operations.¹⁰ AWA argued that the FWS violated the MMPA by failing to adequately assess the cumulative impact of these activities on the Southern Beaufort Sea polar bear population over the five-year period. The Alaska District Court granted summary judgment to FWS, finding that the FWS's regulation on the basis that the ITR satisfied the MMPA's requirements that such take be of "small numbers" of bears and have a "negligible impact" on the Beaufort Sea subpopulation.¹¹ AWA appealed to the Ninth Circuit. The Ninth Circuit reviewed these claims *de novo*. The Ninth Circuit partially overturned and remanded the Alaska District Court's ruling.

First, AWA argued that the FWS improperly subdivided Level A harassment into serious and non-serious categories, which deviated from the MMPA's statutory framework that distinguishes only between Level A and Level B harassment. Level A harassment is defined as any act that has the potential to injure a marine mammal in the wild, while Level B harassment refers to acts that have the potential to disturb marine mammals by disrupting behavioral patterns such as migration, breathing, or feeding, without injuring them.¹² AWA claimed that the

⁹ Moratorium on taking and importing marine mammals and marine mammal products, 16 U.S.C. § 1371 (2018)

¹⁰ 16 U.S.C. § 1371(a)(5)(A)(i), (I) (providing that ITRs may issue only upon the Service's finding that any "taking" will be of "small numbers of marine mammals" and "have a negligible impact" on the "species or stock" of such mammals.); § 1362(13) (defining "take," as, among other things, to "harass.").

¹¹ *Alaska Wildlife All. v. United States Fish & Wildlife Serv.*, No. 23-35299, 2024 WL 1169411, at *1 (9th Cir. Mar. 19, 2024); *See* 16 U.S.C. § 1371(a)(5)(A)(i), (I).

¹² 16 U.S.C. § 1362(18)(C–D).

FWS's Level A subdivision diluted the assessment of cumulative impact. In response, FWS argued that it was reasonable to split Level A harassment into these subcategories because serious harassment (with a high risk of mortality) has a different impact than non-serious harassment, and the subdivision allowed for a more accurate assessment of negligible impact. The Court held that although the subdivision was reasonable, FWS erred by not providing an aggregate figure for both Level A and Level B harassment, which was necessary for a proper statutory analysis.

Second, AWA argued that FWS failed to assess the cumulative five-year risk of Level A take. AWA argued that this risk, when viewed across the five-year period, was nearly certain (94%) to occur, but that FWS had ignored this point. In response, FWS claimed that it focused on annual risk projections and the median value of zero Level A takes in individual years, contending that this median justified its conclusion that no serious Level A harassment would occur. The Court held that FWS did not adequately assess the cumulative five-year risk, as required by the MMPA, and remanded for FWS to reconsider its assessment, particularly in aggregating the five-year probabilities.

Third, AWA argued that FWS misapplied the MMPA's evidentiary standard by requiring a preponderance of evidence for a take to be considered "reasonably likely." AWA contended that FWS ignored a significant risk (46% annually) of Level A harassment, which amounted to a substantial possibility. In response, FWS argued that it did not impose a preponderance standard but instead relied on the median of 0.0 in the model, which it believed better reflected the most likely outcome. The Court held that while FWS's approach in prioritizing the median value was reasonable, FWS failed to fully address the implications of the high probability for Level A take. This error warranted further calculation and analysis on remand.

Fourth, AWA claimed that FWS improperly authorized the take of about half of the Beaufort Sea polar bear population under the "small numbers" prong for Level B harassment. AWA argued that FWS's authorization was improper because it used an annual figure that allowed for more take than was reasonable under the MMPA. In response, FWS argued that the MMPA did not require the "small numbers" analysis to be conducted in aggregate over five years; instead, a "per-year" figure would be sufficient. The Court agreed with FWS and determined that FWS's use of annual figures was reasonable and supported by the statute.

Fifth, AWA argued that FWS failed to impose adequate mitigation measures to minimize the adverse impact on polar bears, as required by the MMPA's "least practicable adverse impact" standard. The MMPA requires that ITRs "set[] forth [. . .] permissible methods of taking [. . .] and other means of effecting the least practicable adverse impact" on the marine mammals affected.¹³ AWA claimed that FWS previously had found certain mitigation measures to be practicable but dismissed them

¹³ 16 U.S.C. § 1371(a)(5)(A)(i)(II); 50 C.F.R. § 18.27(e).

in this case without sufficient justification. In response, FWS claimed that AWA's proposed measures were not feasible, given the scope of the 2021 ITR, which applied to 17 companies over 19.8 million acres for five years, whereas AWA referenced a measure for a single company over a much smaller area and shorter timeframe.

The Court agreed with FWS's reasoning, and concluded that AWA's claims of practicability were "dubious." Further, the Court also concluded that FWS had satisfied the MMPA's requirement for the "least practicable adverse impact." The Ninth Circuit reasoned that the Service reasonably interpreted the standard to "require mitigation measures that reduce impacts from industry activities but are not so restrictive as to make [such] activities unduly burdensome or impossible to undertake and complete" because the MMPA does not define "least practicable adverse impact."

Ultimately, the Ninth Circuit held that FWS's issuance of the 2021 ITR violated the MMPA by failing to consider the cumulative harm to the polar bear population over a five-year period under a segmented analysis. However, the Court upheld FWS's approach in subdividing Level A harassment, FWS's use of annual figures for the "small numbers" prong, and the adequacy of the mitigation measures to minimize harm to polar bears under the "least practicable adverse impact" standard. Therefore, the Ninth Circuit reversed in part and affirmed in part the district court's grant of summary judgment. The Ninth Circuit declined to vacate the 2021 ITR, allowing oil and gas activities to continue while the FWS revised its regulation. The Court reasoned that vacating the ITR would disproportionately harm the economy by criminalizing oil and gas operations in the Beaufort Sea without clear evidence that the ongoing activities were causing immediate harm. On remand, the Service would be required to provide a more complete explanation for its cumulative impact assessment.

3. *Stillaguamish Tribe of Indians v. Washington*, 102 F.4th 955 (9th Cir. 2024)

The Stillaguamish Tribe of Indians ("the Tribe") sued the State of Washington to secure formal recognition that their treaty-based fishing rights extended beyond the Stillaguamish River into the surrounding marine waters. The Tribe invoked the district court's continuing jurisdiction from *United States v. Washington* ("*Final Decision #1*") to establish that Port Susan, Skagit Bay, Saratoga Passage, Penn Cove, Holmes Harbor, and Deception Pass (collectively "the Claimed Waters") were part of their "usual and accustomed" fishing grounds ("U&As") under the Treaty of Point Elliott.¹⁴ The United States District Court for the Western District of Washington determined that the Tribe's U&As

¹⁴ *Stillaguamish*, 102 F.4th at 958 (noting that approximately eighty sub-proceedings have been brought under *Final Decision #1* in the decades since); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

did not include the marine waters of the Claimed Waters. The three-judge panel issued the opinion *per curiam*. The Ninth Circuit panel vacated the district court's decision and remanded the case for further factual findings on the Tribe's historical fishing presence in the Claimed Waters.

First, the Tribe argued that the district court did not properly apply Judge Boldt's original decision in *United States v. Washington*, *Final Decision #1*, which defined U&As as locations where a tribe "customarily fished from time to time at and before treaty times." The Tribe made three objections. First, the Tribe argued that the court failed to draw the requisite inferences of fishing from evidence of village location, travel, and tribal presence. Second, the Tribe argued that the court did not apply the "relaxed" preponderance standard that applies to U&As determinations. Third, the Tribe argued that the court erroneously demanded non-speculative evidence of the Tribe's fishing at treaty time. The Court disagreed with all of the Tribe's claims, holding that the district court accurately applied *Final Decision #1* by assessing whether the Tribe had demonstrated a consistent history of fishing in the Claimed Waters because, although the court did not explicitly cite to *United States v. Washington* on each finding, the district court essentially recited the correct framework for establishing "customary" fishing "at and before treaty times," as set forth in *Final Decision #1*.

Second, the Tribe argued that the district court erred in its evaluation of historical evidence by failing to infer the Tribe's fishing activities from evidence of villages, travel, and presence in the Claimed Waters. The Ninth Circuit, while affirming the district court's adherence to the appropriate legal framework, found that the district court's factual findings were insufficiently detailed to enable proper appellate review. The Court held that it could not review on appeal the issue of whether the district court's findings were clearly erroneous without a more thorough explanation of how the court assessed the credibility, and persuasiveness, of expert testimony and other evidence relating to the Tribe's activities in the Claimed Waters.

Third, the Tribe argued that the district court erred in concluding that the Tribe did not establish that the Claimed Waters were their usual and accustomed fishing grounds at and before 1855, when the Treaty of Point Elliott was signed, because the Tribe's expert historian testimony supported its claim that the Tribe historically fished in the Claimed Waters. As such, the Tribe argued that this claim should not have been dismissed by the court as speculative. The Court held that the district court failed to sufficiently address the Tribe's historical evidence, particularly expert testimony citing previous anthropological research and tribal oral histories. The Court noted that the district court's dismissal of the claim as "insufficient to demonstrate by a preponderance of the evidence that [the Tribe] fished 'customarily [. . .] from time to time' in saltwater, or that the marine areas at issue were their 'usual and accustomed' grounds and stations" warranted further explanation.

Therefore, the Ninth Circuit remanded for additional factual findings to clarify the basis for the district court's determination.

Judge Bress, joined by Judge Bybee, concurred to question whether the fifty-year injunction from *Final Decision #1* still remains necessary and properly within the district court's scope of equitable powers. Judge Bress urged a "robust process" in which the district court would allow all interested parties to present evidence on changed factual or legal circumstances, consistent with Supreme Court precedent on institutional decrees.

Concurring separately, Judge Gould explained that he did not share the jurisdictional concerns outlined by Judge Bress, observing that *Final Decision #1* "relies on the original jurisdiction that federal courts maintain to adjudicate tribes' treaty rights[]." Judge Gould emphasized that questions about dissolving or narrowing the original injunction were beyond the scope of the Tribe's present claim.

In sum, the Ninth Circuit panel held that the district court properly applied the law of the case as set forth in *Final Decision #1* and its sub-proceedings. However, the panel concluded that the district court's factual findings were insufficiently detailed to permit meaningful appellate review therefore the panel could not uphold the district court's judgment on the limited record before it. The panel vacated the district court's order and remanded the case for further factual findings regarding the Tribe's evidence of villages, presence, and fishing activities in the Claimed Waters.

4. *National Resources Defense Council v. Haaland*, 102 F.4th 1045 (9th Cir. 2024)

Environmental interest groups, including the Natural Resources Defense Council, San Francisco Baykeeper, and the Winnemem Wintu Tribe (collectively, NRDC) sued the Bureau of Reclamation (Reclamation) and the Fish and Wildlife Service (FWS) challenging the adequacy of the required Endangered Species Act (ESA) Section 7¹⁵ consultations by and between Reclamation and the U.S. Fish and Wildlife Service (FWS) regarding alleged effects to delta smelt resulting from the renewal of such contracts, including further consultations after remand in 2015. NRDC argued that Reclamation violated the ESA by failing to engage in an adequate consultation over whether the renewal of government water supply contracts would likely jeopardize the existence of the delta smelt and by failing to reinitiate consultation with the National Marine Fisheries Service (NMFS) regarding the contracts' effects on Chinook Salmon. The Ninth Circuit affirmed the district court's ruling that the agencies' consultations complied with their obligations under the Administrative Procedure Act¹⁶ (APA) and ESA¹⁷

¹⁵ 15 U.S.C. § 1536.

¹⁶ 5 U.S.C. §§ 551 *et seq.* (1996).

¹⁷ Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq.* (2022).

The Ninth Circuit also upheld the district court's decision to dismiss NRDC's supplemental claim from 2015. In this claim, NRDC alleged that Reclamation was required to reinstate its ESA consultation with NMFS concerning the impact of the SRS Contracts on endangered Chinook salmon based on new information that emerged after NMFS issued a revised biological opinion addressing the long-term operations of the Central Valley Project (CVP), particularly during the drought conditions of 2014 and 2015.

