CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Clean Air Act

1. El Comité Para el Bienestar de Earlimart v. U.S. Environmental Protection Agency, 786 F.3d 688 (9th Cir. 2015).

In this case, El Comité Para el Bienestar de Earlimart and several other community organizations (collectively, El Comité),[1] petitioned for judicial review of the United States Environmental Protection Agency's (EPA) 2012 final action approving revisions to California's State Implementation Plan (SIP) for achieving emission standards under the Clean Air Act (CAA).[2] Specifically, El Comité argued that EPA's approval of California's Pesticide Element and Fumigant Regulations, which established goals for reducing volatile organic compound (VOC) emissions, 1) was unreasonable in light of the SIP's plain language, 2) ignored an earlier remand order requiring EPA to ensure enforceability of the Element's emission reduction commitments, and 3) was prohibited due to EPA's failure to secure "necessary assurances"[3] from California that the SIP would not violate Title VI of the Civil Rights Act[4] by exposing Latino schoolchildren to a disparate impact from pesticide use. The Ninth Circuit considered the steps EPA had taken in approving the plan and found that: 1) EPA had interpreted ambiguities in the Pesticide Element in a reasonable manner, 2) EPA did not need to consider the enforceability of earlier control measures because EPA could enforce the revised control measures, and 3) EPA had reasonably determined that California had supplied the necessary assurances that enforcement of the new Pesticide Element would comply with federal law, including Title VI of the Civil Rights Act. The court therefore upheld EPA's final order approving the revised SIP.

1 Petitioners included Association of Irritated Residents, Wishtoyo Foundation, and Ventura Coastkeeper.

2 42 U.S.C. §§ 7401–7671q (2012). SIPs are provided for by *id.* § 7410.

3 *Id.* § 7410(a)(2)(E).

4 Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to d-7 (2012).

Prior to this case, *El Comité Para el Bienestar de Earlimart v. Warmerdam* (*El Comité I*)[5] was litigated to enforce emissions standards in the Pesticide Element of California's 1994 SIP. The 1994 Element committed California to reducing VOC emissions by a maximum of 20% from the 1990 baseline by 2005 and gave California's Department of Pesticide Regulation (DPR) the authority to adopt additional regulatory measures to ensure those reductions were achieved. EPA approved the Pesticide Element after California submitted additional supporting documentation. DPR then determined that no further regulations were needed to meet its reduction commitments. Among other challenges, El Comité filed a petition for review challenging EPA's approval of the Pesticide Element on the grounds that the Element contained no enforceable commitments. The Ninth Circuit remanded the petition to EPA with instructions to determine whether EPA could enforce the Pesticide Element's commitments. Before EPA complied with that order, California submitted its revised 2009 SIP. The revised SIP's Pesticide Element established permissible fumigant emissions levels as well as methods to achieve those limitations and monitor compliance. EPA approved the revisions in 2012 after determining that the revisions included enforceable emission reduction standards. At that point, El Comité filed the petition at issue in this case.

This case required the Ninth Circuit to resolve three issues related to EPA's approval of California's revised SIP. The court considered 1) whether EPA reasonably interpreted the Pesticide Element; 2) whether the revised Pesticide Element was sufficiently enforceable; and 3) whether California had supplied adequate assurances of compliance with federal law. First, the court concluded that EPA's interpretation of the Pesticide Element's VOC reduction commitments was reasonable in light of ambiguity in the Element's language. El Comité argued that the Pesticide Element unambiguously required a 20% reduction in emissions for the San Joaquin Valley rather than the 12% reduction approved by EPA, and that EPA failed to consider whether the revision from 12% to 20% violated the Act's "anti-backsliding" provision.[6] The court, however, agreed with EPA that the Pesticide Element ambiguously and inconsistently referenced both 12% and 20% VOC emission reduction commitments. Based on that ambiguity, the court deferred to EPA's interpretation setting the Pesticide Element's reduction commitment at 12%.

Second, the Ninth Circuit agreed with EPA that the revised Pesticide Element established enforceable emission reduction regulations. The court first deferred to EPA's conclusion that the Element's fumigant regulations were sufficient to keep pesticide VOC emissions below required levels because EPA based that determination on a consideration of the relevant factors and there had been no clear error in EPA's judgment. The court next deferred to EPA's determination that the fumigant regulations' failure to

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5 539 F.3d 1062 (9th Cir. 2008).

6 *See* 42 U.S.C. § 7410(l) (2012) (mandating that the Administrator must not approve a revision to an implementation plan that interferes with any applicable requirement with regard to attainment, reasonable further progress, or any other requirements under the CAA).

regulate nonfumigant VOC emissions was acceptable because the regulations were still designed to reduce overall VOC emissions by 12% as required by the Pesticide Element. The court finally deferred to EPA's decision to ignore the remand order in *El Comité I* instructing EPA to consider the enforceability of the original Pesticide Element because EPA had determined that the revised Element was enforceable.

Finally, the Ninth Circuit upheld EPA's acceptance of California's assurances of compliance with Title VI of the Civil Rights Act because EPA provided a reasoned explanation for its determination. During the comment period on the proposed revision, El Comité submitted evidence that it claimed showed that the revised SIP could have a disparate impact on Latino schoolchildren in violation of Title VI of the Civil Rights Act. El Comité argued that the revision potentially violated the CAA, which requires states to provide EPA with the necessary assurances that no federal or state law prevents implementation of any portion of the SIP.[7] In support, El Comité submitted EPA's findings and analysis undertaken as part of an earlier administrative complaint, in which EPA determined that DPR's renewal of a pesticide registration would have a disparate impact on Latino schoolchildren, along with EPA's subsequent settlement agreement with DPR. California responded by submitting to EPA proof of the state's compliance with the earlier settlement agreement along with reports indicating that the revised SIP would reduce overall pesticide emissions. EPA, in turn, determined that California had provided the necessary assurances of compliance with state and federal law. El Comité argued that EPA should have scrutinized California's assurances more closely, but the Ninth Circuit deferred to EPA's determination and explained that EPA must provide a reasoned judgment as to whether a state has supplied the necessary assurances of compliance with state and federal law, but that the actual nature of those assurances is left to EPA's discretion.

The Ninth Circuit ultimately upheld EPA's final action approving California's 2012 revised SIP, including EPA's interpretation of the SIP's Pesticide Element. The court thus denied El Comité's petition for judicial review.

2. Committee for a Better Arvin v. U.S. Environmental Protection Agency, 786 F.3d 1169 (9th Cir. 2015).

In this case, the Committee for a Better Arvin, along with a coalition of environmental and community groups (collectively, Committee for a Better Arvin),[8] sought judicial review of the United States Environmental Protection Agency's (EPA) actions from the Ninth Circuit Court of Appeals. Committee for a Better Arvin asserted that EPA erred in approving California's plans to comply with air quality standards under the Clean Air

[7] *Id.* § 7410(a)(2)(E).

[8] Petitioners include the Comite Residentes Organizados al Servicio del Ambiente Sano, and Association of Irritated Residents.

Act (CAA).[9] The Ninth Circuit granted in part, denied in part, and remanded to EPA.

Under the CAA, states are required to create a State Implementation Plan (SIP), which establishes measures for complying with National Ambient Air Quality Standards (NAAQS).[10] Areas that do not currently meet those standards are known as nonattainment areas.[11] Initially the proposed SIP is made open to the public, and after public notice and hearings, EPA is required to review the SIP and either approve it or reject it in part or in whole.[12] Committee for a Better Arvin challenged EPA's approval of revisions to California's 2007 SIP, and specifically challenged the revised NAAQS compliance plans for two pollutants: fine particulate matter and ozone. Although separate petitions were filed for each pollutant, the court addressed them collectively as both petitions were closely related and involved the same parties.

The court first noted that Congress gave EPA general rulemaking authority with respect to the CAA. As a result, the court reviewed EPA's actions to determine whether the actions were reasonable or inconsistent with the CAA. The court found that, because the revised SIP did not contain requisite mobile emission standards, EPA violated the CAA by approving the revisions. However, the court also found that EPA did not violate the CAA by failing to require California to include other state mechanisms in the SIP and that the other control measures approved by EPA were enforceable.

First, Committee for a Better Arvin argued that EPA's approval of California's SIP violated the CAA. California's SIP calculated necessary emission reductions and forecasts based on state adopted measures (waiver measures), which were not incorporated into the SIP. While the CAA provides a private right of action for citizens to enforce a SIP's provision through federal court,[13] only those provisions included in the SIP are subject to such enforcement.[14]

EPA argued that the CAA does not require including waiver measures in the SIP due to EPA's longstanding policy of not requiring the inclusion of waiver measures in California's SIPs and because Congress ratified the longstanding policy in the CAA's savings clause.[15] The court rejected this argument and focused on the plain language of § 7410(a) of the CAA, which stated that SIPs "shall include" all emissions, control measures, means, and techniques on which the state relies.[16] In addition, the court found that the savings clause does not apply to policies that are "inconsistent with any provisions of this chapter."[17] Since EPA's policy was inconsistent with the

9 42 U.S.C. §§ 7401–7671q (2012).

10 *Id.* §§ 7409–7410.

11 *Id.* § 7407(d)(1)(A)(i).

12 *Id.* § 7410(k)(3).

13 *Id.* § 7604.

14 El Comité Para el Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1069 (9th Cir. 2008).

15 42 U.S.C. § 7410(a)(2)(A) (2012).

16 *Id.* § 7410(a).

17 *Id.* § 7515.

plain language of § 7410(a), the court held that EPA violated the CAA by approving California's SIP without the inclusion of waiver measures.

Committee for a Better Arvin also argued that EPA erred by not requiring the inclusion of three nonwaiver measures into California's SIP. In response, EPA argued that one of the measures was partially invalidated by the California Supreme Court, while the other two measures would have only a de minimis effect on emission reductions and did not affect California's ability to meet air quality standards. The court agreed with EPA, finding that the first nonwaiver measure was properly excluded from the SIP because the measure was partially invalidated by the California Supreme Court, and that EPA's conclusion that the remaining nonwaiver measures would have only a de minimis impact on overall emission reduction was not arbitrary and capricious, or contrary to law.

Committee for a Better Arvin went on to argue that EPA's approval of California's proposed control strategies to comply with NAAQS was in violation of the CAA. Committee for a Better Arvin reasoned that California's commitment to achieve aggregate emission reductions was merely an aspirational goal because the commitment contained no specific strategies or measures. It claimed that California could simply fail to meet individual emission reductions targets as long as the aggregate reduction commitment was met. The court rejected this argument, finding that, because commitments in the SIP required California to meet specific reductions by specific deadlines, California's commitment to propose and adopt emission control measures was not merely an aspirational and unenforceable goal.

In the alternative, Committee for a Better Arvin argued that the commitments were unenforceable because California had discretion whether to change or honor the commitments. The court rejected this argument as well and reasoned that, once approved, commitments in the SIP would be binding and could only be changed with EPA's approval. The court went on to note that EPA may not approve any SIP revision that would interfere with California's ability to meet air quality requirements.[18]

Lastly, Committee for a Better Arvin argued that the commitments were unenforceable because it would be impossible to bring a timely objection if commitments were not met by the deadline. Petitioners reasoned that information on whether state agencies have fulfilled their commitments is held exclusively by the California Air Resources Board and the Intervenor, San Joaquin Valley Unified Air Pollution Control District, and is not available to the public. Further, even if the public could determine whether California's commitments were fulfilled, this determination would not be known until after the deadline, at which point it would be too late to sue for enforcement.

The court rejected Committee for a Better Arvin's argument, explaining that all relevant information was available throughout the regulatory process prior to the adoption of emission control measures. In addition, the court rejected Petitioner's timing argument. The court reasoned that just because

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[18] *Id.* § 7410(a)(1).

the public cannot sue to enforce a commitment until after the deadline has passed does not negate the commitment's enforceability. The court concluded that if California did not fulfill its commitment, the public could seek a remedy for such violations, and EPA could use means available in the CAA to ensure that California attains relevant NAAQS in a timely manner.

3. National Parks Conservation Ass'n v. U.S. Environmental Protection Agency, 788 F.3d 1134 (9th Cir. 2015).

In this case, PPL Montana and the National Parks Conservation Association (NPCA)[19] challenged the United States Environmental Protection Agency's (EPA) regional haze regulations under the Clean Air Act (CAA)[20] for the state of Montana. PPL Montana, owners and operators of the Colstrip Steam Electric Generating Station (Colstrip) and the J.E. Corette Steam Electric Generating Station (Corette), petitioned for review of EPA's Best Available Retrofit Technology (BART) determinations at Colstrip and Corette, arguing that the regulations were too strict.[21] NPCA petitioned for review of the same determinations, but argued that the regulations did not do enough to remedy visibility impairment caused by regional haze. Thus, for different reasons, both PPL Montana and NPCA argued that the regulations for Colstrip and Corette were arbitrary and capricious. After consolidating the various petitions, the Ninth Circuit held that many of EPA's regional haze regulations for Colstrip and Corette were arbitrary and capricious, and as such in violation of the CAA.

The CAA requires EPA to promulgate regulations to "assure . . . reasonable progress toward meeting the national goal" of regional haze reduction.[22] The CAA gives states the option to submit to EPA a State Implementation Plan (SIP) setting forth emission limits and other measures necessary to make reasonable progress toward the national visibility goal.[23] If a state chooses not to submit a SIP, the CAA requires EPA to produce a Federal Implementation Plan (FIP) for that state.[24] All implementation plans must require installation of BART to reduce emissions from certain emission sources.[25] Five statutory factors determine which type of emissions-reducing technology constitutes BART.[26] The CAA requires EPA to explain the basis for its decisions, including underlying factual bases, methods of analysis,

19 Petitioners included Montana Environmental Information Center and the Sierra Club.

20 42 U.S.C. §§ 7401–7671q (2012). The regional haze regulations are codified at 42 U.S.C. §§ 7491–7492 (2012).

21 *Id.* § 7491(b)(2)(A).

22 *Id.* § 7491(a)(4).

23 *Id.* §§ 7410(a), 7491(b)(2).

24 *Id.* § 7410(c)(1)(A).

25 *Id.* § 7491(b)(2).

26 The five factors are; "[T]he cost of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the [emission] source, and the degree of improvement in visibility which [is] anticipated." *Id.* § 7491(g)(2).

and legal and policy considerations.[27] EPA must also respond to the comments and new data submitted during the comment period.[28]

The State of Montana did not submit a SIP, so EPA published a proposed FIP requiring PPL Montana to take actions to reduce emissions of nitrogen oxide (NO_X) and sulfur dioxide (SO_2) at Colstrip and Corette.[29] Both PPL Montana and NPCA commented on the Proposed FIP. EPA responded to the comments of petitioners, but its final FIP implemented the proposed FIP in almost all respects relevant to the appeal.

EPA concluded that the targeted reduction of NO_X emissions at Colstrip Units 1 and 2 could be achieved by installing both separated overfire air (SOFA) and selective non catalytic reduction (SNCR) technologies. NPCA contended that EPA failed to justify its rejection of selective catalytic reduction (SCR)—a more aggressive technology than SNCR—in addition to SOFA. PPL Montana, on the other hand, contended that EPA failed to justify the need for SOFA and SNCR, rather than SOFA alone. EPA identified the costs of the various technologies for NO_X reduction, but offered little reasoning for its selection of SOFA and SNCR together. The Ninth Circuit concluded that EPA's BART determination for NO_X emissions at Colstrip Units 1 and 2 was arbitrary and capricious because EPA did not provide a reasoned response to the petitioners' comments. The Ninth Circuit explained that, while the CAA does not require EPA to justify its cost-effectiveness decisions with a bright-line rule, the law does require EPA to provide a reasoned explanation for why it exercised its discretion in a particular way.

Both petitioners disputed the rationality of EPA's selection of a fourth scrubber as BART for SO_2 emissions control at Colstrip Units 1 and 2 for essentially the same reasons they disputed EPA's NO_X BART determinations. The parties argued that EPA's cost-effectiveness analysis with regard to SO_2 again failed to explain what made the cost reasonable in light of potential visibility benefits. On this issue, the Ninth Circuit found that EPA thoroughly and rationally explained its response to NPCA's objection.[30] However, the court also determined that EPA's response to PPL Montana did not adequately explain its rationale for its cost-effectiveness analysis and failed to explain why the benefits of a fourth scrubber justified its cost. Therefore,

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27 *Id.* § 7607(d)(6)(A).

28 *Id.* § 7607(d)(6)(B).

29 To reduce NO_X, the Proposed Rule required PPL Montana to install two new technologies at Colstrip Units 1 and 2 of the four-unit Colstrip station. To reduce SO_2, the Proposed Rule required PPL Montana to implement new technologies at Colstrip Units 1 and 2—lime injection and a fourth "scrubber." At the Corette station, the Proposed Rule imposed 30-day average rolling emission limits of 0.40 lb/mmBtu for NO_X and 0.70 lb/mmBtu for SO_2 and required PPL Montana to achieve this by using its current technology.

30 NPCA contended that EPA should have considered requiring installation of advanced scrubbers at Colstrip, not just the introduction of an additional scrubber. But EPA sufficiently explained that its "BART Guidelines recommend constructing a new system when a current control system achieves less than 50 percent removal efficiencies . . . and therefore EPA is not required to consider replacement technology." Nat'l Parks Conservation Ass'n v. U.S. Envtl. Prot. Agency, 788 F.3d 1134, 1145 (9th Cir. 2015) (quotation marks and citations omitted).

the court found that EPA's requirement to install a fourth scrubber at Colstrip Units 1 and 2 was arbitrary and capricious.

PPL Montana and NPCA also argued that EPA's BART determinations at Colstrip Units 1 and 2 were arbitrary and capricious because they were inconsistent with EPA's Corette analysis. Corette did not require additional controls even though the cost and potential visibility impacts were similar. PPL Montana questioned why EPA required more of Colstrip 1 and 2 than Corette, while NPCA questioned why Corette was not held to the same standard as Colstrip 1 and 2. The Ninth Circuit agreed with both petitioners that the unexplained inconsistencies in EPA's cost-effectiveness reasoning made EPA's BART determination arbitrary and capricious.

PPL Montana further objected to EPA's use of the CALPUFF visibility model in determining BART at Colstrip Units 1 and 2. CALPUFF is a model used to estimate an emissions source's impact on visibility.[31] PPL Montana claimed that because the maximum potential incremental visibility benefit of SNCR fell within CALPUFF's margin of error, it could not be reasonably anticipated to improve visibility.[32] EPA's failure to adequately address PPL Montana's concerns over CALPUFF's utility further supported the Ninth Circuit's conclusion that the requirement to install SNCR at Colstrip Units 1 and 2 was arbitrary and capricious.

PPL Montana also challenged the emissions limitations for Corette, asserting the CAA does not authorize EPA to impose emissions limits without determining BART.[33] The court held that EPA sufficiently explained that, after it already found BART was in place at Corette, it could skip the remaining analyses, including the visibility analysis, and impose emissions limitations. The Ninth Circuit concluded that PPL Montana's contention was, in fact, a challenge to the Regional Haze Rule, and thus not a proper challenge to Montana's FIP. Additionally, PPL Montana and EPA disagreed on whether converting emissions limits to 30-day rolling averages would require EPA to raise the limits set forth in the Proposed Rule. The Ninth Circuit concluded that the complexity of the issue justified deference to EPA's reasoned judgment.

Finally, NPCA argued that EPA's decision not to require any additional emission reducing technology at Colstrip Units 3 and 4 was arbitrary and capricious and contrary to the CAA's reasonable progress requirement. EPA replied that the visibility benefits from requiring SCR at Colstrip Units 3 and 4 were not sufficient and compared the potential benefits to another station where improvements were cost-justified.[34] The Ninth Circuit held that EPA's explanation was reasonable with respect to Colstrip Units 3 and 4 because

31 40 C.F.R. pt. 51 app. Y § III.A.3.

32 PPL Montana also objected to the application of CALPUFF to Colstrip and Corette because of their distance from Class I areas, contending that the model is inaccurate at such great distances. To this, EPA had a valid response.

33 *See* 42 U.S.C. § 7491(g)(2) (2012).

34 EPA contrasted this effectiveness with what was implemented in North Dakota at Antelope Valley Station, a location to which NPCA specifically urged comparison. The cost was much lower at that location relative to its reasonable progress.

the explanation provided NPCA with at least some broad metric for understanding which cost-per-ton ratios EPA will approve and which it will not.

In conclusion, the Ninth Circuit held that EPA did not offer a rational explanation in response to a number of the petitioners' comments concerning regulations on Colstrip Units 1 and 2 and Corette. EPA's responses in those instances were therefore arbitrary and capricious. PPL Montana showed that the requirement of additional technology at Colstrip Units 1 and 2 and to some extent Corette was arbitrary and capricious, while NPCA failed to show that the fourth scrubber at Colstrip Units 1 and 2 was necessary and also that additional technology was justified at Colstrip Units 3 and 4. The court granted in part and denied in part the petitions for review, vacated the portions of the Rule setting emissions limits at Colstrip Units 1 and 2 and Corette, and remanded to EPA for further proceedings.

