2019 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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NINTH CIRCUIT REVIEW EDITOR'S NOTE

The 2019–2020 Ninth Circuit Environmental Review summarizes twenty-six decisions by the United States Court of Appeals for the Ninth Circuit issued between January and December 2019. All of the summarized opinions concern cases and questions of law impacting natural resources, energy, and the environment. Additionally, it features two chapters authored by Ninth Circuit Review members that discuss important topics stemming from recent cases out of the Ninth Circuit.

In the first chapter, Jacqueline O'Keefe broadly discusses Rule 19 of the Federal Rules of Civil Procedure and surveys common contexts where Rule 19 and indispensable party issues arise. In doing so, this chapter highlights how Rule 19 can be an important concern in environmental cases involving natural resources disputes, as demonstrated by the 2019 case from the Ninth Circuit, *Dine Citizens Against Ruining our Environment v. Bureau of Indian Affairs*. Overall, it provides helpful insight on what can seemingly be an unpredictable area of civil procedure.

In the second chapter, Harrison Beck writes about climate change jurisprudence and the widely observed case involving youth plaintiffs suing the federal government for its role in causing climate change that was dismissed by the Ninth Circuit in early 2020: *Juliana v. United States*. This chapter surveys and discusses various approaches to climate change litigation, focusing on the public nuisance and public trust doctrine theories of liability. It is a timely and important topic that highlights what a successful climate change litigation strategy might look like.

The Ninth Circuit Review is made possible through the hard work of its five members who are selected from the Environmental Law member base each year. The case summaries that appear here are the result of their commitment to ensuring that practitioners, advocates, fellow law students, and anyone with a related interest receive an accurate review of the state of environmental law in the Ninth Circuit.

Thank you for reading!

Hannah Clements
2019–2020 NINTH CIRCUIT
ENVIRONMENTAL REVIEW EDITOR

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CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Clean Water Act

1. Pacific Coast Federation of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076 (9th Cir. 2019)*

The Pacific Coast Federation of Fishermen's Association, along with recreationists, biologists, and conservation organizations (collectively, Association),[1] filed a citizens suit against the United States Bureau of Reclamation and the San Luis & Delta Mendota Water Authority (collectively, defendants), [2] alleging that a drainage system managed by the Defendants discharged pollutants into the surrounding waters without a National Pollutant Discharge Elimination System (NPDES) permit, in violation of the Clean Water Act[3] (CWA). The United States District Court for the Eastern District of California entered judgment for defendants.[4] On appeal, the Ninth Circuit held that the district court properly interpreted the CWA's term "irrigated agriculture," but erred by placing the burden on the Association to show that the discharges were not covered by an exception, in interpreting "entirely" to mean "majority," and in striking the Association's seepage and sediment theories of liability from the Association's motion for summary judgment.

The CWA requires that the NPDES permits be obtained prior to the discharge of pollutants from any point source to navigable waters of the United States.[5] The Association's claim arose from suspected discharges

[1] Plaintiffs included the Pacific Coast Federation of Fishermen's Associations, California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, Inc., The Institute for Fisheries Resources, and Felix Smith.

[2] Defendants included Donald R. Glaser, in his official capacity as Regional Director of the U.S. Bureau of Reclamation, United States Bureau of Reclamation, and San Luis & Delta Mendota Water Authority.

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

[4] Pac. Coast Fed'n of Fishermen's Ass'ns v. Murillo, No. 211CV02980KJMCKD, 2017 WL 3421910 (E.D. Cal. Aug. 9, 2017).

[5] 33 U.S.C. § 1323(a).

of pollutants, in violation of the NPDES requirement, from the Grasslands Bypass Project (the Project), jointly administered by the defendants, which collects the selenium and salt-rich water that is not absorbed by crops during irrigation and diverts it through a drainage system to surrounding waters. The Project includes the San Luis Drain (the Drain), which collects and discharges contaminated groundwater from irrigated lands adjacent and upstream of the Drain into nearby waterways, which both parties agree meet the "navigable waters of the United States" jurisdictional element of the CWA.[6]

In November 2011, the Association filed their initial complaint alleging defendants violated the CWA by failing to obtain an NPDES permit for discharges from seepage into the Drain from adjacent lands, sediments from within the Drain, and groundwater discharges from lands underlying a solar project. The defendants argued that the discharges at issue did not require them to obtain an NPDES permit under an exception for discharges composed entirely of return flows from irrigated agriculture.[7] The district court granted Defendants' motion to dismiss, but allowed the Association to file their First Amended Complaint. The district court again entered judgment for defendants, holding that three of the Association's theories of liability in their motion for summary judgment did not arise from the allegations in their First Amended Complaint, and the Association's remaining claim was based on discharges from the solar facility that amounted to a minority of discharges from the Project.

The Association appealed, contending that the district court erred by placing the burden of proof upon the Association to show the Drain's discharges were not exempt. The Association also argued the district court incorrectly interpreted what constitute discharges from irrigated agriculture and that the district court erred in holding the word "entirely" in the CWA exception means "most." On appeal, the Ninth Circuit reviewed de novo both district court's grant of summary judgment, as well as the district court's interpretation of the CWA and its implementing regulations.

The Ninth Circuit first considered the burden of proof issue, holding that the defendants had the burden of establishing that the Project's discharges were composed entirely of return flows from irrigated agriculture. The court reasoned that to establish a violation of the CWA, a plaintiff must prove five jurisdictional elements, none of which includes proving the absence of an exception. Instead, once the plaintiff establishes the five elements, the defendant carries the burden to demonstrate the applicability of a statutory exception to the CWA.[8]

Second, the Ninth Circuit analyzed the district court's interpretation of "irrigated agriculture." The court held that though the district court erred by first focusing on the statute's legislative history

6 *Id.* § 1362(7).

7 *Id.* § 1323(a).

8 N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1001 (9th Cir. 1993).

instead of beginning with the meaning of its text, it ultimately came to the correct result by interpreting the term "irrigated agriculture" broadly. The Ninth Circuit found that the plain meaning of the statutory text demonstrated that agriculture has a broad meaning, but went on to consider legislative history, as well. The court concluded that because Congress amended the CWA five years after its enactment to include an exception for discharges composed entirely of return flows from irrigated agriculture and because Congress wanted farmers who relied on irrigation and those relying on rainfall to be treated equally under the CWA's permitting requirements, Congress intended the exception to be defined broadly and include discharges from all activities related to crop production.

Third, the Ninth Circuit analyzed the Association's argument that the district court erred by holding that the CWA exempts discharges from the CWA's permitting requirements unless a majority of the total commingled discharge is unrelated to crop production. The court first considered the ordinary meaning of entirely, determining that it is defined as "wholly, completely, or fully."[9] The Ninth Circuit found that such a definition differed significantly from "majority," the meaning that the district court gave the term, and that the district court had erred in this interpretation. The court further reasoned that because many activities related to crop production fall under the definition of "irrigated agriculture," Congress's use of "entirely" was meant to limit the scope of the statutory exception, without which, it would become all-encompassing. Thus, the court concluded, Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the exception.

The Ninth Circuit next considered the effect of the district court's erroneous interpretation of "entirely" on the Association's solar project seepage claim, holding that the lower court improperly struck the Association's claim. The Ninth Circuit determined the district court improperly dismissed the Association's solar project seepage theory since the district court based its decision on an erroneous interpretation of "entirely." The district court acknowledged that the Association had provided sufficient evidence to raise an inference that discharges came from the solar project, but due to the unlikelihood that the Association could show that the majority of discharges came from the project, they stipulated to the dismissal of that claim. The Ninth Circuit reversed the district court, finding that the district court's interpretation of "entirely" was the but-for cause of the Association's seepage claim being struck.

The Ninth Circuit then analyzed the effect of the district court's improper placement of the burden of proof on the Association's other claims, holding that it also resulted in the lower court erroneously striking the Association's claims. The district court determined that the Association had failed to provide evidence to show that discharges

9 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 758 (2002).

stemmed from activities unrelated to crop production, and dismissed the Association's claims. The Ninth Circuit explained, however, that had the district court properly imposed the burden of proof on Defendants, any such lack of evidence would have been fatal to the Defendants, not the Association.

Finally, the Ninth Circuit held that the Association's First Amended Complaint provided Defendants with fair notice of their seepage and sediment theories of liability. The court reasoned that because the Association's essential allegation was that the Drain's discharges violated the CWA because the contaminants in the discharges originated from non-agricultural areas and uses, the Association's later inclusion of sediments and seepages from highways and residences could be understood as encompassed by the allegations in the First Amended Complaint. In addition, at oral argument the defendants conceded that they received the Association's expert witness reports, were on notice as to "what their expert was talking about," and had enough information to respond.

In sum, the Ninth Circuit held that the district court properly interpreted the CWA's term "irrigated agriculture," but erred by placing the burden on the Association to demonstrate that the discharges were not covered by an exception, in interpreting "entirely" to mean "majority," and in striking the Association's seepage and sediment theories of liability from the Association's motion for summary judgment because they were adequately encompassed by the First Amended Complaint.

2. Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204 (9th Cir. 2019)*

Colombia Riverkeeper, along with other environmental action groups (collectively, Columbia Riverkeeper),[10] brought action against the Environmental Protection Agency (EPA),[11] claiming the EPA violated the Clean Water Act (CWA)[12] by failing to issue a temperature Total Maximum Daily Load (TMDL) for two interstate rivers, the Columbia and the Snake, after Washington and Oregon allegedly made a constructive submission to the EPA by signaling they would not produce a TMDL. The United States District Court for the Western District of Washington granted Columbia Riverkeeper's motion for summary judgment and ordered the EPA to approve or disapprove the constructive submission within thirty days, and upon disapproval, to issue a final TMDL within thirty days.[13] On appeal, the Ninth Circuit

[10] Plaintiffs included Columbia Riverkeeper, Idaho Rivers United, Snake Riverkeeper, Pacific Coast Federation of Fishermen's Associations, and The Institute for Fisheries Resources.

[11] Defendants included Andrew Wheeler, in his official capacity as Administrator of the U.S. Environmental Protection Agency, and the U.S. Environmental Protection Agency.

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

[13] Columbia Riverkeeper v. Pruitt, 337 F. Supp. 3d 989 (W.D. Wash. 2018).

held that Washington and Oregon made constructive submissions of no temperature TMDL, and therefore the EPA violated the CWA by refusing to issue a TMDL.

TMDLs under the CWA come into play when technology-based point-source pollution controls fail to adequately improve polluted waters.[14] Under the TMDL program, states must identify qualifying "impaired waters" within their borders and rank them in order of priority. A water may be impaired due to a high level of a certain pollutant or because of a certain condition, such as turbidity. The rankings make up what is referred to as the "section 303(d) lists," and once a state develops its list, it must then submit a TMDL to the EPA for approval for each pollutant in each impaired water.[15] Upon submission, the EPA then has thirty days to either approve or deny the state's TMDL. If approved, the TMDL goes into effect. If disapproved, the EPA must create and issue its own TMDL within thirty days.

Washington and Oregon listed both the Columbia and Snake Rivers on their impaired water lists for temperature due to the serious threat high water temperature pose to the river's native salmon and trout species, many of which are nearing extinction. In the mid-1990s, Washington and Oregon submitted their 303(d) lists but later entered into a memorandum of agreement (MOA) with the EPA, which assigned the EPA the duty of developing and issuing a temperature TMDL for the Columbia and Snake Rivers, because neither state had a functioning TMDL program. The MOA provided that after the EPA issued the TMDL, the states would then implement it. In accordance with the agreement, the EPA published a draft temperature TMDL for the rivers in July 2003. However, due to opposition from other federal agencies, the EPA never issued a final temperature TMDL.

In February 2017, Columbia Riverkeeper and other environmental groups brought suit against the EPA under the CWA's citizen suit provision, arguing that Washington and Oregon's failure to implement a temperature TMDL amounted to a constructive submission of no temperature TMDL, and therefore the EPA had a duty to approve or disapprove the TMDL. The district court accepted Columbia Riverkeeper's argument of constructive submission and granted its motion for summary judgment, ordering the EPA to issue a final TMDL within thirty days. The EPA appealed. The Ninth Circuit reviewed the grant of summary judgment de novo.

The Ninth Circuit first held that constructive submission will be found where a state has failed over a long period of time to submit a TMDL and clearly and unambiguously decided not to submit a TMDL, reasoning that this prolonged failure functionally amounts to an inadequate TMDL, thus triggering the EPA's duty to issue its own. The

14 33 U.S.C.§ 1313.

15 *Id.* §§ 1313(d)(1)(A), (C).

court also found it persuasive that both the Seventh and Tenth Circuits adopted the constructive submission doctrine.[16]

Next, the Ninth Circuit rejected the EPA's argument that EPA's duty to establish a TMDL arises only when a State completely fails to submit any TMDLs for approval, holding, instead, that where a state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, the EPA has a mandatory duty to act. The court explained that an interpretation of the TMDL program that provides states and the EPA with the ability to avoid their statutorily mandated obligations would be contrary to both the mechanics and the purpose of the CWA. Additionally, the court reasoned that the expedited timeline provided for in the same subsection supports its holding because an interpretation of the TMDL program that allows the EPA to indefinitely avoid compliance with the requirements of the statute would undermine the expediency that Congress envisioned. The Ninth Circuit also noted that its holding was consistent with precedent in both the Ninth Circuit, as well as other circuits.

Finally, the Ninth Circuit held that Washington and Oregon clearly and unambiguously indicated that they would not produce a TMDL for the Columbia and Snake Rivers and that the EPA violated the CWA by failing to issue its own TMDL. The Ninth Circuit indicated that because Washington and Oregon have both issued more than 1,200 TMDLs, including other TMDLs for the Columbia and Snake Rivers since 2000, the states would have likely already issued Columbia and Snake temperature TMDLs if they ever planned to do so. Additionally, because neither state has a plan to produce or issue TMDLs for either river, the states' continued inaction amounted to a clear refusal to act and a prolonged failure to produce such TMDLs. The court also noted that the states refusal to act was explained by the MOA, which stipulated that the states did not intend to develop temperature TMDLs for the rivers at issue, but instead that it was the duty of EPA to do so.

In sum, the Ninth Circuit established that constructive submission will be found where a state has failed over a long period of time to submit a TMDL and clearly and unambiguously decided not to submit a TMDL, that constructive submission doctrine is applicable even when a state fails to submit TMDL, that Washington and Oregon clearly and unambiguously indicated that they would not produce a TMDL for the Columbia and Snake Rivers, and that the EPA violated the CWA by failing to issue its own TMDL.

[16] Scott v. City of Hammond, 741 F.2d 992, 996 (7th Cir. 1984); Hayes v. Whitman, 264 F.3d 1017, 1024 (10th Cir. 2001).

B. Clean Air Act

1. Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019)*

Rocky Mountain Farmers Union and other representatives of the ethanol and petroleum industry (collectively, "petitioners")[17] filed suit against California officials[18] alleging that multiple versions of California's Low Carbon Fuel Standard regulations (LCFS) are unconstitutional under the Commerce Clause[19] and Supremacy Clause.[20] The United States District Court for the Eastern District of California granted Respondent's FRCP 12(c)[21] motion for judgment on the claims precluded by the Ninth Circuit's earlier decision in this case, *Rocky Mountain Farmers Union v. Corey* (*Rocky Mountain I*),[22] further granted Respondent's additional motions to dismiss on most of the other claims, and Petitioners voluntarily dismissed all remaining claims.[23] Petitioners appealed. The Ninth Circuit reversed the district court's holding that claims against early versions of the LCFS were not moot, remanded for dismissal of the mooted claims, and affirmed the district court on all other grounds.

The California legislature recognized that climate change poses a serious threat to the health and wellbeing of California's citizens, natural resources, and environment. To address this growing threat, California Air Resources Board (CARB) utilized the police powers of the State of California to enact regulations to minimize the greenhouse gas emissions by allowing the state to assess parties who sell fuel based on its carbon intensity. CARB first released a 2011 LCFS which used two methods to assess the carbon intensity of fuels: one by assigning default values to a fuel based on its particular country or region of origin, and

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17 Petitioners included Redwood County Minnesota Corn and Soybean Growers, Penny Newman Grain, Inc., Rex Nederend, Fresno County Farm Bureau, Nisei Farmers League, California Dairy Campaign, and Growth Energy. American Fuel & Petrochemical Manufacturers Association, American Trucking Associations, and the Consumer Energy Alliance were plaintiffs to the original action.

18 Respondents included Richard W. Corey in his official capacity as executive officer of the California Air Resources Board (CARB); Alexander Sherriffs, Barbara Riordan, Hector De La Torre, John Eisenhut, John Gioia, Mary D. Nichols, Ron Roberts, Daniel Sperling, Sandra Berg, John R. Balmes, Phil Serna, Dean Florez, Diane Takvorian, Judy A. Mitchell in their official capacity as CARB board members; Gavon Newsom in his official capacity as Governor of the State of California; and Xavier Becerra in his official capacity as Attorney General of California. Additionally, Sierra Club, Conservation Law Foundation, Environmental Defense Fund, and Natural Resources Defense Council were parties to the suit as Intervenor-Defendants-Appellees.

19 U.S. CONST. art. I, § 9, cl. 3.

20 U.S. CONST. art. VI, cl. 2.

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

22 730 F.3d 1070 (9th Cir. 2013).

23 Rocky Mountain Farmers Union v. Corey, 258 F. Supp. 3d 1134 (E.D. Cal. 2017); *see also* Rocky Mountain Farmers Union v. Corey, No. 1:09-CV-02234-LJO-BAM, 2017 WL 3479008 (E.D. Cal. Aug. 14, 2017).

the other by performing a more individualized assessments of each fuel. CARB slightly amended the LCFS in 2012, but the main methodology in determining the carbon intensity of fuels remained. However, in 2015, CARB repealed and replaced the 2011 and 2012 versions of the LCFS, specifically eliminating the method of assigning a default carbon intensity value to fuels based on their geographic origin.

Prior to the enactment of the 2015 standards, Petitioners filed suit alleging CARB unconstitutionally exceeded its police power in promulgating the 2011 and 2012 versions of the LCFS and therefore violated the Commerce Clause by regulating interstate commerce. The district court and the Ninth Circuit both analyzed the original claims, and the Ninth Circuit in *Rocky Mountain I* concluded that the 2011 and 2012 versions of the LCFS did not facially discriminate against interstate commerce in ethanol or crude oil and did not discriminate against crude oil in purpose or effect. The Ninth Circuit remanded for further fact finding on the alleged discriminatory effect of certain portions of the 2011 and 2012 versions of the LCFS. Back at the district court, petitioners amended their complaints numerous times to include claims against the 2012 version and the 2015 version. The final amended complaint alleged that federal law preempts all three versions of the LCFS, all three illegally regulate extraterritorially, all three violate the commerce clause facially (in purpose and in effect), and that the Ninth Circuit's holding in *Rocky Mountain I* does not preclude the claims. The district court first held that the claims against the 2011 and 2012 versions of the LCFS are not moot, then granted respondents' motions for judgment on the claims precluded by *Rocky Mountain I*, and to dismiss most other claims. Petitioners voluntarily dismissed the only remaining claim. The Ninth Circuit reviewed de novo 1) the district court's holding that the claims against the 2011 and 2012 versions of the LCFS are not moot, 2) whether the 2015 LCFS violates the Commerce Clause by regulating extraterritorially, 3) whether the 2015 LCFS violates the Commerce Clause by facially discriminating against interstate commerce, and 4) whether the 2015 LCFS purposefully discriminates against interstate commerce.

First, the Ninth Circuit addressed all of petitioners claims stemming from the 2011 and 2012 versions of the LCFS. Petitioners argued the repeal of the 2011 and 2012 versions and subsequent replacement with the 2015 version does not alter the relief the court may provide, therefore the claims arising under the 2011 and 2012 versions were not moot. The court disagreed, holding that because the 2015 LCFS specifically repealed the 2011 and 2012 versions, any claims arising under the 2011 or 2012 versions are moot unless the alleged unconstitutionality is also present in the 2015 standards. Here, petitioners attempted to maintain the claims against the 2011 and 2012 standards by seeking a remedy for unconstitutionally high deficits or unconstitutionally low credits from the 2011 and 2012 versions of the LCFS. The court, however, held that petitioners lack of standing for

these particular claims and the Eleventh Amendment bar a remedy. Therefor because no remedy remains and the 2015 LCFS regulations repealed and replaced the 2011 and 2012 versions, the claims arising under the repealed regulations were moot.

Next, the court addressed petitioners' claim that the 2015 LCFS rules regulate extraterritorially, violating the "federal structure" of the Constitution and the Commerce Clause.[24] The court held that *Rocky Mountain I* and recent Ninth Circuit precedent, *American Fuel & Petrochemical Manufacturers v. O'Keeffe*,[25] preclude the extraterritoriality claims arising under the 2015 LCFS. Because *Rocky Mountain I* specified that any future extraterritoriality claim arising under the Commerce Clause against a regulation similar to the 2011 and 2012 versions of the LCFS regulations would fail, the court held here that Petitioners failed to distinguish how their claims differ from those arising under the 2011 and 2012 regulations. The court upheld the reasoning in *Rocky Mountain I*: California may constitutionally regulate the in-state sales of out-of-state entities to ensure a consistent application of the same fuel standards. Further, the court dismissed petitioners' claim that the 2015 LCFS unconstitutionally regulate activities reserved for the jurisdiction of other states' police powers, holding instead that California's interest in the regulations show intent to protect the state's own natural resources, and as such the regulations are constitutional. Finally, the court dismissed any arguments alleging the 2015 LCFS regulations violate the "federal structure" of the Constitution, given *O'Keeffe* created binding precedent in upholding a program very similar to the LCFS regulations. The court, relying on *O'Keeffe*, determined only a Commerce Clause analysis is appropriate in analyzing any claim alleging that a program similar to the LCFS is inconsistent with the "federal structure" of the Constitution. Because *Rocky Mountain I* precluded a Commerce Clause argument, and the facts at hand are not distinct from those in *O'Keeffe*, the court held circuit precedent precludes petitioners' exterritoriality claims against the 2015 LCFS.

The court then addressed petitioners' claim that the 2015 LCFS facially discriminates against interstate commerce in the regulation of ethanol and crude oil. Petitioners concede *Rocky Mountain I* controls the facial discrimination claims, but argue for an overruling of *Rocky Mountain I*. As *Rocky Mountain I* upholds California's ability to regulate types of fuel based on origin to control the state's internal markets and protect against local harms by regulating fuels from different regions, the court here found Petitioners' renewed claims under the 2015 LCFS unpersuasive and insufficient to warrant overruling *Rocky Mountain I*, particularly because the 2015 standards eliminate fuel assessments

[24] U.S. CONST. art. I, § 9, cl. 3.

[25] 903 F.3d 903 (9th Cir. 2018).

based on regions of origin. As such, the court held that circuit precedent precludes petitioners' facial challenges.

Finally, the court addressed Petitioners' claim that the 2015 LCFS purposefully discriminates against interstate commerce. *Rocky Mountain I* left open the possibility that all LCFS versions intended mainly to boost local fuel interests, but petitioners failed to bring in new information to support an allegation of malintent on remand. The court held that where California incidentally receives beneficial side effects from the standards, petitioners must provide evidence showing the main *purpose* of the standard was to create these benefits. Here, petitioners relied on the same basic facts from *Rocky Mountain I* to support their claim and further only pointed to the legislative history of prior versions of the LCFS. Finding no new evidence to support the claim, the court held *Rocky Mountain I* precludes the claim that the 2015 LCFS discriminates in purpose.