NRDC's claims arose from Reclamation's management of the Central Valley Project (CVP), the largest federally-operated water management system in the United States. In the 1960s, Reclamation established "Settlement Contracts" with Sacramento River Contractors, along with contracts to provide water through the Delta-Mendota Canal, known as the "DMC Contracts." As these contracts approached expiration in the 2000s, Reclamation initiated consultations to facilitate their renewal. Concurrently, Reclamation engaged in consultations to assess the environmental impacts of the Central Valley Project's Operations Criteria and Plan (OCAP), leading to over twenty years of litigation primarily regarding Reclamation's consultations with NMFS. The Ninth Circuit reviewed the claims *de novo*.

First, NRDC argued that FWS failed to analyze how the contract renewals would affect delta smelt populations and critical habitat given the changed environmental conditions and declining species abundance. NRDC argued that FWS improperly relied on a 2008 Operations Criteria and Plan (OCAP) Biological Opinion in its 2015 Letter of Concurrence and failed to sufficiently analyze the potential impacts of the contract renewals on the delta smelt. The Court rejected that argument, affirming Reclamation and FWS's practice of conducting a "two-track" consultation process, in which the agencies first consulted on coordinated, systemwide operations and then consulted on more specific aspects of CVP operations, including the water contract renewals. The Court held that FWS's reliance on the 2008 OCAP Biological Opinion and Letter of Concurrence was appropriate because the 2008 Opinion analyzed the effects of contract renewals within the broader CVP operational framework and determined that the renewal of the contracts would not jeopardize the continued existence of the delta smelt.

Second, NRDC alleged that FWS violated its obligations under the ESA by failing to ensure that its 2015 consultation was based on the best scientific and commercial data available, as required by statute.¹⁸ NRDC cited several sources of new scientific information, including a 2015 report by the Management, Analysis, and Synthesis Team (MAST) and population surveys conducted by a state fisheries agency indicating a decline in delta smelt numbers. However, the Court found that FWS had considered this information as part of the Supplemental Information provided in 2015. The Court applied a highly deferential standard of review to the agencies, emphasizing that the decision as to what

¹⁸ 16 U.S.C. § 1536(a)(2).

constitutes “best available science” is one that “belongs to the agency’s special expertise.” The Court thus concluded that NRDC failed to show that the new data materially affected the agency’s conclusion or directly undermined the 2008 OCAP Biological Opinion’s findings.

Third, NRDC argued that FWS improperly postponed to an unspecified future consultation its impact analysis of the Settlement Contract renewals’ impacts on delta smelt. The Court, however, rejected this characterization, noting first that FWS’s expressed concerns about possible future issues for the delta smelt “does not mean that FWS deferred its analysis.” Instead, the Court determined, applying the same deferential standard to the agency, that the 2015 Letter of Concurrence, along with the amended 2005 Letters of Concurrence, constituted FWS’s analysis that the execution of the renewed Contracts would likely not adversely affect the delta smelt and its critical habitat.

Fourth, NRDC argued that FWS failed to articulate a rational connection between its conclusion of contract reestablishment and the evidence before it. The Court rejected NRDC’s claim, holding that FWS could rationally rely on its 2008 OCAP Biological Opinion’s analysis of the environmental effects of the renewed Contracts to reach its conclusion. The panel adhered to the same reasoning it adopted when rejecting NRDC’s prior two arguments regarding the contracts, applying a deferential standard of review to FWS.

Fifth, NRDC argued that the FWS acted arbitrarily and capriciously by relying on the 2008 OCAP Biological Opinion without considering intervening changes in environmental conditions. The Court pointed to FWS’s consideration of Reclamation’s Temporary Urgency Change Petitions in its reinitiation of consultation, which concluded that the effects on delta smelt were within the range analyzed in the 2008 OCAP Biological Opinion. The 2008 OCAP Biological Opinion found that the deviations would not result in additional adverse effects beyond those previously assessed. Because the 2015 Letter of Concurrence relied on the 2008 Opinion, which had already accounted for the baseline deviations, the Court held that FWS was not required to provide further explanation.

Sixth, NRDC argued that the 2015 Letter of Concurrence was invalid because it failed to consider the effects of renewing the contracts through 2045, which was beyond the timeframe analyzed in the 2008 OCAP Biological Opinion. The Court rejected this argument. It reasoned that FWS considered both delta smelt and “other effects” stemming from the renewal of the Settlement Contracts for their entire 40-year term before determining that the renewal of those Contracts was not likely to adversely affect the delta smelt.

Finally, in a separate claim for relief, NRDC argued that Reclamation violated the ESA by failing to reinitiate consultation with NMFS on the effect of continued implementation of the Settlement Contracts impacting the winter-run and spring-run Chinook salmon in light of new information about the alleged ecological effects of the Contracts. The Ninth Circuit affirmed the district court’s dismissal of this

claim. The Court held that the renewed Settlement Contracts did not provide Reclamation with the necessary discretion to trigger reinitiation under the ESA. The Court also rejected NRDC's arguments that federal and state laws require Reclamation to depart from contract terms to protect ESA-listed species, which would provide the discretion needed to trigger reinitiation of consultation. The Ninth Circuit found that NRDC forfeited this argument by failing to develop it before the district court, and, even if considered, the argument lacked merit because compliance with legal obligations does not constitute a source of discretion.

Concurring in part and dissenting in part, Judge Gould agreed with the majority that NRDC's claims regarding the DMC Contracts were not moot and that Reclamation engaged in a valid consultation with FWS. However, he dissented from the majority's conclusion on two key points. First, Judge Gould concluded that because "FWS did not consider the effect of renewing the Settlement Contracts through 2045, the end of the renewed Settlement Contracts' term," the district court erred in dismissing NRDC's claim for relief as to the Settlement Contracts. Second, Judge Gould reasoned that Reclamation retained some discretion under the Settlement Contracts, such that the ESA required Reclamation to reinitiate consultation on the Contracts' effects on Chinook salmon. However, Judge Gould did not elaborate on the source of Reclamation's retained discretion.

In sum, the Ninth Circuit held that the Bureau of Reclamation and FWS complied with their obligations under the ESA and APA by relying on the 2008 OCAP Biological Opinion and conducting a complete analysis of the Contract renewals' impacts. The Court affirmed the district court's grant of summary judgment in favor of the agencies.

5. *Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180 (9th Cir. 2024)

Environmental organizations brought an action against the State of Montana, challenging a wolf-trapping law that they alleged would result in the unlawful "taking" of grizzly bears. The Ninth Circuit Court of Appeals reviewed the district court order that granted a preliminary injunction limiting wolf trapping and snaring to January 1, 2024 to February 15, 2024. The Ninth Circuit affirmed the district court's grant of injunctive relief, but the Court also held that the injunction was overbroad in two ways. First, the Court found that the injunction was geographically overbroad; there was insufficient evidence of the presence of grizzly bears in all of the areas covered by the injunction. Second, the injunction was held to be overbroad because it prevented the lawful trapping of wolves for research purposes. Accordingly, the Ninth Circuit remanded the injunction back to the district court to reconsider the overbreadth issues. However, the geographic scope of the injunction would remain in place until the district court made its determination.

Plaintiffs in the case are two nonprofit environmental organizations: the Flathead-Lolo-Bitterroot Citizen Task Force (“Flathead”) and WildEarth Guardians (“WildEarth”). Defendants are the State of Montana (“State”); the Chair of the Montana Fish and Wildlife Commission (“Commission”); the president of the Commission, Lesley Robinson; and Montana Governor Greg Gianforte.

Plaintiffs alleged that a state law allowing for the recreational snaring and trapping of wolves would result in the unlawful “taking” of grizzly bears in violation of section 9 of the Endangered Species Act (“ESA”).¹⁹ In 1973, Congress passed the ESA which, at the time, was one of the most comprehensive programmatic limits on harm to threatened and endangered species. Section 9 of the ESA includes a “blanket prohibition” on the “taking” of any listed species. A “take” is a term of art, defined by the ESA as an act which means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁰ It is unlawful under the ESA to “take” any species listed either “endangered” or “threatened.” Additionally, the ESA has a provision that allows private individuals and organizations to sue for, among other things, the unlawful taking of listed species.

Two years after the passage of the ESA, grizzly bears were listed as threatened and continue to be listed as such. Currently, around 2,000 grizzlies live in areas within the boundaries of Wyoming, Washington, Montana, and Idaho. Since 2012, Montana has allowed the recreational trapping of wolves. Originally, the “wolf-trapping season” was just over a month from mid-December to the end of February. In 2021, the Montana Legislature required the Commission to extend the season to nearly four months. However, the new season would “float” in areas believed to be inhabited by grizzlies.

The start and end date of the trapping season could fluctuate depending on an on-the-ground assessment of grizzly bear activity, conducted by the Commission. The dates of the wolf-trapping season were intended to fall while grizzly bears were hibernating, preventing any accidental harm or death for the grizzly bears. The start date of the season could be pushed back if assessments indicated that grizzlies were not yet hibernating; the end date also could be shortened if there was evidence of a “non-target capture” of a grizzly bear.” Additionally, in 2023, Montana updated its mapping method, shrinking the occupied grizzly bear range. Shrinking the occupied grizzly range in turn resulted in a longer trapping season in more areas of Montana.

In response to the changes in the wolf-trapping season, the environmental-organization plaintiffs moved for a preliminary injunction. Plaintiffs sought to reinstate the original dates of the trapping season from mid-December to the end of February. The requested injunction also would extend the occupied grizzly bear range. Extension of the occupied grizzly range was based in part on evidence provided in

¹⁹ 16 U.S.C. § 1538.

²⁰ 16 U.S.C. § 1532(19).

Plaintiff's reply brief stating that "[g]rizzly bears have the potential to be found anywhere in the western two-thirds of Montana." Plaintiffs also produced a news article reporting an adult grizzly being photographed "along the Missouri and Judith rivers, the farthest east a bear has been seen in Montana in more than 100 years."

At oral argument, the State defense was provided an opportunity to address the article and bulletin but raised no objections. Subsequently, the district court granted the motion for a preliminary injunction. Based on plaintiffs' evidence, the preliminary injunction excluded areas in the "western two-thirds of Montana" from wolf-trapping activities. The wolf-trapping season was shortened by the district court to its original dates, "the time period when it is reasonably certain that almost all grizzly bears will be in dens."

Defendants filed an interlocutory appeal, arguing that the district court erred in four respects: first, the district court's consideration of the news article and other evidence in plaintiffs' reply brief was improper; second, the district court applied the wrong preliminary injunction standard; third, plaintiffs did not meet their evidentiary burden by failing to show either a serious question on the merits or a reasonable certainty of irreparable harm; and, fourth, the district court's injunction was geographically and temporally overbroad.

The State's first argument on appeal was that the district court abused its discretion by considering a news article that "came out the day of oral argument" and "was never corroborated by any witness." The Ninth Circuit found that this was not an abuse of discretion because the State had an opportunity to respond to the new evidence but made no objection. Moreover, the rules of evidence do not apply strictly in the preliminary injunction context. Additionally, in the issuance of preliminary injunctions, "haste [] is often necessary" and the district court "may give even inadmissible evidence some weight when to do so serves the purpose of preventing irreparable harm before trial."

The State's second argument was that the district court applied the wrong preliminary injunction standard. Defendants claimed that the district court erred by requiring a lower burden of proof from the plaintiffs' than was proper. Under the Supreme Court's decision in *Winter*, a party is entitled to a preliminary injunction if it can prove "[it] is likely to succeed on the merits."²¹ Alternatively, in the Ninth Circuit, the standard of proof requires "serious questions going to the merits," which is a lesser showing than likelihood of success on the merits. The Court of Appeals held that the "serious questions" version of the test "remains viable" even after the holding in *Winter*. Accordingly, the Ninth Circuit determined that the district court did not abuse its discretion in applying the "serious questions" test.

The State's third argument was that the district court abused its discretion in analyzing the two preliminary injunction factors under the ESA. The first factor at issue was the serious questions on the merits.

²¹ *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

Serious questions are ones that “cannot be resolved one way or the other [. . .] because they require more deliberative investigation.” To meet the burden, Plaintiffs need *not* show a “certainty of success” nor even a “probability of success” but only a “fair chance of success on the merits.” The question at issue in this case was whether Montana’s 2023 recreational wolf trapping and snaring regulations will cause the unlawful “take” of grizzly bears in violation of section 9 of the ESA.

