CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Federal Water Pollution Control Act

1. Natural Resources Defense Council, Inc. v. County of Los Angeles, 673 F.3d 880 (9th Cir. 2011).

The Natural Resources Defense Council (NRDC) and Santa Monica Baykeeper (collectively, Plaintiffs) appealed the ruling of the United States District Court for the Central District of California granting summary judgment in favor of Defendants[1] who were alleged to have violated the Clean Water Act (CWA).[2] Plaintiffs alleged that Defendants discharged polluted stormwater runoff into four navigable waters of southern California: the Santa Clara River, Los Angeles River, San Gabriel River, and Malibu Creek (collectively, the Watershed Rivers). This discharge, Plaintiffs asserted, was in excess of the limitations imposed by Defendants' National Pollutant Discharge Elimination System (NPDES)[3] permit. The United States Court of Appeals for the Ninth Circuit reviewed the district court's judgment de novo and reversed the grant of summary judgment for Defendants regarding the Los Angeles River and San Gabriel River, but affirmed the grant of summary judgment regarding the Santa Clara River and Malibu Creek.

Stormwater runoff is surface water generated by precipitation that flows over streets and other developed land. Unlike rainwater that runs over and permeates the soil, stormwater running over impermeable surfaces

1 The named defendants were the County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne Burke, Gloria Molina, Zev Yaroslavsky, Dean D. Efstathiou, and Don Knabe.

2 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

3 *Id.* § 1342. In 1987, Congress amended the CWA to include a stormwater permit system. *Id.* § 1342(p); *see* Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 966 F.2d 1292, 1295 (9th Cir. 1992); *see also* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharge, 55 Fed. Reg. 47,990, 47,994 (Nov. 16, 1990) (codified at 40 C.F.R. pts. 122, 123, 124) (noting Congress's intent to regulate discharges from municipal sewer systems and other priority storm water discharges through a permit program).

collects "suspended metals . . . floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants."[4] In this case, Defendants' municipal separate storm-sewer systems (MS4s) collected the stormwater and—without passing the stormwater through wastewater treatment facilities—drained it into the Pacific Ocean. This drainage system is very complex and its infrastructure includes 500 miles of open channels, 2,800 miles of storm drains, and no map exists specifying the locations of the storm drains.[5] However, it is known that stormwater is channeled through these four Watershed Rivers before reaching the Pacific Ocean.

Plaintiffs alleged that Defendants violated the CWA by allowing untreated and heavily polluted stormwater to flow into several navigable waters that end in the Pacific Ocean—also a navigable water. The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[6] To achieve that end, the CWA prohibits any person from discharging any pollutant from a point source into navigable waters unless such discharge is in compliance with the CWA.[7] A discharge of a pollutant includes any addition of a pollutant to a navigable water from a point source.[8] Under the CWA, the MS4s operated by the Defendants are considered point sources.[9] The only way a person or entity may add pollutants to a navigable water is if they comply with the CWA by obtaining an NPDES permit limiting the type and quantity of pollutants that can be discharged.[10]

The California State Water Resources Control Board for the Los Angeles Region issued Defendants an NPDES permit (Permit) to discharge stormwater in their county.[11] The Permit required Defendants to implement a Stormwater Quality Management Program (SQMP),[12] and also vested Defendants with legal authority to control and prohibit discharges into the MS4.[13] The Permit employed mass emission monitoring stations, along with other means, to monitor pollution in the four Watershed Rivers.[14] For the

4 Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 344 F.3d 832, 840 (9th Cir. 2003).

5 Natural Res. Def. Council, Inc. v. County. of L.A., 673 F.3d 880, 884 (9th Cir. 2011).

6 33 U.S.C. § 1251(a) (2006).

7 S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004).

8 33 U.S.C. § 1362(12) (2006); *see* Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 308 (9th Cir. 1993).

9 33 U.S.C. § 1362(14) (2006). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, *channel*, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* (emphasis added).

10 33 U.S.C. § 1342(a), (p) (2006); *Miccosukee Tribe of Indians*, 541 U.S. at 102.

11 CAL. REG'L WATER QUALITY CONTROL BD. L.A. REGION, ORDER NO. 01-182/NPDES PERMIT NO. CAS004001, WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL STROM WATER AND URBAN RUNOFF DISCHARGES WITHIN THE COUNTY OF LOS ANGELES, AND THE INCORPORATED CITIES THEREIN, EXCEPT THE CITY OF LONG BEACH 3 (2007)[hereinafter PERMIT], *available at* www.waterboards.ca.gov/losangleles/waterissues/programs/stormwater/municipal/la_ms4/final%20order%20no.%2001-182%20as%20amended%20on%20april%2014%20211.pdf.

12 Natural Res. Def. Council, Inc. v. County. of L.A., 673 F.3d 880, 888 (9th Cir. 2011).

13 *Id.*

14 *Id.* Mass emission monitoring measures all the constituents in water to give a cumulative picture of the pollutant load. *Id.*

four Watershed Rivers in this case, mass emission monitoring detected high levels of pollutants being discharged on multiple occasions. The monitoring stations for the Los Angeles and San Gabriel Rivers are located within the channelized portion of the MS4 owned and operated by Defendants; whereas the monitoring stations for Malibu Creek and the Santa Clara River are not.

Defendants did not dispute that water quality exceedances occurred between 2002 and 2008 at the monitoring stations for the four Watershed Rivers. Nevertheless, the district court held that Plaintiffs had failed to establish the liability of Defendants because they failed to present evidence as to who was responsible for the stormwater discharge.[15] Although the district court noted that Defendants were responsible for pollutants in the MS4 when they passed mass-emission stations, that did not necessarily establish that Defendants were responsible for the "discharge" of the pollution within the meaning of the CWA.[16] Consequently, the Ninth Circuit analyzed: 1) whether an exceedance at the mass emission monitoring stations constituted a Permit violation, and if so, 2) whether pollutants discharged by the Defendants caused or contributed to the water quality exceedances.

First, the Ninth Circuit addressed whether the "exceedances" at the mass emission stations constituted a Permit violation. Section 2.1 of the Permit mandated that "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited."[17] Defendants argued that municipal discharges were not to be held to the same regulatory standards as private entities under NPDES permits. The Ninth Circuit found otherwise. The court recognized that Congress expanded NPDES permitting so as to apply CWA requirements to municipal dischargers and noted that the United States Court of Appeals for the D.C. Circuit has since invalidated the section 402 exemptions for MS4s promulgated by the United States Environmental Protection Agency (EPA).[18] Furthermore, EPA did not promulgate any regulations targeting MS4 dischargers after the D.C. Circuit invalidated the exemptions,[19] and Congress amended the CWA in 1987 to specifically regulate discharges from MS4s.[20] Thus, in contrast to Defendants' claim, the court concluded that NPDES permits are enforceable against municipalities.

Likewise, the Ninth Circuit held that mass emission monitoring is a valid enforcement mechanism against municipal dischargers. To hold

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15 Natural Res. Def. Council v. County of L.A., No. CV 08-1467, 2010 WL 761287, at * 6 (C.D. Cal. Mar. 2, 2010).

16 *Id.* at * 7.

17 PERMIT, *supra* note 11, at 23.

18 *See* Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1371 (D.C. Cir. 1977).

19 *See also* Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency (*NRDC v. EPA*), 966 F.2d 1292, 1296 (9th Cir. 1992) (citing National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, 56 Fed. Reg. 56,548 (Nov. 5, 1991) (codified at 40 C.F.R. pt. 122)).

20 *See* Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999); *NRDC v. EPA*, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 . . . .").

otherwise, the Ninth Circuit found, would "emasculate the Permit" in a manner unsupported by case law or textual analysis.[21] The Permit incorporated the Water Quality Control Plan for the Los Angeles Region (the Basin Plan), which set water quality standards for contaminants for the Watershed Rivers. Moreover, there was no safe harbor provision in the Permit. Instead, Part 6.D of the Permit required municipal compliance.[22] Consequently, mass emission monitoring validly measures compliance with the Permit, and Permit violations constitute CWA violations.

Finally, the Ninth Circuit addressed whether there was sufficient evidence in the record to demonstrate that Defendants had discharged stormwater that caused or contributed to water quality violations. Although the district court found the evidence lacking as to all four Watershed Rivers, the Ninth Circuit held that the evidence was sufficient regarding the Los Angeles and San Gabriel Rivers, but not for the Santa Clara River or Malibu Creek. The Permit specifies that a "discharge" from the MS4 that causes or contributes to the violation of water quality standards is prohibited,[23] and a "discharge" is any addition of a pollutant to a navigable water from a point source.[24] Here, the MS4 is a "point source"[25] and the four Watershed Rivers at issue are all "navigable waters."[26] Thus, a discharge from the MS4 into any of the Watershed Rivers is a violation of the CWA.

At issue, then, were Defendants' contentions that they merely transported the pollutants, did not discharge them, and that it would be impossible to pinpoint who was actually responsible for the discharges. In response, the Ninth Circuit noted that the mass emission measuring stations for the Los Angeles and San Gabriel Rivers are actually located *within* the section of the MS4 owned and operated by Defendants. Consequently, when pollutants were detected, they had not yet *exited* the point source into navigable waters. As such, Defendants had control over the polluted stormwater where it was measured, and thereby caused or contributed to the exceedances when that water was discharged into the rivers. Furthermore, the MS4 is a man-made construction, not a naturally occurring Watershed River, so a discharge occurred when the polluted stormwater flowed out of the channels of the monitoring stations and into the navigable waterways. Such action constituted a violation of the CWA because the CWA "bans 'the discharge of any pollutant by any person' regardless of whether

21 Natural Res. Def. Council, Inc. v. County. of Los Angeles, 673 F.3d 880, 895 (9th Cir. 2011); *see* also Nw. Envtl. Advocates v. City of Portland, 56 F.3d 979, 986 (9th Cir. 1995) ("The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions.").

22 PERMIT, *supra* note 11, at 71 ("Each Permittee must comply with all terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act . . . and is grounds for [an] enforcement action, Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof.").

23 *Id.* at 18.

24 Federal Water Pollution Control Act, 33 U.S.C. § 1362(12) (2006).

25 *See id.* §§ 1342(p)(2), 1362(14).

26 The jurisdictional elements of a CWA violation include the discharge from a point source into a navigable water. *Id.* § 1362(12); *see* Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999).

that 'person' was the root cause or merely the current superintendent of the discharge."[27]

In sum, the Ninth Circuit reversed the district court's grant of summary judgment on two of Plaintiffs' claims and affirmed the grant of summary judgment on the remaining two claims. The court held that Defendants discharged pollutants into the Los Angeles and San Gabriel Rivers because the mass emission stations were concretely within the Defendants' MS4 control. Conversely, the court held that Plaintiffs had failed to establish a relationship between Defendants' conduct and the MS4 pollution detected at the mass emission stations of the Santa Clara River and Malibu Creek. Consequently, Plaintiffs were entitled to summary judgment regarding their Los Angeles River and San Gabriel River claims, and Defendants were entitled to summary judgment regarding the Santa Clara River and Malibu Creek claims.

B. Clean Air Act

1. Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control District, 644 F.3d 934 (9th Cir. 2011).

Plaintiff, Jensen Family Farms, Inc. (Jensen), a for-profit agricultural corporation,[28] brought suit against Monterey Bay Unified Air Pollution Control District (District), a political subdivision of the State of California, challenging District rules regulating diesel-powered engines. Seeking permanent injunctive relief, Jensen alleged that: 1) the Clean Air Act (CAA)[29] preempted District Rules 220, 310, and 1010 (collectively, Rules); 2) California law preempted Rules 220 and 310; and 3) the Rules violated substantive due process. The California Air Resources Board (CARB), California's air pollution control agency, intervened as a defendant. The United States District Court for the Northern District of California rejected each of Jensen's arguments and granted the District's and CARB's (collectively, Defendants) joint motion for judgment on the pleadings.[30] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of judgment on the pleadings in favor of Defendants and held that Jensen's appeal of the denial of its motion for a preliminary injunction was moot.

In 2004, CARB adopted an airborne toxic control measure (ATCM) to regulate particulate matter emissions from diesel-fueled engines.[31] In 2007,

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27 W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 167 (4th Cir. 2010) (quoting 33 U.S.C. § 1311(a) (2006)); *see also* 33 U.S.C. § 1362(14) (2006) (defining "point sources" to include channels).

28 Jensen is incorporated under the laws of California, and its principle place of business is located in Monterey, California. Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist., 644 F.3d 934, 936 (9th Cir. 2011).

29 42 U.S.C. §§ 7401–7671q (2006).

30 FED. R. CIV. P. 12(c).

31 *See* CAL. CODE REGS. tit. 17, §§ 93115–93115.15 (2011).

the District adopted rules in response to the ATCM: Rule 220 requires District-registration of any diesel engine with fifty brake horsepower or larger that is used in agricultural operations; Rule 310 imposes administrative fees for registration; and Rule 1010 sets emissions standards for stationary diesel engines. Jensen owns and operates stationary and portable diesel engines to provide power to irrigation pumps on its farms. In February 2008, Jensen registered several engines with the District and paid the required fees. In November 2008, Jensen filed the present suit.

The district court concluded that the CAA does not preempt the Rules because Rules 220 and 310 are not "standard[s] or other requirement[s] relating to the control of emissions,"[32] and Rule 1010 applies only to stationary sources. The district court also found that Rules 220 and 310 do not violate California law and rejected Jensen's due process challenge after finding that the Rules have a rational basis. Jensen timely appealed. The question presented to the Ninth Circuit was whether the CAA preempts the District's Rules. The court reviews a district court's judgment on the pleadings de novo.[33]

The Ninth Circuit began by describing the state-federal partnership under the CAA.[34] While states primarily direct regulation of emissions from stationary sources,[35] the federal government sets nationwide emissions standards for mobile sources.[36] The court then noted that in subsections 209(a) and (e), CAA expressly preempts states from setting emissions standards for motor vehicle and "nonroad" mobile sources, respectively.[37]

Given this backdrop, the court turned to Jensen's federal preemption claim concerning Rules 220 and 310, which apply to diesel engines used in agricultural operations or nonroad sources.[38] The court determined the threshold issue to be whether Rules 220 and 310 fell within the "sphere of implied preemption" created by section 209(e)(2) of the CAA.[39] If so, California would then be required to obtain EPA authorization[40] prior to adopting "standards or other requirements relating to the control of emissions" from nonroad engines.[41] The court concluded that because the Rules did not constitute such standards or requirements for nonroad mobile sources, section 209(e) did not preempt the Rules.

In its analysis, the Ninth Circuit considered the plain language of the clause as indicative of Congress's preemptive intent,[42] and looked to United States Supreme Court precedent to determine what constitutes a "standard"

32 42 U.S.C. § 7543(e)(1) (2006).

33 Turner v. Cook, 362 F.3d 1219, 1225 (9th Cir. 2004).

34 Gen. Motors Corp. v. United States, 496 U.S. 530, 532 (1990).

35 42 U.S.C. § 7416 (2006).

36 *Id.* §§ 7521, 7547.

37 *Id.* § 7543(a), (e).

38 *Id.* § 7543(e)(1).

39 Pac. Merch. Shipping Ass'n v. Goldstene, 517 F.3d 1108, 1113 (9th Cir. 2008).

40 Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist., 627 F.3d 730, 734 (9th Cir. 2010).

41 42 U.S.C. § 7543(e)(2) (2006).

42 CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993).

under the CAA.[43] The court concluded that a "commonsense reading" of Rules 220 and 310 "has nothing to do with emissions standards or the control of emissions."[44] The court reasoned that providing information about diesel engines and paying fees did not conform to examples of "standards relating to the control of emissions" for federal preemption purposes.[45] The court also expressed confidence that Rules 220 and 310 did not constitute state action that Congress intended to preempt via section 209(e) of the CAA because Rules 220 and 310 would not disrupt national uniformity in emissions rules for nonroad engines and vehicles.[46]

The court next rejected Jensen's contention that, because Rules 220 and 310 "relate to" emissions standards, they are preempted by section 209(e). The court reasoned that such a broad reading of the "relating to" clause would preempt *every* rule relating to nonroad engines and vehicles—a result directly at odds with the Supreme Court's decision in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District* (*South Coast*).[47] The court further noted that *South Coast* did not suggest that the governmental authority's statutory mission has any bearing on the question of federal preemption. Finally, the court noted that any reliance Jensen placed in *Morales v. Trans World Airlines, Inc.*[48] was ill-founded because that case left room for state actions like Rules 220 and 310, which are "too tenuous, remote, or peripheral . . . to have pre-emptive effect."[49]

The court turned to Rule 1010, which the court determined unquestionably sets emission standards, but by its language applies only to "stationary" engines. The court concluded that the CAA does not preempt Rule 1010 because "stationary" engines as defined in Rule 1010 are mutually exclusive from those "nonroad" engines preempted by section 209(e).

The Ninth Circuit next addressed Jensen's claims that Rules 220 and 310 are preempted by California law. The court dismissed Jensen's first claim by noting that Rules 220 and 310 were issued pursuant to the California Health and Safety Code—not the ATCM, as Jensen contended. Jensen also argued that Rules 220 and 310 were preempted by California's Portable Equipment Registration Program.[50] The court noted that any preemptive effects of the Portable Equipment Registration Program are limited to voluntarily registered program participants, and that Jensen did not claim to be such a participant.

Finally, the Ninth Circuit addressed Jensen's substantive due process challenge to the Rules. Applying rational basis review,[51] the court rejected

43 Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252–53 (2004).

44 *Jensen Family Farms, Inc.*, 644 F.3d 934, 939–40 (9th Cir. 2011) (distinguishing emission limits from equipment and design requirements).

45 *Engine Mfrs. Ass'n*, 541 U.S. at 252–53.

46 Engine Mfrs. Ass'n v. U.S. Envtl. Prot. Agency, 88 F.3d 1075, 1079–80 (D.C. Cir. 1996).

47 541 U.S. at 252–53.

48 504 U.S. 374, 383 (1992).

49 *Id.* at 390 (internal quotation marks omitted).

50 CAL. CODE REGS. tit. 13, §§ 2450–2465 (2011).

51 United States v. Alexander, 48 F.3d 1477, 1491 (9th Cir. 1995) (noting that under rational basis review, the burden is on the defendant to show that a statute violates due process by

the claim because Jensen admitted that the Rules serve the legitimate governmental interest of minimizing air pollution from diesel engines. The court also found that Jensen's argument that the Rules violate Article 13A of the California Constitution was waived because Jensen did not raise the issue in its complaint.[52]

In summary, the Ninth Circuit affirmed the district court's grant of judgment on the pleadings in favor of Defendants. In doing so, the court held that Rules 220, 310, and 1010 were not preempted by the CAA; that Rules 220 and 310 were not preempted by state law; and that the Rules did not violate Jensen's substantive due process rights.

2. Montana Sulphur & Chemical Co. v. United States Environmental Protection Agency, 666 F.3d 1174 (9th Cir. 2012).

Petitioner, Montana Sulphur & Chemical Company (Montana Sulphur), brought separate suits challenging several steps taken by the United States Environmental Protection Agency (EPA) to promulgate regulations governing sulfur dioxide (SO_2) emissions under the Clean Air Act (CAA)[53] to assure attainment and maintenance of national ambient air quality standards (NAAQS) through enforceable emissions limitations.[54] The United States Court of Appeals for the Ninth Circuit consolidated the suits on appeal. In the first, Montana Sulphur sought review of EPA's final rule partially disapproving a proposed revision to the state implementation plan (SIP) for Montana (State) governing SO_2, and of a review of a prior EPA action (SIP Call) preceding the formal SIP revision. In the second, Montana Sulphur sought review of EPA's April 2008 final rule promulgating a final implementation plan (FIP) for the State's SO_2 emissions. The Ninth Circuit concluded that EPA did not act arbitrarily or capriciously in its actions regarding either the SIP or FIP and thus denied both petitions for review.

Each suit arose from a long-standing dispute surrounding regulations governing emissions from industrial facilities located near Billings, Montana. Montana Sulphur operates a plant northeast of Billings that recovers 95%–98% of sulfur from nearby refineries as a marketable product. The remaining sulfur is emitted in the form of SO_2, a highly reactive gas and known cause of acid rain. In 1978, EPA concluded that the Billings area met the primary standards for SO_2.[55] In 1980, EPA approved the State's SIP for attaining and maintaining SO_2 NAAQS in the Billings area.[56] Subsequent monitoring,

"proving the absence of a rational relationship between [the statute] and a legitimate governmental objective").

52 *See* Hormel v. Helvering, 312 U.S. 552, 556 (1941) (noting that "[o]rdinarily an appellate court does not give consideration to issues not raised below").

53 42 U.S.C. §§ 7401–7671q (2006).

54 *Id.* §§ 7407(a), 7410(a)(2)(A).

55 Air Quality Control Regions, Criteria, and Control Techniques: Attainment Status Designations, 43 Fed. Reg. 40,412 (Sept. 11, 1978 (codified at 40 C.F.R. pt. 81).

56 Final Rulemaking on Approval of the Montana State Implementation Plan, 45 Fed. Reg. 2,034 (Jan. 10, 1980 (codified at 40 C.F.R. pt. 52).

however, showed individual "exceedances" of SO_2 levels, which remained fairly constant throughout the 1980s.

In 1990, the City of Billings (City) hired a contractor to conduct dispersion modeling for the Billings area, which revealed potential violations of federal SO_2 standards. In 1991, another firm performed dispersion modeling and found results similar to the 1990 modeling. In 1992, EPA advised the Montana Department of Health and Environmental Services (MDHES) that the SIP did not adequately regulate emissions in the area and needed revision. MDHES notified the City in turn.

In 1993, EPA issued a formal SIP Call because the existing SIP was "substantially inadequate" to attain and maintain NAAQS.[57] EPA asked MDHES to submit revisions within eighteen months, and MDHES submitted several revisions to EPA between 1996 and 2000. In 2002 and 2003, EPA took final action,[58] approving most of the SIP, but disapproving certain aspects of the SIP that directly affected Montana Sulphur, including: 1) the attainment demonstration, 2) the emission limits regarding Montana Sulphur's 100-meter stack and its corresponding stack height credit, and 3) the emission limits for Montana Sulphur's 30-meter and auxiliary vent stacks.

In the first case, Montana Sulphur petitioned the Ninth Circuit for review of EPA's May 2, 2002 SIP action. The Ninth Circuit stayed the action pending EPA's promulgation of a FIP to remedy the SIP pursuant to its authority under section 7401(c) of the CAA.[59] In the second case before the Ninth Circuit, Montana Sulphur challenged the timeliness of EPA's 2008 FIP, as well as the FIP's limits on flares, and the feasibility of flare monitoring technologies required by the FIP. Typically, the Ninth Circuit reviews EPA's decision to approve or disapprove a SIP, as well as EPA's promulgation of a FIP, for arbitrariness and capriciousness under the CAA.[60] The court reviews issues of statutory construction pursuant to the Supreme Court's mandate in *Chevron U.S.A., Inc. v. Nautral Res. Def. Counsel*.[61] The court has also noted that it will afford EPA considerable deference in the interpretation of EPA regulations,[62] as well as in the evaluation of complex scientific data within EPA's area of expertise.[63]

The Ninth Circuit first addressed Montana Sulphur's challenges to the SIP Call. As a threshold matter, the court evaluated whether Montana Sulphur's challenges were justiciable since a SIP Call is not a final agency

57 Approval and Promulgation of State Implementation Plans; Call for Sulfur Dioxide SIP Revisions for Billings/Laurel, MT, 58 Fed. Reg. 41,430 (proposed Aug. 4, 1993) (codified at 40 C.F.R. pt. 52).

58 Approval and Promulgation of Air Quality Implementation Plans; Montana; Billings/Laurel Sulfur Dioxide State Implementation Plan, 67 Fed. Reg. 22,168 (May 2, 2002); 68 Fed. Reg. 27,908 (May 22, 2003) (codified at 40 C.F.R. pt. 52).

59 42 U.S.C. § 7410(c) (2006).

60 *Id.* § 7607(d)(9)(A)–(C).

61 467 U.S. 837, 842–43 (1984).

62 Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891–92 (9th Cir. 1986).

63 Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 344 F.3d 832, 869 (9th Cir. 2003).

action[64] and, accordingly does not yet require any specific obligations from Montana Sulphur. The court concluded that the challenges were not ripe at the time the SIP Call occurred because Montana Sulphur had not suffered "actual or imminent" injury that would suffice for standing.[65] However, the court noted that Montana Sulphur filed its petition for review after EPA issued its partial disapproval of the SIP—a final agency action. The validity of that SIP disapproval was predicated on validity of the SIP Call initiating it. As a result, the court concluded that because a successful challenge to the SIP Call (not a final agency action) would necessarily invalidate the SIP disapproval (a final agency action), Montana Sulphur's challenge of the SIP Call was justiciable at this time.

Having found Montana Sulphur's challenges to the SIP Call justiciable, the Ninth Circuit moved on to the merits of the petitioner's challenge. Montana Sulphur first argued that EPA exceeded its authority by issuing a SIP Call when the Montana SIP was *not* "substantially inadequate to attain or maintain" the SO_2 NAAQS, and had also met all statutory requirements of a SIP.[66] Montana Sulphur further argued that EPA could not depend on predicted violations of NAAQS that employed dispersion modeling that assumed worst-case scenarios.

The Ninth Circuit rejected these arguments because EPA did not ignore actual SO_2 monitoring data when it issued the SIP Call, and because EPA had explicitly dealt with the results and explained the modeling's shortcomings. The EPA had further clarified that it was impractical to conduct actual monitoring given the complexity of SO_2 sources, and that the data it collected prior to the SIP Call came from a monitoring network on just a few sites that were not located in areas of maximum concentration. Furthermore, in its partial disapproval of the SIP in 2002, EPA had explained that actual monitoring is no more accurate than modeling.[67]

In reaching its conclusion, the court also relied on the CAA, which expressly acknowledges modeling as an adequate regulatory tool.[68] Furthermore, while Montana Sulphur argued that the 1990 amendments to the CAA illustrate that Congress intended to eliminate the use of modeling, the court cited legislative history providing that EPA may rely on any available "sound data" and "may rely on modeling or statistical extrapolation" where appropriate and necessary.[69] Thus, the Ninth Circuit

64 *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (describing the two conditions that must be satisfied for agency action to be "final").

65 *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) ("[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

66 *See* Clean Air Act, 42 U.S.C. § 7410(a)(2) (2006) (outlining the minimum statutory requirements of a SIP).

67 67 Fed. Reg. 22,168, 22,185 (May 2, 2002) (codified at 40 C.F.R. pt. 52).

68 42 U.S.C. § 7410(a)(2)(K)(i) (2006).

69 S. REP. NO. 101-228, at 15 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3401.

concluded that EPA did not act arbitrarily or capriciously by relying on predictive modeling to make the SIP Call in 1993.

The court next addressed Montana Sulphur's various challenges to the 2002 partial disapprovals of the State's revised SIP. Montana Sulphur first argued that EPA's stack height calculation was illogical for several reasons. The court noted that Congress adopted 42 U.S.C. § 7423 to regulate the use of tall stacks.[70] The court observed that while a raised pollution source lowers ground-level concentrations of pollution, it spreads around the pollution rather than actually reducing it.

The court then reviewed EPA's formulas for calculating stack height, which restrict a source from receiving credit for a stack height that is higher than a Good Engineering Practice (GEP) figure.[71] The court explained that EPA regulations provide for three possible avenues for calculating GEP stack height. In the SIP, the State had approved a modeling demonstration for Montana Sulphur's 100-meter stack under one of these options, but EPA rejected the State's calculations and insisted that another option, resulting in a height of 65 meters, was the correct calculation. Montana Sulphur constructed a 100-meter high flue stack after the 1993 SIP Call. EPA later concluded the stack should only be 65 meters, and Montana Sulphur disagreed with several steps in the process that led EPA to this conclusion.

First, Montana Sulphur challenged EPA's rejection of the State's fluid modeling calculation of GEP stack height. EPA justified its decision by asserting that the SIP did not actually require Montana Sulphur to meet the new source performance standards (NSPS) emission rate.[72] Montana Sulphur contended that NSPS may not be used as a substantive emissions limit because EPA regulations state that the "allowable emission rate to be used in making demonstration" shall be prescribed by the NSPS.[73]

The Ninth Circuit rejected Montana Sulphur's position because EPA's interpretation of its regulation was reasonable and because "allowable emissions" is a term of art that refers to enforceable emissions limitations. Furthermore, EPA noted that if NSPS was merely a modeling assumption that regulated entities were not presumptively required to meet, that would obviate the NSPS regulations that allow sources to demonstrate that the NSPS emissions rate is "infeasible."[74] Finally, the court noted that EPA's interpretation was consistent with the preamble to EPA stack height regulations[75] as well as precedent from the United States Court of Appeals

70 *See* Sierra Club v. U.S. Envtl. Prot. Agency, 719 F.2d 436, 441 (D.C. Cir. 1983) (discussing the congressional intent of 42 U.S.C § 7423).

71 GEP calls for "the height necessary to ensure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles." 42 U.S.C. § 7423(c) (2006).

72 67 Fed. Reg. at 22,209.

73 40 C.F.R. § 51.100(kk)(1) (2011).

74 *Id.*

75 Stack Height Regulation, 50 Fed. Reg. 27,892, 27,898 (July 8, 1985) (codified at 40 C.F.R. pt. 51).

for the District of Columbia.[76] Accordingly, the Ninth Circuit concluded that it was neither arbitrary nor capricious for EPA to require the SIP to include NSPS limits consistent with the modeling demonstration.

Montana Sulphur next argued that 40 C.F.R. § 51.100(kk)(1) permitted the use of Montana's emission rates (MAAQS) as benchmarks for ambient air quality. Montana Sulphur noted that the broad language of the regulation—"*an* ambient air quality standard"—did not require the standard to be a NAAQS.[77] EPA insisted that only NAAQS should apply. The court found the language of the regulation itself to be ambiguous, but noted that the preamble to regulation spoke exclusively in terms of NAAQS with regard to stack height. The court found that EPA's interpretation was not only reasonable, but was consistent with the purpose of 42 U.S.C. § 7423—to ensure that states set adequate standards. Acknowledging the regulatory ambiguity, the court deferred to EPA's judgment in technical matters and found that EPA did not act arbitrarily or capriciously in rejecting Montana's stack height credit calculation.

Montana Sulphur next challenged EPA's decision to partially disapprove the revised SIP due to the SIP's failure to include numerical emissions limits on flares.[78] The revised SIP imposed a "best practice" work standard in lieu of numerical emissions limits. Under EPA's regulations, a proposed SIP "must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements."[79] In this case, Montana had shown that the control strategies in the SIP would attain the NAAQS when combined with numerical limits on flare. But the court noted that the SIP itself did not contain those additional flare limits. Accordingly, the court agreed with EPA's partial disapproval of the SIP for a failure to include flare emissions limitations. Especially where the SIP relies on emissions limits to demonstrate attainment, EPA could reasonably require those limits to actually appear in the SIP.

Additionally, Montana Sulphur challenged EPA's disapproval of the SIP limitations on Montana Sulphur's five auxiliary vent stacks and 30-meter stack. Despite the numerical limit on SO_2 emissions from these stacks, EPA rejected the limit because it failed to control the sulfur content of fuel burned, and because the SIP lacked monitoring methods to actually enforce the limit. The court concluded that EPA reasonably insisted that the State include monitoring measures to ensure that this limit was enforceable, especially where the State relied upon those limits in the SIP for attainment demonstration.

The court next addressed Montana Sulphur's challenges to EPA's final rule promulgating the FIP to fill perceived gaps in the SIP. Montana Sulphur first argued that EPA lacked authority to promulgate a FIP under 42 U.S.C. §

76 *See* Natural Res. Def. Council, Inc. v. Thomas, 838 F.2d 1224, 1241 (D.C. Cir. 1988).

77 40 C.F.R. § 51.100(kk)(1) (2011) (emphasis added).

78 Flares are incineration devices that capture gases released by equipment—they are most often used in emergency situations but also during routine startup, shutdown, and maintenance.

79 40 C.F.R. § 51.112(a) (2010).

7410(c) because it failed to act within two years of its partial disproval. While the court identified the "explicit deadline" set out in the section, it noted that the United States Supreme Court has refused to treat this requirement as a strict jurisdictional limit that precludes later action.[80] The court further supported its conclusion by pointing to the CAA, which provides remedies for EPA inaction. Accordingly, the Ninth Circuit held that the failure to act within two years does not "utterly deprive" EPA of authority to promulgate the FIP.[81]

Montana Sulphur next argued that EPA acted arbitrarily and capriciously by placing numerical limits on flare emissions during startup, shutdowns, and maintenance (SSM) for several reasons: such an infeasible limit would certainly be violated; the limit is inconsistent with EPA's history of exempting flaring during SSM; the limit is based on unsupported state modeling; the court should not defer to EPA's internal excess emissions policy (EEP); and enforcement discretion does not compensate for infeasible requirements.

The court first observed that EPA must provide for NAAQS attainment at all times and adopted such a policy as early as 1993. EPA also clarified in a 1999 EEP that while there are no "outright exemptions" for SSM, states may "adopt an affirmative defense to penalties for unforeseeable and unavoidable exceedances."[82] The court then found that the FIP in question had such an affirmative defense and that other circuits have endorsed EPA's position that the CAA requires continuous compliance, including during SSM.[83] EPA recognized that regulated entities would inevitably violate this rule, but that the provision of an affirmative defense, combined with a judicious exercise of enforcement discretion would resolve those problems. The court held that because EPA had specifically promulgated an affirmative defense in its FIP, facilities would know the requirements necessary to establish an infeasibility defense. As a result, the Ninth Circuit concluded that EPA reasonably interpreted the CAA to require continuous limits on emissions and that the actual numerical limits imposed by the FIP were not arbitrary and capricious.

Montana Sulphur next argued that EPA acted arbitrarily and capriciously by requiring installation of flare monitoring technology that exists only in pilot testing. While the court agreed that the monitoring technology was in pilot testing at the time of the FIP, it also observed that EPA revised the FIP to allow other methods to determine total sulfur concentration. The court thus concluded that Montana Sulphur had alternate approaches to measure sulfur and that Montana Sulphur failed to identify to

80 Barnhart v. Peabody Coal Co., 537 U.S. 149, 158 (2003).

81 *See* Nat'l Petrochemical & Refiners Ass'n v. U.S. Envtl. Prot. Agency, 630 F.3d 145, 155–56 (D.C. Cir. 2010) (holding that where Congress is silent on the effect of EPA's delay in promulgating revised regulations, there is no correlating presumption that Congress intended EPA to lose authority to act).

82 Mont. Sulphur & Chem. Co. v. U.S. Envtl. Prot. Agency, 666 F.3d 1174, 1191 (9th Cir. 2012).

83 *See, e.g.*, Mich. Dep't of Envtl. Quality v. Browner, 230 F.3d 181 (6th Cir. 2000).

any evidence on the record that such alternate means were technically infeasible.

Next, Montana Sulphur contended that EPA acted arbitrarily and capriciously by imposing fixed emissions limits on Montana Sulphur, but granting variable emissions limits to a nearby power plant and refinery. EPA explained that fixed emissions limits were easier to model, monitor, and enforce,[84] were used at virtually every other source in the country,[85] offered a reasonable explanation for why EPA selected a different type of emissions limit than the State had chosen, and addressed concerns about the State's use of variable limits.[86] Accordingly, the court concluded that it was not arbitrary or capricious for EPA to select a different type of emissions limits than the State.

Montana Sulphur next argued that EPA acted arbitrarily and capriciously by imposing emissions limits and monitoring requirements for Montana Sulphur's auxiliary stacks and 30-meter stack. In the FIP, EPA adopted the State's mass emissions limits imposed in the SIP and added monitoring requirements to ensure compliance with the limits. The court found that it was reasonable for EPA to use the State's original emissions limitations for consistency because they were part of the State's overall control strategy supporting attainment, and EPA's modeling assumption simplified monitoring and compliance for Montana Sulphur. Thus, the court concluded that specific emissions limits and monitoring requirements EPA imposed in the FIP, based on revised emission models and that allow Montana Sulphur to use existing technology, were not arbitrary or unreasonable.

The Ninth Circuit quickly dismissed Montana Sulphur's next argument that EPA had acted arbitrarily or capriciously in using the 65-meter figure in the FIP. The court observed that it already concluded that EPA properly rejected Montana's calculated stack height credit in the SIP and that it was proper to use the 65-meter figure instead.

Montana Sulphur next claimed that EPA acted arbitrarily and capriciously because the FIP failed to recognize that, in the time between SIP disapproval (2002) and FIP implementation (2006–2008), several regulated entities entered into consent decrees and agreed to permit changes which effectively reduced their emission limits. EPA gave three reasons why it did not consider those events. First, the purpose of the FIP was to fill gaps in Montana's SIP, and Montana never revised its SIP to reflect those changes. Second, emissions limits necessary to achieve attainment must be federally enforceable and be pre-approved by EPA. This is accomplished by reflecting changes in the SIP or FIP, not by consent

84 Federal Implementation Plan for the Billings/Laurel, Montana, Sulfur Dioxide Area, 71 Fed. Reg. 39,259, 39,268 (proposed July 12, 2006) (to be codified at 40 C.F.R pt. 52).

85 Federal Implementation Plan for the Billings/Laurel, Montana, Sulfur Dioxide Area, 73 Fed. Reg. 21,418, 21,444–45 (April 21, 2008) (codified at 40 C.F.R pt. 52).

86 Approval and Promulgation of Air Quality Implementation Plans; Montana; Billings/Laurel Sulfur Dioxide State Implementation Plan, 67 Fed. Reg. 22,168, 22,207 (May 2, 2002) (codified at 40 C.F.R pt. 52).

decrees with a "limited lifespan," or with facility-specific permits conditions that a state may change without EPA approval. Finally, the emissions limits in the consent decrees and permit actions were substantively inconsistent with the three-hour and calendar-day averaging times of the NAAQS. The court found EPA's position justified due to the specific procedures for SIP approval or disapproval and EPA's responsibility to promulgate a FIP when the SIP is inadequate.

Finally, Montana Sulphur argued that EPA acted arbitrarily and capriciously because the FIP employed an outdated modeling method, the Industrial Source Complex (ISC), which was the preferred model at the time the State proposed its SIP. The court noted that EPA revised its Guidelines on Air Quality Models in 2005 to recommend a new dispersion model, but grandfathered ISC models for one year. However, EPA continued to defend its use of the ISC dispersion model in the final FIP in April 2008. The court concluded that EPA's continued use of ISC modeling was not arbitrary or capricious because the FIP replaced only the limited portions EPA had disapproved, and using a different model may have yielded results inconsistent with the rest of the SIP.