In conclusion, the Ninth Circuit vacated the district court's ruling on the 2011 and 2012 versions of the LCFS and remanded all claims arising under the prior versions to the district court with instructions to dismiss as moot. Further, the court affirmed the district court's finding that *Rocky Mountain I* precluded petitioners' claims that the 2015 LCFS regulates extraterritorially, facially discriminates, and purposefully discriminates.

C. Toxic Substances Control Act

1. Safer Chemicals, Healthy Families, v. U.S. Environmental Protection Agency*, 943 F.3d 397 (9th Cir. 2019)*

A variety of environmental and other organizations (collectively, petitioners)[26] sought review in the Ninth Circuit of the "Risk Evaluation Rule,"[27] (the Rule) promulgated by the U.S. Environmental Protection Agency (EPA) under its authority granted by a 2016 amendment to the Toxic Substances Control Act[28] (TSCA), which established a process to evaluate the health and environmental risks of chemical substances. Petitioners argued that certain provisions of the Rule relating to evaluating the risks of a substance's "conditions of use" violated requirements of the TSCA, challenging the Rule on three separate

[26] Petitioners in this consolidated action included: Safer Chemicals, Healthy Families; Alaska Community Action on Toxics; Environmental Health Strategy Center; Environmental Working Group; Learning Disabilities Association of America; Sierra Club; Union of Concerned Scientists; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC; WE ACT for Environmental Justice; Asbestos Disease Awareness Organization; Vermont Public Interest Research Group; Alliance of Nurses for Healthy Environments; Cape Fear River Watch; Natural Resources Defense Council; and Environmental Defense Fund.

[27] 40 C.F.R. §§ 702.31–702.51 (2019).

[28] Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2012).

grounds.[29] The Ninth Circuit held that: concerning the first grounds, it lacked jurisdiction; concerning the second grounds, it failed on the merits; and concering the third grounds, it granted, in part, the petition for review.

The TSCA was enacted by Congress in 1976 "to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances."[30] Addressing shortcomings of the implementation of the TSCA, Congress amended the Act in 2016 to restructure how chemicals are evaluated and regulated, while leaving intact the purpose of the TSCA. The 2016 amendments directed the EPA to evaluate chemicals to determine whether they present an unreasonable risk and to prioritize them as high- or low-priority, as well as prescribed statutory deadlines by which the evaluations must be completed. If the EPA determines the chemical presents an unreasonable risk, then it must be regulated. The amendments also require the EPA to evaluate the chemical substances under their "conditions of use," defined to mean "the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of."[31]

As required by the TSCA, the EPA promulgated the Rule in July 2017, addressing the prioritization and risk evaluation. The Rule stated that to evaluate the chemicals under their conditions of use, EPA "will determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under each condition of uses [sic] within the scope of the risk evaluation."[32] The Rule adopted the same definition for "conditions of use" as the TSCA, but it explained that the scope of the evaluation will include "[t]he condition(s) of use, as determined by the Administrator, that the EPA plans to consider in the risk evaluation."[33] The Rule also listed three categories of uses and activities excluded from the definition of conditions of use, collectively referred to as "legacy activities."[34] The Rule also stated in the preamble that the EPA "intends to exercise discretion in addressing circumstances where [a] chemical substance . . . is unintentionally present as an

[29] This case was brought directly to the Ninth Circuit pursuant to the judicial review provisions of the TSCA granting circuit courts exclusive review of rules promulgated under the TSCA. *Id.* § 2618.

[30] S. REP. NO. 94-698, at 1 (1976).

[31] 15 U.S.C. § 2602(4).

[32] 40 C.F.R. § 702.47.

[33] *Id.* § 702.41(c).

[34] "Legacy activities" are defined as: 1) "circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution," which EPA calls "legacy uses"; 2) "disposals from such uses," which EPA calls "associated disposal"; and 3) "disposals that have already occurred," which EPA calls "legacy disposal." Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 33,726, 33,729 (July 20, 2017).

impurity in another chemical substance that is not the subject of pertinent scoping," but that "it would be premature to definitively exclude a priori specific conditions of use from risk evaluation."[35]

Petitioners filed petitions for review of the Rule pursuant to the judicial review provisions of the TSCA[36] and the Administrative Procedure Act (APA).[37] The petitions were consolidated, and a number of industry groups moved to intervene.[38] A motions panel of the Ninth Circuit granted the motion to intervene. Petitioners challenged the Rule on three grounds: that the TSCA requires the EPA to evaluate the risks associated with uses of chemicals collectively and the Rule contradicts that mandate; that the Rule "expresses an impermissible intent to exclude some conditions of use from the scope of the risk evaluation";[39] and that the exclusion of "legacy activities" from the definition of "conditions of use."[40]

Petitioners' first challenge interpreted three provisions of the Rule to mean that the EPA plans to conduct evaluations on a use-by-use basis, rather than evaluating all of the uses of a chemical collectively, which petitioners claimed the TSCA requires. The Ninth Circuit held that this claim was not justiciable because petitioners' interpretation of EPA's intentions and the resulting theory of injury were too speculative and therefore not ripe.[41] Petitioners maintained that they were injured by the Rule because the EPA will underestimate risk where there is exposure from multiple activities involving a chemical and that the Rule will deprive petitioners of information regarding the risk of chemicals. The Ninth Circuit concluded that the ambiguous text of the Rule creates a justiciability problem because it is not clear under the Rule how the EPA will conduct the risk evaluations and without that there is no concrete, imminent harm to petitioners. The court noted that should the EPA, in the future, conduct a risk evaluation that petitioners believe failed to consider all conditions of use and resulted in harm, petitioners could challenge the improper determination, but here, the court held the challenge to be not justiciable.

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[35] *Id.* at 33,730.

[36] 15 U.S.C. § 2618 (2012).

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

[38] Intervenors included: American Chemistry Council; American Coatings Association; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Battery Council International; Chamber of Commerce of the United States of America; EPS Industry Alliance; IPC International, Inc.; National Association of Chemical Distributors; National Mining Association; Polyurethane Manufacturers Association; Silver Nanotechnology Working Group; Society of Chemical Manufacturers and Affiliates; Styrene Information and Research Center, Inc.; and Utility Solid Waste Activities Group.

[39] Safer Chemicals, Healthy Families, v. U.S. Envtl. Prot. Agency, 943 F.3d 397, 409 (9th Cir. 2019).

[40] *Id.* at 422.

[41] *Id.* at 411 (noting that "[c]onstitutional ripeness is often treated under the rubric of standing because ripeness coincides squarely with standing's injury in fact prong").

Petitioners next argued that, whether or not their assertions on the first claim were correct, the Rule contravenes the TSCA's requirement that EPA "consider *all* of the chemical's conditions of use when conducting a risk evaluation."[42] Petitioners pointed to language in the Rule's preamble that suggested that the EPA may exclude circumstances in which a chemical appears unintentionally as an impurity in a second chemical, and another suggestion that the EPA may exclude existence of an impurity if the risk associated with it is de minimis.[43] Petitioners also pointed to specific provisions of the Rule that referred to the conditions of use "within the scope of" the evaluation,[44] arguing that the provisions demonstrate that some conditions of use will be outside the scope of the evaluations. Regarding the language from the preamble, the Ninth Circuit explained that the language did not indicate that the EPA was binding itself, and therefore, the court held that the language in the preamble was not a final agency action reviewable under the APA.

Turning to the scope provisions challenged by Petitioners, the court first noted that the challenged language was not ambiguous, so unlike Petitioners' first challenge, it was not speculative whether the Rule authorizes the EPA to do what Petitioners claim, thus finding the challenge ripe. However, the Ninth Circuit held that petitioners' challenge failed on the merits, explaining that "the conditions of use within the scope of" an evaluation more naturally refers to the EPA's discretion in determining the conditions of use that are applicable to a certain substance, rather than excluding a certain use from the evaluation. Therefore, "the challenged provisions unambiguously d[id] not grant the EPA the discretion petitioners contend,"[45] and the court denied the challenge.

Petitioners' final claim challenged the EPA's exclusion of "legacy activities" from the definition of "conditions of use." After again finding the claim to be justiciable, the court reviewed the EPA's interpretation of the TSCA's "conditions of use" definition, applying *Chevron* deference.[46] Unlike petitioners' second challenge, here, the EPA conceded that the exclusion of "legacy activities" was reviewable, despite being in the preamble language, because the agency intended to apply it as a binding statutory interpretation, and the court agreed. The TSCA defines "conditions of use" to mean "the circumstances, as determined by the administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed,

[42] *Id.* at 416.

[43] *See* Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 33,726, 33,730 (July 20, 2017).

[44] *See* 40 C.F.R. §§ 702.41(a)(5), (a)(8), (a)(9), (c)(4)(1), (c)(4)(iii), (d)(2); 702.49(b)–(d) (2019).

[45] *Safer Chemicals*, 943 F.3d at 419.

[46] Chevron, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Under *Chevron* deference, courts defer to an agency's reasonable interpretation of an ambiguous statute. *Id.*

distributed in commerce, used, or disposed of."[47] The EPA justified its interpretation excluding the "legacy activities" by arguing the use of "intended" and "reasonably foreseen" indicates that "conditions of use" are meant to be forward looking, and the use of "known" when combined with "to be" is a present tense verb, while "intended," "known," and "reasonably foreseen" are meant to require the EPA to exercise its judgment. As an example, the EPA explained that it could not regulate the disposal of asbestos insulation previously installed in a building because the insulation is no longer manufactured. Therefore, the EPA contended, Congress' intention was that EPA focus on future activities. Petitioners disputed the EPA's claim that "when a substance is no longer manufactured or distributed for a particular use, it is unable to evaluate or regulate that use and associated disposal,"[48] and argued that the EPA's exclusion of "legacy activities" undermines the core purpose of the TSCA.

The Ninth Circuit first stated that the EPA's contention that a reasonable interpretation of the TSCA's "conditions of use" refers to future uses and associated disposals of products only when the product is still being manufactured was without merit. The EPA resisted this, arguing the TSCA granted the agency broad discretion to determine what constitutes a condition of use. Although the court agreed the TSCA provided the EPA with discretion, it stated, "that discretion may only be exercised within the bounds of the statutory definition itself."[49] The court explained that the EPA's asbestos example is actually useful in showing why the EPA's interpretation cannot be upheld: "[t]he *future* disposal of asbestos is clearly an example of a chemical being 'disposed of.'"[50] Finding the TSCA's definition of "conditions of use" to clearly include uses and future disposals of chemicals even if they are no longer being manufactured, the Ninth Circuit held that the EPA's exclusion of "legacy uses" and "associated disposals" was unlawful. The court drew a distinction, however, between "legacy uses" and "associated disposal," on the one hand, and "legacy disposals" on the other, which are disposals that have already occurred. The court found the TSCA unambiguously does not require past disposals to be considered conditions of use. The court noted that uncontrolled discharges such as spills and leaks could be considered *independent* disposals, and therefore be regulated because the disposal is *ongoing*, but recognized that that does not mean "legacy disposals" should be considered "conditions of use."

In conclusion, the Ninth Circuit dismissed the petition for review with respect to petitioners' first claim for lack of justiciability, denied the petition with respect to petitioners' second claim and part of petitioners' third claim on the merits, and granted the petition, in part,

47 15 U.S.C. § 2602(4) (2018).

48 *Safer Chemicals*, 943 F.3d at 424.

49 *Id.* at 425 (citing Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 533 (2007)).

50 *Id.* at 424.

with respect to Petitioners' challenge of the exclusion of "legacy uses" and "associated disposals," vacating those portions of the preamble.

D. Resource Conservation and Recovery Act

1. Center for Biological Diversity v. U.S. Forest Service*, 925 F.3d 1041 (9th Cir. 2019)*

The Center for Biological Diversity, along with other conservation organizations (collectively, the Center),[51] filed a claim against the Unites States Forest Service (USFS) seeking declaratory and injunctive relief under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA).[52] The Center seeks to require the administrator of Arizona's Kaibab National Forest (the Kaibab) to address the use of lead ammunition by hunters in the Kaibab, alleging that the USFS is liable under the RCRA for "contributing to the past or present . . . disposal" of solid waste.[53] This case previously reached the Ninth Circuit on appeal from the district court's dismissal for lack of standing, which the Ninth Circuit reversed.[54] Then, the District Court for the District of Arizona dismissed the case a second time, holding that the Center was improperly seeking an advisory opinion, and therefore, the court lacked subject matter jurisdiction on justiciability grounds.[55] On appeal, the Ninth Circuit reversed and remanded, finding the Center has put forth a justiciable claim.

The Kaibab is home to a variety of wildlife species and is a popular site for big-game hunting. Some hunters use lead ammunition and leave behind the remains of their kill, which can contain fragments of spent ammunition and can later be consumed by other animals. The Center alleged that this spent lead ammunition significantly impacts the endangered California condor because the condors rely on animal carcasses as a primary food source, and lead poisoning is a leading cause of condor mortality in Arizona. While the USFS does have the authority to regulate hunting in the Kaibab,[56] it has largely deferred to Arizona's hunting regulations, which allow lead ammunition except when hunting waterfowl.[57] Thee USFS requires commercial hunting outfitters to

51 Plaintiffs include the Sierra Club and Grand Canyon Wildlands Council.

52 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

53 *Id.* § 6972(a)(1)(B).

54 Ctr. for Biological Diversity v. U.S. Forest Serv., 640 F. App'x 617, 620 (9th Cir. 2016).

55 Ctr. for Biological Diversity v. U.S. Forest Serv., No. CV-12-08176-PCT-SMM, 2017 WL 5957911, at *6 (D. Ariz. Mar. 15, 2017).

56 USFS recognized at oral argument that it could remove the lead bullets from the Kaibab, require hunters to do so, or prohibit the use of lead ammunition.

57 *See* ARIZ. ADMIN. CODE § R12-4-304; "Ten gauge or smaller, except that lead shot shall not be used or possessed while taking ducks, geese, swans, mergansers, common moorhens, or coots." *Id.* at § R12-4-304(C)(3)(e).

obtain a "special use" permit, but the permits do not regulate the hunting itself. Arizona has implemented a voluntary lead-reduction program, offering free non-lead ammunition to hunters, but the Center alleged that lead poisoning is still a significant problem in the Kaibab.

After reversing the district court dismissal for lack of standing, the Ninth Circuit remanded the case, leaving for the district court the question of whether the suit should be dismissed under Federal Rule 12(b)(6).[58] The district court, instead, dismissed for lack of jurisdiction, finding the Center was merely seeking an advisory opinion. The district court reasoned that any judicial directive would be nothing more than a recommendation to the USFS, rather than binding, and therefore an improper intrusion by the courts into the Agency's domain. On appeal, the Ninth Circuit found the district court decision "largely ignor[ed] our previous disposition,"[59] and relied on a misperception of the effects of a favorable ruling for the Center.

First, the Ninth Circuit quickly dispensed of the justiciability issue. The advisory opinion prohibition ensures that "[f]ederal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."[60] A case satisfies justiciability requirements by satisfying two prongs: one, there must be "an honest and actual antagonistic assertion of rights by one [party] against another";[61] and two, the decision from the court must serve as more than an advisement or recommendation. The Ninth Circuit stated that its previous determination that the Center satisfied standing requirements also satisfies justiciability requirements. By satisfying the injury and causation prongs of the standing analysis, the Center presented a genuine adversarial issue, satisfying the first requirement of justiciability, and a favorable ruling would require the USFS to address the problem of lead ammunition in *some* manner, satisfying the second requirement.

The Ninth Circuit then addressed the district court's three misperceptions. First, the district court concluded that the USFS had the discretion to disregard an order requiring it to address lead ammunition, however, the Ninth Circuit stated that the RCRA specifically provides otherwise.[62] Whatever discretion the USFS may

58 FED. R. CIV. P. 12(b)(6).

59 Ctr. for Biological Diversity v. U.S. Forest Serv., 925 F.3d 1041, 1048 (9th Cir. 2019).

60 Flast v. Cohen, 392 U.S. 83, 97 (1968).

61 U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (quoting Muskrat v. United States, 219 U.S. 346, 359 (1911)).

62 RCRA specifies, "the district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to [a substantial endangerment to health or the environment], to order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6972(a) (2012). And "person" includes "the United States and any other governmental instrumentality or agency." *Id.* § 6972(a)(1)(A). "Under a plain meaning . . . a private citizen . . . could seek a mandatory injunction, *i.e.*, one that orders a responsible party to 'take action' by attending to the cleanup . . . or a prohibitory injunction, *i.e.*, one

have over hunting in the Kaibab, the Agency would be required to comply with a court order regarding the disposal of lead ammunition. Second, the district court improperly relied on *Chicago & Southern Air Lines v. Waterman S.S. Corp.*,[63] which involved an act providing both presidential and judicial review of an administrative order.[64] The Supreme Court found this dual review unconstitutional as it would either entail impermissible judicial review of an order that embodies presidential discretion,[65] or a court decision subject to presidential approval, in other words, an advisory opinion.[66] The Ninth Circuit distinguished *Waterman* as a case concerning separation of powers over a matter for which the President had unreviewable discretion, while USFS does not have such unreviewable discretion. Rather, the RCRA itself expressly grants authority for judicial review.[67] The USFS cannot disregard a court order if the RCRA liability is found, though it may have discretion in how to implement the order. Finally, the district court maintained that an order to address lead ammunition would be "an improper intrusion into the domain of the USFS"[68] because the agency has expertise on the matter to which the court should give deference. The Ninth Circuit, however, responded:

> To the extent the exercise of that authority "intrudes"—to use the district court's term—on the exercise of USFS's discretion, it does so because that discretion is subject to the limits enunciated by Congress, and because Congress has sanctioned judicial "intrusion" if those limits are exceeded. Typically, we call that "intrusion" judicial review.[69]

The Ninth Circuit then addressed the USFS's argument, which did not defend the district court's advisory opinion ruling, but rather, construed the decision as declining jurisdiction on equitable grounds, arguing that the court had discretion to decline jurisdiction because the Center was seeking injunctive relief. The Ninth Circuit first made clear that the district court's analysis relied on a lack of jurisdiction, not discretion to decline jurisdiction should it be found. The Ninth Circuit also explained that Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[70] The RCRA citizen suit provision expressly authorizes judicial injunctive relief, and nothing in the provision confers discretion to decline jurisdiction. Not

that 'restrains' a responsible party from further violating RCRA." Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996).

63 333 U.S. 103 (1948).

64 *Id.* at 104–05.

65 *Id.* at 114.

66 *Id.* at 113.

67 42 U.S.C. § 6972(a).

68 *Center*, No. CV-12-08176-PCT-SMM, 2017 WL 5957911 at *6 (D. Ariz. Mar. 15, 2017).

69 *Center*, 925 F.3d 1041, 1050 (9th Cir. 2019).

70 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

only did the district court not purport to decline jurisdiction, but the court also could not have properly done so.

Finding the case to be justiciable, the Ninth Circuit reversed the district court ruling and remanded the case to the district court to determine whether the Center had stated a claim.[71]

E. Healthy Forests Restoration Act

1. Center for Biological Diversity v. Ilano*, 928 F.3d 774 (9th Cir. 2019)*

Two environmental groups, the Center for Biological Diversity and Earth Island Institute (collectively, CBD), sued the United States Forest Service, alleging the Forest Service violated the National Environmental Policy Act (NEPA)[72] both by designating 5.3 million acres of at-risk forest under Healthy Forests Restoration Act (HFRA)[73] without preparing an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), and by invoking the categorical exclusion allowed under the HFRA for the Sunny South Project. The United States District Court for the Eastern District of California granted summary judgment in favor of the Forest Service and Defendant-Intervenor, Sierra Pacific Industries.[74] On appeal, the Ninth Circuit affirmed, holding that landscape-scale area designations under the HFRA do not require NEPA analysis, and that the Forest Service's determination that Sunny South project qualified as a categorical exclusion was not arbitrary and capricious.

In response to the growing threat of insect and disease infestation in National Forests, Congress amended the HFRA to enable the Forest Service to more expeditiously identify and manage the risks associated with pine bark beetle. The amendments create a two-step process, the first of which requires the designation of large areas of forest land that face heightened risk of harms from infestation and disease as "landscape-scale areas." The second step under the HFRA requires the Forest Service to develop and implement treatment projects to combat

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71 A party bringing a citizen suit claim under RCRA must establish that the defendant "has contributed . . . or is contributing to the past or present . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (2012). The Center's claim alleged USFS as a contributor "both because it possesses unused regulatory authority over the hunters and because Section 7003's liability standards are analogous to those imposed on private landowners at common law." *Center*, 925 F.3d at 1052. The court noted that *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011), may foreclose the Center's first argument, but that *Hinds* did not address the question presented here. On the Center's second argument, the court noted that there is tension among the circuits and district courts. The court remanded to allow the parties to better present the issues as they have evolved.

72 National Environmental Policy Act, 16 U.S.C. §§ 4321–4370h (2012).

73 Healthy Forest Restoration Act, 16 U.S.C. §§ 6501–6591e (2012).

74 Ctr. for Biological Diversity v. Ilano, 261 F. Supp. 3d 1063, 1071 (E.D. Cal. 2017).

issues faced in the landscape-scale areas. A project under the second step may be categorically excluded from the requirements of NEPA if it meets certain requirements pertaining to its location, size, purpose, development, and implementation, and does not present extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

In 2015, the Chief of the Forest Service designated 5.3 million acres of land in California as a landscape-scale area under the HFRA. Following this designation, the Forest Service developed the Sunny South Project, which authorized tree thinning and prescribed burning across 2,700 acres of the Tahoe National Forest. In 2016, biologists conducted research to determine the possible effects of the project on sensitive species. As part of the study, biologists examined the project's potential impact on the California spotted owl, which the Forest Service designated as a sensitive species in the Tahoe National Forest. The Forest Service incorporated project measures intended to protect important areas of owl habitat. The study concluded that while the Sunny South Project may affect individual owls, it was not likely to result in a trend toward federal listing or loss of viability, and would ultimately benefit the species. The Forest Service approved the project, concluding that the degree of potential effect on the owl did not necessitate a finding of "extraordinary circumstances" and the project was categorically excluded from the NEPA under the HFRA.

CBD sued, alleging the Forest Service violated the NEPA, both in its designation of the landscape-scale area and by categorically excluding the Sunny South Project. The district court granted summary judgment for the Forest Service and CBD appealed. The Ninth Circuit reviewed the district court's grant of summary judgment de novo.

The Ninth Circuit first held that landscape-scale area designations under the HFRA do not require the NEPA analysis. CBD argued that the Forest Service's designation of 5.3 million acres violated NEPA because the Agency failed to prepare an EA or EIS to determine whether the proposed action would have a significant impact on the human environment. The Forest Service contended that because the designation of landscape-scale areas does not directly or indirectly affect the environment, evaluation of effects could not be meaningful, and relieved the Agency of conducting NEPA analysis. The Ninth Circuit agreed with the Forest Service, finding that designation of landscape-scale areas, as opposed to a particular planned project, is too speculative of a government action and that any NEPA analysis prepared would be little more than a study. The court noted that this interpretation was consistent with legislative intent that the HFRA expedite the response to declining forest lands by removing certain environmental analysis barriers.