4. Association of Irritated Residents v. U.S. Environmental Protection Agency, 790 F.3d 934 (9th Cir. 2015).

In this case, the Association of Irritated Residents (AIR) filed a petition for review in the Ninth Circuit Court of Appeals. AIR challenged the United States Environmental Protection Agency's (EPA)[35] promulgation of 40 C.F.R. § 52.245 under section 110(k)(6) of the Clean Air Act (CAA)[36] on two grounds. First, AIR alleged that EPA's determination that EPA had mistakenly approved certain New Resource Review rules in 2004 as part of California's State Implementation Plan (SIP) was not reasonable. Second, AIR alleged that, even assuming EPA's error determination was reasonable, the measure that EPA used to correct the error was outside the scope of EPA's statutory authority under the CAA. The Ninth Circuit denied the petition, finding that EPA did not act arbitrarily or capriciously in its error determination because EPA gave adequate consideration to relevant factors and arrived at a rational conclusion. The Ninth Circuit analyzed EPA's interpretation of section 110(k)(6) of the CAA under the *Chevron*[37] two-step, and found that EPA's interpretation was permissible.

Under the CAA, states have the primary responsibility to develop emission limits.[38] This responsibility involves creating a SIP,[39] which sets out how the state intends to achieve the National Ambient Air Quality Standards (NAAQS) set by EPA at levels necessary to protect the public health and welfare.[40] The state then submits the SIP to EPA for approval. Before EPA can accept a SIP, the state must give EPA necessary assurances that state

35 Respondent-intervenors included Air Coalition Team, Dairy Cares, Foster Farms, LLC, Foster Poultry Farms, and San Joaquin Valley Unified Air Pollution Control District.

36 42 U.S.C. §§ 7401–7671q (2012). Section 110(k)(6) is codified at 42 U.S.C. § 7410(k)(6) (2012).

37 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

38 42 U.S.C. § 7407(a) (2012).

39 *Id.*

40 *Id.* § 7409.

law authorizes the air control districts to carry out the SIP.[41] Once the SIP is accepted it has "the force and effect of federal law."[42] In this case, California delegated its responsibility to the San Joaquin Valley Unified Air Pollution Control District (the District).

In 1977, Congress enacted the CAA's New Source Review (NSR) program.[43] At the time, California had a law exempting agricultural operations, both major and minor, from NSR obligations. A major source is a source that emits above a threshold level of any air pollutant. The NSR added a requirement that new and modified major sources in nonattainment areas must, among other things, acquire NSR construction permits and purchase offset credits.[44] This additional requirement does not extend to minor sources.[45] In 2004, EPA designated the San Joaquin Valley as a nonattainment area, triggering the NSR's requirement that major sources acquire NSR permits and purchase offset credits. Because California's agricultural exemption was now in conflict with the NSR requirements, any SIP the District proposed to EPA would be rejected because the District could not give the requisite necessary assurances that it could carry out an SIP under California state law.

In order to resolve this conflict California passed SB 700,[46] which required major sources to acquire NSR permits and purchase offset credits, but exempted minor sources from the permit and offset requirements. At around the same time SB 700 was passed, the District proposed and approved its 2004 NSR Rules, which required NSR permits and offset requirements for major and minor sources. AIR then filed lawsuits against minor sources for their noncompliance of the District's newly approved 2004 NSR Rules. In defense, these minor sources contended they were following applicable state law under SB 700. Ultimately, a district court granted summary judgment to AIR because the minor sources had violated the 2004 NSR Rules.[47] EPA then realized its error in approving the 2004 NSR Rules. To resolve the conflict between the 2004 NSR Rules and SB 700, California submitted SIP revisions in 2010 to amend the 2004 NSR Rules retroactively. However, to eliminate the mismatch between the SIP and state law that had existed between the 2004 approval and the 2010 amendments, EPA relied on section 110(k)(6) of the CAA, and proposed amending its 2004 NSR Rules approval to be consistent with SB 700. AIR then filed this lawsuit challenging EPA's error determination and EPA's error-correcting method under section

41 *Id.* § 7410(a)(2)(E).

42 Safe Air for Everyone v. U.S. Envtl. Prot. Agency, 488 F.3d 1088, 1091 (9th Cir. 2007) (internal quotation marks and citation omitted).

43 Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129, 91 Stat. 685, 745–51 (codified as amended at 42 U.S.C. §§ 7501–7508 (2012))

44 A nonattainment area is an area designated by the EPA that does not meet the EPA-set pollutant level. 42 U.S.C. § 7407(d)(1)(A)(i) (2012).

45 *See id.* § 7502(c)(5) (only requiring permits for major sources).

46 Act of Sept. 22, 2003, 2003 Cal. Legis. Serv. ch. 479 (West) (codified at scattered sections of CAL. HEALTH & SAFETY CODE).

47 Ass'n of Irritated Residents v. C & R Vanderham Dairy, No. 1:05-CV-01593 OWW SMS, 2007 WL 2815038, at *22 (E.D. Cal. Sept. 25, 2007).

110(k)(6). AIR requested that the Ninth Circuit vacate the proposed amendment, 40 C.F.R. § 52.245. The Ninth Circuit reviewed EPA's error determination under an arbitrary or capricious standard. The Ninth Circuit reviewed EPA's interpretation of section 110(k)(6) under the *Chevron* two-step analysis.

With this background in mind, the court first considered whether EPA acted arbitrarily or capriciously, abused its discretion, or contradicted the CAA in finding it had made an error. The parties' dispute centered on differing interpretations of SB 700's offset provision and savings clause provision. Because the court determined these provisions were ambiguous, the court looked to whether EPA's interpretation of these provisions was reasonable. The court noted that if EPA's interpretation was reasonable, that interpretation would govern.

EPA interpreted the offset provision of SB 700 to apply to both offset credits and SIP credits. This interpretation was based in large part on the California Attorney General's interpretation of the statute, which AIR had requested EPA seek. The Attorney General read the statute's language as exempting minor sources because "real, permanent, quantifiable, and enforceable emission reductions" referred to the CAA's offset credit.[48] AIR contended that the offset provision of SB 700 only applied to SIP credits and EPA's interpretation was unreasonable on two grounds. First, AIR argued that since EPA had approved SIP credits for emission reductions for minor sources, EPA could not argue that SB 700 exempted minor sources from SIP credits. The court rejected this argument, noting that EPA's interpretation required both SIP credits *and* offset credits to be issued. Evidence of only SIP credits being issued was not enough. Second, AIR argued that the court should not defer to the Attorney General's interpretation and cited two cases in support.[49] The court rejected this argument, distinguishing the two cases on the grounds that they were facial challenges to statutes requiring judicial review rather than review of an agency's interpretation of a statute. In addition, the court noted that other Circuits have concluded that EPA's reliance on an attorney general's interpretation of a state law is appropriate.[50] Accordingly, EPA's interpretation of the offset provision of SB 700 was reasonable.

The Savings Clause in SB 700 stated that "[a]ny district rule or regulation affecting stationary sources on agricultural operations adopted on or before January 1, 2004, is applicable to an agricultural source."[51] AIR contended that the savings clause preserved the District's authority to apply the 2004 NSR Rules to minor agricultural sources. EPA argued that the savings clause was limited to a preservation of the District's authority to

48 CAL. HEALTH & SAFETY CODE § 42301.18(c) (West 2013)).

49 Virginia v. Am. Booksellers Ass'n, 484 U.S. 383 (1988); Maldonado v. Harris, 370 F.3d 945 (9th Cir. 2004).

50 Def. of Wildlife v. U.S. Envtl. Prot. Agency, 415 F.3d 1121, 1124 (10th Cir. 2005); Ohio Envtl. Council v. U.S. Envtl. Prot. Agency, 593 F.2d 24, 28 (6th Cir. 1979).

51 Act of Sept. 22, 2003, 2003 Cal. Legis. Serv. ch. 479, sec 2, § 39011.5(3)(b) (West) (codified at CAL. HEALTH & SAFETY CODE § 39011.5(3)(b) (West 2013)).

regulate newly labeled agricultural sources under SB 700's new definition of agriculture. In addition, EPA did not believe that the savings clause limited a district's authority, but concluded that other provisions of the SB 700 might. This interpretation was, once again, based in large part on the California Attorney General's interpretation of SB 700. The court ultimately found that it was reasonable for EPA to rely on the Attorney General's interpretation.

Finally, the court noted that EPA's desire to correct the 2004 approval was not arbitrary and that EPA properly considered the purpose and structure of the CAA. EPA's role as enforcer of the NAAQS is secondary to the state's responsibility for developing a SIP to achieve the NAAQS. Because California had a blanket exemption for agricultural sources from the CAA's NSR requirements prior to the enactment of SB 700, it was likely that California intended some exemptions to continue in its new SIP. Therefore, the court accepted EPA's interpretation of SB 700, and held EPA was reasonable in its error determination.

The second issue the court considered was whether EPA had the authority under section 110(k)(6) of the CAA to correct the error in the way that it did. For EPA to correct an error, section 110(k) requires EPA to determine it has made an error and then revise that error "in the same manner as the approval, disapproval, or promulgation . . . as appropriate without requiring further submissions from the State."[52] Because the court had already determined that EPA was reasonable in finding an error, the court focused on each party's interpretations of two key phrases in the statutory language: "in the same manner" and "appropriate." To resolve whose interpretation to adopt, the court conducted the *Chevron* two-step analysis.

AIR argued that the phrase "in the same manner" limits EPA's error-correcting actions to either an approval or disapproval of a state submitted plan because those were the only actions available to EPA when it was presented with the SIP. EPA countered that "in the same manner" refers to procedural processes, and only requires EPA to use the same process as used to approve the 2004 NSR Rules into the SIP. The court first noted that the statute was silent on the meaning of "in the same manner," and so the court would defer to EPA's interpretation so long as it was reasonable. In finding that EPA's interpretation was reasonable, the court made three observations. First, EPA's interpretation of "in the same manner" as referencing procedural processes was consistent with the context of the statute because the same subsection contains two other procedural requirements. Second, EPA's interpretation was reasonable because EPA has always interpreted "in the same manner" as referring to procedure. Third, the United States Supreme Court found that the phrase "in the same manner" refers to procedure in the context of the Affordable Care Act.[53]

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52 CAA, 42 U.S.C. § 7410(k)(6) (2012).

53 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, and 42 U.S.C.); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2583–84 (2012).

Because EPA's interpretation was reasonable, the court accepted EPA's interpretation of "in the same manner."

AIR also argued that "appropriate" does not allow EPA to promulgate regulation to amend or limit a SIP sua sponte, and that the method EPA could use to error correct was limited to those actions enumerated in section 110(k). EPA argued that section 110(k)(6) both allowed EPA to error correct sua sponte and to use actions beyond those enumerated in section 110(k). Because the statue was silent on the meaning of appropriate, the court noted that it would defer to EPA's interpretation so long as it was reasonable. The court found EPA's interpretation reasonable for four reasons. First, EPA's chosen method of error correcting was selected only after considering alternatives such as retroactive disapproval. Second, EPA considered each action listed in section 110(k) and found that none of these methods would appropriately remedy the situation.[54] Third, EPA's interpretation respected state law. In the wake of the lawsuits following the 2004 NSR Rules, California submitted new NSR Rules adopting the explicit limitations from SB 700. By correcting the SIP to reflect these changes, EPA respected California's role in achieving NAAQS. Fourth, it was reasonable to understand Congress's amending section 110(k) to add section 110(k)(6) as giving the agency authority to act in ways not enumerated in section 110(k). Because the interpretation was reasonable, the court accepted EPA's interpretation of appropriate.

In sum, the court held that EPA reasonably determined it had made an error in approving the District's 2004 NSR Rules. The court also held EPA had authority under section 110(k)(6) of the CAA to correct its error in the way it had chosen. Accordingly, the court denied AIR's petition for review.

B. Clean Water Act

1. Alaska Eskimo Whaling Commission v. U.S. Environmental Protection Agency, 791 F.3d 1088 (9th Cir. 2015).

In this case, the Alaska Eskimo Whaling Commission (AEWC) filed a petition for review on behalf of native Alaskan villages that engage in subsistence hunting of bowhead whales, seeking a remand to the United States Environmental Protection Agency (EPA) for the addition of further restrictions on a permit issued by EPA. The permit at issue allows, subject to regulations, the discharge of waste streams into the Beaufort Sea by oil and gas exploration facilities.

EPA issued the permit pursuant to the National Pollutant Discharge Elimination System (NPDES) permit program of the Clean Water Act

[54] Partial approval or disapproval would be inappropriate because NSR Rules are not separable. Limited approval or disapproval would be inappropriate because it would incorporate the entire rule into the SIP and not eliminate the mismatch. Conditional approval or disapproval would be inappropriate because it would not retroactively correct the mistake. A SIP call for plan revisions pursuant to 42 U.S.C. § 7410(k)(5) (2012) would also be inappropriate because it would not retroactively correct the mistake.

(CWA).[55] The permit authorized the discharge of thirteen different types of waste streams subject to specific limitations and requirements. Before issuing the permit, EPA was required to determine that the discharges would not cause an unreasonable degradation of the marine environment.[56]

In challenging the permit, the AEWC argued that EPA failed to adequately consider the extent to which the authorized discharges would interfere with the native communities' fall hunt by diverting the migratory routes of the whales, thereby making hunting more dangerous. Prior to oral argument, EPA conceded in a letter to the court that the agency had recently discovered that the model used to evaluate the effect of the discharges had not included noncontact cooling water discharges. Because EPA failed to evaluate all authorized discharges, the court remanded to EPA for reconsideration of what effect the noncoolant water discharges could have on the marine environment, and specifically on the migratory paths of bowhead whales.

The court reviewed the AEWC's challenge to EPA's actions under the arbitrary and capricious standard of the Administrative Procedure Act.[57] As the court explained, under that standard, the reviewing court evaluates the propriety of an administrative agency's determination based solely on the grounds the agency used to make the determination. If those grounds are inadequate or improper, the court must remand rather than attempt to deduce which pieces of evidence the agency may have consulted before making its decision.

In reviewing the agency's determination, the court examined EPA's initial explanation of its permitting decision, which cited a specific model the agency used to evaluate the level of dilution of each of the permitted discharges. In conjunction with review of EPA's explanation of its permitting decision, the court reviewed the letter filed by EPA acknowledging that the agency did not include noncontact cooling water in the model. EPA's oversight is important because the agency issued the permit under paragraph (a) of the regulatory requirements, which made issuance of the permit contingent on the agency determining that the discharges would not result in unreasonable degradation of the marine environment.[58] By failing to consider the noncontact cooling water discharges, EPA did not fully meet its requirement to evaluate all discharges prior to issuing the permit. Therefore, depending on EPA's findings with regard to the noncontact cooling water, the permit might no longer be issuable under paragraph (a). In that case, the agency would have to issue the permit under paragraph (c), which imposes additional regulations on permits.[59]

55 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012). The NPDES program is codified at *id.* § 1342.

56 40 C.F.R. § 125.123(a) (2015).

57 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5225, 5372, 7521 (2012). The standard of review is set forth in *id.* § 706.

58 40 C.F.R. § 125.123(a) (2015).

59 *Id.* § 125.123(c).

The court was unable to conclude from the data and information on record whether EPA's error in failing to include cooling water in its model would have affected any of the regulations associated with the permit. Therefore, the court remanded to EPA for reconsideration of its determination that discharge of noncontact cooling water would not cause unreasonable degradation of the marine environment.

The court declined to review the AEWC's other claims challenging the sufficiency of EPA's analysis in its permitting decision. In declining review, the court held that unlike the findings as to noncontact cooling water, EPA's factual findings with respect to the other discharges were supported by the administrative record and therefore entitled to deference. Thus, the court granted in part AEWC's petition and denied the petition in all other respects.

2. ONRC Action v. Bureau of Reclamation, 798 F.3d 933 (9th Cir. 2015).

In this case, ONRC Action (ONRC)[60] argued that the Bureau of Reclamation (BOR)[61] violated the Clean Water Act (CWA)[62] by discharging pollutants into the Klamath River without a permit. Defendants filed a motion for summary judgment, contending that no permit was required. In response, plaintiff filed a cross-motion for partial summary judgment. A magistrate judge issued a Report and Recommendation in favor of defendants. The district court adopted the Report and Recommendation and entered summary judgment for the defendants. The Ninth Circuit affirmed the district court's judgment.

The Lower Klamath Lake and the Klamath River have historically been connected by the Klamath Straits. Water flowed from the Klamath River, through the Straits, and into the Lower Klamath Lake. However, in 1909, a railroad company constructed an embankment across the Klamath Straits. The embankment included headgates that, when closed, prevented the natural water connection through the Straits. In 1917, the headgates were closed, cutting off the flow of water between the Lower Klamath Lake and the Klamath River.

It became apparent that the Lower Klamath Lake could not contain the extra water once the headgates were closed. In the 1940s, the BOR sought to control the flow of water without opening the headgates. The BOR excavated and channelized the Klamath Straits and some of the nearby marshland, turning it into what is now the Klamath Straits Drain (KSD). These improvements allowed water to once again follow the historic path of the Straits.

There are two pumping stations along the KSD that regulate the water flow from the Lower Klamath Lake to the Klamath River. While the pumping stations are not always in operation, they are used to keep the water

60 ONRC Action is an environmental group based in Oregon.

61 Intervenor-defendant-appellees included the Klamath Basin Water Users Association, Oregon Water Resources Congress, and Klamath Drainage District.

62 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

elevation level in the KSD within a certain operating range. The KSD is part of the Klamath Irrigation Project, which provides irrigation services to about 210,000 acres of land in Oregon and California.

The CWA limits the "discharge of pollutants," including "any addition of any pollutant to navigable waters from any point source."[63] A "point source" includes a broad range of "discernible, confined and discrete conveyance[s] . . . from which pollutants are or may be discharged."[64] The addition of any pollutant from a point source to navigable waters is unlawful without a permit.[65] ONRC argued that the BOR was discharging pollutants via the KSD into the Klamath River, a navigable water.

The Ninth Circuit referred to the Supreme Court opinion in *Los Angeles County Flood Control District v. Natural Resources Defense Council* (*L.A. County Flood Control*),[66] to resolve the appeal. *L.A. County Flood Control* was decided after the district court's opinion in this case. In *L.A. County Flood Control*, the Supreme Court held that "the flow of water out of a concrete channel within a river" was not a "discharge of a pollutant" under the CWA.[67] The Court reasoned that "pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the CWA."[68] Rather, the CWA prohibits the *addition* of pollutants, and "no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body."[69] A water transfer is only considered a discharge of pollutants when the two separate bodies of water are "meaningfully distinct water bodies."[70]

The question presented in *ONRC Action* was whether waters of the KSD were "meaningfully distinct" from waters of the Klamath River.[71] In this case, the natural hydrological connection between the Lower Klamath Lake and the Klamath River was disconnected only because of human intervention. But because of the KSD, which follows the general historic path of the Straits, the hydrological connection was restored more than seventy years prior to ONRC's suit. Furthermore, much of the waters returned to the Klamath River by the KSD initially came from the Klamath River itself. For these reasons, the Ninth Circuit concluded that the waters were not distinct and determined that the KSD was "essentially an improved version of a previously existing natural waterway, the Straits."[72]

The Ninth Circuit clarified that the KSD is not simply a substitute to a historic natural connection, but it nevertheless constituted a hydrological connection. The KSD uses two pumping stations to create a hydrological connection, but the need for these pumping stations did not necessarily

63 *Id.* § 1362(12).
64 *Id.* § 1362(14).
65 *Id.* § 1311(a).
66 133 S. Ct. 710 (2013).
67 *Id.* at 711.
68 *Id.*
69 *Id.* at 713.
70 *Id.* (citing S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 112 (2004)).
71 *Id.* at 713.
72 ONRC Action v. Bureau of Reclamation, 798 F.3d 933, 938 (9th Cir. 2015).

make the Klamath River and Lower Klamath Lake meaningfully distinct. The court pointed to *South Florida Water Management District v. Miccosukee Tribe*, where the use of pumps to link different water bodies against the flow of gravity did not necessarily make the bodies meaningfully distinct under the CWA.[73] The Ninth Circuit deferred to the district court's finding that the KSD creates a hydrological connection between the Klamath River and Lower Klamath Lake. Therefore, those waters were not meaningfully distinct and a permit was not required under the CWA.

In conclusion, the Ninth Circuit held that the KSD restored a longstanding hydrological connection between the Klamath River and Lower Klamath Lake. Because of this hydrological connection, the two water bodies were not meaningfully distinct. Thus, no permit was required under the CWA to operate the KSD. The Ninth Circuit affirmed the motion for summary judgment in favor of defendants.

C. Comprehensive Environmental Response, Compensation, and Liability Act

ASARCO, LLC. v. Celanese Chemical Co., 792 F.3d 1203 (9th Cir. 2015).