In summary, the Ninth Circuit found that EPA did not act arbitrarily or capriciously or abuse its discretion by making the SIP Call, disapproving portions of the revised SIP, or promulgating the requirements set forth in the FIP. Thus, the Ninth Circuit denied Montana Sulphur's petitions for review in both cases.

3. Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 638 F.3d 1183 (9th Cir. 2011).

The Natural Resources Defense Council, Inc. and other environmental groups (collectively, Petitioners)[87] sought review of a preliminary finding of the United States Environmental Protection Agency (EPA).[88] This finding validated a California state implementation plan (SIP) that controls motor vehicle emissions for milestone years 2009 and 2012. Petitioners argued that EPA's adequacy finding was "arbitrary, capricious, or otherwise contrary to law."[89] The United States Court of Appeals for the Ninth Circuit denied the petition for review, holding that EPA's interpretation was reasonable and that the state was not required to demonstrate attainment for the limited purpose of approving milestone-year budgets.

The Clean Air Act (CAA)[90] requires EPA to determine national ambient air quality standards (NAAQS) for certain air pollutants that may injure the health or welfare of the public. Each state, divided into different "air quality

87 Petitioners are the Natural Resources Defense Council, Inc., East Yard Communities for Environmental Justice, Coalition for a Safe Environment, and Endangered Habitats League.

88 Respondent is the United States Environmental Protection Agency. Respondent-Intervenors are the Southern California Association of Governments and the South Coast Air Quality Management District.

89 Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 638 F.3d 1183, 1187 (9th Cir. 2011).

90 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

control regions," regulates NAAQS for each region.[91] Regions are classified in reference to each of the NAAQS as in being attainment, nonattainment, or unclassifiable.[92] The CAA requires states to create a SIP to address attainment, maintenance, and enforcement of the NAAQS in each region.[93] States provide notice of the proposed SIP, set a hearing, and then submit the SIP to EPA for final approval.[94] Nonattainment regions have additional requirements, which include providing for attainment of the NAAQS by a specific deadline[95] and providing for "reasonable further progress" (RFP)[96] during interim years.

The SIP contains a section that describes strategies to control emissions and reduce ambient levels of pollution.[97] Emissions amounts are divided between motor vehicles and all other sources; the portion allocated to motor vehicles, is defined as the "motor vehicle emissions budget."[98] Among the emissions that EPA regulates is particulate matter, specifically PM-10 and PM-2.5.[99] The current case focused on PM-2.5 and the regulations EPA promulgated to explain the requirements for SIPs.[100] EPA defined a timeline regarding the RFP of a nonattainment area, with 2002 as the default baseline emission "inventory year" and 2009 and 2012 as the "milestone years."[101] EPA requires that the states achieve linear progress to reduce emissions from the inventory year to the attainment year.[102]

Furthermore, federally funded transportation projects and plans must conform to the applicable SIP.[103] Although EPA has an affirmative responsibility to ensure that projects conform to the SIP, this responsibility clashes with EPA's responsibility to approve a final SIP.[104] Specifically, EPA must *initially* approve "conformity" when a state submits their SIP for approval, but EPA's *final* approval of a SIP may not occur for some time

91 *Id.* § 7407(a).

92 *Id.* § 7407(d).

93 *Id.* § 7410(a)(1).

94 *Id.*

95 *See, e.g.*, *id.* § 7502(a)(2)(A)–(B).

96 *Id.* § 7502(c)(2). "Reasonable further progress" refers to annual incremental reductions in emissions of the relevant air pollutant required to ensure attainment of the NAAQS. *Id.* § 7501(1).

97 *See, e.g.*, 40 C.F.R. § 93.101 (2010) (defining "control strategy implementation plan revision").

98 *Id.* (defining "motor vehicle emissions budget").

99 *See, e.g.*, National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,654 n.1, n.5 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50) (describing PM-10 as "particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers," and PM-2.5 as "particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers").

100 40 C.F.R. §§ 51.1007–51.1009 (2010).

101 *Id.* §§ 51.008(b), 51.009(c)(2),(d).

102 *Id.* § 51.009(d).

103 42 U.S.C. §§ 7506(c)(1), (2) (2006).

104 *Id.*; *see* Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 638 F.3d 1183, 1187 (9th Cir. 2011) (recognizing such a conflict).

after submission.[105] Addressing this logistical conflict, EPA promulgated the 1997 conformity rule (updated in 2004), which allowed EPA to quickly determine conformity after a cursory review of the motor vehicle emissions budget.[106] After evaluating the budgets based on six specified criteria, EPA makes an adequacy determination for the purpose of transportation conformity.[107] This allows projects and plans to proceed without final approval of the budget or the SIP. This adequacy determination is separate from EPA's overall approval and is limited in scope.[108]

The present petition concerns the South Coast Air Basin area, which EPA designated as a "nonattainment" area with respect to PM-2.5 in 2005.[109] In 2007, the California Air Resources Board submitted a SIP to EPA that contained two sets of motor vehicle emissions budgets for PM-2.5: baseline budgets (budgets for only the milestone years) and SIP-base budgets (budgets for milestone years and the attainment year).[110] Petitioners opposed these budgets and submitted comments, stating that the South Coast Air Basin could not achieve attainment based on the proposed plans. EPA found that the SIP-based budget was not adequate for transportation conformity purposes; however, EPA found the baseline budgets adequate and requested the baseline budgets to be used in future transportation conformity determinations. Further, EPA found the baseline budgets were "consistent with the requirement to demonstrate reasonable further progress."[111] Petitioners filed this review to challenge EPA's adequacy determination regarding the milestone-year baseline budget. In evaluating SIPs, the court applies a standard of review where it sets aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[112]

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105 *Natural Res. Def. Council, Inc.*, 638 F.3d at 1187. "Conformity" means the transportation plan conforms to the SIP's purpose of reducing air quality violations and reaching air quality standards, and ensuring that activities will not contribute to future violations. 42 U.S.C. § 7506(c)(1) (2006).

106 *See* 40 C.F.R. § 93.118 (2010); *see also* Transportation Conformity Rule Amendments: Flexibility and Streamlining, 62 Fed. Reg. 43,780, 43,782 (Aug. 15, 1997) (to be codified at 40 C.F.R. pts. 51, 93) (describing the conformity rule as allowing EPA to make an initial "cursory review").

107 40 C.F.R. § 93.118(e)(4) (2010). These criteria include: 1) endorsement by the governor and subject to a state public hearing; 2) prior consultation with federal, state, and local agencies; 3) a clearly identified and quantified emissions budget; 4) achievement of RFP, attainment, or maintenance; 5) an emissions budget consistent with and related to the plan's emissions inventory and control measures; and 6) explanation and documentation of previous changes to emissions budgets or control measures. *Id.*

108 62 Fed. Reg. 43,780, 43,782 (Aug. 15, 1997) (to be codified at 40 C.F.R. pts. 51, 93).

109 40 C.F.R. § 81.305 (2010). South Coast Air Basin includes Orange County and portions of Los Angeles, Riverside, and San Bernardino Counties. *See id.*

110 *Natural Res. Def. Council, Inc.*, 638 F.3d at 1189. South Coast Air Basin has a baseline year of 2004, milestone years of 2009 and 2012, and attainment year of 2015. *Id.* at 1188.

111 *Id.* at 1189.

112 Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2006). The APA is silent as to the standard of review over agency adequacy determinations regarding SIPs. The court notes, however, that the United States Supreme Court directs appellate courts to proceed under the APA's general standards of review for agency adequacy determinations. Vigil v. Leavitt, 381 F.3d

The issue presented to the Ninth Circuit in this case was whether EPA's adequacy determination for the milestone-year budget was proper. Petitioners argued that EPA failed to consider attainment data, thus invalidating the adequacy determination. Petitioners also argued that EPA may make an adequacy determination only when the state shows it can achieve attainment. In return, EPA argued that a state need only show linear progress toward an attainment target, and that the total target emission is the only information required to make the intermediate-year emissions calculations.

The court acknowledged that it must set aside an agency's action when an agency fails to consider mandatory factors established in the statute.[113] However, courts give substantial deference to an agency's interpretation of its own regulations,[114] such as the conformity rule that was at issue here. The Ninth Circuit first considered EPA's conformity rule with regard to milestone-year budgets, and found that attainment requirements are irrelevant to milestone budgets. Thus, EPA only considers the milestone years in the milestone budgets. The court agreed with EPA's interpretation of the definition of "motor vehicle emissions budget," which concluded that the budget must meet RFP or demonstrate attainment. Therefore, the milestone budgets in controversy would only be subject to the requirement that the nonattainment area make reasonable progress toward attainment.

The Ninth Circuit next examined the PM-2.5 Implementation Rules,[115] which details what a SIP must contain. Under 40 C.F.R. § 51.1007, a state must submit its SIP as quickly as possible and must include RFP as governed by section 51.1009. Section 51.1009 requires the SIP to show RFP, including the set milestone years of 2009 and 2012.[116] The emissions of each milestone year must linearly progress in the reduction of emissions from the base to the attainment year using the calculation method expressly laid out in section 51.1009(f).[117]

EPA examined the calculation method and found that the only information necessary to calculate a milestone-year budget is the attainment-year emissions target.[118] Petitioners interpreted the implementation rules differently, arguing that the State must submit an attainment demonstration for the starting point of the analysis. The court found Petitioners' starting point to be a suggestion, rather than a mandated

826, 833 (9th Cir. 2004) (citing Alaska Dep't of Envtl. Conservation v. U.S. Envtl. Prot. Agency, 540 U.S. 461, 496–97, n.18 (2004)).

113 Cerrillo-Perez v. U.S. Immigration & Naturalization Serv., 809 F.2d 1419, 1422 (9th Cir. 1987).

114 Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."). In this case EPA was not interpreting statutory language, but rather its own regulations in furtherance of the Clean Air Act. *See* 40 C.F.R. § 93.118(e)(4) (2010).

115 40 C.F.R. §§ 51.1007–51.1009 (2010).

116 *Id.* § 51.1009(c)(2).

117 *Id.* § 51.1009(d).

118 *See id.* § 51.1009(f) (referring to the target attainment-year emissions as the "full implementation inventory").

starting point under section 51.1007. The court also addressed Petitioners' final argument that their interpretation was compelled by the agency's intent, finding that the Petitioners' cited cases failed to address the applicability of the implementation rules to the milestone budget. Thus, the court found that the implementation rules do not speak directly to whether EPA can approve milestone-year budgets and do not require EPA to use attainment data in its determination.

In summary, the Ninth Circuit denied Petitioners' petition for review on the basis that EPA's action was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The court found that the SIP requires only a demonstration of RFP toward attainment, which may be calculated using target attainment-year emission data. Therefore, Petitioners failed to convince the court that EPA's PM-2.5 Implementation Rules require the use of attainment data for the milestone budget. Consequently, the court agreed with EPA that a state is not required to use attainment data when determining the adequacy of milestone-year motor vehicle emissions budgets.

4. Natural Resources Defense Council, Inc. v. South Coast Air Quality Management District, 651 F.3d 1066 (2011).

Plaintiffs, the Natural Resources Defense Council and other groups (collectively, NRDC),[119] appealed the United States District Court for the Central District of California's dismissal of their claims against the South Coast Air Quality Management District (SCAQMD)[120] for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted.[121] NRDC alleged that SCAQMD violated section 173(c) of the Clean Air Act (CAA),[122] but the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the district court.

The CAA requires the United States Environmental Protection Agency (EPA) to establish National Ambient Air Quality Standards (NAAQS),[123] and requires states to enforce NAAQS through EPA-approved state implementation plans (SIPs).[124] Regions that fail to meet NAAQS are designated nonattainment regions,[125] and new pollution sources in these regions are required to obtain "offsetting emissions reductions."[126] SCAQMD

119 NRDC was joined as a Plaintiff-Appellant by Communities for a Better Environment, the Coalition for a Safe Environment, and Desert Citizens Against Pollution.

120 SCAQMD was joined by its Governing Board and Barry Wallerstein (Defendants-Appellees), and Orange County Sanitation District, Southern California Edison Co., County Sanitation District No. 2 of Los Angeles County, El Segundo Power LLC, Los Angeles Area Chamber of Commerce, and the Los Angeles County Business Federation (Intervenor-Defendants-Appellees).

121 FED. R. CIV. P. 12(b)(1), (6).

122 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

123 *Id.* § 7409(a).

124 *Id.* § 7410(a), (k).

125 *Id.* § 7407(d)(1)(A)(i).

126 *Id.* § 7503(a)(1)(A).

implements a SIP in the South Coast Basin, a nonattainment region, and allows pollution sources to either offset their emissions with emission reduction credits (ERCs) or credits from an "offset account."

NRDC claimed SCAQMD violated both its own Regulation XIII[127] and CAA section 173(c) by: 1) distributing invalid ERCs, 2) maintaining invalid credit offset accounts, and 3) failing to track emission reductions. The district court dismissed NRDC's claim. The Ninth Circuit reviewed the district court's dismissal de novo.[128]

First, the Ninth Circuit determined that the district court lacked jurisdiction over the alleged section 173 violation. Section 307(b) of CAA only permits review of *final action* in a federal appellate court.[129] If such review *could* have been obtained but was not pursued, the agency action is not later subject to judicial review.[130] Thus, section 307 review is exclusive. Because EPA had approved SCAQMD's implementation of California's SIP,[131] NRDC was effectively seeking review of an EPA decision—a *final action* that required section 307 review. Since section 307 review was not timely sought, the Ninth Circuit concluded that the trial court lacked jurisdiction over the section 173 claim.

Second, the Ninth Circuit determined that SCAQMD's SIP implementation through Regulation XIII lacked validity requirements[132] for internal offsets. The Ninth Circuit analyzed the plain meaning of Regulation XIII, which distinguished between ERCs (to which the validity requirement applies) and internal offsets. Accordingly, applying the ERC validity requirement to the internal offsets would collapse the distinction between ERCs and the internal offsets. This, the Ninth Circuit concluded, would be inconsistent with the "either/or" language of the plan.[133] Thus, the validity requirement only applied to ERCs, not internal offsets, and NRDC failed to state a claim based on SCAQMD's alleged violation of the SIP.

Finally, the court dismissed NRDC's third and fourth claims because NRDC failed to allege a violation of EPA's approval of the SIP. NRDC alleged that EPA's rule required SCAQMD to use a "tracking system"[134] for offset

127 *See* SCAQMD Regulation XIII: New Source Review, §§ 1301–1325 (2011), *available at* http://www.aqmd.gov/rules/reg/reg13_tofc.html (governing New Source Review—i.e. pre-construction review requirements for new and modified facilities under CAA).

128 Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030 (9th Cir. 2008).

129 42 U.S.C. § 7607(b)(1) (2006).

130 *Id.* § 7607(b)(2).

131 *See* Revisions to the California State Implementation Plan, South Coast Air Quality Management District, 71 Fed. Reg. 35,157 (June 19, 2006) (to be codified at 40 C.F.R. pt. 52).

132 Validity requirements for Regulation XIII are a part of Rule 1309, which is titled "Emission Reduction Credits." Rule 1309 details the requirements an applicant must provide in order to convert its own emission reductions into tradable ERCs. *See* SCAQMD Regulation XIII § 1309(b) (2011), *available at* http://www.aqmd.gov/rules/reg/reg13/r1309.pdf.

133 Natural Res. Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist., 651 F.3d 1066, 1072 (9th Cir. 2011); *see also* SCAQMD Regulation XIII § 1303(b)(2)(A) (2011), *available at* http://www.aqmd.gov/rules/reg/reg13/r1303.pdf.

134 The "tracking system" would require SCAQMD to provide for "necessary offsets required to meet the appropriate statutory offset ratio," and to "mitigate emissions from those sources exempted from offsets under Rule 1304 which are not exempt from federal regulation."

accounts. The only mention of a "tracking system," however, was in the preamble of EPA's SIP approval.[135] The court reasoned that a preamble to an EPA rule approving a SIP has "little legal traction" and that it would not consider the preamble "unless the regulation itself is ambiguous."[136] Because the regulation made no reference to a tracking system, the court deemed it unambiguous and, consequently, refused to interpret the preamble to require what the rule did not clearly state. As a result, the court also dismissed NRDC's claims alleging that SCAQMD failed to use a tracking system for its offsets in violation of EPA's SIP approval, concluding that NRDC failed to state a claim upon which relief could be granted.

5. Pacific Merchant Shipping Association v. Goldstene, 639 F.3d 1154 (9th Cir. 2011).

Plaintiff, Pacific Merchant Shipping Association (PMSA), appealed the denial of its motion for summary judgment in its action against Defendant James Goldstene, Executive Officer of the California Air Resources Board (CARB).[137] The action was brought, and judgment entered, in the United States District Court for the Eastern District of California. On appeal, the United States Court of Appeals for the Ninth Circuit declined to find that the Dormant Commerce Clause[138] or general maritime principles[139] preempted California's Vessel Fuel Rules,[140] and affirmed the district court's denial of PMSA's motion for summary judgment.

Ocean-going vessels are a leading source of air pollution and the largest source of sulfur dioxides (SO_x) in California, in part because they use low-grade bunker fuel.[141] From 2006 data, CARB determined that ocean-going vessels traveling within twenty-four nautical miles of the coast generated 15 tons of particulate matter (PM), 157 tons of nitrogen oxide (NO_x), and 117

Approval and Promulgation of Implementation Plan for South Coast Air Quality Management District, 61 Fed. Reg. 64,291, 64,292 (Dec. 4, 1996) (to be codified at 40 C.F.R. pt. 52).

135 *Natural Res. Def. Council, Inc.*, 651 F.3d at 1073; *see* 61 Fed. Reg. at 64,292.

136 El Comité para el Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1070 (9th Cir. 2008) (noting that the court will not consider a preamble unless the regulation itself is ambiguous (citing Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000))). Generally, an agency's non-binding interpretation of its own regulation is entitled to deference only when it is persuasive, as in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), or when the regulation's language is ambiguous under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Christensen*, 529 U.S. at 587–88.

137 Goldstene was joined by Defendant-Intervenors Natural Resources Defense Council, Inc., Coalition for Clean Air, Inc., and South Coast Air Quality Management District.

138 U.S. CONST. art. I, § 8; Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) (recognizing Congress's "power to regulate commerce in its dormant state").

139 *See generally* Brittan J. Bush, *The Answer Lies in Admiralty: Justifying Oil Spill Punitive Damages Recovery Through Admiralty Law*, 41 ENVTL. L. 1255 (2011) (arguing that the Oil PolultionAct of 1990 does not preempt general maritime and state maritime law from awarding punutive damages).

140 *See* CAL. CODE REGS. tit. 13, § 2299.2(b) (2009); *id.* at tit. 17, § 93118.2(b).

141 Bunker fuel has approximately 25,000 parts per million (ppm) of sulfur in comparison to diesel fuel with 15 ppm. Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1159–60 (9th Cir. 2011).

tons of SO_x. As a result, this harmful pollution affects the lives of 27 million Californians,[142] with the most severe health issues concentrated in the South Coast Air Basin.[143] CARB promulgated the Vessel Fuel Rules[144] to reduce PM, NO_x, and SO_x emissions and their concomitant health problems. The rules became effective on July 1, 2009.[145] The South Coast Air Quality Management District claimed that without the Vessel Fuel Rules, it would be unable to bring the South Coast Air Basin into compliance with federal air quality standards,[146] thus leaving California subject to serious federal sanctions.[147]

The Vessel Fuel Rules aim to reduce air pollutants from ocean-going vessels in a number of ways. The Vessel Fuel Rules primarily apply to ocean-going vessels making California port calls, which travel within the "Regulated California Waters"—an area within twenty-four nautical miles of the California coast.[148] Vessels merely travelling through the region—so-called "innocent passage"—are exempt from the rules.[149] The Vessel Fuel Rules envision a two-stage implementation process that reduces permissible sulfur content in two stages by January 2012.[150] Owners and operators of regulated vessels are required to maintain detailed records of the location of the vessel at various times, and the type and amounts of fuel used, or else face sanctions.[151] Finally, the rules terminate upon a determination by the Executive Officer of CARB that the federal government is enforcing equally stringent rules.[152]

Prior to this litigation, PMSA claimed that the Clean Air Act (CAA)[153] and the Submerged Lands Act (SLA)[154] preempted the Marine Vessel Rules—a precursor to the Vessel Fuel Rules at issue here.[155] In that earlier case, the Ninth Circuit determined that the CAA preempted the emissions standards comprising the Marine Vessel Rules. Accordingly, the court found it

142 CARB estimated that 300 premature deaths result from PM emissions from vessels, excluding cancer effects. *Id.* at 1160.

143 The South Coast Air Basin consists of Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernardino counties. *Id.* The South Coast Air Basin has long been in noncompliance with federal air quality standards, and the South Coast Air Quality Management District claimed that compliance would be impossible without these regulations. *Id.*

144 *See* sources cited *supra* note 140.

145 *Pac. Merch. Shipping Ass'n*, 639 F.3d at 1158.

146 The South Coast Air Basin must achieve national ambient air quality standards for $PM_{2.5}$ by 2014, or it may risk the reduction or termination of federal transportation funding. *Id.* at 1160.

147 *See* Clean Air Act, 42 U.S.C. § 7509(b) (2006).

148 CAL. CODE REGS. tit. 13, § 2299.2(b) (2009); *id.* at tit. 17, § 93118.2(b).

149 *See id.* at tit. 17, § 93118.2(c) (exempting "ocean-going vessel voyages that are comprised of continuous and expeditious navigation through any Regulated California Waters for the purpose of traversing such bodies of water without entering California internal or estuarine waters or calling at a port, roadstead, or terminal facility"); *see also Pac. Merch. Shipping Ass'n*, 639 F.3d at 1158 (describing such ships' travel as "innocent passage").

150 CAL. CODE REGS. tit. 13, § 2299.2(a) (2009); *id.* at tit. 17, § 93118.2(a).

151 *Id.* at tit. 17, § 93118.2(e)(2), (f).

152 *Id.* § 93118.2(j).

153 42 U.S.C. §§ 7401–7671q (2006).

154 43 U.S.C. §§ 1301–1315 (2006).

155 Pac. Merch. Shipping Ass'n v. Goldstene, 517 F.3d 1108, 1109 (9th Cir. 2008).

"unnecessary" to determine whether the SLA preempted the rules.[156] CARB subsequently drafted the Vessel Fuel Rules to replace these preempted rules.

On April 27, 2009, PMSA filed a complaint alleging that the SLA and the Commerce Clause preempted application of some Vessel Fuel Rules[157] beyond California's three-mile territorial boundary. Accordingly, PMSA requested a permanent injunction barring the implementation or enforcement of the Vessel Fuel Rules in federal waters. The district court denied PMSA's summary judgment motion and granted the request for an interlocutory appeal. The Ninth Circuit reviewed the district court's decision de novo, and affirmed.

The Ninth Circuit acknowledged the "highly unusual and challenging" task of balancing the Supremacy Clause, Dormant Commerce Clause, maritime law preemption doctrines, and international relations with California's sovereign police powers to adopt laws to protect its residents.[158] The court began its analysis by considering the history of the SLA. Congress passed the SLA in 1953, in response to several United States Supreme Court rulings holding that the federal government has "paramount rights in and powers over" the three-mile belt of land along the United States' coast.[159] The SLA granted coastal states the rights to submerged lands extending three-miles seaward of the states' coasts, but retained federal control over submerged lands further seaward.[160] The SLA effectuates this transfer in several ways, most pertinently by granting plenary approval to any coastal state's claim of a seaward boundary extending up to three geographical miles from the coastline.[161]

The court first addressed PMSA's argument that the SLA preempted the Vessel Fuel Rules under the doctrine of field preemption.[162] According to PMSA, because the SLA established a three-mile territorial boundary for California where none previously existed, the SLA implicitly: 1) granted states only limited authority to regulate within that three-mile boundary, and 2) outright precluded states from regulating with any effect outside that boundary.

The Ninth Circuit began its analysis by acknowledging, like the district court had, the existence of a general presumption against preemption.[163] PMSA argued that a presumption against preemption was not applicable in

156 *Id.* at 1115.

157 Specifically, PMSA challenged the application of CAL. CODE REGS. tit. 13, § 2229.2 and CAL. CODE REGS. tit. 19, § 93118.1.

158 *Pac. Merch. Shipping Ass'n*, 639 F.3d 1154, 1162 (9th Cir. 2011).

159 United States v. California (*California I*), 332 U.S. 19, 22 (1947); *see also* United States v. Louisiana. (*Louisiana I*), 339 U.S. 699, 701 (1950).

160 United States v. Lousisiana (*Louisiana III*), 446 U.S. 253, 256 (1980).

161 Submerged Lands Act, 43 U.S.C. § 1312 (2006); *see also* People v. Weeren, 607 P.2d 1279, 1283 (Cal. 1980) (recognizing that California law previously delineated the sea boundary to extend three miles seaward from the California coast).

162 Implicit field preemption arises when Congressional intent leaves no role for state or local input or in an area, such as foreign affairs, where the federal interest is so dominant that it will preclude any state action. Barber v. Hawwai'i., 42 F.3d 1185, 1189 (1994) (quoting Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991)).

163 *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

the instant case because the Supreme Court's decision in *United States v. Locke*[164] suggested that no such presumption exists when state laws regulate in an area with "a history of significant federal presence."[165] The Ninth Circuit countered that a more recent Supreme Court decision, *Wyeth v. Levine*,[166] dismissed a similar argument as a misunderstanding.[167] In *Wyeth*, the Court explained that the presumption against preemption arises from the fact that states are "independent sovereigns in our federal system," and explained that the existence of federal regulation does not inherently rebut the presumption.[168] The Ninth Circuit concluded that the Vessel Fuel Rules were ultimately concerned with the prevention and control of air pollution—an area of state concern,[169]rather than with maritime commerce, conduct at sea, or the definition of state boundaries—fields occupied by the federal government. Accordingly, the district court correctly started with a general presumption against preemption.

Second, having recognized a presumption against preemption, the Ninth Circuit considered whether the SLA nevertheless preempted the Vessel Fuel Rules. The court rejected offhand PMSA's argument that the Vessel Fuel Rules amounted to a territorial claim by California. The court distinguished CARB's mere attempt "to regulate conduct beyond the state's territorial boundaries because of the serious harmful effect . . . on the state and its residents," from an attempt to "invade or interfere" with federal powers to set territorial boundaries or claim national territorial rights.[170]

The court surveyed a series of Supreme Court cases recognizing the federal government's paramount rights in and power over the marginal seas to admit states, to set state boundaries, and to regulate navigation.[171] However, those federal rights and powers are not infringed when Congress authorizes a state to exercise police powers within the marginal seas.[172] PMSA argued that the Vessel Fuel Rules not only applied within California's marginal seas, but also to vessels traveling in federal waters beyond the three-mile boundary. The Ninth Circuit applied the effects test,[173] and determined that California could enact "reasonable regulations to monitor and control extraterritorial conduct substantially affecting its territory."[174]

164 529 U.S. 89 (2000).

165 *Id.* at 108 (declining to apply the presumption against preemption to state law regulating in the field occupied by the Port and Waterways Safety Act of 1972).

166 555 U.S. 555 (2009).

167 *Id.* at 571–72.

168 *See id.* at 565 n.3 (internal quotations omitted).

169 *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (noting that legislation designed to address air pollution "clearly falls within the exercise of even the most traditional concept of . . . the police power").

170 *Pac. Merch. Shipping Ass'n*, 639 F.3d 1154, 1168 (2011).

171 *See* United States v. Maine, 469 U.S. 504, 513 (1985); United States v. Louisiana (*Louisiana II*), 363 U.S. 1, 35 (1960); *California I*, 332 U.S. 19, 35–36 (1947).

172 *California I*, 332 U.S. at 36; *see also* Toomer v. Witsell, 334 U.S. 385, 393 (1948) (allowing the state to maintain its sponge fishery as it was within its police power).

173 The effects test allows individual states to exercise extraterritorial jurisdiction based on effects within the state. Strassheim v. Daily, 221 U.S. 280, 285 (1911).

174 *Pac. Merch. Shipping Ass'n*, 639 F.3d at 1170.

The court also found support for its conclusion in the Restatement of Foreign Relations, which explained that states may regulate conduct occurring outside their boundaries if: 1) the conduct has a substantial effect within the territory, and 2) the regulation is reasonable.[175]

The court noted that the validity of a state law applied to extraterritorial conduct depends on the contacts between the harmful conduct and the state itself. In an earlier Ninth Circuit case, the fact that seamen and maritime employees were California residents, were interviewed and hired in California, and paid California taxes provided sufficient contacts to uphold a California overtime-work law against claims of federal preemption.[176] By contrast, the Ninth Circuit found insufficient contacts to withstand preemption in a case involving Alaska labor law, where the employees primarily worked outside the territorial waters of Alaska, were not Alaska residents, and were hired and began work in Seattle, Washington.[177] The Ninth Circuit surveyed other court opinions that, in applying the effects test, similarly upheld state laws that regulated conduct on the high seas so long as such conduct affected state interests.[178]

The Ninth Circuit also approved of the district court's reliance on two federal circuit court decisions finding that the SLA did not impinge upon states' rights to regulate conduct occurring outside their territorial borders. In both cases, federal statutes authorized states to regulate the piloting of ships beyond the three-mile boundaries established by the SLA—pilots subsequently challenged the state regulations on the theory that the SLA implicitly confined state regulation to the marginal seas.[179] The United States Court of Appeals for the First Circuit explained that the issue of a state's territorial limits, defined by the SLA, was distinct from the state's ability to control navigation.[180] The United States Court of Appeals for the Fifth Circuit reached a similar conclusion, holding that the SLA only addresses "who retains title to submerged lands both within and beyond the three-mile line," and had no bearing on regulation of navigation on the water.[181]

Ultimately, the "clear weight of this case law" convinced the Ninth Circuit that PMSA overestimated the SLA's scope.[182] The court held that the SLA was concerned with the narrow issue of who owned submerged lands, and did not create a territorial zone of exclusive federal authority. The court

175 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §§ 402(1)(c), 403 (1987).

176 Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1424–25 (9th Cir. 1990).

177 Guller v. Golden Age Fisheries, 14 F.3d 1405, 1409 (9th Cir. 1994)

178 *See* State v. Jack, 125 P.3d 311, 322 (Alaska 2005) (affirming State's jurisdiction over a criminal assault on an Alaskan ferry in Canadian waters); People v. Weeren, 607 P.2d 1279, 1285 (Cal. 1980) (affirming conviction of California residents with state fishing licenses for violating California commercial swordfish regulations by using spotter aircraft registered in state to catch fish outside California's territorial waters); State v. Stephansky, 761 So. 2d 1027, 1036 (Fla. 2000) (affirming State's power to criminally charge a citizen on a cruise ship because it affected Florida's tourism industry).

179 *See* Gillis v. Lousiana, 294 F.3d 755, 761 (5th Cir. 2002); Warren v. Dunlap, 532 F.2d 767, 772 (1st Cir. 1976).

180 *Warren*, 532 F.2d at 772.

181 *Gillis*, 294 F.3d at 761.

182 Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1174 (9th Cir. 2011).

further held that state laws regulating conduct outside of the state's territorial waters should generally be upheld if they satisfies the effects test.

The court next applied the effects test to the Vessel Fuel Rules. The court found genuine issues of material fact precluding summary judgment in favor of PMSA. The conduct regulated by the Vessel Fuel Rules not only implicated state environmental and health concerns, but also economic concerns in light of the importance of shipping to California. The court catalogued the specific environmental effects of emissions from ocean-going vessels, and noted that the Vessel Fuel Rules should significantly reduce those effects.

The Ninth Circuit next considered whether the Dormant Commerce Clause or the doctrine of maritime law preempted the Vessel Fuel Rules.[183] Under the Dormant Commerce Clause, a state law may be unconstitutional because of its effect on interstate or foreign commerce.[184] State laws may also be unconstitutional under general maritime law preemption if they contravene the general characteristics of uniform maritime law.[185] The court determined that the Vessel Fuel Rules did not directly regulate commerce or interfere with general maritime law because that was not their central purpose.[186] Accordingly, the court determined that any incidental impacts must be analyzed under a balancing test weighing state and federal interests.[187]

In applying the balancing test for the dormant Commerce Clause and general maritime law, the Ninth Circuit first recognized the importance of uniformity with respect to environmental regulation on the high seas. However, the court concluded that these interests were too attenuated to justify invalidating the Vessel Fuel Rules. Because the Vessel Fuel Rules contain a sunset clause, the court predicted that the Vessel Fuel Rules would terminate once the heightened standards under the ECA go into effect.[188] By contrast, the court found that California had "an especially powerful"

183 *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917) (recognizing that a state regulation is invalid if it "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations").

184 The Supreme Court requires a two-tiered approach to determine if a state regulation runs afoul of the Dormant Commerce Clause. *Pac. Merch. Shipping Ass'n*, 639 F.3d at 1177 (citing Or. Waste Sys. Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)). If the state regulation directly burdens interstate commerce or discriminates against out-of-state interests, it is presumptively invalid. *Id.* If, however, the state regulation merely has an "incidental effect" on interstate commerce, the state regulation is subjected to a balancing test. *Id.* Under this balancing test, a state regulation is preempted if the burdens it imposes on interstate commerce outweighs the putative benefits to the extent that the state regulation is unreasonable or irrational. *Id.*

185 *Id.* at 1178.

186 *See* Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 395–96 (9th Cir. 1995).

187 *See In re* Exxon Valdez, 484 F.3d 1098, 1101 (9th Cir. 2007) (applying such a balancing test in the context of maritime law).

188 The sunset clause provides for the termination of the Vessel Fuel Rules when the federal government adopts and enforces requirements that will achieve equivalent emission reductions. *Pac. Merch. Shipping Ass'n*, 639 F.3d at 1180.

interest in controlling the effects of air pollution. While acknowledging the "expansive and possibly unprecedented" regulatory scheme envisioned by the Vessel Fuel Rules, the court nevertheless found that the severe environmental problems confronting California were themselves unprecedented. Accordingly, the Ninth Circuit declined to find that the Dormant Commerce Clause or general maritime principles preempted the Vessel Fuel Rules and affirmed the district court's decision to deny PMSA's motion for summary judgment.

C. Comprehensive Environmental Response, Compensation, and Liability Act

1. City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440 (9th Cir. 2011).

The City of Los Angeles (the City) brought suit against BCI Coca-Cola Bottling Company of Los Angeles (Coca-Cola) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[189] and California state nuisance law.[190] The City sought reimbursement of environmental cleanup costs at Berth 44 in the Port of Los Angeles (Berth 44) arising from environmental contamination caused by the operation of San Pedro Boat Works. The United States District Court for the Central District of California granted partial summary judgment in favor of Coca-Cola, and the City appealed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment in favor of Coca-Cola because Coca-Cola was not liable as an "owner" under CERCLA, and because the City did not raise a triable issue of fact on its California state law nuisance claims. The Ninth Circuit also held that the district court did not err in denying the City leave to amend its complaint to add a breach of contract claim.

Berth 44, located within the Port of Los Angeles in Los Angeles Harbor, is owned by the City of Los Angeles and run by the Board of Harbor Commissioners (the Board).[191] In 1965, the Board, which is responsible for issuing land use permits at Los Angeles Harbor, issued Revocable Permit No. 936 (Permit No. 936) to the Los Angeles Harbor Marine Corporation (LAHMC), granting possession of a small area of land and water at Berth 44 for the limited purpose of operating a boatworks. In the late 1960s, Pacific American began negotiations with LAHMC to purchase the permit.

189 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

190 The City brought common law tort claims of public and private nuisance. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 604 (Cal. 1997) (noting California law mirrors the Restatement (Second) of Torts definition of public nuisance: substantial and unreasonable interference with a public right); San Diego Gas & Elec. Co. v. Superior Court, 920 P.2d 669, 696–97 (Cal. 1996) (noting private nuisance requires substantial and unreasonable interference with plaintiff's enjoyment of the land).

191 LOS ANGELES CHARTER & ADMIN. art. VI, § 651 (2011).

Meanwhile, Pacific American incorporated San Pedro Boat Works as a wholly owned subsidiary corporation.

In August 1969, Pacific American purchased the permit from LAHMC with the City's approval. In closing the sale, Pacific American conveyed all of its interest in LAHMC's physical assets—but *not* Permit No. 936—to San Pedro Boat Works. As a result, Pacific American never owned the boatworks' assets. While San Pedro Boat Works became the sole owner of the facilities and machinery at Berth 44, it did not assume immediate responsibility for every aspect of the boatworks. On August 4, 1969, Pacific American accepted an assignment of Permit No. 936 from LAHMC. Pacific American later obtained Revocable Permit No. 1076 from the Board to replace Permit No. 936, and in June 1970 assigned Permit No. 1076 to San Pedro Boat Works with the Board's approval. During this period, Pacific American was the named permittee of Permit Nos. 936 and 1076 for operation of the boatworks for roughly ten months. In 1993, Coca-Cola purchased Pacific American, including its remaining assets and liabilities. In 1995, the City discovered a variety of contaminated sediments at Berth 44, which the City removed in 2003.

The City filed its initial action against Coca-Cola, Pacific American, and San Pedro Boat Works in 2002, alleging the defendants were liable for the contamination. In its fourth amended complaint, the City alleged claims against Coca-Cola under CERCLA[192] and California state nuisance law.[193] The City asserted four theories of CERCLA liability against Coca-Cola: that Pacific American was a CERCLA "owner"[194] because 1) it held title to assets used at Berth 44, and because 2) it held the Revocable Permits from the City to do business at Berth 44; that 3) Pacific American was a CERCLA "operator"[195] in its own right, and that 4) it was also derivatively liable as an "operator" by virtue of owning San Pedro Boat Works.[196]

The City moved for summary judgment on the CERCLA claims, and the district court found in favor of Coca-Cola on theories 2) through 4). The district court then submitted theory 1) to the jury without specific instruction as to the definition of "ownership" under CERCLA. The jury returned a special verdict finding that Pacific American did not own the assets of the boatworks, so the district court dismissed the City's CERCLA claims sua sponte. The district court then granted Coca-Cola's motion for summary judgment on the City's nuisance claims, entered final judgment in favor of Coca-Cola, and held that Coca-Cola did not own the Boat Works' assets as a result of its ownership of Pacific American.

192 42 U.S.C. § 9607(a)(2) (2006).

193 *See People* ex rel. *Gallo*, 929 P.2d at 604; *see also San Diego Gas and Elec. Co.*, 920 P.2d at 696–97.

194 42 U.S.C. §§ 9601(20)(A)(ii), 9607(a)(2) (2006); *see also* United States v. Bestfoods, 524 U.S. 51, 56 (1998).

195 42 U.S.C. § 9601(20)(A)(ii) (2006) (describing an owner or operator as "any person owning or operating [a] facility").

196 *See* City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 446 (9th Cir. 2011).