The Ninth Circuit next analyzed CBD's second NEPA claim, holding that the Forest Service's finding that the Sunny South Project did not involve extraordinary circumstances was not arbitrary or

capricious. CBD challenged the Forest Service's finding on the ground that the project's potential impact on the California spotted owl constituted extraordinary circumstances, due to canopy reduction in the project area, and that the Forest Service should have conducted an EA before proceeding with the project. The Forest Service argued that it sufficiently identified the owl as a sensitive species, examined the cause-and-effect relationship between the Sunny South Project and the potential effect on the owl, determined the Project did not present extraordinary circumstances, and therefore correctly invoked the categorical exclusion from NEPA compliance. The Ninth Circuit held in favor of the Forest Service, finding that because the Agency considered relevant scientific data and engaged in careful analysis, the Forest Service's determination of no extraordinary circumstances was not arbitrary and capricious. The court also noted that though CBD presented scientific data that conflicted with studies relied upon by the Forest Service, the Forest Service has deference to rely on the reasonable opinions of its own qualified experts.

In sum, the Ninth Circuit affirmed the judgment of the district court, holding that the Forest Service's designation of 5.3 million acres as facing elevated threat from infestation and disease did not require the preparation of an EA or EIS since the effects were too speculative to effectively analyze the environmental consequences. Additionally, the court held that the Forest Service appropriately invoked the categorical exclusion from the NEPA compliance provided for in the HFRA because sufficient evidence supported the Agency's finding of no extraordinary circumstances and therefore the finding was not arbitrary and capricious.

II. ENERGY

A. Energy Infrastructure

1. City of San Juan Capistrano v. California Public Utilities Commission*, 937 F.3d 1278 (9th Cir. 2019)*

The City of San Juan Capistrano (the City) filed a claim against the California Public Utilities Commission (the Commission), alleging the Commission violated the City's due process rights when it approved an electrical grid project located within the city. The City contended that by not giving "due consideration" to project alternatives as required by California law, the Commission "deprived the City of liberty and property interests over its environmental integrity, cultural integrity, and development, along with its procedural right to a fair hearing."[75] The City asked the court to enjoin the Commission's approval of the

[75] City of San Juan Capistrano v. Cal. Pub. Util. Comm'n, 937 F.3d 1278, 1280 (9th Cir. 2019).

project and to declare the approval order unenforceable against the City. It also asked for attorney's fees. The District Court for the Central District of California dismissed the suit, with prejudice, holding the City, as a political subdivision, lacked standing to sue the Commission.[76] On appeal, the Ninth Circuit affirmed.

The project involved replacing a transmission line and upgrading a substation that were both located on property owned by San Diego Gas & Electric (the Utility). In a Commission hearing, the City opposed the project as a "duly admitted party," and following the hearing, the Commission administrative law judge (ALJ) recommended approving the alternate project with less environmental impact. However, after an ex parte meeting with the Utility, the commissioner assigned to the project recommended approval of the original project. The Commission agreed and denied the City's application for rehearing. Rather than challenge the Commission's decision in state court, the City sued the Commission in federal court, alleging the ex parte meeting resulted in the Commission rejecting the ALJ's recommendation. On appeal, the Ninth Circuit reviewed the question of standing and defendant's sovereign immunity de novo.

First addressing standing, the Ninth Circuit relied on *City of South Lake Tahoe v. California Regional Planning Agency*,[77] in which the Ninth Circuit characterized political subdivisions as creatures of the state, who, therefore, lack standing to challenge state law in federal court on constitutional grounds. The City claimed that *South Lake Tahoe* is limited to barring only facial challenges to state statutes and regulations and does not bar the City's challenge of administrative procedure. The Ninth Circuit rejected this claim, stating that Ninth Circuit case law relies on the identity of the parties rather than the procedural context. Therefore, the Ninth Circuit held that the City lacked standing to challenge the Commission's decision on due process grounds.

The Ninth Circuit also held that because the Commission is an arm of the State of California, the Eleventh Amendment,[78] which grants sovereign immunity to states in federal court, bars the City from challenging the Commission's decision in federal court. The City conceded the Commission's sovereign immunity, but argued for leave to amend its complaint against a commissioner under *Ex parte Young*.[79] However, the City only briefly suggested to the district court that it *could* amend its complaint and argued that the Eleventh Amendment did not apply to its claims. Therefore, the Ninth Circuit held that

[76] City of San Juan Capistrano v. Cal. Pub. Util. Comm'n et al., Case No. SACV 17-01096, 2017 WL 6820027 (C.D. Cal. 2017).

[77] 625 F.3d 231 (9th Cir. 1980).

[78] U.S. CONST. amend. XI.

[79] 209 U.S. 123, 155–56 (1908) (allowing suits in federal court against "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state").

because the City did not request leave to amend its complaint below, the City waived its right to amend.

The Ninth Circuit ultimately held that the district court properly dismissed the City's claims because the City lacked standing and the claims were barred by the Eleventh Amendment.[80]

2. Pit River Tribe v. U.S. Bureau of Land Management*, 939 F.3d 962 (9th Cir. 2019)*

The Pit River Tribe and other environmental organizations (collectively, Pit River)[81] filed suit against the Bureau of Land Management and the Department of the Interior (collectively, BLM) alleging BLM's improper continuances of "unproven" geothermal leases under the Geothermal Steam Act (GSA)[82] and violations of other environmental statutes.[83] The United States District Court for the Eastern District of California granted Pit River's motion for summary judgment, holding BLM was not warranted in extending the unproven leases, vacating the decision of the Agency, and remanding the issue of the continuance to BLM for further consideration.[84] BLM appealed. The Ninth Circuit reviewed the holding of the district court de novo and affirmed.

Congress enacted the GSA in 1970 to promote development and regulate the harvesting of geothermal resources on federal land. Prior to the GSA, the Mineral Leasing Act (MLA)[85] provided the statutory scheme for regulating the extraction of resources under the theory of unitization instead of under the common law practice of the "rule of capture." Unitization considers an entire oil or gas field as one "unit," regardless of the surface boundaries or number of leases on the land. Unitization allows drilling on a single lease to constitute drilling into the unit as a whole, which in turn allows many leases within the unit to remain inactive. This scheme, adopted in the MLA, allows lessors to extend their leases, both productive and non-productive, to preserve access to the unit. Congress adopted unitization in § 1017 of the GSA, allowing leases to be managed as units with a provision requiring the

[80] A concurring opinion mentioned the potential for the Ninth Circuit to revisit the per se rule barring political subdivisions from challenging state law in federal court, noting that since *South Lake Tahoe*, "the meaning of standing has changed." *City of San Juan Capistrano*, 937 F.3d at 1282 (R. Nelson, J., concurring).

[81] Other respondents 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.

[82] Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001–1028 (2012).

[83] Pit River also alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012), and the National Historic Preservation Act, 54 U.S.C. §§ 300101–307108 (2012), but the district court, having vacated BLM's decision to extend the leases, held the additional claims were moot.

[84] Pit River Tribe v. U.S. Bureau of Land Mgmt, No. 2:04-cv-00956-JAM-AC 2017 WL395479 (E.D. Cal. Jan. 27, 2017).

[85] Mineral Leasing Act of 1920, 30 U.S.C. §§ 221i–236a (1964).

Secretary of the Interior to review the leases within the unit every five years and remove any lease viewed as not necessary.[86] However, § 1005(a) of the GSA lists a "primary lease" as limited to ten years unless the lease either produces or is proven capable of producing geothermal steam at commercial quantities, at which point the lease may be extended for up to forty years.[87] For non-productive leases, § 1005(c) of the GSA allows for one to two five-year extensions in the event that drilling operations began prior to the expiration of the primary lease and are being diligently pursued.[88] Every provision in the GSA limits the duration of any lease to not more than fifty years.

Three years after Congress enacted the GSA, BLM promulgated regulations authorizing geothermal leaseholders to enter into unit agreements. BLM entered into an agreement with a lessor at the Glass Mountain Unit establishing a "unit area" and a "participating area." The unit area established the Glass Mountain Unit, while the participating area included any part of the unit deemed to be productive. The terms of the agreement dictated that any area not included in the participating area needs to be removed from the agreement and the unit area. In 1989, the lessor requested an extension on their lease, one of which produced geothermal steam and twenty-four of which sat "unproven," meaning the lease was not productive but the lessor had not finished exploratory drilling. In accordance with the GSA, the BLM extended the productive lease for forty years and the twenty-four unproven leases for an additional five years, pursuant to § 1005(c). In 1998, after agency delay and a change in BLM's interpretation of § 1005(a), BLM adopted the unitization theory and extended all leases in the participating area, comprised of the single productive lease and the twenty-four unproven leases, for up to forty years pursuant to § 1005(a). Pit River filed suit in 2013.

First, the Ninth Circuit addressed whether it maintained jurisdiction to hear the appeal. The court reviewed the standard needed to satisfy the final judgment rule and found that 1) the district court's grant of summary judgement was final, 2) the district court's decision will restrain BLM on remand and require them to apply a potentially erroneous standard, and 3) review of the district court's decision now prevents BLM from being unable to appeal the result of its own decision. Because the issue met those three criteria, the court had jurisdiction to hear the appeal.

Next, the court addressed whether § 1005(a) of the GSA authorizes continuation of geothermal leases, and in what manner the statute authorizes those continuations. Pit River argued the section only authorizes forty-year extensions on a lease-by-lease basis. BLM countered that the section should be interpreted as allowing forty-year continuations on a unit-wide basis due to the overall scheme of the GSA

86 30 U.S.C. § 1017.
87 *Id.* at § 1005(a).
88 *Id.* at § 1005(c).

and the backdrop set by the MLA. The court looked to the text of § 1005(a) and disposed of the five arguments advanced by BLM in favor of its position.

First, BLM asserted that because geothermal steam reservoirs are functionally the same as underground pools of oil and gas, Congress intended the MLA unitization approach to apply. The court disagreed, finding no support for BLM's assertion in the record and refusing to give the framework of the MLA more weight than the plain language of the GSA. Second, BLM argued that the MLA provides an important historical context, therefore Congress had the unitization principle in mind when creating the GSA and intended unitization to apply equally to the GSA. The court dismissed this suggestion, holding instead that Congress made clear that geothermal recovery is sufficiently different from oil and gas and therefore requires its own statutory scheme to manage the new technology and developing market. BLM next attempted to assert that the separation of § 1005(a) (the primary lease term extension provision) from § 1005(c) (all other lease term extensions) was simply a stylistic preference of Congress and carried no legal significance, even though the MLA contained all lease extensions in one provision. Further, BLM asserted that § 1017 of the GSA, which authorizes unitization, broadly incorporates the unitization framework of the MLA to the GSA. The court firmly rejected BLM's assertions, holding that Congress expressly intended to separate the lease extension provisions to eliminate the unitization principle and that the difference in time limits on lease terms is sufficient to negate the idea that § 1017 generally incorporates the MLA framework into the GSA. Next, BLM argued that the language of § 1005(g)(1),[89] allowing a unit-wide extension of unproductive leases for five years, pulls unitization into § 1005(a) because § 1005(g)(1) extensions are unavailable if a lease has received a § 1005(a) extension and therefore, the provisions must be equal and unitization must apply to both. The court rejected BLM's argument because it incorrectly equated shorter, unit-wide extensions for unproductive leases with longer term extensions of productive leases. Finally, BLM asserted that the legislative history of § 1005(a) indicates Congressional intent that a "comparable provision," namely § 1017, allows all leases in a unit to benefit in the event any one is productive during a primary lease term. Again, the court strongly rejected this suggestion, reading the legislative history to suggest that Congress simply intended to differentiate the short-term extensions made on a unit-wide basis from the long term extensions made on a lease-by-lease basis, not that § 1017 dictate the terms for all lease extensions.

Finding that BLM failed to meet its burden of persuading the court to stray from the plain language of the statutory text, the court concluded that the meaning of the GSA § 1005(a) is unambiguous and requires the continuation of nonproductive leases on a lease-by-lease

[89] *Id.* at § 1005(g)(1).

basis. Therefore, the court affirmed the district court's grant of summary judgment in Pit River's favor.

3. Protect Our Communities Foundation v. Lacounte*, 939 F.3d 1029 (9th Cir. 2019)*

Protect Our Communities Foundation, David Hogan, and Nica Knite (collectively, plaintiffs) brought suit against the Bureau of Indian Affairs (BIA),[90] challenging BIA's approval of an industrial-scale wind facility in Southern California. The project developer, Tule Wind, LLC (Tule), and Ewiiaapaayp Band of Kumeyaay Indians (the Tribe) intervened as Defendants. Plaintiffs claim that BIA's environmental analysis did not comply with the National Environmental Protections Act (NEPA)[91] and that BIA's approval violated the Administrative Procedure Act (APA)[92] and the Bald and Golden Eagle Protection Act[93] (Eagle Act). The United States District Court for the Southern District of California granted defendants' motion for judgment on the pleadings on two claims[94] and granted defendants' motions for summary judgment on the third.[95] Plaintiffs appealed. Reviewing de novo, the Ninth Circuit affirmed.

Tule planned to construct an eighty-five turbine wind facility sixty miles east of San Diego. Phase I involved the construction of sixty-five turbines and required approval from the Bureau of Land Management (BLM), who is responsible for granting rights-of-way for use of federal lands. Phase II involved the construction of 20 turbines located on the Tribe's reservation and thus required approval from the BIA, who serves as a trustee for federally recognized Indian tribes. Pursuant to the NEPA's procedural requirements, the BLM prepared an Environmental Impact Statement (EIS) that covered both project phases. The EIS identified an "unavoidable adverse impact" to golden eagles and considered five project alternatives.[96] In addition, Tule drafted a Project Specific Avian and Bat Protection Plan, describing ways to mitigate

[90] Defendants included Darryl Lacounte in his official capacity as Acting Director of Bureau of Indian Affairs, David L. Bernhardt in his official capacity as Secretary of Interior, Tara Katuk Maclean Sweeney in her official capacity as Assistant Secretary for Indian Affairs, and Amy Dutschke in her official capacity as Regional Director of Bureau of Indian Affairs Pacific Region Division of Environmental Cultural Resources Management & Safety.

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

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

[93] Bald and Golden Eagle Protection Act, 16 U.S.C. § 668–668d (2012).

[94] Protect Our Communities Found. v. Black, No. 14cv2261 JLS, 2016 WL 4096070 (S.D. Ca. Mar. 29, 2016).

[95] Protect Our Communities Found. v. Black, 240 F. Supp. 3d 1055 (S.D. Ca. 2017).

[96] Protect Our Communities Found. v. Lacounte, 939 F.3d 1029, 1033 (9th Cir. 2019).

impacts on these species. Relying on this plan and the EIS, the BLM approved Phase I.[97]

In preparation for Phase II, Tule drafted a Supplemental Project-Specific Avian and Bat Protection Plan (SPP) which included updated eagle surveys and described measures to document and avoid bird impacts to meet the current Fish and Wildlife Service (FWS) no-net loss standard for local breeding eagle populations. The BIA also made the SPP available for public comment. Relying on the SPP and BLM's EIS, the BIA approved Phase II, issuing a Record of Decision (ROD). The ROD included several mitigation measures designed to avoid impacts to golden eagles and stipulated that Tule had to apply for an eagle take permit under the Eagle Act before operation. Plaintiffs filed suit alleging that the BIA violated the NEPA by relying on the BLM's EIS, violated the NEPA and the APA by failing to prepare any supplemental NEPA review, and violated the Eagle Act and the APA by approving the lease.

First, the Ninth Circuit held that the BIA properly relied on the BLM's EIS to satisfy its NEPA review requirement. Plaintiffs alleged that this reliance was improper because the BIA did not explain its decision to not implement one of the EIS's mitigation measures. They argue that the BIA was required to authorize turbine construction based on the assessed risk each location presents to golden eagles. However, the Ninth Circuit found that no explanation was necessary because the BIA did properly implement the mitigation measure. Outlined in the SPP, the BIA explained how Phase II will meet FWS' no-net loss and found that all twenty turbines could satisfy this standard.

Next, the Ninth Circuit reviewed the BIA's alternatives analysis. Plaintiffs contend that the BIA's analysis was deficient because the EIS did not consider an alternative where only some of the Phase II turbines were authorized. The BIA argued that plaintiffs failed to exhaust this argument and that the BIA nevertheless satisfied its NEPA requirements. The court held that plaintiffs' argument is not waived because comments on the EIS raised the issue that a different number of turbines and different siting decisions were possible. Thus, the BIA had an opportunity to consider this issue before giving their approval. Moreover, the Ninth Circuit held that the EIS's alternative analysis was sufficient to satisfy the NEPA. Because the NEPA requires agencies to issue a single EIS for "connected, cumulative, and similar actions,"[98] Phase II is not considered an isolated project. Although no mid-range alternative was considered as to the Phase II turbines, the EIS's fifth alternative did consider a mid-range alternative for the project as a whole.

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[97] BLM's approval survived review. Protect Our Communities Found. v. Jewell, 825 F.3d 571, 588 (9th Cir. 2016).

[98] Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1118 (9th Cir. 2000).

The Ninth Circuit then rejected Plaintiffs' claim that the BIA needed to prepare a supplemental EIS (SEIS). Plaintiffs argued that the information contained in the SPP and third-party comments, that arose after the EIS was published, met the "new and significant" threshold that can trigger the SEIS requirement.[99] The Ninth Circuit found that this information was not new or significant as the EIS already articulated and considered these issues. Nothing additional was required because the BIA maintained a hard look at the environmental impact of the project through its extensive discussion in the ROD and SPP.

Furthermore, the Ninth Circuit held that the BIA's approval was not contrary to law. While the Ninth Circuit has invalidated agency action that sanctioned unlawful conduct by third parties, action that permits a third party to engage in otherwise lawful behavior, and only incidentally leads to subsequent unlawful action, is permitted under the the APA. Because the BIA required Tule to apply for a permit and to comply with all applicable laws, the BIA's authorization did not violate the APA. The Ninth Circuit also held that the BIA's approval was not arbitrary or capricious even though the BIA did not condition its approval on Tule obtaining an Eagle Act take permit. Those who obtain permits from government agencies are responsible for their own compliance with the Eagle Act. Because compliance is Tule's responsibility, the Ninth Circuit held that the BIA's decision not to require a permit before issuing its approval was not irrational.

In sum, the Ninth Circuit found the EIS analysis sufficient to satisfy NEPA because the BIA followed the listed mitigation measures and adequately considered all reasonable and feasible alternatives. Nor did the BIA's NEPA analysis require a SEIS as any additional information was not new nor significant. Finally, the court held that the BIA's approval of Phase II of Tule's project did not violate the APA or the Eagle Act as Tule was responsible for its own compliance with the Eagle Act and still required to obtain a permit before operation.

B. Energy Policy and Conservation Act

1. Natural Resources Defense Council v. Perry*, 940 F.3d 1072 (9th Cir. 2019)*

The Natural Resources Defense Council, in conjunction with states, municipalities, and other nonprofit organizations (collectively, plaintiffs),[100] brought suit against the Department of Energy (DOE),[101]

99 40 C.F.R. § 1502.9 (2019).

100 Plaintiffs included Natural Resource Defense Council, Inc.; Sierra Club; Consumer Federation of America; Texas Ratepayers' Organization to Save Energy; People of the State of California, by and through Attorney General Xacier Becerra; California State Energy Resources Conservation and Development Commission; State of Maryland; State of Washington; State of Maine; Commonwealth of Massachusetts; State of Vermont; State of

alleging that the DOE's refusal to publish new energy-conservation standards in the Federal Register violated the Energy Policy and Conservation Act (EPCA).[102] Plaintiffs claimed that the Secretary of Energy had a non-discretionary duty under EPCA's error-correction rule[103] to submit the new standards for publication. The United States District Court for the Northern District of California granted summary judgment in favor of the Plaintiffs.[104] The DOE appealed. The Ninth Circuit reviewed the judgment de novo and affirmed.

Under the EPCA, the DOE establishes energy conservation standards for certain consumer products and industrial equipment through notice-and-comment rulemaking. In 2016, the DOE adopted the error-correction rule, creating a forty-five day window between the DOE's issuance of a final rule establishing an energy conservation standard and the rule's publication in the Federal Register.[105] During this period, the DOE posts the rule on its website and invites the public to identify any errors that should be corrected before final publication.[106] Requests for correction cannot be premised on a disagreement with a policy choice that the Secretary made, nor will the DOE consider any new evidence.

The rule provides that if, after receiving properly filed requests, the Secretary decides not to undertake any correction, the Secretary "will submit the rule for publication as it was posted."[107] If there are no properly filed requests and the Secretary identifies no errors, the Secretary "will in due course submit the rule."[108] If the Secretary receives a properly filed request and determines that a correction is needed, the Secretary "will, absent extenuating circumstances, submit a corrected rule for publication" within thirty days after the error-correction period has elapsed.[109]

In December 2016, the DOE finalized four new energy conservation standards, posting the final rules prescribing the standards on its website. The fourty-five day error-correction period ended on January 19, 2017, for one rule and February 11, 2017, for the other three. The DOE received one minor correction request for one rule and no correction requests for the remaining three. However, after the error-

Connecticut; Commonwealth of Pennsylvania; District of Columbia; State of Illinois; State of New York; State of Oregon; City of New York; and State of Minnesota.

101 Defendants also included James R. Perry, in his official capacity as Secretary of Energy. The Air-Conditioning, Heating, & Refrigeration Institute intervened as defendants.

102 Energy Policy Conservation Act, 42 U.S.C. §§ 6291–6317 (2019).

103 10 C.F.R. § 430.5 (2020).

104 Nat. Res. Def. Council, Inc v. Perry, 302 F. Supp. 3d 1094, 1101 (N.D. Ca. 2018).

105 10 C.F.R. § 430.5.

106 Error is defined narrowly as "an aspect of the regulatory text of a rule that is inconsistent with what the Secretary intended regarding the rule at the time of posting." *Id.* at § 430.5(b).

107 *Id.* at § 430.5(f)(1).

108 *Id.* at § 430.5(f)(2).

109 *Id.* at § 430.5(f)(3).

correction period ended, the DOE refused to submit any rules to the Office of the Federal Register for publication.

Plaintiffs brought suit under the EPCA's citizen-suit provision,[110] arguing that the error-correction rule imposes a non-discretionary duty on the DOE to publish the four new standards in the Federal Register. The district court found jurisdiction was proper under the EPCA's citizen-suit provision as the rule imposes a non-discretionary duty and held that the DOE violated this duty. The district court ordered the DOE to publish the four rules in the Federal Register. The Ninth Circuit stayed the district court order pending resolution of the DOE's appeal.

On appeal, the Ninth Circuit held that jurisdiction was proper under the EPCA's citizen-suit provision because the error-correction rule creates a mandatory duty to publish the final rules in the Federal Register. The DOE first argued that the Agency retains discretion because the word "will" was intended to describe what will ordinarily occur at the end of the error-correction period. The Ninth Circuit noted that agencies are ordinarily free to withdraw a proposed rule before it has been published, even if the rule received final agency approval and was submitted to the Office of the Federal Register. However, because of the plain language of the error-correction rule, the Ninth Circuit found that the DOE relinquished this discretion. The rule's use of the word "will" unambiguously imposed a mandatory duty.