In this case, ASARCO brought a contribution claim against Celanese Chemical Company (CNA)[74] under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[75] The United States District Court for the Northern District of California granted CNA's motion for summary judgment. On appeal, the Ninth Circuit affirmed the district court's decision.

During or after certain CERCLA civil actions, section 133(f)(1) creates a right of contribution for private parties that are liable or potentially liable for cleanup costs under CERCLA.[76] One way that a contribution claim accrues for a potentially responsible party (PRP) is when that PRP is already involved in a lawsuit under section 106 (for federally required abatement actions)[77] or section 107(a) (for cleanup cost recovery by the government or a private party).[78] The other way that a contribution claim accrues is when a person has "resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement."[79]

ASARCO was the corporate successor to a company that operated a silver and lead smelter on an industrial site (Selby Site) for many years. ASARCO operated the Selby Site and also leased tideland (State Lands) from

73 541 U.S. at 110–12.

74 CNA Holdings, LLC was erroneously named in the suit as "Celanese Chemical Co."

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

76 *Id.* § 9613(f)(1).

77 *Id.* § 9606.

78 *Id.* § 9607(a).

79 *Id.* § 9613(f)(3)(B).

the California State Lands Commission (CSLC) abutting the Selby Site. During this period, the property deposited smelting byproducts on the Selby Site as well as the State Lands. After being named as the likely source of lead pollution, the smelter was closed down. However, ASARCO leased a parcel of land on the Selby Site containing a sulfur dioxide plant to Virginia Chemicals, the corporate predecessor to CNA. The plant operated from 1972 to 1977. Operations occurring before and during CNA's leasehold contaminated the soil at the Selby Site with sulfuric acid.

In 1977, after the sulfur dioxide plant shut down, Wickland Oil Company (Wickland) purchased the Selby Site from ASARCO. In 1981, Wickland leased the State Lands to build and operate a marine fuel terminal. Afterwards, Wickland became aware of the fact that the Selby Site contained hazardous substances. Eventually, EPA placed the Selby Site on the California State Superfund List. As a result, Wickland incurred cleanup costs and filed a cost-recovery suit under section 107 against ASARCO and CSLC. In 1989, Wickland, ASARCO, and CSLC entered into a judicially approved settlement agreement (Wickland Agreement), which settled the ongoing lawsuit and established a procedure for allocation past and future costs connected to events and conditions underlying the lawsuit. CSLC was a party to the Wickland Agreement—not as a government agency, but as a former owner of part of the Selby Site. Virginia Chemicals was not added as a party to the lawsuit, nor was it added to the Wickland Agreement.

In 2005, ASARCO filed for bankruptcy. At this time, Wickland's successor-in-ownership, CSLC, and the California Department of Toxic Substances and Control responded by asserting claims for ASARCO's share of past and future environmental costs. The parties negotiated for a plan that would assess claims for a share of past and future environmental costs. In March 2008, the Bankruptcy Court approved the agreement (2008 Bankruptcy Settlement).

In 2011, ASARCO sued CNA for contribution costs under CERLCA section 113(f)(1).[80] CNA responded by moving for summary judgment on the ground that the lawsuit was barred by the statute of limitations under section 113(g)(3)(B).[81] The district court granted CNA's motion for summary judgment, and found that the statute of limitations applied to judicial settlements between private parties as well as between a private party and the United States or a state. Thus, the district court determined that ASARCO could not circumvent the statute of limitations because the 2008 Bankruptcy Settlement presented no new costs that were not already contemplated in the Wickland Agreement.

The Ninth Circuit reviewed de novo the district court's grant of summary judgment and interpretation of CERCLA. The interpretation of the settlement agreement was also reviewed de novo, with deference given to any factual findings made by the district court unless they were clearly

80 *Id.* § 9613(f)(1).
81 *Id.* § 9613(g)(3)(B).

erroneous. The Ninth Circuit ultimately affirmed the district court's decisions.

ASARCO first argued that the Wickland Agreement did not start the clock on a three-year statute of limitations. ASARCO reasoned that the three-year statute of limitations in section 113(g)(3)(B) applied to liability resolutions involving the United States or a state, and not a section 107 agreement between private parties.[82] The Ninth Circuit found that the statute of limitations under section 113(g)(3)(B) did in fact apply to private party contribution claims. The Ninth Circuit relied in part on *Cooper Industries, Inc. v. Aviall Services, Inc.*,[83] which held that section 113 provides two express avenues for contribution, one that starts accruing after a section 106 or section 107 suit, and one that accrues when a party or person has resolved liability with the United States or a state.[84]

The Ninth Circuit held that judicially approved settlements between private parties could trigger the section 113(g)(3)(B) statute of limitations based on the statute's plain meaning, which did not expressly preclude settlements that do not involve the United States or a state. The Ninth Circuit went on to explain that the interpretation would not result in superfluity. The provisions that ASARCO used to support an argument of superfluity were distinct, as they conferred certain rights upon parties that settle their liability with the United States or a state. Judicially approved settlements not including the government, like the Wickland Agreement, do not confer the same rights for settlement protection. Lastly, the Ninth Circuit explained that its interpretation assures that every word in section 113(g)(3)(B) has an operative effect; otherwise, judicially approved settlements between private parties would not be affected by the statute of limitations and would never expire. Furthermore, the court was concerned that if judicially approved settlements did not start the statute of limitations clock it would encourage private parties to settle with each other rather than with the government, and render the statute of limitations provision meaningless.

The Ninth Circuit next assessed the scope of the Wickland Agreement to determine if it settled the dispute between ASARCO and Wickland over the Selby Site. The court found that the terms of the Wickland Agreement encompassed work in the Virginia Chemicals-leased area, and did not differentiate between site conditions caused by Virginia Chemicals and those caused by ASARCO. The Ninth Circuit concluded that the terms of the Wickland Agreement showed that it was designed to be a complete and final determination of every agreeing party's liability and costs incurred when cleaning the Selby Site.

ASARCO argued that the future work and associated costs contemplated by the Wickland Agreement were too uncertain under California law to be enforceable. The Ninth Circuit disagreed because the

[82] *Id.* § 9607.
[83] 543 U.S. 157 (2004).
[84] *Id.* at 166–67.

terms of the agreement clearly defined who would pay to remediate the Selby Site, and anticipated that tasks could be added to accomplish the goals of the agreement. The court held that simply because full costs were unknown did not mean that the Wickland Agreement was not comprehensive.

The Ninth Circuit next reviewed the 2008 Bankruptcy Settlement. ASARCO argued that the Wickland Agreement did not address all costs at the Selby Site, and, as a result, the 2008 Bankruptcy Settlement was a new cost. However, the 2008 Bankruptcy Settlement showed that the claims and negotiations leading up to the 2008 Bankruptcy Settlement stemmed exclusively from ASARCO's original liability for cleanup efforts that were addressed in the Wickland Agreement. Thus the government's mandates to pay in the 2008 Bankruptcy Settlement were not a new cost, but rather an obligation that reflected the parties' original duties and liabilities in the Wickland Agreement. The Ninth Circuit held that "ASARCO's new contribution claim via the 2008 Bankruptcy Settlement is for exactly the same liability ASARCO assumed in the 1989 Wickland Agreement, and is therefore time barred."[85] After comparing the Wickland Agreement with the 2008 Bankruptcy Settlement, the Ninth Circuit concluded that the scope of the Wickland Agreement included the entirety of response costs connected with the Selby Site while the 2008 Bankruptcy Settlement merely fixed the response costs.

Lastly, ASARCO contended that, following the 2008 Bankruptcy Agreement, ASARCO should have the right to pursue a contribution claim under CERCLA section 113(f)(3)(B). First, ASARCO reasoned that costs being sought from CNA had not been contemplated in the Wickland Agreement. Second, ASARCO asserted that section 113(f)(3)(B) grants an absolute and distinct right to seek contribution following settlement with the government. The Ninth Circuit noted that the court had addressed the first argument when it found that the 2008 Bankruptcy Settlement did not result in new costs. As for the second argument, the Ninth Circuit found that no such right exists. The court reasoned that if a bankruptcy settlement with the government revived an otherwise expired CERCLA claim, it could be used to circumvent the statute of limitations. As a result, parties would find themselves tempted to use bankruptcy as a tool for reviving expired claims. The Ninth Circuit noted that ASARCO's interpretation would discourage settlement agreements between private parties and discourage a thorough and diligent pursuit of contribution claims following judicially approved settlements.

In sum, the Ninth Circuit held that 1) a judicially approved settlement agreement between private parties to a CERCLA cost-recovery suit starts the clock on the statute of limitations in section 113(g)(3)(B), and 2) a later bankruptcy settlement that fixes the cost-recovery settlement does not revive a contribution claim that has otherwise expired.

85 ASARCO, LLC. v. Celanese Chem. Co., 792 F.3d 1203, 1214 (9th Cir. 2015).

D. Federal Insecticide, Fungicide, and Rodenticide Act

Pollinator Stewardship Council v. U.S. Environmental Protection Agency, 806 F.3d 520 (9th Cir. 2015).

In this case, the Pollinator Stewardship Council (Pollinator)[86] petitioned the Ninth Circuit for review of a pesticide registration promulgated by the United States Environmental Protection Agency (EPA).[87] Pollinator challenged EPA's unconditional registration of sulfoxaflor under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[88] The Ninth Circuit concluded that EPA had based its unconditional registration of sulfoxaflor on insufficient data, thus failing to meet the substantial evidence standard required by FIFRA.[89] In addition, because a failure to vacate EPA's unconditional registration of sulfoxaflor presented a threat of environmental harm and because EPA could arrive at a different decision regarding the registration on remand, the court vacated the registration and remanded to EPA.

Under FIFRA, a pesticide may not be sold or used without EPA's approval and registration.[90] The manufacturer of the pesticide must submit an application to EPA describing the manner in which the pesticide will be used, its benefits, its ingredients, and a description of studies conducted regarding, among other things, the pesticide's environmental effects.[91] EPA may then take one of three actions: 1) deny the application if denial is "necessary to prevent unreasonable adverse effects on the environment,"[92] 2) conditionally register the pesticide when there is "insufficient data to evaluate the environmental effects of [the] pesticide" for "a period reasonably sufficient for the generation and submission of required data,"[93] or 3) unconditionally register the pesticide if there is sufficient data to evaluate the environmental risks.[94]

In making its decision, EPA follows a multi-tier framework called the Pollinator Risk Assessment Guidance for assessing pesticides affecting pollinators,[95] which was established in response to concerns about the rapid decline in bee populations. Under Tier 1, EPA determines the level of risk to bees by comparing the dose at which half the tested bees die (the acute

86 Petitioners included American Honey Producers Association, National Honey Bee Advisory Board, American Beekeeping Federation, Thomas R. Smith, Bret L. Adee, and Jeffery S. Anderson.

87 Dow Agrosciences LLC was a respondent-intervenor in opposition to Pollinator's petition.

88 Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012).

89 *Id.* § 136n(b).

90 *Id.* § 136a(a).

91 *Id.* § 136a(c).

92 *Id.* § 136a(a).

93 *Id.* § 136a(c)(7)(C).

94 *Id.* § 136a(c)(5).

95 U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR ASSESSING PESTICIDE RISKS TO BEES (2014), *available at* https://www.epa.gov/sites/production/files/2014-06/documents/pollinator_risk_assessment_guidance_06_19_14.pdf.

median lethal dose) with the likely concentration of the pesticide in the environment should EPA approve the pesticide.[96] If the resulting figure (the risk quotient) is above the level of concern (LOC), then EPA moves on to Tier 2.[97] If the risk quotient is below the LOC, EPA will approve the pesticide. For bees, EPA set the LOC at 0.4.[98] Under Tier 2, EPA measures the effect of the proposed pesticide on bees by analyzing data from "semi-field" studies.[99] Although there is a Tier 3, EPA did not reach Tier 3 in this case.

In 2010, Respondent-Intervenor Dow Agrosciences LLC (Dow) submitted an application to EPA to register three different products containing sulfoxaflor at a maximum application rate of 0.133 lb a.i./A.[100] EPA analyzed sulfoxaflor within the Pollinator Risk Assessment Framework. In its Tier 1 analysis, EPA found that the risk quotient for oral exposure fell between 0.8 and 5.7 depending upon the type of bee, a range greater than the 0.4 LOC.

Because the risk quotient of sulfoxaflor at the suggested application rate was greater than the LOC, EPA moved onto Tier 2 and analyzed the semi-field studies Dow had submitted with its application. These studies confine bees to a tunnel enclosure containing one type of crop sprayed with sulfoxaflor. At the outset, the court noted that these studies generally have several shortcomings: 1) during these studies, bees die at an above-average rate due to study-induced stress; 2) the measured effect is overstated because a bee's natural diet consists of more than just one type of crop; and 3) the studies are of limited duration and therefore fail to capture long-term adverse effects. In this case, the set of studies submitted by Dow had a further shortcoming: all but one of the six tests failed to use the proposed maximum application rate of 0.133 lb a.i./A. In addition, the one test that used the proposed maximum application rate, the Ythier 2012 study, failed to provide conclusive information because the crop chosen, cotton, was a suboptimal source of pollen, and the study was designed to measure pesticide residue on the cotton rather than the biological effects of sulfoxaflor on the bees. As a result, EPA concluded that the effect of sulfoxaflor on bee mortality, flight activity, and behavioral abnormalities was unknown, and the effect of sulfoxaflor on brood development and long-term colony health was inconclusive.

Due to the gaps in data at Tier 2, EPA's environmental risk assessment concluded that one or more additional Tier 2 semi-field studies were required for Dow's application to be approved. Based on this finding, in January 2013, EPA conditionally registered sulfoxaflor at a lower maximum application rate of 0.09 lb a.i./A. In order for EPA to register sulfoxaflor at the higher application rate of 0.133 lb a.i./A, the additional studies would

96 U.S. ENVTL. PROT. AGENCY, How We Assess Risks to Pollinators, https://www.epa.gov/pollinator-protection/how-we-assess-risks-pollinators#data (last visited July 16, 2016).

97 U.S. ENVTL. PROT. AGENCY, *supra* note 95, at 7.

98 *Id.*

99 *Id.* at 24.

100 "Lb a.i./A" stands for pounds of active ingredient per acre.

need to assess the impact of sulfoxaflor on brood development and long-term colony strength, as well as use a pollinator-attractive crop.

Despite the record being void of additional studies, in May 2013 EPA unconditionally registered sulfoxaflor at the 0.09 lb a.i./A application rate. This unconditional registration included various mitigation measures, including: 1) longer minimum intervals between applications, 2) certain crop-specific restrictions on blooming crops, and 3) a required warning label for continuously blooming crops. In explaining its final decision, EPA concluded that while there is a potential hazard to bees from sulfoxaflor, the hazard would be mitigated by the adopted mitigation measures. Furthermore, EPA found that application of sulfoxaflor according to the label would not cause unreasonable adverse effects to bees, and that the benefits of application would outweigh the costs.

After EPA filed its final decision to unconditionally register sulfoxaflor, Pollinator filed for review in the Ninth Circuit. Pollinator claimed that EPA's decision violated FIFRA because the decision was not supported by substantial evidence in the record. EPA and Dow responded that the limited studies provided enough data for EPA to make its registration decision and that EPA has the flexibility to determine what type of data is needed to support its registration decisions. The Ninth Circuit reviewed EPA's decision under the substantial evidence standard as required by FIFRA.[101]

In determining whether EPA had violated FIFRA, the court analyzed the Tier 2 studies originally submitted by Dow to determine if there was substantial evidence that a maximum application rate of 0.09 lb a.i./A would not have an unreasonable adverse effect on bees. The court resorted to these studies because EPA and Dow did not submit additional studies to the record. In its review of studies relating to the biological effect of sulfoxaflor on bees, the court noted that only two of the six Tier 2 studies applied sulfoxaflor at the 0.09 lb a.i./A rate: the Ythier 2012 study and the Hecht-Rost 2009 study. The Ythier 2012 study failed to give sufficient data because the study was designed to quantify plant residues rather than measure the biological effect of sulfoxaflor on bees. The Hecht-Ross 2009 study also failed to give sufficient data due to a pest infestation, a long preexposure period in the tunnels resulting in higher bee stress, a short observation period, and a lack of bee larvae in the tunnels.

The court next evaluated the studies that measured the effects of sulfoxaflor on brood development and long-term colony health. The court found that only two of the Tier 2 studies measured brood termination rates and both studies used less than half the EPA-approved 0.09 lb a.i./A application rate. In addition, these studies also had high brood termination rates in the control tunnels when compared to studies done according to OECD guidelines, suggesting the controls were not appropriate measuring sticks. The court also found that the three studies measuring colony strength failed to use more than half the EPA-approved 0.09 lb a.i./A application rate. Further limiting their reliability, these studies measured colony strength only

101 FIFRA, 7 U.S.C. § 136n(b) (2012).

7 to 17 days after sulfoxaflor was applied, which likely failed to account for negative effects that could only appear over a longer time period.

These above deficiencies formed the basis for EPA's original conclusion in January 2013 that only conditional registration of sulfoxaflor was appropriate. Because the court found that these deficiencies still existed under the 0.09 lb a.i./A application rate, EPA's decision to unconditionally register sulfoxaflor was unsupported by substantial evidence that sulfoxaflor would not have unreasonable adverse effects on bees. EPA argued that these deficiencies and the inconclusiveness of the Tier 2 studies favored unconditional registration because the inconclusiveness itself demonstrated that sulfoxaflor does not cause unreasonable adverse effects on bees. The court rejected this argument, noting that an agency cannot rely on ambiguous studies as evidence of a conclusion not supported by those studies. EPA also argued that applying sulfoxaflor at the 0.09 lb a.i./A application rate did not create a LOC. Citing to the studies the court rejected this argument. The court noted that while only two of the sixty-six nectar measurements and one of the sixty-six pollen measurements in the Ythier 2012 study were above the LOC; EPA is required by regulation to mandate pollinator field-testing whenever the LOC is exceeded.[102] Furthermore, the court found that EPA must follow its own regulations, even when those measurements were close to being at a level of no concern.[103]

Having decided that EPA failed to meet the substantial evidence standard of review, the court considered whether to vacate the unconditional registration of sulfoxaflor in remanding to EPA. The court noted that vacating EPA's final decision requires the court to decide whether doing so will result in possible environmental harm,[104] as well as the likelihood that EPA could promulgate the same decision on remand.[105] Because the court concluded that failure to vacate posed a potential risk of causing environmental harm, and that EPA might reach a different decision based on additional Tier 2 studies, the court vacated the unconditional registration of sulfoxaflor.

In sum, the court held that (1) EPA had based its decision to unconditionally register sulfoxaflor on insufficient data and that the decision was therefore unsupported by substantial evidence, and (2) leaving the unconditional registration of sulfoxaflor in effect on remand would pose a risk of environmental harm. Accordingly, the court vacated the registration and remanded to EPA for additional studies.

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102 40 C.F.R. § 158.630(d), (e) n.25 (2015).

103 *See* Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency, 735 F.3d 873, 883–84 (9th Cir. 2013).

104 Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995).

105 North Carolina v. U.S. Envtl. Prot. Agency, 531 F.3d 896, 929 (D.C. Cir 2008); Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993).

II. NATURAL RESOURCES

A. Endangered Species Act

1. Sierra Club v. U.S. Bureau of Land Management, 786 F.3d 1219 (9th Cir. 2015).

In this case, the Sierra Club and other organizations[106] (collectively, Sierra Club) challenged the United States Bureau of Land Management's (BLM) decision to grant North Sky River Energy, LLC (North Sky) a right-of-way across BLM land, alleging that BLM violated the Endangered Species Act (ESA)[107] by failing to consult with the United States Fish and Wildlife Service (FWS) regarding the effects of the project. Sierra Club also alleged that BLM violated the National Environmental Policy Act (NEPA)[108] by failing to prepare an Environmental Impact Statement (EIS). The district court found for BLM after determining that North Sky would have completed the Wind Project regardless of whether BLM approved the Road Project because North Sky had a feasible alternative, and that the BLM-approved Road Project had independent utility. On appeal, the Ninth Circuit affirmed the district court's ruling. Additionally, the Ninth Circuit found that BLM did not act arbitrarily or capriciously when it changed its initial position that consulting with FWS might be required.

The Sierra Club challenged two North Sky projects: first, a wind energy project (Wind Project) developed by North Sky on 12,000 acres of private land located outside of Tehachapi, California; and second, North Sky's proposed use of BLM land for a right-of-way connecting the Wind Project with an existing state highway (Road Project). North Sky also contemplated an alternative right-of-way traversing private land (Private Road Option). Ultimately North Sky opted for the Road Project, finding that the Private Road Option would disturb vegetation and wildlife habitat.

Initially, BLM believed that the ESA required BLM to consult with FWS when reviewing the Road Project proposal. However, after North Sky submitted the Private Road Option, BLM concluded the Private Road Option was a viable alternative to the Road Project. This determination obviated the ESA's consultation requirement because it meant the viability of North Sky's operation was not dependent on BLM approval. BLM issued an environmental assessment which found that the Road Project would have no significant environmental impact, and found that the Road Project would provide dust control, reduce erosion, and control unauthorized vehicle access to the Pacific Crest Trail. Based on these findings, BLM issued a permit for the Road Project.