Plaintiffs’ provided evidence, including declarations by experts and research materials. The evidence appeared to show that Montana’s regulations would permit wolf trapping at times when a “substantial number” of grizzlies would be outside their dens and when grizzly bears can be attracted to, and snared by, the wolf traps. The State presented expert evidence and research materials supporting mitigation measures to prevent the unlawful taking of grizzlies. The State’s evidence included the implementation of the floating trapping season based on comprehensive assessments of grizzly activity. Further, the State required the use of specialized traps that allow grizzly bears to escape unharmed and trapper education and training courses. The State argued that their mitigation efforts must be successful, as evidenced by the absence of any verified instances of grizzly bears being caught in traps during the wolf trapping season. Both sides provided evidence suggesting that the takings of grizzly bears are underreported.

The Ninth Circuit found that a “genuine scientific and factual debate” existed and the question could not be resolved without further “deliberative investigation.” Because a reasonable judge or jury could find in favor of the plaintiffs, even in light of the State’s proffered evidence, there existed a “serious question” on the merits.

The second preliminary injunction factor at issue was the likelihood of irreparable injury. Here, the Ninth Circuit stated that the district court is afforded a great deal of deference. Additionally, the Court noted that all that is required of plaintiffs to show a likelihood of irreparable injury is a “reasonably certain threat of imminent harm to a protected species.” Future harm does not need to be shown with certainty to grant an injunction under the ESA.

Plaintiffs’ experts asserted that Montana’s wolf-trapping laws presented a reasonable threat of harm to grizzly bears. Specifically, Plaintiffs’ experts stated that grizzly bears have large home ranges including in areas frequented by wolves. Grizzlies can be attracted to scented and baited wolf traps and can become caught in those traps. Further, an increased number of grizzlies could be active outside their dens during the scheduled wolf-trapping season due to increasing temperatures linked to climate change. One expert stated, “Grizzly bears in the Northern Rockies will almost certainly enter dens later and exit dens earlier as annual temperatures continue to warm and vegetal foods become available earlier and later in the year.”

The State argued that their evidence showed that the mitigation efforts and temporally limited scope of the trapping season would prevent

any possible takes. The State pointed to the lack of any reports of a grizzly bear being caught in a wolf trap in Montana since 2013. Nevertheless, Ninth Circuit held that the district court did not err in its conclusion that irreparable injury to a threatened species was reasonably certain. In affirming, the Ninth Circuit reasoned that mere disagreement with the district court's ruling would be insufficient to reverse and the district court's ruling was "not implausible on the record."

The final argument by the State was that the preliminary injunction issued by the district court was overbroad in three respects. First, the State argued that the injunction was temporally overbroad. Defendant's main contention was that new evidence in Plaintiff's reply brief should not have been used in the district court's consideration. As explained above, that contention was rejected by the Ninth Circuit. Instead, the Ninth Circuit held that the time limits in the injunction were "no broader . . . than necessary to redress the injury."

The State's second overbreadth argument alleged the district court erred in granting an injunction that covered "more than half of the entire state of Montana." Here, the Ninth Circuit agreed with the State's argument. The area covered by the injunction included large spans of land outside of occupied grizzly territories, including areas not requested by plaintiffs. Importantly, the district court did not provide an explanation for why such a large area was necessary to prevent the unlawful "take" of grizzly bears. Plaintiffs' proffered evidence in the news article and Commission bulletin stated that "[g]rizzly bears have the potential to be found anywhere in the western two-thirds of Montana (west of Billings)." However, the Ninth Circuit reasoned that such "potential" was too speculative to support such a broad geographic injunction. Because the State did not provide evidence for an alternative geographic scope, the Ninth Circuit remanded the issue to the district court for reconsideration. To prevent possible harm, the Ninth Circuit preserved the geographical scope of the injunction until the district court was able to issue a revised injunction.

Finally, the State argued that the flat ban on wolf trapping was overbroad because it restricted lawful taking of wolves for scientific research purposes. Such trapping and research typically occur during the summer, well outside the temporal scope of the injunction. Because plaintiffs stated that they would have no objection excluding these government research activities, the Ninth Circuit vacated and remanded to the district court to clarify this particular issue.

In sum, the Ninth Circuit's ruling provided a clear analysis of how to balance preliminary injunction factors under the ESA. While affirming the district court's grant of injunctive relief, the Court also acknowledged the overbreadth of the district court's decision. Remanding the case in part for reconsideration, the Ninth Circuit reinforced the principle that injunctive relief should be narrowly tailored to the specific harm it seeks to prevent.

6. *Montana Wildlife Federation v. Haaland*, No. 20-35291, 2025 WL 225388 (9th Cir. Jan. 17, 2025)

Threatened sage-grouse²² habitat received a (partial) victory from the Ninth Circuit in *Montana Wildlife Federation v. Haaland*.²³ The Ninth Circuit addressed appeals from two separate but related district court decisions out of the U.S. District Court for the District of Idaho and the U.S. District Court for the District of Montana. In both cases, Wildlife Federation and other environmental organizations (“organizations”) challenged oil and gas leases issued in Wyoming and Montana. The organizations argued that the Bureau of Land Management (“BLM”) made changes to agency Resource Management Plans which reduced the time for public participation and removed limits on development in sage-grouse habitat in violation of the National Environmental Policy Act (“NEPA”)²⁴ and the Federal Land Policy Management Act (“FLPMA”).²⁵

The government²⁶ appealed the district court’s determination that the issuance of lease sales on protected sage-grouse habitat was unlawful under FLPMA and NEPA. Moreover, the government argued that the district court’s decision to vacate the leases was an abuse of discretion. The Ninth Circuit reviewed the case under the “arbitrary and capricious” standard of review required by the Administrative Procedure Act (“APA”),²⁷ holding that in some leases BLM violated public participation requirements under NEPA and FLPMA because BLM failed to provide a “reasoned explanation” for the shortened participation timeframe. As for the remedy, the Ninth Circuit held that the Montana District Court did not abuse its discretion by granting a preliminary injunction vacating the oil and gas leases because the seriousness of BLM’s violations outweighed the disruptive consequences to leaseholders and government agencies. Alternatively, the Ninth Circuit held that the Idaho District Court’s vacatur was significantly more disruptive than the seriousness of the violation and thus was an abuse of discretion.

In 2015, BLM changed a number of its land use management plans for the leasing of land for oil and gas exploitation to “promote the recovery of [] greater sage-grouse habitat.”²⁸ The changes required prioritization of oil and gas leasing outside of grouse-protected habitat. In 2018, BLM revised its requirements under the land use management plans in two

²² Greater sage-grouse is a species of grouse (a group of sub-arctic and temperate birds that inhabit areas of the northern hemisphere) threatened by loss of habitat in the western United States. Rands, Michael R.W. (1991). Forshaw, Joseph (ed.). *Encyclopedia of Animals: Birds*. London: Merehurst Press. p. 91.

²³ *Montana Wildlife Federation v. Haaland*, 127 F.4th 1 (2025).

²⁴ 42 U.S.C. § 4321 *et seq.* (2025).

²⁵ 43 U.S.C. § 1701 *et seq.* (2022).

²⁶ Defendants/Appellants are Deb Haaland, in her official capacity as Secretary of the Interior; Donato Judice, in his official capacity as Montana Bureau of Land Management State Director; Bureau of Land Management; U.S. Department of the Interior; and State of Wyoming; State of Montana, Intervenor-Defendants.

²⁷ 5 U.S.C. § 551 *et seq.* (1996).

²⁸ *Montana Wildlife Federation*, 127 F.4th at 8.

ways. First, BLM changed the requirement that oil and gas leases prioritize grouse habitat only where there was a “backlog” in the administrative capacity. Second, BLM “severely shortened” the public comment period under NEPA for new leases: the public notice period was shortened from 90 to 45 days, while the public protest period was shortened from 30 to ten days.

Following the 2018 changes, BLM issued leases to explore and exploit oil and gas resources in “core” sage-grouse habitat in Wyoming. The BLM completed an Environmental Assessment and issued a Finding of No Significant Impact. Lease sales in grouse-habitat were issued with reduced public comment periods and were justified because there was no administrative backlog. Environmental organizations brought this suit in district court, requesting that the Court “declare invalid and set aside the decisions authorizing” the Wyoming sales as well as “all leases issued in connection with those sales.”²⁹

The Ninth Circuit found that the shortened public participation period violated NEPA. The panel recognized that the requirement under NEPA for “a meaningful opportunity for public participation” requires sufficient time for the public to review information and prepare responses. Because some lease sales had participation periods of only 15 days, the Court held the public participation was inadequate in comparison to the previous 30-day period. Moreover, the panel noted that BLM’s justification for the 2018 changes as “efficient[]” and “streamlin[ed]” improvements was in conflict with the goals of NEPA. Therefore, the Court held that BLM failed to provide an adequate explanation for the changes and that BLM’s decision was arbitrary and capricious under the APA.

Addressing the remedies, the Ninth Circuit held that the Montana District Court did not abuse its discretion in vacating the leases. Because the seriousness of the agency’s shortened public participation period “infected everything that followed,” the error of the violation could not be remedied without entirely redoing the lease process. As for the Idaho District Court’s decision, the Ninth Circuit held that BLM’s violation was less serious because there was a greater likelihood that the agency could substantiate its decision to issue the leases on remand, following adequate public participation. Moreover, the Ninth Circuit gave substantial weight to the economic harm likely to result for the vacated leases (worth over \$125 million).

In sum, Ninth Circuit’s decision in *Montana Wildlife Federation v. Haaland* highlights the Court’s willingness to find drastic changes in public participation periods “arbitrary and capricious” under the APA. Additionally, the Court’s holdings indicate an unwillingness to upset major economic interests when expenditures are made under otherwise violative agency actions.

²⁹ *Id.* at 16.

7. *Stavrianoudakis v. United States Fish & Wildlife Serv.*, 108 F.4th 1128 (9th Cir. 2024)

California and the Federal government cannot condition permits for falconry licenses on warrantless and unannounced searches, argued the American Falconry Conservancy (“AFC”), along with a group of California falconers (“the Falconers”). AFC, the Falconers, and one falconer’s spouse sued the California Department of Fish and Wildlife (“CDFW”) and the Federal Fish and Wildlife Service (“FWS”) in the United States District Court for the Eastern District of California alleging unconstitutional requirements imposed on falconry licenses. The falconry petitioners argued that California’s requirement that license applicants agree to unannounced and warrantless inspections is a facial violation of the Fourth Amendment. On appeal, the Ninth Circuit addressed two main claims. The plaintiffs’ alleged that requiring assent to searches posed an unconstitutional condition on the license applicants (unconstitutional-condition claim); the plaintiffs’ also alleged that the unannounced inspections were a facial and as-applied violation of the Fourth Amendment (unannounced-inspection claim).

The district court dismissed all of the Falconer’s Fourth Amendment-based claims, concluding that the possibility of future inspections was too speculative an injury to grant standing. The district court noted that the individual falconers “have never been subjected to the unannounced inspections pursuant to the challenged regulations.” Likewise, the district court ruled AFC lacked associational standing because AFC did not allege any of its members faced “immediate or threatened injury from unannounced, warrantless inspections.” Administrative Procedure Act (“APA”)³⁰ claims were also dismissed by the district court. Plaintiffs appealed to the Ninth Circuit.

Falconry is governed at the federal level by the Migratory Bird Treaty Act.³¹ Federal regulations define falconry as “caring for and training raptors for pursuit of wild game, and hunting wild game with raptors,” and a permit is required to engage in falconry.³² Originally, the permitting process was a cooperative effort between States and the federal government. States were given the choice to either prohibit falconry altogether or regulate falconry themselves, subject to federal requirements. In 2014, the U.S. Fish & Wildlife Service (“FWS”) abandoned the cooperative-federalism scheme and, since then, a State or Tribal permit is sufficient to lawfully practice falconry in the United States.