The City appealed on the ground that Pacific American was an "owner" of the boatworks for purposes of CERCLA liability since it held the revocable permit to operate the boatworks at Berth 44 for ten months from 1969 to 1970. The City also appealed both the district court's grant of summary judgment for Coca-Cola on the nuisance claims and the district court's denial of the City's motion for leave to amend its complaint to add a breach of contract claim against Pacific American. On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment de novo[197] and the district court's denial of a motion for leave to amend a complaint for abuse of discretion.[198]

The Ninth Circuit first addressed the City's CERCLA claims. The City contended that Coca-Cola was liable for cleanup of Berth 44 because Pacific American possessed Revocable Permits from the City for ten months, and was thus an "owner" of the physical assets of the boatworks when the pollution was discharged, and that Coca-Cola assumed Pacific American's CERCLA "owner" liability when it purchased Pacific American's assets and liabilities in 1993. The Ninth Circuit first noted that because CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance *owned* or *operated* any facility at which such hazardous substances were disposed of,"[199] Coca-Cola is liable under CERCLA as a successor-in-interest to Pacific American only if Pacific American was an "owner" of the boatworks facility. The Court then pointed out that Congress did not clearly define the word "owner" in CERCLA,[200] and that the United States Supreme Court has recognized that this definition is entirely tautological, and thus useless.[201]

Turning to its own jurisprudence, the court invoked the single Ninth Circuit case that examined the meaning of the term "owner" under CERCLA, where it held that holding an easement for a non-polluting pipeline was not sufficient to be considered an owner or operator under CERCLA.[202] In *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust* (*Long Beach*), the court read CERCLA to incorporate the common law definition of its terms,[203] and found that the common law definition of "owner" under California state case law did not include an easement holder.[204] The Ninth Circuit then observed that *Long Beach* demonstrates that there is a relevant distinction between absolute title ownership to real property and mere possessory interests in real property for the purposes of CERCLA owner liability.

197 Kendall–Jackson Winery, Ltd., v. E. & J. Gallo Winery, 150 F.3d 1042, 1046 (9th Cir. 1998).

198 DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987).

199 42 U.S.C. § 9607(a)(2) (2006) (emphasis added).

200 *Id.* § 9601(20)(A)(ii).

201 United States v. Bestfoods, 524 U.S. 51, 56, 66 (1998).

202 *See* Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1370 (9th Cir. 1994).

203 *Id.* at 1368.

204 *Id.* at 1368–69.

The Ninth Circuit then explained that other courts have not followed *Long Beach*'s methodology,[205] and that the only circuit court to address the liability of a lessee under CERCLA's owner provision determined that lessees could be liable as owners only in the rare case where the lessee was a de facto owner, such as in the case of the "proverbial ninety-nine year lease."[206] The Ninth Circuit declined to follow the Second Circuit's "nebulous and flexible" five-factor balancing test from *Commander Oil Corp. v. Barlo Equipment Corp.* Instead, the court relied on its own precedent in *Long Beach*, finding that the holder of a permit for specific use of real property is not the "owner" of that real property, but that such a permittee holds a possessory interest in the land. The court likened the possessory interest of a permittee to that of a licensee or easement holder because the fee title owner retains power to control the use of the real property.

The Ninth Circuit supported this finding by reviewing California state case law that consistently distinguishes between possessory (and non-possessory) interests and title ownership, and noted that other courts have ruled similarly.[207] Further, the court cited the plain language of CERCLA and explained that in establishing "owner" liability, Congress used the unmodified term "owner" that, "when used alone, imports an absolute owner."[208] Turning to the present case, the court observed that the "narrow bundle of rights" that Pacific American enjoyed during its ten-month possession of the Revocable Permits to operate the boatworks did not include the "core attributes" of ownership.[209] Finally, the court stressed that its finding was consistent with the legislative intent of CERCLA, which holds liable both the passive title owner of real property and the active or negligent operator of the facility. The Ninth Circuit concluded that Pacific American as a holder of the Revocable Permits was not an "owner" of the boatworks for the purposes of CERCLA liability. Accordingly, the court held that Coca-Cola was not liable to the City for the costs of environmental cleanup.

The Ninth Circuit next addressed the City's public and private nuisance claims under California state law. The City contended that Pacific American was liable under the Restatement approach, which California adopted, because it knew or should have known of the pollution at Berth 44.[210] The City first argued that testimony by a San Pedro Boat Works employee that

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205 *See* United States v. S.C. Recycling & Disposal, Inc., 653 F. Supp. 984, 1002–03 (D.S.C. 1986), *aff'd in part*, *vac'd in part sub nom.* United States v. Monsanto Co., 858 F.2d 160, 176 (4th Cir. 1988).

206 Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 330–31 (2d Cir. 2000).

207 *See, e.g.*, Mesa Verde Co. v. Montezuma Cnty. Bd. of Equalization, 898 P.2d 1, 11 (Colo. 1995); Spanish River Resort Corp. v. Walker, 497 So. 2d 1299, 1301 (Fla. Dist. Ct. App. 1986); Stansbury v. MDR Dev., L.L.C., 871 A.2d 612, 620–21 (Md. Ct. Spec. App. 2005); Peoples Gas, Light, & Coke Co. v. Harrison Cent. Appraisal Dist., 270 S.W.3d 208, 212–13 (Tex. App. 2008).

208 Dirs. of Fallbrook Irrigation Dist. v. Abila, 39 P. 794, 796 (Cal. 1895) (citation omitted).

209 City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 451 (9th Cir. 2011).

210 *See* People ex rel. Gallo v. Acuna, 929 P.2d 596, 604 (Cal. 1997); RESTATEMENT (SECOND) OF TORTS §§ 838, 839 (1979); *see also* San Diego Gas & Elec. Co. v. Superior Court, 920 P.2d 669, 696–97 (Cal. 1996).

toxic paint scrapings from boat hulls were routinely discharged into Berth 44 during the period that Pacific American held the Revocable Permits meant that Pacific American had actual knowledge that San Pedro Boat Works was discharging pollutants. The court rejected this argument because the record did not reflect that anyone had told Pacific American of this practice or that any agents or employees of Pacific American had observed the practice. The court further noted that the knowledge of a San Pedro Boat Works employee could not be imputed to Pacific American, but only to San Pedro Boat Works. Because the City did not provide a reason to deviate from this rule, and did not challenge the district court's finding that San Pedro Boat Works was not an alter-ego of Pacific American, the Ninth Circuit held that the district did not err when it held that the City produced no evidence that Pacific American had actual knowledge of the pollution caused by San Pedro Boat Works.

The City next argued that Pacific American should have known that the boatworks was polluting Berth 44 because the Revocable Permit imposed a duty to keep and maintain the premises, which translated into a duty to investigate.[211] The court rejected this theory because section 839 of the Restatement only applies when the defendant is "in possession" of the property, and Pacific American had only the right to possess, but was not in fact in possession of the boatworks. Finding section 838—referring to land leased by a third party—applicable, the court observed that the City did not proffer any evidence that Pacific American would have had a "reason to know" of the pollution. Accordingly, the Ninth Circuit held that Pacific American could not be liable for public or private nuisance.

Finally, the Ninth Circuit addressed the district court's denial of the City's 2006 motion for leave to file a fourth amended complaint to add another cause of action for breach of contract. The court noted that although "[t]he court should freely give leave [to amend a pleading] when justice so requires,"[212] the district court's discretion to deny leave is "particularly broad where [a] plaintiff has previously amended the complaint."[213] The court found that, at a minimum, the City delayed amending the complaint for three years, and that the City did not sufficiently refute the district court's finding that a breach of contract claim would require Coca-Cola to redo extensive discovery, thus causing undue prejudice. Therefore, the court concluded that the district court did not abuse its discretion in denying the City's motion for leave to amend its complaint.

In summary, the Ninth Circuit affirmed the district court's grant of summary judgment to Coca-Cola on the CERCLA and California state nuisance law claims, and held that the district court did not abuse its discretion in denying the City leave to amend its complaint to add a breach of contract claim.

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211 *See* RESTATEMENT (SECOND) OF TORTS § 839 cmt. i (1979).

212 FED. R. CIV. P. 15(a)(2).

213 Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989).

2. Pakootas v. Teck Cominco Metals, Ltd., 646 F.3d 1214 (9th Cir. 2011).

Joseph Pakootas and Donald Michel, members of the Confederated Tribes of the Colville Reservation, together with the State of Washington (collectively Pakootas) sued Teck Cominco Metals, Ltd. (Teck Cominco) seeking penalties for violations of a cleanup order issued under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[214] The suit claimed Teck Cominco violated a United States Environmental Protection Agency (EPA) order requiring Teck Cominco to conduct a cleanup of contaminated sediments in the Columbia River, ten miles south of the Canadian border in the State of Washington. The United States District Court for the Eastern District of Washington granted Teck Cominco's 12(b)(1)[215] motion to dismiss for lack of subject matter jurisdiction. Pakootas and the other plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit affirmed, holding that Pakootas's suit was barred by CERCLA's limitations on review and that Pakootas did not satisfy CERCLA's exception for suits to recover penalties. Therefore, the action by Pakootas, seeking penalties from Teck Cominco, did not give the district court subject matter jurisdiction to hear the case.

From 1905 until 1995, Teck Cominco dumped contaminated slag from a smelter in Trail, British Columbia, into the Columbia River. The contaminated sediments flowed south in the Columbia River into Washington. In 1999, the Colville Tribes petitioned EPA to designate the Columbia River as a Superfund site under CERCLA, which would require any responsible party to pay for remediation.[216] EPA studied the area's environmental contamination and, in 2003, issued a unilateral administrative order for the responsible party, Teck Cominco, to conduct a remedial investigation and to clean up the contamination in the Columbia River.

After EPA released its unilateral administrative order, Pakootas filed suit against Teck Cominco under the citizen suit provisions of CERCLA.[217] Pakootas sought declarative and injunctive relief as well as penalties for Teck Cominco's failure to comply with the EPA-directed cleanup.[218] The district court denied Teck Cominco's motion to dismiss, and the Ninth Circuit affirmed the denial.[219] In that case, *Pakootas v. Teck Cominco Metals,*

214 42 U.S.C. §§ 9601–9675 (2006). Section 310 details CERCLA's citizen suit provision. *See id.* § 9659(a).

215 FED. R. CIV. P. 12(b)(1).

216 *See generally* Anthony R. Chase & John Mixon, *CERCLA: Convey to a Pauper and Avoid Cost Recovery Under Section 107(A)(1)?*, 33 ENVTL. L. 293 (2003) (discussing the "polluter pays" principle).

217 *See* Pakootas v. Teck Cominco Metals, Ltd. (*Pakootas I*), 452 F.3d 1066, 1068, 1070 (9th Cir. 2006); 42 U.S.C. § 9659(a)(1) (2006) ("[A]ny person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter . . . .").

218 *See Pakootas I*, 452 F.3d at 1070.

219 *Id.* at 1071, 1082.

Ltd. (*Pakootas I*), the Ninth Circuit decided that even though the source of the pollution originated in Canada, the suit was not an extraterritorial application of CERCLA because the contamination was located in Washington.[220]

While the *Pakootas I* appeal was pending, EPA and Teck Cominco reached a "contractual agreement" for Teck Cominco to conduct the remediation of the polluted Columbia River in Washington. In the agreement, Teck Cominco agreed to clean up the contaminated river and to submit to personal jurisdiction in the United States District Court if EPA took legal action to enforce the contract. EPA agreed to not sue for penalties or injunctive relief provided that Teck Cominco pursued the cleanup in a "satisfactory" manner.[221] However, EPA ultimately withdrew its unilateral administrative order and opted not to seek penalties for the 892 days in which Teck Cominco was in violation of the order.

Pakootas and the other plaintiffs then amended their complaint to seek civil penalties under CERCLA's citizen suit provisions for the 892 days in which Teck Cominco was in violation of EPA's unilateral administrative order.[222] Pakootas made three arguments for finding that their claim satisfied subject matter jurisdiction. First, Pakootas argued that the suit was not barred by CERCLA because section 9613 only limits the timing of the review of challenges and is not a jurisdictional statute.[223] Second, Pakootas claimed that the suit did not constitute a challenge to remedial action under CERCLA because plaintiffs only requested penalties for past noncompliance, not a review of future cleanup activities. Third, Pakootas averred that the suit satisfied an exception in section 9613 for actions to enforce orders and recover penalties.[224]

The Ninth Circuit reviewed de novo the lower court's dismissal for lack of subject matter jurisdiction. The court examined three issues: 1) whether CERCLA's timing of review provisions are jurisdictional, 2) whether Pakootas's suit for penalties constituted a challenge under section 9613, and 3) whether the section 9613(h)(2) exception for penalties applied to Pakootas.

First, the court determined that CERCLA's timing of review provision includes a jurisdictional limitation. The court followed the United States

220 *Id.* at 1077–79. The decision in *Pakootas I* rested on CERCLA's definition of "facility," which the court interpreted to mean "any site or area where a hazardous substance has . . . come to be located." *Id.* at 1074.

221 Pakootas v. Teck Cominco Metals, Ltd. (*Pakootas II*), 646 F.3d 1214, 1217–18 (9th Cir. 2011).

222 *See* 42 U.S.C. § 9659(a)(1) (2006).

223 42 U.S.C. § 9613(h) (2006) ("Timing of review—No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 . . . or under State law which is applicable or relevant and appropriate under section 9621 of this title . . . to review any challenges to removal or remedial action selected under section 9604 of this title.").

224 *Id.* § 9613(h)(2) (exempting "action[s] to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.").

Supreme Court's guidance in *Arbaugh v. Y & H Corp.*,[225] which sets a "readily administrable bright line" rule for whether statutes limit jurisdiction.[226] CERCLA's clear statutory language ("No federal court shall have jurisdiction . . . .")[227] convinced the Ninth Circuit that section 9613 limited subject matter jurisdiction for claims under CERCLA. Therefore, the court found that section 9613 deprives federal courts of the power "to review any challenges to removal or remediation action."[228]

Second, the court found that the Pakootas suit constituted a challenge to a remedial action under section 9613. While the penalties sought by Pakootas were for past violations, the central issue was the remedial action because, the court proclaimed, the penalties were the "hammer" with which EPA could enforce its remediation agreement.[229] The court reasoned that if Pakootas were allowed to bring a citizen enforcement action for civil penalties, then the punitive incentive to force Teck Cominco to carry out the agreed cleanup would be out of the hands of EPA. If EPA had no authority to enforce the agreement, Teck Cominco might decide to commit an economically efficient breach by paying the citizen suit penalties, thus leaving EPA empty-handed. Therefore, the court found that allowing citizen suits for civil penalties in this case would be against public policy because it might leave Teck Cominco financially incapable of performing its obligated remediation.

The court also based its decision on the structure of section 9613. The court observed that if citizen suits to recover penalties for past violations were not "challenges" to ongoing cleanup actions under 9613(h), the exceptions to CERCLA's denial of federal jurisdiction in section 9613(h) would be rendered superfluous.

Third, the court determined that the penalty exception in section 9613(h)(2) does not apply to citizen suits. The plain language of section 9613(h)(2) makes it clear that the exception for penalty suits only applies to the party entitled to recover the penalty.[230] In the case of CERCLA, the penalties are fines paid to the government, making the government the only entity entitled to recover the penalty. Furthermore, Congress designed section 9613(h)(2) to allow EPA—not citizens, who have their own exception under section 9613(h)(4)—to seek penalties.[231] Finally, the court reasoned, if citizens could sue under section 9613(h)(2), they could commandeer EPA's enforcement power and use it to interfere with cleanup performance. The court concluded that citizens filing CERCLA claims do not fall within the section 9613(h)(2) exception. Without an applicable exception, the court held that it lacked subject matter jurisdiction to hear Pakootas's claim.

225 546 U.S. 500 (2006).
226 *Id.* at 516.
227 *See supra* note 223.
228 42 U.S.C. § 9613(h) (2006).
229 *Pakootas II*, 646 F.3d 1214, 1221 (9th Cir. 2011).
230 *Id.* at 1224–25.
231 *See* 42 U.S.C. § 9613(h)(2), (4) (2006).

In summary, the Ninth Circuit affirmed the district court's dismissal of Pakootas's suit based on lack of subject matter jurisdiction. The court held that section 9613(h) bars challenges by citizens to recover penalties for past violations, and that citizen suits do not satisfy the section 9613(h)(2) exception.

3. Redevelopment Agency of the City of Stockton v. BNSF Railway Co., 643 F.3d 668 (9th Cir. 2011).

Plaintiff-Appellee-Cross-Appellant the Redevelopment Agency of the City of Stockton, California (Agency) filed suit against Defendants-Appellants-Cross-Appellees BNSF Railway Company and Union Pacific Railroad Company (collectively, Railroads), seeking cost recovery and an injunction related to a contaminated parcel of land. The Railroads removed the case from California Superior Court to the United States District Court for the Eastern District of California. The district court found the Railroads liable for the contaminated property and accordingly granted the Agency damages and an injunction. The parties appealed and cross-appealed the findings of liability and the award of damages to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court's findings of liability against the Railroads and remanded the case for entry of summary judgment for the Railroads.

In 1968, the State of California entered into a contract (Agreement) with several railroad companies to relocate their tracks onto a state-owned parcel (Property). In exchange for the rights-of-way necessary to operate railroad tracks on the parcel, the Railroads agreed to maintain the track, roadbed, and drainage. Accordingly, the Railroads installed a "French drain" on the Property—a buried, perforated pipe that protects soil stability by diffusing drainage water across a wide subterranean area. In the 1970s, a nearby bulk petroleum facility had several petroleum spills, including a spill of up to 6,000 gallons of diesel fuel. Unbeknownst to the Railroads, petroleum from these spills drifted beneath the Property via the French drain, contaminating much of the Property. The State did not officially transfer the Property's deed to the Railroad until 1983. The Railroads sold the Property to the Agency in 1988, and commercial developers subsequently discovered the contamination in 2004. The Agency incurred costs of more than $1.3 million to remove contaminated soil and remediate the site.

In 2005, the Agency sued the Railroads in California Superior Court, seeking cost recovery and an injunction requiring the Railroads to remediate any remaining contamination. The Railroads removed the case to the Eastern District of California, and both parties filed cross-motions for summary judgment. In 2007, the district court granted the Agency damages after holding that the Railroads were liable for the contamination under both state nuisance law[232] and the Water Code provision of the Polanco Redevelopment Act (Polanco Act).[233] However, the district court declined to

232 CAL. CIV. CODE § 3479 (West 1997).

233 CAL. HEALTH & SAFETY CODE § 33459–33459.8 (West 1999).

apply a third theory of liability to the Railroads under the Polanco Act's CERCLA provision.[234] Both parties appealed the district court's ruling on the cross-motions for summary judgment to the Ninth Circuit, which reviewed the case de novo.

The Ninth Circuit first reviewed whether the Railroads were liable for the contamination under California nuisance law.[235] The court narrowed its inquiry by noting that the parties did not dispute whether the contamination itself was a nuisance, but rather if the Railroads were liable for that nuisance. The Ninth Circuit next dismissed the district court's reasoning that the Railroads had "*created or assisted in the creation of the nuisance*"[236] by installing the French drain, which facilitated the migration of petroleum across the Property. No precedent supported the notion that an individual assists in the creation of a nuisance merely because his actions are a but-for cause of that nuisance. The Railroads were not liable under nuisance law merely because they constructed a conduit for unrelated reasons, which happened to affect the distribution of someone else's contamination.[237] The district court's contrary finding "defie[d] semantics, the law, and common sense."[238]

The Ninth Circuit then considered whether the Railroads might nevertheless be liable under nuisance law as possessors of land with an abatable artificial condition.[239] The court focused on "[w]hether the Railroads 'should have known' about the contamination"—a determination dependent upon whether the Railroad had a duty to inspect the land and "whether [the condition] was discoverable by a reasonable inspection."[240] Although the petroleum contamination would not have been discoverable by a reasonable inspection of the Property's surface, the Agency argued that the Railroads had a duty to inspect the Property's subsurface for contamination because the nearby bulk petroleum facility was a potential source of hazardous waste. Additionally, the Agreement required the Railroads to maintain the drainage system.

The Ninth Circuit quickly dispatched with the Agency's first argument, calling it "untenable" that a landowner might have a duty to inspect the subsurface of his land in order to discover and control his neighbor's pollution.[241] Such a holding, the court noted, would invert the core purpose

234 *Id.* § 33459 (West 1999). The Polanco Act is the corollary state Superfund statute to the federal Superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

235 *See* CAL. CIV. CODE § 3479 (West 1997).

236 County. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006).

237 Redevelopment Agency of the City of Stockton v. BNSF Ry. Co. (*City of Stockton*), 643 F.3d 668, 675 (9th Cir. 2011).

238 *Id.*

239 *See* RESTATEMENT (SECOND) OF TORTS § 839 (1979) (subjecting a possessor of land of liability when in possession by an abatable artificial condition on such land); *see also id.* § 839 cmt. f (defining "abatable physical conditions" as those that "reasonable persons would regard as being susceptible of abatement by reasonable means.").

240 *City of Stockton*, 643 F.3d at 675–76 (citing Leslie Salt Co. v. S.F. Bay Conservation and Dev. Comm'n, 153 Cal. App. 3d 605, 621 (Cal. Ct. App. 1984)).

241 *City of Stockton*, 643 F.3d at 676.

of nuisance law: "to protect a person from his neighbor's activities, not to render him liable for them."[242]

The Ninth Circuit considered the Agency's second argument to be a closer call, but nevertheless rejected it. The court acknowledged that dicta in another of its cases contemplated that a contractual obligation might heighten a landowner's duty to investigate for contamination.[243] However, the court distinguished the contractual language in that case from the language in the Agreement. Whereas the contract in *City of Los Angeles v. San Pedro Boat Works* imposed an obligation to "keep and maintain [the] premises in a safe, clean, wholesome, sanitary and sightly condition,"[244] the Agreement in this case merely stated "the maintenance of all railroad facilities including track, roadbed, [and] railroad drainage . . . shall be by [the] Railroads at their expense."[245] The court interpreted the Agreement as merely imposing an obligation to maintain certain structures on the Property—not a duty to keep the Property free from contamination. Accordingly, the court declined to impose liability under any theory of nuisance law.

The Ninth Circuit next examined the theories of liability under California's Polanco Redevelopment Act,[246] which allows local redevelopment agencies to recover the cost of remediation from any "responsible party."[247] The Polanco Act defines "responsible party" by reference to other statutes.[248] The term encompasses any person described under specific provisions of either section 13304(a) of the California Water Code,[249] or section 9607(a) of CERCLA,[250] as incorporated by reference in the California Health and Safety Code.[251]

The Ninth Circuit first considered whether the Railroads were a "responsible party" under the definition drawn from the California Water Code: any person who "has caused or permitted" waste to be discharged in such a way that it may enter state waters and create a nuisance.[252] The court resolved the Railroads' liability as a "responsible person" under this definition on the same grounds that it dismissed the district court's nuisance ruling: The Railroads did not create a nuisance because they were not directly involved in any petroleum spills, and whatever pollution emanated from their French drain did so without their knowledge or involvement.

Having dismissed both of the district court's rationales for holding the Railroads liable for the contamination, the Ninth Circuit finally considered

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242 *Id.*

243 *See* City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 453 (9th Cir. 2011).

244 *Id.*

245 *City of Stockton*, 643 F.3d at 676.

246 CAL. HEALTH & SAFETY CODE § 33459–33459.8 (West 1999).

247 *Id.* § 33459.4(a).

248 *Id.* § 33459(h).

249 CAL. WATER CODE § 13304(a) (West 2009).

250 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a) (2006).

251 CAL. HEALTH & SAFETY CODE § 25323.5 (West 2006).

252 CAL. WATER CODE § 13304(a) (West 2009).

the Agency's third theory of liability, that the Railroads were a "responsible party" under the Polanco Act's CERCLA provision because they owned the Property at the time the contamination took place.[253] The district court declined to find the Railroads liable as owners under the CERCLA provision because although the Railroads were running trains on the Property while the contamination occurred in the 1970s, the Railroads did not receive the deed to the Property until 1983. On appeal, the Agency argued that despite this, the Railroads were owners under CERCLA for two reasons: the doctrine of equitable conversion rendered the Railroads "equitable owners" of the Property upon execution of the Agreement in 1968,[254] and the Railroads' easement to operate trains over the Property constituted ownership under CERCLA.

The Ninth Circuit dismissed both of the Agency's arguments. First, the court noted that the doctrine of equitable conversion only applies when the purchaser of land executes a valid executory land sales contract which, among other things, contains a "description of the land to be conveyed"[255] that is "sufficient to delineate the property on the ground without resort to parol evidence." In this case, the Agreement merely conveyed "all rights of way necessary" for future railroad operation.[256] The Ninth Circuit determined that the Agreement lacked sufficient delineation of property rights to implicate the doctrine of equitable conversion because the Agreement only purported to convey a right-of-way, not a fee simple interest, and did not otherwise illuminate the extent of the Railroads' property rights. The Ninth Circuit similarly dismissed the Agency's argument that the Railroads' easement made them owners under CERCLA. The court first noted that Ninth Circuit precedent does not recognize easement-holders as "owners" for purposes of CERCLA liability, because they lack title to the property at the time of contamination.[257] The court stated that, if anything, an easement-holder could be liable as an *operator* under CERCLA, but that the Railroads in this case would not qualify because their easement activities were neither responsible for nor related to the discharge.

Accordingly, the Ninth Circuit reversed the district court's grant of summary judgment for the Agency as to the Railroads' liability under California nuisance law and the Polanco Act's Water Code provisions, and upheld the district court's grant of summary judgment for the Railroads under the Polanco Act's CERCLA provisions.

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253 42 U.S.C. § 9607(a)(2) (2006) (ascribing liability to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of").

254 *See* Parr–Richmond Indus. Corp. v. Boyd, 272 P.2d 16, 22 (1954) (noting that a land sales contract renders the purchaser the equitable owner of the land).

255 *City of Stockton*, 643 F.3d 668, 679 (9th Cir. 2011) (citing Corona Unified Sch. Dist. of Riverside Cnty. v. Vejar, 165 Cal. App. 2d 561, 566 (Cal. Ct. App. 1958)).

256 *City of Stockton*, 643 F.3d at 679.

257 *See* Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust, 32 F.3d 1364, 1370 (9th Cir.1994); *see also* City of Los Angles v. San Pedro Boat Works, 635 F.3d 440, 451–52 (9th Cir. 2011).

4. Team Enterprises, LLC. v. Western Investment Real Estate Trust, 647 F.3d 901 (9th Cir. 2011).

Plaintiff-Appellant Team Enterprises, LLC. (Team), the operator of a dry-cleaning store, sued several entities,[258] including Defendant-Appellee R.R. Street & Co. (Street), the manufacturer of a device that distills perchlorethylene (PCE) from dry-cleaning wastewater. Team sought contribution for the cost of remediating PCE-contaminated land under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[259] and under several state laws. The United States District Court for the Eastern District of California granted Street's motion for summary judgment on all claims.[260] Team appealed the grant of summary judgment for four of those claims—two claims under CERCLA's arranger liability provision,[261] a claim under California nuisance law,[262] and another claim under California trespass law.[263] The United States Court of Appeals for the Ninth Circuit reviewed de novo, and affirmed the district court's grant of summary judgment on all four claims.

From 1980 to 2004, Team's dry-cleaning store in Modesto, California utilized PCE, a hazardous chemical, in its dry-cleaning process—which in turn, generated PCE-laden wastewater. To recycle some of the PCE, Team used Street's equipment, the "Puritan Rescue 800 filter-and-still combination equipment" (Rescue 800), which filters PCE from the wastewater and then discharges the remaining PCE-laden water into a bucket—which Team then routinely poured down a sewer drain, thus contaminating nearby land. The California Regional Water Quality Control Board ordered Team to pay for site remediation, and Team subsequently sought contribution for those costs from defendants, including Street. Street moved for summary judgment, and the district court granted Street's motion.[264] Team appealed the district court's grant of summary judgment of four claims, alleging that Street: 1) arranged for PCE disposal under CERCLA because Street implicitly

258 In addition to R.R. Street & Co., Defendants included several property management companies, as well as the manufacturers of several chemicals used in the dry-cleaning process.

259 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 26 U.S.C. §§ 4611–4662, 42 U.S.C. §§ 6911a, 9601–9675 (2006).

260 Team Enterprises, LLC. v. W. Inv. Real Estate Trust, No. CV F 08-0872 LJO SMS, 2010 WL 3133195, at *18 (E.D. Cal. Aug. 9, 2010).

261 42 U.S.C. § 9607(a)(3) (2006) (rendering liable "any person who . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances").

262 *See* CAL. CIV. CODE § 3479 (West 2012) (defining "nuisance").

263 *See* Capogeannis v. Super. Court., 15 Cal. Rptr. 2d 796, 799 (Cal. Ct. App. 1993) (defining trespass as "an invasion of the interest in the exclusive possession of land") (citations and internal quotation marks omitted); Martin Marietta Corp. v. Ins. Co. of N. Am., 47 Cal. Rptr. 2d 670, 681 (Cal. Ct. App. 1996) (concluding that "unauthorized entry" is the essence of a cause of action for trespass). Under California law, wrongful "invasion by pollutants" may also constitute trespass. *Martin Marietta Corp.*, 47 Cal. Rptr. 2d at 682.

264 *Team Enterprises, LLC.*, 2010 WL 3133195, at *18.

intended for dry cleaners to dispose of PCE, 2) arranged for PCE disposal under CERCLA because it controlled the PCE disposal process, 3) assisted in the creation of a chemical nuisance, and 4) committed trespass by contaminating the Modesto land.

The Ninth Circuit first addressed Team's claims under CERCLA. The court began by noting that CERCLA imposes strict liability for environmental contamination upon four classes of "covered persons."[265] Because CERCLA allows covered persons to seek contribution for cleanup costs,[266] Team could defeat summary judgment and seek contribution from Street if it established that a genuine dispute existed over whether Street arranged for the disposal of PCE.

Team first argued that Street was liable under CERCLA because Street intended for dry-cleaners to dispose of PCE. The court highlighted that the seller of a hazardous product has not necessarily displayed the intent required to have "arranged" for disposal of that hazardous product, even if the seller knows the product will be disposed in the future.[267] The court believed this echoed the "useful product" defense to arranger liability.[268] Augmenting both of these theories, the court held that the seller of a product which uses or generates hazardous waste may only be subject to CERCLA arranger liability if the seller entered the transaction with the specific aim to dispose of a hazardous substance.[269]

Team next argued that because Street's design of the Rescue 800 did not eliminate all PCE from dry-cleaning wastewater, Street implicitly intended for users of the Rescue 800 to pour the remaining PCE down the drain. The Ninth Circuit failed to find such an implied intention in Street's product design.[270] Team also argued that Street's intent could be inferred from its failure to warn users about the risks of improper disposal. The Ninth Circuit disagreed, reasoning that such a holding would unreasonably expand the scope of arranger liability.

Team's third CERCLA argument proposed that Street had incurred arranger liability because Street exercised control over the PCE disposal

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265 *See* 42 U.S.C. § 9607(a) (2006). "Covered persons" includes persons or entities who "arrange[] for the disposal or treatment" of hazardous substances. *Id.* § 9607(a)(3).

266 *See id.* § 9613(f) ("Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . during or following any civil action under section 9606 . . . [or] 9607 of [title 42].").

267 *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1879 (2009) (finding that the ordinary meaning of the word "arrange" implies *purposeful action*, and individual must take intentional steps towards the disposal of hazardous substances to be subject to arranger liability).

268 *Id.* at 1878–79. *See* Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999); Fl. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318–19 (11th Cir. 1990) (noting that the "useful product" defense allows sellers of hazardous products to avoid arranger liability by showing that the product was sold for a useful purpose, rather than an attempt to avoid liability for hazardous waste).

269 This burden of proof rests with the plaintiffs. Team Enterprises, LLC. v. W. Inv. Real Estate Trust (*Team*), 647 F.3d 901, 909 (9th Cir. 2011).

270 At worst, the court said, the design indicated that Street was "indifferent to the possibility that Team would pour the remaining PCE down the drain." *Id.*

process. The Ninth Circuit held that Team must show that Street exercised *actual* control over the PCE disposal since Street had no legal authority to exercise control over Team. The court dismissed each of Team's three arguments as insufficient to impute arranger liability to Street. First, the court found no arranger liability for the seller of a hazardous chemical who required buyers to transfer the chemical in a way that often caused spills.[271] Second, the court noted that the manual instructed disposal into a bucket, not the drain, so Street lacked actual control of Team's chosen disposal method. Finally, the court reasoned that alleged dumping of PCE by Street employees at a different Team location had no bearing on whether Street actually controlled the PCE disposal in Modesto—where the contamination in question occurred.[272]

The Ninth Circuit next addressed whether Street could be liable under California nuisance law.[273] The court identified two avenues of potential liability: 1) when an individual affirmatively instructs the polluter to improperly dispose of the hazardous substance, and 2) when an individual assists in the creation of a nuisance by manufacturing or installing a faulty waste disposal system. The court found both theories of liability inapplicable to Street, noting that Street did not instruct Team to dispose of PCE into drains, sewers, or on the ground—only into a bucket. Additionally, the court observed that the Rescue 800 was a filtration system, not a disposal system.

Last, the court turned to Team's claim under California trespass law.[274] The court noted that although California law recognizes "invasion by pollutants" as a species of trespass,[275] an *unauthorized* invasion is the sine qua non of a trespass claim.[276] Team failed to present evidence that either the Rescue 800 or PCE entered Team's Modesto store without consent. Furthermore, if the instant contamination constituted trespass, then Team would have illogically trespassed against itself when its employees poured the PCE-laden wastewater down the drain.

In summary, the Ninth Circuit affirmed the district court's award of summary judgment for defendants on both arranger liability theories under CERCLA, and on both theories under California's nuisance and trespass laws.

In a special concurrence, Judge St. Eve of the Northern District of Illinois, sitting by designation, recommended an alternative plain-meaning construction of CERCLA's arranger liability provision. Judge St. Eve noted that CERCLA only extends arranger liability to individuals who "owned or possessed" the hazardous substances.[277] Because Street never owned or possessed the PCE at issue, Street should not qualify as an arranger under

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271 *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1875, 1883–84.

272 The alleged dumping by Street occurred at a different Team dry-cleaning store located in McHenry, California. *Team*, 647 F.3d at 911.

273 *See* CAL. CIV. CODE § 3479 (West 2012).

274 *See* Capogeannis v. Super. Court., 15 Cal. Rptr. 2d 796, 799 (Cal. Ct. App. 1993).

275 Martin Marietta Corp. v. Ins. Co. of N. Am., 47 Cal. Rptr. 2d 670, 682 (Cal. Ct. App. 1995).

276 *Id.* at 681.

277 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(3) (2006).

CERCLA. The concurring judge acknowledged, however, that Ninth Circuit precedent precluded such a plain-meaning approach in this case.[278]

II. NATURAL RESOURCES

A. *Endangered Species Act*

1. Conservation Force v. Salazar, 646 F.3d 1240 (9th Cir. 2011), cert. denied sub nom. Blasquez v. Salazar, 132 S.Ct. 1762 (2012).

Plaintiffs, hunters Miguel Madero Blasquez and Colin G. Crook and the nonprofit corporation Conservation Force, filed suit against Defendants,[279] including Secretary of the Interior Ken Salazar, challenging an administrative forfeiture under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA),[280] the Eighth Amendment Excessive Fines Clause,[281] and the Due Process Clause.[282]

Each plaintiff separately hunted leopards in different African countries[283] and then attempted to import leopard trophies into the United States with deficient export permits.[284] In April 2008, the United States Fish and Wildlife Service (FWS) notified the plaintiffs of the seizure of the trophies and their proposed forfeiture, and informed plaintiffs of their right to seek either administrative or judicial review. Plaintiffs Blasquez and Crook sought administrative review and made timely petitions for remission with the Office of the Solicitor. However, their petitions were denied; likewise, their supplemental petitions were denied. Consequently, they filed suit in the United States District Court for the Northern District of California in March 2009. On defendants' motion, the district court dismissed plaintiffs' CAFRA claim for lack of jurisdiction[285] and the remaining claims for failure to state a claim.[286]

278 *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1082 (9th Cir. 2006).

279 Defendants included United States Fish and Wildlife Service (FWS); Rowan Gould, FWS Acting Director; Daniel G.. Shillito, Pacific Southwest Region Solicitor; and Carolyn Lown, Pacific Southwest Region Assistant Solicitor.

280 18 U.S.C. §§ 983, 985; 28 U.S.C. §§ 2466–2467 (2006).

281 U.S. CONST. amend. VIII.

282 U.S. CONST. amend. V.

283 Plaintiff Miguel Blasquez hunted his leopard in Zambia in 2007, and Plaintiff Colin Crook hunted his leopard in Namibia in 2007. Conservation Force v. Salazar, 677 F. Supp. 2d 1203, 1206–07 (N.D. Cal. 2009).

284 *See* Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1538(a)(1)(A), (c) (2006) (prohibiting importation of endangered species into or out of the United States without a permit, with certain exceptions). Importation of the skulls and skins was unlawful under the ESA, 16 U.S.C. §§ 1531–1544 (2006), because the export permits were deficient under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, which has been implemented through the ESA. *Conservation Force*, 677 F. Supp. 2d at 1207.

285 FED. R. CIV. P. 12(b)(1).

286 *Id.* at 12(b)(6).

The issue presented to the United States Court of Appeals for the Ninth Circuit was whether the plaintiffs had waived their right to judicial forfeiture proceedings by pursuing administrative remedies. First, the Ninth Circuit affirmed the district court's dismissal of the plaintiffs' CAFRA claim for lack of jurisdiction. The court held that the United States Department of the Interior, Office of the Solicitor (Solicitor) did not violate CAFRA because under 50 C.F.R. § 12.23(a) the Solicitor may seek forfeiture of the leopard trophies pursuant to the Endangered Species Act of 1973 (ESA),[287] the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[288] and related regulations.[289] Consequently, if the Solicitor initiates a forfeiture proceeding, the affected party must receive a notice advising him that he may seek recovery of the property either administratively or judicially pursuant to 50 C.F.R. §§ 12.23(b), and 12.24. Correspondingly, the court found that FWS acted within its authority under 50 C.F.R. § 23.23(a) in enforcing CITES' permit requirements, that the trophies were lawfully subject to forfeiture,[290] and that FWS gave proper notice to plaintiffs both of its intent to forfeit the trophies[291] and of plaintiffs' available remedies.[292] As a result, the court pointed out, the administrative and judicial remedies were mutually exclusive.