After the permit was issued, Sierra Club sued BLM, alleging its decision to issue a permit for the Road Project violated the ESA and NEPA. North Sky

106 Plaintiff-appellants included the Center for Biological Diversity and Defenders of Wildlife.

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

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

intervened and the parties cross-moved for summary judgment. The district court granted summary judgment for BLM, holding that BLM's decision to issue the permit was not arbitrary or capricious. The Ninth Circuit reviewed the district court's grant of summary judgment de novo.

The first issue on appeal was whether the ESA required BLM to consult with FWS regarding impacts of the Wind Project prior to approving the Road Project. The ESA consultation requirement is triggered only by federal agency action.[109] ESA consultation ensures that a federal agency considers the direct and indirect effects of its action on a protected species or critical habitat, as well as the effects of other activities that are interrelated or interdependent with the proposed action.[110] At the outset, the court determined that the Wind Project was not a federal agency action because it involved a private company developing private land without federal funds, and the Wind Project was not dependent on BLM approval of the Road Project. BLM was, therefore, not required to consult with FWS on the Wind Project's direct effects. The court noted that the Road Project was a federal agency action, and that BLM had properly consulted the ESA on the Road Projects direct effects.

The Ninth Circuit then considered whether the effects of the Wind Project were indirect effects of the Road Project, or whether the Wind Project was an interrelated or interdependent activity with the Road Project, either of which would require consultation with FWS. First, the court determined that the Wind Project was not an indirect effect of the Road Project because the Road Project was not a cause of the Wind Project. Rather, North Sky could have completed the Wind Project without BLM involvement by moving forward with the Private Road Option. Second, the court found that the Wind Project was not interrelated or interdependent with the Road Project because, as the court noted, the Road Project was not a "but for" cause of the Wind Project. In addition, the court found that the Road Project had independent utility because it promised to improve dust control, reduce erosion, and control unauthorized vehicle access to the Pacific Crest Trail. Accordingly, the Ninth Circuit held that BLM was not required to consult with FWS regarding the direct, indirect, or interrelated effects of the Wind Project.

The second issue on appeal was whether BLM had a duty to prepare an EIS under NEPA. An EIS is required for any "major Federal action significantly affecting the quality of the human environment."[111] An EIS must address the impacts of connected actions.[112] The Ninth Circuit repeated its finding that BLM's decision was not a major federal action because BLM had no control or responsibility over the Wind Project. In addition, the court explained that Wind and Road Projects were not connected, cumulative, or

109 16 U.S.C. § 1536(a) (2012).
110 50 C.F.R. § 402.02 (2015).
111 42 U.S.C. § 4332(2)(C) (2012).
112 40 C.F.R. § 1508.25(a)(1) (2015).

similar actions.[113] Two actions are unconnected if each of two projects has an "independent utility," which is determined by asking if each would have taken place with or without the other.[114] Because the Road Project had the additional utility of dust control, storm water control, and limiting access to the Pacific Crest Trail, the Road Project had independent utility from the benefit to North Sky. Moreover, North Sky would have developed the Wind Project with or without the Road Project due to the available Private Road Option.

Finally, the court found that BLM had not acted arbitrarily and capriciously when it disregarded its initial decision to consult with FWS because 1) BLM's initial position was not a published regulation or official policy,[115] and 2) BLM adequately justified its change of view by demonstrating that the Private Road Option would provide North Sky with private access to the Wind Project.

In sum, the Ninth Circuit held that BLM did not violate the ESA because the Wind Project was not a federal agency action and the Wind Project was independent from the Road Project. The court also held that BLM did not violate NEPA in its failure to prepare an EIS because the two projects had independent utility and were not connected actions. Accordingly, the court affirmed the district court's ruling.

2. Cottonwood Environmental Law Center v. U.S. Forest Service, 789 F.3d 1075 (9th Cir. 2015).

In this case, Cottonwood Environmental Law (Cottonwood) sued the United States Forest Service (USFS) in the United States District Court for the District of Montana. Cottonwood asserted that USFS violated the Endangered Species Act (ESA)[116] by failing to reinitiate consultation with the United States Fish and Wildlife Service (FWS) after FWS revised a critical habitat designation. Both parties filed cross-motions for summary judgment. While the district court ruled that USFS did violate the ESA by failing to reinitiate consultation, the court denied injunctive relief. The Ninth Circuit affirmed the district court, but also remanded to provide Cottonwood an opportunity to make a showing of irreparable harm as grounds for injunctive relief.

The case centered on the Canada lynx, a cousin to the bobcat and a threatened species under the ESA. In 2006, FWS designated 1,841 square miles of land as critical habitat to the Canada lynx. However, none of that

113 Sierra Club only argued that the Road and Wind Projects were connected, obviating the need to discuss whether the projects were cumulative or similar actions. In dicta, the court did note that North Sky's analysis of wind farms within 25 miles of the right-of-way sufficiently addressed the cumulative effect of the two projects.

114 Cal. *ex rel.* Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior, 767 F.3d 781, 795 (9th Cir. 2014) (internal quotation marks omitted).

115 *See* Fed. Commc'ns Comm'n v. Fox Television Stations, Inc. *(Fox)*, 556 U.S. 502, 514–16 (2009) (explaining that, in order for an agency change to be subjected to further review, the change must be a change in official policy).

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

land was National Forest land, effectively exempting National Forest land from section 7 consultation. In 2007, USFS adopted the Northern Rocky Mountains Lynx Direction (Lynx Amendments), which set specific guidelines for permitting activities determined to have an adverse effect on Canada lynx. USFS initiated section 7 consultation with FWS to insure that any action taken would not adversely affect any endangered or threatened species, and FWS issued a Biological Opinion (BiOp) that determined that the management direction in the Lynx Amendment did not jeopardize the Canada lynx. In particular, the BiOp stated that no critical habitat was designated for the Canada lynx on federal lands, necessarily resulting in FWS concluding that no Canada lynx would be affected on federal land.

Four months later, FWS announced that its critical habitat designation was improperly influenced by a previous employee, and as a result might not be scientifically accurate. In 2009, FWS revised its critical habitat designation from 1,841 to 39,000 square miles, and included eleven National Forests. Despite this significant change and addition of critical habitat in National Forests, USFS declined to reinitiate section 7 consultation with FWS on the Lynx Amendments. Subsequently, Cottonwood brought action against USFS. The district court ruled that USFS violated the ESA, but declined to provide injunctive relief. On appeal, the Ninth Circuit considered whether Cottonwood had standing to sue, whether the lawsuit was ripe for review, whether failing to reinitiate in section 7 consultation violated the ESA, and whether the Ninth Circuit could provide injunctive relief. The majority of the Ninth Circuit held that Cottonwood had standing to sue, the issue was ripe, and USFS violated the ESA. However, the Ninth Circuit affirmed the district court's denial of injunctive relief.

The Ninth Circuit first held that Cottonwood had Article III standing[117] to sue. The court found that Cottonwood's declarations established that its members extensively used specific National Forests where the Lynx Amendments apply and "demonstrate[d] their date-certain plans to visit the forests for the express purpose of viewing, enjoying, and studying Canada lynx."[118] The court rejected USFS's argument that Cottonwood lacked standing because it brought a programmatic challenge, rather than a challenge to specific implementing project that poses an imminent risk to its members. Instead, the court determined that Cottonwood properly alleged a procedural injury stemming from USFS' decision not the reinitiate consultation on the Lynx Amendments. The court then explained that Cottonwood's alleged procedural injury relaxed its burdens to show causation and redressability. The court went on to hold that Cottonwood was not required to establish what a section 7 consultation would reveal or what standards would be set if USFS would reinitiate consultation, and that Cottonwood's declarations alleging aesthetic, recreational, scientific, and spiritual injuries were not too attenuated to the procedural injury to establish standing.

117 U.S. CONST. art. III, § 2.

118 Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1080 (9th Cir. 2015).

The Ninth Circuit then addressed the ripeness of the lawsuit. The Court concluded that when a party like Cottonwood suffers a procedural injury, it may proceed with legal action at the time the alleged procedural failure takes place. The court explained that no additional factual development was required after a procedural injury had occurred. In so holding, the court rejected USFS's argument that Cottonwood's lawsuit was not ripe for review until Cottonwood challenged a particular project that implements the Lynx Amendments.

The Ninth Circuit next turned to the merits. Cottonwood argued that USFS violated section 7 of the ESA by failing to reinitiate consultation on the Lynx Amendments when FWS later designated critical habitat on National Forest land. USFS responded by arguing that it had no remaining obligations because it completed its action in 2007, when it made the final decision to amend the Forest Plans. The Ninth Circuit disagreed with USFS and held that USFS must reinitiate consultation on the Lynx Amendments.

USFS argued that it was not required to reinitiate consultation because it had already promulgated the Lynx Amendments and incorporated the Amendments into the Forest Plans when FWS revised its critical habitat designation. The Ninth Circuit disagreed. The court first explained that the ESA did not limit reinitiation of consultation to when there is ongoing agency action. Instead, consultation is required whenever new information reveals potential impacts of an agency action on listed species or when new critical habitat is designated that may be impacted by an agency action. The court went on to note that it had previously held that an agency had obligations for section 7 consultation even after the underlying action had been completed. Similarly, the court noted that because USFS had continuing authority over the Lynx Amendments to the Forest Plans, it had the continuing obligation to follow requirements of the ESA. The Ninth Circuit concluded that, pursuant to ESA's implementing regulations, USFS was required to initiate consultation when FWS revised its critical habitat designation in National Forests.

The Ninth Circuit then turned to Cottonwood's claim for injunctive relief. The court first noted that, starting with *Thomas v. Peterson*,[119] there was an exception to the traditional test for injunctive relief when addressing a procedural violation under the ESA. In *Thomas*, the Ninth Circuit noted that the procedural requirements of the ESA are analogous to those of NEPA.[120] Accordingly, there was no reason that the same principle of relaxed standing that already applied to NEPA should not apply to procedural violations of the ESA.

However, USFS argued that *Thomas* had been overturned by two Supreme Court cases.[121] In the first of the two cases, *Winter v. Natural Resources Defense Council*, the Supreme Court rejected the Ninth Circuit's

119 753 F.2d 754 (9th Cir. 1985).
120 Id. at 765.
121 Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).

test for preliminary injunction in NEPA cases as too lenient.[122] In *Monsanto Co. v. Geertson Seed Farms*, the Supreme Court disapproved of cases that do not apply the traditional four-factor test.[123] The Ninth Circuit analyzed whether the Supreme Court's analysis for the two cases of injunctive relief under NEPA extends to the ESA. The Ninth Circuit noted that, indeed, the reasoning in *Thomas* explicitly relied on the presumption of irreparable injury that was previously recognized in the NEPA context. "Thus, even though *Winter* and *Monsanto* addressed NEPA and not the ESA," the Ninth Circuit agreed that "they nonetheless undermine the theoretical foundation for our prior rulings on injunctive relief in *Thomas* and its progeny."[124] Although the Ninth Circuit held that the traditional test of *Thomas* had been undermined, the court concluded that Cottonwood should not be faulted for relying on *Thomas*, which had been the law of the Ninth Circuit since 1985. As a result, the Ninth Circuit remanded the case to the district court to allow Cottonwood an opportunity to show irreparable injury.

In sum, the Ninth Circuit held that 1) Cottonwood had standing to sue, 2) the issue was ripe for review, and 3) USFS violated the ESA by failing to reinitiate consultation with FWS. However, the Ninth Circuit failed to grant an injunction, and instead remanded the issue to give Cottonwood an opportunity to show irreparable injury.

In dissent, Judge Pregerson disagreed with the majority opinion's ruling in regards to injunctive relief. The dissent argued that *Winter* and *Monsanto* do not address the ESA, but instead focused on NEPA's standard for injunctive relief. The dissent explained that NEPA's statutory goals are fundamentally procedural, while ESA's statutory goal is to substantially provide for the conservation of endangered and treated species and their ecosystems. The dissent argued that the ESA has a unique history and purpose, and the Supreme Court's ruling in *Winter* and *Monsanto* should not control the outcome of this case.

3. Bear Valley Mutual Water Co. v. Jewell, 790 F.3d 977 (9th Cir. 2015).

In this case, several municipalities and water districts[125] (collectively, Bear Valley) sued the United States Fish and Wildlife Service, the Department of the Interior, and other federal officials (collectively, FWS), alleging that: 1) FWS violated the Endangered Species Act (ESA)[126] because it did not cooperate with state and local agencies in resolving water resources issues that arose from the critical habitat designation of the Santa

122 555 U.S. at 21–22.

123 561 U.S. at 157.

124 *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1090.

125 Plaintiff-appellants included the Big Bear Municipal Water District, the City of Redlands, the City of Riverside, the City of San Bernardino Municipal Water Department, the East Valley Water District, the Riverside County Flood Control and Water Conservation District, the San Bernardino Valley Municipal Water District, the San Bernardino Valley Water Conservation District, the Western Municipal Water District, the West Valley Water District and the Yucaipa Valley Water District.

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

Ana sucker; 2) FWS acted arbitrarily and capriciously in revising its critical habitat designation to include previously excluded land; and 3) FWS violated the National Environmental Policy Act (NEPA)[127] by failing to prepare an environmental impact statement prior to designation. The United States District Court for the Central District of California granted FWS summary judgment on all claims. The Ninth Circuit affirmed.

The Santa Ana sucker is a small freshwater fish native to California. In the late 1990s, two coalitions formed and developed the Santa Ana Sucker Conservation Plan (SASCP) and the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), a regional plan encompassing 1.26 million acres, to balance the incidental taking of the sucker with conservation measures. In 2004, FWS formally approved the MSHCP. Under the terms of the MSHCP Implementation Agreement (Implementation Agreement), FWS stipulated that lands within the boundaries of the MSHCP would not be designated as Critical Habitat for the Santa Ana sucker.

In April 2000, FWS listed the sucker as a threatened species, but did not designate critical habitat for the sucker in the Final Listing Rule.[128] FWS conducted additional research and issued its critical habitat designations in 2004, excluding certain "essential habitat" areas encompassed by the MSHCP and the SASCP.[129] After review and comment, FWS promulgated its 2005 Final Rule revising the primary constituent elements for the sucker and reducing the designated critical habitat from 21,129 acres to 8,305 acres. Conservation groups sued FWS alleging that the 2005 rule violated the ESA and Administrative Procedure Act (APA),[130] and the parties settled in 2009. The settlement agreement required FWS to reconsider its critical habitat designation for the Santa Ana sucker. In 2010, FWS issued its Final Rule designating 9,331 acres as critical habitat, including areas within the MSHCP. The municipalities and water districts then brought the suit at issue in this case. The Ninth Circuit reviewed de novo the district court's grant of summary judgment for FWS, and explained that claims against an agency arising under the ESA are evaluated under the APA's arbitrary and capricious standard.[131]

Bear Valley first argued that FWS violated section 2(c)(2) of the ESA[132] by failing to work with state and local agencies to balance water resource

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

128 FWS did not designate critical habitat on the ground that its "knowledge and understanding of the biological needs and environmental limitations of the Santa Ana sucker and the primary constituent elements of its habitat are insufficient to determine critical habitat for the fish." Endangered and Threatened Wildlife and Plants; Threatened Status for the Santa Ana Sucker, 65 Fed. Reg. 19,686, 19,696 (Apr. 12, 2000).

129 Endangered and Threatened Wildlife and Plants; Final Rule to Designate Critical Habitat for the Santa Ana Sucker (*Castostomus santaanae*), 69 Fed. Reg. 8839, 8844, 8846 (Feb. 26, 2004).

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

131 *See id.* § 706(2)(A) (providing that an agency decision will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

132 ESA, 16 U.S.C. § 1531(c)(2) (2012).

concerns with endangered species conservation goals. The Ninth Circuit held that Bear Valley's argument failed as a matter of law because section 2(c)(2) merely announces general policy goals and contains no procedural mandate. The court explained that the ESA's policy goals are implemented through the substantive and procedural requirements found in section 4 of the ESA.[133] The court then determined that FWS complied with section 4's requirements, and therefore conformed with section 2(c)(2)'s statement of policy.

Next, Bear Valley challenged FWS's decision not to exclude land covered by the MSHCP from the Final Rule's critical habitat designation. Bear Valley argued that, since there is a standard to review an agency's decision to exclude areas from a critical habitat designation, the same standard should be used to review an agency's decision not to exclude areas. The Ninth Circuit agreed with the district court that FWS's decision was unreviewable because the statute authorizes FWS to exclude areas from a critical habitat designation, but does not compel FWS to do so.[134] Therefore, FWS's decision not to exclude the habitat at issue in this case was an unreviewable exercise of agency discretion.

While an agency's decision not to exclude essential habitat from a critical habitat designation is unreviewable, courts can review whether FWS properly included an area in a critical habitat designation.[135] Bear Valley contended that, by executing the MSHCP and the Implementation Agreement, FWS pledged not to designate any areas covered by the MSHCP as critical habitat. Bear Valley argued that FWS's failure to consider the consequences of ignoring those assurances made the 2010 Final Rule arbitrary and capricious. FWS responded that its obligations under the ESA necessarily took priority over any assurances in the Implementation Agreement, and argued it would be inappropriate and unlawful for an agency to prospectively agree to the substantive outcome of a future rulemaking. The Ninth Circuit agreed that FWS could not relinquish its statutory obligation to designate essential critical habitat through agreements with third parties. The Ninth Circuit then determined that FWS complied with the ESA because it adequately considered the impacts of designating areas covered by the MSHCP and SASCP as critical habitat in the 2010 Final Rule.

The Ninth Circuit then dispatched with Bear Valley's next two assignments of error. The court first explained that the 2010 Final Rule did not violate the "No Surprises" rule—which provides that, once a permit has been issued pursuant to a habitat conservation plan, the permittee can rely on the agreed upon cost of conservation and mitigation—[136] because the 2010 Final Rule did not require Bear Valley to undertake new or costlier conservation measures. The Ninth Circuit next explained that FWS did not

133 *See id.* §§ 1533(b)(5)(A)(ii), 1533(i).

134 *See id.* § 1533(b)(2) (stating that FWS "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.").

135 Bear Valley Mutual Water Co. v. Jewell, 790 F.3d 977, 990 (9th Cir. 2015).

136 Habitat Conservation Plan Assurances Rule, 63 Fed. Reg. 8,859, 8,867 (Feb. 23, 1998).

fail to provide adequate notice and comment by relying on studies not in the 2009 Proposed Rule's record to develop the 2010 Final Rule because those new studies merely expanded on and confirmed information that was in the record.

Bear Valley next argued that the 2010 Final Rule designated areas unoccupied by the Santa Ana sucker as a critical habitat, and that FWS failed to explain how the unoccupied areas were essential to the conservation of the sucker or how the designated occupied areas were inadequate to meet conservation goals required by the ESA. The Ninth Circuit disagreed, explaining that the 2010 Final Rule sufficiently demonstrated that designation of unoccupied habitat was essential, which in turn demonstrated that designation of only occupied areas would have been inadequate.

Finally, Bear Valley argued that FWS violated NEPA by failing to prepare an environmental impact statement in connection with the 2010 final rule. The Ninth Circuit, however, explained that NEPA does not apply to the designation of critical habitat as a matter of law.[137] Ultimately, the Ninth Circuit affirmed the district court's decision to grant summary judgment on all claims in favor of FWS.

4. Building Industry Ass'n of the Bay Area v. U.S. Department of Commerce, 792 F.3d 1027 (9th Cir. 2015).

In this case, the Building Industry Association of the Bay Area (BIABA)[138] sued the National Marine Fisheries Service (NMFS)[139] in the United States District Court for the Northern District of California. BIABA sued NMFS under the Administrative Procedure Act (APA)[140] and the Endangered Species Act (ESA),[141] alleging a failure to follow the appropriate methodology for designating critical habitat. In addition, BIABA alleged that NMFS had violated the National Environmental Policy Act (NEPA)[142] by failing to submit an Environmental Impact Statement (EIS). The district court held that NMFS had not violated the ESA, that a decision to not exclude an area from critical habitat designation was not subject to judicial review, and that NMFS was not required to conduct a NEPA analysis when designating critical habitat. The Ninth Circuit affirmed the district court's holdings.

137 *See* Douglas Cty. v. Babbitt, 48 F.3d 1495, 1502–07 (9th Cir. 1995) (deciding that NEPA does not apply to the designation of a critical habitat because ESA procedures have displaced NEPA requirements, NEPA does not require an EIS for actions that preserve the physical environment, and ESA furthers the goals of NEPA without requiring an EIS).

138 Bay Planning Coalition (BPC) was also a plaintiff-appellant.

139 The United States Department of Commerce delegates its responsibility for critical habit designation to NFMS. Other defendant-appellees include the National Oceanic and Atmospheric Administration, Gary Locke (Secretary for the United States Department of Commerce), and Eric C. Schwaab (Assistant Administrator for the United States National Marine Fisheries Service).