At issue are two provisions of the federal regulations, mirrored in California’s falconry regulations. First, plaintiffs challenge federal regulations that authorize regulators to conduct unannounced inspections of “[f]alconry equipment and records . . . in the presence of the

³⁰ 5 U.S.C. § 551 *et seq.* (1996).

³¹ 16 U.S.C. §§ 703–711 (2019).

³² 50 C.F.R. § 21.6.

permittee during business hours on any day of the week . . .”³³ Plaintiffs also challenged a federal provision that requires permit applicants to submit a “a signed and dated statement showing that [they] agree that the falconry facilities and raptors may be inspected without advance notice by . . . authorities at any reasonable time of day.”³⁴ Plaintiffs challenged a similar California provision which further authorizes regulators to “inspect, audit, or copy any permit, license, book, or other record required to be kept by the licensee under these regulations at any time.” California requires permittees to renew their licenses every year and certify they “understand [their] facilities, equipment, or raptors are subject to unannounced inspection.”

The Falconers and AFC provided evidence of six separate instances of state and federal law enforcement conducting unannounced inspections. One event occurred in 1983 when Peter Stavrianoudakis was living as a “non-resident falconer in Nevada.” Stavrianoudakis described “armed members of [CDFW]” searching his home and arresting him without a warrant. Another named plaintiff, Scott Timmons, described an inspection of his mother’s house in 1992, while he was enrolled in college. AFC further alleged that armed FWS agents conducted warrantless searches of two Washington AFC members, and CDFW agents searched two of its California members.

The Ninth Circuit held that the Falconers have standing to bring their claims against CDFW. To show standing, the Falconers needed to show a concrete, particularized injury was likely caused by the defendant and would be redressed by a favorable judicial decision. The Court ruled that the injury in this case was concrete and particularized because anytime a plaintiff is forced to give up a constitutional right in exchange for a benefit they suffer a “cognizable injury.” Here, the requirements imposed by CDFW forced permit applicants to agree to warrantless inspections of their homes, papers, and effects, which “constitutes a surrender of their Fourth Amendment right[s].” The “Falconers suffer this injury every time they renew their licenses, whether or not they are actually subjected to any unlawful inspections.” Additionally, the plaintiffs satisfied the other requirements of standing because their injury was directly caused by CDFW’s regulations, and injunctive relief would redress the harm by no longer subjecting the Falconers to the unconstitutional condition.

Additionally, the Falconer’s claims against FWS were deemed unripe by the Ninth Circuit. Because FWS had delegated its regulatory authority to the states, plaintiffs would have to prove a tenuous sequence of events in order to show “remediable impact traceable to FWS.” To show that the claim was ripe, the Falconer had to prove that the “issues presented are definite and concrete, not hypothetical or abstract.” Instead, the Falconers only argument for a definite and concrete harm necessarily followed a cascading logic. First, the district court would need to enjoin

³³ 50 C.F.R. § 21.82(d)(9)

³⁴ 50 C.F.R. § 21.82(d)(2)(ii).

CDFW on remand; next the injunction would need to trigger federal review and ultimate revocation of California's licensing authority; then FWS would need to reintroduce the federal regulatory scheme; and only then would the Falconers be subject to a concrete harm: the unconstitutional conditions they faced under the CDFW. The Ninth Circuit found this sequence of events "too attenuated and hypothetical" to support federal jurisdiction for the claims against FWS.

The Court next turned to the unannounced-inspection claims against FWS and CDWS, holding that the Falconers failed to show sufficient injury to satisfy Article III standing. The Falconer's alleged that federal and state regulations that authorized unannounced inspections violated the Fourth Amendment "because they authorize 'unreasonable warrantless searches of Falconers' private homes, protected curtilage, and other property.'" The Ninth Circuit ruled the alleged injury was not concrete or particularized enough to satisfy standing because the regulation did not impose a "clear burden" on the Falconers. The Falconers could not show any evidence that unannounced inspections have happened within the last decade or under the current regulatory scheme. Moreover, plaintiffs provided no evidence that the coercive force of the regulations compelled them to significantly change their everyday practices or that the unannounced inspections were likely to occur in the future. Accordingly, the Court ruled that the alleged injury was too hypothetical to sufficiently demonstrate an injury in fact.

The Ninth Circuit found AFC had associational standing to bring its claim for unconstitutional conditions against CDFW. Associational standing requires an organization to establish its members would otherwise have individual standing; show that the interests the organization seeks to protect are germane to its purpose; and show that neither the claims asserted nor the relief requested require the participation of individual members in the lawsuit. The Ninth Circuit found that members of AFC had individual standing in this case because Stavrianoudakis and others were members of AFC. AFC's interest in preventing its members from unconstitutional conditions was found to be germane to the organization's purpose of "promoting 'the broadest liberties possible for falconers.'" AFC's request for only declaratory and injunctive relief did not require further involvement from individual members of the organization. However, for the same reasons provided for the Falconers, the Court held that AFC's unconstitutional-condition claim against FWS was not ripe.

The Court found that AFC did not have associational standing for their unannounced-inspection claims. The Ninth Circuit ruled that the first element of associational standing was not met because AFC failed to establish a sufficient injury to one of their members. Mirroring the reasoning the Court gave for the same claims brought by the Falconers, the Court ruled that AFC could not show a cognizable injury to one of their members, either by being subject to a warrantless search or by showing "continuing, present adverse effects" from the defendant's past

illegal conduct. Finding that none of AFC's members was subject to the threat of future injury, the Court held AFC lacked standing to bring the unannounced-inspection claim.

In sum, the Ninth Circuit held that the Falconers had standing to bring their unconstitutional-condition claims against CDFW. However, the Falconer's unconstitutional-condition claims against FWS were deemed unripe by the Ninth Circuit. Additionally, the Falconers failed to show sufficient injury to satisfy Article III standing for their unannounced-inspection claims against FWS and CDWS. The Ninth Circuit held that AFC had associational standing to bring its claim for unconstitutional conditions against CDFW, but AFC's unconstitutional-condition claim against FWS was not ripe. Finally, AFC was found not to have associational standing for their unannounced-inspection claims against FWS and CDWS.

II. WATER

1. *Coastal Environmental Rights Foundation v. Naples Restaurant Group, LLC*, 115 F.4th 1217 (9th Cir. 2024)

Coastal Environmental Rights Foundation (CERF), an environmental organization, brought a citizen suit against Naples Restaurant Group, LLC and its owner, John Morris (collectively, Naples), in the United States District Court for the Central District of California. CERF sued Naples under the Clean Water Act (CWA),³⁵ alleging that Naples did not have a National Pollutant Discharge Elimination System (NPDES) permit³⁶ to set off fireworks that fell into public waters. The district court ruled in favor of Naples, finding insufficient evidence that Naples was in ongoing violation of the CWA, and CERF appealed to the Ninth Circuit. Between the district court's ruling and the Ninth Circuit appeal, Naples obtained a NPDES permit authorizing its public fireworks displays. The Ninth Circuit held that the NPDES permit rendered moot CERF's claims for declaratory and injunctive relief, civil penalties, and attorneys' fees, and vacated and remanded the case.

The case centered on Naples's Fourth of July fireworks show. Since 2011, Naples had hosted the show at Alamitos Bay in Los Angeles, an inlet of the Pacific Ocean. For the show, Naples would launch hundreds of fireworks from a barge with a licensed pyrotechnic operator. Following CERF's citizen suit, the district court found that one of the fireworks malfunctioned, resulting in a premature explosion that discharged pollutants into the Bay. However, the district court ruled in favor of Naples, holding there was insufficient evidence to establish continuous and ongoing CWA violations, and dismissed CERF's case without prejudice.

³⁵ Clean Water Act, 33 U.S.C. §§ 1251–1389 (2024).

³⁶ *Id.* § 1342 (general NPDES permitting requirements).

Following the district court's ruling, in May 2023, the Los Angeles Regional Water Quality Control Board (Board) began issuing NPDES permits for public fireworks displays over Los Angeles waters. In June 2023, the Board granted Naples a NPDES permit.

At the same time, CERF appealed the district court's ruling to the Ninth Circuit. Ordinarily, the Ninth Circuit would review the merits of the district court's decision. But because of Naples's intervening NPDES permit, the Ninth Circuit reviewed the issue of mootness *sua sponte*. Naples's NPDES permit therefore turned the case onto a single question: Did the NPDES permit moot this case, thus barring judicial relief?

The Ninth Circuit reviewed the mootness issue *de novo*, looking to Supreme Court caselaw in *Gwaltney*³⁷ and *Laidlaw*.³⁸ Both *Gwaltney* and *Laidlaw* set principles for when CWA citizen suits become moot. First, *Gwaltney* held that a CWA citizen suit becomes moot when it is “*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur,”³⁹ and *Laidlaw* reiterated that courts are to apply this test stringently.⁴⁰ Second, *Gwaltney* held that when a citizen suit prevails, the court may order injunctive relief or impose civil penalties,⁴¹ and *Laidlaw* reiterated that civil penalties are to remedy “*ongoing* unlawful conduct,” not “*wholly past* violations.”⁴² With these principles, the Ninth Circuit turned to whether Naples's NPDES permit had mooted CERF's three claims for relief: (1) declaratory and injunctive relief, (2) civil penalties, and (3) attorneys' fees.

First, CERF sought declaratory and injunctive relief. CERF requested that the Court declare Naples in violation of the CWA for discharging pollutants into Alamitos Bay without an NPDES permit, and enjoin Naples from continuing this discharge unless it obtained an NPDES permit and restored the quality of Alamitos Bay to its state before the discharge. Naples argued that CERF's claims for declaratory and injunctive relief became moot after Naples had obtained an NPDES permit authorizing its fireworks displays, asserting that Naples could have legally discharged pollutants under the permit's conditions. The Ninth Circuit agreed with Naples, holding that Naples's NPDES permit mooted CERF's request for declaratory and injunctive relief. The Ninth Circuit reasoned that Naples's NPDES permit, by itself, showed that the only CWA violation that CERF had asserted was not reasonably expected to recur, and thus that there was no present harm to enjoin.

Second, CERF sought civil penalties. CERF argued that civil penalties would provide it with effective relief, keeping the suit alive and not moot, even if it were absolutely clear that Naples would not discharge fireworks without a permit again. The Ninth Circuit disagreed. Instead,

³⁷ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

³⁸ *Friends of the Earth, Inc. v. Laidlaw Env't Servs., (TOC) Inc.*, 528 U.S. 167 (2000).

³⁹ *Gwaltney*, 484 U.S. at 66 (emphasis in original).

⁴⁰ *Laidlaw*, 528 U.S. at 189.

⁴¹ *Gwaltney*, 484 U.S. at 53.

⁴² *Laidlaw*, 528 U.S. at 186–88.

the Court held that it should not treat requests for civil penalties differently than requests for declaratory and injunctive relief when deciding mootness. Thus, the Ninth Circuit held that Naples's NPDES permit mooted CERF's claim for civil penalties. Further, the Ninth Circuit reasoned that the civil penalties were moot because they simply no longer had a deterrent effect against Naples after Naples's NPDES permit.

Third, CERF sought attorneys' fees. CERF argued that its request for attorneys' fees supported its continued interest in the action, surviving Naples's mootness argument. But the Ninth Circuit again disagreed. The Ninth Circuit held that CERF's request for attorneys' fees was insufficient on its own to create an Article III case or controversy, and thus that attorneys' fees could not revive an otherwise-moot case. Although the Ninth Circuit acknowledged opposing caselaw—specifically, that a request for attorneys' fees did not moot a CWA citizen suit in *Northwest Environmental Advocates v. City of Portland*⁴³—the Ninth Circuit distinguished that case because the citizen plaintiffs there claimed that the defendant had violated its NPDES permit conditions, a different claim than the one made here.

The dissent argued that the case should not be moot because the majority incorrectly concluded that Naples met the heavy burden of proving that its wrongful behavior would not recur. The dissent emphasized that Naples failed to provide any evidence proving it would not violate the CWA in the future. Further, the dissent pointed out that while Naples did obtain a NPDES permit, it only sought one after being sued and it had previously violated the CWA for a decade without one. Ultimately, the dissent criticized the majority's decision for weakening mootness analysis under the CWA and possibly undermining environmental protections. In response, the majority refuted the dissent's view as being speculative, emphasizing that there was not sufficient evidence to believe Naples would violate its NPDES permit or let it lapse.