In this case, the plaintiffs were informed of their remedial options via the notice of intent to forfeit issued by FWS. That notice informed the plaintiffs that they could *either* seek an administrative petition of remission—requesting that the agency return the property—*or* initiate a judicial process to decide if the property should be forfeited. Noting that the two distinct remedies "provide alternative, not sequential, administrative and legal remedies,"[293] the Ninth Circuit concluded that the district court properly held that plaintiffs' CAFRA claim was barred from judicial review.[294] In sum, the court concluded that plaintiffs waived the opportunity for judicial forfeiture proceedings because they received proper notice[295] of the proposed forfeitures and chose to pursue administrative remedies.

287 16 U.S.C. §§ 1531–1544 (2006).

288 Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (codified at 16 U.S.C. § 1538(a)(1)(A), (c) (2006)).

289 50 C.F.R. §§ 23.1, 23.4 (2007) (imposing trade restrictions on certain species and a system of permits and certificates designed to protect them from commercial exploitation).

290 50 C.F.R. §§ 12.23, 23.13 (2007).

291 Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983(a) (2006).

292 50 C.F.R. §§ 12.23(b), 12.24 (2007).

293 Malladi Drugs & Pharm., Ltd. v. Tandy, 552 F.3d 885, 890 (D.C. Cir. 2009).

294 *See* 50 C.F.R. § 12.24(a) (2011) (expressly providing that the remedies are exclusive); *Malladi Drugs & Pharm.*, 552 F.3d at 889 (holding that the remedies are exclusive); *In re* U.S. Currency, $844,520.00 (Cole v. United States), 136 F.3d 581, 582 (8th Cir. 1998) (per curiam) (holding that the remedies are exclusive).

295 Notice was required to be sent to the plaintiffs 60 days after the date of seizure. *See* Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011); 18 U.S.C. § 983(a)(1)(A)(i) (2006) (requiring notice not more than 60 days after seizure unless otherwise allowed).

2. Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015 (9th Cir. 2011).

The Greater Yellowstone Coalition (Coalition) challenged the final rule issued by the United States Fish and Wildlife Service (FWS) delisting the Yellowstone grizzly bear (*Ursus arctos horribilis*) from the threatened species list under the Endangered Species Act (ESA).[296] In 2007, FWS determined that the Yellowstone population of grizzly bears had met the criteria necessary to be considered a recovered population, and then delisted the Yellowstone grizzlies.[297] Coalition argued that FWS's final rule violated the ESA because: 1) FWS failed to adequately consider how the loss of whitebark pine, an important food source, would affect grizzly bears, and 2) there were not adequate regulatory mechanisms in place to protect the grizzlies after delisting. The United States District Court for the District of Montana granted summary judgment to Coalition on both grounds, concluding that FWS failed to rationally support the determinations that whitebark pine loss would not affect grizzlies and that adequate regulatory mechanisms protected the species.[298] FWS and other intervenors[299] appealed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling as to whitebark pine; FWS had not rationally explained why the potential loss of whitebark pine in the ecosystem would not affect grizzly bears. The Ninth Circuit reversed the district court with respect to the question of adequate regulatory mechanisms because the regulatory framework described in the final conservation strategy, national forest plans, and national park regulations provided sufficient protections for grizzlies.

Coalition filed its lawsuit under the ESA shortly after FWS finalized its conservation strategy and published the final rule to remove the distinct population segment of Yellowstone grizzlies from the list of threatened species.[300] The ESA's procedures for delisting required FWS to issue a finding that the population would not be threatened after federal protections were removed. Specifically, section 4 of the ESA required FWS to consider five factors affecting the species: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or

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

297 Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment and Removing the Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 14,866 (Mar. 29, 2007) [hereinafter Final Rule], (codified at 50 C.F.R. pt. 17).

298 Greater Yellowstone Coal. v. Servheen, 672 F. Supp. 2d 1105, 1126–27 (D. Mont. 2009).

299 Intervenors included the State of Montana; Montana Department of Fish, Wildlife, and Parks; State of Wyoming; Safari Club International; Safari Club International Foundation; National Wildlife Federation; Idaho Wildlife Federation; Montana Wildlife Federation; and Wyoming Wildlife Federation.

300 *See* Final Rule, 72 Fed. Reg. at 14,866.

(E) other natural or manmade factors affecting its continued existence."[301] Coalition claimed that FWS failed to explain in the final rule how factors D and E posed no threats to the continued existence of Yellowstone grizzlies.

The Ninth Circuit reviewed the district court's decision on summary judgment de novo[302] and FWS's compliance with the ESA under the Administrative Procedure Act (APA).[303] The court would uphold FWS's decision to delist the grizzlies unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[304] Based on this standard, the court concluded that FWS violated the ESA by not providing a rational basis to conclude that the loss of whitebark pine (factor E) would not threaten grizzlies. Nevertheless, the court concluded that FWS's explanation provided adequate support for the existence of adequate regulatory mechanisms (factor D).

The court first conducted an analysis of factor E, the natural or manmade factors, by focusing on FWS's conclusion that any changes to whitebark pine production are not likely to impact Yellowstone grizzlies. The court noted that whitebark pine is an important food source for Yellowstone grizzlies, especially in the autumn as the bears prepare to hibernate for most of the winter. In years where whitebark pine production is lower than average, grizzly bears venture into human-occupied areas in search of food, resulting in increased grizzly mortality. The future of the whitebark pine food source, however, is uncertain. Whitebark pine forests are currently facing serious risk of declines related to"epidemic" threats caused by infestations of mountain pine beetles, European blister rust, and loss of habitat resulting from climate change.[305] With this in mind, the court proceeded to reject the five arguments FWS put forward to justify a finding that declines in whitebark pine would not threaten grizzlies.

First, FWS claimed that Yellowstone grizzlies are "notoriously resourceful omnivores" that will make behavioral adjustments in finding food if whitebark pine becomes scarce.[306] The court rejected this rationale because scientific studies indicated that declines in whitebark pine lead to more human encounters with grizzlies and increased grizzly mortality. Second, FWS pointed to long-term studies that showed grizzly population growth even during years of low whitebark pine productivity. The court called this justification for delisting grizzlies irrational: FWS cannot rely on studies of natural whitebark pine variation to conclude that epidemic declines will not affect grizzlies. Third, FWS cited other populations of grizzlies, including the Northern Continental Divide Ecosystem (NCDE) grizzly population that continued to thrive despite

301 16 U.S.C. § 1533(a)(1)(A)–(E) (2006).

302 Suever v. Connell, 579 F.3d 1047, 1055 (9th Cir. 2009).

303 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–709, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006); *see also* Native Ecosystems Council v. Dombeck, 304 F.3d 886, 901 (9th Cir. 2002).

304 5 U.S.C. § 706(2)(A) (2006).

305 Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1025 (9th Cir. 2011).

306 *Id.* at 1,026 (quoting Final Rule, 72 Fed. Reg. 14,866, 14,932 (Mar. 29, 2007) (codified at 50 C.F.R. pt. 17).

significant declines in whitebark pine. This argument failed to persuade the court that Yellowstone grizzlies would not be threatened because FWS conceded that Yellowstone grizzlies, unlike NDCE grizzlies, have a distinct and unique dependence on whitebark pine. Fourth, FWS argued that whitebark pine reserves would be available for Yellowstone grizzlies in the eastern mountain ranges within the Yellowstone Primary Conservation Area (PCA), even if whitebark pine in the west declined significantly. The court rejected this argument because FWS had defined the PCA as the minimal habitat necessary for Yellowstone grizzly recovery. Therefore, sufficient habitat for the population could not be sustained in only a portion of the PCA where whitebark pine survived. Fifth, FWS averred that adaptive management and monitoring by FWS biologists would allow the agency to relist Yellowstone grizzlies if their population became threatened in the future by other natural factors, including loss of whitebark pine. The court rejected the position that the possibility of relisting a species could serve as a justification for delisting. The court concluded that FWS failed to provide a rational explanation for why factor E, natural or other manmade factors, would not threaten Yellowstone grizzlies.

The court then turned to the issue of adequate regulatory mechanisms, and ultimately concluded that United States Forest Service (USFS) regulations, National Park Service (NPS) regulations, and federal and state laws provided sufficient protection for Yellowstone grizzlies post-delisting. The court declined to decide whether a non-binding, multi-agency conservation strategy could be considered a regulatory mechanism. Nevertheless, the national forest plans for six national forests within the ecosystem, and the NPS superintendent's compendia for Yellowstone and Grand Teton National Parks, included the conservation strategy's recommended habitat standards and population requirements. The court determined that these regulations sufficed for adequate mechanisms because the agencies were bound to follow their own rules.[307] Moreover, numerous federal and state laws listed in the conservation strategy provided additional legal protections for Yellowstone grizzlies.[308] Therefore, FWS was justified in concluding that adequate regulatory mechanisms protect the species.

In summary, the Ninth Circuit affirmed the district court's grant of summary judgment for Coalition on the issue of FWS's analysis for factor E, holding that FWS failed to explain how threats to whitebark pine would affect Yellowstone grizzlies. The court accordingly vacated FWS's rule delisting the Yellowstone population, and remanded the case to the district court. Regarding factor D, the court reversed the district court, concluding that the national forest plans, NPS regulations, and federal and state laws constitute adequate regulatory mechanisms in the protection of grizzlies.

Circuit Judge Thomas concurred with the court's analysis of Factor E, but dissented from the court's opinion with respect to Factor D. Judge

307 *See* Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 852 (9th Cir. 2003) (citing Steenholdt v. Fed. Aviation Admin., 314 F.3d 633, 639 (D.C. Cir. 2003)).

308 *Greater Yellowstone Coal.*, 665 F.3d at 1031–32.

Thomas concluded that FWS had not provided sufficient justification for the existence of adequate regulatory mechanisms because FWS relied on the voluntary conservation strategy. A voluntary, non-binding agreement among federal and state agencies should not be considered a regulatory mechanism, Judge Thomas argued, because its provisions are not legally enforceable.[309] Moreover, the national forest plans only included habitat standards, and the NPS regulations and other federal and state laws were silent as to how they "actually protect the grizzly" from mortality.[310] Judge Thomas reiterated the district court's view that FWS was bound to provide a more in-depth analysis of how the laws and regulations cited in the delisting rule actually protected Yellowstone grizzlies, and that FWS could not rely on "good intentions" or unenforceable management goals.[311]

3. Rock Creek Alliance v. United States Fish & Wildlife Service, 663 F.3d 439 (9th Cir. 2011).

A coalition of environmental groups[312]—including the Rock Creek Alliance—sued the United States Fish and Wildlife Service (FWS) for violations of the Endangered Species Act (ESA).[313] Rock Creek Alliance challenged two biological opinions (BiOps) issued by FWS which concluded that a proposed copper and silver mine in northwest Montana would not result in adverse modification of bull trout (*Salvelinus confluentus*) critical habitat[314] or jeopardize[315] grizzly bears (*Ursus arctos horribilis)*.[316] The United States District Court for the District of Montana granted summary judgment in favor of FWS, and Rock Creek Alliance appealed. The United States Court of Appeals for the Ninth Circuit affirmed, ruling that FWS's determinations—finding that the mine would not adversely modify bull trout habitat or result in jeopardy to grizzly bears—were not arbitrary or capricious.

Rock Creek Alliance's lawsuit arose out of a proposal by Revett Silver Company to develop a copper and silver mine on United States Forest Service (USFS) land in northwest Montana. The ESA required USFS to consult with FWS to determine whether the mining permit would adversely

309 *See* Or. Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (clarifying that regulatory mechanisms mean "current, enforceable measures").

310 *Greater Yellowstone Coal.*, 665 F.3d at 1035.

311 *Id.* at 1034.

312 Rock Creek Alliance, Cabinet Resource Group, Earthworks, Alliance for the Wild Rockies, Natural Resources Defense Counsel, Trout Unlimited, Idaho Council of Trout Unlimited, Pacific Rivers Council, and Great Old Broads for Wilderness.

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

314 *Id.* § 1536(a)(2); Interagency Cooperation–Endangered Species Act of 1973, As Amended, 50 C.F.R. § 402.01 (2011) (implementing the ESA for critical habitat).

315 16 U.S.C. § 1536(a)(2) (2006); 50 C.F.R. § 402.01 (2011) (requiring that any federal action is not likely to jeopardize the continued existence of any listed species).

316 Rock Creek Alliance v. U.S. Fish & Wildlife Serv., 663 F.3d 439, 442 (9th Cir. 2011). Bull trout and grizzly bears are both listed as threatened species under the ESA. 50 C.F.R. § 17.11 (2011).

affect ESA-listed species.[317] As part of the consultation, FWS produced two BiOps: one concluding that the mine would not adversely modify bull trout critical habitat, and the other concluding that the mine would not jeopardize grizzly bear recovery.

Rock Creek Alliance sued FWS under the Administrative Procedure Act (APA)[318] claiming that the BiOps on bull trout and grizzly bears were arbitrary and capricious. According to Rock Creek Alliance, FWS improperly relied on large-scale analyses and failed to explicitly address bull trout recovery. Rock Creek Alliance also claimed that FWS's methodology for calculating grizzly bear habitat was flawed and that FWS relied on speculative mitigation plans for the bears. Therefore, the BiOps could not reasonably conclude that there would be no adverse modification to bull trout habitat and no jeopardy to grizzly bears. The Ninth Circuit applied the APA's standard of review, which upholds an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[319]

The court addressed each of Rock Creek Alliance's arguments in turn. First, the court determined that FWS's large-scale analysis of bull trout critical habitat was not erroneous because the analysis accounted for each of the critical habitat elements,[320] and was a reasonable attempt to compare the size of the project area to the overall critical habitat area. Second, although an analysis of bull trout recovery was not presented in a separate section of the BiOp, a fair reading of the opinion led the court to conclude that FWS had adequately considered the effects of the mine on bull trout recovery.

Third, the court determined that FWS's no jeopardy conclusion resulted from an appropriate methodology concerning grizzly bears. The ESA does not require FWS to replace impacted habitat on an acre-by-acre basis, and FWS's mitigation plan would result in improved habitat for grizzlies. Fourth, the mitigation plan satisfied the requirement of "specific and binding plans"[321] for a no jeopardy finding because the mining permit was conditioned upon the acquisition of mitigation parcels.[322]

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment to FWS because FWS reasonably concluded that the mine would not adversely affect bull trout critical habitat and/or result in jeopardy to grizzly bears.

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317 *See* 16 U.S.C. § 1536(a)(1) (2006) (mandating agencies to consult with FWS before approving projects); 50 C.F.R. § 402.01 (2011) (implementing the consultation requirement of the ESA).

318 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3344, 4301, 5335, 5372, 7521 (2006).

319 *Id.* § 706(2)(A); Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010).

320 Critical habitat elements include "water temperature, substrate composition (specifically, increased sediment load), migratory corridors, channel stability, and cover." *Rock Creek Alliance*, 663 F.3d at 442.

321 Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 935–36 (9th Cir. 2008).

322 The court also noted that there was a clear commitment to implementing the mitigation plan because Revett had already purchased 273 acres. *Rock Creek Alliance*, 663 F.3d at 444.

4. San Luis & Delta-Mendota Water Authority v. Salazar, 638 F.3d 1163 (9th Cir. 2011).

Plaintiffs Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove (the Growers),[323] the owners of nut orchards, filed a lawsuit against Defendant United States Fish and Wildlife Service (FWS)[324] challenging the constitutionality of FWS's application of the Endangered Species Act (ESA)[325] to the delta smelt (*Hypomesus transpacificus*). The United States District Court for the Eastern District of California rejected the Growers' constitutional challenge and granted summary judgment to FWS. The Growers appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the district court's judgment.

The delta smelt is a small fish endemic to California that is no longer commercially valuable. FWS listed the delta smelt as a threatened species in 1993 and designated critical habitat in 1994. In 2008, acting under section 7 of the ESA,[326] FWS issued a biological opinion (BiOp) to the United States Bureau of Reclamation (BOR) regarding the coordinated effect of two large water diversion projects operated by BOR and the California Department of Water Resources. The BiOp concluded that the proposed coordination was "likely to jeopardize the continued existence of the delta smelt and adversely modify delta smelt habitat."[327] The BiOp included a reasonable and prudent alternative (RPA) to the proposal,[328] which would reduce takes of delta smelt by restricting water flow. The BiOp also contained an incidental take statement, which would protect BOR from liability under the "no-take provision" of section 9 of the ESA[329] so long as BOR adhered to the RPA.

323 The Growers' initial lawsuit was consolidated with four similar cases brought by the San Luis & Delta-Mendota Water Authority, Westlands Water District, State Water Contractors, Metropolitan Water District of Southern California, Coalition for a Sustainable Delta, and Kern County Water Agency.

324 In addition to FWS, Defendant-Appellees in the consolidated case included the United States Department of the Interior and its Secretary; the United States Bureau of Reclamation and its Commissioner, Acting Commissioner, and Mid-Pacific Regional Director; the California Department of Water Resources and its Director; the United States Department of Justice; the United States Environmental Protection Agency and its Administrator; the United States Department of Transportation and its Secretary; the United States Maritime Administration and its Acting Deputy Administrator; the United States Department of Homeland Security and its Secretary; the Federal Emergency Management Agency and its Administrator; and the United States Army Corps of Engineers and its Lieutenant General. Two environmental organizations, the Natural Resources Defense Council and the Bay Institute, joined as Defendant-Intervenor-Appellees.

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

326 *Id.* § 1536(a).

327 San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1168 (9th Cir. 2011) (internal quotation marks omitted).

328 *Id.* at 1168; *see also* 16 U.S.C. § 1536(b)(3)(A) (2006) (statign that the Secretary of the Interior "shall suggest those reasonable and prudent alternatives" which the action agency may engage in that will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat).

329 16 U.S.C. § 1538(a)(1)(C) (2006).

The Growers sued FWS in the Eastern District of California, claiming that their nut orchards received substantially less water as a result of FWS's actions on behalf of the delta smelt. Among other things, the Growers challenged the constitutionality of FWS's application of sections 7 and 9 of the ESA to the delta smelt, arguing that the Commerce Clause[330] did not extend to "a purely intrastate species [with] . . . no commercial value."[331] The Growers and FWS cross-motioned for summary judgment, and the district court granted FWS's cross-motion. As a preliminary matter, the district court found that although the Growers could challenge section 7 of the ESA, the Growers not only lacked standing to challenge section 9 of the ESA, but their claim under section 9 of the ESA was not ripe. The district court nevertheless judged the constitutional merits of the Growers' challenges to both sections, and held that application of sections 7 and 9 of the ESA to the delta smelt was permissible under the Commerce Clause. The Growers appealed the district court's ruling to the Ninth Circuit, which reviewed the case de novo.

The Ninth Circuit first evaluated whether the Growers had Article III standing to challenge section 9 of the ESA. The court noted that under the standard set forth in *Lujan v. Defenders of Wildlife*,[332] standing requires: 1) that a plaintiff have an "injury in fact" which is both "concrete and particularized," and either "actual or imminent"; 2) a "causal connection between the injury and the conduct complained of"; and 3) "it must be likely . . . that the injury will be redressed by a favorable decision."[333] The court quickly determined that the Growers had an injury in fact because the adverse consequences of reduced water delivery were both "concrete and particularized" and "actual or imminent."[334]

The Ninth Circuit next evaluated the causation element of standing. On this point, the court found the United States Supreme Court's decision in *Bennett v. Spear*[335] particularly instructive. In *Bennett*, a factually similar case, BOR reduced water flow after receiving a BiOp from FWS. The Supreme Court held that because the BiOp had a "powerful coercive" or "determinative" effect on BOR's actions, a group of ranchers affected by BOR's decision to reduce water flow also had standing to challenge FWS's BiOp.[336] Although the Growers sought to challenge FWS's power to enforce the no-take provision of section 9 of the ESA, the Ninth Circuit found no meaningful distinction between the instant case and *Bennett* because the coercive power of FWS's BiOp stemmed, at least in part, from FWS's power to enforce section 9 of the ESA. Because FWS's power to enforce section 9 of the ESA was at least a "substantial factor motivating" BOR to comply with

330 U.S. CONST. art. I, § 8, cl. 3.

331 *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1168.

332 504 U.S. 555 (1992).

333 *Id.* at 560–61.

334 *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1169–70 (internal quotation marks omitted).

335 520 U.S. 154 (1997).

336 *Id.* at 169.

the BiOp, the Ninth Circuit determined that a sufficient causal link existed between the Growers' injury and section 9 of the ESA.[337] Finally, the Ninth Circuit determined that invalidating FWS's power to enforce section 9 of the ESA would redress the Growers' injury because BOR could restore water flows without fearing take liability.

The Ninth Circuit next considered whether the Growers' as-applied challenge to section 9 of the ESA was ripe for judicial review. The court rejected the district court's decision to analyze ripeness under precedents applicable to pre-enforcement challenges.[338] The court noted that the Growers were not making a pre-enforcement challenge because only BOR—not the Growers—was the potential target of ESA section 9 enforcement. Instead, the Ninth Circuit evaluated ripeness under the general ripeness standard enunciated in *Abbott Laboratories v. Gardner*.[339] Applying the *Abbott Laboratories* test, the court determined that the Growers' challenge to section 9 of the ESA was fit for review because: 1) the case would not benefit from further factual development, and 2) the Growers would suffer hardship if the court withheld its consideration.

The Ninth Circuit finally turned to the Growers' as-applied Commerce Clause challenge to sections 7 and 9 of the ESA. The court upheld the constitutionality of both sections, finding that the ESA "bears a substantial relation to commerce."[340] The court began its analysis by surveying the Supreme Court's Commerce Clause jurisprudence, noting that Congress has the well-established power to regulate activities that "substantially affect interstate commerce."[341] The Ninth Circuit then honed-in on the Court's opinion in *Gonzalez v. Raich*, in which the Court noted that even if a regulation "ensnares some purely intrastate activity,"[342] it is still constitutional if the "general regulatory statute bears a substantial relation to commerce."[343] The Ninth Circuit also concluded that it was required to "evaluate the aggregate effect of the statute (rather than an isolated application) in determining whether the [ESA] relates" to interstate commerce.[344]

The Ninth Circuit next surveyed circuit court precedents, beginning with its own. The court noted that it had already rejected a Commerce

337 *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1171 (citing Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301, 308–09 (D.C. Cir. 2001)).

338 *See* Reno v. Catholic Soc. Servs., 509 U.S. 43, 57–58 (1993); Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc).

339 387 U.S. 136 (1967). In order to determine if a controversy is ripe for judicial resolution, the Court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 148–49.

340 *See* Gonzalez v. Raich, 545 U.S. 1, 17 (2005).

341 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 560 (1995).

342 545 U.S. at 22.

343 *Id.* at 17.

344 *San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163, 1175 (9th Cir. 2011) (citing *Lopez*, 514 U.S. at 561; United States v. Morrison, 529 U.S. 598, 610 (2000)).

Clause challenge to the Eagle Protection Act[345] for reasons similar to those announced by other circuit courts in rejecting challenges to the ESA.[346]

The court next noted that all four circuit courts that addressed similar Commerce Clause challenges to the ESA had rejected those challenges. The court found the United States Court of Appeals for the Eleventh Circuit's post-*Raich* decision in *Alabama-Tombigbee Rivers Coalition v. Kempthorne*[347] particularly instructive, noting that it presented "almost identical circumstances to those confronting us here."[348] In *Alabama-Tombigbee Rivers Coalition*, the Eleventh Circuit held that application of the ESA to the Alabama sturgeon—another purely intrastate species—was constitutional because the challenged sections of the ESA were "an essential part of a larger regulation of economic activity."[349] The Ninth Circuit agreed with this rationale, finding it supported by *Raich*.[350] The court then synopsized six reasons "why the protection of threatened or endangered species implicates economic concerns": a species may be endangered due to commercial overutilization; the ESA prohibits interstate commerce in listed species; the ESA protects the future and unanticipated commercial value of listed species; recovery of a listed species may allow future utilization of the species; people traveling between states stimulate commerce through recreational observation of listed species; and genetic diversity provided by listed species generally improves agriculture and aquaculture.[351]

The Growers next argued that unlike the Controlled Substances Act[352] at issue in *Raich*, the ESA is not a comprehensive *economic* regulatory scheme. The Ninth Circuit dismissed this claim, noting that *Raich* does not require the comprehensive regulatory scheme to actually regulate commerce—only that it has a substantial relation to commerce.

In summary, the Ninth Circuit reversed the district court, holding that the Growers had standing to bring an as-applied challenge to section 9 of the ESA, and that their claim was ripe for judicial review. Ultimately however, the Ninth Circuit affirmed the district court's grant of summary judgment for FWS and the environmental organizations on the constitutional merits, holding that sections 7 and 9 of the ESA are valid exercises of Congress's power under the Commerce Clause.

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

346 *See* United States v. Bramble, 103 F.3d 1475, 1482 (9th Cir. 1996).

347 477 F.3d 1250 (11th Cir. 2007).

348 *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1175.

349 *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1273 (quoting *Lopez*, 514 U.S. at 561).

350 *See* Gonzalez v. Raich, 545 U.S. 1, 22–24 (2005) (discussing how the intrastate manufacture and possession of controlled substances is within federal jurisdiction because Congress specified its intent to impose a comprehensive regulatory scheme).

351 *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1176.

352 21 U.S.C. §§ 801–971 (2006).

B. Federal Land Policy and Management Act

1. Gardner v. United States Bureau of Land Management, 638 F.3d 1217 (9th Cir. 2011)

Plaintiffs Fred Gardner and Concerned Citizens for Little Canyon Mountain (Concerned Citizens), an unincorporated association comprised of land owners, miners, and grazers in Grant County, Oregon (collectively Gardner), sought declaratory and injunctive relief under the Administrative Procedure Act (APA)[353] to compel Defendant United States Bureau of Land Management (BLM) to prohibit off-road vehicle (ORV) use in Little Canyon Mountain. The district court granted summary judgment in favor of BLM. Gardner appealed, asserting that BLM violated both the Federal Land Policy and Management Act of 1976 (FLPMA)[354] and applicable regulations[355] when it failed to ban ORV use in Little Canyon Mountain. The United States Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment, holding that: 1) FLPMA did not require BLM to close Little Canyon Mountain to ORV use, 2) BLM properly found that ORV use had not caused "considerable adverse effects" under applicable regulations, and 3) BLM's decision to deny Gardner's petition to close Little Canyon Mountain to ORV use was not arbitrary and capricious.

BLM manages approximately 2,500 acres of land in Little Canyon Mountain that has been designated as "open use" year round since BLM issued the John Day Resource Management Plan (John Day RMP) in 1985. This designation allows ORV use in Little Canyon Mountain, which includes a popular two-acre parcel known as "the pit."

A 2003 environmental assessment of Little Canyon Mountain predicted that a proposed BLM project to decrease fire risk and improve forest health by reducing fuels would likely increase ORV use in the area and could lead to "noticeable" impacts within five to ten years.[356] BLM ultimately adopted measures to mitigate the potential impact of ORV use in Little Canyon Mountain.

Mr. Gardner, Concerned Citizens, and other neighboring landowners regularly complained about ORV use in and around the pit. In June 2006, Gardner petitioned BLM to immediately close BLM land in Little Canyon Mountain to all recreational ORV use. BLM responded that the area could not be closed unless ORV use caused "considerable adverse effects,"[357] and welcomed Gardner to provide specific information and to participate in the ongoing John Day RMP revision process. Gardner filed suit in November 2007 after a BLM-initiated alternative dispute resolution process between Gardner and ORV users failed. The district court granted summary judgment in favor of BLM, and Gardner appealed. The Ninth Circuit reviewed the grant

353 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).
354 43 U.S.C. §§ 1701–1785; 16 U.S.C. § 1338a (2006).
355 43 C.F.R. §§ 8340–8342 (2011).
356 Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1219 (9th Cir. 2011).
357 43 C.F.R. § 8341.2(a) (2011).

of summary judgment de novo[358] and in accordance with section 706 of the APA.[359]

The issue presented to the Ninth Circuit on appeal was whether BLM violated FLPMA and applicable regulations when it failed to ban ORV use in Little Canyon Mountain. The Ninth Circuit first reviewed the sources of BLM's authority to oversee the use and management of certain federal lands: FLPMA,[360] Executive Orders issued by Presidents Nixon[361] and Carter,[362] Department of the Interior regulations specifically regarding ORV use,[363] and Ninth Circuit precedent regarding BLM authority that is independent of the RMP process.[364]

The Ninth Circuit next examined the power of the reviewing courts to compel agency action under section 706(1) of the APA.[365] The court noted that the United States Supreme Court, in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*),[366] held that this authority is limited to situations where an agency has failed to take a discrete and required action.[367] The *SUWA* Court held that similar provisions of FLPMA did not require BLM to take discrete agency action because those provisions allowed BLM to use its discretion to achieve broad objectives.[368]

The Ninth Circuit applied this reasoning to the FLPMA provision at issue in the present case,[369] and found no evidence in the record that the BLM failed to meet FLPMA's broad mandate to exercise discretion to remedy harms and manage lands in accordance with the multiple-use directive.[370] Accordingly, the court held that FLPMA does not mandate or compel the BLM to completely exclude ORV use in Little Canyon Mountain.

The court also found no evidence in the record to suggest that BLM made a finding of "considerable adverse effects" pursuant to its independent authority outside the resource management plan (RMP) designation process to limit ORV use.[371] The court further noted that this independent authority gives BLM discretion in determining how and when to make such a finding,

358 *Gardner*, 638 F.3d at 1220 (citing Swanson v. U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir.1996)).

359 Administrative Procedure Act, 5 U.S.C. § 706 (2006).

360 The court specifically reviewed BLM's authority under 43 U.S.C. § 1712(a) (2006) (requiring promulgation of land use plans, also referred to as resource management plans), § 1732(a) (requiring management of lands in accordance with principles of multiple use and sustainable yield), and §§ 1701(a)(8), 1732(b) (requiring contemporaneous enforce of relevant environmental laws governing use of public lands).

361 Exec. Order No. 11,644 §§ 1,8, 3 C.F.R. 142-44 (1971-1979).

362 Exec. Order No. 11,989 at § 2, 3 C.F.R. 120-21 (1977) (amending Exec. Order 11,644).

363 *See* 43 C.F.R. §§ 8340–8342 (2011).

364 Sierra Club v. Clark, 756 F.2d 686, 690 (9th Cir. 1985).

365 Administrative Procedure Act, 5 U.S.C. § 706(1) (2006).

366 542 U.S. 55 (2004).

367 *Id.* at 64.

368 *Id.* at 66–67, 71.

369 *Gardner*, 638 F.3d 1217, 1222 (applying 43 U.S.C. § 1732(b) (2006)).

370 *See* Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(c) (defining "multiple use"); § 1702(h) (defining "sustained yield"); § 1732(a) (requiring the Secretary to manage public lands under principles of "multiple use" and "sustained yield").

371 43 C.F.R. § 8341.2(a) (2011).

in contrast to the "ministerial or non-discretionary act[s]" referenced in *SUWA* that would compel agency action.[372] Accordingly, the court determined that BLM did not fail to take a required, discrete agency action.

Finally, the court addressed whether BLM's decision to deny Gardner's petition to close Little Canyon Mountain land to ORV use was arbitrary and capricious.[373] Citing circuit precedent, the court noted that the arbitrary and capricious standard is narrow,[374] and that a court must defer to the agency as long as the agency considered relevant factors and articulated a rational connection between the facts in the record and its ultimate decision.[375]

The court found that BLM's denial of Gardner's petition was not arbitrary and capricious because Gardner did not provide BLM with specific facts supporting his allegations that ORV use resulted in environmental damage constituting "considerable adverse effects."[376] In the absence of requisite evidence, BLM articulated a rational basis for denying the petition: the regulatory requirements had not been satisfied. The court further noted that BLM had asked Gardner to present any specific evidence of environmental damage, and encouraged Gardner and other residents to be involved in the RMP revision process. The Ninth Circuit also acknowledged that BLM actively monitors Little Canyon Mountain.[377] Accordingly, the court held that, based on the record before it, BLM did not unreasonably deny Gardner's petition to close Little Canyon Mountain to ORV use.

In summary, the Ninth Circuit held that FLPMA did not require BLM to close Little Canyon Mountain to ORV use, that BLM properly found that ORV use had not caused "considerable adverse affects" under applicable ORV regulations, and that BLM's decision to keep Little Canyon Mountain open to ORV use was not arbitrary and capricious.

C. Magnuson-Stevens Fishery Conservation and Management Act

1. West Coast Seafood Processors Ass'n v. Natural Resources Defense Council, Inc., 643 F.3d 701 (9th Cir. 2011).

The Natural Resources Defense Council (NRDC),[378] a non-profit environmental organization, filed a lawsuit against the National Marine

372 *SUWA*, 542 U.S. at 64–65 (2004).

373 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

374 Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008), *abrogated in part by* Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008), *as recognized in* Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009).

375 Arrington v. Daniels, 516 F.3d 1106, 1112 (9th Cir. 2008) (citing Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric., 415 F.3d 1078, 1093 (9th Cir. 2005)).

376 43 C.F.R. § 8341.2(a) (2011).

377 For example, BLM addressed public health safety concerns after a motor vehicle struck an ORV rider in 2007.

378 In addition to NRDC, Plaintiffs included the Pacific Marine Conservation Council. Though the Makah Indian Tribe (Tribe), whose treaty fishing grounds comprise Pacific Ocean waters off the northern coast of Washington State—including those waters under United States fisheries

Fisheries Service (NMFS),[379] a federal agency that regulates fisheries. West Coast Seafood Processors Association (WCSPA),[380] a trade association for seafood processors, attempted to intervene in that lawsuit. The United States District Court for the Northern District of California denied WCSPA's motion to intervene. WCSPA appealed the district court's denial to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit dismissed WCSPA's claim for mootness.

NMFS uses two tools to manage Pacific groundfish fisheries: the "Pacific Coast Groundfish Fishery Management Plan" (Groundfish Plan) sets procedures for assessing and protecting groundfish fisheries, and the "specifications and management measures" (Specifications) set quotas for groundfish catch. The Groundfish Plan has been updated sporadically since 1982, while the Specifications are regularly promulgated on an annual or biennial basis. In 2002, NRDC filed a lawsuit challenging part of the Groundfish Plan as a violation of the Magnuson-Stevens Fishery Conservation and Management Act.[381] NRDC amended its complaint four times in the next five years, each time to challenge a new amendment to the Groundfish Plan. During that same period, NRDC filed four separate lawsuits challenging the Specifications issued in 2002, 2003, 2004, and for the 2005–2006 period. WCSPA successfully intervened in all four of NRDC's challenges to the Specifications, but only participated as amicus curiae in NRDC's 2002 challenge to the Groundfish Plan. That changed in 2009 when NMFS released the 2009–2010 Specifications. Rather than continue its previous pattern of filing a separate legal challenge to the new Specifications, NRDC challenged the 2009–2010 Specifications by amending its complaint in the ongoing Groundfish Plan litigation. WCSPA moved to intervene in the Groundfish Plan litigation two days later. The magistrate judge denied WCSPA's motion to intervene as untimely because the Groundfish Plan litigation had been going on for nearly eight years. WCSPA appealed.

The issue presented to the Ninth Circuit was whether the magistrate judge erred when he determined the timeliness of WCSPA's motion to intervene by considering the overall length of the litigation (eight years) rather than the time that had elapsed since NRDC challenged the 2009–2010 Specifications (two days). However, while WCSPA's appeal was pending before the Ninth Circuit, the district court entered a final judgment in the underlying case between NRDC and NMFS. As a result, the Ninth Circuit did not reach the merits of the appeal, because it found that WCSPA's appeal was moot since granting WCSPA the right to intervene in a concluded case

management jurisdiction—is listed as Intervenor-Appellee, the Tribe's motion to intervene was denied in *NRDC v. Gutierrez*, No. C 01-0421 JL, 2007 WL 1518359, at ¶10–16 (N.D. Cal. May 22, 2007).

379 In addition to NMFS, Defendants in the underlying litigation included the National Oceanic and Atmospheric Administration and Gary Locke in his position as United States Secretary of Commerce. W. Coast Seafood Processors Ass'n v. NRDC (*West Coast Seafood*), 643 F.3d 701, 701 (9th Cir. 2011).

380 WCSPA participated as Applicant–in–intervention–Appellant. *Id.*

381 16 U.S.C. §§ 1801–1884 (2006).

did not constitute a "present controversy as to which effective relief can be granted."[382] Before dismissing the case outright, the court considered whether WCSPA's appeal fell within the "capable of repetition, yet evading review" exception to mootness, but found that the issue presented was not one of the "extraordinary cases" in which both requirements of the exception were satisfied.[383]

The court first noted that an issue is capable of repetition if there is a "reasonable expectation"[384] that the same party will confront the same controversy again. The court considered the unique pattern of NRDC's many cases against NMFS and determined that it was unlikely that such a unique pattern of litigation would confront WCSPA again. The court next noted that an issue evades review if it is "inherently limited in duration such that it is likely always to become moot before federal court litigation is completed."[385] The court differentiated between the inherently limited duration of the biennial Specifications and the indefinite duration of litigation concerning those Specifications. The court then warned of "conflating" the controversy of WCSPA's appeal with the controversy of the underlying litigation in which WCSPA sought to intervene. The court concluded that the underlying litigation at issue was not inherently limited in duration because it could have continued indefinitely, and thus the issue did not evade review.

In summary, because the Ninth Circuit was incapable of providing effective relief, and because the issue underlying WCSPA's appeal was neither reasonably capable of repetition, nor so inherently limited in duration as to likely always evade review, the Ninth Circuit dismissed WCSPA's appeal as moot.

In a dissent, Judge Carlos Bea concluded that the "capable of repetition, yet evading review" exception applied to WCSPA's appeal, and thus that the court should have addressed the merits of the case. Judge Bea evaluated the merits of WCSPA's motion to intervene, and determined that the district court abused its discretion.

Judge Bea first explained that WCSPA's appeal fell within the "capable of repetition, yet evading review" exception because the impetus for WCSPA's attempted intervention was NRDC's challenge to the 2009–2010 Specifications. He concluded that WCSPA's case thus evaded review because the challenge to those Specifications would always became moot after two years, when the Specifications expire. Judge Bea then noted that both the United States Supreme Court[386] and the Ninth Circuit[387] have held

382 Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 900 (9th Cir. 2007) (quoting Vill. of Gambell v. Babbitt, 999 F.2d 403, 406 (9th Cir. 1993) (quoting Nat'l Envtl. Def. Council v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988))).

383 Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 798 (9th Cir. 1999) (en banc).

384 Feldman v. Bomar, 518 F.3d 637, 644 (9th Cir. 2008).

385 Ctr. for Biological Diversity v. Lohn, 511 F.3d 960, 965 (9th Cir. 2007) (quoting Native Vill. of Noatak v. Blatchford, 38 F.3d 1505, 1509–10 (9th Cir. 1994)).

386 S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 514–16 (1911) (holding that an order that expires by its terms after two years evades review).