Next, the Ninth Circuit found that the DOE violated the non-discretionary duty imposed by the error-correction rule. The rule specifies a general 30-day deadline for submitting the original rule for publication. The Agency must submit a corrected rule within the timeframe unless unusual circumstances are present. As the Agency did not claim extenuating circumstances, the DOE had a non-discretionary duty to submit all four rules for publication within 30 days after the error-correction period ended.

The Ninth Circuit rejected the DOE's argument that, even if the error-correction rule imposes a mandatory duty, Plaintiffs cannot invoke the EPCA's citizen-suit provision because the provision does not authorize suits for the enforcement of non-discretionary duties imposed by regulation. The provision requires plaintiffs to identify an alleged failure by the DOE to perform an "act or duty under this part."[111] The Ninth Circuit held that "under this part" encompasses duties imposed both by statue and regulation. Congress consistently used this phrase throughout the statute to refer to requirements established by regulation and the DOE did not identify a provision that used this phrase to refer solely to statutory requirements. Thus, plaintiffs properly invoked the EPCA's citizen-suit provision.

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110 EPCA's citizen-suit provision authorizes any person to bring a civil action against an agency administering the statute only where there is an alleged failure to perform a non-discretionary act or duty. 42 U.S.C. § 6305(a)(2) (2019).

111 *Id.*

In sum, the Ninth Circuit held that the plain language of the error-correction rule imposed a non-discretionary duty on the Secretary of Energy to submit the new energy conservation standards for publication within 30 days after the error-correction period ended. Because the DOE failed to publish the four new standards, the DOE violated the EPCA. Additionally, because the error-correction rule imposed a non-discretionary duty and the phrase "under this part" encompasses duties imposed by statute and regulation, the court had jurisdiction under the EPCA's citizen-suit provision.

C. Public Utilities Regulatory Policy Act

1. Californians for Renewable Energy v. California Public Utilities Commission*, 922 F.3d 929 (9th Cir. 2019)*

Californians for Renewable Energy and other solar energy producers in California, (collectively, CARE)[112] filed suit against the California Public Utilities Commission and its current and former commission members, among others, (collectively, CPUC)[113] in the United States District Court for the Central District of California alleging CPUC's regulations do not comply with the federal Public Utility Regulatory Policies Act (PURPA).[114] The district court denied CARE's motion for leave to file an amended complaint seeking attorney's fees and granted summary judgment for CPUC on all other claims.[115] CARE appealed. The Ninth Circuit affirmed the district court's denial of the motion to leave to file an amended complaint and grant of summary judgement on two claims, but reversed and remanded for further adjudication of whether CPUC's programs use the proper standards for compensation when fulfilling Renewable Portfolio Standards (RPSs).

Congress passed PURPA in 1978 to promote alternative energy generation and granted authority to the Federal Energy Regulatory Commission (FERC) to set out regulations governing how utilities must interact with small, independent alternative energy producers. One of the greater mandates of PURPA is the requirement that utilities purchase electricity from small or cogeneration alternative energy facilities, called qualified facilities (QFs). Utilities must purchase electricity from QFs at a compensation rate equivalent to the utility's

112 Petitioners include Californians for Renewable Energy and its members Michael E. Boyd and Robert Sarvey, all small-scale solar energy producers.

113 Respondents include California Public Utilities Commission, current CPUC commission members Michael R. Peevey, Timothy Alan Simon, Michael R. Florio, Catherine J.K. Sandoval, Mark J. Ferron, former CPUC commission members Rachel Chong, John A. Bohn, Dian M. Gruenich, Nancy E. Ryan, and Southern California Edison Company.

114 Solutions for Utilities, Inc. v. Cal. Pub. Utilities Comm'n, No. 11-04975-SJO-JCGx, 2016 WL 7613906 (C.D. Cal. Dec. 28, 2016); Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601–2645 (2005).

115 *Solutions*, 2016 WL 7613906 at *1.

avoided cost, measured by the cost to the utility of the electricity or capacity the utility would generate itself or purchase from a different source but for the purchase from the QF. Additionally, PURPA mandates utilities to connect QFs to the grid to facilitate such purchases. In promulgating regulations, FERC granted authority to state regulatory agencies to decide how to best comply with PURPA through state regulations. CPUC is the state agency charged with implementing PURPA requirements in California. PURPA does not contain a provision providing attorney's fees for claims arising under the statute.

After the passage of PURPA, CPUC struggled to come up with a beneficial regulatory scheme, as their initial attempt created QF "oversubscription"[116] and caused a repeal of the mandated contracting requirements between QFs and utilities. In 2002, California enacted an RPS, setting a requirement that utilities in the state obtain 33% of their electricity from renewables by 2020, and 50% by 2030. To achieve these goals, companies may also purchase RPS credits (instead of electricity) from renewable sources. The majority of the RPS requirements in California are met by renewable facilities with capacities over 20 megawatts (MW).

In 2005, Congress lessened the requirements of PURPA through the Energy Policy Act[117] (EPAct), after determining QFs no longer faced harsh barriers to the market. The EPAct removed the purchase obligation from any QF that FERC determined no longer faced discriminatory access to competitive electricity markets, which FERC interpreted as any utility over 20 MW.

As such, CPUC took multiple steps to implement PURPA and EPAct's requirements, four of which are challenged in this action. First, CPUC released the Qualifying Facility and Combined Heat Power (CHP) Settlement (QF Settlement)[118] which laid out standard contracts for utilities to enter with QFs. One contract, designed specifically for QFs with a capacity of less than 20 MW, sets a flat rate fee for utility companies based on energy costs (fuel and certain maintenance costs) and capacity costs (mainly capital costs of facilities). CHP facilities with capacities below 20 MW are compensated based on a Market Price Referent point: the cost to design, build, and operate a 500 MW combined cycle natural gas power plant. Second, CPUC implemented the Renewable Market Adjusting Tariff (Re-MAT) program, which applies to generators with a capacity of 3 MW or less, requiring utilities to purchase electricity at a program-specific rate.[119] Lastly, CPUC

116 Oversubscription in this instance is the result of more QF facilities signing contracts than the utility company has the electricity demand need for, at that particular price.

117 Energy Policy Act of 2005, 16 U.S.C. §§ 1251–1252, 1254 (2005).

118 *Solutions*, 2016 WL 7613906 at *6.

119 The rate is calculated using 1) the average of the highest executed contract rates resulting from CPUC's auction to utility companies; 2) a two-month price adjustment

created the Net Energy Metering (NEM) Program, limited to consumer generators with a capacity of 1 MW or less. This program compares the amount of electricity generated to the amount used by the consumer over a 12-month period, and requires compensation when the consumer generates more than it uses. The utility must compensate the consumer for this excess generation at a rate based on an hourly day-ahead delay rate.[120] Even as defined by CPUC, this rate does not include capacity costs.

In 2011, CARE sued CPUC alleging both PURPA and § 1983[121] claims. The district court dismissed both claims and the Ninth Circuit upheld the dismissal, but reversed and remanded CARE's PURPA claims. The district court then entered summary judgment in favor of CPUC on all of CARE's PURPA claims and refused CARE's motion for leave to amend the complaint. The Ninth Circuit reviewed the district court's grant of summary judgment de novo, and denial of the motion to amend a complaint for an abuse of discretion.

First, the Ninth Circuit held that district court erred in granting summary judgment in favor of CPUC regarding the use of multiple sources of electricity in the calculation of avoided costs to determine the set price for contracts entered into under the QF Settlement. CARE argued that avoided costs should not be based on multiple sources, but on each individual type of electricity.[122] CARE argued that due to the lack of separate calculations, avoided costs for renewables are impermissibly calculated based on natural gas benchmarks instead of renewable benchmarks. CPUC in return argued that FERC does not require the use of multi-tiered pricing and gives the state discretion to determine the best implementation of PURPA. Relying on FERC precedent, the Ninth Circuit held where a state requires utilities to source away from certain types of generators through an RPS, the utility cannot calculate avoided costs based on a type of generator that would not also meet the RPS standards. Given an issue of fact exists as to whether CPUC's programs conform to this holding, the Ninth Circuit remanded this issue to the district court.

The court next addressed whether the avoided costs must include capacity costs, holding that the district court correctly granted summary judgment after determining all CPUC programs at issue adequately address PURPA requirements for the inclusion of capacity costs in avoided costs. The court applied the FERC standard requiring the inclusion of capacity costs only where a QF is of "sufficient reliability

based on market response; and 3) a time-of-delivery adjustment, with assumed inclusion of capacity costs.

120 A calculation of one day's price based on the production from the preceding day.

121 42 U.S.C. § 1983 (2012).

122 This is known as "multi-tiered pricing" and requires a utility to calculate a separate avoided cost for each source (coal, natural gas, solar, etc.) instead of one overall avoided cost that considers all sources in its calculation.

and with sufficient legally enforceable guarantees of deliverability"[123] and actually displaces the utilities need for additional capacity. The court held CARE did not provide any sufficient evidence as to why capacity costs, which CARE attempted to distinguish from capital costs, are an inadequate representation of avoided costs when determining the QF Settlement contract price. Further, the court found unpersuasive CARE's argument that the rate a utility pays to a consumer for excess generation under the NEM program must include capital costs. The compensation requirements of PURPA only apply under the NEM program where a utility purchases energy from a reliable QF, which allows the utility to actually forgo spending its own money on other capacity. NEMs do not rise to the requisite level of reliability, given they are not legally required to provide a utility with energy, and utilities cannot forgo purchasing other capacity based on NEMs. Therefore, utilities cannot be required to compensate for the capital costs of consumer-generators under the NEM program. In analyzing the Re-MAT and CHP programs, the court found no issue as to the capital costs, because CARE provided only a bare assertion the costs need consideration, with no supporting reasoning. However, the court instructed the district court to review these programs for the use of natural gas facility benchmarks in calculating avoided costs, as consistent with the holding on the first issue. Finally, the court dismissed CARE's assertion that CPUC cannot allow utilities to condition purchases from QFs on the transfer of the QF's RECs to the utility. The court held that because the REC program is a state program, it is outside the purview of PURPA and therefore the federal statute does not govern its implementation.

The Ninth Circuit then turned to the third issue, holding that the NEM program does not violate PURPA's interconnection requirement. CARE argued the NEM program violates PURPA by placing the burden of the interconnection fee on the QFs. Relying on the plain text of the statute, the court held that PURPA's interconnection mandate only requires QFs be connected when needed to meet the mandatory purchase requirements; the statute provides no requirement that utilities must pay for the interconnection. Therefore, the NEM program does not violate PURPA and the district court properly granted summary judgment on the issue.

Finally, the court held the Eleventh Amendment[124] bars the award of equitable damages and attorney's fees under PURPA. Provided by both the Eleventh Amendment's protection of states and an absence of Congressional authorization of attorney's fees under PURPA, the court upheld the district court's denial of the motion based on a determination that CARE cannot state a cause of action for damages and attorney's

[123] Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,216 (Feb 29, 1980).

[124] U.S. CONST. amend. VI.

fees against CPUC. The court further recognized that while a cause of action potentially exists against the individual commissioners for prospective injunctive relief, the commissioners have absolute immunity when acting in their legislative capacity, as in this case. Lastly, in light of Supreme Court precedent, the court found the lack of a PURPA provision providing for attorney's fees was dispositive against CARE's assertion that the private attorney general theory applied.[125] As such, the court held the district court did not abuse its discretion in denying CARE's motion for leave to file an amended complaint.

In conclusion, the Ninth Circuit affirmed the district court's denial of CARE's motion for leave to file an amended complaint and grant of summary judgment on all but one issue. The court reversed and remanded to the district court to determine whether CPUC's programs utilize other renewable energy providers as the benchmark for the calculation of avoided costs under PURPA.

Judge Jacqueline H. Nguyen dissented, disagreeing with the court's holding that PURPA requires avoided cost calculations based on sources that would also meet RPS requirements. Judge Nguyen reasoned this holding is inconsistent with FERC's administrative goal of allowing states discretion in their implementation of PURPA's requirements. A state should have flexibility in determining the calculation of avoided costs, given states may consider the reliability of solar or renewables relevant to the determination of proper avoided costs. Further, Judge Nguyen points out QFs and CPUC discussed the issue of avoided cost calculation, with the QF settlement reflecting this debate and the compromises resulting from it. As such, the court has no place to question the validity of the QF settlement.

2. Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (9th Cir. 2019)*

Winding Creek Solar LLC (Winding Creek) brought an action seeking declaratory and injunctive relief against the California Public Utilities Commission (CPUC).[126] Winding Creek alleged that the Public Utility Regulatory Policies Act (PURRPA)[127] preempted two CPUC regulatory programs for alternative energy producers and, as such, should be awarded the contract with the state utility company, Pacific Gas & Electric (PG&E). The United States District Court for the Northern District of California, finding both California's Re-MAT and Standard Contract programs in violation of PURPA, held that PURPA preempted both programs.[128] The district court granted summary

[125] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269–70 (1975) (foreclosing the award of attorney's fees under the private attorney general theory absent explicit congressional authorization).

[126] Named defendants included Carla Peterman, Martha Guzman Aceves, Liane Randolph, Clifford Rechtschaffen, and Michale Picker in their official capacities as Commissioners of CPUC.

[127] Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601–2645 (2005).

[128] Winding Creek Solar LLC v. Peevey, 293 F. Supp. 3d 980, 991–992 (N.D. Cal. 2017).

judgment on the declaratory claim, but denied injunctive relief. Both sides appealed. Reviewing the judgment de novo, the Ninth Circuit affirmed.

Title II of PURPA facilitates the development of alternative energy sources by addressing the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional facilities and by alleviating the financial burdens imposed by state and federal utility authorities. Congress delegated to the Federal Energy Regulatory Commission (FERC) the authority to promulgate rules under the statute.[129] First, FERC's "must-take" provision requires electric utilities to buy all the power a Qualifying Cogeneration Facility (QF)[130] produces.[131] Second, the utilities must pay the same rate they would have if they had obtained that energy from a different source.[132] FERC's regulations guarantee QFs the choice of calculating this rate either at the time of contracting or at the time of delivery.[133]

The main program at issue is California's Renewable Market Adjusting Tariff (Re-MAT) program, which creates a competitive market-based rate for utilities to purchase power from QFs. In this auction, the utility offers contracts at a pre-defined price to the QFs at the head of the queue.[134] However, Re-MAT caps the amount of energy a utility must buy. California's three investor owned utilities are obligated to purchase in total only 750 MW statewide.[135] Once a utility would exceed their obligated limit for any generation category by extending their next contract, the utility can stop offering Re-MAT contracts. The second PURPA program at issue is the Standard Contract. The Standard Contract program does not cap the amount of energy a utility is obligated to buy, but instead offers an avoided-cost rate calculated using a six-variable formula, of which three variables are impossible to determine at the time of contracting.[136]

As a QF, Winding Creek was accepted into Re-MAT. However, by the time Winding Creek reached the top of the queue, the contract price had already dropped. Because they could not develop the solar facility at

129 16 U.S.C. § 824a-3a.

130 A QF is a FERC-certified alternative energy producer.

131 18 C.F.R. § 292.303(a)(1) (2019).

132 This rate is derived from the utility's avoided costs or the costs the utility would have incurred but for the purchase from a QF. A utility can avoid costs either by purchasing the energy from some other source or by generating the energy itself. *Id.* at § 292.101(b)(6).

133 *Id.* at § 292.304(d)(2).

134 CPUC sets the initial contract price for each category of generation. Subsequent price adjustment also follows a formula set by CPUC. If QFs reject the first offer they receive, they keep their place in line until the next offering.

135 The 750 MW cap is divided equally among three types of generation: baseload; non-peaking, as-available; and peaking, as-available. This is then divided among the utilities according to their customers' share of peak electricity demand, minus any generation a utility is already obligated to purchase under prior CPUC programs.

136 The three variables are burner tip gas price, market heat rate, and a location adjustment factor. *See* Winding Creek Solar LLC, 153 FERC 61027 (Oct. 15, 2015).

such a low price, Winding Creek rejected this and later offers. Winding Creek initially challenged the validity of Re-MAT before FERC,[137] but after various orders and notices of intent not to act, Winding Creek filed suit in the district court.

The Ninth Circuit held that PURPA preempted California's Re-MAT program because Re-MAT's cap on the amount of energy utilities must purchase from QFs and Re-MAT's pricing scheme violated the statute. The court found Re-MAT's cap violated PURPA's "must-take" provision. Re-MAT requires utilities to purchase no more than 5 MW from each source category in any two-month period, mandating that each utility must purchase only a fraction of the 750-MW statewide cap. To comply, a utility may need to purchase less energy than a QF makes available. Because such an outcome exists, the court ruled that Re-MAT violated PURPA.

The Ninth Circuit further held that Re-MAT's pricing scheme violated PURPA because PURPA requires a utility to pay QFs at an avoided-cost rate.[138] The Re-MAT price, which is arbitrarily adjusted every two months according to the QFs' willingness to supply energy at the pre-defined price, "strays too far afield" from a utility's but-for costs.[139] Thus, the Ninth Circuit found that both Re-MAT's energy purchase cap and pricing structure violated PURPA.

CPUC argued that Re-MAT's noncompliance with PURPA is not consequential because QFs may instead sell energy to utilities through the Standard Contract.[140] Previously, FERC held the Standard Contract to be PURPA compliant and thus upheld Re-MAT as an alternative program. However, the Ninth Circuit ruled that the Standard Contract's regulations on their face violated PURPA and, as such, did not need to defer to FERC's "unreasoned conclusion."[141] PURPA mandates that QFs be given a choice between calculating the avoided-cost rate at the time of contracting or at the time of delivery. Yet, the only formula CPUC provides for calculating avoided costs relies on variables that are unknown at the time of contracting. In this way, the Standard Contract

137 *See* Winding Creek Solar LLC, 144 FERC 61122 (Aug. 12, 2013); Winding Creek Solar LLC, 151 FERC 61103 (May 8, 2015); Winding Creek Solar LLC, 153 FERC 61027 (Oct. 15, 2015).

138 The avoided cost rate is the rate the utility would have incurred obtaining energy from a source other than the QFs. 18 C.F.R. § 292.304. The court recognized that state agencies can take a variety of factors into account when calculating avoided cost. *Id.* at §§ 292.302(b), 292.304(e).

139 Winding Creek Solar LLC v. Peterman, 932 F.3d 861, 865 (9th Cir. 2019).

140 FERC concluded that, as long as a state provides QFs the opportunity to enter into long-term, legally enforceable obligations at avoided-cost rates, a state may also have alternative programs that put limits on QF contracts. *See* Winding Creek Solar LLC, 151 FERC 61103 (May 8, 2015).

141 *Winding Creek*, 932 F.3d at 865. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415–2417 (2019) (holding that Auer deference is only appropriate if the regulation being interpreted is "genuinely ambiguous" and the Agency's interpretation "reflect[s] fair and considered judgment" (internal quotation marks omitted)).

fails to give QFs the option to calculate avoided cost at the time of contracting, violating PURPA.

Finally, the Ninth Circuit briefly turned to Winding Creek's appeal of the district court's denial of injunctive relief. The court found that the district court did not abuse its broad discretion to fashion equitable relief because awarding a modified contract under the preempted programs would be inappropriate.[142]

In sum, the Ninth Circuit affirmed the district court and held that CPUC's Re-MAT and Standard Contract programs violated PURPA, PURPA preempted both programs, and injunctive relief was inappropriate.

III. NATURAL RESOURCES

A. Tribal Law

1. United States v. Washington*, 928 F.3d 783 (9th Cir. 2019)*

The United States, both on its own behalf and as trustee for the Skokomish tribe, brought an action against the State of Washington and tribes therein[143] (collectively, the State) seeking injunctive and declaratory relief regarding off-reservation fishing rights on the Satsop River. After hosting a meeting with other tribal stakeholders to discuss primary fishing rights on the Satsop, which did not lead to an agreement, the Skokomish commenced this proceeding claiming primary fishing rights. The United States District Court for the Western District of Washington granted summary judgment for the State, holding that the Skokomish failed to adequately perform the pre-trial settlement meeting mandated by the Boldt Decision,[144] and failed to invoke jurisdiction pursuant to the Boldt Decision. On appeal, the Ninth Circuit affirmed, holding that the Skokomish had failed to properly assert jurisdiction.

In the 1850s, Isaac Stevens, then Governor of the Washington Territory, negotiated eleven treaties with tribes in the area that would

142 Nor is it the court's job to fashion a new contract to Winding Creek's liking. *See* Allco Renewable Energy Ltd. v. Mass. Elec. Co., 875 F.3d 64, 74 (1st Cir. 2017) (noting that federal courts are neither statutorily authorized nor competent to set avoided-cost rates).

143 The defendants in this case were the State of Washington, the Jamestown S'Klallam Tribe, the Port Gamble S'Klallam Tribe, the Squaxin Island Tribe, the Muckleshoot Indian Tribe, the Quileute Indian Tribe, the Hoh Tribe, the Lummi Tribe, the Quinault Indian Nation, the Nisqually Indian Tribe, the Suquamish Indian Tribe, the Tulalip Tribes, the Puyallup Tribe, the Upper Skagit Indian Tribe, and the Swinomish Indian Tribal Community.

144 The Boldt Decision is the binding legal scheme for adjudicating fishing disputes between Washington's tribes. United States v. Washington, 384 F. Supp. 312, 404 (W.D. Wash. 1974).

become Washington State.[145] In exchange for 64 million acres of land, the tribes retained small reservations and the right to take fish "in common with" non-Native Americans at their "usual and accustomed" off-reservation sites.[146] Sadly, as a result of rapidly increasing non-Native populations and regulations implemented by Washington State in the decades following the Stevens Treaties, Indian fishing represented only a miniscule fraction of the total catch by the mid 1950s. Consequently, after protests by tribes, the United States filed a lawsuit in 1970 that culminated in the so called "Boldt Decision," where Judge Boldt held that the phrase "in common with" guaranteed tribes 50% of harvestable fish in their "usual and accustomed" fishing grounds.[147] The decision prescribed each tribe's "usual and accustomed" territory, concluding that the Skokomish's "usual and accustomed" territory was "all the waterways draining into the Hood Canal and the Canal itself."[148]

Further, the Boldt Decision laid out rules regulating when parties could invoke the court's continuing jurisdiction. Tribes can invoke the court's continuing jurisdiction to determine: (a) whether or not the actions intended or effected by any party are in conformity with the Boldt Decision, (b) whether a proposed state regulation is reasonable and necessary for conservation, (c) whether a tribe is entitled to self-regulate, (d) disputes concerning the subject matter of a case which the parties have been unable to resolve among themselves, (e) claims to returns of seized or damaged fishing gear, or (f) the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by the Boldt Decision. Additionally, before filing a request for determination (RFD), parties must confer with all the potentially affected parties and attempt to negotiate a settlement. At that meeting, the party seeking primary fishing rights must divulge the legal basis for its claim and whether earlier court rulings addressed or resolved the matter.