140 5 U.S.C. §§ 551–559, 701–706, 1305, 1305, 3344, 4301, 5335, 5372, 7521 (2012).

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

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

This case centered on the southern distinct population segment of green sturgeon and the aftermath of NFMS's decision to list the green sturgeon as a threatened species. Under the ESA, agencies are required to consider designating critical habitat upon listing a species as threatened or endangered.[143] As part of that consideration, the ESA requires the agency to consider, among other things, the economic impact of the designation.[144] If the benefits of excluding designation outweigh the benefits of designation, the agency may exclude an area from critical habit designation;[145] however, an agency may not exclude an area where the exclusion would result in the extinction of the species.[146]

Pursuant to the ESA, NMFS designated over 12,000 square miles of marine, estuary, and riverine habitat as a critical habitat. NMFS also excluded fourteen areas from its critical habitat designation, finding that the benefits of exclusion outweighed the benefits of designation for these areas.

BIABA sued, alleging NMFS had violated the APA and the ESA by failing to follow the specific methodology of section 4(b)(2) of the ESA and failing to comply with NEPA. The Center for Biological Diversity (CBD) intervened, and the parties cross-moved for summary judgment. The district court granted summary judgment for NMFS and CBD, holding that 1) NMFS had complied with the ESA, 2) NMFS's decision to not exclude was not subject to judicial review, and 3) NEPA was not implicated in critical habit designation. The Ninth Circuit reviewed the district court's grant of summary judgment de novo, and reviewed NMFS's actions under the arbitrary and capricious standard.

The Ninth Circuit first held that NMFS had complied with section 4(b)(2) of the ESA in deciding which areas to designate as critical habitat. Section 4(b)(2) states that the agency "shall designate critical habitat . . . after taking into consideration the economic impact," and that the agency "may exclude any area from critical habit" if the benefits of exclusion outweigh the benefits of designation and exclusion will not result in extinction of the species.[147] In rejecting BIABA's contention that the second sentence requires a specific balancing-of-the-benefits methodology, the Ninth Circuit noted the use of the discretionary term "may." In addition, the court pointed to an October 2008 legal opinion from the Department of the Interior that had independently concluded section 4(b)(2) did not contain a specific methodology. This legal opinion was entitled to *Skidmore* deference.[148] Finally, the court noted that the legislative history further reinforced this interpretation. The Ninth Circuit held that NMFS had complied with section 4(b)(2) because the record showed that NMFS considered the conservation value of each area, and that NMFS had

143 16 U.S.C. § 1533(b)(6)(C) (2012).

144 *Id.* § 1533(b)(2) (also known as section 4(b)(2)).

145 *Id.*

146 *Id.*

147 *Id.*

148 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Under *Skidmore*, an agency's ruling, interpretation, or opinion is not controlling, but it may provide guidance to the court. *Id.* at 140.

estimated the economic impact of each area by assessing the level of economic activity and the level of protection required by existing regulations for each of these economic activities.

Second, the Ninth Circuit determined that NMFS's decision to not exclude certain areas from critical habitat designation could not be judicially reviewed. In rejecting BIABA's argument to the contrary, the court noted that *Bear Valley Mutual Water Co. v. Jewell (Bear Valley)*,[149] decided earlier in the same term, held that an agency's decision not to exclude critical habitat was unreviewable.[150] The court explained that this conclusion fit within the framework of *Heckler v. Chaney*,[151] where the Supreme Court held an agency decision was unreviewable where "a court would have no meaningful standard against which to judge the agency's exercise of discretion."[152] Because the second sentence of section 4(b)(2) was completely discretionary, the court had no standard against which to judge NMFS's decision not to exclude areas from designation. Accordingly, the Ninth Circuit reaffirmed *Bear Valley*, and held that NMFS's decision not to exclude was not subject to judicial review.

Third, the Ninth Circuit concluded that NMFS was not required to comply with NEPA in its decision to designate critical habitat. In rejecting BIABA's argument to the contrary, the court noted that this issue had already been considered and decided. In *Douglas County v. Babbitt*,[153] the Ninth Circuit held that critical habit designations were not subject to NEPA for three reasons: First, the ESA displaced NEPA's procedural requirements; second, NEPA does not apply to actions to critical habit designations because designations do not alter the physical environment; and third, critical habit designations serve the purpose of NEPA by protecting the environment from human impact.[154] The Ninth Circuit reaffirmed *Douglas County* and held that NFMS was not required to comply with NEPA in its decision to designate critical habitat.

In sum, the Ninth Circuit held that NFMS had complied with section 4(b)(2) of the ESA, NFMS's decision to not exclude under the ESA was not subject to judicial review, and NEPA was not implicated in critical habitat designation. Accordingly, the Ninth Circuit affirmed the district court's ruling.

5. Klamath-Siskiyou Wildlands Center v. MacWhorter, 797 F.3d 645 (9th Cir. 2015).

In this case, the Klamath-Siskiyou Wildlands Center and other organizations[155] (collectively, KS Wild) appealed the dismissal of its claim

149 790 F.3d 977 (9th Cir. 2015).
150 *Id.* at 989.
151 470 U.S. 821, 830 (1985).
152 *Id.*
153 48 F.3d 1495 (9th Cir. 1995).
154 *Id.* at 1503, 1505–1506.
155 Plaintiff-appellants included Cascadia Wildlands Project and Rogue Riverkeeper.

against the United States Forest Service (USFS).[156] KS Wild is an organization concerned with the impact of suction dredge mining on the Coho salmon's critical habitat located in Rogue River-Siskiyou National Forest (the National Forest). KS Wild argued that its letter to USFS providing notice of its intent to file suit was sufficient to state a claim under the Endangered Species Act (ESA).[157] USFS asserted that KS Wild failed to strictly comply with the ESA notice provisions and, therefore, the district court lacked subject matter jurisdiction. The district court agreed with USFS. The Ninth Circuit reversed and remanded the district court's judgment.

Under the General Mining Law of 1872[158] and the Organic Administration Act of 1897,[159] a miner must submit to USFS a "notice of intent to operate" (NOI) if mining "might cause significant disturbance of surface resources."[160] After receiving the NOI, USFS must notify the miner if the operation will "likely cause significant disturbance of surface resources."[161] If so, the miner must submit a more detailed "plan of operations" for approval by USFS before mining can proceed.[162]

Under section 7 of the ESA, USFS must consult with the appropriate wildlife agency to ensure that any potential federal action is unlikely to "jeopardize the continued existence of any [listed] species or result in the . . . adverse modification of habitat of such species."[163] In *Karuk Tribe of California v. U.S. Forest Service* (*Karuk Tribe*),[164] the Ninth Circuit held that USFS's review of NOIs is an "agency action" and therefore is subject to the consultation requirement of section 7 of the ESA.[165] A private citizen may bring suit to remedy a violation of the ESA, provided that written notice of the alleged violation was given at least sixty days before suit was filed.[166]

On June 12, 2012, shortly after the decision in *Karuk Tribe*, KS Wild sent USFS a letter as notice of its intent to file suit under the ESA. The letter stated that the National Marine Fisheries Service (NMFS) had designated critical Coho salmon habitat within the National Forest. The letter alleged that USFS approved numerous NOIs from miners, but failed to consult with NMFS before approving suction dredge mining in the National Forest. The letter claimed that USFS notified miners on several occasions that it would be unnecessary to submit a proposed plan of operations. On August 8, 2012, USFS responded that KS Wild's letter "did not provide specific information about which mining operations [were] of concern, such as names of miners

156 The United States Forest Service was a defendant-appellee. Intervenor-defendant-appellees included Waldo Mining District, Thomas Kitchar, and Donald Young.

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

158 Ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. (2012)).

159 Ch. 2, § 1, 30 Stat. 11, 36 (codified at 16 U.S.C. § 482 (2012)).

160 30 U.S.C. § 22 (2012); 16 U.S.C. § 482 (2012); 36 C.F.R. § 228.4(a) (2015).

161 36 C.F.R. § 228.4(a) (2015).

162 *Id.* § 228.5(a).

163 16 U.S.C. § 1536(a)(2) (2012).

164 681 F.3d 1006 (9th Cir. 2012).

165 *Id.* at 1027.

166 16 U.S.C. § 1540(g)(2)(A)(l) (2012).

or mining claims, locations, or dates of mining operations."[167] On October 3, 2012, KS Wild sent USFS a letter with an updated list of thirty-one suction dredge mining projects with an appendix identifying all the claims on the list by date and location.

On October 22, 2012, more than sixty days after its June letter but fewer than sixty days after its October letter, KS Wild filed a complaint in federal district court. KS Wild amended its complaint and specifically identified a number of NOIs that it alleged were approved without consultation, including some that did not match with those in the June notice letter. USFS moved to dismiss the amended complaint, arguing that KS Wild's June notice letter was insufficient notice. The district court concluded that KS Wild's notice to USFS was deficient and dismissed the claims. KS Wild timely appealed. The Ninth Circuit, reviewing the claims de novo, reversed and remanded.

USFS contended that KS Wild's June notice letter was deficient and relied on *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation* (*Southwest Center*)[168] to support its contention. In that case, the Ninth Circuit held that the plaintiff's notice letters were inadequate because the letters only made general assertions of violations of the ESA. However, the Ninth Circuit disagreed with USFS's comparison to *Southwest Center* because KS Wild specifically alleged a geographically and temporally limited violation of the ESA. In this case, the Ninth Circuit concluded that KS Wild had provided USFS with all the necessary information to put USFS on notice of the alleged violations of the ESA, and that USFS did not need more specific information to know which NOIs might require consultation.

In sum, the Ninth Circuit held that KS Wild's June notice letter adequately notified the Forest Service of their alleged violations of the ESA. Therefore, the claim should not have been dismissed. The Ninth Circuit remanded all other questions in the suit to be addressed by the district court.

6. Cascadia Wildlands v. Thrailkill, 806 F.3d 1234 (9th Cir. 2015).

In this case, Cascadia Wildlands and other environmental groups[169] (collectively, Cascadia) brought an action seeking to enjoin the Douglas Fire Complex Recovery Project (Recovery Project), which authorized salvage logging of roughly 1,600 acres of fire-damaged forest. In approving the Recovery Project, the Medford District of the Bureau of Land Management (BLM) relied on a biological opinion (BiOp) issued by the United States Fish and Wildlife Service (FWS) that concluded that the Recovery Project was "not likely to result in jeopardy to the [Northern Spotted Owl] species or destruction or adverse modification of critical habitat."[170] Cascadia claimed that FWS failed to comply with procedural requirements of the Endangered

167 Klamath-Siskiyou Wildlands Ctr. v. MacWhorter, 797 F.3d 645, 648–649 (9th Cir. 2015).
168 143 F.3d 515 (9th Cir. 1998).
169 Plaintiff-appellants included Oregon Wild, and the Center for Biological Diversity.
170 Cascadia Wildlands v. Thrailkill, 806 F.3d 1234, 1236 (9th Cir. 2015).

Species Act (ESA)[171] by not applying the "best available scientific data" to its biological opinion regarding: 1) the effect of barred owls on detecting the presence of spotted owls, 2) the effect of wildfires on the spotted owl habitat, and 3) FWS's 2011 Northern Spotted Owl Recovery Plan (Recovery Plan).[172] The parties consented to final disposition by a magistrate judge in the United States District Court for the District of Oregon. The magistrate judge denied Cascadia's motion for preliminary injunction. The Ninth Circuit affirmed, finding that FWS's conclusions were based on the best available science and that Cascadia had failed to establish a likelihood of success on the merits.

Cascadia first argued that FWS did not use the best available scientific information to account for the adverse impact of barred owls on the accuracy of northern spotted owl surveys, which caused FWS to underestimate the number of spotted owl sites and make unsupported "no jeopardy" conclusions. The Ninth Circuit disagreed. The court found that the record showed that FWS relied on several scientific surveys addressing the impact of barred owls on spotted owl survey results. The court deferred to FWS's judgment over what constituted the best scientific data available, and held that FWS had satisfied its statutory requirements.

Next, Cascadia argued that FWS did not use the best available scientific information when determining that the effects of wildfires did not jeopardize the spotted owl habitat. The court found that FWS relied on several scientific reports regarding pre fire and post fire habitats to support the conclusion in its BiOp. Furthermore, the court noted that a reviewing court cannot substitute its judgment for that of the agency when the agency used adequate and reliable data. Because the court concluded that the Service issued its opinion based on multiple relevant scientific studies, it rejected Cascadia's claim.

Finally, Cascadia argued that the Recovery Plan constituted the best available science and the FWS was required to follow it. The court rejected this argument for two reasons. First, the court stated that recovery and jeopardy are two distinct concepts. The court noted that a Recovery Project that does not jeopardize the spotted owl habitat does not necessarily need to promote or bring about a long-term recovery of the species. Rather, the BiOp properly focused on the Recovery Project's ability to conserve the habitat so as not to have a detrimental effect on the species population. Second, the court noted that FWS was not obligated to follow the Recovery Plan because the plan does not have the force of law and is therefore not binding on FWS.

In sum, Cascadia failed to show that FWS did not utilize the best available scientific information when issuing its BiOp that the Recovery Project would not jeopardize the Northern Spotted Owl or its critical habitat. Because Cascadia failed to show that it was likely to succeed on the merits, the Ninth Circuit affirmed the denial of the preliminary injunction.

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

172 U.S. FISH & WILDLIFE SERV., REVISED RECOVERY PLAN FOR THE NORTHERN SPOTTED OWL (2011).

7. Center for Biological Diversity v. U.S. Fish & Wildlife Service, 807 F.3d 1031 (9th Cir. 2015).

The Center for Biological Diversity (CBD) brought suit against the United States Fish and Wildlife Service (FWS) challenging FWS's decision to sign a memorandum of agreement (MOA) based on conclusions reached in its Biological Opinion (BiOp). Specifically, CBD alleged that the BiOp failed to meet standards set forth in the Endangered Species Act (ESA)[173] and, as a result, FWS's decision to sign the MOA was arbitrary and capricious. The United States District Court for the District of Nevada granted FWS's motion for summary judgment. On appeal, the Ninth Circuit affirmed the district court's opinion.

The Moapa dace is a small thermophilic fish found in the Muddy River in the Clark County area of Nevada. FWS listed the Moapa dace as an endangered species under the ESA in 1967. The many threats the Moapa dace faces include loss of habitat from water diversions and development. In 1979, a protected area for the Moapa dace was established known as the Moapa Valley National Wildlife Refuge, which consisted of approximately 106 acres of springs and wetlands in the Warm Springs Area of the Upper Moapa Valley.

In 2002, Nevada's state engineer issued Order 1169,[174] resulting in an abeyance for any applications for groundwater appropriation in the Coyote Spring Valley. The abeyance would be in effect pending a study of the impact of pumping groundwater (pump test) on preexisting water rights. During the same time period, FWS was concerned that groundwater pumping in the Arrow Canyon, Coyote Springs Valley hydrographic basin, and California Wash hydrographic basin was causing spring flow decline in the Warm Spring area.

In 2004, FWS met with organizations and water-rights holders to identify conservation measures to assist with the Moapa dace's survival in anticipation of the pump test. In 2006, FWS and the water-rights holders entered into the MOA as a means of reconciling the respective parties' rights of use with the conservation and recovery needs of the Moapa dace. The MOA contained various monitoring, management, and conservation measures that could be grouped into two categories: those "designed to reduce pumping and dedicate water rights for Moapa dace conservation and measures designed to restore and improve Moapa dace habitat."[175] Furthermore, the MOA indicated that all parties wanted FWS to prepare a BiOp.

In 2006, FWS issued a BiOp that analyzed the possible effects of removal of 16,100 acre-feet per year from two basins in the Moapa Valley

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

174 OFFICE OF THE STATE ENG'R OF THE STATE OF NEV., ORDER 1169 (2002), *available at* http://www.blm.gov/style/medialib/blm/nv/groundwater_development/water_rights.Par.78070.File.dat/Order%201169%20Coyote%20Spring.pdf

175 Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 807 F.3d 1031, 1039 (9th Cir. 2015).

National Wildlife Refuge.[176] The BiOp stated that the groundwater pumping could result in a 31% loss of spawning habitat in one unit of the Moapa dace, but other units' spawning habitats would be relatively unaffected.[177] The BiOp further stated that temperature reductions from loss of flow in one unit could extend downstream and impact the Moapa dace by restricting reproductive potential and making the dace more vulnerable to wildfires. In addition, the BiOp focused on the conservation measures in the MOA and predicted that the measures would increase thermal habitat and reproduction potential in streams, provide secure habitats in case of water declination from groundwater developments, improve habitat in range of species, and reduce vulnerability to wildfires and other catastrophic events. Overall, the BiOp concluded that the MOA was not likely to jeopardize the Moapa dace.

In response, CBD sued FWS for declaratory and injunctive relief. The suit was brought under section 7 of the ESA,[178] the National Environmental Policy Act,[179] the National Wildlife Refuge System Improvement Act,[180] and the Constitution's Property Clause.[181] The district court granted summary judgment in favor of FWS. CBD appealed the district court's ruling of summary judgment on the ESA claim only, arguing that 1) the BiOp reached unsupported conclusions that the MOA contained enforceable and effective conservation methods, 2) the BiOp was not based on the best available science, and 3) the BiOp failed to evaluate all foreseeable consequences of the MOA.

Because the BiOp constituted a final agency action, the court applied the highly deferential arbitrary and capricious standard of the Administrative Procedure Act.[182] With that standard in mind, the Ninth Circuit first addressed whether CBD had standing to bring suit. In order to establish standing, a plaintiff must demonstrate that there exists an injury-in-fact, that the injury is traceable to the challenged conduct, and that the injury is likely redressable by a favorable decision.[183] The court found that CBD's injury-in-fact requirement was met because CBD members had various interests—scientific, spiritual, aesthetic, personal, and work-related—that would be harmed by a decline in the Moapa dace population. Because CBD alleged a procedural violation, its burden was lessened under the causation and redressability prongs; CBD needed only to show that correct procedure

176 Memorandum from the Field Supervisor, Nevada Fish and Wildlife Office, FWS, to Manager, California/Nevada Operations, FWS, at 1 (January 30, 2006), *available at* http://water.nv.gov/hearings/past/dry/browseable/exhibits%5CUSFWS/Exhibit%20602%20Muddy%20River%20MOA.pdf.

177 *Id.* at 55.

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

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

180 Natural Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252.

181 U.S. CONST. art. IV, § 3, cl. 2.

182 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5225, 5372, 7521 (2012). The standard of review is set forth in *id.* § 706.

183 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

might influence FWS's decision to sign the MOA. Finding that CBD satisfied all three standing prongs, the Ninth Circuit held that CBD had standing to bring its claim.

The court next considered the challenges to the BiOp. CBD first argued that the conservation measures included in the MOA were not enforceable under the ESA and therefore could not factor into the MOA's jeopardy analysis.[184] The court disagreed because the MOA conservation measures constituted the entire action contemplated by FWS in the BiOp and could therefore be relied on as an action or an effect in the jeopardy analysis. Additionally, the BiOp states that formal consultation with FWS is required if any provisions of the MOA are not met. The Ninth Circuit found that this provision constitutes recourse under the ESA and makes the conservation measures in the MOA sufficiently enforceable.

CBD next argued that FWS failed to satisfy the ESA's requirement that it use the best available science when developing the BiOp.[185] Specifically, CBD argued that FWS conceded that the flow reduction trigger scheme that constituted the foundation of the "no jeopardy" finding was based on expediency rather than science. CBD supported its argument by pointing to the fact that the flow reduction triggers were negotiated and not biologically based. The Ninth Circuit noted that the ESA does not require FWS to design or plan its projects using the best science possible. Rather, once an action is submitted for formal consultation, the consulting agency must use the best scientific and commercial evidence available in *analyzing* the potential effects of that action on endangered species in its biological opinion. Therefore, the court concluded that negotiated terms do not of themselves prove that FWS failed to utilize the best available science when it performed its analysis.

Next, CBD argued that there was not sufficient evidence to support a finding that the MOA's conservation measures were effective at ensuring against jeopardy to the Moapa dace. Additionally, CBD argued that the court should not defer to the BiOp's conclusions because FWS failed to address concerns raised by its own scientists regarding the effectiveness of the MOA's conservation measures. The Ninth Circuit explained that CBD's claim failed because there was no evidence supporting a conclusion that FWS scientists' concerns were supported by better science than the science used in the BiOp, or that FWS disregarded better scientific information than the evidence FWS relied upon.

The court next deferred to the BiOp's "no jeopardy" finding. The court first explained that an agency only "jeopardizes" a protected species if it increases the jeopardy to that species. The Ninth Circuit found that CBD did not point to a single provision in the MOA that caused even a minor deterioration in the Moapa dace's pre-action condition, and that the negative

184 *See* Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101 (9th Cir. 2012) ("[C]onservation agreement entered into by the action agency to mitigate the impact of a contemplated action on listed species must be enforceable under the ESA [for the agreement to factor into a BiOp's jeopardy determination].").