387 Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 855–56 (9th Cir. 1999) (holding that a permit that expires in two years evades review); *see also* Greenpeace Action v. Franklin,

that two-year timeframes are too short to fully litigate a case, suggesting that the issue evades review.

Citing Supreme Court precedent,[388] Judge Bea next stated that the appropriate analysis is whether WCSPA's appeal is merely *capable* of repetition—not whether the controversy is likely to recur, as the majority argued—and he concluded that it was. Judge Bea noted that the majority's decision preventing WCSPA from intervening in the present case would likely lead NRDC to employ similar tactics to shut WCSPA out of future litigation. Regarding whether WCSPA's motion to intervene was timely, he pointed out that although the underlying litigation began in 2002, NRDC's fifth amended complaint in 2009 was the first time that it challenged the 2009–2010 Specifications. By amending its complaint to challenge the Specifications, NRDC substantially changed the character of the litigation, and thus effectively reset the timeliness clock. Therefore, Judge Bea determined that WCSPA's motion was filed at an early stage of the proceedings because it was only two days after NRDC amended its complaint.

Judge Bea next reviewed the magistrate's conclusion that granting WCSPA's motion might prejudice the other parties. He criticized the magistrate's decision to consider NRDC's non-profit status—and the potential financial difficulties that accommodating an additional party might impose—because every intervenor makes original parties expend more resources in litigation.

Finally, Judge Bea considered the reason for WCSPA's "delay." He reiterated his belief that WCSPA had not truly delayed: WCSPA waited until 2010 to intervene because the 2009–2010 Specifications were not challenged until NRDC's fifth amended complaint. WCSPA could not have foreseen in 2002 that, eight years later, NRDC would amend the complaint in its Groundfish Plan litigation to include a challenge to the 2009–2010 Specifications.

Judge Bea concluded that the magistrate abused his discretion by denying WCSPA's motion to intervene because: 1) the relevant proceeding was still at an early stage, 2) the magistrate considered irrelevant factors in evaluating prejudice to the parties, and 3) WCSPA had not delayed its motion to intervene.

14 F.3d 1324, 1329–30 (9th Cir. 1992) (holding that fishing quota specifications that expire in one year evade review).

388 U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) ("Since the litigant faces *some* likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue." (emphasis added)).

D. Montana Wilderness Study Act

1. Citizens for Balanced Use v. Montana Wilderness Ass'n, 647 F.3d 893 (9th Cir. 2011).

Three conservation groups (collectively, Appellants)[389] appealed the United States District Court for the District of Montana's denial of their motion to intervene on the side of the Defendants[390] in an action brought by Citizens for Balanced Use (CBU), Plaintiffs. In the underlying action, CBU challenged an interim order issued by the United States Forest Service (USFS) restricting motorized vehicles in a section of the Gallatin National Forest as a violation of the Montana Wilderness Study Act (MWSA)[391] and the Administrative Procedure Act (APA).[392] The United States Court of Appeals for the Ninth Circuit reversed and remanded with instructions for the district court to allow Appellants to intervene in the ongoing litigation.

The Gallatin National Forest is located in southwest Montana and contains the Hyalite-Porcupine-Buffalo Horn Wilderness Study Area (Study Area). The MWSA created the Study Area and requires it to be maintained in accordance with the wilderness character of 1977.[393] Correspondingly, in October 2006, USFS issued the Travel Management Plan (Plan) to manage recreation and travel in the Study Area. At that time, Appellants filed an action to challenge the Plan[394] on the theory that it permitted increased motorized activity in violation of the MWSA and the National Environmental Policy Act (NEPA).[395] The district court ruled in favor of Appellants and enjoined the implementation of the Plan.[396] USFS appealed, and the Ninth Circuit affirmed the district court's decision.[397] By November 2009, in response to the earlier ruling, USFS announced the interim order at issue in this case, which further limited motorized use in the Study Area. As a result, CBU brought suit claiming that the order violated the MWSA and APA because it restricts motorized vehicle use in areas that were open to use in 1977. Appellants then filed a motion to intervene as of right, and in the alternative, to intervene permissively under Rule 24 of the Federal Rules of Civil Procedure (FRCP).[398]

The two-part issue before the Ninth Circuit was whether the district court erroneously denied the Appellants' motion to intervene as of right, and

389 The Montana Wilderness Association, Greater Yellowstone Coalition, and the Wilderness Society.

390 The United States Forest Service and Mary Erickson in her official capacity as the Supervisor of the Gallatin National Forest.

391 Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243.

392 5 U.S.C. §§ 501–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

393 § 3(a), 91 Stat. at 1244 (1977).

394 *See* Mont. Wilderness Ass'n v. McAllister (Montana I), 658 F. Supp. 2d 1249, 1252 (D. Mont. 2009).

395 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

396 *McAllister*, 658 F. Supp. 2d at 1266.

397 Mont. Wilderness Ass'n v. McAllister (Montana II), 666 F.3d 549, 551 (9th Cir. 2011).

398 FED. R. CIV. P. 24(a)(2), (b).

in the alternative, whether the district court erroneously denied the Appellants' alternative motion to intervene permissively. The court noted that it had jurisdiction over the denial of a motion to intervene pursuant to 28 U.S.C. § 1291.[399] The Ninth Circuit reviewed the denial of intervention as of right de novo,[400] and the denial of permissive joinder for abuse of discretion.[401] However, the court observed that it need not reach the issue of permissive intervention if it determined that intervention as of right was improperly denied.[402]

Under FRCP 24(a)(2), an applicant seeking to intervene as of right must demonstrate that: 1) the intervention application was timely; 2) the applicant had a significant protectable interest in the subject of the action; 3) the disposition of the action, as a practical matter, may impair or impede the applicant's ability to protect his interest; and 4) the existing parties may not adequately represent the applicant's interest.[403] These requirements are broadly interpreted in favor of intervention,[404] and CBU even conceded that Appellants met the first three requirements.[405] CBU solely argued that Appellants were properly denied intervention because they failed to show that USFS may not adequately represent their interest.

The burden of showing inadequacy of representation is "minimal" and is satisfied if an applicant can demonstrate that representation of its interest may be inadequate.[406] In assessing inadequacy of representation, the court examines: 1) whether a present party will make all of the proposed intervenor's arguments; 2) whether the present party is capable and willing to make such arguments; and 3) whether the proposed intervenor would offer necessary elements to the proceeding that other parties would neglect.[407] There is a presumption of adequate representation if the applicant and an existing party share the "same ultimate objective."[408] However, this presumption can be rebutted by a "compelling showing" of inadequacy.[409]

Here, CBU argued that USFS shared the same ultimate objective as the Appellants—upholding the interim order—thus there is a presumption of adequacy. Conversely, Appellants argued that no such alignment existed because USFS only implemented the order to comply with a district court decision it is seeking to overturn on appeal. Therefore, because USFS had earlier opposed Appellants in their efforts to secure these restrictions, USFS

399 Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 814 (9th Cir. 2001) (asserting that the denial of a motion to intervene is a final appealable order).

400 *Id.* at 817.

401 League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1307–08 (9th Cir. 1997).

402 United States v. City of Los Angeles, 288 F.3d 391, 398, 402 (9th Cir. 2002).

403 Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006).

404 *Id.*

405 Even so, the Ninth Circuit analyzed the first three requirements and found that Appellants had met them.

406 Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003).

407 *Id.*

408 League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1305 (9th Cir. 1997) (internal quotations and citation omitted).

409 *Arakaki*, 324 F.3d at 1086.

may change or abandon its position if it succeeds in reversing the prior ruling. Furthermore, USFS asserted that MWSA could be complied with on much narrower grounds than Appellants would allow. Accordingly, the Ninth Circuit found that this demonstrated a fundamental difference of opinion between Appellants and USFS. Because intervention as of right only requires that the disposition of the action "may" practically impair a party's ability to protect its interest, Appellants persuasively rebutted any presumption of adequate representation here.

In conclusion, the court found that in Appellant's timely motion to intervene they demonstrated a significant protectable interest that may be impaired by Defendant's current action, and that USFS could not adequately represent their interest. As such, the court determined Appellants were entitled to intervene.

2. Montana Wilderness Association v. McAllister, 666 F.3d 549 (9th Cir. 2011).

Montana Wilderness Association and other environmental groups (collectively, MWA)[410] challenged the 2006 Gallatin National Forest Travel Management Plan (Management Plan) implemented by the United States Forest Service (USFS), asserting the plan violates the Montana Wilderness Study Act of 1977 (Study Act)[411] because it failed to preserve the wilderness character of the area by allowing excessive motorized use. Citizens for Balanced Use and other recreational groups (collectively Citizens)[412] also challenged the Management Plan, arguing the plan unlawfully limited motorized use. The United States District Court for the District of Montana combined these cases and granted MWA's motion for summary judgment. USFS appealed this decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the district court decision and remanded the plan to USFS.

In the 1964 Wilderness Act,[413] Congress established a national system of wilderness areas in order to preserve the "wilderness character" of the areas.[414] Subsequently in 1977, Congress passed the Study Act and identified nine study areas in Montana.[415] The Study Act required USFS to maintain these areas in their "presently existing wilderness character."[416] USFS must

410 MWA also included the Greater Yellowstone Coalition and The Wilderness Society, Inc. Mont. Wilderness Ass'n v. McAllister 666 F.3d 549, 549 (9th Cir. 2011).

411 Pub. L. No. 95-150, 91 Stat. 1243 (1977).

412 Citizens also included Kenneth Zahn, Big Sky Snowriders, and Gallatin Valley Snowmobile Association. *Montana II*, 666 F.3d at 549.

413 16 U.S.C. §§ 1131–1136 (2006 & Supp. II 2008), *amended by* Pub. L. No. 111-11, 123 Stat. 991 (2009).

414 *See id.* § 1131(a). Wilderness is defined as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." *Id.* § 1131(c).

415 § 2(a), 91 Stat. at 1243–44 (1977). Congress passed the Study Act in response to USFS's failure to include specific study areas in Montana despite its charge to select such wilderness areas. *Montana II*, 666 F.3d at 552.

416 § 3(a), 91 Stat. at 1244 (1977).

continue to maintain the 1977 wilderness character of these areas until Congress either designates the study areas as wilderness areas or removes their Study Act protection.

USFS historically managed the Gallatin National Forest in Montana under its 1987 forest plan. Since 1987, motorized and mechanized recreational use increased dramatically, especially in the Hyalite–Porcupine–Buffalo Horn Wilderness Study Area within Gallatin. In 2002, USFS began preparing a travel plan to balance recreational uses with management goals after recognizing the demand for recreational opportunities in Gallatin. USFS issued its record of decision (ROD) in 2006, which included a final environmental impact statement (FEIS) in accordance with the National Environmental Policy Act (NEPA).[417] In it, USFS limited the geographic boundaries for motorized and mechanized vehicles in order to comply with the Study Act. Nevertheless, USFS allowed for an increased volume of recreational use that it did not account for. Because it lacked statistically valid data regarding the volume of pre-1997 recreational use, USFS concluded the missing data was irrelevant to its finding.

In response to USFS's travel plan, MWA filed an action under the Administrative Procedure Act (APA).[418] In its claim, MWA argued the travel plan violated the Study Act and USFS failed to sufficiently examine and disclose the effect of the travel plan on the study area's wilderness character. Contemporaneously, Citizens challenged the plan because it unlawfully limited motorized use; however, on appeal, Citizens supported USFS's geographical restrictions on motorized use. The district court held that USFS's decision to ignore the increased volume of motorized use was arbitrary and capricious, and USFS failed to explain how its travel plan complied with the Study Act.[419] Additionally, the court held that USFS violated NEPA by failing to evaluate the impact of its incomplete recreational use record for the study area. Consequently, the court enjoined USFS from using the plan and remanded to the agency. USFS appealed the ruling of the district court remanding the case back to the USFS for proceedings consistent with the Montana Wilderness Study Act. The Ninth Circuit reviewed the district court's decision de novo and affirmed.

The Ninth Circuit first addressed USFS's interpretation of the Study Act, specifically focusing on USFS's requirement to maintain the 1977 wilderness character of the areas.[420] Under USFS's interpretation, it need only maintain the "physical, inherent characteristics" of the study areas that ensure future wilderness use.[421] In contrast, MWA argued that USFS must maintain the 1977 wilderness character for all who currently use the area. Specifically, MWA urged that the low volume of motorized use in 1977 must

417 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

418 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

419 *Montana I*, 658 F. Supp. 2d at 1256.

420 *See* Wilderness Act, 16 U.S.C. § 1133(b) (2006).

421 *Montana II*, 666 F.3d 549, 555 (9th Cir. 2011).

be maintained to ensure the area's potential for future wilderness designation.

Under the language of the 1964 Wilderness Act, the court emphasized that the Act defined wilderness to have "outstanding opportunities for solitude" in addition to physical characteristics.[422] The court discussed the solitude requirement, noting that solitude hinges on a "current user's perception of other users" rather than on physical parameters of the land.[423] The court found that USFS ignored a key ingredient to wilderness character by focusing solely on the physical characteristic of the area.[424] Additionally, the court acknowledged that Congress could not have intended to allow degradation of wilderness character without physical intrusion—results allowable by USFS's interpretation. For instance, it would allow unrestricted loud noise by helicopter flights because there would be no physical impact, a result contrary to Congress's purpose in passing the Study Act.

The court further noted that USFS's interpretation was inconsistent with its past actions. USFS provided in the Forest Service Manual that study areas should be maintained in the 1977 wilderness character, but provided advice for conflicting uses of the area. The court commented that user conflict was not at issue because it had no impact on the area's physical landscape. Even so, USFS did evaluate users' perceptions of a study area in *Russell Country Sportsmen v. USFS*.[425] Because current users must have opportunities for solitude comparable to those of 1977, USFS's determination otherwise in this case was inconsistent with the Study Act. Finally, the court found USFS's interpretation of the Study Act was not entitled to deference. While the court acknowledged USFS's interpretation of ambiguous statutes "warrant[s] respect,"[426] it found that USFS's interpretation digressed from the terms of the Wilderness Act,[427] the Study Act,[428] and its own practices.

The court next addressed USFS's incomplete analysis of the increased volume of motorized use, concluding that the travel plan was arbitrary and capricious. USFS is required to evaluate all of the impacts of the increased volume of use to determine whether its current restrictions are sufficient to maintain the wilderness character, and the court found it was unacceptable for USFS to ignore this vital requirement on the basis of imperfect data. However, unlike the district court, the Ninth Circuit did not modify the

422 16 U.S.C. § 1131(c) (2006).

423 *Montana II*, 666 F.3d at 556 (emphasis removed).

424 The court examined a variety of dictionary definitions for "solitude" and "opportunity" to reach its conclusion. *Id.*

425 668 F.3d 1037, 1047 (9th Cir. 2011).

426 Alaska Dep't of Envtl. Conservation v. U.S. Envtl. Prot. Agency, 540 U.S. 461, 488 (2004) (quoting Wash. State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003)) (internal quotation marks omitted).

427 16 U.S.C. § 1131(c)(2) (2006) (requiring that the area's wilderness character preserve "opportunities for solitude or a primitive and unconfined type of recreation").

428 Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, § 2(b), 91 Stat. 1243 (1977) (mandating that the area's wilderness character be preserved in accordance with the Wilderness Act).

recreational use limitations USFS imposed in its response to the increased volume of use.[429]

Finally, the Ninth Circuit examined the district court's ruling that USFS failed to comply with NEPA by not discussing the incomplete data regarding historic recreational use in its FEIS. Under NEPA, USFS must satisfy 40 C.F.R. § 1502.22 when there is an absence of data.[430] The court concluded that the historical use data was relevant to both Study Act analysis and NEPA analysis, and directed USFS to acknowledge this missing information and comply with section 1502.22 in assessing reasonably foreseeable impacts despite the gaps in data.

In conclusion, the Ninth Circuit affirmed the district court's determination that the Management Plan was inadequate, as it failed to account for the impact that increased volume in motorized and mechanized use would have on current users' recreational use of the study area.

3. Russell Country Sportsmen v. United States Forest Service, 668 F.3d 1037 (9th Cir. 2011).

The Russell Country Sportsmen and other Montana-based recreational groups (collectively Russell Country) filed suit to prevent the United States Forest Service (USFS) from implementing a travel management plan for parts of the Lewis and Clark National Forest. The suit claimed that: 1) USFS violated the Montana Wilderness Study Act (Study Act)[431] by approving a travel plan that eliminated roads open for designated motorized recreational use, and 2) USFS violated the National Environmental Policy Act (NEPA)[432] by not conducting a supplemental environmental impact statement (EIS) for changes to the original travel plan. The Montana Wilderness Association intervened on the side of USFS to defend the travel plan. The United States District Court for the District of Montana granted summary judgment for Russell Country.[433] USFS appealed. The United States Court of Appeals for the Ninth Circuit reversed, holding that USFS's travel plan conformed to the Study Act and NEPA.

In 2006, USFS proposed revisions to the travel management plan for 1.1 million acres of the Lewis and Clark National Forest, including the Middle

429 The district court found the only way to satisfy the "arbitrary and capricious standard of review [was] to substantially reduce" the area for vehicle use or reduce access for motorized and mechanized use. *Montana I*, 658 F. Supp. 2d 1249, 1256 (D. Mont. 2009).

430 40 C.F.R. § 1502.22(b) (2011) (providing that if relevant information cannot be obtained, the environmental impact statement must include "(1) [a] statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community").

431 Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243.

432 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

433 Russell Country Sportsmen v. U.S. Forest Serv., No. CV 08-64-GF-SEH, 2010 WL 889870 at *4 (D. Mont. Mar. 10, 2010).

Fork Judith Wilderness Study Area (WSA).[434] USFS's draft EIS included five summer and three winter alternatives for motorized recreation. The alternatives would have allowed motorized use on routes totaling between 1,287 and 2,262 miles and allowed vehicles to park, pass, or turn around within 300 feet of roads or trails.

The final travel management plan, adopted in 2007, designated 1,366 miles of roads and trails for motorized recreational use. USFS eliminated the 300-foot turnaround rule[435] and reduced the parking, passing, and turning around area to 70 feet to ensure safety and protect vegetation. The final plan reduced motorized recreational use in the WSA from 112 miles to 38 miles. Russell Country filed suit to invalidate the rule based on the Study Act and NEPA.

First, Russell Country argued that USFS should have preserved WSA's original designated motorized recreation route because the Study Act requires USFS to manage WSAs "so as to maintain their presently existing wilderness character."[436] Russell Country averred that nothing in the Study Act authorizes USFS to improve the wilderness character of the WSA. And, moreover, the Study Act and legislative history of the act specifically contemplated continued motorized use, which should, therefore, be kept at original levels.[437]

Second, Russell Country alleged that USFS violated NEPA by adopting restrictions on motorized recreation that fell outside the scope of the draft EIS. Specifically, the 1,366 miles available to motorized recreational use in the final plan fell outside of the range of 1,951 to 3,036 miles proposed in the draft EIS, and therefore warranted a supplemental EIS.[438] Additionally, Russell Country maintained that USFS violated NEPA by not conducting a supplemental EIS for other modifications to the draft EIS, such as adding trail closures, altering the snowmobile season, and modifying the turnaround rule.

Applying a de novo standard of review, the Ninth Circuit reversed the district court's grant of summary judgment for Russell Country.[439] First, the

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434 WSAs are federal lands designated by Congress as areas to be studied for possible inclusion in the National Wilderness Preservation System. Wilderness Act, 16 U.S.C. § 1131(a) (2006). WSAs must be managed to maintain their wilderness character, which USFS has determined requires emphasizing non-motorized recreation. Russell Country Sportsmen v. U.S. Forest Serv., 668 F.3d 1037, 1040 (9th Cir. 2011).

435 *See Russell Country Sportsmen*, 668 F.3d at 1040 (stating that the 300-foot turnaround rule provided access to dispersed campsites by motorized vehicle if campsites were within 300 feet of a road or trail).

436 *Id.* at 1041 (quoting Montana Wilderness Study Act of 1977 § 3(a), 91 Stat. at 1244).

437 *See* H.R. REP. No. 95-620, at 4 (1977) ("The use of off-road vehicles, while generally prohibited in designated wilderness areas, is entirely appropriate in [WSAs].").

438 *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006) (requiring an EIS for any proposed federal action "significantly affecting the quality of the human environment"); 40 C.F.R. § 1502.9(c)(1)(i) (2011) (requiring a supplemental EIS if "the agency makes substantial changes in the proposed action that are relevant to environmental concerns").

439 *Russell Country Sportsmen*, 668 F.3d at 1041 (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001)). Because neither the Study Act nor NEPA contain judicial review

court held that the Study Act allows USFS to enhance the wilderness character of WSAs, so USFS is not required to retain the original mileage of motorized routes. Second, the court decided that a supplemental EIS was not required under NEPA for USFS's decisions on route mileage, trail closures, snowmobile end dates, or the turnaround rule. The court thus concluded that the travel plan satisfied the Study Act and NEPA.

The court first ruled that USFS's travel plan did not violate the Study Act because the Act allows USFS to improve the wilderness character of study areas. In this case of first impression, the court looked to the statutory language and found the Study Act's requirement that USFS manage WSAs so as to "maintain their presently existing wilderness character" means that the agency must guard against deterioration, but does not prohibit improvements.[440] Citing several dictionaries,[441] the court ruled that "maintain" means to "keep in a state of repair, efficiency, or validation" or to "preserve from failure or decline."[442] Therefore, the Study Act requires USFS to prevent against decline, but does not prohibit activities that enhance the wilderness character.

The court found that the Study Act's purpose supported the plain meaning of the statutory language. Although the Study Act did not define wilderness character, the court determined that the Act borrowed the terms and definition from the Wilderness Act of 1964.[443] Accordingly, USFS can accomplish the Study Act's purpose by either preserving the study area against decline or improving the wilderness character. Furthermore, the court proclaimed, allowing existing uses of motorized recreation does "nothing to maintain the area's potential for wilderness designation."[444] Therefore, the court dismissed Russell Country's argument that the legislative history of the Study Act illustrates a congressional intent to continue motorized recreation. While Congress recognized the existence of recreational activity, there was no mandate to maintain such recreational use. Rather, because Congress contemplated USFS's ability to limit motorized use in the future,[445] the court held that USFS's travel plan adhered to the Study Act.

provisions, the Ninth Circuit applied the Administrative Procedure Act's standard for reviewing agency actions. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) (providing agency actions must be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

440 Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, § 3(a), 91 Stat. 1244.

441 RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1160 (2d ed. 1987); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1058 (5th ed. 2011); OXFORD ENGLISH DICTIONARY VOL. IX, at 223 (2d ed. 1989).

442 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1362 (2002).

443 Wilderness Act, 16 U.S.C. §§ 1131–36 (2006 & supp. II 2008) *amended by* Pub. L. No. 111-11). The Wilderness Act defines wilderness as an undeveloped piece of land that retains its "primeval character and influence," and which is "protected and managed so as to preserve its natural conditions." *Id.* § 1131(c).

444 *Russell Country Sportsmen*, 668 F.3d at 1043.

445 The court noted that the forest must be managed according to the multiple-use doctrine articulated in the National Forest Management Act of 1976. *See* 16 U.S.C. §§ 472a, 521b, 1600,

The Ninth Circuit also determined that the travel plan satisfied the requirements of NEPA—joining the First,[446] Eighth,[447] and Tenth Circuits[448] in adopting the recommended guidance from the Council for Environmental Quality (CEQ) for actions requiring a supplemental EIS.[449] A supplemental EIS is only required if the final action makes "substantial changes in the proposed action that are relevant to environmental concerns."[450] The CEQ guidance clarifies that supplementation is not required when there is a minor variation or the new variation is "qualitatively within the spectrum of alternatives that were discussed in the draft EIS."[451] The court used this standard to analyze each of the four alleged violations of NEPA.

First, the court determined that the overall motorized use mileage in the final travel management plan fell within the range contemplated by the draft EIS. The Ninth Circuit rejected the district court's mileage calculations in the draft EIS[452] because some roads and trails were open to multiple forms of recreation and should not be counted more than once. The court calculated that the draft EIS proposed mileage totals from 1,287 to 2,262 miles. USFS's decision of 1,366 miles fell within this range; therefore, no supplemental EIS was required.

The court also held that the additional trail closures included only in the final travel management plan did not violate NEPA. The additional trail closures constituted minor variations that fell within the qualitative spectrum of the draft EIS. Additionally, Russell Country's argument regarding the modification of the snowmobile season end date became moot after USFS reinstated the original proposed end date.

Finally, the modification of the turn-around rule did not require a supplemental EIS because the decrease in turnaround distance from 300 to 70 feet constituted a minor variation to the draft EIS. The court rejected USFS's argument that a decision to lessen environmental impacts never requires a supplemental EIS. Instead, the court ruled that the reduction was a minor variation because the turnaround rule was a secondary aspect of the travel plan. Furthermore, the court found there was little reason to believe the modified travel plan would impact or change the cost-benefit analysis already considered by USFS in the draft EIS.

1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

446 Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1292 (1st Cir. 1996).

447 *In re* Operation of the Mo. River Sys. Litig., 516 F.3d 688, 693 (8th Cir. 2008).

448 N. M. *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 705 n.25 (10th Cir. 2009).

449 *See* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981).

450 40 C.F.R. § 1502.9(c)(1)(i) (2011).

451 46 Fed. Reg. at 18,035.

452 The district court computed the total mileage by adding the total miles of each type of motorized recreation authorized per mile of trail (e.g., passenger vehicles, 4x4's, all-terrain vehicles, motorcycles). *See* Russell Country Sportsmen v. U.S. Forest Serv., 668 F.3d 1037, 1046 (9th Cir. 2011). The Ninth Circuit found that the district court double-counted the mileage totals, such as counting a route twice that is open for both motorcycle and ATV use, which resulted in an exaggerated total. *Id.*

The Ninth Circuit therefore held that USFS's travel plan for the Lewis and Clark National Forest conformed to the requirements of the Study Act and NEPA. The Study Act's requirements to "maintain" the WSA did not prohibit USFS from taking actions that enhanced the wilderness character of the area. Furthermore, the travel plan did not require a supplemental EIS because the variation in route mileage fell within the range of alternatives considered, because changes to trail closures were minor, and because the turnaround rule constituted a minor variation from the draft EIS.

E. National Forest Management Act

1. Sierra Forest Legacy v. Sherman, 646 F.3d 1161 (9th Cir. 2011)

Sierra Forest Legacy and other environmental protection groups[453] (collectively, Sierra Forest) brought suit claiming the 2004 Sierra Nevada Forest Plan Amendment (2004 Framework) and the Basin Project, approved under the 2004 Framework, were executed in violation of the National Environmental Policy Act (NEPA)[454] and National Forest Management Act (NFMA).[455] The State of California brought a separate but related NEPA action. Both Sierra Forest and California appealed unfavorable summary judgments and limited remedial orders in their respective suits. The United States District Court for the Eastern District of California found that the United States Forest Service (USFS) and related federal defendants[456] (collectively, Forest Service) violated NEPA and ordered Forest Service to create a supplemental environmental impact statement (SEIS). In the interim, the district court denied the requests of Sierra Forest and California to enjoin Forest Service from implementing the 2004 Framework.

Sierra Forest and California argued that Forest Service violated NEPA by failing to consider short-term impacts of the 2004 Framework and by failing to disclose and rebut expert opposition. Appellants also contended that the district court abused its discretion when considering the equitable factors governing permanent injunction. Sierra Forest separately argued that Forest Service violated NEPA when it approved the Basin Project without analysis of cumulative impacts to sensitive species. Sierra Forest and California also asserted that the 2004 Framework and Basin Project violate NFMA for failure to maintain adequate wildlife population levels and for failure to comply with requirements to monitor species. The United States Court of Appeals for the Ninth Circuit reviewed each issue de novo, including the district court's grant of summary judgment, the district court's

453 Plaintiff-Appellant groups include the Center for Biological Diversity, the Natural Resources Defense Council, the Sierra Club, and the Wilderness Society.

454 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

455 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

456 See Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1161–62 (9th Cir. 2011), for a complete listing of Defendants–Appellees and Defendants–Intervenors–Appellees.

grant of injunctive relief, and standing, ripeness, and mootness. The court reviewed agency decisions under the Administrative Procedure Act (APA).[457]

The question presented to the Ninth Circuit was whether the process of establishing management guidelines governing 11.5 million acres of federal land in the Sierra Nevada complied with NEPA's procedural requirements and NFMA's substantive restrictions. Regarding NEPA, a majority of the Ninth Circuit affirmed the district court's decision that the SEIS adequately addressed short-term impacts to forest wildlife and that Forest Service properly approved the Basin Project. However, the court determined Forest Service violated NEPA by neglecting to update the 2001 SEIS alternatives with new modeling techniques. The court vacated the district court's orders granting limited remedies and remanded for the district court to reconsider the equities of a "substantive" injunction without giving undue deference to government experts.

Turning to NFMA, a majority of the Ninth Circuit reversed the district court's decision on Sierra Forest's NFMA claim. Given the fragmented opinion, Judge Reinhardt's narrower holding controls.[458] Judge Reinhardt held that since Forest Service lacked authority to retroactively amend forest plans, the 2007 Amendment to the 2004 Framework did not change the population monitoring requirements for the Basin Project. Judge Noonan would have reversed for the reasons stated in his concurrence in *Sierra Forest Legacy v. Rey*.[459] Judge Fisher, concurring in the NEPA claim but dissenting in the NFMA claim, would have affirmed the district court and held that Forest Service may retroactively amend the 2004 Framework, and that the Basin Project claim was moot due to its compliance with the amended framework. Judge Fisher also found that Sierra Forest's challenge to the Basin Project was ripe, and that the adaptive management provisions in the Basin Project comply with NFMA. In sum, the Ninth Circuit ultimately remanded to the district court to determine whether Forest Service complied with the 2004 Framework's population monitoring requirements, as they were at the time the Basin Project was approved. Further, the court noted Sierra Forest's facial challenge to the 2004 Framework would be ripe for judicial consideration after the district court's determination.[460]

In 2001, Forest Service completed the Sierra Nevada Forest Plan Amendment and an accompanying rule of decision (collectively, 2001 Framework), which significantly altered guidelines for management of ten

457 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006) (setting aside agency decisions only when arbitrary or capricious).

458 Although Judge Reinhardt's narrow holding controls, given the fragmented opinion, the decision does not serve as binding precedent in regards to the NFMA claim. When the court is fragmented, the narrowest opinion is taken as the opinion of the court. *See* Hayes v. Ayers, 632 F.3d 500, 519–20 (9th Cir. 2011).

459 577 F.3d 1015, 1024–26 (9th Cir. 2009) (Noonan, J., concurring) (stating that Sierra Forest was entitled to assert an interest in environmental concerns with individual members, and that USFS is financially biased when it awards contracts for the sale of timber under the project).

460 The United States Supreme Court has determined that plaintiffs can satisfy ripeness in NEPA claims considering such claims are procedural in nature, rather than substantive. *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978).

national forests and one management unit by restricting logging based in part on the presence of sensitive species. In 2003, Forest Service released a draft SEIS proposing changes to the 2001 Framework and sought internal review from its staff and interagency review from the United States Environmental Protection Agency (EPA) and Fish and Wildlife Service (FWS). Forest Service received over 50,000 public comments, as well as critiques of the plan from several experts for its lack of emphasis on species preservation.

In 2004, Forest Service released the 2004 Sierra Nevada Forest Plan Amendment and final SEIS, which liberalizes management restrictions by emphasizing mechanical thinning over controlled burns and by increasing the maximum size of trees subject to logging. Members of the public submitted over 6,000 appeals. The USFS Chief denied the appeals, but instructed the regional forester to provide information concerning adaptive monitoring.[461] Also in 2004, Forest Service released an environmental assessment (EA) for the Basin Project, designed to implement the 2004 Framework, which would harvest timber in a 40,000-acre area of the Plumas National Forest. The EA examined direct and cumulative effects on sensitive species, and concluded that the Basin Project's anticipated effects did not constitute a significant environmental effect.[462]

NEPA requires federal agencies to engage in a comprehensive review of the environmental impacts of agency actions or proposed legislation, and to offer appropriate alternatives.[463] Though NEPA does not impose substantive requirements, it calls for a process[464] to adequately identify and evaluate the adverse environmental effects of proposed actions.[465]

Forest Service first asserted several procedural bar defenses. First, Forest Service argued that California lacks standing to challenge the 2004 Framework under NEPA; several intervenors similarly asserted that Sierra Forest lacks standing. The Ninth Circuit reviewed the constitutional requirements to demonstrate standing,[466] emphasizing that a plaintiff must assert a concrete interest.[467] The court then found that California asserted a well-founded desire to protect its territory and proprietary interests from

461 Adaptive monitoring is defined as a system under which Forest Service continuously assesses the effects of management practices on sensitive species and adjusts as needed.

462 Effects include ecological, aesthetic, historic, cultural, economic, social, or health effects. 40 C.F.R. § 1508.8 (2011). Cumulative effects result from past or present actions with reasonably foreseeable impacts. *Id.* § 1508.7. Direct effects result from actions occurring at the same time and place. *Id.* § 1508.8.

463 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), (E) (2006). Agencies may also be required to include a "full and fair discussion of significant environmental impacts" and information regarding alternatives to minimize impacts. 40 C.F.R. § 1502.1 (1979).

464 Lands Council v. McNair, 537 F.3d 981, 1000 (9th Cir. 2008) (quoting Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996)), *abrogated in part by* Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008), *as recognized in* Am. Trucking Ass'ns v. City of L.A., 559 F.3d 1046, 1052 (9th Cir. 2009).

465 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

466 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000).

467 Summers v. Earth Island Inst., 555 U.S. 488, 496–97 (2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)).

direct and indirect harm resulting from action on federal land, and that these concrete and particularized interests are protected by the application of NEPA to the 2004 Framework. In its analysis, the court distinguished a similar case, *Summers v. Earth Island Institute*, where the plaintiff environmental organizations' "vague desire" to visit locations that might be harmed by the challenged regulations was insufficient to establish a particularized interest.[468] Here, California maintained concrete interests spanning its entire territory, and its potential injury was neither vague nor speculative.

The Ninth Circuit further found that California asserted actual harm to its procedural interest in federal management decisions made under NEPA, even though it offered no evidence that a specific logging project under the 2004 Framework had been approved. Citing *Ohio Forestry Ass'n v. Sierra Club*,[469] the court reasoned that after an LRMP is adopted, a procedural injury exists if the injury is traceable to some action that will affect a plaintiff's interests.[470] Finally, the court explained that even if a specific project were required for standing, it would take judicial notice of the Basin EA in the record, which approves intensive management within California. Accordingly, the court held that California had standing to assert a facial NEPA claim against the 2004 Framework.

The Ninth Circuit then turned to Sierra Forest and found that affidavits supported Sierra Forest's assertion of imminent harm to its members' interests in areas affected by the 2004 Framework. The court also held that Sierra Forest, like California above, had standing to bring a facial NEPA challenge to the 2004 Framework, independent from specific implementing projects, in light of actual harm to Sierra Forest's procedural interests.

The court next addressed Sierra Forest and California's first NEPA claim that Forest Service violated NEPA by focusing on uncertain long-term impacts in the 2004 Framework SEIS at the expense of known short-term harm. The court acknowledged NEPA's policy goal of taking a "hard look" at environmental consequences[471] by considering possible direct and indirect impacts.[472] The court concluded that Forest Service may appropriately find that long-term benefits outweigh short-term costs, so long as agency experts analyzed the immediate harm of a proposed action.[473] The court also noted that proper agency analysis may rely on long-term modeling, despite the

468 555 U.S. at 496.

469 523 U.S. 726 (1998).

470 *Id.* at 737 (acknowledging that a person may have standing when "the [NEPA violation] takes place," even if the agency has not yet made site-specific implementation decisions).

471 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

472 N. Alaska Envtl. Ctr., v. Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006); *see also* National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)(iv) (2006) (requiring analysis of "the relationship between local short-term uses of man's environment and the maintenance and enhancement of longterm productivity"); Or. Natural Res. Council Fund v. Brong, 492 F.3d 1120, 1134 (9th Cir. 2007) ("[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." (citations omitted)).

473 *See* Native Ecosystems Council v. USFS, 428 F.3d 1233, 1251 (9th Cir. 2005).

inherent uncertainty of projections.[474] The Ninth Circuit also found that the 2004 final SEIS adequately addressed short-term effects to sensitive species by including a substantial discussion of the potential harms and size projections of old growth forests. The court concluded it is within Forest Service's discretion to determine that long-term effects, though uncertain, are desirable even in light of short-term harm. Accordingly, the court held that Forest Service complied with NEPA by disclosing and adequately addressing short-term effects of the 2004 Framework.

In addressing Sierra Forest and California's second NEPA claim, the Ninth Circuit explained that while the Forest Service must discuss and respond to opposing views not adequately discussed in the draft EIS,[475] the mere presence of expert disagreement does not violate NEPA.[476] Further, the court found that so long as the SEIS addresses the substance of public comments, NEPA does not require an agency to prioritize comments of scientific experts over those of other public commenters or to disclose expert identities in response to public critiques.

The Ninth Circuit next turned to Sierra Forest's separate NEPA claim that the Basin EA failed to assess the Project's cumulative impact. The court concluded Forest Service complied with NEPA by providing a detailed cumulative analysis of several aspects of the Basin Project in its Basin EA, and by providing extensive discussions of cumulative impact in the 2004 Framework SEIS.[477]

Finally, the Ninth Circuit turned to the district court's grant of injunctive relief on the NEPA claim, and reviewed the four requirements a plaintiff must meet to be awarded a permanent injunction.[478] The court rejected as plainly erroneous the district court's conclusion that it lacked jurisdiction over the substantive claims concerning the 2004 Framework. It found that the district court was not limited to providing procedural relief[479] because Sierra Forest and California had standing to assert a facial NEPA challenge to the 2004 Framework, and their claim was ripe. The court,

474 *See* Nev. Land Action Ass'n v. USFS, 8 F.3d 713, 718 (9th Cir. 1993).

475 *Methow Valley Citizens Council*, 490 U.S. at 350 n.13 (quoting 40 C.F.R. § 1502.9 (1987)); *see also* Lands Council v. McNair, 537 F.3d 981, 1001 (9th Cir. 2008) ("[T]he Forest Service must acknowledge and respond to comments by outside parties that raise significant scientific uncertainties and reasonably support that such uncertainties exist."); 40 C.F.R. § 1503.4(a) (2012) ("An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond . . . in the final statement.").

476 *Lands Council*, 537 F.3d at 1001.

477 League of Wilderness Defenders–Blue Mtns. Biodiversity Project v. USFS, 549 F.3d 1211, 1216 (9th Cir. 2008) (describing the cumulative impacts analysis as encompassing any and all "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" (quoting 40 C.F.R. § 1508.7 (2008))).