Pursuant to these requirements, the Skokomish hosted a meeting with other tribes to determine whether the Skokomish had primary fishing rights on the Satsop. There, the Skokomish stated that the Boldt Decision did not address primary fishing rights to the river, and relied on the "Thompson Report," which highlighted anthropological data suggesting Skokomish rights to the Satsop, to bolster their claim. After no agreement was reached, the Skokomish filed an RFD in the district court asserting primary fishing rights on the Satsop. After the district court dismissed the case on summary judgment, the plaintiffs appealed.

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145 Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n et al., 443 U.S. 658, 666 (1979).

146 *See, e.g.*, Treaty with the S'Klallam, Jan. 26, 1855, 12 Stat. 933.

147 United States v. Washington, 384 F. Supp. at 343. This is defined as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times."

148 *Id.* at 377.

The Ninth Circuit reviewed the district court's grants of summary judgment de novo.

The Ninth Circuit held the Skokomish failed to adequately invoke jurisdiction pursuant to the Boldt Decision. The Skokomish failed to adequately perform the requisite meeting to settle the claim before filing their RFD. When filing the RFD, they relied on a 1985 ruling wherein they had filed an RFD to establish primary fishing rights on the Hood Canal.[149] Citing to a single exhibit from the record in that case—a journal from the secretary to the 1855 Treaty of No Point, which stated that the Skokomish fished on the Satsop during and before treaty times—the Skokomish argued that they were entitled to primary fishing rights on the Satsop. However, the Skokomish did not bring this 1985 RFD up at the meeting with other tribes, as was required by the Boldt Decision. At the meeting, the Skokomish attested to the fact that the Boldt Decision had not addressed primary fishing rights on the Satsop, a notion wholly opposite to their argument at the district court based on the 1985 RFD. Therefore, they failed to provide other tribes their legal basis for asserting primary fishing rights. Additionally, the Ninth Circuit held that the Skokomish failed to properly invoke jurisdiction by failing to allege jurisdiction with the specificity required by the Boldt decision. The Skokomish had pointed to all of the categories for invoking continuing jurisdiction under the Boldt decision without explaining how any one in particular was applicable.

Although the Ninth Circuit held it did not have jurisdiction to reach the merits of the Skokomish's claim, the court stated what it would have held if it had jurisdiction. According to the Ninth Circuit, the Skokomish misrepresented the 1985 RFD, which addressed only primary fishing rights to the Hood Canal, something well within the Boldt Decision's definition of the Skokomish's "usual and accustomed" territory. Their claim that it stood for anything other than that was an unreasonable extension of the case's holding. Should the Skokomish have primary fishing rights to the Satsop (which the court doubted), such rights could not be demonstrated by the 1985 RFD.

Judge Bea concurred in order to argue that, in his estimation, the Boldt Decision had likely run its course, and should be addressed soon to determine its enduring applicability. Judge Boldt, he argued, found that a permanent injunction was only necessary to protect fish resources and the rights of tribes, and to ensure the lawful exercise of state police power. Forty-five years after the decision, Judge Bea argued, that goal had been achieved.

Judge Paez also concurred. Although he agreed that the Skokomish failed to invoke jurisdiction pursuant to the Boldt Decision, he did not agree that the court lacked jurisdiction to hear the claim given a number of other relevant federal statutes providing federal court

[149] United States v. Washington, 626 F. Supp. 1405, 1469 (W.D. Wash. 1985).

jurisdiction.[150] Judge Paez also asserted that parties could waive jurisdictional requirements under the Boldt Decision, and noted that the parties had done so here.[151] Finally, Judge Paez disagreed with Judge Bea's concurrence insofar as it argued that the Boldt Decision had run its course, emphasizing that Judge Bea cited nothing for that proposition and that no party had asked the court to address that question.

2. Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, No. 17-17320, 2019 WL 3404210 (9th Cir. 2019)*

A coalition of regional, national, and tribal conservation organizations[152] sued the United States Department of the Interior, its Secretary, and several bureaus within the Agency (collectively, Federal Defendants),[153] alleging violation of the Endangered Species Act[154] (ESA) and the National Environmental Policy Act[155] (NEPA) for multiple agency actions that reauthorized coal mining activities on land reserved to the Navajo Nation. The Navajo Transitional Energy Company (NTEC), a tribal-owned corporation that owns the mine at issue in this case, intervened in the action for the purpose of moving to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7),[156] arguing that NTEC was a required party that could not be joined due to tribal sovereign immunity and therefore the lawsuit could not proceed. The United States District Court for the District of Arizona agreed with NTEC and granted its motion to dismiss.[157] On appeal the Ninth Circuit affirmed, holding that NTEC had a legally protected interest in the subject matter of the suit, that the Federal Defendants could not adequately represent NTEC's interest in the litigation, that NTEC could not be joined due to tribal sovereign immunity, and that the action could not, "in equity and good conscience,"[158] proceed without NTEC. The

150 *See* 28 U.S.C. § 1345 (2018) (providing standing when the United States is a party); *id.* at § 1331 (providing standing when cases involve federal questions); *id.* at § 1343 (providing standing when cases involve civil rights); *id.* at § 1362 (providing standing when cases involve tribes).

151 Judge Paez cited to *Muckleshoot Tribe v. Lummi Indian Tribe*, another case where parties failed to properly invoke jurisdiction under Boldt and yet the court heard the case anyway because of judicial economy. 141 F.3d 1355, 1357 (9th Cir. 1998).

152 Plaintiffs included Dine Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Amigos Bravos, Sierra Club, and Center for Biological Diversity.

153 Defendants included the Bureau of Indian Affairs, United States Department of Interior, United States Office of Surface Mining Reclamation and Enforcement, United States Bureau of Land Management, David Bernhardt in his official capacity as Secretary of the U.S. Department of the Interior, and United States Fish and Wildlife Service.

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

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

156 FED. R. CIV. P. 12(b)(7) & 19.

157 Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs, (No. CV-16-08077-PCT-SPL), 2017 WL 4277133 (D. Ariz. 2017).

158 FED. R. CIV. P. 19(b).

Ninth Circuit also refused to apply the public rights exception in favor of the plaintiffs.

This action resulted from changes and renewals to lease agreements, rights-of-way, and government issued permits relating to the 33,000-acre Navajo Mine. The Navajo Mine (Mine) is the sole producer of coal for the Four Corners Power Plant (Power Plant), both of which operations are located on tribal land of the federally recognized Navajo Nation within New Mexico. The Mine and Power Plant are vital sources of revenue for the Navajo Nation, generating between 40 and 60 million dollars per year for the tribe.

In 2011, Intervenor-Defendant Arizona Public Service Company (APS), the operator of the Power Plant, and the Navajo Nation amended the lease governing Power Plant operations, sought renewal from the Department of the Interior of the existing surface mining permit for the Mine, and a new permit that would allow operations to expand into another part of the lease area. The lease amendments and rights-of-way could not be issued without approval from multiple bureaus within the Department of Interior.

The Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) engaged in formal consultation with the U.S. Fish and Wildlife Service, as required by the ESA when a project "may affect listed species or critical habitat."[159] Fish and Wildlife issued a final Biological Opinion that concluded the proposed mining action would not jeopardize the continued existence of any of the threatened and endangered species evaluated. Based upon this Biological Opinion, OSMRE developed an Environmental Impact Statement (EIS) pursuant to NEPA in May 2015. In July 2015, OSMRE and the Bureau of Indian Affairs (BIA) issued a Record of Decision that approved the continued operation and expansion of the Mine.

Upon obtaining the permits, APS and NTEC made considerable financial investments in the Power Plant and Mine and implemented the conservation measures required by the Record of Decision. NTEC moved mining operations into the areas designated by the new permit and acquired a new 115 million dollar line of credit, secured by the Mine as an asset of NTEC.

In April 2016, the plaintiff conservation organizations sued the federal defendants. Plaintiffs alleged that Fish and Wildlife's Biological Opinion violated the ESA, and therefore BIA, OSMRE, and BLM's reliance upon the Biological Opinion contravened the ESA. In addition, plaintiffs also alleged NEPA violations, asserting that federal defendants constructed an unlawfully narrow purpose and need statement for the project in the EIS, which failed to consider reasonable alternatives and to provide proper analysis of the impacts of the mining operations.

159 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(a) (2019).

After federaldefendants answered, NTEC intervened in the action for the sole purpose of filing a motion to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7).[160] Federal defendants opposed NTEC's motion to dismiss, arguing that they were the only party required to defend actions based on alleged violations of the ESA and NEPA. The district court granted NTEC's motion to dismiss and plaintiffs appealed. The Ninth Circuit reviewed the district court's decisions to dismiss and action for failure to join a required party for abuse of discretion, but reviewed its underlying legal conclusions de novo.

The Ninth Circuit first held that NTEC was a required party that must be joined if feasible because it had a legally protected interest in the subject matter of this suit that would be impaired by its absence. A person or entity is a required party and must be joined if feasible if either "in that [party]'s absence, the court cannot accord complete relief among existing parties"; or if "that [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may . . . as a practical matter impair or impede the [party]'s ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."[161]

The Ninth Circuit determined NTEC had a legally protected interest, reasoning that if the plaintiffs succeeded in their challenge to agency actions, NTEC's interest in the existing lease, rights-of-way, and surface mining permits would be impaired, and thus NTEC's expected jobs and revenue would be affected. The court also noted that unlike other cases where the court could tailor the scope of relief available to be only prospective in nature, here it could not adjust relief to avoid disruption of NTEC's legally protected interests. The Ninth Circuit also rejected plaintiffs' argument that NTEC's interests would not be impaired or impeded because existing parties to the suit would adequately represent those interests. The court found that neither the federal defendants nor APS could adequately represent NTEC's interests because although the federal defendants had an interest in defending their NEPA and ESA actions, that interest differed from NTEC's interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation. APS could also not adequately represent NTEC's interests because APS did not share the Navajo Nation's sovereign interest in controlling its own resources.

Second, the Ninth Circuit held NTEC was an "arm" of the Navajo Nation that enjoyed the Nation's immunity from suit and therefore could not feasibly be joined as a party to the litigation. The court reasoned that because NTEC is wholly owned by the Navajo Nation, is organized pursuant to Navajo law, was created specifically so the Nation could purchase the Mine, and because NTEC's profits go entirely to the

160 FED. R. CIV. P. 12(b)(7) & 19.

161 FED. R. CIV. P. 19(a)(1).

Navajo Nation, the company shared the Navajo Nation's tribal sovereign immunity and therefore could not feasibly be joined.

Next, the Ninth Circuit evaluated the final joinder consideration, which requires the court to determine whether, in equity and good conscience, the actions should proceed among the existing parties or should be dismissed.[162] The court held that the litigation could not, in good conscience, continue in NTEC's absence. In making this determination, the court considered four factors of Federal Rules of Civil Procedure Rule 19(b).[163]

The Ninth Circuit first considered the extent which a judgment rendered in NTEC's absence might prejudice the company, concluding that NTEC would be prejudiced if the lawsuit were to proceed and plaintiffs prevailed given the annual revenue at stake for the Navajo Nation. Second, the court found that its inability to shape relief so as to avoid prejudice similarly favored dismissal since the Navajo Nation would inevitably be prejudiced if plaintiffs succeed and federal defendants were unable to come to the same decisions as prior to the suit without imposing new restrictions or requirements on the Mine or Power Plant. The third factor requires the court to determine whether a judgment rendered in NTEC's absence would be adequate. The Ninth Circuit found the third factor weighed against dismissal since the judgment would not create conflicting obligations because it would be the Federal Defendants' duty, not NTEC's, to comply with NEPA and the ESA. Fourth, the court considered whether plaintiffs would have an alternate remedy if the suit was dismissed and concluded that they would not. The Ninth Circuit did not find this factor dispositive, however, pointing to case law which held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.[164] After considering all four factors, the Ninth Circuit concluded the litigation could not continue in NTEC's absence.

Finally, the Ninth Circuit held the public rights exception did not apply. Plaintiffs and the United States argued that the public rights exception applied because the litigation against the government was to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA. The Ninth Circuit rejected this argument, reasoning that while the plaintiffs only seek a renewed NEPA and ESA process, the implication of their claims is that the federal defendants should not have approved the mining activities in their exact form. Therefore, the relief the plaintiffs seek threatened NTEC's existing legal entitlements to the government-approved leases and permits. Because continuing the litigation without NTEC threatened to destroy their legal entitlements, the public rights exception did not apply.

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162 FED. R. CIV. P. 19(b).

163 *Id.*

164 Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1025 (9th Cir. 2002).

In sum, the Ninth Circuit affirmed the judgment of the district court, holding that NTEC had a legally protected interest in the subject matter of the suit, that the federal defendants could not adequately represent NTEC's interest in the litigation, that NTEC could not be joined due to tribal sovereign immunity, and that the action could not, "in equity and good conscience,"[165] proceed without NTEC. The Ninth Circuit also refused to apply the public rights exception in favor of the plaintiffs.

3. FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019)*

FMC Corporation operated an elemental phosphorous plant on fee land within the Shoshone-Bannock Fort Hall Reservation in Idaho (the Reservation) for decades, producing approximately 22 million tons of carcinogenic, radioactive, and toxic hazardous waste still stored onsite. Eventually, the Environmental Protection Agency (EPA) declared the facility a Superfund Site[166] under the Comprehensive Environmental Response, Compensation and Liability Act[167] ("CERCLA"). Soon thereafter the EPA brought an enforcement action against FMC for violating the Resource Conservation and Recovery Act[168] ("RCRA"), which culminated in a consent decree requiring FMC to obtain permits from the Shoshone-Bannock Tribes (Tribes) for using the facility and storing the associated waste onsite. FMC and the Tribes agreed to a $1.5 million per year fee for storing the hazardous waste, which FMC paid from 1998 (when the consent decree took effect) until 2001 (when FMC ceased using the plant), though it continued to store hazardous waste onsite. FMC then ceased paying the fee.

The Tribes sued FMC in tribal court seeking payment for the continued storage of the waste. After years of litigation regarding whether the tribal court had jurisdiction over FMC and a subsequent appeal, the Tribal Court of Appeals held that the Tribes had regulatory jurisdiction over FMC pursuant to *Montana v. United States*[169] and that FMC owed the Tribes $19.5 million in unpaid permit fees for hazardous waste storage from 2002 to 2014. For context, the so-called *Montana* Exceptions provide three routes for tribal regulatory jurisdiction: (1) tribes have jurisdiction to regulate the activities of nonmembers who enter consensual commercial relationships with them, (2) tribes have jurisdiction to exercise civil authority over the conduct of nonmembers on fee lands that threaten the "political integrity, the economic security,

165 FED. R. CIV. P. 19(b).

166 ENVTL. PROT. AGENCY, SUPERFUND CLEANUP PROCESS, https://www.epa.gov/superfund/superfund-cleanup-process (last visited Feb. 25, 2019).

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

168 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

169 137 F.3d 1135, 1140 (9th Cir. 1998).

or the health or welfare of the Tribe," and (3) tribes may regulate the conduct of nonmembers on fee land where so authorized by federal law.

In response, FMC filed suit in federal district court alleging that the Tribes lacked jurisdiction under *Montana* and that the Tribal Court of Appeals violated its due process rights on account of the court's alleged bias towards the company. The United States District Court for the District of Idaho held that the Tribes had jurisdiction under *Montana v. United States* and that the Tribal Court of Appeals had not denied FMC due process.[170] However, the district court further held that the Tribal Court of Appeals' judgment was only entitled to comity, and was therefore enforceable, under the first but not the second *Montana* Exception. Both parties appealed. On Appeal, the Ninth Circuit held that the Tribes had jurisdiction under both *Montana* Exceptions and that the Tribal Court of Appeals did not violate FMC's due process rights.

Under the Fort Bridger Treaty of 1868, the Tribes have sovereign authority of the Fort Hall Reservation.[171] While 97% of the Reservation is held in trust for the Tribes and their members by the federal government, 3% is fee land owned by non-members. FMC's phosphorous facility was located on fee land. Over its decades of operation, FMC's operations thereon produced millions of tons of hazardous waste, including one million tons of contaminated soil and groundwater, a number of unlined waste ponds, and approximately 21 uncontained, buried railroad cars. In response to FMC's improper treatment and storage of the waste, the EPA brought an enforcement action, which FMC sought to settle. The resulting consent decree required FMC pay $11.9 million to install containment and clean up the area and to obtain tribal permits wherever required. Further, just before FMC and the EPA entered into the consent decree, FMC agreed with the Tribes to pay $1.5 million per year for a use permit to store its hazardous waste on tribal land, a rate significantly lower than the $5 per ton the Tribes' regulations stated. FMC then paid its annual $1.5 million annual permit fee until 2002, when it ceased operations. It then refused to pay. The Tribes, in response, filed a motion in the consent decree seeking a declaration that FMC was required to obtain tribal permits for the storage of its hazardous waste. The district court agreed, holding that FMC was required to obtain permits under the consent decree, that the Tribes had jurisdiction to regulate FMC, and that the Tribes were intended third-party beneficiaries of the consent decree.[172] On appeal, the Ninth Circuit addressed only the third point, ruling that the Tribes were incidental rather than intended beneficiaries and, therefore, did not have the power to enforce the consent decree.[173] The Ninth Circuit

170 FMC Corp. v. Shoshone-Bannock Tribes, (No. 4:14-CV-489-BLW), 2017 WL 4322393 (D. Idaho 2017).

171 Treaty with the Shoshonees and Bannacks, July 3, 1868, 15 Stat. 673.

172 United States v. FMC, (No. CV-98-0406-E-BLW), 2006 WL 544505 (D. Idaho 2006).

173 United States v. FMC, 531 F.3d 813, 815 (9th Cir. 2008).

remanded with the understanding that FMC had sought the tribal permits at issue voluntarily.

The Tribes' Land Use Policy Commission granted FMC a building permit to demolish its facility and a use permit for the continued storage of hazardous waste. FMC appealed to the Fort Hall Business Council, which affirmed the Commission's decision. FMC then appealed to the Tribal Court, which held that the regulations upon which the permit fees were based were invalid because they had not been submitted to the Secretary of the Interior as was required by tribal law.[174] On appeal, the Tribal Court of Appeals reversed, holding that the regulations were properly vetted by the federal government and that the Tribes had jurisdiction to regulate FMC.[175] In the interim between the two judgments, however, FMC learned that some judges on the panel of the Tribal Court of Appeals had spoken publicly at a legal conference about their disdain for the business practices of companies like FMC, which pollute native lands and then leave. FMC, consequently, requested reconsideration with a reconstituted panel. In response, the Tribal Court of Appeals, with a new panel sitting, revised its prior ruling, holding that the Tribes had jurisdiction to regulate under the second *Montana* Exception as a result of the risks to human health and the environment resultant from FMC's contamination. Since the EPA's original remedial plan proved insufficient and had never been implemented, the Tribal Court found FMC's site to be an imminent health threat on the Reservation. It held FMC liable for its missed annual permit fees.

FMC then filed a complaint in federal court requesting the court deny enforcement of the Tribal Court of Appeals' judgment on the grounds that the Tribes lacked jurisdiction to regulate and that the tribal proceedings violated FMC's due process rights. The district court sided with the Tribes, holding that because the reconstituted panel independently reached the same conclusions as the previous panel, the alleged bias was harmless.[176] Further, it held that while the judgment was enforceable under the first *Montana* Exception, it was not under the second *Montana* Exception because there was an insufficient nexus between the $1.5 million annual storage fee and the threat the waste posed to the Tribes. The Tribes appealed.

The Ninth Circuit, on appeal, reviewed the Tribal Courts' legal rulings on jurisdiction de novo, and reviewed the Tribal Courts' factual findings underlying those jurisdictional decisions for clear error.

174 FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council, Case Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct., Civil Division, May 21, 2008).

175 FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council, Case Nos. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal Ct. of Apps., June 26, 2012).

176 FMC Corp. v. Shoshone-Bannock Tribes, (No. 4:14-CV-489-BLW), 2017 WL 4322393 (D. Idaho 2017).

Likewise, it reviewed de novo the Tribal Courts' grant of summary judgment on FMC's due process claim. In doing so, the Ninth Circuit was obliged to uphold the Tribal Courts' judgment so long as it found those courts had subject matter jurisdiction and had not violated FMC's due process. For the Tribes to have subject matter jurisdiction, they need regulatory jurisdiction to impose permit fees, and adjudicatory jurisdiction to enforce them in court. This inquiry is determined by *Montana*, which, again, provides three means for tribal regulatory jurisdiction.

The Ninth Circuit affirmed the district court's holding regarding the first *Montana* Exception, asserting that FMC's consensual business relationship with the Tribes satisfied the test. Given that the first *Montana* Exception only requires that the nonmember defendant should have reasonably anticipated its interaction would trigger tribal jurisdiction, the court found it clear that FMC should have expected tribal regulation considering the scale and associated danger of its operations and the consent decree with the EPA. FMC argued the EPA coerced it into entering relations with the Tribes, but the Ninth Circuit disagreed, pointing out the "sweet heart" deal EPA had offered FMC and holding that FMC, consequently, entered the consent decree, and subsequently pursued tribal permits, for its own good.

The Ninth Circuit also reversed the district court in holding that the Tribes had jurisdiction under the second *Montana* Exception and that there was a sufficient nexus between the annual use permits and the danger associated with FMC's facility. By storing millions of tons of hazardous waste on the Reservation, according to the Ninth Circuit, FMC imperiled the subsistence and welfare of tribal members, satisfying the second *Montana* Exception. Further, the Ninth Circuit distinguished the application of a permit scheme to control and compensate for the storage of hazardous waste, which it thought had a sufficient nexus, from a hypothetical requirement mandating FMC divest its holdings from Chinese corporations as a regulation on its storage of hazardous waste on the Reservation, which it did not think had a sufficient nexus. Nothing in *Montana*, according to the Ninth Circuit, counsels courts to read the second exception narrowly.

The Ninth Circuit also affirmed the district court's holding on FMC's due process claims. It first found that nothing the two allegedly biased judges said at the legal conference constituted legitimate bias towards FMC. The judges' statements in disagreement with the Supreme Court's logic in *Montana* and disdain for situations where nonmember companies take advantage of tribal hospitality did not, according to the Ninth Circuit, indicate that the judges would not faithfully apply the law to the case before them. Further, the reconstituted panel's reconsideration of the allegedly biased panel's prior rulings alleviated any potential bias. The Ninth Circuit noted that underlying FMC's argument was the notion that Tribal Courts present inherent risk for nonmembers' due process protections and rejected that

contention flat out, pointing to empirical studies and previous cases demonstrating tribal courts' evenhandedness.

4. Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179 (9th Cir. 2019)*

The Muckleshoot Indian Tribe brought an action seeking to obtain additional usual and accustomed fishing grounds and stations (U&As) in saltwater areas of the Puget Sound. A number of other tribes in the area[177] intervened and moved to dismiss the action, arguing that the district court lacked subject matter jurisdiction because the extent of the Muckleshoot's saltwater U&A in the Puget Sound had already been determined in a previous order: the Boldt Decision.[178] The United States District Court for the Western District of Washington granted the motion, holding the district court lacked subject matter jurisdiction over the action.[179] On appeal, the Ninth Circuit affirmed.