In sum, the Ninth Circuit held that the case was moot on all three of CERF's claims for relief because the sole CWA violation that CERF asserted could not reasonably be expected to recur after Naples obtained a NPDES permit.

2. *Puget Soundkeeper Alliance v. Port of Tacoma*, 104 F.4th 95 (9th Cir. 2024)

Puget Soundkeeper Alliance (PGA), an environmental organization, petitioned the Ninth Circuit for review of the U.S. District Court for the Western District of Washington's decision granting partial summary judgment to the Port of Tacoma (Port). PGA sought to challenge the district court's finding of non-liability for the Port's industrial stormwater discharges. PGA initially had brought a Clean Water Act (CWA)⁴⁴ citizen-

⁴³ 56 F.3d 979, 990 (9th Cir. 1995).

⁴⁴ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (2024).

suit action against the Port for alleged noncompliance with its Industrial Stormwater General Permits (ISGPs). On appeal to the Ninth Circuit, the Port argued that the ISGPs only covered discharges from industrial activity, that the ISGPs were not enforceable through citizen suits, and that two of the ISGPs were overly restrictive. Additionally, the Port argued that a Washington State Hearings Board (Hearings Board) decision on the Port's 2020 ISGP should give preclusive effect to that permit. The Ninth Circuit rejected each of the Port's arguments. After doing so, the Court then reversed the district court's grant of partial summary judgment, vacated the district court with respect to the 2020 ISGP, and remanded back to the district court for further consideration of the issues connected to the 2020 ISGP.

Defendants the Port and SSA Terminals, LLC operated a 137-acre marine cargo terminal, the West Sitcum Terminal (the Terminal), in Tacoma, Washington. At issue in this case was a 12.6-acre area of the Terminal called "the Wharf." Broadly, EPA regulations require permits for stormwater discharges from facilities associated with industrial activity.⁴⁵ More specifically, the same EPA regulations require permits for discharges from "transportation facilities" that house "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations."⁴⁶ The Washington State Department of Ecology (the State) had issued three ISGPs—in 2010, 2015, 2020—to the Port for its stormwater discharges. Additionally, starting in 2010, the State omitted from its stormwater permits the language requiring permitting only for those facilities "which have vehicle maintenance shops, material handling facilities, equipment cleaning operations, or airport deicing operations." Instead, the State required stormwater discharge permits for all "transportation facilities." Each of the Port's permits included this unqualified "transportation facilities" language. Plaintiffs PGA had sued, concerned that the Port was not abiding by the conditions of its ISGPs. Specifically, PGA was concerned that the Port's stormwater discharges from the Wharf violated the CWA.

In general, the CWA prohibits the discharge of any pollutant into the waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. While EPA can issue NPDES permits, most states, including Washington, can be authorized to do so.⁴⁷ In Washington, the state's Department of Ecology issues Clean Water Act permits, including ISGPs. In this case, the State issued each of the Port's ISGPs.

The Ninth Circuit reviewed the district court's decision *de novo*. The Port raised four arguments alleging that its disposal of stormwater was proper. The Ninth Circuit rejected each of the Port's arguments.

First, the Port argued that the ISGPs did not extend to the area of their facilities called "the Wharf." Further, the Port argued that even if

⁴⁵ 40 C.F.R. § 122.26(b)(14)(viii).

⁴⁶ *Id.*

⁴⁷ *See* 33 U.S.C. § 1342(b).

the ISGPs were written to cover the whole facility, the specific provisions dealing with stormwater discharges only controlled discharges associated with industrial activity. The Court determined that permit coverage was triggered when the facility, taken as a whole, conducted industrial activity. The Court noted that the nature of the facility, not the nature of discharge, triggered coverage under the ISGPs. In making this determination, the Court pointed to the contents of the ISGPs. Language in the ISGPs made clear, the Court said, that the specific obligations described covered a whole facility. The Court also explained that an ISGP provides two core responsibilities: preparation of a Stormwater Pollution Prevention Plan and sampling of discharges for pollutants. The Court stated that the ISGPs did not qualify the origin of the stormwater. The Court also explained that the permit-holder must sample discharges from the whole site. Finally, the Court noted that where the ISGPs provide exceptions to limit coverage, they do so explicitly. As such, the Court rejected the Port's argument and found that the ISGPs covered the entire facility.

Next, the Port argued even if the IGSPs covered the Wharf, the ISGPs could not be enforced by citizen suits. In making this argument, the Port cited to *Atlantic States Legal Foundation v. Eastman Kodak Company*.⁴⁸ In *Eastman Kodak*, the Second Circuit held that when state regulations require a greater scope of coverage than federal coverage under the CWA, citizen suits cannot enforce those state regulations.⁴⁹ The Ninth Circuit disagreed with the Port's argument. In finding that citizen-suit enforcement was appropriate, the Court first pointed to the plain language of the CWA. The CWA states that "any citizen may commence a civil action [. . .] against any person [. . .] who is alleged to be in violation of [. . .] an effluent standard or limitation under this chapter."⁵⁰ The Court pointed out that each element of that statutory section was met in this case. "Effluent standard or limitation" is defined in the statute to include permits.⁵¹ Additionally, the ISGPs were permits issued under 33 U.S.C. § 1342 and were in effect. Separately, the Court noted that it was bound by Ninth Circuit precedent from *Northwest Environmental Advocates v. City of Portland*,⁵² which directly conflicted with *Eastman Kodak*. Thus, the Court found that citizen-suit enforcement was proper.

The Port also argued that the terms of the 2010 and 2015 ISGPs were overly restrictive. The Court rejected this argument, finding that the Port could not collaterally attack the validity of the two permits. The Court noted that the CWA does not contemplate federal court review of state-issued permits. The Court did note that the Port could have received the same judicial review in a Washington state court. Even so, the Court observed that collateral attacks on CWA permits cannot occur during

⁴⁸ 12 F.3d 353 (2d. Cir. 1993).

⁴⁹ *Id.* at 359.

⁵⁰ 33 U.S.C. § 1365(a).

⁵¹ *Id.*; 33 U.S.C. § 1365(f)(7).

⁵² 74 F.3d 945 (9th Cir. 1996).

CWA enforcement actions. According to the Court, the proper channels for objection to the 2010 and 2015 ISGPs would have been the Hearings Board, followed by state court. But because the Port had not already brought challenges to the 2010 and 2015 ISGPs, the Port had lost the ability to do so. As such, the Court found that the Port could not collaterally attack the validity of the 2010 and 2015 ISGPs.

Next, the Port argued that a Hearings Board decision on the Port's 2020 ISGP should be given preclusive effect. The Court disagreed. The Court pointed out that a Washington Court of Appeals had subsequently reversed the Hearings Board's determination. The Court also noted that the district court, in its decision, had not addressed the state court of appeals' reversal of the Hearings Board. The Court remanded this issue back to the district court.

In sum, the Ninth Circuit reversed the district court's grant of summary judgment, vacated the district court's decision with regard to the scope of the 2020 ISGP, and remanded to the district court for further consideration the preclusion issues associated with the 2020 ISGP.

In concurrence, Judge O'Scannlain wrote to assert that *Northwest Environmental Advocates*, upon which the majority relied, had been incorrectly decided. Judge O'Scannlain noted that the majority had properly followed *Advocates* in this case, as it was Ninth Circuit precedent. But he wrote that *Advocates* was incorrect because it had created both a circuit split as well as an interpretation of the CWA that Congress did not intend. *Advocates* created a circuit split by conflicting with the holding in *Eastman Kodak*, and Judge O'Scannlain was concerned that this circuit split would cause unnecessary confusion among litigants. Further, Judge O'Scannlain objected to the holding in *Advocates* because it provided for citizen suits in cases about state water quality standards. He asserted that Congress had not intended to permit citizen suits in that context. Nevertheless, Judge O'Scannlain joined the majority's holding.

3. *United States v. Korotkiy*, 118 F.4th 1202 (9th Cir. 2024)

Chief Engineer of the MV Donald, a foreign-flagged cargo ship, Denys Korotkiy brought a challenge to his conviction under 33 C.F.R. § 151.25 for failing to maintain an accurate Oil Record Book in U.S. waters. On appeal, Korotkiy urged the Ninth Circuit to reverse the District Court for the Southern District of California's order for three reasons. First, Korotkiy argued that § 151.25 did not require crewmembers to maintain substantively "accurate" records in Oil Record Books. Second, Korotkiy argued that neither Congress nor the international community intended for such prosecutions to occur. Third, Korotkiy argued that only ship masters, not chief engineers, should be charged for violations of § 151.25. The Ninth Circuit held that "maintain" in § 151.25 requires a covered

ship's Oil Record Book to contain accurate (or at least not knowingly inaccurate) entries, aligning with several sister circuits.⁵³

Korotkiy's claim arose out of the alleged overboard dumping of oily bilge water on the high seas and the subsequent omission or falsification of those discharges in the ship's Oil Record Book. The MV Donald traveled from South Korea to San Diego in May 2022. While at sea, Chief Engineer Korotkiy allegedly ordered crew members to dump oily bilge water overboard, bypassing required pollution controls, and then omitted or falsified those operations in the Oil Record Book. Upon arriving at the Port of San Diego, the U.S. Coast Guard inspected the ship, found major gaps and apparent misstatements in the Oil Record Book, and concluded that the recorded bilge-water operations did not match the ship's alarm and machinery data. The government charged Korotkiy with multiple counts, including failure to maintain an accurate Oil Record Book in violation of 33 U.S.C. § 1908(a) and 18 U.S.C. § 2(b). The Court analyzed only whether failing to "maintain" an Oil Record Book in U.S. waters could include failing to keep the Book accurate because the defendant only challenged whether 33 C.F.R. § 151.25 applied to his conduct, and not the sufficiency of the evidence. The Court reviewed the district court's order *de novo*.

First, Korotkiy argued that § 151.25 simply obligates ships to preserve the Oil Record Book's physical condition, rather than ensure its substantive correctness. Korotkiy contended that the regulation's "maintenance" requirement, § 151.25, imposed only a duty on shipmasters to "preserve" or "keep" an Oil Record Book in good condition and on board the ship and that an interpretation of "maintenance" that requires accuracy undermines both the International Convention for the Prevention of Pollution from Ships (MARPOL) and the Act to Prevent Pollution from Ships (APPS) because it permits the federal government to prosecute misconduct committed on the high seas and outside of the United States' jurisdiction. The government conceded that this was a matter of first impression in the Ninth Circuit, and accordingly asked the Court to adopt the Fifth, Second, Third, and First Circuits' reasoning in *Jho*,⁵⁴ *Ionia*,⁵⁵ *Vastardis*,⁵⁶ and *Hornof v. United States*,⁵⁷ respectively, which all addressed similar situations to Korotkiy's and each held that "maintain" means keeping an Oil Record Book accurate or at least not knowingly false. The Court held that presenting a knowingly inaccurate record in U.S. waters violates § 151.25.

Second, Korotkiy argued that neither Congress nor the international community intended for such prosecutions to occur because MARPOL's enforcement framework envisions extraterritorial dumping violations

⁵³ 118 F.4th at 1202 (joining the Fifth, Second, Third, and First Circuits and holding that "the regulation's plain language proscribes Korotkiy's conduct and affirm the district court's decision.").

⁵⁴ *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008).

⁵⁵ *United States v. Ionia Management S.A.*, 555 F.3d 303 (2d Cir. 2009) (per curiam).

⁵⁶ *United States v. Vastardis*, 19 F.4th 573 (3d Cir. 2021).

⁵⁷ 107 F.4th 46 (1st Cir. 2024).

being referred to a vessel's flag state and does not contemplate direct U.S. prosecution of recordkeeping omissions originating on the high seas. The government responded that both Congress and MARPOL's enforcement scheme permit the United States to act when a foreign-flagged vessel presents an inaccurate Oil Record Book in its ports. The Ninth Circuit held that prosecuting recordkeeping violations discovered in U.S. waters aligns with APPS and the treaty's allowance for port-state jurisdiction. The Court reasoned that the international framework does not foreclose such enforcement but rather encourages it to ensure thorough investigations.