185 *See generally C*ascadia Wildlands v. Thrailkill, 806 F.3d 1234 (9th Cir. 2015).

effects stated in the MOA were caused by state-mandated groundwater pumping, not the conservation measures in the MOA themselves. The court characterized CBD's objections to the MOA and BiOP as claims that FWS did not do enough to ensure the survival of the Moapa dace. However, the court explained that holding FWS to such obligations would broaden FWS's obligations, both as an action agency and consulting agency, beyond what the ESA required. In sum, the Ninth Circuit concluded that CBD was unable to prove that the BiOp's conclusion was arbitrary or capricious.

Finally, CBD argued that by failing to issue an Incidental Take Statement (ITS), FWS acted arbitrarily and capriciously because it failed to consider all possible consequences of the proposed action. The law provides that "if after consultation . . . FWS concludes that the taking of endangered species incidental to the agency's action will not [jeopardize the continued existence of an endangered species, FWS] shall provide the Federal Agency with an ITS.[186] Once again, the Ninth Circuit focused on the fact that the agency action was the execution of the MOA by FWS, and explained that the execution itself does not result in pumping of groundwater. As a result, the Ninth Circuit found that there was no evidence showing an incidental take was likely to occur because FWS simply executed the MOA, and thus, FWS was not obligated to issue an ITS.

Ultimately, the Ninth Circuit held that 1) CBD had standing, but 2) FWS did not act arbitrarily or capriciously in determining, based on the BiOp, that participation in the MOA would not jeopardize the Moapa dace. The court upheld the district court's motion for summary judgment.

B. Geothermal Steam Act

Pit River Tribe v. U.S. Bureau of Land Management, 793 F.3d 1147 (9th Cir. 2015).

In this case, the Pit River Tribe and various environmental organizations[187] (collectively, Pit River) brought suit against the United States Bureau of Land Management's (BLM) in the United States District Court for the Eastern District of California. Pit River argued that the BLM's decision to continue 26 geothermal leases violated the Geothermal Steam Act (GSA),[188] the National Environmental Policy Act (NEPA),[189] the National Historic Preservation Act (NHSPA),[190] and the federal government's fiduciary trust obligation to Indian tribes, which required consulting with affected tribes. The district court dismissed Pit River's claims and found for the BLM on the pleadings. The Ninth Circuit reversed and remanded.

186 16 U.S.C. §1536(b)(4) (2012).

187 Plaintiff-appellants included the Native Coalition for Medicine Lake Highlands Defense; Mount Shasta Bioregional Ecology Center; Save Medicine Lake Coalition; and Medicine Lake Citizens for Quality Environment.

188 Geothermal Stream Act of 1970, 30 U.S.C. §§ 1001–1028 (2012).

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

190 National Historic Preservation Act, 16 U.S.C. §§ 470–470x-6 (2012).

The GSA authorizes the BLM to issue leases for a term of ten years, to promote the development of geothermal steam on federal land and in national forests.[191] Under GSA § 1005(a), the BLM must *continue* leases that, after the initial ten-year lease period, are producing geothermal steam in commercial quantities.[192] If a lease is not producing commercial quantities of geothermal steam, the BLM may *extend* the lease for up to five years under GSA § 1005(g).[193] This latter decision is discretionary, and requires the BLM to conduct NEPA and NHPA analyses prior to granting extensions.[194]

Between 1982 and 1986, the BLM entered into an agreement (Unit Agreement) for developing and operating the Glass Mountain Area, which included granting 26 initial leases that were at issue in this case. The leases were located in the Medicine Lake Highlands, which in turn formed part of the Glass Mountain Unit (Unit) established by the BLM to manage geothermal leases. In 1990, the BLM's California office agreed to extend 23 unproven leases[195] held by one leaseholder. In 1991, the same office agreed to continue one of those 23 leases that was now producing commercial quantities of geothermal steam. In 1992, the office extended two additional leases owned by the same party.

In 1998, based on requests from the leaseholder, the BLM retroactively vacated and revoked all 25 extensions it had granted to the unproven leases and simultaneously granted 40-year continuations to those same leases, even though none of those leases was producing commercial quantities of geothermal steam. The BLM claimed that both the GSA and the Unit Agreement governing leases in the Unit obligated the BLM to continue all 26 leases. In doing so, the BLM did not explain why its interpretation of the GSA and the Unit Agreement changed to require the BLM to continue leases it previously determined could only be extended.

In 2004, Pit River challenged the BLM's decisions to continue the unproven leases. The district court held that Pit River lacked prudential standing under the Administrative Procedure Act (APA)[196] to bring its GSA claims because the claims were not within § 1005(a)'s "zone of interest."[197] The district court did not consider whether Pit River raised a claim under § 1005(g). The district court then dismissed Pit River's NEPA, NHSA, and fiduciary claims, finding that the BLM had acted pursuant to a nondiscretionary duty under § 1005(a), and that additional statutory analyses would have therefore been superfluous.

The Ninth Circuit reversed and remanded. Pit River relied on the APA to challenge the BLM's decision to vacate the lease extensions and

191 30 U.S.C. § 1005(a), (g) (2012).

192 *Id.* § 1005(a).

193 *Id.* § 1005(g).

194 *Id.* § 1005(a), (g).

195 Unproven leases are those not producing or utilizing geothermal stream in commercial quantities.

196 Administrative Procedure Act, 5 U.S.C. § 702 (2012) ("[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

197 Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1389 (2014).

simultaneously issue lease continuations for those same leases. The BLM agreed that Pit River had Article III[198] standing, but argued that Pit River's claims should fail because the claims did not fall within the GSA's relevant zone of interest as required by the APA.[199] To satisfy the zone of interest test, the complainant must seek to protect an interest arguably within the protective scope of the statute under which the claim arises.[200] In cases where the plaintiff is not itself the subject of the contested agency action, courts should find that the asserted interest is outside of the relevant statute's zone of interest if the interest is so marginally related to the statute, or so clearly inconsistent with the statute's implicit purposes, that it is unreasonable to assume that Congress intended to allow for such claims.[201] Whether a party's claims fall within the relevant zone of interest is properly determined using traditional tools of statutory interpretation to assess whether the statute encompasses the claim, and is therefore not a prudential standing issue.[202]

Relying on a recent decision involving standing analysis,[203] the Ninth Circuit first rejected the district court's prudential standing analysis of Pit River's claims. The Ninth Circuit then determined under which sections of the GSA Pit River's claims arose. The district court had concluded that Pit River's claims arose only under § 1005(a) of the GSA because Pit River challenged the BLM's decision to issue lease continuations. However, upon review of Pit River's complaint, as well as the transcript from the hearing on the parties' cross-motion for judgment on the pleadings, the Ninth Circuit determined that Pit River raised § 1005(a) claims in response to the BLM's 1998 decision to issue lease-continuations, and § 1005(g) claims in response to the BLM's simultaneous decision to reverse and vacate its earlier decision to only extend those same leases.

Regarding the zone of interest test, the Ninth Circuit first noted that *Bennett v. Spear*[204] requires the zone of interest analysis to be based on the particular provision of the law the plaintiff relies on, and not the overall purpose of the Act.[205] The Medicine Lake Highlands are part of the Pit River Tribe's ancestral territory, and have ongoing cultural and religious significance for the Tribe. The physical, environmental, and aesthetic integrity of the Highlands are therefore of interest to the Tribe. Further, the geothermal leases may have an adverse impact on that integrity. The BLM's failure to conduct § 1005(g) analyses thus impacted tangible Tribe interests. As a result, the Ninth Circuit held that Pit River's § 1005(g) claim was within

198 U.S. CONST. art. III, § 2.

199 *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) (holding that the plaintiff's asserted interest must be "arguably within the [statute's] zone of interest to be protected or regulated by the statute.").

200 *Id.*

201 Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

202 *Lexmark Int'l, Inc.*, 134 S. Ct. 1377, 1387 (2014) (rejecting the "prudential standing" label even though the substance of the test remained largely the same).

203 *Id.* at 1387–88.

204 520 U.S. 154 (1997).

205 *Id.* at 175–76.

that section's zone of interest as the claim involved interests protected by § 1005(g).

Pit River additionally argued that it was entitled to judgment on the merits of its GSA claims, including the assertion that the BLM continued a block of leases within the Unit when the BLM should have considered whether extensions were appropriate on a lease-by-lease basis. The Ninth Circuit remanded the question of the BLM's compliance with the GSA, but declined to direct the district court to enter judgment in Pit River's favor. Instead, the Ninth Circuit explained that determining whether the BLM violated the GSA would require the district court to undertake a thorough factual analysis before resolving the claims on the merits. The Ninth Circuit also noted that the BLM's answer to Pit River's pleadings raised both issues of fact and affirmative defenses, making judgment based solely on Pit River's pleadings inappropriate.[206]

Ultimately, the Ninth Circuit determined that the district court erred in granting the BLM judgment on the pleadings on Pit River's NEPA, NHPA, and fiduciary duty claims. The Ninth Circuit agreed with the district court that § 1005(a) conferred a nondiscretionary duty on the BLM to continue appropriate leases without considering environmental factors. However, because the Ninth Circuit held that Pit River raised claims under § 1005(g), which, if successful on remand, would require BLM to comply with NEPA and NHPA and to consult with affected tribes prior to granting lease extensions, the BLM's failure to perform such analyses precluded judgment on the pleadings in its favor.

C. Magnuson-Stevens Fishery Conservation and Management Act

Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015).

In this case, the Chinatown Neighborhood Association and other organizations[207] (collectively, CNA) sought to challenge the California Shark Fin Law.[208] The Shark Fin Law prohibited the possession, sale, trade, and distribution of detached shark fins in California.[209] CNA argued that the Magnuson-Stevens Fishery Conservation and Management Act (MSA)[210] preempted the Shark Fin Law because the Shark Fin Law interferes with federal management of shark fishing in the exclusive economic zone (EEZ) and with the federal government's ability to balance the statutory objectives of the MSA. CNA also contended that the Shark Fin Law violates the

206 *See* FED. R. CIV. P. 12(b)(6).

207 Plaintiff-appellants included Asian Americans for Political Advancement.

208 CAL. FISH & GAME CODE § 2012(b) (West 2013). Defendants included Kamala Harris in her capacity as Attorney General of the State of California, and Charlton Bonham is his capacity as Director of the California Department of Fish & Game. Intervenor-defendants included Humane Society of the United States, Monterey Bay Aquarium Foundation, Asian Pacific American Ocean Harmony Alliance.

209 CAL. FISH & GAME CODE § 2012(b) (West 2013).

210 Magnuson-Stevens Fishery Conservation and Mgmt. Act, 16 U.S.C. §§ 1801–1891(d) (2012).

Commerce Clause[211] by interfering with interstate commerce and cutting off the flow of shark fins through California into the rest of the country. The Ninth Circuit rejected CNA's arguments and affirmed the district court's dismissal of the amended complaint with prejudice.

The MSA was enacted to create a federal-regional partnership to regulate fishery resources.[212] Under the MSA, the federal government has sovereign rights and exclusive fishery management authority over all fish and Continental Shelf fishery resources within the EEZ.[213] The EEZ spans from the seaward boundary of each coastal state to 200 miles offshore.[214] The states retain jurisdiction over fishery management within their boundaries.[215]

"Shark finning" is the removal of fins from a living shark. Shark finning has become an increasingly common practice to meet the demand for fins used primarily for shark fin soup. As a result, tens of millions of sharks die each year despite the state and federal prohibitions already regulating the waters off the California coast. In response, the California legislature passed the Shark Fin Law, making it a misdemeanor to possess, sell, trade, or distribute detached shark fins in California.[216]

In August 2012, CNA moved for a preliminary injunction against the enforcement of the Shark Fin Law. The district court denied the motion and the Ninth Circuit affirmed. In December 2013, CNA filed an amended complaint. At the hearing on the motion to dismiss, the district court asked CNA's counsel whether "you've got the complaint where you want it," and counsel responded affirmatively.[217] Based on this response, the district court denied CNA a second round of amendments and granted defendants' motion to dismiss with prejudice. The Ninth Circuit reviewed the district court's decision on the motion to dismiss de novo and the denial of leave to amend for abuse of discretion.

In CNA's amended complaint, CNA attacked the Shark Fin Law under several theories, including preemption, violation of the Commerce Clause, and violation of the dormant Commerce Clause. Additionally, CNA requested the court find that the district court abused its discretion in failing to grant its leave to amend sua sponte. CNA was unsuccessful on each of its claims against the Shark Fin Law and on its request to find an abuse of discretion by the district court.

The Ninth Circuit first analyzed CNA's preemption argument. CNA asserted that the Shark Fin Law interferes with federal authority to manage shark fishing in the EEZ and therefore "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[218] The court disagreed, holding that the police powers of states

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211 U.S. CONST. art. I, § 8, cl. 3.

212 Nat. Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 749 (D.C. Cir. 2000).

213 16 U.S.C. § 1811(a) (2012).

214 *Id.* § 1802(11).

215 *Id.* § 1856(a)(1).

216 CAL. FISH & GAME CODE § 2012(b) (West 2013).

217 CNA v. Harris, 794 F.3d 1136, 1144 (9th Cir. 2015).

218 Arizona v. United States, 132 S. Ct. 2492, 2501 (2012).

should not be superseded unless it was the "clear and manifest" purpose of Congress to do so. The court gave two reasons for why it disfavored preemption in this case. First, there is a general presumption against preemption. This presumption applies generally, but is particularly strong in instances where Congress has legislated in an area traditionally managed by the states.[219] In this case, control over fish in state waters has historically been regulated by states. Second, there is no explicit preemption provision in the MSA.[220] CNA had merely pointed to a potential obstacle to general federal purposes, which is insufficient to overcome the presumption against preemption.

CNA also argued that because the MSA attempts to balance competing objectives in fishery management, Congress intended to prevent states from promoting one objective over others. CNA claimed that California wrongly valued of conservation over other objectives of the MSA.[221] The Ninth Circuit acknowledged various competing values within the MSA, but concluded that conservation was paramount. The court held that the Shark Fin Law was consistent with the MSA's primary goal of conservation.

CNA also argued that by failing to address on-land activities related to finning in the MSA, Congress intended to leave such activities unregulated. The Ninth Circuit rejected this argument because silence alone does not indicate preemption of state law. Rather, "a clear and manifest purpose is always required."[222]

The Ninth Circuit next analyzed CNA's Commerce Clause claims. CNA alleged that the Shark Fin Law is invalid because it curbs commerce in shark fins between California and out-of-state destinations and prevents shark fins from moving from one out-of-state destination to another through California. The court rejected these arguments because a state can regulate commercial relationships when at least one party is in California.[223] Even when a state law has significant extraterritorial effects it still does not violate the Commerce Clause if those effects result from the regulation of in-state conduct.[224] Unlike the cases relied upon by CNA, the Shark Fin Law does not fix prices in other states, require those states to adopt California standards, or attempt to regulate transactions conducted wholly out of state.

CNA also argued that according to *Pike v. Bruce Church, Inc.*,[225] the Shark Fin Law should be struck down under the dormant commerce clause because the burden on interstate commerce is excessive compared with "putative local benefits."[226] The court rejected this argument because the Shark Fin Law does not interfere with inherently federal activities or activities that require national uniformity. The court held that without any

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219 McDaniel v. Wells Fargo Invs., LLC, 717 F.3d 668, 674 (9th Cir. 2013).

220 *MSA*, 16 U.S.C. §1801 (2012).

221 *Id.* § 1801(b) (recognizing various competing values under the MSA).

222 P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988).

223 Gravquick A/S v. Trimble Navigation Int'l, Ltd., 323 F.3d 1219, 1224 (9th Cir. 2003).

224 *See* Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070, 1101–04 (9th Cir. 2013) (describing modern extraterritoriality doctrine).

225 397 U.S. 137 (1970).

226 *Id.* at 142.

significant burden on interstate commerce, it is inappropriate to determine the law's constitutionality based on the court's own evaluation of the benefits of the law and the State's wisdom in adopting it.

Finally, the Ninth Circuit analyzed the district court's denial of CNA's motion for leave to amend. CNA asked the court to find that the district court abused its discretion in failing to grant leave sua sponte. CNA contended that if it was permitted to plead additional facts to support its preemption claim, it could have alleged a direct conflict between the California statute and the MSA. CNA argued that the Shark Fin Law affects the ability of commercial fishers to reap the optimum yields prescribed in Fishery Management Plans for shark harvests under the MSA. The court rejected this argument and held that the MSA does not preempt a state law simply because the state law could have an effect on the realization of optimal yields. The court reasoned that there were still commercially viable uses for sharks besides their fins, so it was still possible to realize the optimal yields for shark harvests by other means without the need to detach shark fins. Moreover, the MSA could not be interpreted so broadly because Congress expressly preserved state control over commerce in fish products within state borders. Such control would certainly affect the realization of optimum yields under the MSA. Therefore, the court concluded that simply because the Shark Fin Law affects the realization of optimal yields does not mean that the Shark Fin law is in direct conflict with the MSA. Thus, CNA's amendment would not have changed the outcome in this case, and granting leave to amend would have been futile.

In sum, the Ninth Circuit held that the MSA did not preempt the Shark Fin Law because there was no clear and manifest intent by Congress to do so. The court held that the Shark Fin Law was consistent and cooperative with the purpose of the MSA, strengthening the presumption against preemption. The court also held that simply because the Shark Fin Law has an effect on the realization of optimal yields does not put it in direct conflict with the MSA. Thus, the district court did not abuse its discretion in dismissing the case because granting a second round of amendments would have been futile. Finally, the court held that the Shark Fin Law did not violate the Commerce Clause or the Dormant Commerce Clause because the effects of the law result only from regulation of in-state conduct. For these reasons, the Ninth Circuit affirmed the district court's judgment.

Judge Reinhardt dissented in part. He contended that CNA should have been granted leave to amend the complaint for their preemption claim because the defects in CNA's complaint could have been cured by amendment. Judge Reinhardt pointed out that the federal government has the authority to maximize productivity within the EEZ and the Shark Fin Law could pose an obstacle to legal shark fishing. He believed that if the fin is the main part of a shark that has commercial value and if the Shark Fin Law causes fishermen to cease catching sharks in EEZ fisheries, the federal objective of achieving optimum yield could be unconstitutionally impaired. Judge Reinhardt felt that leave to amend should be freely given and that CNA should at least have the opportunity to adequately plead its claim.

D. Outer Continental Shelf Lands Act

Alaska Wilderness League v. Jewell, 788 F.3d 1212 (9th Cir. 2015).

In this case, the Alaska Wilderness League, as part of a coalition of environmental groups[227] (collectively, the Coalition), sought review of actions taken by the Bureau of Safety and Environmental Enforcement (BSEE) in approving oil spill response plans (OSRPs) submitted by Shell, along with exploration plans, as required under the Clean Water Act (CWA).[228] The Coalition claimed that BSEE's approval of the OSRPs violated the Administrative Procedure Act (APA),[229] the Endangered Species Act (ESA),[230] and the National Environmental Policy Act (NEPA).[231] The district court granted summary judgment in favor of the federal defendants and Shell, and the Ninth Circuit affirmed.

The Outer Continental Shelf Lands Act (OCSLA)[232] provides a process for the exploration and development of offshore oil and gas resources that includes submission of an exploration plan to the Secretary of the Interior for approval.[233] Although the OCSLA governs the actual development of oil and gas resources, the CWA supplements the OCSLA by providing structured guidance for preventing and responding to potential oil spills. The CWA requires that an OSRP accompany the exploration plan for the purpose of contingency planning and places statutory requirements on what must be included in an OSRP.[234] BSEE must "promptly review" submitted OSRPs, "require amendments to any plan that does not meet the requirements [of the Act]," and "shall . . . approve any plan that meets" the statutory requirements of the CWA.[235]

The court reviewed the district court's grant of summary judgment de novo. In its review, the court considered BSEE's actions in approving the OSRPs under the arbitrary and capricious standard set forth in the APA.[236] The court noted that under that narrow standard of review, it could not substitute its own judgment for that of the agency. BSEE had authority to promulgate rules regarding OSRPs and to review submitted plans for compliance with the requirements of the CWA; accordingly, the court

227 Plaintiff-appellants included the Center for Biological Diversity, Inc., Greenpeace, Inc., the National Audobon Society, Inc., the Natural Resources Defense Council, Inc., Ocean Conservancy, Inc., Oceana, Inc., the Pacific Environment and Resources Center, REDOIL, Inc., and the Sierra Club.

228 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012). *See* 30 C.F.R. § 550.219 (2015) (describing information regarding potential oil and hazardous substance spills required as accompaniment to the exploration plan).

229 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335 (2012).

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

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

232 43 U.S.C. §§ 1331–1356a (2012).

233 *Id.* § 1344.

234 CWA, 33 U.S.C. § 1321(j)(5)(D) (2012).

235 *Id.* § 1321(j)(5)(E)(i)–(iii).

236 APA, 5 U.S.C. § 706 (2012).

reviewed BSEE's interpretation of the CWA to determine whether it was reasonable.