In the 1850s, Isaac Stevens, then Governor of the Washington Territory, negotiated eleven treaties with tribes in the region that would become Washington State (the Stevens Treaties).[180] Under the Stevens Treaties, each tribe ceded its lands in exchange for a small reservation and the right to take fish "in common with" others at its "usual and accustomed" fishing grounds and stations (U&As).[181] In 1970, the United States filed a complaint against the State of Washington seeking to enforce these treaty fishing rights.[182] The proceeding culminated with the so-called Boldt Decision, where Judge Boldt defined U&As for "every fishing location where members of a tribe customarily fished from time to time at and before treaty times."[183] Relevant to this proceeding, the Boldt Decision defined the Muckleshoot's U&A to include "locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar, and Black Rivers . . . and Lake Washington, and secondarily in the saltwater of Puget Sound."[184]

Because determining the total extent of each tribe's fishing rights was too herculean a task for a single district court judge, Judge Boldt included a permanent injunction retaining jurisdiction in the district court to implement its decrees in the Boldt Decision.[185] Paragraph 25 of the permanent injunction identifies various kinds of "subproceedings" a

177 The Jamestown S'Klallam Tribe, the Port Gamble S'Klallam Tribe, the Swinomish Tribe, and the Tulalip Tribe jointly filed a motion to dismiss. The Suquamish Tribe, Squaxin Island Tribe, and the Puyallup Tribe jointly filed a separate motion to dismiss.

178 United States v. Washington, 384 F. Supp. 312, 327 (W.D. Wash. 1974).

179 United States v. Washington, (No. C70-9213, 2018), WL 1933718 (W.D. Wash. 2018).

180 Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n et al., 443 U.S. 658, 666 (1979).

181 *Id.*

182 United States v. Washington, 384 F. Supp. at 327.

183 *Id.* at 332.

184 *Id.* at 367.

185 *Id.* at 408.

party may bring within the *United States v. Washington* framework.[186] Relevant here, Paragraph 25(a)(1) permits tribes to ask the court to resolve any ambiguity in the Boldt Decision's determinations of U&As, while Paragraph 25(a)(6) allows tribes to invoke the court's continuing jurisdiction to decide "the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by" the Boldt Decision.[187] In this instance, the Muckleshoot relied on Paragraph 25(a)(6) to seek additional U&A's in the saltwater of Puget Sound.

The district court dismissed the Muckleshoot's action on two grounds. First, it relied on the Ninth Circuit's decision in *Muckleshoot Tribe v. Lummi Indian Tribe*[188] (*Muckleshoot I*), which held that once a tribe's U&As have been "specifically determined" in the Boldt Decision, continuing jurisdiction regarding the U&A resides only in Paragraph 25(a)(1), not Paragraph 25(a)(6).[189] Since the Boldt Decision spoke to the Muckleshoot's U&A, the district court determined that the U&A had been "specifically determined." The court correspondingly held that it lacked jurisdiction under Paragraph 25(a)(6). In so holding, the district court pointed to a previous "subproceeding" from 1997 where the Puyallup, Suquamish, and Swinomish Tribes sought a determination that the Muckleshoot lacked U&As in the saltwater areas of Puget Sound outside of Elliot Bay.[190] The judge overseeing that "subproceeding" had already determined the scope and extent of the Muckleshoot's saltwater U&A in the Puget Sound, a clear demonstration that it no longer needed to be reexamined.[191] Additionally, the district court held that the Muckleshoot were collaterally estopped from relitigating the issue raised in the 1997 proceeding.

Ordinarily courts of appeal review dismissals for lack of subject matter jurisdiction de novo. However, since the district court found a lack of subject matter jurisdiction based on its interpretation of a prior judicial decree, the Ninth Circuit reviewed this appeal giving deference to the district court's interpretation.

As a result, the Ninth Circuit affirmed, agreeing with the district court that the Boldt Decision determined the entirety of the Muckleshoot's saltwater U&A in the Puget Sound and that the fact a proceeding had already been held on that issue precluded jurisdiction under Paragraph 25(a)(6). The most reasonable reading of the 1997 subproceeding, according to the panel majority, is that Judge Boldt, "in referring to the Muckleshoot's fishing rights in Puget Sound, determined in effect that the only part of Puget Sound in which the

186 *Id.* at 419.

187 *Id.*

188 141 F.3d 1355, 1359 (9th Cir. 1998).

189 The court held that Judge Boldt determined the tribe's saltwater U&A in the Puget Sound included the Elliott Bay area. *Id.*

190 United States v. Washington, 19 F. Supp. 3d 1252, 1272 (W.D. Wash. 1997).

191 *Id.*

Muckleshoot had any usual and accustomed fishing was 'the open waters and shores of Elliott Bay,'" and nothing more.[192] Relitigating that issue, therefore, was a needless task. Consequently, the Ninth Circuit never addressed the Muckleshoot's collateral estoppel argument.

Judge Ikuta dissented, arguing that the majority misinterpreted the holding of *Muckleshoot I*. *Muckleshoot I*, she pointed out, held that when a tribe claims that a U&A from the Boldt Decision is ambiguous under Paragraph 25(a)(1), a court's only job is to discern Judge Boldt's intent and, therefore, may consider only evidence relevant to that determination.[193] Further, *Muckleshoot I* held that when a tribe invokes jurisdiction under Paragraph 25(a)(6) to determine the scope of its U&As in areas not addressed by the Boldt Decision, the tribe can offer new evidence to establish it historically fished in the areas at issue. *Muckleshoot I* did not determine, however, what happens after a tribe's U&As are clarified pursuant to Paragraph 25(a)(1). Since the Boldt Decision set out broad saltwater U&As for the Muckleshoot covering the whole Puget Sound, the tribe, in *Muckleshoot I*, had to proceed under Paragraph 25(a)(1), not Paragraph 25(a)(6), thus preventing the court from making a finding that areas outside of Elliott Bay were not part of the tribe's U&A.

Judge Ikuta argued it was unfair for the district court in this instance to prevent the Muckleshoot from providing evidence the tribe claimed showed that various areas within the Puget Sound outside of Elliott Bay were historically Muckleshoot fishing locations. She asserted that after *Muckleshoot I* determined that the tribe's saltwater U&As were limited to Elliott Bay, the tribe was entitled to request a new determination under Paragraph 25(a)(6) regarding areas outside of Elliott Bay. By dismissing the proceeding, the district court had, therefore, determined that the tribe did not have any additional U&As in the Puget Sound outside of Elliott Bay without reviewing all the evidence admissible in Paragraph 25(a)(6) proceedings under *Muckleshoot I*.

IV. MISCELLANEOUS

A. National Environmental Policy Act

1. Oregon Natural Desert Ass'n v. Rose*, 921 F.3d 1185 (9th Cir. 2019)*

The Oregon Natural Desert Association (ONDA) sued the Bureau of Land Management (BLM),[194] alleging that BLM's Travel Management

192 Muckleshoot Indian Tribe v. Tulalip Tribes, 944 F.3d 1179, 1184 (9th Cir. 2019).

193 *Muckleshoot I*, 141 F.3d at 1359.

194 Defendants include BLM, Jeff Rose in his official capacity as Burns District Manager, the Interior Board of Land Appeals, and Rhonda Karges in her official capacity as Field Manager of Andrews Resource Area.

Plan (Travel Plan) and Comprehensive Recreation Plan (Recreation Plan) for the Steens Mountain Cooperative Management and Protection Area (Steens Mountain Area), as well as the Interior Board of Land Appeals' (the Board) approval of the Travel Plan, violated the National Environmental Policy Act (NEPA),[195] the Federal Land Policy Management Act (FLPMA),[196] and the Steens Mountain Cooperative Management and Protection Act (Steens Act).[197] Harney County intervened to defend the Board's approval of the Travel Plan and cross-claimed against the BLM, challenging the Recreation Plan. The United States District Court for the District of Oregon granted BLM's motion for summary judgment, upholding both agency actions.[198] On appeal, the Ninth Circuit upheld the district court's finding that BLM satisfied its obligation to consult the Steens Mountain Advisory Council before issuing the Recreation Plan, but vacated and remanded the Travel Plan and Recreation Plan, holding that neither plans adequately established the baseline environmental conditions necessary for a procedurally adequate assessment of the environmental impacts, and thus were an arbitrary and capricious agency action.

This litigation arose from the BLM's issuance of the Travel and Recreation Plans regarding the route network for motorized vehicles in the Steens Mountain Area. The BLM developed the Recreation Plan, opened the public comment period on the revised Recreation Plan Environmental Assessment, and made Route Analysis Forms and aerial photographs available during this time. Neither the photographs nor the forms revealed any details about the conditions of the routes.

In addition, the Board affirmed the BLM's decision to open Obscure Routes to motorized travel, based on a new definition of the term "roads and trails." When presented with the issue in 2009, the Board concluded that there exists an inherent incongruity in determining that routes are obscure on the ground, and concluding that opening them to motorized use is consistent with the Steens Act.[199] In 2014, however, the Board redefined "roads and trails" to mean something that existed as a matter of record in October 2000 and that might again be used in the future, despite a present difficulty in physically tracing it on the ground. The BLM added the Obscure Routes back to the Steens Mountain transportation network only over the winter, while the area was largely inaccessible, therefore precluding the public from surveying the Obscure Routes.

During this time, the BLM formally briefed the Advisory Council on the Recreation plan, at which point it gave Advisory Council members copies of each route analysis and discussed the project. After the public

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

196 Federal Land Policy and Management Act of 1979, 43 U.S.C. §§ 1701–1787 (2012).

197 Steens Mountain Cooperative Management and Protection Area of 2000, 16 U.S.C. §§ 460nnn-11–460nnn-53. (2012).

198 Or. Nat. Desert Ass'n v. Cain, 292 F. Supp. 3d 1119, 1134 (D. Or. 2018).

199 16 U.S.C. § 460nnn-22(b)(1).

comment period closed, the BLM attached ground photographs that had greater detail showing the vegetation and the condition of the routes themselves for a few Obscure Routes. Ultimately, the BLM issued the Recreation Plan and the Board approved the BLM's Travel Plan.

ONDA sued, alleging that BLM's Travel Plan and Recreation Plan for Steens Mountain Area, as well as the Board's approval of the Travel Plan, violated NEPA, FLPMA, and the Steens Act. The district court granted summary judgment for the BLM, denying ONDA's challenge to the Board's decision on the Travel Plan and the BLM decision regarding the Recreation Plan. On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment de novo and applied the arbitrary and capricious standard under NEPA.

First, the Ninth Circuit analyzed the county's claim that the BLM failed to properly consult with the Advisory Council before issuing the Recreation Plan. The BLM argued that although it must make any decision to permanently close an existing road in the Steens Mountain Area in consultation with the Advisory Council, the Steens Act does not specify how the BLM must consult with the Council. The Ninth Circuit agreed with the BLM, holding that the BLM satisfied its obligation to consult the Council before issuing the Recreation Plan, so its action was not arbitrary and capricious. The court noted that the county failed to explain how the BLM's purported failure to consult the Council more extensively caused the BLM not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decision making and public participation. The Ninth Circuit concluded that even if the degree or mode of consultation were insufficient, any error was harmless to the county, and affirmed the holding of the district court.

Second, the Ninth Circuit considered ONDA's claim that the Board acted arbitrarily and capriciously by changing its definition of "roads and trails." The Board defended its decision to alter its definition by concluding that since the statute clearly meant to allow the BLM to designate roads and trails as open to motorized travel, the prohibition against motorized off-road travel meant that motorized travel that does not occur on either a road or a trail is prohibited. The Ninth Circuit rejected the Board's explanation, holding that the Board acted arbitrarily and capriciously by changing its definition of "roads and trails" without providing a reasoned explanation for the change. The Ninth Circuit noted that while an agency may change its policies over time, it must at least display awareness that it is changing its position and that there are good reasons for the new policy. However, because the BLM did not explain what led it to alter its earlier decision or why the new approach was more consistent with the text of the Steens Act, the Ninth Circuit vacated its approval of the Travel Plan and remanded it to the BLM.

Third, the Ninth Circuit addressed ONDA's claim that the Board Acted arbitrarily and capriciously by affirming the BLM's issuance of

the Travel Plan without first establishing the baseline environmental conditions necessary for a procedurally adequate assessment of the Travel Plan's environmental impacts. The Board argued that the EA and the previous EIS contained the required analysis of the project's impact on noteworthy aspects of the Steens Mountain Area. The Ninth Circuit agreed with ONDA and held that the Board acted arbitrarily and capriciously in affirming the BLM's issuance of the travel plan, explaining that EA contained no references to any material in support or opposition to its conclusions and provided only a cursory analysis of the project's impact on important elements of the area, and thus was procedurally deficient under NEPA. Because the Ninth Circuit concluded the Travel Plan was inadequate on procedural grounds, it did not reach ONDA's substantive challenges to the Travel Plan.

Finally, the Ninth Circuit analyzed ONDA's claim that the BLM acted arbitrarily and capriciously in issuing the Recreation Plan without adequately establishing the baseline environmental conditions. The BLM defended its decision by pointing to route analysis forms and aerial photographs it made available during the comment period. The Ninth Circuit again agreed with ONDA, holding that the BLM's Recreation Plan was procedurally inadequate, and therefore arbitrary and capricious. The court reasoned that because the BLM provided supporting materials that failed to reveal any details about the condition of the Obscure Routes and because the BLM made more detailed photographs available only after the comment period closed, it could not be fully aware of the environmental consequences of the proposed action, thereby precluding informed decision making and public participation. Accordingly, the Ninth Circuit vacated the Recreation Plan and remanded it.

In sum, the Ninth Circuit held both the BLM's issuance of the Recreation Plan, and the Board's approval of the BLM's issuance of the Travel Plan, to be procedurally deficient under NEPA for failure to establish the baseline conditions necessary for careful consideration of information about significant environmental impacts to the Steens Mountain Area. The court vacated and remanded both plans.

2. WildEarth Guardians v. Provencio*, 923 F.3d 655 (9th Cir. 2019)*

WildEarth Guardians, along with other environmental advocacy groups (collectively, Guardians),[200] filed a claim against the United States Forest Service (USFS), challenging travel management plans implemented by USFS that permitted limited motorized big game retrieval in three regions of the Kaibab National Forest (the Kaibab). Guardians sought injunctive and declaratory relief, alleging violations of the Travel Management Rule,[201] the Administrative Procedure Act[202]

[200] Plaintiffs include WildEarth Guardians, Grand Canyon Wildlands Council, Wildlands Network, and the Sierra Club.

[201] Travel Management Rule, 36 C.F.R. § 212.50(a) (2019).

(APA), the National Environmental Procedure Act[203] (NEPA), and the National Historic Preservation Act[204] (NHPA). The District Court for the District of Arizona granted summary judgment in favor of USFS.[205] On appeal, the Ninth Circuit affirmed.

The Kaibab, located in northern Arizona, is approximately 1.6 million acres, including Grand Canyon National Park, and is comprised of three noncontiguous Ranger Districts. The Kaibab hosts a wide variety of landscapes, and it is also home to a number of endangered and sensitive species.[206] The Travel Management Rule was promulgated by the U.S. Department of Agriculture in 2005 to "provide[ ] for a system of National Forest System roads, National Forest System trails, and areas on National Forest System lands that are designated for motor vehicle use."[207] The rule created certain restrictions on motor vehicle use for designated roads and prohibited motor vehicle use on roads not designated.[208] The rule also included a provision allowing for "the limited use of motor vehicles within a specified distance of certain forest roads" specifically for the retrieval of legally downed big game.[209]

Guidelines for implementation of the rule were prepared by USFS's Southwestern Regional Office, which noted the importance of hunting to the public in the region. The guidelines suggested allowing motor vehicles to travel up to three miles from designated roads for bison retrieval and up to one mile for elk and deer retrieval. In implementing the rule, USFS created a travel management plan for each of the three Ranger Districts in the Kaibab. For each of the districts, USFS performed an environmental assessment (EA), concluding with a finding of no significant impact (FONSI). In the Williams and Tusayan Ranger Districts, the FONSIs allowed for the motorized retrieval of elk within

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

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

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

205 WildEarth Guardians v. Provencio, 272 F. Supp. 3d 1136 (D. Ariz. 2017).

206 The court stated:

> The Williams Ranger District . . . features a diverse array of vegetation including Douglas firs, white firs, ponderosa pines, and aspens . . . [and] . . . also serves as a habitat for a number of endangered species, including the Mexican spotted owl, the California condor, and the black-footed ferret. It contains six areas where spotted owls are known to live and breed, and three spotted owl critical habitats overlap the District. . . . The Tusayan Ranger District . . . features varied terrain, from ponderosa pine forests to grasslands, and is home to a number of sensitive species, including bald eagles, goshawks, peregrine falcons, burrowing owls, bats, and voles. . . . The North Kaibab Ranger District . . . boasts diverse terrain and vegetation, as well as sensitive animal species. Two federally listed endangered species—the Mexican spotted owl and California condor—live in the District, which the U.S. Fish and Wildlife Service has designated as critical habitat for the spotted owl.

WildEarth Guardians v. Provencio, 923 F.3d 655, 661–62 (9th Cir. 2019).

207 Travel Management Rule, 36 C.F.R. § 212.50(a) (2019).

208 *Id.*

209 *Id.* § 212.51(b).

one mile of designated roads and included several other restrictions, but neither FONSI allowed for the motorized retrieval of bison. The FONSI for the North Kaibab Ranger District did allow for the motorized retrieval of bison and elk because in 2009 no elk were taken while thirty-eight bison were taken in that district. The FONSI also prohibited retrieval of deer due to the high number of deer takings in the district. Following an affirmation of the travel management plans by the Regional Forester on an administrative appeal, Guardians filed a complaint in the district court alleging violations of the Travel Management Rule, NEPA, APA, and NHPA. On appeal, the Ninth Circuit reviewed the district court's summary judgment ruling in favor of USFS de novo. Under the APA, an agency action can be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[210]

Guardians first argued that the travel management plans violated the Travel Management Rule because the rule calls for the "limited" use of motor vehicles on "certain" roads for big game retrieval, while the management plans allow for big game retrieval on *all* designated roads. The Ninth Circuit, however, agreed with the district court that Guardians' interpretation of the word "limited" focused only on the spatial aspect of the limitation. The management plans included limitations based on factors other than geography, which were significantly stricter than prior to the management plans, and the Ninth Circuit noted that although Guardian's interpretation was not unreasonable, they presented no evidence that such an interpretation is required. The Ninth Circuit concluded that the restrictions constituted a "limited" use of motorized vehicles.

As to allowing motorized use on "certain" forest roads, Guardians argued that "certain" should be interpreted as "some, but not all," however, the Ninth Circuit was persuaded by USFS's argument that the more common definition is "definite" or "fixed." By allowing motorized use only on designated roads, the Ninth Circuit found USFS to have complied with the Travel Management Rule. Lastly, the preamble to the Rule calls for USFS to allow for big game retrieval "sparingly," which Guardians argued was violated for the same reason that the management plans allow for retrieval on all designated roads. The Ninth Circuit found this argument unpersuasive for the same reasons as above, and also noted that the preamble does not impose a duty beyond the language of the regulations. The court also noted that Guardians' relied only on the spatial concept of "sparingly," ignoring the other restrictions imposed by the plans. Ultimately, the Ninth Circuit held that the USFS did not violate the Travel Management Rule.

The Ninth Circuit then addressed defendant's argument that Guardians lacked standing for its NEPA claims because the standing declarant himself was a source of the negative effects, resulting in

210 APA, 5 U.S.C. § 706(2)(A) (2012).

redressability not being satisfied. The Ninth Circuit equated this argument to a hypothetical plaintiff challenging a CO2 producing power plant, who would lack standing because they happen to exhale CO2 themselves, which the court stated would be an absurd result and defy precedent. Defendants also contended that Guardians' lacked prudential standing based on the perceived motivation behind the claims, asserting that NEPA cannot be used to reverse USFS decisions. The Ninth Circuit was not persuaded by this argument, stating that attempting to protect the environment is well within NEPA's zone of interests, and concluded that Guardians did have standing to bring the NEPA claims.

Guardians claimed that USFS violated NEPA by failing to perform an environmental impact statement (EIS), which is required if an action might significantly affect environmental quality. First, Guardians contended that motorized big game retrieval could have detrimental effects on the environment, however, each of the three EAs produced discussed the negative effects and concluded the concern was not substantial enough to warrant an EIS. The Ninth Circuit agreed with Guardians that motorized big game retrieval can negatively affect the environment, but concluded the effects were not substantial enough to warrant an EIS, stating that Guardians may disagree with the substantive conclusions of the EA, but that there was no indication of procedural failures. The court expressed skepticism of USFS's argument that the management plans *reduced* the negative impacts in relation to the pre-plan activity, thereby making the impacts insignificant. However, the Ninth Circuit ultimately concluded that USFS's determination that the impacts were not significant enough to warrant an EIS was not arbitrary and capricious, and therefore USFS did not violate NEPA based on the environmental impact of the travel management plans.

Guardians also claimed USFS violated NEPA's requirement to prepare an EIS when an action's effects are likely to be highly controversial or highly uncertain.[211] The Ninth Circuit stated, however, that mere opposition is not sufficient to support an action being "highly controversial," and USFS recognized the potential for controversy but determined there was not significant scientific controversy regarding the impacts. Guardians also claimed USFS violated NEPA for not considering the precedent that may be established by this action for future actions.[212] The Ninth Circuit noted, however, that despite language in the record indicating that other districts will defer to the Kaibab's policy for motorized game retrieval, each forest plan would still be subject to its own NEPA analysis, and thus concluded the consideration of precedential impact did not warrant an EIS. Guardians' final NEPA claim contended that USFS did not adequately consider the impact of the plans on the Mexican spotted owl, a threatened species

211 40 C.F.R. § 1508.27(b)(4)–(5) (2019).

212 *Id.* § 1508.27(b)(6).

found in the Williams and North Kaibab districts. The Ninth Circuit disagreed, stating that the EA's conclusion that the plans would not adversely affect the owl was sufficient to obviate the need for an EIS. The Ninth Circuit ultimately concluded USFS completed the requisite hard look analysis, and its conclusions were not arbitrary and capricious, satisfying NEPA requirements.

Finally, Guardians claimed USFS violated the NHPA by (1) failing to properly identify and evaluate cultural properties; (2) erroneously applying "Exemption Q"[213] to excuse NHPA consultation; and (3) arbitrarily concluding the travel plans would have no adverse effect on cultural resources. On the first claim, Guardians contended that USFS failed to reasonably survey the area because it did not survey 100 percent of the affected areas. The Ninth Circuit agreed with USFS, finding that because less than 0.1 percent of the acreage in each district would be impacted, USFS reasonably concluded it did not need to complete 100 percent surveys. The Ninth Circuit agreed with Guardians that Exemption Q was not appropriate because the travel plans involved surface disturbances, but the court explained that USFS did consult with appropriate parties, which would not be required had Exemption Q been applied, and therefore, the court determined any reference to Exemption Q by USFS did not affect the NHPA process. Lastly, the Ninth Circuit was not persuaded by Guardians' contention that USFS arbitrarily determined the plans would have no adverse effect on cultural resources, stating Guardians had cherry-picked from the record to establish its assertion. Instead, the Ninth Circuit concluded USFS's determination was adequately supported.