Third, Korotkiy argued that only ship masters, and not chief engineers, should be charged for violations of 33 C.F.R. § 151.25 because § 151.25's language about record-keeping duties applies only to the vessel's master, not a chief engineer. The government responded that 18 U.S.C. § 2(b) enables charging non-masters who knowingly cause a master's failure to maintain an accurate Oil Record Book. The Ninth Circuit held that chief engineers are not exempt simply because § 151.25 explicitly names the master as responsible because aiding-and-abetting principles apply to all ship personnel involved in concealing bilge-water discharges.

In dissent, Judge Smith argued that the majority's interpretation of "maintain" impermissibly stretched the plain meaning of the regulation and overlooked the context in which "maintenance" ordinarily refers only to preserving a record's physical condition. He further contended that this broader reading went beyond MARPOL's intended enforcement framework by effectively allowing prosecution of recordkeeping violations that originated on the high seas, a jurisdictional reach he deemed contrary to both the text and spirit of the treaty.

In sum, the Ninth Circuit held that "maintain" in 33 C.F.R. § 151.25 requires substantive accuracy in an Oil Record Book when a vessel is subject to U.S. jurisdiction. Korotkiy's convictions were upheld because Korotkiy knowingly caused the Book to contain false entries; thus, his conviction was valid. Accordingly, the Court affirmed the district court's denial of Korotkiy's motion to dismiss.

III. CONSUMER ISSUES

1. *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771 (9th Cir. 2024)

Plaintiff Summer Whiteside (Plaintiff) appealed to the Ninth Circuit the U.S. District Court for the Central District of California's decision to dismiss her claims. Plaintiff had brought a putative class action suit against Defendant Kimberly Clark Corp. (Defendant), alleging that Defendant's baby wipe products violated California false advertising

laws.⁵⁸ Plaintiff also brought claims for breach of warranty and unjust enrichment. The district court granted Defendant's Federal Rule of Civil Procedure (FRCP) 12(b)(6)⁵⁹ motion, finding that, as a matter of law, labeling on Defendant's products was not misleading. Specifically, the district court found that the term "plant-based" indicates that a product is mostly, but not exclusively, derived from plants. The district court also determined that a reasonable consumer is expected to consult other features of a product's packaging when a front label is not "unmistakably clear about the facet for which [the consumer] seeks more information."⁶⁰ On appeal, the Ninth Circuit reversed the district court in part and affirmed in part.

Plaintiff had sued Defendant alleging that Defendant's packaging for baby wipe products was misleading. Specifically, Plaintiff alleged that Defendant's use of the phrases "natural care" and "plant-based" on Defendant's packaging was misleading. The district court determined that Defendant had two categories of packaging for the relevant baby wipe products: "Unasterisked products" and "Asterisked products." The "Unasterisked Products" did not include qualifying information on the product's front label. The "Asterisked Products," however, included the statements "plant-based wipes*" and "*70%+ by weight" on the product's front label. Both "Unasterisked Products" and "Asterisked Products" had lists of ingredients on their back labels. The phrase "NATURAL AND SYNTHETIC INGREDIENTS" preceded the list of ingredients on both categories of product.

Before analyzing the merits, the Ninth Circuit explained its reasonable consumer standard and back-label disclaimers and ingredients standard. The Ninth Circuit stated that claims under California law are governed by a reasonable consumer standard.⁶¹ This standard requires plaintiffs to show that members of the public are likely to be deceived by the marketing claims. The Ninth Circuit also explained that including a disclaimer on a product does not automatically eliminate a defendant's liability for false statements on a front label. Additionally, the Court noted that if a product's front label is plausibly misleading to reasonable customers, the Ninth Circuit does not consider the back label at the pleadings stage.

On appeal, the Ninth Circuit reviewed the FRCP 12(b)(6) dismissal *de novo*. Under this standard, the Ninth Circuit took all allegations of material fact in the complaint as true and construed those facts in the light most favorable to the plaintiff.⁶² The Ninth Circuit further noted

⁵⁸ Plaintiff brought claims under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500 *et seq.*, and Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 *et seq.*

⁵⁹ Fed. R. Civ. P. 12(b)(6).

⁶⁰ To support this principle, the district court cited to *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016) and *Moore v. Trader Joe's Co.*, 4 F.4th 874 (9th Cir. 2021).

⁶¹ *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

⁶² *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1120 (9th Cir. 2007).

that dismissal under FRCP 12(b)(6) is appropriate when the complaint fails to state sufficient facts creating a plausible claim to relief.⁶³

The Court first addressed the parties' theories on how to determine if the front labels on Defendant's products were ambiguous. Plaintiff asserted that a front label can be unambiguous for FRCP 12(b)(6) so long as the plaintiff has plausibly alleged that a reasonable consumer would view the label as having one unambiguous meaning. Defendant argued that a front a label must be unambiguously deceptive in order to prevent a defendant from insisting that a front and a back label be read together.⁶⁴ The Ninth Circuit agreed with Plaintiff. The Ninth Circuit stated that a front label is ambiguous when a reasonable consumer would necessarily require more information before reasonably concluding that the label is making a particular representation.

Next, the Ninth Circuit analyzed whether the "Unasterisked Products" were misleading as a matter of law. The Ninth Circuit broke this inquiry into two parts. First, the Court analyzed the relevance of the products' back labels to the front labels. Then, the Court analyzed whether the front labels themselves were misleading.

Plaintiff alleged that a reasonable consumer could have interpreted the front labels of the "Unasterisked Products" as unambiguously representing that the products did not contain synthetic materials. Defendant asserted that the front labels were ambiguous, requiring consideration of the back labels. The Ninth Circuit found for Plaintiff. The Ninth Circuit stated that a front label is not ambiguous in a California false-advertising case just because it is susceptible to more than one meaning. Further, the Court stated that front-label ambiguity is determined by whether a front label necessarily requires a consumer to look at a back label, not whether the consumer could choose to look at the back label. In this case, the Ninth Circuit determined that a reasonable consumer could have plausibly understood "plant-based" to mean entirely plant-based. Thus, the Ninth Circuit held that the back label on the "Unasterisked Products" was not a basis for dismissal under FRCP 12(b)(6).

Plaintiff also asserted that the front labels on the "Unasterisked Products," by themselves, were misleading. Plaintiff argued that the phrase "planted-based" could reasonably imply that the products were made only from plant sources. In response, Defendant asserted that reasonable consumers understand that baby wipes are produced through complex manufacturing processes that involve both synthetic and natural ingredients. The Ninth Circuit agreed with Plaintiff. The Court reasoned that a reasonable consumer could suppose that baby wipe manufacturers have devised a method to make baby wipes with only plant-based compounds. The Court also rejected Defendant's assertion that a reasonable consumer would know of the complex baby-wipe

⁶³ *Trader Joe's*, 4 F.4th at 880.

⁶⁴ To support this proposition, Defendant cited to *McGinity v. Proctor & Gamble Co.*, 69 F.4th 1093, 1098 (9th Cir. 2023).

manufacturing process. The Court pointed out that the Federal Trade Commission's (FTC) Green Guides state that unqualified representations about renewable materials are likely to mislead a consumer that a product is entirely renewable.⁶⁵ The Ninth Circuit concluded that the qualified use of the phrase "plant-based" could lead a reasonable consumer to believe that the product was made entirely from plant-based materials.

Plaintiff then argued that the front labels on the "Asterisked Products" were ambiguous and presented questions of fact that should not be resolved on an FRCP 12(b)(6) motion. The district court had found that the "Asterisked Products" were unmistakably clear about the baby wipes being 70% plant-based by weight. The Ninth Circuit agreed with the district court. The Ninth Circuit reasoned that the "Asterisked Products" packaging followed California state law regarding qualifications on products made only partly from renewable materials.⁶⁶ Further, the Ninth Circuit stated that it would have reached this same conclusion even if the front label on the "Asterisked Products" was ambiguous. According to the Court, if the front label was ambiguous, a reasonable consumer would consult the back label. The back label on this product stated that the product was made of "natural and synthetic ingredients." As such, the Ninth Circuit affirmed the district court's dismissal with respect to Plaintiff's "Asterisked Product" claims.

Defendant also argued that FRCP 9(b) provided additional grounds for dismissing Plaintiff's complaint.⁶⁷ Defendant asserted that Plaintiffs failed to specify which package of baby wipes she saw in the store and purchased. The Ninth Circuit rejected this claim. The Court determined that while the record contained many different labels, Plaintiff had sufficiently alleged which label she had seen.

Plaintiff had also sought claims of warranty and unjust enrichment. The district court had dismissed these claims. Because the Ninth Circuit reversed the district with respect to the "Asterisked Products" claims, the Ninth Circuit required the district court to reconsider Plaintiff's warranty and unjust enrichment claims.

In sum, the Ninth Circuit reversed the district court's dismissal of Plaintiff's claims with respect to the "Unasterisked Products," affirmed the district court's dismissal with respect to the "Asterisked Products," and remanded back to the district court for further proceedings.

⁶⁵ The State of California has codified the Green Guides as law. *See* Cal. Bus. & Prof. Code § 17580.5.

⁶⁶ Cal. Bus. & Prof. Code § 17580.5(b)(1).

⁶⁷ FRCP 9(b) requires that "the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . ." *See also* *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (requiring that plaintiff must plead "the who, what, when, where, and how of the misconduct charged.").

2. *American Apparel & Footwear Association, Inc. v. Baden*,
107 F.4th 934 (9th Cir. 2024)

Trade associations⁶⁸ representing manufacturers of children’s products brought two preemption claims. Their suit alleged that two federal statutes—the Federal Hazardous Substances Act (FHSA)⁶⁹ and the Consumer Product Safety Act (CPSA)⁷⁰—preempted part of Oregon’s Toxic-Free Kids Act (TFKA) and two of its implementing regulations. The United States District Court for the District of Oregon dismissed the FHSA preemption claim and granted the State’s motion for summary judgment on the CPSA preemption claim. The trade associations timely appealed both dismissals. The Ninth Circuit affirmed the district court’s ruling, holding that FHSA and CPSA neither expressly nor impliedly conflict preempted Oregon’s TFKA.

As background, the Oregon Legislature had enacted the TFKA in 2015. The TFKA directs the Oregon Health Authority (OHA), a state agency, to create and maintain a list of high-priority chemicals of concern for children’s health (HPCCCH), and to issue regulations implementing the TFKA. As of January 1, 2022, OHA had listed 73 HPCCCHs.

The trade associations filed suit alleging that the TFKA should be enjoined because it subjects these 73 HPCCCH-listed chemicals to requirements that are preempted by federal law. The trade associations challenged Oregon Revised Statutes § 431A.258 (“Notice Statute”), Oregon Administrative Rules (OAR) § 333-016-2060 (“Notice Regulation”), and OAR § 333-016-3015 (“Exemption Regulation”) as unlawful because they impose requirements not identical to the federal framework.

The Notice Statute requires manufacturers of children’s products (or the manufacturers’ trade associations) to give biennial notices when a children’s product sold or offered for sale in Oregon contains a HPCCCH-listed chemical at or above a *de minimis* level.⁷¹ The Notice Regulation specifies that the notice must report the amount of the chemical used in each component part within each product category.⁷² If a children’s product fails to timely remove or substitute a HPCCCH-listed chemical, and that product is “mouthable,” “a children’s cosmetic” or “made for, marketed for use by or marketed to children under three years of age,” it may be banned in Oregon.⁷³ But the Exemption Regulation provides a few carveouts from the TFKA’s requirement. To be exempt, however, a manufacturer must submit an exemption request, a required fee of

⁶⁸ Plaintiff-Appellants consist of the following trade associations: American Apparel & Footwear Association, Inc., Halloween Industry Association, Inc., Juvenile Products Manufacturers Association, Inc., and Toy Association, Inc., d/b/a Safe to Play Coalition.

⁶⁹ 15 U.S.C. §§ 1261–1278 (2008) (providing text of Act).

⁷⁰ 15 U.S.C. §§ 2051–2089 (2008) (providing text of Act).

⁷¹ ORS §§ 431A.258(1)(a), (6).