The Coalition challenged BSEE's approval of Shell's OSRPs as arbitrary and capricious under the APA. Specifically, the Coalition claimed that Shell's OSRP assumed that in a worst case discharge of 25,000 barrels of oil per day it could recover 90 to 95 % of any oil spilled in the Arctic Ocean, which the Coalition characterized as an unrealistic and impossibly high recovery rate. The Coalition asserted that, because Shell assumed such an impossibly high recovery rate, BSEE's approval of the OSRP was necessarily arbitrary and capricious. The court, however, held that the record did not support the Coalition's claim regarding the impossibly high recovery rate; rather, Shell was claiming it had the capacity to *store* 95 % of the amount discharged, not that it could actually recover that much. Accordingly, the court rejected the Coalition's claim.

The Coalition next argued that BSEE violated section 7 of the ESA, which requires federal agencies to consult with appropriate environmental agencies prior to taking actions that may affect endangered species.[237] The court explained that the consultation requirement is only triggered if there is discretionary Federal involvement or control because consultation is meaningless if the agency lacks power to implement changes.[238] The court concluded that approval of OSRPs is a nondiscretionary action, and thus ESA consultation is not triggered. In reaching this conclusion, the court applied the *Chevron*[239] framework to evaluate BSEE's interpretation of the CWA. Under this framework, the court first reviews the governing statute for ambiguity. If it finds ambiguity, the court then reviews if the agency's interpretation of the statute is reasonable.

The first step of *Chevron* required the court to review the relevant portions of the CWA for ambiguity. Upon review, the court found the statute ambiguous in two ways: in the language itself, and in the statute's structure. The court noted that the text of the CWA does not explicitly grant or deny BSEE discretion to consider additional environmental factors, such as the presence of endangered species, in the OSRP approval process. The court further noted that the applicable sections of the CWA suggest no agency discretion because they appear to operate as a checklist, with BSEE approving any OSRP that meets all requirements. Finally, the court concluded that the statute's structure added to the ambiguities of the text by characterizing BSEE's discretion using both broad language and finite criteria. Because the statute's text was ambiguous, the court proceeded to the second step of the *Chevron* analysis.

The second step of *Chevron* required the court to review BSEE's interpretation of the ambiguous statute and determine if the interpretation was reasonable. If BSEE's interpretation was a reasonable construction of the statute, the court must defer to BSEE's interpretation. BSEE read the statute as an instruction to issue regulations that explain how operators can

[237] ESA, 16 U.S.C. § 1536(a) (2012).

[238] 50 C.F.R. § 402.03 (2015).

[239] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

comply with the statutory checklist. BSEE interpreted the CWA to require approval of OSRPs that meet the statutory requirements. The Ninth Circuit concluded that these interpretations of the governing statutes were both reasonable and consistent with the legislative history. Therefore, the court deferred to BSEE's interpretation of the statute, and held that BSEE's approval of the OSRPs was a nondiscretionary act that did not trigger the consultation requirement under the ESA.

Finally, the Coalition claimed that BSEE violated NEPA by failing to prepare an Environmental Impact Statement (EIS) before approving Shell's ORSPs. NEPA requires federal agencies to provide an EIS for all "major Federal actions significantly affecting the quality of the human environment."[240] The court rejected this claim because NEPA exempts agencies from the EIS requirement where an agency's action is nondiscretionary. Because the court had already concluded that BSEE must approve all OSRPs that meet the statutory requirements and could not refuse to perform that action, BSEE's approval of the plan fell within the NEPA exception. Thus, BSEE did not need to submit an EIS prior to approving an OSRP.

Because BSEE's approval of Shell's OSRPs did not violate the APA, the ESA, or NEPA, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the federal defendants and Shell.

III. MISCELLANEOUS

A. Administrative Procedure Act

Organized Village of Kake v. U.S. Department of Agriculture., 795 F.3d 956 (9th Cir. 2015) (en banc).

In this case, the Organized Village of Kake and others (collectively, the Village)[241] sued the Department of Agriculture (USDA) in the United States District Court of Alaska. The Village alleged that the USDA's adoption of the Tongass Exemption violated the Administrative Procedure Act (APA)[242] and the National Environmental Policy Act (NEPA).[243] The district court held that the USDA violated the APA, and did not address the Village's NEPA claim. The Ninth Circuit, sitting en banc, affirmed the district court's holding.

240 NEPA, 42 U.S.C. § 4332(C) (2012).

241 Plaintiff-appellees included the Alaska Wilderness Recreation and Tourism Association, Southeast Alaska Conservation Council, Natural Resources Defense Council, Tongass Conservation Society, Greenpeace, Inc., Wrangell Resources Council, the Center for Biological Diversity, Defenders of Wildlife, Cascadia Wildlands, and the Sierra Club.

242 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5225, 5372, 7521 (2012).

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

This case centered on two rules of decision (ROD) regarding the Roadless Rule[244] reached by the USDA in 2001 and 2003. The USDA has designated about one-third of National Forest Service lands as inventoried roadless areas. These roadless areas have unique scientific, environmental, recreational, and aesthetic qualities, referred to as "roadless values."[245] In 2000, the costs associated with local-level and forest-level management plans prompted the USDA to consider adopting a national roadless land rule. The USDA considered, among other things, whether to exempt the Tongass National Forest (the Tongass), the nation's largest national forest, from the proposed rule. Ultimately, in its 2001 ROD, the USDA adopted an approach that applied the Roadless Rule to the Tongass, but codified several exceptions designed to mitigate the socioeconomic impacts of the Roadless Rule in Southeast Alaska.[246]

After the USDA promulgated the 2001 ROD, several lawsuits followed. The State of Alaska brought one such lawsuit in 2001 in the United States District Court of Alaska.[247] In that suit, the State of Alaska claimed that the Roadless Rule violated the Alaska National Interest Lands Conservation Act (ANILCA),[248] the APA, NEPA, the Tongass Timber Reforms Act (TTRA),[249] and other federal statutes.[250] Ultimately, the case settled and the complaint was dismissed.

As part of the settlement, the USDA agreed to publish, but not necessarily adopt, a proposed rule to "temporarily exempt the Tongass from the application of the roadless rule," and require advanced notice of any proposed rulemaking to permanently exempt the Tongass, as well as another Alaskan forest, from application of the Roadless Rule.[251] Pursuant to these changes, the USDA issued its 2003 ROD promulgating the Tongass Exemption.[252] The 2003 ROD found that little of relevance had changed from when the 2001 ROD was released and that the public comments offered did not raise any new issues not already explored in 2001.[253] Accordingly, the USDA relied on the Final Environmental Impact Statement (FEIS) from 2001 rather than preparing a new EIS.

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244 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (proposed Jan. 12, 2001) (to be codified at 36 C.F.R. §§ 294.10–294.14).

245 *Id.* at 3,245, 3,251.

246 *Id.* at 3,254–55.

247 Alaska v. U.S. Dep't of Agric., No. 3:01-cv-00039-JKS (D. Alaska filed Jan. 31, 2001).

248 16 U.S.C. §§ 3101–3233 (2012).

249 Pub. L. No. 101-626, 104 Stat. 4426 (1990) (codified as amended in scattered sections of 16 U.S.C.).

250 *See* Organized Vill. of Kake v. U.S. Dep't of Agric., 776 F. Supp. 2d 960, 964 (D. Alaska 2011) (describing this litigation), *rev'd*, 746 F.3d 970 (9th Cir. 2014), *aff'd en banc*, 795 F.3d 956 (9th Cir. 2015).

251 *See* Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 41,865, 41,866 (proposed Jul. 15, 2003) (notice of proposed rulemaking).

252 Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (proposed Dec. 30, 2003) (to be codified at 36 C.F.R. § 294.14).

253 *Id.* at 75,139, 75,141.

In response to the 2003 ROD, the Village sued the USDA, alleging that the USDA's promulgation of a new rule violated the APA and NEPA. Alaska intervened as a party-defendant.[254] The district court granted summary judgment to the Village because "the Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in [2001], were deemed sufficient in [2003]."[255] The USDA declined to appeal, but Alaska did appeal. On appeal a divided three-judge panel reversed the district court's APA ruling and remanded for consideration of the Village's NEPA claim.[256] The Village petitioned for a rehearing en banc, and a majority of the Ninth Circuit granted the Village's petition.[257] On rehearing, the Ninth Circuit reviewed the district court's decision de novo and the USDA's actions under the arbitrary and capricious standard.

The Ninth Circuit first held that Alaska had standing to appeal on behalf of the USDA. Although the Village did not challenge standing on appeal, the court noted that Alaska must still satisfy Article III[258] standing for the court to have jurisdiction. Where an intervenor appeals on behalf of a government agency, "the test is whether the intervenor's interests have been adversely affected by the judgment."[259] Here, the court found this test was met because, under the National Forest Receipts Program, Alaska had a right to twenty-five percent of gross receipts of timber sales from national forests within the State.[260] Since the amount of timber harvested in the Tongass directly affected the amount of money Alaska receives, Alaska had an interest in the judgment.

The majority also noted that an inquiry into whether Congress intended to legislate a private cause of action was not a question of Article III standing.[261] Furthermore, the court held that under the APA, the determination of whether Alaska has standing depended on whether Alaska met the "zone of interest" test.[262] In the APA context, the zone of interest test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue."[263] Because the Village met this test, the court held there was standing.

The court next held the USDA violated the APA. To comply with the APA, the agency must, among other things, provide "good reasons" for the

254 Defendant-intervenors included the United States Forest Service and the Alaska Forest Association, Inc.

255 Organized Vill. of Kake v. U.S. Dep't of Agric., 776 F. Supp. 2d 960, 974, 977 (D. Alaska 2011).

256 Organized Vill. of Kake v. U.S. Dep't of Agric. *(Kake I),* 746 F.3d 970, 973–74 (9th Cir. 2014), *aff'd en banc*, 795 F.3d 956 (9th Cir. 2015).

257 Organized Vill. of Kake v. U.S. Dep't of Agric. *(Kake II)*, 795 F.3d 956, 962–63 (9th Cir. 2015).

258 U.S. CONST. art. III, § 2.

259 Didrickson v. U.S. Dep't of the Interior, 982 F.2d 1332, 1338 (9th Cir. 1992).

260 16 U.S.C. § 500 (2012).

261 Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386–88 (2014).

262 *Id.* at 1388–89.

263 *Id.* at 1389.

new policy.[264] If the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[265] With this in mind, the court found that the 2003 ROD rested on factual findings that contradicting those in the 2001 ROD and that the 2003 ROD failed to give good reasons for adopting a new policy.[266] The 2001 ROD had found that "the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast Alaska] communities" caused by application of the Roadless Rule.[267] In contrast, the 2003 ROD explained that the shift in agency position rested on "(1) serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions would cause in communities throughout Southeast Alaska, (2) comments received on the proposed rule, and (3) litigation over the last two years."[268] The court explained why these three reasons were not good reasons for the new policy.

First, the socioeconomic concerns were not new. These same concerns led to the 2001 ROD's adoption of special mitigation measures in order to allow certain ongoing timber and road construction projects. While the USDA could give more weight to socioeconomic facts in 2003, the USDA still had to give a reasoned explanation for this shift in policy. Although not every violation of the APA invalidates an agency action, where prejudice is obvious to the court the party challenging the agency action need not make a further showing.[269] That was the case here, and therefore the socioeconomic concerns were not good reason for the new policy. Second, the public comments received were not good reason for the new policy because, as the USDA admitted, the comments received relating to the 2003 ROD raised no new issues not already explored. Third, the litigation occurring over the past two years was not a good reason for the new policy. The Roadless Rule had created a nationwide dispute and the 2003 ROD resulted in the present lawsuit. The court noted that, at most, the USDA was trading one lawsuit for another.

Having found that the 2003 ROD violated the APA, the court sought to determine the appropriate remedy. The court noted that ordinarily a rule violating the APA is deemed invalid. However, Alaska argued that by reinstating the 2001 ROD, the district court reinstated another invalid rule because the 2001 ROD had been enjoined by the Wyoming district court both

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264 Fed. Commc'ns Comm'n v. Fox Television Stations, Inc. (Fox), 556 U.S. 502, 515 (2009).

265 *Id.* at 515–16 (emphasis omitted).

266 *Kake II*, 795 F.3d 956, 967–68 (9th Cir. 2015).

267 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,255 (proposed Jan. 12, 2001) (to be codified at 36 C.F.R. §§ 294.10–294.14).

268 Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,137 (proposed Dec. 30, 2003) (to be codified at 36 C.F.R. § 294.14).

269 *See* Jicarilla Apache Nation v. U.S. Dep't of the Interior, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (holding that prejudice was obvious because the agency departed from precedent in a way that harmed petitioner).

when the Tongass Exemption was promulgated and when the judgment below was entered. In response, the Ninth Circuit first noted that the Wyoming injunction conflicted with another Ninth Circuit opinion.[270] Additionally, the court noted that the Tenth Circuit had vacated both of the Wyoming District Court injunctions.[271] Accordingly, reinstatement of the 2001 ROD was the appropriate remedy.

In sum, the Ninth Circuit held that the USDA's 2003 ROD violated the APA because the USDA relied on the same underlying facts as the 2001 ROD but did not provide a good reason for its change in policy. Accordingly, the Ninth Circuit affirmed the district court's ruling.

Judge Callahan, in dissent, argued that the majority's standing analysis failed for several reasons. First, Congress did not intend for the National Forest Receipts Program to create a private cause of action for states to enforce their interest in shared revenue. Even if Congress did intend to create a statutory right, that right had not been infringed. Under 16 U.S.C. § 500,[272] Alaska was entitled to a share of revenue, but Alaska was not entitled to have revenue generated. Thus, Alaska's showing that it received less money was not a violation of any statutory right created by the relevant statute.

Judge Callahan also asserted that the majority misconstrued the zone of interest test.[273] The zone of interest test was meant to apply only after the litigant had already shown injury in fact. Because Judge Callahan believed there was no injury in fact the zone of interest test should not have applied. According to Judge Callahan, the real issue in this case was whether there was a "case or controversy" under Article III. The majority held that to meet the case or controversy requirement, Alaska only needed to show it had a stake in defending the Tongass Exemption. Judge Callahan noted that this interpretation was contrary to Supreme Court precedent and Ninth Circuit precedent.[274]

Further, Judge Callahan argued that the majority misunderstood the requirement of good reasons for changing policy set forth in *Federal Communications Commission v. Fox Television Stations, Inc. (Fox)*.[275] In *Fox*, the court held that an agency must "provide reasoned explanation for its action," which normally requires "that it display awareness that it is

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270 *Kake II*, 795 F.3d at 970; *see also* Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F.3d 999 (9th Cir. 2009).

271 Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1272 (10th Cir. 2011); Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1214 (10th Cir. 2005).

272 16 U.S.C. § 500 (2012).

273 Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

274 Diamond v. Charles, 476 U.S. 54, 66–69 (1986) (dismissing for lack of jurisdiction because a defendant intervenor did not demonstrate an injury in fact necessary to establish his standing to appeal); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1109 (9th Cir. 2002) ("To establish standing [to appeal], the defendant-intervenors must first show that they have suffered an injury in fact."), *abrogated on other grounds by* Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

275 556 U.S. 502, 514–16 (2009).

changing position."[276] Judge Callahan believed that the USDA met this requirement by acknowledging it had changed its mind. In addition, Judge Callahan thought the USDA met the APA's requirements by explaining that the Tongass Exemption would provide for a better balance between environmental preservation, road access, and timber availability. Judge Callahan believed this balance was reinforced by the USDA's detailed Environmental Impact Statement and discussed in the 2003 ROD.[277] Accordingly, even if this case was not dismissed for lack of appellate jurisdiction, Judge Callahan would have reversed and remanded the case because the requirements under *Fox* had been met.

Judge M. Smith also wrote separately to discuss the reality of changing presidential administrations and the effect these changes have on policy. The 2001 ROD was promulgated at the end of the Clinton administration, which urged the USDA to adopt protections for roadless areas. On the other hand, the 2003 ROD was promulgated at the beginning of the Bush administration, which placed more emphasis on the socioeconomic impacts of roadless area legislation. Although the underlying facts of the 2001 ROD and the 2003 ROD were substantially the same, the majority ignored the fact that the USDA was viewing those facts through two different lenses. Judge Smith argued that *Fox* supports altering policy because of a change in presidential administrations so long as "the agency's path may reasonably be discerned."[278]

Furthermore, *Fox* only required a single good reason for a change in policy. Judge Smith noted that the USDA had four legitimate reasons: 1) resolving litigation by complying with federal statutes governing the Tongass, 2) satisfying demand for timber, 3) mitigating socioeconomic hardships caused by the Roadless Rule, and 4) promoting road and utility connections in the Tongass. These reasons, which were received after the USDA considered the facts and conducted a full notice-and-comment period, were entitled to deference. Accordingly, Judge Smith would have reversed the district court's decision.

B. Mandamus

Pesticide Action Network North America v. U.S. Environmental Protection Agency, 798 F.3d 809 (9th Cir. 2015).

In this case, Pesticide Action Network North America and the Natural Resources Defense Council (collectively, PAN) petitioned the Ninth Circuit for a writ of mandamus ordering the United States Environmental Protection Agency (EPA) to issue a final decision on an administrative petition PAN

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276 *Id.* at 515 (emphasis omitted).

277 Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,137 (proposed Dec. 30, 2003) (to be codified at 36 C.F.R. § 294.14).

278 *Fox*, 556 U.S. at 513–14 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

filed in 2007 requesting that the agency revoke registration of the pesticide chlorpyrifos. Although the Ninth Circuit recognized the scientific and technical complexity inherent in making pesticide registration decisions, the court granted mandamus relief and ordered EPA to issue a final response to PAN's petition after finding EPA's delay in responding to the petition excessive.

EPA is tasked with registering pesticides it determines are safe under the Federal Food, Drug, and Cosmetic Act,[279] meaning that exposure to the pesticide chemical residue will not likely result in harm. EPA has the authority to revoke or amend a registration if EPA determines that the pesticide is not safe.[280] The Food Quality Protection Act (FQPA),[281] passed in 1996, required that EPA review all pesticides in use at that time for compliance with current safety standards. The FQPA required an initial review to be completed within fifteen years, and repeat reviews to be completed every fifteen years thereafter.[282]

Chlorpyrifos is a pesticide primarily used to control pest insects on crops.[283] EPA's initial review of chlorpyrifos in 2000 allowed for its continued use in agricultural areas. In 2007, PAN filed an administrative petition with EPA seeking a ban on chlorpyrifos based on concerns over its toxicity. EPA never responded to that petition, and in 2010 PAN filed suit in federal court demanding a response. That suit was stayed after EPA promised to issue a human health risk assessment by June 2011 and a final response by November 2011.

After EPA failed to issue the promised final response, PAN filed a petition for a writ of mandamus with the Ninth Circuit in April 2012. In reaction, EPA promised to issue a final response by February 2013 if the response was a complete denial of PAN's administrative petition, or by February 2014 if the response was a proposed rule to revoke or modify the chlorpyrifos registration. The district court denied the mandamus petition, holding that mandamus was inappropriate because EPA had a timeline for a final response. The suit was dismissed without prejudice so as not to preclude future relief should EPA fail to meet its timeline. Months after EPA missed its February 2014 deadline, PAN filed the petition for a writ of mandamus that is the subject of this decision.

In reviewing the petition for mandamus, the court noted that mandamus is an extraordinary measure that is only warranted when an agency's delay is "egregious." To determine if mandamus is warranted, the court weighs six so-called "TRAC factors." These factors are:

> (1) [T]he time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the

279 21 U.S.C. § 346a(b)(2)(i)–(ii) (2012).

280 *Id.* § 346a(l)(2).

281 Food Quality Protection Act of 1996, 7 U.S.C. § 136 (2012).

282 *Id.*

283 U.S. Envtl. Prot. Agency, *Chlorpyrifos*, http://www2.epa.gov/ingredients-used-pesticide-products/chlorpyrifos (last visited July 16, 2016).

> speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.[284]

The court determined that several factors weighed in favor of mandamus. Specifically, EPA had stretched the "rule of reason" to its limits by failing to issue a final ruling after eight years and by failing to provide any meaningful timeline for issuing a final ruling. Additionally, the potential health risks posed by chlorpyrifos warranted expedited agency action. Finally, EPA's repeated failure to comply with deadlines in this matter had led to three nonfrivolous lawsuits, and the court wanted to avoid further litigation over EPA's apparent inability to meet its deadlines. Therefore, the court granted PAN's petition for mandamus and ordered EPA to issue either a final response to PAN's administrative petition, or a proposed and final revocation rule for the chlorpyrifos registration, by October 31, 2015.

C. National Environmental Policy Act

1. WildEarth Guardians v. Montana Snowmobile Ass'n, 790 F.3d 920 (9th Cir. 2015).

In this case, WildEarth Guardians and other environmental groups[285] (collectively, WildEarth) brought an action against the United States Forest Service (USFS) under the National Environmental Policy Act (NEPA)[286] challenging USFS's designation of over two million acres of public land in the Beaverhead-Deerlodge National Forest (the Forest) for use by snowmobiles and other winter motorized vehicles. The United States District Court for the District of Montana granted USFS's motion for summary judgment. The Ninth Circuit affirmed in part, reversed in part, and remanded the case.