478 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (outlining the plaintiff's burden of showing: 1) an irreparable injury, 2) that legal remedies are inadequate compensation for that injury, 3) that an equitable remedy is warranted based on a balance of hardships between the parties, and 4) that a permanent injunction would not be a disservice to the public interest); *see also* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010).

479 Sierra Forest Legacy v. Rey, 670 F. Supp. 2d 1106, 1110 (E.D. Cal. 2009).

referencing authority under the APA[480] and case law,[481] acknowledged that it may set aside agency action pending NEPA compliance. The court subsequently found that the district court abused its discretion in concluding that it lacked jurisdiction to enjoin the Forest Service from further action under the 2004 Framework.

The Ninth Circuit then turned to Sierra Forest's challenge to the district court's traditional equitable analysis as an alternative ground for its limited remedial order. The district court kept the 2004 Framework in place and ordered Forest Service to create another EIS consistent with the factors the Ninth Circuit identified in its decision on the preliminary injunction portion of the case.[482] The Ninth Circuit ultimately found that the district court erred by relying on Forest Service experts in its equitable analysis because federal experts are not entitled to deference outside of administrative action.[483] The court reasoned that while deference is appropriate when the government has unique expertise, "[e]cology is not a field within the unique expertise of the federal government."[484] The court also found that deference to agency experts is particularly inappropriate when their conclusions rest on a foundation tainted by procedural error.

Accordingly, the Ninth Circuit held that the district court abused its discretion by deferring to agency views concerning the equitable prerequisites for an injunction. The court thus vacated the district court's narrow permanent injunction, and remanded for an analysis of the requirements of a permanent injunction with instructions not to defer to Forest Service experts simply because of their relationship with the agency. The court then ordered that its interim injunction be kept in place until the district court addresses these cases on remand and crafts its own injunctive order.

To summarize, the Ninth Circuit held: 1) that the district court properly granted summary judgment against Sierra Forest and California on their NEPA claims, and 2) that Forest Service did not violate NEPA when promulgating the 2004 Framework or approving the Basin Project. The court vacated the district court's permanent injunction and remanded for analysis without unwarranted deference to Forest Service experts.

Moving on to the NFMA claim, the Ninth Circuit concluded, per Judge Reinhardt, that the 2007 Amendment does not retroactively eliminate the 2004 Framework's population monitoring requirement. The Ninth Circuit remanded for the district court to determine whether Forest Service

480 Administrative Procedure Act, 5 U.S.C. § 706(2)(D) (2006).

481 *See, e.g.*, Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562–63 (9th Cir. 2006) (enjoining timber sales premised on a policy change that violated NEPA).

482 *Rey*, 670 F. Supp. 2d at 1113–14.

483 *See* Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) ("This is not the usual situation in which the court reviews an administrative decision and, in doing so, gives deference to agency expertise."), *aff'd in relevant part by* 952 F.2d 297 (9th Cir. 1991).

484 Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1185–86 (9th Cir. 2011); *see* Lands Council v. McNair 537 F.3d 981, 1004–05 (9th Cir. 2008) (applying a balance of harms analysis without deference to agency views); *see also* Mass. v. EPA, 549 U.S. 497, 520 (2007) (noting that "special solicitude" is given to states concerning interests in health and welfare).

complied with the 2004 Framework's population monitoring requirements, as they were at the time the Basin Project was approved. Additionally, the Ninth Circuit found that because the district court did not determine whether the Basin Project complied with the 2004 Framework (as it existed at the time of the Basin Project's approval) Sierra Forest's challenge to the 2004 Framework was not ripe for judicial consideration.

Sierra Forest first argued that the Basin Project violates the NFMA because it was approved in violation of the population monitoring requirements set forth in Appendix E of the 2004 Framework. The court noted that the NFMA requires a forest plan to be consistent with the governing forest management plan[485] and that the 2004 Framework was the governing forest management plan when the Basin Project was approved. Forest Service argued that the 2007 Amendment retroactively eliminated the obligation to comply with the monitoring requirements in Appendix E of the 2004 Framework, thereby rendering Sierra Forest's claim moot.

The Ninth Circuit found that the 2007 Amendment could not apply retroactively without statutory authority in the NFMA under its decision in *Friends of Southeast's Future v. Morrison*,[486] even though *Morrison* did not explicitly address the NFMA in its entirety. The Ninth Circuit discussed the impropriety of overruling previous panel decisions,[487] especially where the relevant text of the NFMA has not changed subsequent to *Morrison*. The court also noted that the NFMA does not provide an express statutory grant that allows for retroactive amendments and that a clear statement is required in order to show such Congressional intent.[488] After extensive statutory interpretation, the Ninth Circuit concluded that the 2007 Amendment does not retroactively free Forest Service of its obligation to ensure that the Basin Project complies with the 2004 Framework's population monitoring requirements as they stood at the time the Basin Project was approved.

Forest Service alternatively argued that the 2007 Amendment rendered Sierra Forest's claim moot by eliminating any effective relief.[489] The Ninth Circuit acknowledged that in order to demonstrate mootness, a defendant must show that *no* effective relief is available.[490] However, Forest Service's repeal of its approval for the Basin Project and implementation of a new approval process demonstrated that effective relief was available. Accordingly, the Ninth Circuit remanded to the district court to determine whether the Basin Project complies with the 2004 Framework, as it existed prior to the 2007 Amendment.

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485 *Lands Council*, 537 F.3d at 989; *see also* National Forest Management Act of 1976, 16 U.S.C. § 1604(i) (2006).

486 153 F.3d 1059, 1070 (9th Cir. 1998) (holding that NFMA does not provide USFS with retroactive amending authority).

487 United States v. Contreras, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc).

488 *See, e.g.*, Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 316–17 (2001); Landgraf v. USI Film Prods., 511 U.S. 244, 272–73 (1994).

489 *See* Nw. Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988).

490 *Id.* at 1244–45 (citing Garcia v. Lawn, 805 F.2d 1400, 1403 (9th Cir. 1986)).

The Ninth Circuit then turned to Sierra Forest's second NFMA claim that the 2004 Framework violates the NFMA because it will not maintain species viability due to the vagueness of its adaptive management strategy. The court determined this claim was unripe for adjudication because the district court must first determine whether the Basin Project complied with the 2004 Framework. The court found that such a claim is not ripe until the challenged plan plays a causal role with respect to the imminent harm from logging.[491] The court also observed that there was no showing of a causal relationship between any alleged deficiencies in the Basin Project and any alleged defect in the Framework itself. The court thus remanded to the district court to determine whether Forest Service complied with the 2004 Framework's population monitoring requirements when it approved the Basin Project.

In summary, the district court erred in granting summary judgment to the Forest Service on Sierra Forest's first NFMA claim because it applied the 2007 Amendment retroactively. Sierra Forest's second NFMA claim, a facial challenge to the 2004 Framework, is not ripe for review until after the district court decides the first claim under the 2004 Framework and not the 2007 Amendment. Accordingly, the district court's decision on those issues is vacated and the case is remanded for further proceedings in light of the opinions on this appeal.

Judge Fisher dissented from Judge Reinhardt's holding on both NFMA claims and would have affirmed the district court. Judge Fisher found that the Forest Service may retroactively amend the 2004 Framework since the governing 2007 Amendment is expressly retroactive. He also found that the Basin Project claim was moot because it complied with the amended 2004 Framework and was unripe outside of a concrete project or application setting. Judge Fisher then found that Sierra Forest's challenge was ripe regarding the Basin Project and that the adaptive management provisions of the 2004 Framework comply with the NFMA because the agency's technical experience requires deference to agency decisions. Judge Noonan concurred in the result reached in Judge Reinhardt's opinion as to the NFMA claims, and dissented from Judge Fisher's opinion with respect to the NEPA claims for the reasons stated in his concurrence in *Sierra Forest Legacy v. Rey*.[492]

491 Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 734 (1998).

492 577 F.3d 1015, 1024–26 (9th Cir. 2009) (Noonan, J., concurring).

F. Wild Free-Roaming Horses and Burros Act

1. In Defense of Animals v. United States Department of the Interior, 648 F.3d 1012 (9th Cir. 2011).

Plaintiffs (collectively, In Defense of Animals)[493] petitioned for an interlocutory appeal of the United States District Court for the Eastern District of California's denial of their motion for a temporary restraining order (TRO) and/or preliminary injunction (Motion)[494] to prevent the defendants (collectively, Government)[495] from rounding up wild horses along the California-Nevada border on August 9, 2010. The United States Court of Appeals for the Ninth Circuit denied the interlocutory appeal as moot because the roundup had already taken place.

In Defense of Animals argued the large-scale removal of the horses violated the Wild Free-Roaming Horses and Burros Act[496] and the National Environmental Policy Act (NEPA),[497] and filed the Motion to prevent BLM's scheduled roundup of the horse and burro populations.[498] Without discussing the merits of In Defense of Animals' argument, the court concluded that the issue was moot because the offending action had already taken place; said the court: the judiciary "cannot order [the completed roundup's] effects undone."[499] In other words, because the action that In Defense of Animals sought to preliminarily enjoin had already occurred, the "parties no longer [had] a legally cognizable interest in the determination of whether the preliminary injunction was properly denied."[500] However, the court noted, "the underlying dispute . . . remains alive."[501]

493 Plaintiffs included the non-profit organizations In Defense of Animals and the Dreamcatcher Wild Horse and Burro Sanctuary, as well as individuals Barbara Clarke, Chad Hanson, and Linda Hay.

494 The district court also denied an emergency motion for injunctive relief, but this appeal only considered the preliminary injunction.

495 Defendants included the United States Department of the Interior, the Bureau of Land Management (BLM), Secretary of the Interior Ken Salazar, BLM Director Robert Abbey, and BLM Field Manager Ken Collum.

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

497 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006) (noting that an environmental impact statement may be required prior to any action being implemented).

498 The proposed roundup would employ roping from horseback and a helicopter drive method, where low-flying helicopters steer the animals into capture sites. The gather would proceed at a slow pace, minimize risks associated with extreme temperature conditions, and provide the horses with electrolytes to combat dehydration. Once captured, the horses would be transported to temporary holding facilities and segregated: younger animals to be removed as excess; sick or disabled horses to be euthanized; and horses selected for release to be classified according to traits like sex and body condition class, color, size, and disposition. Excess animals would be transferred to spacious, privately owned, BLM-managed holding facilities in the Midwest to await adoption. In Def. of Animals v. U.S. Dep't of the Interior, 737 F. Supp. 2d 1125, 1131 (E.D. Cal. 2010).

499 Am. Horse Prot. Ass'n v. Watt, 679 F.2d 150, 151 (9th Cir. 1982).

500 Animal Legal Def. Fund v. Shalala, 53 F.3d 363, 366 (D.C. Cir. 1995).

501 *Id.*

In summary, the court narrowly held the Motion moot, but acknowledged that the merits of In Defense of Animals' argument—that the roundup violates the Wild Free-Roaming Horses and Burros Act and that the agency failed to take a "hard look" under NEPA—was still pending before the district court.[502]

In a dissent, Judge Rawlinson argued that the claim for relief was not moot for two reasons. First, because the court could still provide effective relief by returning the horses to their native habitat[503]—the horses were currently in holding areas and could be returned easily. Second, Judge Rawlinson argued, "in deciding a mootness issue, the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief."[504]

III. MISCELLANEOUS

A. *Federal Tort Claims*

1. Adams v. United States, 658 F.3d 928 (9th Cir. 2011).

One hundred and thirty-four farmers (the Farmers) filed an administrative Federal Tort Claims Act (FTCA)[505] claim against Defendant-Appellant Bureau of Land Management (BLM), an agency of the United States Department of the Interior (DOI). DOI denied the Farmers' FTCA claim. The Farmers then filed a lawsuit in the United States District Court for the District of Idaho against both BLM and E.I. Du Pont De Nemours & Co. (DuPont), a chemical manufacturer. The district court adopted a bellwether trial plan[506] with four Bellwether Plaintiffs and subsequently ruled in favor of the Farmers. BLM and DuPont appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit dismissed the Farmers' claims against BLM for lack of federal subject matter jurisdiction.

BLM manages rangelands in Idaho that are susceptible to wildfire damage. One strategy BLM adopted to combat these wildfires was to eliminate cheatgrass (*Bromus tectorum*), a highly combustible, non-native

502 *In Def. of Animals*, 737 F. Supp. 2d at 1129.

503 *See* Nw. Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244–45 (9th Cir. 1988) ("[W]here the violation complained of may have caused continuing harm and where the court can still act to remedy such harm by limiting its future adverse effects, the parties clearly retain a legally cognizable interest.").

504 *Id.* (internal quotation marks omitted).

505 28 U.S.C. §§ 1291, 1364, 1402, 2401, 2402, 2411, 2671–2680 (2006).

506 A bellwether trial plan is one in which a random sample of cases from a large number of similar claims is selected to be a representative sample for efficient and uniform adjudication. The random sample of cases is submitted to a judge or jury for verdicts. The resulting verdicts are used as a basis for resolving the remaining cases. Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–78 (2008).

plant. In 1999 and 2000, BLM applied "Oust," an herbicide manufactured by DuPont, to approximately 70,000 acres of public land in Idaho. Wind carried Oust-contaminated soil from BLM land to the Farmers' land, where it damaged their crops. The Farmers subsequently filed administrative claims with DOI under the FTCA.[507] DOI denied the Farmers' claims and prepared notice of administrative denial letters to send to the Farmers by certified mail, pursuant to section 2401(b) of FTCA. BLM prepared 132 of the letters in bulk using United States Postal Service (USPS) Forms 3800 and 3877, and prepared the remaining two letters individually using only USPS Form 3800. On August 5, 2002, USPS workers picked up the letters from the BLM mailroom and delivered them directly to the Farmers as certified mail, albeit lacking a postmark.

On February 6, 2003, the Farmers filed suit against BLM and DuPont in district court. BLM moved to dismiss the Farmers' claims for lack of subject matter jurisdiction. BLM noted that tort claimants are required to bring their action within six months of the agency's mailing a notice of final denial.[508] Because the Farmers filed their lawsuit on February 6, 2003—six months and one day after BLM mailed its notices on August 5, 2003—BLM argued the Farmers' claims were barred. The district court denied BLM's motion, reasoning that because BLM's notice of denial letters lacked a postmark establishing their mailing date, BLM could not gain the benefit of the six-month statute of limitations.

The district court's bellwether jury found BLM liable for trespass, negligence, and violation of the Idaho nuisance statute[509] in selecting Oust and the application sites, and also found that BLM proximately caused damage to the crops of all four Bellwether Plaintiffs. The district court adopted the bellwether jury's recommendation, allocating 40% fault to BLM and 60% to DuPont. BLM and DuPont appealed to the Ninth Circuit, which remanded the case back to the district court to resolve factual issues regarding whether BLM mailed the notice of administrative denial letters by certified mail. On remand, the district court held that BLM failed to send the letters by certified mail and that USPS Form 3877 requires individuals to mail certified letters from either a post office or via rural carrier—not from the BLM mail room.

The issue then presented to the Ninth Circuit was whether the federal district court had subject matter jurisdiction over the Farmers' claim, an issue which the court reviews de novo.[510] BLM argued that the district court lacked subject matter jurisdiction because: 1) the Farmers filed their lawsuit after the six-month statute of limitations expired, and 2) the Farmers' claims

507 *See* 28 U.S.C. § 2672 (2006) (granting power to federal agency heads to consider claims for money damages against the United States for injury, loss of property, or personal injury caused by negligent and wrongful acts of agency employees acting in the scope of their employment).

508 *Id.* § 2401(b) (2006).

509 IDAHO CODE ANN. § 52-111 (2009).

510 Atwood v. Fort Peck Tribal Ct. Assiniboine, 513 F.3d 943, 946 (9th Cir. 2008).

were barred by the discretionary function exception to the FTCA. [511] The Ninth Circuit agreed with BLM that the Farmers' claims were barred by the six-month statute of limitations applicable to FTCA claims.[512] Accordingly, the court declined to consider BLM's discretionary function exception argument.

The court first noted that there is a six-month statute of limitations on FTCA claims, commencing from the date the notice of denial is mailed by certified or registered mail.[513] Ninth Circuit precedent interpreting section 2401(b) imposes strict requirements on both FTCA claimants and the federal government—because the statute of limitations is subject to neither equitable tolling nor estoppel, FTCA claimants must strictly adhere to the six-month timeframe for filing a claim.[514] Similarly, the federal government must strictly adhere to the FTCA's certified or registered mail requirement in order to trigger the statute of limitations, even if the claimant has actual notice of the denial.[515]

The court recognized that the Farmers' FTCA claims would be barred by the six-month statute of limitations if BLM sent the notices of denial by certified mail on August 5, 2002. The court noted that whether BLM mailed the denial letters by certified mail was a mixed question of law and fact. Accordingly, the court reviewed the district court's factual findings for clear error, and reviewed the district court's legal conclusion—that BLM did not send the letters by certified mail—de novo.

The court looked to USPS regulations to determine whether certified mail must bear a postmark. USPS regulations incorporate by reference the "Mailing Standards of the United States Postal Service, Domestic Mail Manual" (DMM),[516] which the court noted does not require postmarks on all certified mail sent with Form 3800. Rather, the DMM specifically permits individuals to mail a certified letter without a postmark, so long as the mail bears a barcoded "Certified Mail sticker" from Form 3800.[517] The sender handwrites the mailing date on the receipt portion of Form 3800, which he then retains for his own records.[518] The court further noted that certified mail

511 28 U.S.C. § 2680(a) (2006).

512 *Id.* § 2401(b).

513 *Id.*

514 Marley v. United States, 567 F.3d 1030, 1038 (9th Cir. 2009).

515 *See* Raddatz v. United States, 750 F.2d 791, 797 (9th Cir. 1984) (mentioning that failure to send by certified mail "would raise serious doubts as to the letter's effectiveness"); 28 U.S.C. § 2401(b) (2006) ("A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented").

516 39 C.F.R. § 111.1 (2011).

517 For an updated version of the DMM, which is updated at least once per year, see U.S. POSTAL SERV., MAILING STANDARDS OF THE UNITED STATES POSTAL SERVICE, DOMESTIC MAIL MANUAL 734–35 (2012), http://pe.usps.com/cpim/ftp/manuals/dmm300/full/mailingStandards.pdf. Prior versions of the DMM from 2005 onward are available at: http://pe.usps.com/archive.asp (last visited July 11, 2012).

518 *Id.* at 735.

bearing the Form 3800 certified mail sticker may be sent from "any . . . receptacle for First-Class Mail,"[519] including BLM's mail room.

The Farmers noted that the vast majority of the letters were sent using not only USPS Form 3800, but also Form 3877. They argued that Form 3877, unlike Form 3800, requires a sender to mail the letter from a post office or rural carrier. Accordingly, because those letters were sent from BLM's mailroom, they were not sent by the prescribed method qualifying as certified mail. The Ninth Circuit dismissed this argument, noting that although the DMM permits senders to use Form 3877 "in lieu of the receipt portion of Form 3800[,]"[520] senders are still required to apply Form 3800's barcoded sticker to certified mail. Regardless of whether the sender uses Form 3800 or 3877 for his own receipt, the mail is functionally identical when USPS handles it. Thus, the court determined that just as a postmark is optional on a Form 3800 receipt, it is optional on a Form 3877 receipt.

The court concluded by noting that because BLM applied the Form 3800 barcode to its notice of denial letters and paid proper postage, all 134 letters legally qualified as certified mail. Accordingly, the six-month statute of limitations commenced on August 5, 2002, and concluded one day before the Farmers filed their lawsuit—thus extinguishing federal subject matter jurisdiction over their claim.

2. Myers ex rel. L.M. v. United States, 652 F.3d 1021 (9th Cir. 2011).

Myers, a child suing ad litem through her guardian, appealed the ruling of the United States District Court for the Southern District of California that it did not have subject matter jurisdiction over her case under the Federal Tort Claims Act (FTCA)[521] due to the "discretionary function exception."[522] Myers also appealed the district court's ruling that the United States Navy acted reasonably and did not breach its duties in conducting a remediation of the United States Marine Corps Base at Camp Pendleton. Myers argued that the discretionary function exception was inapplicable to this case because the Navy was required to undertake mandatory safety measures during the project. The United States Court of Appeals for the Ninth Circuit reversed the district court's rulings that the discretionary function exception applied and that the Navy acted reasonably in conducting the project.

In 1989, Camp Pendleton was placed on the United States Environmental Protection Agency (EPA) National Priorities List (NPL) of contaminated sites.[523] Thereafter, the Navy entered into a cleanup plan—

519 *Id.* at 733.

520 *Id.* at 735.

521 Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 2401–2402, 2411, 2671–2680 (2006) (waiving the government's sovereign immunity for tort claims arising out of the negligent conduct of government employees acting within the scope of their employment).

522 *Id.* § 2680(a) (providing agencies with immunity from suits for claims based upon an agency's exercise of authorized discretion).

523 The National Priorities List identifies facilities or hazardous substances most in need of remedial action and provides information relating to their cleanup. Only those sites on the NPL are eligible for federal funding to assist in remediations. *See* Mark Latham, *Environmental*

known as a federal facility agreement (FFA)[524]—for Camp Pendleton, under which the Navy was responsible for the cleanup project and for designating a Quality Assurance Officer (QAO) to ensure that all work was performed in accordance with approved plans. Additionally, the Naval Facilities Engineering Command (Naval FEC) implemented a safety and health program manual (Program Manual),[525] which specified the required safety procedures for remediation projects.[526]

Pursuant to the FFA, Camp Pendleton was divided into several "Operable Units." Operable Unit 3 (OU-3) contained sites 1A and 2A, which were contaminated with thallium.[527] The Navy's remediation plan for Camp Pendleton involved the excavation of the contaminated soil from the OU-3 sites, transportation across the base by truck, and dumping of those soils into the Box Canyon Landfill. The Box Canyon Landfill is adjacent to the Family Housing area of Camp Pendleton and an elementary school. The Navy contracted with IT Corporation and OHM Remediation Services (IT/OHM) to carry out the project and prepared a health and safety plan (HASP) to guide the process. Pursuant to the HASP, IT/OHM was responsible for monitoring airborne contaminants and modifying or stopping its operations if conditions presented a risk to health or safety, while the Navy was to oversee the work. Work progressed through the fall of 1999 when 240,000 cubic yards of OU-3's thallium contaminated soil was dumped into Box Canyon Landfill. Although the dust-monitoring system registered more than 200 instances when excessive dust should have required work stoppage, work was never actually stopped.[528] Nor did the Navy's QAO look at the air monitoring data collected by IT/OHM to check the contractor's compliance with the HASP.[529]

Myers and her family lived in the housing area of Camp Pendleton adjacent to the Box Canyon Landfill. Myers's yard was only fifty feet from the landfill, and the elementary school was a mere 200 feet from the landfill. Soon after the thallium-contaminated soil was dumped into the landfill,

Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks, 39 ENVTL. L. 647, 688 (2009).

524 U.S. DEP'T OF DEF., U.S. DEP'T OF THE NAVY & STATE OF CALIFORNIA, CAMP PENDLETON MARINE CORPS BASE FEDERAL FACILITY AGREEMENT (1990), *available at* http://www.marines.mil/unit/basecamppendleton/Pages/BaseStaffandAgencies/Environmental/IR/PDFs/CPEN_FFA.pdf

525 NAVAL FACILITIES ENG'G COMMAND, U.S. NAVY, NAVFACINST 5100.11J 1, SAFETY AND HEALTH PROGRAM MANUAL (2000) [hereinafter PROGRAM MANUAL], *available at* https://portal.navfac.navy.mil/portal/page/portal/navfac/navfac_ww_pp/navfac_hq_pp/navfac_sf_pp/navfac_sf_resource/5100_11j.pdf.

526 *Id.* ¶ 0407.b ("Each [Naval FEC] activity *shall* ensure that plans are reviewed and accepted prior to issuing the Notice to Proceed.") (emphasis added); *id.* ¶ 0407.c ("All [health and safety plans] *shall* be reviewed prior to initiating site work by a *competent person*.") (emphasis added).

527 Thallium is designated as a "toxic pollutant." *See* Federal Water Pollution Control Act (CWA), 33 U.S.C. § 1317(a) (2006); Publication of Toxic Pollution List, 43 Fed. Reg. 4,108, 4,109 (Jan. 31, 1978).

528 Myers *ex rel.* L.M. v. United States, 652 F.3d 1021, 1026 (9th Cir. 2011).

529 PROGRAM MANUAL, *supra* note 525, at ¶ 0407.c (requiring the Navy to approve the HASP before work begins).

Myers became ill. She suffered from gastrointestinal distress, peripheral neuropathy (nerve damage), cognitive defects, and alopecia (hair loss), all of which are known side effects of thallium exposure.[530] Analyses of Myers's urine conducted in March 2000 indicated the presence of thallium in her body in concentrations ten times greater than what is normal; however, subsequent tests purportedly failed to show an excessive concentration of thallium. Although the Navy collected samples from more than 100 sites around Myers's home, none showed levels of thallium above the naturally occurring amount. However, Myers argued that these samples were misleading because they were taken months after the remediation project was completed, and after winter storms likely dissipated the thallium contamination.

The district court trifurcated the bench trial into three phases: breach of duty, actual and proximate causation, and damages. However, the court only reached the first phase and, after three years, finally entered judgment for the Navy. The district court held that the actions of the United States fell within the discretionary function exception, which precluded the court from retaining subject matter jurisdiction over the case. The court went on, however, to find that the Navy acted reasonably, basing its decision on facts that related to whether Myers was actually exposed to thallium from the OU-3 site—facts of causation that were scheduled for argument during the second phase of the trial.

On appeal, Myers argued that both the Program Manual and FFA provisions required the Navy to review HASP compliance and ensure that work was performed in accordance with the safety procedures. Accordingly, the two issues before the Ninth Circuit on appeal were whether the district court committed reversible error in finding: 1) that Myers's claims were barred by the discretionary function exception, and 2) that the United States acted reasonably in fulfilling its duty to ensure that the contractor followed proper safety procedures. The Ninth Circuit reviewed de novo the district court's dismissal for lack of subject matter jurisdiction and reviewed the district court's determinations of fact for clear error.[531]

In a previous Ninth Circuit case, *Terbush v. United States,* the court explained that the discretionary function exception only insulates government decision-making based on policy concerns.[532] To establish the applicability of the exception, the court applied the two-prong test from *Berkovitz v. United States*,[533] determining: 1) "whether the challenged actions involve an 'element of judgment or choice,'" and 2) if a specific course of action is not specified, whether the discretion left to the government is

530 U.S. ENVTL. PROT. AGENCY, NATIONAL PRIMARY DRINKING WATER REGULATIONS, CONSUMER FACTSHEET ON: THALLIUM (2012), *available at* http://www.epa.gov/safewater/pdfs/factsheets/ioc/thallium.pdf.

531 Terbush v. United States, 516 F.3d 1125, 1128 (9th Cir. 2008) (reviewing de novo dismissals for lack of subject matter jurisdiction in FTCA suits); Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005) (reviewing for clear error determinations of underlying facts).

532 *Terbush*, 516 F.3d at 1129.

533 486 U.S. 531 (1988).

"based on considerations of public policy."[534] Concluding that the Program Manual imposed mandatory procedures on the Navy that divested it of any discretion, the Ninth Circuit reversed the judgment of the district court.

Specifically, the Ninth Circuit interpreted the language of the Program Manual as a mandatory requirement that the Navy itself review HASPs for compliance.[535] Because these procedures were mandatory, the Navy had "no rightful option but to adhere to the directive."[536] Consequently, the Navy was required to ensure that the contractor complied with the safety provisions, and was liable for any thallium contamination under the FTCA. Moreover, the Program Manual specified that the HASP reviewer must be a certified industrial hygienist (CIH) or the equivalent by training or experience. Accordingly, there was no room for discretion as to how the review was to be conducted. Citing *Bolt v. United States*,[537] the court held that the Navy had *no discretion* regarding whether or not to review the HASP or whether to allow anyone other than a Navy CIH to perform that duty.[538] The Program Manual was in direct conflict with the Navy's contract with IT/OHM, which made the contractor's CIH responsible for performing the duty. Thus, the court concluded that the Navy breached its non-discretionary duty to review the contractor's HASP prior to its implementation.

The Ninth Circuit next addressed the FFA provisions that Myers claimed also imposed a mandatory requirement on the Navy to ensure that IT/OHM followed certain safety procedures.[539] Here, the court found that the FFA did not specify what the Navy must do to comply with the QAO's duty to oversee the contractor's work. Consequently, the FFA allowed for Navy discretion. Nevertheless, the second prong of the *Berkovitz* test required that the Ninth Circuit examine whether that discretion was to be exercised for policy concerns.[540] In this case, the court found that the "decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not."[541] The Ninth Circuit drew an analogy to the case of *Marlys Bear Medicine v. United States* ex rel. *Secretary of the Department of Interior*[542] and held that the Navy was

534 *Id.* at 536–37.

535 *See* PROGRAM MANUAL, *supra* note 525, at ¶ 0407.c ("All HASPs *shall* be reviewed prior to initializing site work by a competent person.") (emphasis added).

536 *Myers*, 652 F.3d 1021, 1028 (9th Cir. 2011) (quoting *Terbush*, 516 F.3d at 1129).

537 509 F.3d 1028 (9th Cir. 2007).

538 *Id.* at 1033.

539 The FFA provides that the Navy's QAO "will ensure that all work is performed in accordance with approved work plans, sampling plans and QAPPS" and "shall maintain for inspection a log of quality assurance field activities and provide a copy to the Parties upon request." *Myers*, 652 F.3d at 1030–31 (quoting CAMP PENDLETON MARINE CORPS BASE FEDERAL FACILITY AGREEMENT, *supra* note 424, at ¶ 20.1).

540 Berkovitz v. United States, 486 U.S. 531, 536–37 (1988).

541 *Myers*, 652 F.3d at 1032 (internal quotation marks omitted) (citing *Terbush*, 652 F.3d at 1133).

542 241 F.3d 1208 (9th Cir. 2001) (involving the Bureau of Indian Affairs' failure to adequately supervise timbering operations on Indian land as required by the Occupational Safety and Health Act and the Bureau's own regulations).

required to ensure that the contractor complied with the safety provisions of the contract.[543]

Because the Ninth Circuit found that Myers's claims were not barred by the discretionary function exception, the court went on to analyze whether the Navy had acted reasonably. On this issue the Ninth Circuit again reversed the district court. Under the FTCA, the Navy is liable to Myers in accordance with the law of the locality where the act occurred.[544] In this case, California law was applicable and state precedent set by *Yanez v. United States*[545] created direct liability based on the Navy's non-delegable duty of reasonable care.[546] Additionally, because the Navy conceded that the OU-3 project involved "peculiar risk," it was foreseeable that persons exposed to thallium would suffer injuries like Myers's. Furthermore, neither the Navy's CIH nor its QAO ever took steps to review the air-monitoring samples or to ensure that the contractor complied with the HASP. Therefore the court found that the Navy clearly did not act reasonably.

Finally, Myers asked for the case to be reassigned on remand to a different district court judge. The Ninth Circuit weighed the three factors of *Mendez v. County of San Bernardino*[547] and found that the errors of the district court were not significant enough to warrant reassignment.[548] The court determined that the errors of the trial judge were not enough to question his impartiality, and that reassignment would not preserve the appearance of justice. As such, the Ninth Circuit remanded the case back to the original district court judge to determine the issues of causation and damages.

In summary, the Ninth Circuit held that the discretionary function exception was inapplicable in this case because the Navy's Program Manual specifically required Navy review of the contractor's work for HASP compliance. Although the FAA did allow for Navy discretion, the Navy

543 *Myers*, 652 F.3d at 1033 (noting that a failure to effectuate policy choices already made is not protected under the discretionary function exception and rejecting a "limited resources" excuse for failing to follow professional standards).

544 Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006).

545 63 F.3d 870 (9th Cir. 1995).

546 *Id.* at 872 (noting that the peculiar risk doctrine is an exception to the general rule that limits tort liability of an independent contractor). The government will be directly liable when it "fails to ensure that an independent contractor takes adequate safety precautions and the work to be performed involves special dangers." *Myers*, 652 F.3d at 1034 (citations omitted) (quoting Gardner v. United States, 780 F.2d 835, 838 (9th Cir. 1968)).

547 540 F.3d 1109 (9th Cir. 2008).

548 The court determined if reassignment was necessary by applying the *Mendez* factors:

> "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously[ ] expressed views or findings determined to be erroneous based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

Id. at 1133 (quoting United States v. Sears, Roebuck, & Co., Inc., 785 F.2d 777, 779 (9th Cir. 1986) (per curiam) (quotation marks omitted).

breached its duty of care by failing to prevent foreseeable thallium contamination from affecting nearby residents of Camp Pendleton. Thus, the district court had jurisdiction to decide the final two phases of the case: causation and damages.

Judge Rawlinson concurred in part and dissented in part, stating that the majority's opinion "completely rewr[ote] the facts to such an extent that it decide[d] a different case on different facts than that decided by the district court."[549] For example, the district court found that only one sample at Site 1A exceeded the safe thallium level, one sample at Site 2A only slightly exceeded the safe level, and that the final sample at Site 2A produced an unreliable test result. Notwithstanding the inconsistent testing results, the majority disregarded the district court's findings and focused on thallium's poisonous characteristics. The district court also found that any visible dust was from uncontaminated sources, and that airborne dust limits were only exceeded because the limit set on the monitoring system was too low. Conversely, the majority's version centered on how the limit was exceeded over 200 times, yet work was never stopped. Judge Rawlinson did agree with the majority that the FFA allowed for Navy discretion, but asserted that the majority's conclusion was tainted by its impermissible fact-finding. Therefore, in Judge Rawlinson's opinion, the case should have been remanded for clarification regarding the factual issues of the case, rather than directing a verdict for Myers.

B. International Hazardous Waste

1. Carijano v. Occidental Petroleum Corporation, 643 F.3d 1216 (9th Cir. 2011)

Twenty-five members of the Achuar indigenous group of Peru along with Amazon Watch, a California corporation (collectively Plaintiffs), appealed dismissal of their suit against Occidental Peruana, a subsidiary of Occidental Petroleum Corporation (Occidental). Occidental removed the suit from the Los Angeles County Superior Court to the United States District Court for the Central District of California. The district court then granted Occidental's motion to dismiss on the basis of forum non conveniens—that Peru was a more convenient forum. Plaintiffs appealed the district court's ruling and the United States Court of Appeals for the Ninth Circuit reversed the dismissal and remanded, with Judge Rymer dissenting.

Headquartered in Los Angeles County, Occidental is one of the largest oil and gas companies in the United States. Between 1972 and 2000 it extracted roughly a quarter of Peru's total oil production through wells and pipelines in the northern Peruvian rainforest. In that section of rainforest, the Corrientes and Macusari rivers run through and around Occidental's

549 *Myers*, 652 F.3d 1038 (Rawlinson, J., concurring in part and dissenting in part).

operation and are used by several Achuar[550] communities. Amazon Watch, headquartered in San Francisco, California, began working with the Achuar in 2001. They advocated for the group and filmed a documentary about the contamination.

Collectively, Plaintiffs alleged that Occidental knowingly used out-of-date methods for separating crude oil in violation of United States and Peruvian law. This, Plaintiffs claimed, led to the discharge of millions of gallons of toxic oil byproducts into the waterways used by the Achuar. As a result, many of the Achuar now have potentially dangerous levels of lead and cadmium in their blood, and many suffer from multiple illnesses attributed to the pollution of the rivers they use for drinking, fishing, and bathing. Correspondingly, Plaintiffs' amended complaint sought damages, injunctive and declaratory relief, restitution, and disgorgement of profits from Occidental. Pursuant to 28 U.S.C. § 1332(d)(2),[551] Occidental removed the action to federal district court. Shortly thereafter, Amazon Watch joined as plaintiff, suing under California's Unfair Competition Law.[552] The district court then granted Occidental's motion to dismiss on forum non conveniens grounds without oral argument, and simultaneously denied Plaintiffs' request to conduct discovery into the adequacy of Peru as an alternative forum. Noting its jurisdiction under 28 U.S.C. § 1291,[553] the Ninth Circuit reviewed the district court's dismissal for abuse of discretion.[554]

The Ninth Circuit observed that forum non conveniens is meant to prohibit a plaintiff from choosing a forum purely to harass a defendant or to seek more favorable law.[555] However, the mere fact that parties are foreign does not warrant the drastic application of the doctrine that results in dismissal.[556] Dismissal under forum non conveniens is "an exceptional tool to be employed sparingly," and not a "doctrine that compels plaintiffs to choose the optimal forum for their claim."[557] In concluding that the district

550 The Achuar are an indigenous people who have historically resided along rivers in the rainforests of northern Peru and depend on the rivers' waters for survival. Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1222–23 (9th Cir. 2011).

551 28 U.S.C. § 1332(d)(2) (2006).

552 CAL. BUS. & PROF. CODE § 17200 (West 2008) (defining unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by . . . the Business and Professions Code").

553 28 U.S.C. § 1291 (2006).

554 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981). A lower court abuses its discretion by identifying an incorrect legal standard, or by applying the correct standard illogically, implausibly, or without a basis in the facts. United States v. Hinkson, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). Additionally, in the context of forum non conveniens, a "district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors." Ravelo Monegro v. Rosa, 211 F.3d 509, 511 (9th Cir. 2000) (citation omitted).

555 *Piper Aircraft*, 454 U.S. at 249 n.15 ("[D]ismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law.").

556 Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1181–82 (9th Cir. 2006) (noting that juries are capable of addressing a range of subjects, including foreign disputes).

557 Dole Food Co., v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002) (quoting *Ravelo Monegro*, 211 F.3d at 514).

court abused its discretion when it found that Occidental met its burden of demonstrating Peru to be an adequate alternative forum, the Ninth Circuit examined whether: 1) the alternative forum of Peru was adequate; 2) the district court properly weighed the public and private factors and the deference owed to the Plaintiffs' choice of forum; and 3) the district court should have imposed any conditions on the dismissal.

For the Ninth Circuit's first inquiry, the court observed that an alternative forum is adequate where the defendant is amenable to process and a satisfactory remedy is available.[558] First, in regard to Peru, the district court accepted Occidental's "stipulation and consent to jurisdiction in Peru" despite the absence of any waiver of the statute of limitations, which the defense itself suggested may have run. Second, the district court correctly concluded that Occidental sufficiently proved that Peru's substantive and procedural laws would have provided a satisfactory remedy. Although damages are purely compensatory rather than punitive in Peru, an alternative forum need only provide "some remedy" for plaintiffs.[559] Finally, despite alleged discrimination and corruption in the Peruvian legal system, a party must make a "powerful showing," including specific evidence, to demonstrate that an alternative forum is too corrupt to be adequate.[560] Consequently, the district court did not abuse its discretion by concluding that the Plaintiffs' affidavit was too generalized to support a conclusion that the Peruvian legal system would not have afforded Plaintiffs a remedy. Thus, Peru is an adequate alternative forum.