⁷² OAR §§ 333-016-2060(4)(d), (1).

⁷³ ORS § 431A.260(1).

\$1,500, and supporting documentation that the children's product meets the applicable exemption standards.⁷⁴

The trade associations took issue with these exemption requirements. The trade associations sought declaratory and injunctive relief against both the OHA Director and the Oregon Attorney General in their official capacities, claiming that the FHSA and the CPSA preempt the challenged TFKA provisions. The district court found that the FHSA and CPSA did not expressly preempt the TFKA's statutory provisions or its implementing regulations. On appeal, the trade associations argued that the district court erred because these provisions are expressly preempted, and in the alternative, that the provisions are impliedly conflict preempted. No field preemption argument was made.

Additionally, the trade associations made only a facial preemption argument; they did not assert an as-applied challenge. The *Salerno* rule applies to a federal preemption facial challenge to a state statute. The Supreme Court explained in *United States v. Salerno*⁷⁵ that "the challenger must establish that no set of circumstances exists under which the [statute] would be valid."⁷⁶ Here, the trade associations had to show that the TFKA and its implementing regulations are invalid in all their applications. More specifically, the trade associations had to show that either the FHSA or the CPSA expressly or impliedly conflict preempted all 73 HPCCCH. The Ninth Circuit reviewed *de novo* the district court's dismissal of the complaint and the grant of summary judgment on preemption grounds.

First, the Ninth Circuit explained that Congress can preempt state law through express preemption if Congress clearly states that intent in legislation. Express preemption requires interpreting the statute's plain language and its surrounding framework. Both the FHSA and CPSA have express preemption provisions that rely on the actions of the Consumer Product Safety Commission ("Commission") in issuing preempting regulations. That is, these provisions require the Commission to have promulgated specific regulations before preemption occurs. Here, the Ninth Circuit concluded that the Commission had not issued regulations for many of the HPCCCH-listed chemicals. The trade associations, however, also argued that the FHSA preempts state laws simply because the Commission adopted the FHSA's definition of "banned hazardous substances" in a regulation. But the Ninth Circuit disagreed, ruling that merely incorporating the statutory definition in regulations does not trigger preemption. The Court further stated that the Commission must instead actively use its independent expertise and judgment in issuing specific regulations to invoke preemption. Similarly, the Ninth Circuit found no statutory support for the trade associations' argument in the CPSA. Ultimately, the Ninth Circuit concluded that the trade

⁷⁴ OAR § 333-016-3015; OAR § 333-016-2080(1)(e).

⁷⁵ 481 U.S. 739 (1987).

⁷⁶ 481 U.S. at 745.

associations' express preemption argument ran counter to the statutory text, congressional intent, and concepts of federalism.

The Ninth Circuit cited precedent from its sister circuits, notably the Second Circuit, to support this holding. The Ninth Circuit noted that enforcement actions by the Commission under the FHSA do not automatically trigger preemption. Thus, the Ninth Circuit affirmed the district court's holding that the FHSA and CPSA did not expressly preempt the TFKA because the Commission had not enacted the necessary regulations to trigger preemption, and so the trade associations had failed to prove that the TFKA and its regulations are invalid under all circumstances.

Second, the trade associations argued that the CPSA impliedly preempted the Notice Statute, the Notice Regulation, and the Exemption Regulation through principles of conflict preemption. The Ninth Circuit previously held in *Puente Arizona v. Arpaio*⁷⁷ that implied conflict preemption only occurs where (1) "it is impossible to comply with both federal and state law," or (2) "where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷⁸ In reading this second prong, the trade associations interpreted any nonidentical state requirement in the TFKA and its regulations as such an obstacle to congressional intent. But the Ninth Circuit again disagreed. The Ninth Circuit emphasized that the mere fact of tension between federal and state law is not enough to escalate to conflict preemption.

The Ninth Circuit's analysis of implied conflict preemption paralleled its express preemption analysis. As with express preemption, the *Salerno* standard applies to conflict preemption. The Ninth Circuit held that the district court correctly applied *Salerno* in finding that the CPSA does not facially preempt the challenged TFKA provisions because they are constitutionally applicable to the HPCCH-listed chemicals which the CPSC has not yet regulated. Thus, for the same reasons the Ninth Circuit concluded there was no express preemption, it concluded there was no implied conflict preemption.

In sum, the Ninth Circuit held that the FHSA and the CPSA neither expressly nor impliedly conflict preempted the TFKA's exemption requirements contained in statute and regulation, affirming the district court's ruling.

⁷⁷ 821 F.3d 1098 (9th Cir. 2016).

⁷⁸ *Id.* at 1104–05.

IV. CERCLA

1. *Santa Clarita Valley Water Agency v. Whittaker Corporation*, 99 F.4th 458 (9th Cir. 2024)

The Whittaker Corporation (Whittaker) appealed,⁷⁹ and the Santa Clarita Valley Water Agency (SCVWA or Agency) cross-appealed, a \$68.5 million judgment in the Agency's favor, following a combined jury and bench trial in the United States District Court for the Central District of California for state tort causes of action⁸⁰ and a finding of liability under the federal Comprehensive Environmental, Response, Compensation and Liability Act (CERCLA).⁸¹ The Ninth Circuit rejected all three of Whittaker's arguments on appeal and affirmed the jury award against Whittaker. The Court also reversed the district court's ruling on two of the Agency's claims, granting the Agency a finding of liability and declaratory relief against Whittaker under CERCLA.

SCVWA is a public water agency that supplies potable water to over 300,000 residents in Santa Clarita Valley. To do so, the Agency primarily pumps groundwater from two aquifers—a shallow aquifer (the Alluvium) and a deeper, larger aquifer (the Saugus Formation)—through wells. At issue were four wells that pump water from the Saugus Formation. Whittaker and its predecessor landowner (Bermite) had contaminated these wells with various toxic chemicals.

Whittaker and Bermite were both manufacturers of munitions and explosives. Bermite operated at the Santa Clarita site until 1967, when Whittaker acquired the property and continued operating until 1987. Both companies' manufacturing operations involved toxic chemicals, including perchlorate and volatile organic compounds (VOCs). Both companies improperly disposed of large volumes of these toxic chemicals into the ground, which migrated into the Saugus Formation aquifer.

Between 1997 and 2018, the Agency found toxic chemicals in four wells.⁸² First in 1997, the Agency found perchlorate and VOCs in two wells. The Agency took the wells offline and opted to make the contaminated water potable by installing a treatment facility and buying contaminant-free water to blend with the treated water. The Agency and

⁷⁹ Third-party defendants include the Keysor-Century Corporation (Keysor), a California corporation, and Saugus Industrial Center, LLC (SIC), a Delaware limited liability company. Following SCVWA's suit against Whittaker, Whittaker filed a third-party complaint against Keysor and SIC. Whittaker asserted that Keysor was the former owner of a nearby property and used over 50 million pounds of VOCs in its annual operations, and that SIC, as the buyer of the Keysor site, knew or should have known of the contamination issues.

⁸⁰ SCVWA asserted state-law claims of negligence, trespass, public nuisance, and private nuisance.

⁸¹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* (2018).

⁸² The technical names of the four wells, in order, are: Saugus 1 ("S-1"), Saugus 2 ("S-2"), V-201, and V-205.

Whittaker negotiated an agreement where Whittaker was to pay for the treatment facility and reimburse the Agency for the contaminant-free water. In 2010, following treatment and blending, the Agency resumed using the two wells to supply potable water. But that same year, the Agency had to take a third well offline for perchlorate contamination. The Agency and Whittaker reentered negotiations for this well, and Whittaker agreed to pay for a treatment facility and to reimburse the Agency for having to buy replacement water to restore the potable water supply for consumers. Whittaker covered the costs from 2012 to 2017, but since 2017, the Agency apparently bore the costs. Finally, the Agency took a fourth facility offline in 2012 for perchlorate contamination. No treatment facilities have been installed and, like the third well, the Agency has had to buy replacement water to restore the potable water supply. In 2018, the Agency detected perchlorate above the maximum contamination level (MCL) at the fourth well, leading the Agency to commence litigation against Whittaker.

The Agency's lawsuit against Whittaker alleged multiple state and federal law violations, and sought injunctive relief as well as compensatory and punitive damages. First, a jury trial decided the four state law claims for negligence, trespass, public nuisance, and private nuisance. The jury found Whittaker liable for all four claims and awarding the Agency \$7 million in past damages and \$68.3 million for restoration costs. The court reduced the verdict to \$64.8 million to reflect the Agency's fault⁸³ and other settlement offsets.⁸⁴

Following the jury trial, the district court decided the federal law claims. First, the court ruled that the Agency could not obtain relief under the Resource Conservation and Recovery Act (RCRA)⁸⁵ for the VOCs migration, as the risk was not deemed "imminent and substantial." However, the court ruled that, under CERCLA, the Agency could recover \$675,000 in investigation and design costs; but it could not establish liability or obtain further compensation for either the blended water or replacement water costs, as they would be duplicative of the jury award for the state law claim, and thus precluded by CERCLA's bar on double recovery. Ultimately, the final judgment awarded the Agency a total of \$68.5 million in damages, including damages, costs, and prejudgment interest.

⁸³ The jury found that SCVWA, SIC, and Whittaker were all negligent, apportioning 10% of fault to SCVWA for failure to mitigate damages, 30% of fault to SIC, and 60% of fault to Whittaker. The district court reduced the jury verdict to \$64,870,000 to reflect (1) a 10% reduction due to SCVWA's fault and (2) a reduction of \$2.9 million reflecting Whittaker's *pro tanto* offset from its settlement with SIC.

⁸⁴ SIC and SCVWA entered into a settlement agreement. SIC agreed to pay SCVWA \$2.9 million to settle the contamination issues between the parties, in exchange for the district court granting a Motion for Good Faith Settlement. In approving the settlement, the district court determined that the settlement would offset any judgment against Whittaker on a *pro tanto* basis.

⁸⁵ Resource Conservation and Recovery Act of 1976, 42 U.S.C §§ 6901 *et seq.* (2021).

On appeal, Whittaker made three arguments, each of which the Ninth Circuit rejected. First, Whittaker argued the district court erred in letting the Agency assert restoration costs in its damages theory after the close of discovery, contending the Agency violated Federal Rule of Civil Procedure (Rule) 26 by not disclosing the legal theory underlying those damages. The Ninth Circuit noted that whether Rule 26 required the disclosure of legal theories was an issue of first impression for the appellate court. In line with the district court, the Ninth Circuit ruled in favor of the Agency, holding that Rule 26 does not require the disclosure of legal theories. The Court reasoned that because the Agency had disclosed all relevant evidence regarding its damages computation, Whittaker had sufficient notice of the Agency's claims and could have mounted a defense based on that information, and so the failure to disclose a legal theory was not a violation of Rule 26.

Second, Whittaker challenged the jury's reliance on the treatment facilities as a measure of damages for the Agency's restoration costs claim. Whittaker argued that the Agency did not prove the property's original condition, stating that this failure made the treatment facilities an improper measure of damages and that the jury's award of restoration costs put the Agency in a better position than it was pre-contamination. But the Ninth Circuit upheld the jury's decision. The Court agreed that restoration costs were an appropriate measure of damages under California tort law, as they compensated the Agency for the harm caused by Whittaker's negligence. The Ninth Circuit reasoned that the Agency had sufficiently proven that the treatment facilities were necessary to restore the property to its prior condition, and that Whittaker failed to prove the costs would put the Agency in a better position than before the contamination.

Third, Whittaker argued that if the restoration costs are not vacated, they should be reduced because they are unreasonable in light of the limited harm that the VOC contamination had on drinking water. Again, the Ninth Circuit affirmed the jury's verdict. The Court found that there was sufficient evidence to justify the award, including the need for the Agency to meet stringent regulatory standards for water from the contaminated Saugus Formation. The Ninth Circuit emphasized that the jury was entitled to weigh the evidence and make credibility determinations; and the Court found that the jury's conclusion was reasonable.