In 2002, USFS proposed revisions to its Land and Resource Management Plan (the Revised Plan) for the Forest, including revisions to the Plan's snowmobile provisions. In 2009, USFS released its Environmental Impact Statement (EIS) studying the impacts of the Revised Plan and a Record of Decision (ROD) approving the EIS and adopting the Revised Plan. A second ROD in 2010 adopted the travel management component of the

[284] Telecomm. Research and Action Ctr. v. Fed. Commc'ns. Comm'n., 750 F.2d 70, 80 (D.C. Cir. 1984).

[285] Plaintiff-appellants included Friends of the Bitterroot and Montanans for Quiet Recreation, Inc.

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

Revised Plan, which contained the revised snowmobile provisions. WildEarth filed a series of administrative challenges, all of which USFS rejected.

WildEarth then appealed to the district court, and both parties filed cross-motions for summary judgment. WildEarth alleged that: 1) USFS violated NEPA because it failed to adequately analyze the impacts of snowmobiles on either big game winter habitat or competing recreational uses in the Forest; 2) USFS violated Executive Order 11,644 (EO)[287] because USFS did not apply the EO's minimization criteria for off-road vehicle (ORV) use on public land;[288] and 3) subpart C of the Department of Agriculture's Travel Management Plan (TMP),[289] which was promulgated to better effectuate the EO's minimization criteria goals, was invalid because that subpart impermissibly exempted over-snow vehicles (OSV) like snowmobiles when the EO did not distinguish between ORVs and OSVs. The district court granted USFS's motion for summary judgment, holding that USFS's impact analysis and compliance with the EO were both adequate, and holding that WildEarth's challenge to subpart C of the TMP was not ripe for adjudication because USFS had not relied on subpart C to justify the Revised Plan.

The Ninth Circuit, reviewing de novo, held that the EIS prepared by USFS failed to comply with NEPA's procedural requirements. The court also found that although USFS adequately reviewed consequences of its recreation allotments, USFS violated the EO by failing to comply with minimization criteria. Lastly, the Ninth Circuit held that WildEarth's challenges to the TMP was unripe.

The Ninth Circuit began by addressing WildEarth's two NEPA claims. Initially, the court explained that NEPA serves two objectives. NEPA first ensures that agencies will consider accurate information concerning the environmental impacts of agency decision making. NEPA next ensures that all relevant information will be made available to interested parties who may wish to play a role in the agency's decision making and implementation process. While NEPA does not impose substantive obligations on agencies, it does establish procedural obligations requiring agencies to take a "hard look" at the environmental consequences of proposed agency actions.[290] NEPA is supplemented by the regulations of the Council on Environmental Quality (CEQ),[291] which state in part that agencies must make all environmental data underlying agency decisions available to the public before taking any action.[292] Alternatively, the agency may incorporate publicly available data supporting the EIS by reference.[293]

287 Use of Off-Road Vehicles on the Public Lands, Exec. Order No. 11,644, 3 C.F.R. 368 (1973).

288 WildEarth Guardians v. Mont. Snowmobile Ass'n, 790 F.3d 920 (9th Cir. 2015).

289 Travel Management: Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005).

290 *WildEarth Guardians*, 790 F.3d at 924.

291 40 C.F.R. §§ 1500–1508 (2015).

292 *Id.* § 1500.1(b).

293 *Id.* § 1502.21.

With that context in mind, the Ninth Circuit first found that USFS failed to comply both with NEPA's procedural requirements and with the CEQ's regulations because the EIS did not make public the underlying environmental data, or reference any documentary source of data, that USFS relied on in making its determinations regarding the impacts of snowmobile use in the Forest on big game winter habitat. The court determined that the maps in the EIS did not accurately reflect big game winter range, and noted that while USFS allegedly considered more accurate maps when making its final decision, those maps had not been incorporated into the EIS or otherwise been made available to the public. The court explained that, because the hard look at environmental impacts mandated by NEPA requires agencies to use accurate data, the data provided by those agencies to the public must be accurate as well. The court also determined that the EIS did not compensate for the inaccurate maps by otherwise providing accurate data regarding big game winter range and the impacts of snowmobile access on that range. The court concluded that this lack of data hindered the public's ability to challenge USFS's decisions regarding snowmobile use in the Forest. Finally, the court found that, although the EIS acknowledged that motorized vehicles may adversely affect wildlife, the EIS failed to provide the public with adequate information about the impact of snowmobiles as the data did not examine the impact on big game wildlife, failed to consider the impact of snowmobiles specifically, and did not examine the impacts on wildlife in winter. Thus, the Ninth Circuit held that USFS violated NEPA by releasing an EIS without adequate information on the impact of snowmobiles.

Second, the Ninth Circuit affirmed the district court's holding that USFS did not violate NEPA when addressing how the snowmobile allocations in the Revised Plan affected other winter recreation activities. Under the Multiple-Use Sustained-Yield Act,[294] USFS is required to administer National Forests in a manner that balances various interests and uses.[295] The Ninth Circuit found that USFS complied with this mandate. The Revised Plan created categories of recreational opportunities, including motorized and nonmotorized uses, and allotted different categories to different portions of the Forest. The court found that the EIS provided adequate justification for USFS's allocation decisions. The EIS contained a section titled "Recreation and Travel Management," which analyzed and compared competing recreational uses and examined forestwide recreation trends. In addition, the EIS addressed the risk of noncompliance by creating a monitoring program, with a pledge to reevaluate the Revised Plan's designations in the event of noncompliance. The Ninth Circuit concluded that USFS complied with NEPA because USFS took the requisite hard look at the impacts of its recreational snowmobile allotments on other recreational activities throughout the Forest.

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294 Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012).
295 *Id.* § 529.

The court then addressed WildEarth's non-NEPA claims. First, the court agreed with WildEarth that USFS failed to comply with the minimization requirements in the EO and TMP. The EO, issued in 1972, directed agencies to promulgate regulations requiring that all trails allowing ORVs on public lands be located in areas that minimize damage to natural resources, impacts on wildlife, and conflicts between ORVs and other recreational uses.[296] In 2005, the Secretary of Agriculture promulgated the TMP to improve implementation of the EO.[297] The Ninth Circuit first noted that, although WildEarth argued that USFS failed to properly implement the EO, the challenge was essentially directed at USFS's implementation of the TMP, which incorporated and expanded on the EO's requirements. The court therefore determined that WildEarth's challenge was appropriate because the Administrative Procedure Act[298] allows an aggrieved person to challenge an agency's implementation of its own regulation.[299] The court then found that the EIS was not demonstrably in compliance with the TMP's minimization criteria. The EIS referenced a single forestwide analysis and applied general decision making principles to designate multiple areas of the Forest for snowmobile use. The TMP, however, explicitly requires USFS to apply the minimization criteria to each individual area designated for snowmobile use. After examining the EIS and ROD, the court concluded that USFS failed to consider the TMP's minimization criteria at all when making recreation allocations. While the ROD indicated that USFS would consider the TMP's requirements at a later date, the court admonished that mere consideration of the minimization criteria was insufficient. Instead, USFS was obligated to conduct an area-by-area analysis to determine whether the Revised Plan complied with the minimization criteria. Because USFS failed to do so, the Ninth Circuit reversed the district court.

Finally, the Ninth Circuit affirmed the district court's ruling that WildEarth's challenge to subpart C of the TMP was unripe. WildEarth had argued that subpart C, which exempts OSVs from compliance with the EO's minimization criteria, was invalid because the EO itself did not distinguish between ORVs and OSVs. The Ninth Circuit began by describing the standard for assessing ripeness, which first requires the court to consider whether the issues raised are fit for judicial review, and second requires the court to examine the potential hardship to the parties of withholding that review. The court explained that judicial review should be reserved for where the controversy has been fleshed out by instances of concrete action that harm or threaten to harm the complainant. The court then found that USFS did not rely on subpart C of the TMP in crafting the Revised Forest

296 Use of Off-Road Vehicles on the Public Lands, Exec. Order No. 11,644, 3 C.F.R. 368 (1973).

297 Travel Management: Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005).

298 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5225, 5372, 7521 (2012).

299 *See id.* § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). *See also id.* § 706 (explaining the courts scope of review).

Plan. As a result, WildEarth's challenge to subpart C was abstract and not a response to concrete agency action. The Ninth Circuit therefore affirmed the district court's holding that WildEarth's challenge to subpart C was unripe.

The Ninth Circuit ultimately reversed the district court's determination that the EIS adequately analyzed the impacts of snowmobiles on big game winter habitat and that USFS satisfied the EO's minimization criteria. The Ninth Circuit affirmed the district court's determination that the EIS adequately examined the impacts of snowmobiles on competing recreational uses and that WildEarth's challenge to subpart C of the TMP was not ripe for adjudication. The court remanded the case for further proceedings consistent with those holdings.

2. Cascadia Wildlands v. Bureau of Indian Affairs, 801 F.3d 1105 (9th Cir. 2015).

In this case, several environmental groups[300] (collectively, Cascadia) challenged the Bureau of Indian Affairs' (BIA) approval of a timber sale (the Kokwel Project) in Oregon's Coquille Forest to the Coquille Indian Tribe (the Tribe).[301] The BIA holds and manages the Coquille Forest in trust for the Tribe. Cascadia alleged that the timber sale violated the National Environmental Policy Act (NEPA)[302] because the BIA failed to analyze the sale's cumulative environmental impacts in light of a previously approved timber sale on adjacent and overlapping land. In addition, Cascadia alleged that the sale violated the Coquille Restoration Act (CRA)[303] because the terms of the sale failed to comply with the United States Fish and Wildlife Services' (FWS) Recovery Plan for the northern spotted owl. The district court granted summary judgment to the BIA. The Ninth Circuit affirmed, holding that 1) the BIA adequately examined the cumulative environmental impacts of the sale and thus did not violate NEPA, and 2) the BIA did not violate the CRA because the CRA did not oblige compliance with the Recovery Plan for the northern spotted owl.

The Ninth Circuit first addressed Cascadia's NEPA claim. Cascadia argued that the BIA inadequately considered the Kokwel Project's cumulative impacts when preparing the Environmental Analysis (EA) required by NEPA.[304] As a result, the BIA's Finding of No Significant Impact, and its subsequent decision not to prepare an Environmental Impact Statement (EIS), violated NEPA. The Ninth Circuit explained that courts should take a "hard look" at an agency's decision not to prepare an EIS to ensure that the agency provides a convincing explanation for that decision.[305]

300 Plaintiff-appellants included Cascadia Wildlands, Oregon Wild, and Umpqua Watersheds.

301 The Bureau of Indian Affairs was the defendant-appellee, with the Coquille Indian Tribe as defendant-intervenor.

302 42 U.S.C. §§ 4321–4370h (2012).

303 25 U.S.C. §§ 715–715h (2012).

304 *See* 42 U.S.C. § 4332(2)(C) (2012) (outlining five requirements for a detailed statement of the impacts from a Federal action).

305 Cascadia Wildlands v. Bureau of Indian Affairs, 801 F.3d 1105, 1111 (9th Cir. 2015).

The agency must demonstrate that the proposed project will not have significant environmental impacts, either individually or cumulatively in light of other "past, present, or reasonably foreseeable future actions."[306] Ninth Circuit precedent established that agencies are permitted to aggregate the impacts of past actions into a "baseline," and then calculate the additional impact of the project under consideration beyond that baseline to determine the cumulative impact.[307] Cascadia maintained that the BIA impermissibly calculated its baseline for the Kokwel Project because the baseline included the impacts of an adjacent timber sale, the Alder/Rasler Project, which was a "reasonably foreseeable future action" rather than a "past" action.

The Ninth Circuit found that the BIA complied with NEPA because it properly calculated the Kokwel Project's baseline. The court agreed that the Alder/Rasler Project was not a past action, but disagreed that its inclusion in the baseline was invalid. The court explained that agencies had significant discretion in how they present evidence of environmental impacts in an EA. The court then noted that the BIA had used data from the Alder/Rasler Project EA when calculating the baseline, and that the Kokwel Project EA made clear how the baseline was calculated. Finally, the court found that the BIA adequately aggregated the Alder/Rasler Project's impacts in the Kokwel Project EA because, although the Kokwel Project EA did not expressly reference the impacts of the Alder/Rasler Project in each impact calculation, the EA identified the Alder/Rasler Project as part of the cumulative impact baseline at the outset. The Ninth Circuit concluded that the BIA complied with NEPA because the BIA reasonably explained how it reached its decision not to prepare an EIS for the Kokwel Project.

The Ninth Circuit then addressed Cascadia's CRA claim. Cascadia argued that the Kokwel Project violated the CRA, which requires that the Coquille Forest be managed "subject to the standards and guidelines of Federal Forest plans on adjacent or nearby Federal lands."[308] The Coos Bay District Resource Management Plan,[309] one of several federal forest plans covering the Coquille Forest, includes as an "objective" the recovery of endangered species in compliance with Recovery Plans developed by FWS under the Endangered Species Act.[310] Cascadia claimed that this objective should be seen as a "standard and guideline" under the CRA. Cascadia then argued that the FWS had developed a Recovery Plan for the northern spotted owl that included the Coquille Forest, and that the Kokwel Project was inconsistent with that Recovery Plan. As a result, Cascadia asserted that the Kokwel Project failed to comply with the standards and guidelines of a relevant federal forest plan in violation of the CRA.[311]

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306 40 C.F.R. § 1508.7 (2015).

307 *See* Ecology Ctr. v. Castaneda, 574 F.3d 652, 666–67 (9th Cir. 2009) (noting that cumulative impacts analysis satisfied the "hard look" standard).

308 25 U.S.C. § 715c(d)(5) (2012).

309 U.S. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, COOS BAY DISTRICT RECORD OF DECISION AND RESOURCE MANAGEMENT PLAN (1995), *available at* www.blm.gov/or/plans/files/Coos_Bay_RMP_1995.pdf.

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

311 25 U.S.C. § 715c(d)(5) (2012).

The court rejected Cascadia's argument for three reasons. First, the court reasoned that had Congress wanted the CRA to mandate compliance with the objectives of federal forest plans, it would have done so expressly. Second, the court pointed to the Northwest Forest Plan (NFP),[312] which also covers the Coquille Forest, and which expressly contains a series of standards and guidelines for actions within forests covered by that Plan. Since the NFP was developed two years before Congress passed the CRA, the court reasoned that Congress intended for the CRA to reference only those federal forest plans that specifically identified standards and guidelines. Third, the court found that the objectives in the Coos Bay Plan were too general to be standards and guidelines," especially in light of the more concrete requirements labeled as standards and guidelines in the NFP. As a result, the Ninth Circuit concluded that the CRA did not mandate compliance with any objectives in the Coos Bay Plan, including compliance with the Recovery Plan for the northern spotted owl.

The Ninth Circuit ultimately affirmed the district court's determinations and held that 1) the BIA complied with NEPA because the BIA had adequately considered the cumulative environmental impacts of the Kokwel Project, and 2) the BIA had not violated the CRA by failing to ensure that the Kokwel Project was consistent with the Recovery Plan for the northern spotted owl.

3. WildEarth Guardians v. U.S. Department of Agriculture, 795 F.3d 1148 (9th Cir. 2015)

In this case, WildEarth Guardians (WildEarth) sued the Department of Agriculture to enjoin the government from participating in efforts to kill predatory animals in Nevada. WildEarth argued that the government violated the National Environmental Policy Act (NEPA)[313] when it relied on an outdated Programmatic Environmental Impact Statement (PEIS) to analyze the environmental impacts of predator management efforts.

WildEarth's claims arose from the actions of the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), which exists in part to carry out wildlife control programs in cooperation with other federal and state agencies. APHIS and the Nevada Department of Wildlife jointly form the Nevada Wildlife Services Program (NWSP), which controls predatory animals in Nevada. In 1994, APHIS prepared a PEIS to evaluate the environmental impacts of its wildlife programs nationwide. APHIS revised the PEIS in 1997. The PEIS discussed various wildlife management alternatives and singled out a "preferred alternative," although the PEIS made clear that regional and local decision makers would play a role in selecting among viable alternatives. In 2011, APHIS prepared an Environmental Assessment (EA) evaluating NWSP's efforts. The EA

[312] U.S. DEP'T OF AGRIC. & U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (1994), *available at* www.reo.gov/library/reports/newroda.pdf.

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

incorporated the 1994/1997 PEIS by reference. The EA concluded that NWSP's efforts would have no significant environmental impacts. Based on this Finding of No Significant Impact (FONSI), APHIS concluded that a Nevada-specific environmental impact statement (EIS) was unnecessary.

WildEarth sued APHIS in 2012, seeking both injunctive and declaratory relief. WildEarth argued that APHIS violated NEPA because: 1) APHIS acted arbitrarily and capriciously by incorporating the 1994/1997 PEIS into the EA without first supplementing and updating the PEIS, 2) APHIS unlawfully withheld or unreasonably delayed preparation of an updated PEIS, 3) the 2011 Nevada EA was inadequate due to its incorporation of the outdated PEIS, and 4) the 2011 Nevada FONSI was arbitrary and capricious because it was based on an inadequate EA. The district court found that WildEarth lacked standing for its first two claims because WildEarth failed to adequately allege a concrete injury caused by APHIS's reliance on the PEIS. The district court rejected WildEarth's third and fourth claims for lack of standing as well, finding that the alleged injuries would not be redressed by a favorable outcome for WildEarth because Nevada could adopt a state plan that caused similar harm. The Ninth Circuit, finding the district court's reasoning erroneous, held that WildEarth had standing on each of its four claims, and reversed and remanded.

The Ninth Circuit first explained that, to establish standing, a plaintiff must show that 1) he or she has suffered a concrete and particularized injury-in-fact, 2) the injury can be traced to the challenged conduct, and 3) a favorable court decision will likely redress the injury. The court then explained that the causation and redressability elements of standing are relaxed when plaintiffs seek to enforce procedural requirements, as in this case. Under those relaxed standards, WildEarth had standing to bring its claims challenging the sufficiency of the PEIS. The court first determined that WildEarth had associational standing because it was an organization dedicated to protecting wildlife and had a member, Bob Molde, with a clear interest in the aesthetic and recreational enjoyment of predators in the Nevada wilderness, which related, in turn, to WildEarth's organizational purpose of "protecting and restoring wildlife" and "carnivore protection."[314] The court then found that WildEarth showed that Molde would suffer a concrete injury-in-fact because APHIS's reliance on the outdated PEIS allowed for more aggressive efforts to kill predators, which in turn harmed Molde's interest in observing predators in the wild.[315] The Ninth Circuit next found that WildEarth established the causation prong of standing because Molde's injury was caused, at least in part, by APHIS and its reliance on the outdated PEIS in approving NWSP's predator control efforts. Finally, the court found that WildEarth established the redressability prong of standing because a favorable outcome on these claims had the potential to influence APHIS in a manner that would reduce Molde's injury. As a result, the court

314 WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1154–55 (9th Cir. 2015).

315 *See id.* at 1154 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.").

held that Molde, and therefore WildEarth, had standing to challenge APHIS's reliance on the outdated PEIS.

The Ninth Circuit next held that Wildearth had standing to bring its third and fourth, Nevada-specific claims. At trial, WildEarth argued that APHIS violated NEPA by 1) preparing an EA that failed to adequately examine the environmental impacts of several of NWSP's predator control activities, and 2) failing to prepare a Nevada-specific EIS. These violations, in turn, threatened Molde's interest in observing predators in the Nevada wilderness. Accordingly, the Ninth Circuit held that WildEarth had adequately alleged both injury-and-fact and causation. The Ninth Circuit then turned to the question of redressability. APHIS argued that a favorable outcome for WildEarth would not redress Molde's alleged injury because, even though an injunction would end APHIS's involvement in the NWSP, Nevada could continue its predator control efforts with or without federal participation. The Ninth Circuit explained that the presence of multiple causes of injury does not, on its own, defeat redressability, especially in cases of procedural injury. The court clarified that under the relaxed redressability standard applied in procedural injury cases, plaintiffs can demonstrate redressability so long as a defendant is partially causing the alleged injury and a favorable decision for the plaintiff could somewhat reduce the injury.[316] Based on that standard, the Ninth Circuit held that a favorable outcome in this case would sufficiently redress Molde's alleged injury because it would curtail federal involvement in the injurious program, and that WildEarth therefore successfully established the redressability prong of standing. The Ninth Circuit explained that redressability appeared more likely in this case because Nevada currently did not have its own predator management program, and it was purely speculative whether Nevada would unilaterally adopt a state program similar to the one administered by the NWSP.

The Ninth Circuit ultimately found that WildEarth had associational standing to bring each of its four claims, and reversed and remanded the case to the district court for further proceedings.

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316 *See* Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 526 (2007) (quoting Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183 (2000)).