Second, the Ninth Circuit concluded that the district court abused its discretion when it balanced the private and public interest factors and failed to give proper deference to the Plaintiffs' choice of forum. The district court correctly assumed that Amazon Watch was a legitimate domestic plaintiff, but ignored the group in its consideration of the private and public factors. Most glaring was the lack of deference afforded Amazon Watch's choice of forum. There is a "strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum."[561] Whereas a domestic plaintiff's choice of forum is presumptively convenient,[562] a lower level of deference is owed a foreign plaintiff.[563] Ultimately, the district court

558 *See Piper Aircraft*, 454 U.S. at 254 n.22; Leetsch v. Freedman, 260 F.3d 1100, 1103 (9th Cir. 2001) ("The foreign court's jurisdiction over the case and competency to decide the legal questions involved will also be considered. We make the determination of adequacy on a case by case basis, with the party moving for dismissal bearing the burden of proof." (citation omitted)).

559 *Tuazon*, 433 F.3d at 1178 ("[A] forum will be inadequate only where the remedy provided is 'so clearly inadequate or unsatisfactory, that it is no remedy at all.'" (quoting Lockman Found. v Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991)))

560 *Tuazon*, 433 F.3d at 1179.

561 *Piper Aircraft*, 454 U.S. at 255.

562 *Id.* at 255–56.

563 *Ravelo Monegro*, 211 F.3d 509, 514 (9th Cir. 2000) (clarifying that "less deference is not the same thing as no deference") (citation omitted).

abused its discretion by affording reduced deference to Amazon Watch's choice of forum as a domestic plaintiff.

The Ninth Circuit went on to criticize the district court's standard of deference as inconsistent with *Piper Aircraft Company v. Reyno* because the case made no suggestion that deference would be lower where both domestic and foreign plaintiffs joined suit. In doing so, the court distinguished this case from *Vivendi SA v. T-Mobile USA, Inc.*,[564] and noted that Amazon Watch did not choose a forum for mere tactical advantage.[565] In fact, Amazon Watch had been involved in the subject matter of this litigation since 2001 and alleged complaints arising out of events that took place specifically in California. This forum was the defendant's home jurisdiction and was the place of the subject matter of this case. Correspondingly, Amazon Watch did not attempt to inappropriately forum shop, so the district court abused its discretion by failing to afford the appropriate level of deference to the Plaintiffs' chosen forum.

Next, the court examined the private and public interests at stake in this case. Regarding the private interests, the Ninth Circuit factored in:

> "(1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive."[566]

The Ninth Circuit considered the district court's generalized appraisal of the factors inadequate because it neglected significant evidence and failed to account for the enforceability of the judgment. First, the court weighed each factor and found that the district court failed to consider Amazon Watch's residency, which weighed against dismissal. Second, the court found that the convenience of the parties[567] and evidentiary considerations[568] had only a neutral effect on the analysis. However, the district court erred when it failed to properly weigh the difficulty of enforcing a Peruvian judgment. The Ninth Circuit accepted Plaintiffs' evidence that the potential difficulty[569] and unpredictability[570] of enforcement weighed against dismissal.

564 586 F.3d 689 (9th Cir. 2009).

565 *Id.* at 694 (providing less deference to a co-plaintiff because the court found that the co-plaintiff engaged in forum shopping).

566 Bos. Telecomms. Grp., Inc. v. Wood, 588 F.3d 1201, 1206–07 (9th Cir. 2009) (quoting Lueck v. Sundstrand Corp., 236 F.3d 1137, 1145 (9th Cir. 2001)).

567 *Wood*, 588 F.3d at 1208 (finding the convenience factor to be neutral where similar logistical considerations would apply in either forum).

568 *See* Duha v. Agrium, Inc., 448 F.3d 867, 877 (6th Cir. 2006) (suggesting that the initial question is not whether the witnesses are beyond the reach of compulsory process, but whether it has been alleged or shown that witnesses would be *unwilling* to testify).

569 *See* Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1232 (9th Cir. 2011) (discussing the difficulty of enforcing a Peruvian judgment); *see generally*, *In re* B-E Holdings, Inc., 228 B.R. 414 (Bankr. E.D. Wis. 1999) (enforcing an unsatisfied Peruvian default judgment that was awarded in 1992).

Turning to the public interests involved, the Ninth Circuit analyzed both local interests and judicial considerations. The examination of local interest is intended to determine whether the forum itself has an interest in the resolution of the case. Here, California had a significant interest in "deciding actions against resident corporations whose conduct in [the] state causes injury to persons in other jurisdictions."[571] On the other hand, Peru had a stake in the case because it involved its own land and citizens. As a result, the Ninth Circuit found this factor neutral, so the district court abused its discretion when it held that this factor favored dismissal. However, the court found that the district court did not err in finding the factors of court congestion and burden to be neutral; evidence illustrated that courts in Peru were similarly crowded as U.S. courts. Nor did it err in finding the choice of law factor neutral—both Occidental and Plaintiffs provided reasonable arguments for application of either Peruvian or California law.[572] Therefore, the private convenience and evidentiary factors were neutral overall and failed to outweigh the deference owed the Plaintiffs' chosen forum.

Lastly, the Ninth Circuit found the district court abused its discretion when it failed to impose any mitigating conditions on its dismissal of the Plaintiffs' claims. While a district court is not *required* to condition dismissals for forum non conveniens, it is nevertheless an abuse of discretion when "there is a justifiable reason to doubt that a party will cooperate with the foreign forum."[573] Plaintiffs had requested that the district court condition its dismissal so that: "(1) any Peruvian judgment be satisfied; (2) Occidental waive any statute of limitations defense in Peru that would not be available in California; (3) Occidental agree to comply with United States discovery rules; and (4) Occidental translate documents from English to Spanish."[574] The Ninth Circuit acknowledged that there was justifiable reason to believe that Occidental would move to dismiss the lawsuit in Peru on statute of limitations grounds, and noted that "an adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum."[575] On this ground alone it was an abuse of discretion for the district court to dismiss on the basis of forum non conveniens without requiring Occidental to waive any statute of limitations defense.

Similarly, the district court failed to consider the difficulty the Plaintiffs would face in enforcing a Peruvian judgment. Occidental's own expert

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570 *See* U.S. Dep't of State, Bureau of Econ., Energy and Bus. Affairs, *2010 Investment Climate Statement-Peru*, http://www.state.gov/e/eb/rls/othr/ics/2010/138128.htm (last visited July 7, 2012).

571 Stangvik v. Shiley Inc., 819 P.2d 14, 21 n.10 (Cal. 1991).

572 *See* Wash. Mut. Bank v. Super. Ct. of Orange Cnty., 15 P.3d 1071, 1080–81 (Cal. 2001) (applying a three part choice of law test: 1) determine if the foreign law "materially differs" from California law; 2) determine each respective state's interest in the application of its law; and 3) select the law of the state whose interest would be "more impaired" if its law were not applied, with the initial burden placed on the proponent of foreign law).

573 Leetsch v. Freedman, 260 F.3d 1100, 1104 (9th Cir. 2001).

574 *Carijano*, 643 F.3d at 1234.

575 Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan, 273 F.3d 241, 246 (2d Cir. 2001).

explained that there was "corruption and turmoil" in the Peruvian judiciary that would generate "challenge[s] to the enforceability of a judgment based on the procedural deficiencies of a Peruvian proceeding."[576] Consequently, the district court should have required assurances that Occidental be willing to satisfy any judgment as a condition for dismissal. As for the sufficiency of Peruvian discovery, the district court overemphasized Peruvian geography and overlooked the importance of witnesses and evidence located within California. While a thorough analysis might have concluded that Peru's discovery rules would satisfy the Plaintiffs' concerns, the district court erred by rejecting this condition on dismissal without conducting the analysis. Although the Ninth Circuit did agree with the district court's decision not to require Occidental to translate all documents into Spanish, it ultimately found that the district court's failure to impose *any* conditions upon dismissal was an abuse of discretion.

In conclusion, the Ninth Circuit held that the district court abused its discretion by failing to consider all relevant private and public interest factors, and entirely overlooking the enforceability of the judgment. While the district court did consider Amazon Watch to be a proper domestic plaintiff, it erred by affording reduced deference to its chosen forum and ignored the group when it analyzed other factors surrounding forum non conveniens. Thus, the district court abused its discretion when it failed to impose conditions on dismissal. The Ninth Circuit declined to reach Plaintiffs' argument that it should have been allowed discovery prior to Occidental's forum non conveniens motion, and remanded the case for determination of Amazon Watch's standing and further proceedings consistent with its opinion.

Judge Rymer concurred in part and dissented in part. She agreed that the district court did not abuse its discretion in finding that Peru was an adequate alternative forum, but she did not believe that conditions on dismissal were required. Generally, dismissals for forum non conveniens "may be reversed only where there has been a clear abuse of discretion."[577] In this case, Judge Rymer thought the findings of the district court were supported by the record and its balancing of the factors was not unreasonable; therefore, the decision of the district court deserved substantial deference.

Disagreeing with the majority, Judge Rymer opined that the district court did not abuse its discretion in its weighing of the public and private interest factors. Amazon Watch was only one of the twenty-six plaintiffs in this case, and only involved in one of the twelve causes of action. Accordingly, it was reasonable for the district court to lessen the deference given Plaintiffs' choice of forum. Finally, Judge Rymer agreed with the district court's finding that the subject matter of the suit revolved around the people and geography of Peru, and that Peru's interest in the suit outweighed California's.

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576 *Carijano*, 643 F.3d at 1235.

577 *Id.* at 1237 (Rymer, J., concurring in part, dissenting in part) (citing Creative Tech., Ltd. v. Aztech Sys. Pte, Ltd., 61 F.3d 696, 699 (9th Cir. 1995)).

In sum, Judge Rymer would have remanded to the district court to consider whether the imposition of conditions should have been considered, but would have otherwise affirmed the district court's dismissal for forum non conveniens.

C. National Environmental Policy Act

1. Barnes v. U.S. Department of Transportation, 655 F.3d 1124 (9th Cir. 2011).

Plaintiffs[578] challenged an order of the Federal Aviation Administration (FAA on Defendants)[579] that relieved the agency of preparing an environmental impact statement (EIS) for construction of a new airport runway at Hillsboro Airport (HIO) in Portland, Oregon. Plaintiffs argued that the FAA acted unreasonably by failing to hold a public hearing and that FAA's finding of no significant impact (FONSI), which relieved the agency from preparing an EIS, was unreasonable because the agency failed to consider the environmental impacts of increased demand for HIO resulting from the addition of a new runway.[580] The United States Court of Appeals for the Ninth Circuit held that: 1) the agencies were required to analyze the impacts of the increased demand attributable to the new runway as a growth-inducing effect in determining whether an EIS was required, and 2) the meeting held under the direction of a designated hearing officer was a "public hearing" under the Airport and Airway Improvement Act of 1982.[581]

Located in the city of Hillsboro, HIO has become Oregon's busiest airport. It is currently used as a "reliever" airport for Portland International Airport (PDX),[582] and serves commercial air carriers, military aircraft, and general aviation (GA) aircraft.[583] In 2005, the Port of Portland undertook the HIO Master Plan to forecast the future aviation demand at HIO and plan for its development through 2025. This Master Plan projected HIO's annual

578 Michelle Barnes, Patrick Conry, and Blaine Ackley brought the suit and the Port of Portland intervened as an interested party.

579 FAA as well as the United States Department of Transportation, Ray Lahood, J. Randolph Babbitt, Donna Taylor, Carol Suomi, and Cayla Morgan were all named defendants.

580 *See* Airport and Airway Improvement Act of 1982, 49 U.S.C. § 47106(c)(1)(A)(i) (2006) (requiring that an opportunity for public hearing be given to consider the economic, social, and environmental effects of the location and the location's consistency with the objectives of any planning that the community has carried out).

581 49 U.S.C §§ 47101–47175 (2006); Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1141–43 (9th Cir. 2011) (quoting 49 U.S.C. § 47106(c)(1)(A)(i) (2006)).

582 A reliever airport is used to reduce the congestion at large commercial airports. Fed. Aviation Admin., *Airport Categories*, http://www.faa.gov/airports/planning_capacity/passenger_allcargo_tats/categories/ (last visited April 1, 2012).

583 General aviation aircraft are all aircraft other than military and commercial airlines, such as training, sightseeing, personal flying, agricultural, business jets, and medical services. Janet Bednarek, *General Aviation–an Overview*, http://www.nps.gov/nr/travel/aviation/modernaviation.htm (last visited April 1, 2012).

service volume (ASV) to exceed 100% by 2010.[584] Although the ASV is not a ceiling to airport operations, FAA requires airfield improvements to be considered when operations reach 60% of ASV.[585] The HIO Master Plan considered the increased delays, air emissions, and operating costs that would result from operating above ASV, and determined that adding a third runway for small GA aircraft would best ameliorate those undesirable conditions.

Because the proposed runway would be partially funded by FAA grants, the plan required FAA approval and the preparation of an environmental assessment (EA). In 2009, FAA approved and published a draft environmental assessment (DEA) stating that the proposed runway's purpose was to "reduce congestion and delay at HIO in accordance with planning guidelines established by the FAA."[586] Of seven potential alternatives, the Port eliminated all but three. Alternative 1 (the "no action" alternative) was rejected because it would not meet the purpose of the project. The Port focused its considerations on Alternatives 2 and 3, which both proposed a new runway, and differed only as to where a pre-existing helipad should be relocated. The Port found that these alternatives would not lead to increased aviation activity or secondary growth impacts, and that either alternative would actually reduce emissions of grounded aircraft compared to the "no action" alternative. Because HIO represented only 1% of total United States aviation activity, the Port believed the addition of a new runway would not significantly increase the emission of greenhouse gases. Finally, the Port conducted a two-hour open-house meeting with members of the public on November 10, 2009, during which the Port made two presentations. After making minor revisions to the DEA in response to public comment, the Port submitted its final EA stating that neither Alternative 2 nor 3 would increase aviation activity beyond the "no action" alternative. FAA approved the EA and issued a FONSI on January 8, 2010.

On appeal from the FAA ruling, Plaintiffs argued that FAA violated the National Environmental Policy Act of 1969 (NEPA).[587] Specifically Plaintiffs alleged that: 1) FAA failed to consider the indirect effects of the increased aircraft operations, 2) the context and intensity of the project required FAA to prepare an EIS, 3) FAA failed to take a "hard look" at the cumulative effects of the project, 4) FAA failed to consider a reasonable range of alternatives, and 5) FAA failed to provide an adequate public hearing in violation of the Airport and Airway Improvement Act of 1982.[588] The Ninth

584 As of 2007 HIO was operating at 98%, by 2010 the ASV was projected to be 112%, by 2015, 123%, and by 2025, 146% of capacity. *Barnes*, 655 F.3d at 1128–29.

585 *See* FED. AVIATION ADMIN., DEP'T OF TRANSP., FAA ORDER 5090.3C, FIELD FORMULATION OF THE NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS 15, 24 (2000), *available at* http://www.faa.gov/airports/resources/publications/orders/media/planning_5090_3C.pdf.

586 *Barnes*, 655 F.3d at 1129.

587 42 U.S.C. §§ 4321–4347 (2006).

588 *See* Airport and Airway Improvement Act of 1982, 49 U.S.C. § 47106(c)(1)(A)(i) (2006).

Circuit reviewed the agency action under the arbitrary and capricious standard.[589]

Initially, Defendants argued that Plaintiffs waived their NEPA claim. Under NEPA, persons challenging an agency's compliance must structure their participation so that it alerts the agency to the parties' position,[590] unless the flaws in the EA are "so obvious" that there is no need to point them out.[591] In this case, some arguments were sufficiently raised, but others were not. First, Plaintiffs claimed the EA was inadequate because FAA failed to consider the indirect effects of increased aviation was not waived. The court found that a letter sent by one Plaintiff addressed indirect effects resulting from the third runway.[592] Furthermore, because the DEA discussed potential growth-inducing effects of the runway, FAA's failure to discuss the environmental impact of increased demand was "so obvious" that there was no need for Plaintiffs to point it out in their comments. Second, the Plaintiffs' claim that the context and intensity of the project required an EIS was not waived because Plaintiff Barnes stated during her comments that she thought an EIS should be prepared. Third, the Plaintiffs' challenge that the EA failed to consider the cumulative impacts of a new control tower was waived because the project did not forecast building a new tower. Finally, the Plaintiffs' argument that the EA failed to consider reasonable alternatives was waived because their proposed alternatives[593] did not address the purpose of the project—to reduce congestion and delay at HIO. Consequently, the court only addressed the preserved arguments and the public hearing contention.

The Ninth Circuit first examined the Plaintiffs' main argument, that the EA was deficient for failing to consider the indirect effects of the HIO project. Plaintiffs emphasized that an EIS must be prepared if any "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor."[594] Thus, agencies must consider the substantiality of both direct and indirect

589 Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2006). This standard of review requires the court to determine whether the agency took a "hard look" at the consequences of its action. Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1009 (9th Cir. 2006) (citation omitted).

590 Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764–65 (2004) (noting that this notification gives the agency an opportunity to give meaningful consideration to the parties' views, and that parties failed to properly alert an agency when they did not identify rulemaking alternatives beyond those evaluated in the agency's EA).

591 *Id.* at 765. The "so obvious" standard has been interpreted to mean the agency has "independent knowledge" of the issue. 'Ilio'ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1092 (9th Cir. 2006).

592 Plaintiff Ackley's letter noted that the additional runway would increase noise pollution, while decreasing his property value and general quality of life. The Ninth Circuit saw "no other way" to interpret the comment but that Ackley equated construction of a third runway with an increase in air traffic. Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1133 (9th Cir. 2011).

593 Plaintiffs proposed high-speed rail and non-aviation alternatives. *Id.* at 1135.

594 Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005) (citations omitted).

effects.[595] While FAA claimed that the activity at HIO was expected to increase at the same rate regardless of whether a new runway was built, nothing in the record actually discussed the impact of the new runway on aviation demand. FAA also argued that any increase would be irrelevant because the project was meant to address "existing problems," and court precedent only required an EA to account for growth-inducing effects if the project was not designed to alleviate current congestion.[596] However, the court distinguished previous cases by pointing out that FAA has recognized that a new runway is "the most effective capacity-enhancing feature an airfield can provide," so a case-by-case approach is needed for cases of this type.[597] Consequently, the Defendants' cited precedent was not controlling and the court remanded this issue to FAA for consideration.

Second, the Ninth Circuit addressed Plaintiffs' contention that the context and intensity of the project required an EIS.[598] Plaintiffs argued that because building a new runway at HIO is a site-specific project, Defendants could not dilute its environmental impact by averaging it across national and global emissions. Plaintiffs further claimed that the project's greenhouse gas effects were "highly uncertain" and therefore required an EIS.[599] The Ninth Circuit disagreed, and held that there is ample evidence that the effects of greenhouse gases are not "uncertain."[600] Furthermore, the EA included estimates of HIO's contribution to greenhouse gases.[601] Therefore, the court concluded, an EIS was not warranted.

Third, the defective cumulative effects analysis of the EA claimed by Plaintiffs was held to be a harmless error. Plaintiffs based their claim upon zoning changes proposed by the City of Hillsboro in 2009 that created the Airport Use zone and the Airport Safety and Compatibility Overlay zone. Defendants' failure to consider the effects on these zones was harmless because the zoning change was invalidated in 2010.[602]

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595 *See* 40 C.F.R. § 1508.8(b) (2006) (explaining that indirect effects include growth-inducing effects).

596 *See* Seattle Cmty. Council Fed'n v. FAA, 961 F2d 829, 835 (9th Cir. 1992); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 580 (9th Cir. 1998) (holding that a project implemented in order to deal with existing problems is insufficient to constitute a growth-inducing impact).

597 *Barnes*, 655 F.3d at 1138.

598 40 C.F.R. § 1508.27 (2006). "Context" is the setting in which the agency action takes place and "intensity" refers to the degree to which the agency action affects the locale and context interests. Nat'l Parks & Conservation Ass'n v. Babbit, 241 F.3d 722, 731 (9th Cir. 2001).

599 *See* Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1240 (9th Cir. 2005) (explaining the "highly uncertain standard").

600 *See* Mass. v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 534 (2007).

601 The EA estimated that global aircraft emissions account for 3.5% of total greenhouse gas emissions, that aviation accounts for 3% of total emissions in the United States, that HIO represents less than 1% of aviation in the United States; as a result, existing and future greenhouse gas emissions at HIO will only account for 0.03% of greenhouse emissions. *Barnes*, 655 F.3d at 1140.

602 Barnes v. City of Hillsboro, LUBA No. 2010-011, at ll. 6–28 (Or. Land Use Bd. App. June 30, 2010), *available at* http://www.oregon.gov/LUBA/docs/Opinions/2010/06–10/10011.pdf.

Finally, Plaintiffs argued that FAA failed to hold a public hearing as required under the Airport and Airway Improvement Act.[603] The Ninth Circuit began by noting that "public hearing" is not statutorily defined, and that an FAA order requires a "gathering under the direction of a designated hearing officer."[604] The court noted that although FAA orders do not carry the force of law and are not entitled to substantial deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,[605] they may be entitled to weaker deference under *Skidmore v. Swift & Co.*[606] However, the court declined to reach this issue because the meeting provided for by Defendants was functionally used as a "public hearing," in that it gave members of the public ample opportunity to comment, ask questions, and receive answers from a "designated hearing officer" and other officials involved in the project.[607]

In summary, the Ninth Circuit held that FAA's inadequate analysis of indirect effects, which failed to account for the addition of a growth-inducing runway, required that the issue be remanded to FAA for consideration. However, the Ninth Circuit held that the context and intensity of the project did not require an EIS, that FAA's failure to consider cumulative impacts upon zoning was harmless error, and that the meeting presented by Defendants was an adequate "public hearing."

Judge Ikuta dissented, alleging that the majority sided with "delay and air pollution by imposing pointless paperwork" on FAA.[608] She argued that because the purpose of this new runway was to address "existing conditions" at HIO, the majority should have adhered to existing precedent.[609] Furthermore, the judge believed Plaintiffs waived this argument because none of them mentioned "growth-inducing effects" during the comment period. Judge Ikuta noted that the letter used by the majority to preserve the "indirect effects" argument only obliquely mentioned the quality of life and property values of nearby homeowners, and was otherwise

603 Airport and Airway Improvement Act of 1982, 49 U.S.C. § 47106(c)(1)(A)(i) (2006) (requiring that an opportunity for a public hearing be given "to consider the economic, social, and environmental effects of the location and the location's consistency with the objectives of any planning that the community has carried out").

604 FED. AVIATION ADMIN., DEP'T OF TRANSP., FAA ORDER 5050.4B, NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) IMPLEMENTING INSTRUCTIONS FOR AIRPORT ACTIONS ¶ 403.a (2006), *available at* http://www.faa.gov/airports/resources/publications/orders/environmental_5050_4/media/5050-4B_complete.pdf.

605 467 U.S. 837, 844 (1984) (stating that an agency's "legislative regulations" regarding statutes they administer "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

606 323 U.S. 134, 140 (1944) (listing factors that give non-binding agency interpretations the "power to persuade, if lacking power to control").

607 Although Plaintiffs cited *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1132 (C.D. Cal. 1999), for the idea that the "open house" format of the meeting was insufficient to satisfy the public hearing requirement, the court clarified that *Slater* was not binding upon the Ninth Circuit, that it only addressed public hearing issues in dicta, and that the facts involved a very different hearing format than the instant case.

608 Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1143 (9th Cir. 2011) (Ikuta, J., dissenting).

609 *See* Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998) (holding that a project implemented in order to deal with existing problems is insufficient to constitute a growth-inducing impact).

overwhelmingly concerned with the direct effects of the third runway. She also believed the majority's "so obvious" argument ignored Ninth Circuit precedent excusing agencies from analyzing whether a project directed toward *accommodating* increased demand may itself increase demand.[610] Judge Ikuta further contended that the majority disregarded its traditional deference to agency expertise by concluding, without foundation in the record, that airport projects have growth-inducing effects. All of this, according to Judge Ikuta, signaled that FAA did not fail to address whether a new runway would have growth-inducing effects.

2. Center for Environmental Law and Policy v. United States Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011).

Plaintiffs, the Center for Environmental Law and Policy (CELP),[611] sued the United States Bureau of Reclamation (BOR)[612] for conducting an inadequate analysis of the drawdown of Lake Roosevelt on the Columbia River in violation of the National Environmental Policy Act (NEPA).[613] The United States District Court for the Eastern District of Washington granted summary judgment in favor of BOR and CELP appealed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment, finding that: 1) BOR adequately addressed past cumulative effects in its environmental assessment (EA) and other filings, 2) BOR impliedly promised to evaluate cumulative effects of a future project in its notice of intent to file, 3) there were no indirect effects, and 4) BOR adequately considered alternatives.

The Grand Coulee Dam is located on the Columbia River 150 miles from the Canadian border in eastern Washington.[614] BOR and other agencies control the level of water in the reservoir behind the dam called Lake Roosevelt. In 2006, the Washington legislature passed the Columbia River Water Management Act (Water Management Act),[615] which increased the 82,500 acre-feet diversion[616] of Lake Roosevelt, allowing no more than 132,500 acre-feet of water in drought years.[617] After preparing a preliminary

610 *Id.* at 580.

611 Plaintiffs-Appellants included the Center for Environmental Law and Policy and Columbia Riverkeeper, as well as Vision for Our Future as Petitioner-Intervenor.

612 Defendants-Appellees included the U.S. Bureau of Reclamation (BOR) and its Commissioner, Michael L. Connor, as well as the East Columbia Basin Irrigation District and the Washington Department of Ecology as Intervenor-Defendants-Appellees.

613 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

614 Ctr. for Envtl. Law & Pol'y v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1003 (9th Cir. 2011).

615 Act of Feb. 16, 2006, ch. 6, 2006 Wash. Sess. Laws 27 (codified as amended at WASH. REV. CODE §§ 90.90.005–.900 (2010)).

616 In 2004, BOR, the State of Washington Department of Ecology, and other agencies issued a memorandum of understanding (MOU) that set an 82,500 acre-feet per year diversion limit for municipal, industrial, and groundwater replacement uses, and a 50,000 acre-feet diversion limit for drought years. *Ctr. for Envtl. Law & Pol'y*, 655 F.3d at 1003.

617 WASH. REV. CODE § 90.90.060(3) (2010).

environmental impact statement (PEIS)[618] and a supplemental environmental impact statement (SEIS),[619] BOR issued a final EA in June 2009. The final EA included a no-action alternative, potential and cumulative impacts, and a list of planned future projects. BOR issued a finding of no significant impact (FONSI), concluding that there would not be a significant impact in the natural or human environment in the project area.

CELP argued the EA was untimely and that it inadequately addressed past and future cumulative effects, indirect effects, and reasonable alternatives under NEPA.[620] Both parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of defendants, holding that BOR addressed cumulative and indirect impacts, and adequately discussed alternatives. The Ninth Circuit reviewed the district court's decision de novo but limited its review to determining whether BOR took a "hard look" at the proposed action.[621] The court defers to an informed decision but will not overlook a "clear error of judgment."[622]

In order to guarantee that environmental aspects of a policy are considered, NEPA requires agencies to prepare an environmental impact statement (EIS) for federal actions significantly affecting the human environment.[623] An agency may prepare an EA to determine if there is a "significant" effect.[624] The agency must prepare an EA at the "go-no go stage"[625] and include the reason for the proposal, alternatives, and all environmental impacts.[626] An agency may then issue a FONSI in lieu of preparing an EIS if it determines that there are no significant environmental effects.[627]

The Ninth Circuit first addressed the timing of the EA since the EA must be completed before the "go-no go stage." Despite CELP's argument that BOR irretrievably committed water from the lake to the drawdown project prior to the EA (contrary to NEPA), the court found BOR had

618 The PEIS described major components, various projects, environmental effects to projects, and cumulative impacts of the Water Management Act's water management program. *Ctr. for Envtl. Law & Pol'y*, 655 F.3d at 1004.

619 The SEIS addresses alternatives to the drawdown of Lake Roosevelt, along with water drawing methods and cumulative impacts. *Id.*

620 *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006).

621 Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 947 (9th Cir. 2008) (citation omitted) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

622 Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971))).

623 Ctr. for Food Safety v. Vilsack, 636 F.3d 1166, 1169 (9th Cir. 2011).

624 Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1185 (9th Cir. 2008) (citing 40 C.F.R. § 1508.9(a)(1) (2007)).

625 *See* 40 C.F.R. § 1502.5 (2011). The go-no go stage refers to a stage prior to any irreversible and irretrievable commitment of resources. Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000).

626 40 C.F.R. § 1508.9(b) (2011). The EA must include direct, indirect, and cumulative impacts. *Id.* § 1508.8(b).

627 Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1009 (9th Cir. 2006) (citing 40 C.F.R. § 1508.9(a)(1)).

absolute authority to use the water of Lake Roosevelt under its permit.[628] Therefore, BOR was free to divert or not divert the water, with water rights returning to the state if no water was ultimately diverted.[629]

The Ninth Circuit next addressed CELP's argument that BOR failed to consider the cumulative effects[630] of past and present projects. First, CELP argued that the EA's past project discussion was conclusory and filled with cross-references.[631] The court agreed, finding the EA's discussion superficial and populated with vague information.[632] However, the court stated that this section of the EA was not reflective of BOR's overall approach, since BOR addressed other areas with specificity, such as landslides and surface water.[633] The court explained that BOR was not required to replicate this detailed analysis in every section to avoid promoting form over substance.[634] Since the entire record indicated BOR took a "hard look" at these impacts, the court held there was no violation of NEPA.

Second, CELP argued that the EA failed to account for the cumulative impacts of three future projects; however, the court only addressed the Odessa Subarea Special Study (Special Study).[635] While the court agreed that the Special Study was reasonably foreseeable, and that usually proposed actions necessitate a cumulative impacts analysis, the court found that BOR complied with NEPA because the EA included a notice of intent to prepare a separate EIS for the project.[636] Since a notice of intent is a promise to consider all impacts of a future project, the court reasoned, cumulative impacts of the Special Study may be addressed by BOR at a later stage.

Next, the court addressed CELP's argument that BOR violated NEPA for failing to consider the indirect effects[637] of the project in the EA, especially those effects associated with BOR's intent to expand the Weber

628 *See* WASH. REV. CODE § 90.03.250 (2010).

629 *See id.* § 90.14.130.

630 Cumulative effects are incremental impacts, resulting from present and reasonably foreseeable actions. Ctr. for Envtl. Law & Pol'y v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1007 (9th Cir., 2011).

631 *Id.*

632 *See* Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002) ("General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998))).

633 An agency may characterize cumulative effects of past actions in the aggregate without enumerating every past affected project. *See, e.g.*, League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d 1122, 1135–36 (9th Cir. 2010).

634 *Ctr. for Envtl. Law & Pol'y*, 655 F.3d at 1009.

635 The court found CELP failed to meet its burden to show a potential cumulative impact for the other projects. *Id.*

636 *See* N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 980 (9th Cir. 2006).

637 Indirect effects are those "caused by the [agency] action [that] are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (2011). These effects may include growth inducing effects, or effects relating to changes in land use, population, and ecosystems. *Id.*

Siphons.[638] The court found that agencies are not required to account for potential growth effects when the project is intended for a limited use. Furthermore, the court reasoned, several barriers would prevent BOR from making additional diversions, including the fact that BOR must decide to use the expanded capacity of the canals, expand other canals in the area, and conduct a NEPA review of any additional drawdowns. Therefore, the expanded capacity of the Weber Siphons was not an indirect effect because any decision to use the extra capacity would be subject to its own NEPA review.

Finally, the court addressed CELP's argument that the EA contained too few alternatives. While an EA must contain a brief discussion of the alternatives, it must fully and meaningfully consider those alternatives.[639] The court has consistently found that there is no minimum number of alternatives an agency must consider.[640] BOR considered and rejected other alternatives in its SEIS, explicitly referencing the SEIS in its FONSI. Previously, the court had approved an EA with only two alternatives because a prior EIS thoroughly considered alternatives.[641] The court adopted this reasoning, finding that BOR's prior considerations in its SEIS and explicit references to the SEIS in its FONSI satisfied the NEPA alternatives requirement.

The Ninth Circuit explained that while BOR vaguely discussed the cumulative effects, the EA as a whole shows that BOR understood and accounted for cumulative effects in past projects. The court found that BOR's commitment to scrutinize cumulative effects of the Special Study before commencing any action was an adequate safeguard. In sum, the court concluded that BOR did not violate NEPA and accordingly affirmed the district court's decision.

3. Northern Plains Resource Council, Inc. v. Surface Transportation Board, 668 F.3d 1067 (9th Cir. 2011).

The Northern Plains Resource Council (NPRC) and four other Petitioners[642] challenged the approval by the Surface Transportation Board (Board) of a 17.4 mile railroad in southeastern Montana. Since 1983, the Tongue River Railroad Company (TRRC) has proposed three railroad lines (TRRC I, II, and III) to haul coal from new mines in Montana. In 2007, the Board approved the construction of TRRC III after conducting an environmental impact statement (EIS) and including mitigation measures as

638 The Weber Siphons form two portions of a canal system near Interstate 90. The Siphons are to be expanded by 1,950 cubic feet per second. The drawdown of Lake Roosevelt will only account for 181 cubic feet per second of the increased capacity of the siphons.

639 Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1245 (9th Cir. 2005).

640 *Id.* at 1246.

641 Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.3d 517, 523–24 (9th Cir. 1994).

642 Mark Fix; the City of Forsyth, Montana; Native Action, Inc.; and United Transportation Union General Committee of Adjustment.

a condition of the railroad's license. NPRC petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's final approval, and TRRC intervened in defense of the Board's decision. NPRC alleged the Board violated the National Environmental Policy Act (NEPA)[643] and the railroad licensing statute, 49 U.S.C. § 10091(b) as amended by the Interstate Commerce Commission Termination Act (ICCTA).[644] The Ninth Circuit ruled on twenty-one claims: affirming the Board in part, reversing in part, and remanding the railroad license application to the Board for further environmental review consistent with NEPA.

Under federal law,[645] the Board has exclusive authority to license the construction and operation of new railroads. Over the past thirty years, TRRC has proposed three new railroad lines to serve coalmines in the Powder River Basin of Montana and Wyoming. In 1983, TRRC proposed TRRC I, an 89-mile rail line from Miles City to Ashland, Montana.[646] In 1989, TRRC proposed a second railroad, TRRC II, a 41-mile line from Ashland to Decker, Montana. An EIS was conducted for TRRC II, and the Board required a change to TRRC's preferred route along with other mitigation measures as a condition of approval. TRRC objected to the change in route, and subsequently filed a new application, TRRC III, as an alternative to TRRC II. The Board completed a supplemental EIS in 2006 with updates to the environmental reviews conducted in TRRC I and TRRC II. The Board approved TRRC III with mitigation measures in 2007, and NPRC, joined by other individuals and groups, appealed the Board's final decision to the Ninth Circuit.

NPRC claimed that the Board's decision violated NEPA by failing to conduct an adequate environmental review.[647] NPRC alleged deficiencies in the EIS in six areas: 1) inadequate cumulative impacts analysis, 2) inadequate baseline data, 3) impermissibly stale data, 4) inadequate geographic scope, 5) impermissible use of a single EIS, and 6) impermissible tiering of the EIS. For the claim of inadequate cumulative impacts analysis, NPRC alleged that the EIS failed to consider the cumulative impacts of coal bed methane (CBM), other coal mines, and water quality.

NPRC also claimed that the Board's decision violated 49 U.S.C. § 10901, a provision of the ICC Termination Act[648] governing when the Board may license the construction and operation of railroad lines. NPRC alleged that

643 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

644 Pub. L. No. 104, § 88 (1995) (codified at 49 U.S.C. § 701 (2006)).

645 Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10901 (2006).

646 The Board's predecessor, the Interstate Commerce Commission, approved this rail line. The court noted that TRRC I was not at issue in this case and that the line had not yet been built.

647 42 U.S.C. § 4332(C) (2006).

648 Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101, 10102, 10501, 10502, 10701–10709, 10721, 10722, 10741–10747, 10901–10907, 11101–11103, 11121–11124, 11141–11145, 11161–11164, 11301, 11321–11328, 11501, 11502, 11701–11707, 11901–11908, 13101–13103, 13301–13304, 13501–13508, 13521, 13531, 13541, 13701–13713, 13901–13908, 14101–14104, 14121–14123, 14301–14303, 14501–14505, 14701–14709, 14901–14914, 15101–15103, 15301, 15302, 15501–15506, 15701, 15721–15723, 15901–15906, 16101–16106, 701–706, 721–727 (2006); 11 U.S.C. § 1162 (2006); 45 U.S.C. § 797l (2006).

the Board: 1) applied the wrong standard to the analysis of TRRC III, 2) improperly determined that the railroad served the public convenience and necessity, 3) failed to conduct the required balancing test of transportation and environmental interests, 4) failed to allow an administrative law judge to rule on the application, 5) failed to address labor protection for railroad employees, and 6) inappropriately relied on TRRC II as the "no build" alternative to TRRC III. The Ninth Circuit reviewed the NEPA claims and the Board's approval of the railroad application under the "arbitrary and capricious standard"[649] in the Administrative Procedure Act (APA)[650]. The Ninth Circuit ruled on each claim, affirming the Board in part, reversing in part, and remanding the case to the Board for further review.

In the first category of NEPA claims, the Ninth Circuit agreed with NPRC that the EIS for TRRC III contained an inadequate cumulative impacts analysis[651] with respect to CBM projects, other coal mines, and water quality. First, the court determined that the Board improperly limited the cumulative impacts analysis of future CBM development in the Powder River Basin to a five-year period. The court found that the five-year period was unjustified based on a Bureau of Land Management (BLM) and State of Montana programmatic EIS[652] on CBM development, which concluded that development is likely to increase over the next twenty years. Therefore, CBM developments in the next twenty years were reasonably foreseeable and should have been included in the cumulative impacts analysis.[653]

649 The APA requires courts to "hold unlawful and set aside" any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006). The court cited *Lands Council v. McNair* for the propositions that that judicial review under this standard is "narrow," and that courts must give deference to scientific findings that an agency finds reliable. Lands Council v. McNair, 537 F.3d 981, 987–88, 994 (9th Cir. 2008) (en banc), *overruled on other grounds by* Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008). The court reviewed the Board's licensing application decision under the standards set forth in Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–45 (1984) (holding that courts must uphold an agency's reasonable interpretation of a statute administered by that agency, unless that interpretation is contrary to Congress's "unambiguously expressed intent").