On the other side, the Agency raised five arguments on appeal, and the Ninth Circuit granted two. First, the Agency sought injunctive relief under RCRA to compel Whittaker to install groundwater monitoring wells off-site to investigate the extent of the contamination. The Ninth Circuit denied the Agency's request, affirming the district's court's decision. The Court reasoned that the ongoing cleanup efforts, including the installation of over 200 monitoring wells and removal of contaminants, had sufficiently addressed the risk. Further, the Court emphasized that the threat of harm did not meet RCRA's criteria for

imminent endangerment, as the cleanup was extensive and supervised by state-level agencies.

Second, the Agency argued that CERCLA's bar on double recovery does not preclude a finding of liability against Whittaker for its blended and replacement water costs, as it is only seeking a finding of liability, not an award of damages under CERCLA. As with Whittaker's Rule 26 claim, the Ninth Circuit noted that whether CERCLA's bar on double recovery precludes a finding of liability for incurred response costs is a matter of first impression for the appellate court. On this matter, the Ninth Circuit reversed the district court, holding that CERCLA's bar on double recovery does not preclude a finding of liability for incurred response costs, if the relief is structured to prevent double compensation. In so doing, the Ninth Circuit cited to *Price v. U.S. Navy*,⁸⁶ which also held that CERCLA does not bar a finding of liability so long as the district court frames the relief to prevent double recovery.

Consequently, the Ninth Circuit then had to determine whether the Agency satisfied the elements of CERCLA for its incurred blended and replacement water costs, such that a finding of liability is appropriate. As to the blended water costs, the Agency claimed that Whittaker should be held liable because the costs were necessary and consistent with the National Contingency Plan (NCP).⁸⁷ On this, the Ninth Circuit agreed with the Agency, finding that the blended water costs qualified as removal actions, rather than remediation actions, since they were short-term costs incurred to address the immediate contamination threat. Despite some lack of compliance with certain public participation requirements, the Ninth Circuit held that ongoing regulatory oversight met the NCP's public participation requirements. Thus, the Ninth Circuit ruled that Whittaker was liable for 90% of the Agency's blended water costs, in line with the jury's earlier apportionment of fault. As to the replacement water costs, the Agency argued these were a Time-Critical Removal Action (TCRA) and that it met the NCP's lower public participation standards for TCRAs. However, the Ninth Circuit disagreed, holding that the Agency did not substantially comply with the NCP requirements because the action for replacement water extended beyond 120 days, triggering more stringent participation requirements. Thus, the Court affirmed the district court's denial of liability for the replacement water costs.

Third, the Agency sought declaratory judgment under CERCLA as to the incurred response costs for which the Agency established CERCLA liability. The district court had denied the request, reasoning that the jury's award for future costs related to treatment facilities was already sufficient and that further relief would be duplicative. But the Ninth Circuit reversed the district court, finding that under CERCLA, § 9613(g)(2) mandates a declaratory judgment on liability for response

⁸⁶ *Price v. U.S. Navy*, 818 F. Supp. 1326, 1332–33 (S.D. Cal. 1992), *aff'd*, 39 F.3d 1011 (9th Cir. 1994).

⁸⁷ 42 U.S.C. § 9605 (2002).

costs once a party has succeeded in a CERCLA action. The Ninth Circuit emphasized that even if future response costs are speculative or already addressed by the jury's award, CERCLA mandates such a judgment, which would be binding for future recovery actions.

Further, the Ninth Circuit confirmed that declaratory relief would not result in double recovery due to CERCLA's bar. As such, the Ninth Circuit held that the Agency is entitled to declaratory relief for the response costs (*i.e.*, the blended and replacement water costs) that Whittaker was liable for.

Fourth, the Agency argued that it was entitled to prejudgment interest on its replacement water costs, asserting that it incurred these costs and was deprived of the use of its money during the period leading to the judgment. The Ninth Circuit denied the Agency of prejudgment interest, affirming the district court. The Court reasoned that because the Agency did not actually bear the financial burden of the replacement water costs but instead transferred them to its consumers, there was no need to compensate the Agency for the time value of those costs.

Fifth, the Agency argued it was entitled to attorneys' fees under California's private attorney general statute.⁸⁸ The Agency contended that it should be awarded attorneys' fees because it successfully enforced important public rights related to environmental cleanup. The Ninth Circuit denied the Agency of an award of attorneys' fees, affirming the district court. The Ninth Circuit held that the plain language of the statute limited fee awards to situations where a public entity prevails in a lawsuit against another public entity, which was not the case here since Whittaker is a private defendant.

In sum, the Ninth Circuit affirmed in part, and reversed and remanded in part back to the district court to amend the judgment consistent with this opinion. In particular, the Ninth Circuit reversed the district court on the following findings: first, that mere CERCLA liability is not precluded by the bar on double recovery, and second, that Whittaker was, in fact, liable for 90% of the Agency's blended water costs.

2. *Abbey et al. v. United States*, 112 F.4th 1141 (9th Cir. 2024)

Plaintiffs Kevin Abbey et al.⁸⁹ appealed to the Ninth Circuit the U.S. District Court for the Northern District of California's decision to dismiss their complaint against the United States.⁹⁰ On appeal, plaintiffs sought reconsideration of two claims. First, plaintiffs alleged that their claims against the United States were outside of the Federal Tort Claims Act's (FTCA) misrepresentation exception.⁹¹ Second, plaintiffs asserted that

⁸⁸ Cal. Civ. Proc. Code § 1021.5.

⁸⁹ Abbey was co-plaintiff with other past and current San Francisco Police Department employees.

⁹⁰ The U.S. Department of the Navy and Tetra Tech, Inc. joined the federal government as co-defendants.

⁹¹ 28 U.S.C. § 2680(h).

the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) disclosure mandate⁹² limited the FTCA's misrepresentation exception. The Ninth Circuit dismissed both claims, affirming the district court's decision.

This case centered on Hunters Point Naval Shipyard (Hunters Point), a 965-acre former Naval facility along San Francisco Bay. During the Cold War, the U.S. Navy used Hunters Point to decontaminate radioactive vessels that had been used in nuclear weapons testing. In 1989, the Environmental Protection Agency (EPA) determined that Hunters Point was a Superfund site under CERCLA. EPA's Superfund determination required the Navy to remediate Hunters Point before the site could be reused. The Navy subcontracted to a company called Tetra Tech, Inc. to perform the remediation. Subsequently, the Navy negotiated a lease agreement with the San Francisco Police Department.

Plaintiffs alleged that the Navy misrepresented the safety of the leased site in two documents from 1996 prepared under CERCLA's § 120(h)(1) disclosure requirement. Plaintiffs also alleged that the City of San Francisco (City) had relied on the Navy's misrepresentations about the site's safety when the City leased the site. Additionally, plaintiffs claimed that the Navy was negligent in its oversight of Tetra Tech, Inc. Plaintiffs claimed that they were exposed to radiological contamination at the site, which created health problems and elevated risk of future health problems.

The district court dismissed plaintiffs' first and second amended complaints. The district court dismissed plaintiffs' first amended complaint without prejudice. In doing so, the district court stated that the FTCA's misrepresentation exception appeared to bar at least some of portion of plaintiffs' claims. Plaintiffs then filed a second amended complaint. The district court dismissed the second amended complaint, this time with prejudice. The district court stated that the plain language of 28 U.S.C. § 2680(h) exempted any claim arising out of misrepresentation from the FTCA's sovereign immunity waiver.

On appeal, the Ninth Circuit reviewed the case *de novo*.

As a threshold matter, the Ninth Circuit determined that plaintiffs' claims arose out of the Navy's alleged misrepresentations. The Court pointed to the plain language of 28 U.S.C. § 2680(h) which exempts from the FTCA's waiver of sovereign immunity "[a]ny claims arising out of misrepresentation." The Court explained that the Ninth Circuit's case law provides that a claim is barred if the government's alleged misrepresentation is at the claim's essence. The Court further explained that to determine a claim's essence, the Court examines the alleged conduct on which the claim is based. Here, the Court determined that the Navy's alleged misrepresentation was essential to the plaintiffs' claims.

Plaintiffs first argued that the FTCA's misrepresentation exception did not apply because the misrepresentation was not made directly to the plaintiffs. The Ninth Circuit rejected this claim. The Court stated that

⁹² 42 U.S.C. § 9620(h)(1).

the Supreme Court has never required a misrepresentation to be made directly to a plaintiff. Plaintiffs relied on two Supreme Court cases, *Neustadt* and *Block*, to support their claim.⁹³ But the Court determined that neither case was on point regarding third-party misrepresentation. The Court pointed out that *Neustadt* held that a particular claim was barred by § 2680(h) because the case involved traditional negligent misrepresentation. The Court also noted that *Block* involved the absence of information communicated but not misrepresentation.

Next, plaintiffs argued that their reliance on the Navy's alleged misrepresentation should weigh in plaintiffs' favor. The Ninth Circuit rejected this argument. The Court stated that its decision was consistent with circuit precedent establishing a broad view of the FTCA's misrepresentation exception. The Court cited to Ninth Circuit cases *Alexander* and *Lawrence* as examples of this precedent.⁹⁴ The Court also noted that the Fifth and Eleventh Circuits both follow a similar misrepresentation approach.⁹⁵

The plaintiffs then argued that three out-of-circuit cases buttressed their third-party reliance theory.⁹⁶ The Court disagreed. The Ninth Circuit said that the first two out-of-circuit cases, *Jimenez-Nieves* and *Saraw*, involved clerical error and not misrepresentation. The Court distinguished the third out-of-circuit case, *Trentadue*, as not involving third-party reliance. The Court additionally distinguished *Trentadue* because *Trentadue* involved the very question of whether the government's involvement was collateral. The Court stated that in this case the government's actions were central to the plaintiffs' claims.

Next, the plaintiffs asserted that CERCLA's § 120(h) disclosure requirement limits or suspended the FTCA's misrepresentation exception. The Court rejected this claim. The Court stated that Congress did not silently waive sovereign immunity under § 120(h). Following Ninth Circuit precedent, the Court assumed that Congress was aware of the FTCA's misrepresentation exception.⁹⁷ The Court also pointed out that CERCLA does not reference the FTCA. Additionally, the Court noted that it strictly construes waivers of sovereign immunity.⁹⁸ The Court further observed that CERCLA § 120(a)(1) does waive sovereign immunity for other types of suits.

⁹³ *United States v. Neustadt*, 366 U.S. 696 (1961); *Block v. Neal*, 460 U.S. 289 (1983).

⁹⁴ *Alexander v. United States*, 787 F.2d 1349, 1350–51 (9th Cir. 1986); *Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003).

⁹⁵ In the Fifth Circuit, the Court cited to *Baroni v. United States*, 662 F.2d 287 (5th Cir. 1981) and *Williamson v. Dep't of Agric.*, 815 F.2d 368 (5th Cir. 1987). In the Eleventh Circuit, the Court cited to *JB Acquisitions, LP v. United States ex rel. FDIC*, 224 F.3d 1260 (11th Cir. 2015) and *Zelaya v. United States*, 781 F.3d 1315. (11th Cir. 2015).

⁹⁶ To support their claims, plaintiffs cited *Jimenez-Nieves v. United States*, 682 F.2d 1 (1st Cir. 1982); *Saraw Partnership v. United States*, 67 F.3d 567 (5th Cir. 1995); and *Est. of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840 (10th Cir. 2005).

⁹⁷ See *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007) (stating that the Ninth Circuit “presume[s] that Congress is aware of the legal context in which it is legislating.”).

⁹⁸ *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012).

Lastly, the plaintiffs argued that two cases, *Neustadt* and *Zurn*,⁹⁹ supported plaintiffs' argument that CERCLA § 120(h) limited or suspended the FTCA's misrepresentation exception. The Court found neither case persuasive. The Court explained that neither case held that a federal statute displaced the FTCA's misrepresentation exception. The Court then stated that the reasoning in *Neustadt* and *Zurn* could not replace the Ninth Circuit's traditional tools of statutory interpretation.

In sum, the Court held that the plaintiff's claims were barred under 28 U.S.C. § 2680(h) because the plaintiffs' claims arose out of the Navy's misrepresentation. The Court affirmed the district court's dismissal of the plaintiffs' claims for lack of subject matter jurisdiction.

⁹⁹ *City of Garland v. Zurn Industries, Inc.*, 870 F.2d 320 (5th Cir. 1989).