In conclusion, the Ninth Circuit held that USFS, in producing the three travel management plans, did not violate the Travel Management Rule and sufficiently fulfilled the procedural requirements of NEPA and the NHPA, and the court affirmed the district court ruling.

3. Western Watersheds Project v. Grimm*, 921 F.3d 1141 (9th Cir. 2019)*

Western Watersheds Project, along with other conservation organizations (collectively "WWP"),[214] brought an action against the Idaho Director of Wildlife Services, a part of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS") (collectively "Wildlife Services"), to enjoin the federal government's participation in wolf management activities in Idaho pending additional analysis under the National Environmental Policy Act[215] ("NEPA").

213 "The Programmatic Agreement's Exemption Q provided that '[a]ctivities not involving ground or surface disturbance (e.g., timber stand improvement and precommercial thinning by hand)' are 'exempt from further review and consultation.'" *WildEarth Guardians*, 923 F.3d 655, 677 (9th Cir. 2019).

214 Plaintiffs included Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense.

215 NEPA, 42 U.S.C. §§ 4321–4370h (2012).

WWP alleged that Wildlife Services violated NEPA by failing to prepare an Environmental Impact Statement ("EIS") for its wolf management activities in Idaho. The District Court for the District of Idaho dismissed the claim for lack of Article III standing, finding that WWP had not shown that their injuries could be redressed because Idaho could perform the same wolf management operations without assistance from the federal government.[216] On appeal, the Ninth Circuit reversed and remanded, finding WWP had established standing.

In 1974, the Northern Rocky Mountain ("NRM") gray wolf was listed by the U.S. Fish and Wildlife Service ("FWS") as an endangered species under the Endangered Species Act,[217] and as a result, FWS took responsibility for managing the NRM gray wolf population. FWS reintroduced the NRM gray wolf into central Idaho in 1994, with the goal that the wolves would reach a population of thirty breeding pairs within the region. In 2000, FWS estimated the goal of thirty breeding pairs had been reached. In anticipation of delisting the NRM gray wolf, which would shift management of the wolves back to the state, Idaho Department of Fish and Game ("IDFG") prepared a state plan for wolf management in 2002. The NRM gray wolf was ultimately delisted in 2011, and since then, IDFG has been responsible for NRM gray wolf management in Idaho. Management has been in accordance with the 2002 plan, as well as a 2014 Elk Management Plan for Idaho's Lolo elk zone. The primary means of meeting the wolf management objectives is sport hunting, which has produced harvest numbers between 200 to 356 wolves annually. When sport hunting is insufficient, Wildlife Services assists using lethal or non-lethal methods to address depredating wolf packs or individuals.[218] Wildlife Services killed the wolves in the Lolo elk zone using aerial shooting operations from helicopters, which are highly effective, but require special expertise and equipment. IDFG killed fourteen wolves in 2013 to benefit elk, but has not killed wolves any other years. It is not clear whether IDFG has ever carried out an aerial shooting operation. However, IDFG stated that it would conduct its own removal operations in the absence of Wildlife Services, but provided nothing more than general statements about its "independent capabilities" and cited agreements with independent contractors it "has used and may use to perform lethal wolf control."[219]

Prior to the 2011 delisting of the NRM gray wolf, Wildlife Services issued an environmental assessment ("EA") and a finding of no significant impact ("FONSI") discussing its involvement with wolf management in Idaho. In choosing "Alternative 2," Wildlife Services

216 W. Watersheds Project v. Grimm, 283 F. Supp. 3d 925, 942 (D. Idaho 2018).

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

218 From 2011 to 2015, Wildlife Services and livestock producers killed between forty-two and eighty wolves annually to address livestock depredation, and Wildlife Services killed an additional zero to twenty-three wolves annually to protect elk in Idaho's Lolo elk zone.

219 W. Watersheds Project v. Grimm, 921 F.3d 1141, 1145 (9th Cir. 2019).

opted to continue assisting IDFG, while also continuing to monitor the impacts of the management efforts. From 2011 to 2015, Wildlife Services determined that a supplemental NEPA analysis was unnecessary. WWP then filed suit in the District of Idaho claiming four separate NEPA violations involving Wildlife Services' decision not to supplement its 2011 EA and FONSI. On appeal, the Ninth Circuit reviewed the question of standing de novo.

Because redressability is influenced by the scope of the injury, the Ninth Circuit first held that WWP had established an injury-in-fact. For a procedural injury, such as a NEPA violation, a plaintiff "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."[220] WWP submitted eight declarations from their members describing how the wolf-killing activities threatened various aesthetic and recreational interests, which the Ninth Circuit found satisfactory to establish an injury within the scope of NEPA protections.

The Ninth Circuit then held that WWP's injuries were redressable, reversing the district court ruling. In ruling against WWP, the district court relied on *Goat Ranchers of Oregon v. Williams*,[221] in which plaintiffs challenging Wildlife Services' participation in Oregon's cougar management had not shown a redressable injury because Oregon would likely continue its program without Wildlife Services' assistance. The Ninth Circuit found *Goat Ranchers* to lack precedential value,[222] and to be factually distinguishable because Oregon made clear its intention to continue its cougar management program without assistance from Wildlife Services.

The Ninth Circuit also found that the district court had failed to properly apply the relaxed standing requirements for a procedural injury. To establish redressability, "[p]laintiffs alleging procedural injury 'must show only that they have a procedural right that, if exercised, *could* protect their concrete interests."[223] Despite IDFG's insistence that it could and would continue to meet its wolf management objectives without Wildlife Services' assistance, the Ninth Circuit held otherwise, finding *WildEarth Guardians v. Department of Agriculture*[224] to be instructive. In *WildEarth Guardians*, a NEPA claim was brought against APHIS for its participation in Nevada's predator management program. The court there held the procedural injury was redressable, because it was not persuaded by the Nevada Department of Wildlife's assertion that it could implement its program without APHIS, because it gave no description as to how it would continue to implement the

220 WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1154 (9th Cir. 2015) (quoting W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2011)).

221 379 F. App'x 662 (9th Cir. 2010).

222 The court found it lacked precedential value because it was an unpublished opinion.

223 Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1226 (9th Cir. 2008) (quoting Defs. of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 957 (9th Cir. 2005)).

224 795 F.3d 1148 (9th Cir. 2015).

program. Therefore, it would be possible that without APHIS, Nevada's management program would be less harmful to the plaintiff's interests. Here, like *WildEarth Guardians*, the Ninth Circuit did not find it to be clear that IDFG could completely replace Wildlife Services in implementing its program. The Ninth Circuit was particularly skeptical of IDFG's abilities given that Wildlife Services had carried out most lethal management since 2011, partially through aerially hunting, which IDFG may lack the expertise and resources to carry out.

Ultimately, the Ninth Circuit found IDFG's assertion that it could carry out the wolf management program identically to when the program was carried out with Wildlife Services' assistance to be speculative, and thus could not defeat standing. Therefore, the Ninth Circuit reversed the district court's ruling on standing and remanded for further proceedings.

B. Border Wall Litigation

1. Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019)*

The Sierra Club and the Southern Border Communities Coalition (SBCC)[225] (collectively, plaintiffs) sued President Trump and certain cabinet members[226] (collectively, defendants) to enjoin the reprogramming of Department of Defense (DOD) funds to the Department of Homeland Security (DHS) for the purpose of building border barriers in Arizona, California, and New Mexico. Plaintiffs claim that defendants exceeded the scope of their constitutional and statutory authority[227] by spending money in excess of what Congress allocated for border security, violating separation of powers principles as well as the Appropriations Clause[228] and Presentment Clause,[229] and that defendants failed to comply with the National Environmental Policy Act.[230] The United States District Court for the Northern District of California granted a preliminary injunction barring defendants from using reprogrammed funds to construct border barriers and later entered a similar permanent injunction, denying the defendant's motion to stay the injunction pending appeal.[231] The defendants filed an

225 SBCC is a program of Alliance San Diego that brings together organizations from California, Arizona, New Mexico, and Texas aimed at improving the quality of life in border communities.

226 Defendants included Donald Trump in his official capacity as the President of the United States, Mark Esper in his official capacity as Acting Secretary of the Defense, Kevin McAleenan in his official capacity as Acting Secretary of Homeland Security, and Steven Terner Mnuchin in his official capacity as Secretary of the Treasury.

227 Plaintiffs alleged that defendants acted ultra vires in trying to divert funds without the statutory authority to do so.

228 U.S. CONST. art. 1, § 9, cl. 7.

229 U.S. CONST. art. 1, § 7, cl. 2 and 3.

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

231 Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

emergency motion with the Ninth Circuit requesting a stay of the preliminary injunction pending appeal and later appealed the issuance of the permanent injunction. Consolidating these appeals, the Ninth Circuit denied the Defendant's motion to stay the district court's order granting Plaintiffs an injunction.

After Congress denied numerous funding requests from the Executive branch for the construction of a border barrier, the President issued a proclamation under the National Emergencies Act[232] declaring a national emergency at the southern U.S. border that required emergency support from the Armed Forces.[233] This proclamation allowed DOD to use its authority under § 2808 of the Military Construction Codification Act,[234] which gives the Secretary the discretion to authorize military construction projects when the President declares a national emergency.[235] Moving forward, the DHS submitted a request to DOD for funding pursuant to § 284 of the National Defense Authorization Act for Fiscal Year 2017.[236] The Secretary of Defense approved the transfer, invoking § 8005 of the Department of Defense Appropriations Act of 2019[237] to reprogram $1 billion from Army Personnel funds. Section 8005 authorizes the Secretary of Defense to transfer up to $4 billion if the action is necessary, in the national interest and the transfer is approved by the White House Office of Management and Budget.[238] However, this authority may only be used for higher priority items "based on unforeseen military requirements" and never for items where requests for funds have been denied by Congress.[239] The Secretary of Defense invoked § 8005 twice to fund Yuma Sector Project 1 and 2, and El Paso Sector Project 1 as well as El Centro Project 1 and Tucson Sector Projects 1, 2, and 3. Although no concrete action had been taken, the White House also indicated it would use § 2808 to fund additional projects.[240]

Plaintiffs brought suit and initially filed a motion for a preliminary injunction barring the use of funds or resources from the DOD for construction in the Yuma Sector Projects 1 and 2 and El Paso Sector Project 1. The district court granted this motion only with respect to

232 National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018).

233 Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019).

234 Military Construction Codification Act, 10 U.S.C. §§ 2801–2815 (2012).

235 *Id.* at § 2808.

236 FY 2017 National Defense Authorization Act, 130 Stat. 2381 (2016) (codified as amended at 10 U.S.C. §§ 271–284). Allocating funding to support other agencies pursuant to § 284 does not require the declaration of a national emergency. *Id.*

237 2019 Department of Defense Appropriations Act § 8005, 132 Stat. 2981 (2018).

238 *Id.* at 2999.

239 *Id.*

240 CHRISTOPHER T. MANN, CONG. RESEARCH SERV., MILITARY FUNDING FOR SOUTHWEST BORDER BARRIERS 10 (2019).

funds reprogrammed under § 8005.[241] Plaintiffs then filed a motion in the district court for a supplemental preliminary injunction to block reprogrammed funds for recently announced construction in the El Centro Sector and Tucson Sector. Soon after, plaintiffs filed for partial summary judgment seeking a permanent injunction and defendants cross-moved for partial summary judgment. The court issued a permanent injunction prohibiting defendants from using reprogrammed funds under § 8005 to construct in El Paso and Yuma as well as El Centro and Tucson.[242] In front of the Ninth Circuit, the defendants moved to consolidate both appeals, seeking a stay of the injunction pending appeal.[243]

On appeal, the Ninth Circuit decides whether to issue a stay by considering four factors: 1) whether the applicant is likely to succeed on the merits, 2) whether the applicant will be irreparably harmed absent a stay, 3) whether the issuance of the stay will substantially injure the other parties, and 4) whether the public interest favors the stay. Here, the defendants seeking the stay bear the burden of showing that the circumstances in the case justify issuance. Usually a court will speak to merely the "likelihood" and "probability" of the merits.[244] However, both sides urged the Ninth Circuit to evaluate the merits so the issues in this case would not become moot. Thus, the Ninth Circuit evaluated the merits "more fully" than it would otherwise.[245]

In determining the likelihood of thedefendants' success on the merits, the Ninth Circuit first focused on the core of plaintiffs' claims—that the defendants violated the Constitution. Plaintiffs argued that defendants' reprogramming allocates funds for a different purpose than Congress intended and thus violates the Appropriations Clause. The defendants assert that Congress delegated this authority through § 8005. The Ninth Circuit held that there is no statutory appropriation for these expenditures because § 8005's authorization requirements were not met. The court found that the needs for which the funds were reprogrammed were not "unforeseen" and that these expenditures had clearly been "denied by Congress."[246]

Moreover, the court held that § 8005 is not entitled to agency deference, concluding that Congress did not delegate to DOD the power to interpret § 8005. Nor did the Agency's interpretation trigger *Chevron*

241 The district court declined to rule on plaintiffs' § 2808 arguments because the defendants had not disclosed a plan to divert funds using that authority, but held that the plaintiffs were unlikely to succeed on their NEPA claim.

242 Thus, the permanent injunction included the areas subject to the preliminary injunction and the areas subject to the supplemental preliminary injunction.

243 Therefore, the only funding source at issue in this stay motion is § 8005 reprogramming. The Ninth Circuit had not been asked to expand the scope of the injunction to cover other project areas either.

244 Sierra Club v. Trump, 929 F.3d 670, 688 (9th Cir. 2019).

245 *Id.*

246 Pub. L. No. 115-245, § 8005.

review.[247] There was no notice-and-comment rulemaking, formal adjudication, or other DOD processes that would justify *Chevron* deference. DOD's interpretation was also not entitled to *Skidmore* deference[248] because the few documents in the record containing DOD's analysis of § 8005 were unpersuasive. Because DOD's interpretation was not entitled to deference, and because the court found that DOD did not have authorization under § 8005 to reprogram these funds, the defendants violated the Appropriations Clause.

Defendants also argued that plaintiffs lacked a cause of action to challenge the reprogramming. However, the court held that plaintiffs can bring their challenge either through an equitable action to enjoin unconstitutional official conduct or under the judicial review provisions of the Administrative Procedure Act[249] (APA). Federal courts have the discretion to grant injunctive relief against federal officials violating federal law. Because the Ninth Circuit has previously allowed an equitable action to enforce the Appropriations Clause and because Congress has not specifically limited the court's equitable power in this circumstance, the plaintiffs did have an equitable cause of action.

Additionally, the Ninth Circuit concluded that plaintiffs have a cause of action under the APA because there was a final agency action and Congress has not limited judicial review of these actions. Moreover, plaintiffs can assert a constitutional challenge to agency action, even if other claims under the APA are not available. Yet, defendants argued that plaintiffs' claims fall outside the zone of interests of § 8005. However, the Ninth Circuit explained that the necessary test is whether the claims fall within the zone of interests of the Appropriations Clause. While the court expressed doubts as to whether the zone of interests test is required for a constitutional APA claim, the court found this test was met because the plaintiffs sufficiently specified their rights or liberties were infringed by a violation of the Appropriations Clause.

Furthermore, the Ninth Circuit held that the balance of hardships and the public interest did not justify a stay. Plaintiffs' alleged environmental injuries that are likely to be permanent and irreparable sufficiently supported an injunction. Moreover, the public interest "weigh[ed] forcefully" [250] against issuing a stay as the public interest is served when the separations of powers are protected. Accordingly, the court deferred to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border construction.

In sum, the Ninth Circuit held that the defendants were not entitled to a stay because they failed to make a strong showing that they would succeed on the merits, the balance of equitable harms were not in their favor, and the public interest weighed forcefully against entry.

247 Chevron, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

248 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

249 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

250 *Sierra Club*, 929 F.3d at 706.

Additionally, the court found that the plaintiffs were entitled under the APA to seek to enjoin the DOD's proposed reprogramming and their claims fell within the requisite zone of interests served by the Appropriations Clause.

Dissenting, Justice Smith argued that the court should grant Defendants' motion to stay because the majority mistakenly made the Plaintiffs' case into a constitutional issue. When properly viewed as a statutory issue, whether an executive officer exceeded a statutory grant of power, the defendants have satisfied their burden.[251] Plaintiffs do not have an implied cause of action under § 8005, nor do they have an equitable cause of action. While an APA claim is a proper challenge to DOD's action, the plaintiffs fall outside the zone of interests of § 8005. As plaintiffs have no viable claim for relief, Justice Smith asserts that the defendants have showed a strong likelihood of success on the merits. Justice Smith also contends that the other factors favor a stay. The defendants would be irreparably injured because they could never use the enjoined funds once the appropriation lapses and the public interest in preventing drug trafficking outweighs the plaintiffs' aesthetic, recreational, and environmental injuries.

2. In re Border Infrastructure Environmental Litigation*, 915 F.3d 1213 (9th Cir. 2019)*

Environmental organizations and the State of California[252] challenged decisions by the Secretary of the Department of Homeland Security (DHS) waiving a number of laws pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[253] (IIRIRA) for border wall projects in Southern California. In one set of claims, they alleged that DHS' waivers of environmental laws were *ultra vires* that exceeded DHS' authority. In another, they alleged that these waivers violated the Administrative Procedure Act[254] (APA) by failing to conform to various environmental laws, including the National Environmental Policy Act[255] (NEPA), and the United States Constitution.[256] The cases were consolidated. The Southern District of California entered summary judgment for DHS, and plaintiffs appealed.[257] On appeal, the Ninth Circuit affirmed, holding that these

251 Moreover, there was no reason the court should evaluate the merits more fully as the parties had already agreed on an expedited briefing schedule for the merits panel.

252 The plaintiffs include Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Animal Legal Defense Fund, the California Coastal Commission, and the People of California, by and through Attorney General Xavier Becerra.

253 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1103) [hereinafter *Section 102*].

254 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521.

255 National Environmental Policy Act, 54 U.S.C. §§ 4321–4370h (2012).

256 U.S. CONST. amend. V.

257 *In re* Border Infrastructure Environmental Liti., 284 F. Supp. 3d. (S.D. Cal. 2018).

actions were within DHS's authority under the statute and that the environmental claims were precluded by the Secretary's waivers.

In 2017 President Trump issued Executive Order 13,767, directing federal agencies to "deploy all lawful means to secure the Nation's southern border."[258] Included in the order was a directive to immediately construct a physical wall on the border in accordance with existing law (IIRIRA being one such law). At issue were three projects incorporated into this border wall scheme: the "Prototype Project" to construct a wall in San Diego County, the "San Diego Project" to replace 28 miles of fencing in the San Diego area, and the "Calexico Project" to replace three miles of fencing near Calexico, California. Between August and September 2017, DHS invoked § 102(c) of IIRIRA to waive dozens of relevant statutes, including NEPA, the Coastal Zone Management Act[259] (CZMA), and the Endangered Species Act[260] (ESA), once for the Prototype and San Diego Projects (the San Diego Waiver) and again for the Calexico Project (the Calexico Waiver).

The Ninth Circuit reviewed the district court's grant of summary judgment de novo. Section 102(c)(1) of IIRIRA authorizes DHS to "waive all legal requirements" that in the "Secretary's sole discretion" are "necessary to ensure expeditious construction of those barriers and roads" DHS deems necessary.[261] Additionally, § 102(c)(2)(A) provides a jurisdictional bar, granting exclusive jurisdiction to the federal district courts for all claims arising from actions and decisions by DHS under § 102(c)(1), and limiting litigants to claims alleging constitutional violations. Further, § 102(c)(2)(C) provides that district court decisions regarding § 102(c)(1) determinations may only be reviewed by the Supreme Court, and cannot be reviewed by any other appellate court.

First, to determine the scope of its jurisdiction, the court looked at whether each claim arose from § 102(c)(1) waiver determinations. Some of the *ultra vir*es claims alleged the waivers themselves were not authorized under § 102(c)(1) and thus were barred by § 102(c)(2)(C). Other *ultra vires* claims challenged the scope of DHS' authority to build walls under IIRIRA § 102(a) and (b), on the other hand, and were therefore not barred since they did not arise from waiver determinations. The court held the district court had federal jurisdiction over these claims, and the Ninth Circuit had authority to review. Similarly, the court exercised its jurisdiction to review the environmental claims alleging NEPA and APA violations during the planning and construction of the projects, but held that § 102(c)(2)(C) barred the environmental claims pertaining to the merits of the waivers themselves and to DHS' authority to issue the waivers. Further, though the plaintiffs never appealed their constitutional claims (probably realizing that they could only be reviewed by the Supreme Court), the

258 82 Fed. Reg. 8793 (Jan. 25, 2017).

259 Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2012).

260 Endangered Species Act of 1973, 16 U.S.C. §§ 1351–1544 (2012).

261 8 U.S.C. § 102(c)(1) (2012).

court noted that § 102(c)(2)(C) barred review since they arose directly from waiver determinations.

The court then turned to the merits of the reviewable *ultra vires* and environmental claims, each of which relied on the APA. Under the APA, courts ask whether the Agency determinations being challenged are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or in excess of statutory authority. To this point, plaintiffs' *ultra vires* claims alleged that DHS exceeded its statutory authority under IIRIRA § 102(a) and (b) and their environmental claims alleged that the projects were not in accordance with applicable laws.

The court ruled in favor of DHS on the *ultra vires* claims because § 102(a) of IIRIRA vests in the Secretary of DHS authority to "take such actions as may be necessary to install additional physical barriers . . . to deter illegal crossings in areas of high illegal entry into the United States."[262] Plaintiffs argued that at least some of these border projects were not "additional physical barriers" because they were replacement projects rather than new fence lines;[263] but the court concluded that the wall projects were "additional physical barriers,"[264] reasoning that it would be absurd for Congress to authorize DHS to build new border barriers while impliedly prohibiting the maintenance of existing ones. Further, DHS demonstrated that the areas where the projects were located were areas of high illegal entry. The court found plaintiffs' argument that there were other areas of comparably higher illegal entry irrelevant given that there is nothing in the statute suggesting that "high illegal entry" is a comparative determination.

The court then reviewed plaintiffs' argument that the fencing requirements and deadlines in IIRIRA § 102(b) imposed limits on the broad grant of authority in § 102(a). The court dismissed that argument, holding that reading § 102(b) to define the scope of DHS's authority to build border infrastructure projects would render § 102(a) superfluous.

Because the court determined that § 102(a) of IIRIRA authorized the challenged DHS actions, and actions under § 102(a) are subject to the waiver provision in § 102(c)(1), the court concluded that the environmental claims were also properly dismissed. But again, the court could not review any waiver determinations under the environmental statutes given the jurisdictional bar in § 102(c)(2)(C). Though plaintiffs alleged violations of environmental statutes regarding secondary fencing to be added under the San Diego project because the San Diego waiver (by DHS' admission) did not cover such fencing, the court deferred ruling on those claims because DHS' plans regarding the secondary fencing were not final agency actions under the APA.

Judge Callahan concurred in part and dissented in part. He concurred with the majority's rulings on the merits of the *ultra vires* and environmental claims, but dissented in part because he determined that

262 *Id.* § 102(a).
263 *Id.*
264 *Id.*

IIRIRA § 102 limited review of the district court's decisions thereupon to the Supreme Court. Even if the district court had jurisdiction to review those *ultra vires* and environmental claims brought under § 102(a) and (b) of IIRIRA, he argued that the Ninth Circuit lacked jurisdiction to review the district court's decisions related to those claims.