650 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

651 The court noted that a cumulative impact analysis must provide "a useful analysis of the cumulative impacts of past, present, and future projects." Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002) (quoting Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 810 (9th Cir. 1999)). A cumulative impact analysis also must include "some quantified or detailed information" about cumulative impacts, unless the agency can justify its failure to include such information. Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 868 (9th Cir. 2005). Finally, the court noted that NEPA permits agencies to aggregate cumulative effects. League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1217 (9th Cir. 2008).

652 BUREAU OF LAND MGMT., FINAL STATEWIDE OIL AND GAS ENVIRONMENTAL IMPACT STATEMENT (2003), *available at* http://www.blm.gov/mt/st/en/fo/miles_city_field_office/og_eis.html (click on individual sections).

653 The court relied on a Council on Environmental Quality (CEQ) guidance document directing agencies to consider environmental effects in the time frame of the "project-specific" analysis. COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 16 (1997), *available at* http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf. In this case, the Board failed to

The court also affirmed the Board's determination that the nine presently operating CBM wells did not pose any risk of significant environmental impacts after the construction of the railroad. Moreover, the court affirmed the Board's determination that the cumulative impacts of the railroad and CBM wells would not result in significant environmental impacts to air quality and wildlife. The court noted that most of the effects of the railroad on air quality and wildlife were temporary and localized in nature.

The court next determined that the EIS contained an inadequate cumulative impacts analysis with respect to future coal mines. The EIS failed to consider the effects of the Otter Creek coal mines, which at the time of the railroad application were on yet-to-be leased federal lands. The court concluded that the future Otter Creek coal mines were reasonably foreseeable because the federal government transferred the lands to the State of Montana in 2002 for coal development. Furthermore, a major justification for TRRC railroads included the increased development of coal in the area; therefore, the court concluded that the Board violated NEPA by failing to consider the cumulative impacts of the future mines.

The court agreed with NPRC that the Board conducted an inadequate cumulative impacts analysis with respect to water quality. According to The court concluded that the Board relied on an erroneous assumption that the railroad would not be constructed at the same time as future CBM wells would be operating. The construction of the railroad is expected to increase sedimentation in rivers, and reasonably foreseeable CBM wells would be contributing to water quality degradation at the same time; therefore, the Board could not conclude that there would be no cumulative impacts on water quality.

On the second NEPA claim, the court reversed the decision of the Board because the EIS failed to take the required "hard look" at existing baseline data. NPRC claimed that the EIS failed to gather baseline data on species, including pallid sturgeon (*Scaphirhynchus albus*) and the sage grouse (*Centrocercus urophasianus*). The court agreed that the EIS failed to establish baseline data for the species, and concluded that the Board could not rely on mitigation measures to protect the species in lieu of baseline data.

On the third NEPA claim, the court agreed with NPRC that the EIS was inadequate because it relied on stale data. The EIS for TRRC III relied on environmental data from EISs conducted in 1985 (TRRC I) and 1992 (TRRC II). The Board's decision to approve the project in 2007, therefore, relied on stale environmental information, including aerial surveys that were at least ten years old.[654]

explain why it relied on its default five-year analysis when BLM and the State of Montana projected a twenty-year increase in CBM development.

654 Lands Council v. Powell, 395 F.3d 1019, 1031 (9th Cir. 2005) (holding that thirteen-year-old habitat surveys and six-year-old fish counts were "stale" data "too outdated" to be given significant weight).

On the fourth NEPA claim, the court affirmed the Board's decision on the geographic scope of the EIS. The geographic limits for consideration of the environmental impacts of TRRC III were limited to the railroad's right of way. The court concluded that this geographic scope satisfied NEPA's requirements because the agency may decide the geographic boundaries to consider for environmental impacts.[655]

On the fifth NEPA claim, the court determined that the Board did not err by using supplemental EISs rather than creating a single EIS[656] for all three TRRC proposals. The three TRRC projects could not be considered as a single project because at the time of TRRC I there was no way to know that subsequent projects would be proposed. The Board's incorporation of the EISs for TRRC I and TRRC II into the EIS for TRRC III did not constitute an arbitrary and capricious decision because the final EIS successfully addressed the total environmental impacts for all three projects.

On the sixth NEPA claim, the court concluded that the Board did not err by tiering[657] the TRRC III EIS to other site-specific EISs. Although an EIS is not permitted to incorporate the conclusions of other site-specific EISs, the TRRC III EIS only used the site-specific information for general background purposes. The court agreed with the Board that the TRRC III EIS did not rely on site-specific EISs for relevant environmental data or conclusions.

NPRC also claimed that the Board violated various aspects of federal law[658] regulating the construction and operation of railroad lines when the Board approved the TRRC III application. The court referred to these six categories of claims as the railroad claims. The court ruled on each claim, affirming in part, reversing in part, and remanding the case to the Board for reconsideration.

On the first railroad claim, the court concluded that the Board applied the correct statutory standard when it approved the construction of TRRC III. NPRC claimed the standard for approving a new railroad under 49 U.S.C. § 10901 was a determination that the railroad was required or would enhance public convenience and necessity. The Board countered that the Staggers Rail Act of 1980[659] amended the statutory language to allow the Board to approve new railroads if public convenience and necessity "permit"

655 Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976).

656 The court noted that closely interconnected proposals should generally be evaluated with a single EIS. Klamath–Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 998 (9th Cir. 2004). This interconnectedness is evaluated under the "independent utility" test, which allows separate EISs for projects that would have occurred without each other. Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1118 (9th Cir. 2000), *abrogated by* Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

657 "Tiering" is the process of covering general matters in a broad EIS, and incorporating that broad analysis by reference into a narrower EIS, such as a site-specific statement. 40 C.F.R. § 1508.28 (2011).

658 *See* Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10901 (1980).

659 45 U.S.C. § 1018 (2006).

the construction.[660] The court agreed with the Board and the United States Court of Appeals for the Eight Circuit: "Congress subsequently relaxed this restrictive policy by providing that the [Board] need only find that public convenience and necessity 'permit' the proposed construction."[661]

On the second railroad claim, the court affirmed the Board's findings that the public convenience and necessity requirement[662] was satisfied by TRRC III. The court approved the Board's three-part test for public convenience and necessity: 1) whether the applicant is financially fit to construct and operate the railroad, 2) whether there is a public demand, and 3) whether competition would harm existing railroads. Subsequently, the court agreed with the Board's determination that TRRC III satisfied the financial fitness requirement, the clear and public need requirement, and the avoidance of harm to existing competition requirement. The court also noted that the Board did not act arbitrarily in considering a variety of factors to conclude that the public interest would be served by the TRRC III.

On the third railroad claim, the court affirmed the Board's balancing of transportation and environmental concerns. NPRC alleged that the Board improperly included railroad employee concerns and Native American concerns in the environmental category. The court rejected this claim by noting that there was no evidence that including employee concerns and Native American concerns in the environmental analysis led to an improper conclusion.

On the fourth railroad claim, the court affirmed the Board's decision to decide the case itself rather than appoint an administrative law judge. The Board is authorized to appoint an administrative law judge to issue an initial decision on the TRRC III application; however, the Board may reserve consideration if the issue is of "general transportation importance, or that is required for the timely execution of its functions."[663] The court agreed that the Board's decision to issue a decision directly was justified under the circumstances and not outside of the Board's statutory authority.

On the fifth railroad claim, the court concluded that the Board did not err when it did not address labor protection for employees of competing railroads. NPRC alleged that the Board failed to consider labor protection for BNSF employees, a non-applicant railroad company. The court agreed

660 49 U.S.C. §§ 10901, 10903 (1980). The Board argued that this amended standard was lower than the previous standard, which only allowed the Board to approve new railroads when public convenience and necessity "required" or would "be enhanced" by a new railroad. The "permit" language originally only applied to Board-approved abandonment of railroads. Although the court agreed with NRPC that the Staggers Act merely "harmonized" the abandonment and construction language by making them identical, the court nevertheless agreed with the Board that the resulting language established a lower standard for construction than had existed previously.

661 Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 552 (8th Cir. 2003).

662 49 U.S.C. § 10901 (2006).

663 N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1096 (9th Cir. 2011) (citing 49 U.S.C. § 10327(c) (1994)).

with the Board's interpretation of 49 U.S.C. § 10901(e) and § 11347, which only mandates labor protections for employees of the applicant railroad.[664]

On the sixth railroad claim, the court reversed the decision of the Board because the Board arbitrarily used TRRC II as a "no build" alternative. The Board evaluated the TRRC III application using TRRC II as a currently-authorized proposal, despite the fact that TRRC made it clear that TRRC II was not viable in its approved form. Therefore, the Board was not justified in relying on TRRC II as an alternative to the proposed TRRC III.

The Ninth Circuit ruled on over twenty-one claims brought by NPRC against the Surface Transportation Board. The court reversed and remanded on the Board's cumulative impacts analyses of CBM development, other coalmines, and water quality; the adequacy of baseline data; and the staleness of environmental data. The court also reversed and remanded on the Board's reliance on TRRC II as a "no build" alternative.

4. Save the Peaks Coalition v. United States Forest Service, 669 F.3d 1025 (9th Cir. 2012).

Plaintiffs[665] appealed the United States District Court for the District of Arizona's grant of summary judgment for Defendants,[666] United States Forest Service (USFS) and intervenor Arizona Snowbowl (Snowbowl). The district court found that Plaintiffs' claims were barred by the doctrine of laches.[667] On appeal, Plaintiffs alleged that USFS violated the National Environmental Policy Act (NEPA)[668] and the Administrative Procedure Act (APA)[669] by failing to sufficiently consider the scientific integrity of its analysis of the environmental consequences of making snow with reclaimed wastewater, failing to sufficiently consider the health impacts of human ingestion of such snow, and failing to provide high quality information in its final environmental impact statement (FEIS).[670] The United States Court of Appeals for the Ninth Circuit reversed the district court's ruling that laches applied. However, the court held that neither NEPA nor APA violations

664 The court found support for this position amongst other circuit courts. Ry. Labor Execs. Ass'n v. Interstate Commerce Comm'n, 914 F.2d 276, 278 (D.C. Cir. 1990); Crounse Corp. v. Interstate Commerce Comm'n, 781 F.2d 1176, 1192–93 (6th Cir. 1986); and Mo.–Kan.–Tex. R.R. Co. v. United States, 632 F.2d 392, 411–12 (5th Cir. 1980).

665 The Save the Peaks Coalition, Kristin Huisinga, Clayson Benally, Sylvan Grey, Don Fanning, Jeneda Benally, Frederica Hall, Berta Benally, Rachel Tso, and Lisa Tso.

666 The United States Forest Service and Joseph P. Stinger, the Acting Forest Supervisor for Coconino National Forest, were joined by intervenor, Arizona Snowbowl Resort LP.

667 Laches is an equitable principle that limits a party's right to bring a claim when they have slept on their rights. Save the Peaks Coal. v. U.S. Forest Serv. (*Save the Peaks*), 669 F.3d 1025, 1031 (9th Cir. 2012).

668 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

669 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

670 *Save the Peaks*, 669 F.3d at 1035.

occurred because USFS took a sufficient "hard look" at environmental impacts in its FEIS.

Snowbowl is a ski area on the western side of the San Francisco Peaks that is plagued by poor skiing conditions. Because Snowbowl relies entirely upon natural snowfall for its operations, the snow conditions are highly variable. Faced with economic losses, Snowbowl proposed to make artificial snow using Class A+ reclaimed water. During the proposal stage of this plan, USFS released a draft environmental impact statement (DEIS) and accepted comments from the public. Thereafter, USFS prepared an FEIS analyzing the water quality concerns announced by the public. Subsequently, in June 2005, parties affiliated with Plaintiffs sued USFS for allegedly failing to comply with NEPA in *Navajo Nation v. United States Forest Service*.[671] In deciding the case, the Ninth Circuit upheld summary judgment for Defendants, and Plaintiffs subsequently brought the claims at issue, alleging NEPA violations identical to those brought in *Navajo Nation*.[672] Because of Plaintiffs' involvement in *Navajo Nation*, the district court held that the doctrine of laches applied to bar Plaintiffs' claims.[673]

On appeal, Plaintiffs argued that the doctrine of laches did not apply and that Defendants violated NEPA and the APA. Consequently, the issues before the Ninth Circuit were whether the doctrine of laches applied, and whether USFS violated NEPA and the APA by: 1) failing to thoroughly discuss the environmental consequences of making snow from reclaimed water, 2) failing to ensure the scientific integrity of its analysis, and 3) not disseminating quality information. The Ninth Circuit noted that it had jurisdiction under 28 U.S.C. § 1291[674] and reviewed both the applicability of laches and the grant of summary judgment de novo.[675]

The doctrine of laches limits the time in which a party may bring suit: "a party who sleeps on his rights loses his rights."[676] The establishment of a laches defense requires proof that the opposing party lacked diligence in pursuing its claim, and that prejudice resulted from that lack of diligence.[677] In this case, the Ninth Circuit viewed Plaintiffs' decision not to join in the prior suit as "a gross abuse of the judicial process" that was an "egregious" attempt to "evade res judicata and collateral estoppel."[678] Clearly then,

671 479 F.3d 1024, 1048 (9th Cir. 2007), *rev'd en banc on other grounds*, 535 F.3d 1058 (9th Cir. 2008) (en banc). Save the Peaks' website even described *Navajo Nation* as their "prior court case." *Save the Peaks*, 669 F.3d at 1030.

672 479 F.3d at 1048 (alleging NEPA violations by USFS's failure to "consider adequately the risks posed by human ingestion of artificial snow made from treated sewage effluent").

673 Save the Peaks Coal. v. U.S. Forest Serv., No. CV 09-8163-PCT-MHM, 2010 WL 4961417, at ¶25 (D. Ariz. Dec. 1, 2010).

674 28 U.S.C. § 1291 (2006) (providing appellate jurisdiction over all final decisions of federal district courts).

675 *See* Internet Specialties W., Inc. v. Milon–DiGiorgio Enters., Inc., 559 F.3d 985, 991 (9th Cir. 2009) (reviewing application of the laches defense de novo); *see also* Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 858 (9th Cir. 2005) (reviewing the grant of summary judgment de novo).

676 *Save the Peaks*, 669 F.3d at 1031.

677 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1381 (9th Cir. 1988).

678 *Save the Peaks*, 669 F.3d at 1028, 1032.

Plaintiffs lacked diligence in bringing suit. Even so, Defendants were unable to demonstrate prejudice. For environmental cases, prejudice is concerned with whether the harm to be prevented is now irreversible.[679] In this case, construction of artificial snow production had not begun when the suit was filed, and because economic harm does not establish prejudice unless expenditures took place prior to the lawsuit, Defendants could not demonstrate prejudice. Thus, the court held that laches did not apply.[680]

As for the alleged violations of NEPA and the APA, the Ninth Circuit affirmed the district court. In regards to USFS's consideration of human ingestion, NEPA requires agencies to take a "hard look" at proposed actions.[681] Only if an agency's decision is arbitrary and capricious may a court set it aside.[682] Here, the FEIS was "replete" with examples of USFS's consideration of risks posed by ingestion, and USFS even evaluated studies regarding the health effects of drinking reclaimed water.[683] Consequently, the Ninth Circuit found that USFS took a hard look at the issue. Additionally, USFS ensured the scientific integrity of its analysis by independently considering the safety of reclaimed water.[684] Finally, the Ninth Circuit declined to reach the issue of USFS's alleged failure to disseminate high quality information regarding ingestion of reclaimed snow because Plaintiffs failed to preserve the argument on appeal.

In sum, the Ninth Circuit reversed the district court's ruling that the doctrine of laches barred Plaintiffs' claims, but affirmed that neither NEPA nor the APA were violated by USFS's issuance of the FEIS.

5. Southeast Alaska Conservation Council v. Federal Highway Administration, 649 F.3d 1050 (9th Cir. 2011).

Defendant-Intervenor State of Alaska appealed the judgment of the United States District Court for the District of Alaska that ruled in favor of Plaintiff-Appellees—including Southeast Alaska Conservation Council and other conservation groups (collectively SEACC)[685]—in their suit against the

679 *Neighbors of Cuddy Mountain*, 137 F.3d at 1382 (quoting Apache Survival Coal. v. United States, 21 F.3d 895, 912 (9th Cir. 1994)).

680 The Ninth Circuit recognized the uniqueness of this case and the possibility of prejudice, but it declined to further investigate the existence of prejudice. *Save the Peaks*, 669 F.3d at 1035. Rather than answering that complex question, the Ninth Circuit addressed the district court's alternative finding that USFS had not violated NEPA or the APA. *Id.* at 1034–35.

681 Lands Council v. McNair, 629 F.3d 1070, 1075 (9th Cir. 2010).

682 Se. Alaska Conservation Council v. Fed. Highway Admin., 649 F.3d 1050, 1056 (9th Cir. 2011).

683 *Save the Peaks*, 669 F.3d at 1036.

684 Although Plaintiffs argued that USFS based its decision on studies by the Arizona Department of Environmental Quality (ADEQ), the FEIS did not reference ADEQ's analysis. *Id.* at 1037–38.

685 Plaintiffs included Southeast Alaska Conservation Council, Skagway Marine Access Commission, Lynn Canal Conservation, Inc., Alaska Public Interest Research Group, Sierra Club, and Natural Resources Defense Council.

Federal Highway Administration (FHWA).[686] Intervening on behalf of defendants, the State of Alaska argued that the district court erred when it held that the environmental impact statement (EIS) issued by FHWA violated the National Environmental Policy Act (NEPA)[687] because the EIS failed to consider non-construction plans to improve surface access to the Juneau, Alaska area. The district court vacated FHWA's record of decision (ROD) and enjoined both the construction of the project and activities dependent upon the issuance of a valid EIS. The United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment and held that Alaska's EIS violated NEPA because it failed to examine a viable and reasonable alternative to the proposed project or to adequately justify this omission.

In the early 1990s, the Alaska Department of Transportation and Public Facilities (ADOT) aimed to increase access to Juneau from the surrounding communities of the Lynn Canal corridor through the Juneau Access Improvements Project (Project). The Alaska Marine Highway System (AMHS), which included the state-owned ferry system operated by ADOT, linked Juneau to other cities in Alaska, Canada, and the lower forty-eight United States.

Permit requirements and political agendas slowed the Project's progress. In 2002, Alaska Governor Frank Murkowski ordered ADOT to complete the EIS. Since more than three years had passed since the first draft EIS, ADOT determined that a supplemental draft was necessary to address environmental impacts and other substantial changes. Of the ten alternatives to the Project listed in the supplemental draft EIS, a majority involved expensive large-scale construction.[688]

In January 2005, ADOT and FHWA released the supplemental draft EIS for public comment. Despite SEACC comments urging FHWA to consider improving the existing facility, ADOT identified Alternative 2B[689] as the preferred alternative in the final EIS released in January 2006. Because completion of Alternative 2B would have substantial environmental impacts,[690] SEACC again submitted comments focusing on modifications to current ferry operations. FHWA ultimately issued an ROD approving Alternative 2B as the proposed solution in April 2006. ADOT and FHWA began implementing the Project immediately in May 2006.

686 Defendants included FHWA, United States Department of Transportation, United States Forest Service, United States Department of Agriculture, and individual federal officers.

687 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

688 The "No Action" Alternative would continue the existing AMHS; Alternatives 2, 2A, 2B, and 2C would construct a new east Lynn Canal Highway and a new ferry terminal for the AMHS; Alternative 3 would build two new ferry terminals for the AMHS; and Alternatives 4A, 4B, 4C and 4D would construct new ferry lines to operate alongside the AMHS.

689 ADOT selected Alternative 2B as the preferred plan in August 2005. ADOT had previously chosen and abandoned a different plan because it required constructing a highway in lands protected under section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 (2006).

690 Environmental impacts would include loss of wetlands and terrestrial habitat as well as possible reduction of brown bear habitat and relocation of bald eagle nests. Se. Alaska Conservation Council v. Fed. Highway Admin., 649 F.3d 1050, 1054 (9th Cir. 2011).

In August 2006, SEACC sought review of the Project on the grounds that it violated NEPA in addition to other environmental law statutes.[691] SEACC moved for summary judgment on the basis that FHWA acted arbitrarily when it failed to consider the improvement of existing sources as a reasonable alternative.[692] On April 6, 2009, the district court granted SEACC's motion and vacated the ROD, holding that the EIS violated section 4332(2)(C)(iii) of NEPA by failing to consider non-construction alternatives. The district court then enjoined construction of the project and any activities related to the EIS. Alaska appealed this decision on June 4, 2009.

The Ninth Circuit reviews an agency's compliance with NEPA under the Administrative Procedure Act (APA)[693] and must set aside a decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[694] The court evaluates whether a district court based its decision on "relevant factors" and whether the decision was "a clear error of judgment."[695] NEPA requires that a federal agency's EIS thoroughly consider all reasonable alternatives to the proposed action and provide an explanation if an alternative is deemed unacceptable.[696] The court has previously found an EIS inadequate when the agency fails to evaluate reasonable alternatives.[697]

The court agreed with SEACC's argument that FHWA acted arbitrarily in selecting alternatives because all of the suggested alternatives examined in the EIS had similar risks of reducing services and increasing costs.[698] The court found that FHWA's failure to consider the reasonable alternative of improving the existing structure constituted a violation of section 4332(2)(C)(iii) of NEPA. The Ninth Circuit agreed with the district court's finding that the defendants had not considered SEACC's proposal in the final EIS's No Action Alternative. The court then found that the No Action

691 SEACC asserted that the Project also violated the National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)); the Bald and Golden Eagle Protection Act of 1940, 16 U.S.C. §§ 668–668d (2006); and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

692 *See* 40 C.F.R. § 1502.14(a) (2011) (requiring "rigorous" exploration and evaluation of "reasonable alternatives").

693 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

694 *Id.* § 706(2)(A).

695 Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

696 *Se. Alaska Conservation Council*, 649 F.3d at 1050, 1056 (9th Cir. 2011) (citing 40 C.F.R. § 1502.14(a) (2010)).

697 *See, e.g.*, Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1038 (9th Cir. 2008); 'Ilio'ulaokalani Coal v. Rumsfeld, 464 F.3d 1083, 1095 (9th Cir. 2006).

698 The overall estimated cost of Alternative 2B included the $88 million proposed in the EIS and another $34 million reflected in the ROD. The court also found that Alternative 2B would increase State costs and reduce services elsewhere, as money from other transportation projects would be used to pay for the Project. *Se. Alaska Conservation Council*, 649 F.3d at 1057.

Alternative did not provide "substantial treatment" of a non-construction alternative, in violation of NEPA.[699]

Alaska made two arguments in its defense. Alaska first asserted that the "optimization" measures that it considered during the drafting of the EIS qualified as consideration of a non-construction alternative. In dismissing this argument the court reasoned that the EIS failed to provide the public and policymakers enough information to "make an informed comparison of the alternatives."[700] Alaska next argued that the EIS demonstration that all AMHS ferries were already operating at full capacity served as evidence that SEACC's non-construction proposal was unreasonable. The court found this argument unsupported because the EIS merely contained a historical overview of the ferry system rather than an analysis of the effects of proposed changes in service. Accordingly, the Ninth Circuit affirmed the district court's decision.

In summary, the Ninth Circuit held that FHWA violated NEPA when it failed to consider non-construction alternatives in its EIS for the improvement of surface access from surrounding communities to Juneau.

In a dissent, Judge O'Scannlain reasoned that FHWA considered the possibility of improving existing facilities in the No Action Alternative through non-capital improvements such as deploying different vessels, changing schedules, and experimenting with different levels and types of service. The judge reminded the court that its role is not to determine the correctness of the chosen alternative[701] and reasoned that NEPA does not require the EIS to consider alternatives that are "remote and speculative,"[702] such as SEACC's non-construction alternative. He noted that SEACC's proposal would divert vessels from one route to another in contravention of the 2004 Southeast Alaska Transportation Plan,[703] and would directly deprive another area of committed resources. Accordingly, Judge O'Scannlain asserted that Alaska did not act arbitrarily or capriciously in deciding not to separately analyze SEACC's proposal.

699 *See* 40 C.F.R. § 1502.14(b) (2011) (requiring discussion of reasonable alternatives in an EIS to "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate the comparative merits").

700 Animal Def. Council v. Hodel, 840 F.2d 1432, 1439 (9th Cir. 1988), *amended by* 867 F.2d 1244 (9th Cir. 1989).

701 Headwaters, Inc. v. U.S. Bureau of Land Mgmt., 914 F.2d 1174, 1181 (9th Cir. 1990) ("[A]n agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative.").

702 *Id.* at 1180 (quoting Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974)).

703 ALASKA STAT. § 44.42.050(a) (2011) (detailing Alaska's comprehensive "[s]tate transportation plan").

6. Tri-Valley CAREs v. United States Department of Energy, 671 F.3d 1113 (9th Cir. 2012).

Plaintiff Tri-Valley Communities Against a Radioactive Environment (Tri-Valley CAREs),[704] a citizens group, filed a lawsuit under the National Environmental Policy Act (NEPA)[705] against the United States Department of Energy (DOE).[706] The lawsuit challenged the sufficiency of a final revised environmental assessment (FREA) prepared by DOE regarding a proposed "biosafety 3" (BSL 3) facility at the Lawrence Livermore National Laboratory (LLNL). The United States District Court for the Northern District of California granted summary judgment to DOE. Tri-Valley CAREs appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit upheld the district court's grant of summary judgment to DOE.

In 2002, the National Nuclear Security Administration, an agency within DOE, authorized construction of a BSL 3 laboratory in Livermore, California at LLNL. BSL 3 laboratories work with dangerous pathogens that can infect humans and travel by air. Although there are more than 1350 BSL 3 laboratories in the United States, the facility at LLNL was the only BSL 3 laboratory operating at the same site as a nuclear laboratory. DOE prepared an environmental assessment (EA) for the proposed facility. Among other things, this EA evaluated the threat posed by an *accidental* "catastrophic release" of pathogens. DOE used a Maximum Credible Event (MCE) model to simulate the greatest impact that an accidental release of pathogens could reasonably cause. The United States Army (Army) pioneered this model, which mimics the effects of what would happen if defective vials of pathogens broke open in a centrifuge, releasing ten billion pathogens into the air. Whereas the Army found an "extremely remote" chance of public exposure to pathogens when it applied the model to its own labs, DOE found an even lower risk in light of site-specific factors. The BSL 3 facility filters all inside air through two banks of 99.97% effective HEPA filters, is located a half-mile from the nearest public area, and experiences wind speeds that would rapidly diffuse the concentration of remaining pathogens. Accordingly, DOE issued a finding of no significant impact (FONSI).

In 2003, Tri-Valley CAREs filed suit in the Northern District of California, challenging the sufficiency of the EA under NEPA. The district court granted summary judgment to DOE.[707] Tri-Valley CAREs appealed to the Ninth Circuit. The Ninth Circuit reversed in part, on the grounds that although the EA considered the impact of an *accidental* pathogenic release,

704 In addition to Tri-Valley CAREs, Plaintiffs included individuals Marylia Turner and Janis Kate Turner.

705 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

706 In addition to DOE, Defendants included the National Nuclear Security Administration, an agency within DOE, and the Lawrence Livermore National Laboratory (LLNL), a research laboratory working on classified nuclear weapon design.

707 Tri-Valley CAREs v. DOE, No. CV 03-3926-SBA, 2004 WL 2043034, at *21 (N.D. Cal. Sept. 10, 2004).

DOE failed to consider the impact of an *intentional* terrorist attack on the facility.[708]

In 2007, DOE prepared a draft revised environmental assessment (DREA) addressing the impacts associated with three terrorist-attack scenarios on the facility: 1) a direct terrorist attack, resulting in loss of containment; 2) the theft and release of pathogens by a terrorist outsider; and 3) the theft and release of pathogens by a terrorist working inside the facility. DOE circulated the DREA for public comment.

In 2008, after evaluating public comments from Tri-Valley CAREs and others, DOE issued its FREA and a FONSI. The FREA was substantially similar to the DREA except for a few substantive updates, including more detailed information about a 2005 anthrax shipping incident. Tri-Valley CAREs filed a new complaint against DOE in the Northern District of California, alleging a multitude of NEPA violations. Tri-Valley CAREs and DOE cross-moved for summary judgment, and the district court granted summary judgment for DOE.

On appeal, Tri-Valley CAREs made three general arguments: 1) DOE failed to take a "hard look" at the risks associated with a potential terrorist attack, as previously directed by the Ninth Circuit; 2) DOE failed to adequately disclose information about several procedural violations relating to the BSL 3 laboratory under section 102(2)(C) of NEPA,[709] thereby depriving the public of a reasonable opportunity to comment; and 3) the district court erred by excluding extra-record evidence from Tri-Valley CAREs that cast doubt on the model DOE used to analyze the impact of a terrorist attack. The Ninth Circuit reviewed the grant of summary judgment on the NEPA claims de novo,[710] and DOE's actions under the arbitrary and capricious standard of the Administrative Procedure Act.[711]

The Ninth Circuit first addressed Tri-Valley CAREs' argument that DOE failed to comply with the Ninth Circuit's mandate that DOE take a "hard look" at the risks associated with a potential terrorist attack. The court reviewed DOE's evaluation of each attack scenario in turn. First, the court considered DOE's evaluation of the impacts of a direct terrorist attack on the BSL 3 facility, such as a "suicidal plane crash or an explosive device delivered by vehicle or on foot."[712] For this scenario, DOE relied upon the same MCE centrifuge model it used in evaluating an accidental release. DOE reasoned that the catastrophic event in the MCE model—an earthquake or accidental plane crash—would result in similar structural damage to the BSL 3 facility as a direct terrorist attack. Additionally, DOE reasoned that the effects of a direct terrorist attack would further mitigate the impact under the MCE model because the BSL 3 at LLNL uses limited quantities of biological agents (as compared to the larger quantity used in the model), fire

708 Tri-Valley CAREs v. DOE (*Tri-Valley CAREs I*), 203 F. App'x 105, 107 (9th Cir. 2006).

709 42 U.S.C. § 4332(2)(C) (2006); 40 C.F.R. § 1502.9(c)(1)(ii) (2011).

710 N. Cheyenne Tribe v. Norton, 503 F.3d 836, 845 (9th Cir. 2007).

711 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

712 Tri-Valley CAREs v. DOE (*Tri-Valley CAREs II*), 671 F.3d 1113, 1121 (9th Cir. 2012).

resulting from a direct attack would kill many pathogens, and exposure to ambient environmental conditions would render most remaining microorganisms innocuous.

Tri-Valley CAREs argued that use of the same MCE model to measure the impact of an accidental release and an intentional terrorist attack was improper. The Ninth Circuit disagreed, noting that a Ninth Circuit case released between *Tri-Valley CAREs I* and *Tri-Valley CAREs II* (the case at issue) had specifically approved the use of an MCE model to simulate the outer bounds of a direct terrorist attack, so long as the agency decision to use that model was reasonably justified by agency evidence.[713] In the instant case, DOE reasonably justified its use of the MCE model based on record evidence and site-specific factors that mitigated the effect. The court noted that under NEPA, courts "must refrain from acting as a type of omnipotent scientist," and that when reasonable scientists disagree, the courts must defer to agency experts.[714] Accordingly, DOE took the requisite "hard look" at the threat of terrorist attack.

Second, the court considered DOE's evaluation of the theft and release of pathogens by a terrorist outsider. DOE began its analysis by comparing the type of pathogens available at the LNLL BSL 3 facility to those available at other BSL 3 facilities nationwide. DOE concluded that it was unlikely that a terrorist outsider would attempt to obtain pathogens from the LLNL BSL 3 facility because the facility has more extensive security measures than the other BSL 3 facilities. Specifically, DOE noted that the BSL 3 has a patrolled security fence, a badge requirement for entry, an armed emergency response force, strict limits on who may access individual lab rooms at what times, motion sensors in those lab rooms, and locked freezers.

Tri-Valley CAREs argued that DOE impermissibly used a comparative nationwide analysis to determine that the facility was not an attractive terrorist target because NEPA regulations[715] required DOE to assess the *local* risks of a release. The Ninth Circuit disagreed, noting that the regulations did not limit DOE's discretion to apply a nationwide analysis, and that agencies have the discretion to identify the geographic scope in which to measure a project's impacts on the environment.[716] Because "the addition of a single, highly-guarded BSL 3 facility at LLNL did not significantly alter the status quo," DOE's determination was reasonable.[717]

Third, and finally, the court considered DOE's evaluation of the theft and release of pathogens by a terrorist working inside the facility. Rather than use an empirical model, DOE used a two-step probabilistic analysis. First, DOE assessed the probability that an insider with access to BSL 3 pathogens would have the motive to commit a terrorist attack. DOE

713 San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n (*Mothers for Peace II*), 635 F.3d 1109, 1118–21 (9th Cir. 2011).

714 *Tri-Valley CAREs II*, 671 F.3d at 1126.

715 40 C.F.R. § 1508.27(a) (2011).

716 *See* Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976); Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001).

717 *Tri-Valley CAREs II*, 671 F.3d at 1122.

determined that it was unlikely that an insider would have such a motive because less than ten people had access to pathogens at the BSL 3 facility, and each had to go through independent screenings, authorizations, registrations, and monitoring programs from several different government agencies. Second, DOE evaluated what the risk to the public would be if an insider nevertheless had a terrorist motive. DOE determined that the risk of an effective release was still extremely low because the facility does not contain significant amounts of "ready-to-use" pathogenic material, and the high level of internal scrutiny in the facility would make it extremely difficult to prepare pathogens for release

Tri-Valley CAREs argued that NEPA required DOE to use an empirical rather than probabilistic analysis. The Ninth Circuit disagreed, noting that Ninth Circuit precedent only requires agencies to support a FONSI with a "convincing statement" that the project would not significantly impact the environment.[718] DOE satisfied this requirement because its explanation of the probabilistic analysis carefully defined the scope of inquiry and thoughtfully examined the likelihood of an insider stealing and releasing pathogens.

Having determined that DOE satisfied the Ninth Circuit's mandate from *Tri-Valley CAREs I*, the court next considered whether DOE failed to adequately disclose information about several procedural violations relating to the BSL 3 laboratory. First, the court addressed Tri-Valley CAREs' claim regarding a 2005 anthrax shipping incident. In 2005, an employee at LLNL shipped several thousand anthrax samples in three separate shipments from LLNL to other research laboratories. Some of the vials were not properly sealed, and employees at one of the labs were exposed to anthrax that had leaked into the interior packaging. There were no public health concerns because no anthrax was detected outside the shipping container. DOE briefly discussed the incident in its DREA, although it did not identify anthrax as the agent involved. DOE determined that the long history of safe shipments from LLNL obviated the need for a more detailed discussion. After public comments on the incident, including from Tri-Valley CAREs, DOE included a more detailed discussion of the incident in its FREA.

Tri-Valley CAREs argued that DOE violated the Ninth Circuit's standard in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission* (*Mothers for Peace I*),[719] which held that NEPA's two basic purposes are to: 1) require agency consideration of detailed information concerning significant environmental impacts, and 2) ensure that the public can access and contribute to that body of information through comments.[720] The court disagreed with Tri-Valley CAREs for two reasons. First, DOE satisfied the first purpose of NEPA because DOE carefully considered the risks of fatality from hazardous waste shipping in the original EA, the DREA, and the FREA, and concluded that the risk was less than 0.11 per million shipments, and that the risk from infectious substances was too low to even quantify.

718 Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005).

719 449 F.3d 1016 (9th Cir. 2006).

720 *Id.* at 1034 (citing U.S. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004)).

Second, DOE satisfied the second purpose of NEPA because Tri-Valley CAREs itself submitted comments on the 2005 anthrax shipping incident.

Next, the court declined to determine whether DOE's decision not to discuss "restricted" experiments in its FREA was arbitrary and capricious because Tri-Valley CAREs had not addressed that claim in its opening brief to the district court.[721]

The court also considered whether DOE was required to supplement its FREA after the results of an independent DOE security assessment in 2008 gave the LLNL facility a "significant weaknesses" rating—the lowest rating available. Tri-Valley CAREs argued that NEPA regulations require supplementation of a NEPA analysis in response to significant new information relevant to environmental impacts of a project,[722] and that in this case, DOE failed to supplement its FREA. The Ninth Circuit disagreed with Tri-Valley CAREs, noting that DOE prepared a supplemental report after the critical security assessment. DOE determined that the assessment did not reveal significant new information impacting its assessment of the three terrorist attack scenarios, and that it was thus not required to supplement the FREA. The Ninth Circuit held that it was required to defer to DOE's findings that a supplemental report was not required.[723]

Having determined that DOE properly complied with NEPA, the Ninth Circuit finally considered whether the district court abused its discretion by rejecting Tri-Valley CAREs' motion to supplement the record with a report that undermined DOE's reliance on the MCE model. The Ninth Circuit first noted that Tri-Valley CAREs' motion failed to comply with the Northern District of California Civil Local Rule 7-11(a)[724] and that the district court thus operated well within its discretion to deny Tri-Valley CAREs' motion. Regardless, the Ninth Circuit held that the district court could have denied Tri-Valley CAREs' motion on the merits because extra-record material may only be introduced if it falls within one of four narrowly drawn categories and was available at the time the agency made its decision.[725] Because Tri-Valley CAREs sought to introduce a report that was completed almost two years after litigation began in *Tri-Valley CAREs II*, the district court did not abuse its discretion in denying Tri-Valley CAREs' motion to supplement the record.

In conclusion, the Ninth Circuit affirmed the district court's grant of summary judgment to DOE because DOE gave a "hard look" at the risk of a

721 Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) (holding that arguments not raised in a party's opening brief are deemed waived).

722 40 C.F.R. § 1502.9(c)(1)(ii) (2011).

723 The court cited *Wisconsin v. Weinberger*, 745 F.2d 412, 416–17 (7th Cir. 1984), for this proposition.

724 N.D. CAL. CIV. R. 7-11(a) (requiring that any motion for administrative relief include a stipulation explaining why a stipulation is unavailable), *available at* http://www.cand.uscourts.gov/filelibrary/184/All-LocalRules-9-2011-CW.pdf.

725 *See* Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 703–04 (9th Cir. 1996) (outlining the four narrowly drawn categories); *see also* Rock Creek Alliance v. U.S. Fish & Wildlife Serv., 390 F. Supp. 2d 993, 1003 (D. Mont. 2005) (holding that extra-record material must have been available to the agency at the time it was making its challenged decision).

terrorist attack at the LLNL BSL 3 facility and adequately disclosed information pertaining to procedural violations at the facility so that the public had a reasonable opportunity to comment. Additionally, the court found that the district court did not abuse its discretion by denying Tri-Valley CAREs' motion to supplement the record because the motion failed to comply with local rules, and the supplemental evidence would not have been available to DOE at the time it made its final FONSI.