C. Freedom of Information Act

1. Sierra Club v. U.S. Fish & Wildlife Service*, 925 F.3d 1000 (9th Cir. 2019)*

The Sierra Club brought a Freedom of Information Act[265] (FOIA) action against Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) challenging their withholding of sixteen records produced during the Environmental Protection Agency's (EPA) rulemaking process regarding design and operation of cooling water intake structures governed by the Clean Water Act[266] (CWA). The United States District Court for the Northern District of California granted in part and denied in part the parties' cross-motions for summary judgment, finding that four of the disputed documents were fully protected under FOIA Exemption 5, but ordering the Services to produce the other eleven records in full.[267] On appeal, the Ninth Circuit held that nine of the records were not pre-decisional and deliberative under FOIA Exemption 5 and the district court appropriately ordered disclosure, while two of the records were both pre-decisional and deliberative and therefore the district court erred in requiring their disclosure.

The CWA directs the EPA to regulate the design and operation of cooling water intake structures, which draw billions of gallons of water from lakes, rivers, estuaries, and oceans in order to cool their facilities, to minimize adverse effects on aquatic life.[268] Section 7 of the Endangered Species Act[269] (ESA) and implementing regulations require federal agencies to consult with the Services whenever an agency engages in an action that "may affect" a "listed species."[270] The purpose of the consultation is to ensure that the Agency action is "not likely to jeopardize the continued existence" or "result in the destruction or adverse modification of habitat" of any endangered or threatened species.[271] In conducting Section 7 consultation, the Services must prepare a written biological opinion on whether the proposed agency

265 Freedom of Information Act, 5 U.S.C. § 552 (2012).

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

267 Sierra Club v. U.S. Fish & Wildlife Serv., No. 3:15-cv-05872-EDL (N.D. Cal.) (unpublished and unreported).

268 33 U.S.C. § 1326.

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

270 *Id.* at § 1536.

271 *Id.*; 50 C.F.R. § 402.14(a) (2019).

action is one that poses "jeopardy" or "no jeopardy" to the continued existence of a listed species or critical habitat.[272] If the Services conclude that the Agency action causes "jeopardy," the Services must propose "reasonable and prudent alternatives" (RPAs) to the action that would avoid jeopardizing the threatened species.[273]

In 2012, pursuant to the rule-making process that requires EPA to consult with FWS and NMFS about the impact the new regulation might have under the ESA,[274] the EPA began the consultation process with the Services about a proposed rule governing the operation of cooling water intake structures. In response to the EPA's requests, the Services generated various reports including three Biological Opinions, three collections of RPAs, and six other supporting documents at issue in this case.[275]

In August 2014, the Sierra Club submitted FOIA requests to the Services for records related to this ESA Section 7 consultation. The Services produced a large quantity of documents, but withheld other documents under FOIA Exemption 5, which protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the Agency."[276]

The Sierra Club filed suit alleging that the Services had improperly withheld documents under FOIA Exemption 5. The district court granted in part and denied in part the parties' cross-motions for summary judgment. On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment under FOIA de novo.

As an initial matter, the Ninth Circuit elaborated its standard for determining when documents meet FOIA Exemption 5. The court explained that the Services bear the burden of proving that the documents they maintain should be exempt from disclosure are both pre-decisional and deliberative. The Ninth Circuit will find a document to be "pre-decisional" if it is prepared in order to assist an agency decision-maker in arriving at his decision and includes subjective documents which reflect the personal opinions of the writer rather than the policy of the Agency. The court defines a document as "deliberative" only if disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the Agency and thereby undermine the Agency's ability to perform its functions. The Services bear the burden of proving documents are "pre-decisional" and "deliberative."

Next, the Ninth Circuit analyzed the documents at issue to determine which, if any, qualified as pre-decisional. The Services argued

272 50 C.F.R. § 402.14(h)(3).

273 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(g)(8), (h)(3).

274 16 U.S.C. § 1536.

275 Supporting documents included statistical analysis of effects of cooling water intake structure and various guideline documents for owner/operators of cooling water intake structures.

276 FOIA, 5 U.S.C. § 552(b)(5) (2012).

that since the jeopardy opinions, the RPAs, and all the other statistical and instructional documents pre-date the May 2014 "no jeopardy" opinion they were pre-decisional as to that final opinion. The court agreed with the Services as to the 2014 jeopardy opinion, reasoning that the document did not appear to represent the conclusion of the Agency on the likely impact of the final March 2014 rule, but rather was an interim step, communicated only internally within NMFS. The Ninth Circuit also agreed with the Services as to the 2013 RPAs because they appeared to be earlier drafts of the third, March 2014, RPAs and thus did not reflect the FWS' final position regarding the kinds of changes the November 2013 version of the rule needed in order to comply with the ESA. The court disagreed, however, that the 2013 draft jeopardy decision and other accompanying documents were pre-decisional. The Ninth Circuit explained that the issuance of a biological opinion is a final agency action and therefore the question is whether each document at issue is pre-decisional as to the biological opinion, not whether it is pre-decisional as to the EPA's rulemaking. Based on this standard, the court held that because the 2013 draft jeopardy decision was created pursuant to formal consultation, contained the final conclusions by the final decision-makers, and thus represented the final view of an entire agency, the document was not pre-decisional with respect to the later opinion. With respect to the documents accompanying the 2013 draft jeopardy decision, the court held that since they were largely instructional, they were not early-stage recommendations for mitigating the impacts of the later revised rule and thus were not pre-decisional as to the May 2014 "no jeopardy" opinion.

Finally, the Ninth Circuit considered whether the documents at issue were deliberative. The Services argued that the documents were all deliberative because they were the result of a long and complex consultation process with the EPA, during which time they were circulated intra-agency and inter-agency and commented upon, revised, and recirculated for discussion. The Ninth Circuit agreed with the Services with respect to the 2013 RPA and the 2014 draft jeopardy biological opinion, because both documents appear to be successive drafts of the Services' recommendations, and comparison of the documents would shed light on the FWS' internal vetting process and would conceivably allow a reader to reconstruct some of the deliberations that occurred within the agencies. With respect to the 2013 draft jeopardy opinion, accompanying documents, and 2014 RPAs, the court found the Services failed to establish that they were deliberative. The Ninth Circuit reasoned that the records were final products that reflected the agencies' ultimate findings, did not contain line edits, marginal comments, or other written material that exposed internal agency deliberation, and thus did now allow the reader to reconstruct the "mental processes" that led to the final decision so as to be deliberative.

Accordingly, the Ninth Circuit affirmed the district court's order to produce the December 2013 draft jeopardy biological opinions, the March 2014 RPAs, and the remaining statistical and instructional documents because the materials were not pre-decisional and deliberative and therefore not exempt under FOIA Exemption 5. The Ninth Circuit reversed the district court's order to produce the December 2013 RPAs and the April 2014 draft jeopardy opinion because those materials were both pre-decisional and deliberative.

Judge Wallace concurred in part and dissented in part, agreeing with the majority that the April 2014 draft jeopardy opinion and the December 2013 RPAs were not exempt from disclosure, but disagreeing with the majority's conclusion as to the rest of the documents. Judge Wallace argued that the majority overlooked the context of the administrative process, which generated the December draft opinions since they were part of an inter-agency consultation process. This process allows the Services to receive feedback from the Agency on draft opinions, which shows the deliberative nature of that process. Judge Wallace also disagreed with the majority's rule that the deliberative process privilege only protects those documents reflecting the opinions of individuals or groups of employees, rather than the position of an entire agency. Judge Wallace found no case law in support of this proposition, noting that Exemption 5 does not distinguish between inter-agency and intra-agency memoranda.

2. Animal Legal Defense Fund v. United States Department of Agriculture*, 935 F.3d 858 (9th Cir. 2019)*

Plaintiffs, organizations committed to the humane treatment of animals,[277] brought claims under the Freedom of Information Act[278] (FOIA) and the Administrative Procedure Act[279] (APA) against the Animal and Plant Health Inspection Service (APHIS) for violating § 552(a)(2) of FOIA, which requires agencies to make certain categories of records available to the public. After filing suit, plaintiffs requested a preliminary injunction. The United States District Court for the District of Northern California denied the plaintiffs' requested injunction and granted the government's motion to dismiss for lack of subject matter jurisdiction on the grounds that the court lacked the authority to compel an agency to publish records in a public forum as required under § 552(a)(2).[280] The plaintiffs appealed. On appeal, the Ninth Circuit

277 Plaintiffs included the Animal Legal Defense Fund, Stop Animal Exploitation Now, Companion Animal Protection Society, and Animal Folks.

278 Freedom of Information Act, 5 U.S.C. § 552 (2012).

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

280 Animal Legal Def. Fund v. U.S. Dep't of Agric., 2017 WL 3478848 (N.D. Cal. Aug. 14, 2017).

reversed, holding that the district court had jurisdiction to enjoin APHIS for its alleged violation.

Under FOIA, agencies are required to provide records in a number of different contexts. Section 552(a)(3) requires agencies to provide records directly and specifically requested by members of the public, and § 552(a)(2) mandates that agencies make public certain categories of records for inspection in an online format. The § 552(a)(2) mandate is referred to as the "reading room requirement," as agencies used to keep these documents in reading rooms which were open to the public.[281] FOIA vests jurisdiction in federal courts to enjoin agencies from withholding records and to order the production of any agency records improperly withheld from the complainant.[282]

The Animal Welfare Act[283] (AWA) sets standards for the humane treatment of animals and regulates commercial animal enterprises. APHIS enforces AWA on behalf of the United States Department of Agriculture.[284] These enforcement activities generate agency records that were previously housed by APHIS on its website. Many of these records, by APHIS' own characterization, were frequently requested and therefore subject to the "reading room requirement."[285] In February 2017, after growing concerned that its system for reviewing and redacting records before publication online was insufficient, APHIS removed various compliance and enforcement records from its website. While APHIS has begun to repost some records, it stated that it will no longer post official warning letters, stipulations, pre-litigation settlement agreements, and administrative complaints.

In response, plaintiffs filed claims alleging that APHIS violated FOIA's reading room requirement, § 552(a)(2), and requesting the court to enjoin the Agency from withholding these documents and to order APHIS to publish them online. The district court previously denied plaintiffs' motion for a preliminary injunction, concluding that they were unlikely to succeed on the merits of their claims because FOIA does not empower courts to compel an agency to make documents available to the general public. Subsequently, and for the same reason, the court

281 The reading room requirement applies to:

(a) final opinions and orders made in the adjudication of cases;

(b) statements of policy and interpretations of regulations not published in the Federal Register;

(c) administrative staff manuals that affect members of the public;

(d) copies of all records that either:

(i) have been requested pursuant to § 552(a)(3) and are, in the agency's estimation, likely to be the subject of frequent records requests; or

(ii) that have been requested 3 or more times;

(e) a general index of the records referred to under subparagraph (d).

282 5. U.S.C. § 552(a)(4)(B).

283 Animal Welfare Act, 7 U.S.C. §§ 2131–59 (1968).

284 9 C.F.R. §§ 1–12 (2020).

285 5 U.S.C. § 552(a)(2).

granted APHIS' motion to dismiss for lack of subject matter jurisdiction. On appeal, the Ninth Circuit reviewed the district court's dismissal de novo.

Despite the fact that neither party raised the issue, the Ninth Circuit began by determining that plaintiffs had standing to sue. The court ruled that the plaintiff organizations had adequately plead standing because they alleged that they frequently used APHIS' database to access records, that without access to the database they would be forced to issue individual FOIA requests on an ongoing basis, and that the effort of individually requesting and then waiting for APHIS' records would consume a substantial amount of their staffs' time. This informational injury, according to the Ninth Circuit, was exactly the kind of injury contemplated by Congress in passing FOIA. This is true even absent a specific document request under § 552(a)(3).

The Ninth Circuit then went on to address the lower court's concern—whether courts are empowered under FOIA to compel agencies to make certain documents public pursuant to § 552(a)(2). APHIS urged the court to adopt the D.C. Circuit's holding in *CREW I*,[286] which interpreted FOIA's judicial review provision as only empowering courts to order agencies to provide documents to the plaintiffs in a FOIA request, but not to demand agencies to make documents public through the reading room provision. The Ninth Circuit chose not to follow *CREW I* because doing so would leave no avenue for judicial review of § 552(a)(2) violations and because the holding of *CREW I* had been limited to situations in which plaintiffs raise FOIA claims under the APA without properly invoking FOIA's judicial review provision. Rather, the Ninth Circuit interpreted FOIA's judicial review provision based on the plain language of the statute. "[T]o enjoin the agency from withholding agency records,"[287] according to the Ninth Circuit, authorizes district courts to stop agencies from holding back records they have a duty to make available, including the requirement under § 552(a)(2) to post certain documents online. It would be absurd for Congress to provide a provision that agencies "shall" make these documents available under § 552(a)(2), but provide no means of enforcing that mandate.

APHIS further argued that district courts only have authority to order agencies to provide copies of records to particular plaintiffs because FOIA authorizes district courts to refer certain cases that raise questions about the Agency's conduct to the Office of Special Counsel if "the court orders the production of any agency records improperly withheld from the complainant."[288] It would be illogical, according to APHIS, for Congress to include such a provision if courts did in fact have authority to order agencies to make public documents under

286 Citizens for Responsibility & Ethics in Wash. v. Dept. of Justice, 846 F.3d 1235 (D.C. Cir. 2017) [hereinafter *CREW I*].

287 5 U.S.C. § 552(a)(4)(B).

288 *Id.* § 552(a)(4)(F)(i).

§ 552(a)(2) because courts would do so instead of using their authority to refer cases to the Office of Special Counsel for disciplinary proceedings. The Ninth Circuit disagreed, interpreting § 552(a)(4)(F)(i) as simply allowing district courts, when ordering agencies to produce records improperly withheld, to flag when agency personnel acted so arbitrarily or capriciously as to warrant the Office of Special Counsel to investigate.

Judge Callahan dissented in part. She preferred and would have adopted the interpretation advanced by *CREW I* – that FOIA only vests district courts with the authority to compel agencies to provide documents to the litigants before them and not to online reading rooms.

3. Animal Legal Defense Fund v. United States Department of Agriculture*, 933 F.3d 1088 (9th Cir. 2019)*

The Animal Legal Defense Fund (ALDF) filed suit against the United States Department of Agriculture and its sub-agency the Animal and Plant Health Inspection Service (collectively "USDA") under the Freedom of Information Act[289] (FOIA) for denying its request for expedited processing of their Animal Welfare Act-related FOIA requests. Specifically, ALDF challenged the USDA's failure to include animals in the definition of an "individual."[290] The District Court for the Northern District of California granted USDA's motion for summary judgment.[291] The Ninth Circuit affirmed.

ALDF is a nonprofit organization dedicated to protecting the lives and interests of animals using the legal system. ALDF showed concern for a tiger named "Tony" being displayed in a cage at a truck stop in Louisiana, and specifically requested USDA perform an Animal Welfare Act (AWA) inspection. After the inspection, USDA informed ALDF that in order to see the results, ALDF needed to submit a FOIA request. ALDF accordingly submitted a records request, asking particularly for expedited processing of their records request. FOIA allows the expedition of record requests when the request demonstrates a "compelling need," which is met when a failure to expedite "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."[292] ALDF utilized this definition in their request, claiming Tony is an "individual," and a failure to expedite the request would create an imminent threat to Tony's life and physical safety. USDA denied the request to expedite, reasoning that animals are not included under the term "individual." ALDF proceeded to submit other, unrelated expedited requests for documents regarding AWA inspections, some of which were also denied by USDA on the grounds that an animal is not an "individual." ALDF filed a complaint in district court

289 Freedom of Information Act, 5 U.S.C. § 552 (2016).

290 *Id.* at § 552(a)(6)(E)(v)(I).

291 Animal Legal Def. Fund v. U.S. Dep't of Agric., (No. 17-cv-03903-PJH), 2018 WL 2387812 (N.D. Cal. May 25, 2018).

292 5 U.S.C. § 552(a)(6)(E)(v)(I).

challenging USDA's refusal to expedite requests for AWA inspection documents and seeking a declaration that the term "individual" includes animals. After ALDF filed the complaint and over three months after the original request, USDA released four pages of records concerning Tony's inspection. More than a month later, USDA announced its intention to release more documents regarding Tony. Days before the release of forty-three additional pages of documents regarding Tony's welfare check, Tony's owner euthanized him. The district court then granted summary judgment in favor of USDA.

On appeal, ALDF challenged the district court's grant of summary judgment on three grounds: (1) FOIA's goal of broad disclosure promotes a liberal construction of the expedited processing of records request provision to include animals, (2) the Animal Welfare Act supports the suggestion that Congress also intended FOIA to cover animals, and (3) another FOIA provision[293] incorporates animals in the term "individual" therefore the same definition should apply to the expedited processing provision. The Ninth Circuit first reviewed sua sponte the district court's holding that it maintained subject matter jurisdiction over the suit, then reviewed de novo the district court's grant of summary judgment in favor of USDA.

The Ninth Circuit first addressed USDA's argument that the district court lacked subject matter jurisdiction because the case was moot, given USDA had fulfilled ALDF's request for the documents. The court distinguished ALDF's claim as one of "pattern or practice," which is not mooted when the FOIA request is complete as opposed to a claim for a "specific request," which is mooted upon completion. For a "pattern or practice" claim, the plaintiff must show: (1) the violation was not an isolated incident, (2) the policy personally harms the plaintiff, and (3) the policy or practice provides has a sufficient likelihood of future injury to the plaintiff. The court held ALDF's claim satisfied all three prongs, because USDA refused to expedite multiple requests for animals, ALDF personally was denied expedition on its requests, and it is likely USDA will continue to deny these requests. Therefore, ALDF's claim was not mooted when USDA fulfilled the request. USDA then argued that FOIA's jurisdiction stripping provision divested the district court of jurisdiction. Again, the Ninth Circuit disagreed, holding that when a claim is one of "pattern or practice," the provision does not apply.

Turning to the substantive claims, the Ninth Circuit analyzed the definition of the term "individual." Relying on dictionary definitions and the use of the term "individual" in both the Dictionary Act and the Administrative Procedure Act, the court concluded that as a noun standing alone, "individual" is defined as a single human being. The court acknowledged that when used in conjunction with a reference to a species or group, the term can be applied to animals. Because FOIA's provision does not indicate a group or subset, use of the term

293 *Id.* § 552(b)(7)(F).

"individual" in this provision refers to a human being. In response to ALDF's argument that the term should be generously construed to address FOIA's overarching goal of broad disclosure, the court noted that the expedited processing provision is intentionally limited in scope to allow for effective prioritization.

Next, the court dismissed ALDF's assertion that since Congress protects animals through the Animal Welfare Act, FOIA should be interpreted to protect animals as "individuals." Because Congress specifically chose to limit the records that receive expedited processing to human being, the court found it was not at liberty to override that policy decision.

Finally, the court disposed of ALDF's argument that animals are included under the term "individual" in FOIA's exemption provision, which allows the withholding of law enforcement information to protect the safety of an "individual."[294] Therefore, ALDF argued, the same definition of "individual" should apply to the expedition provision. The court disagreed, as the exemption had never been applied to withhold records to protect the safety of an animal nor could it be, given exemptions must be construed narrowly to conform with the overall FOIA goal of disclosure. Accordingly, the court held the term "individual" in both provisions only includes human beings.

In conclusion, the Ninth Circuit upheld USDA's policy of denying expedited records request processing of Animal Welfare Act-related claims, affirming the district court's grant of summary judgment.

D. Administrative Procedure Act

1. Center for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019)*

The Center for Biological Diversity (CBD) filed suit against David Bernhardt, in his official capacity as Secretary of the Department of the Interior (Interior), in the United States District Court for the District of Alaska seeking to reinstate the Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska Rule[295] (Refuges Rule). CBD alleged Interior acted ultra vires in rescinding the Refuges Rule after Congress passed a Joint Resolution under the Congressional Review Act[296] (CRA), taking all force and effect away from the Refuges Rule. Further, CBD alleged the Joint Resolution and the CRA violate the Take Care Clause of the

294 *Id.* § 552(b)(7)(F) (stating "This section does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual").

295 50 C.F.R. § 36.32(b) (2016).

296 Congressional Review Act, 5 U.S.C. §§ 801–808 (1996).

Constitution,[297] and that the CRA's Reenactment Provision[298] is unconstitutionally vague. The district court granted Interior's motion to dismiss, determining that CBD failed to establish Article III standing and failed to state a claim.[299] On appeal, the Ninth Circuit affirmed, holding that CBD's constitutional claims failed to state a plausible basis for relief and that the Court lacked jurisdiction to hear the additional statutory claims.

In 1996, Congress enacted the CRA to provide an expedited review process of federal regulations promulgated under congressionally delegated authorities. The CRA requires the House of Representatives and the Senate to pass, and the President to sign, a Joint Resolution in order to strip a federal regulation of its authority. While this process is a shortened version of the typical procedure for enacting legislation, it invokes the constitutional authority of Congress to amend its rules of procedure and further contains a jurisdiction-stripping provision precluding judicial review. Further, CRA prohibits an agency from issuing a new rule that is substantially the same.

Under the National Wildlife Refuge System Administration Act of 1966,[300] the National Wildlife Refuge System Improvement Act of 1997,[301] and the Alaska National Interest Lands Conservation Act,[302] Interior, through the United States Fish and Wildlife Service (FWS), maintains authority to manage wildlife refuges on federal land. However, where no direct federal rule governing a wildlife refuge exists, state laws managing wildlife apply to federal refuges within the state's border. In 1994, seeking to restore big game prey populations to levels sufficient to allow hunting for human consumption goals, the State of Alaska passed a law allowing the specific targeting of big game predators, including black bears, brown bears, and wolves.[303] In 2016, amid growing concern that Alaska's management program directly conflicted with FWS' ability to regulate federal refuges, FWS promulgated the expansive Refuges Rule prohibiting Alaska's predator-control methods on federal refuges. In compliance with the CRA, Interior submitted the Refuges Rule to Congress. Congress passed a joint resolution stripping the Refuges rule of its force and effect, and the President signed it into law on April 3, 2017. In response, Interior rescinded the Refuges Rule, effectively reinstating the state management program.

Immediately after Interior rescinded the Refuges Rule, CBD filed suit seeking to reinstate the rule and later amended its complaint to

297 U.S. CONST. art. II, § 3.

298 5 U.S.C. § 801(b)(2).

299 Ctr. for Biological Diversity v. Zinke, 313 F. Supp. 3d 976, 993 (D. Alaska 2018).

300 16 U.S.C.§ 668dd–ee (1998).

301 *Id.*

302 16 U.S.C. § 3101–3233 (1980).

303 ALASKA STAT. § 16.05.255(e) (2014), ALASKA ADMIN. CODE tit. 5, §§ 92.110, 92.115, 92.124 (2019).

allege the Joint Resolution violates the Take Care clause, the reenactment provision in the CRA is unconstitutionally vague, and that Interior acted ultra vires in abiding by the Joint Resolution and rescinding the Refuges Rule. The Ninth Circuit reviewed the district court's order granting Interior's motion to dismiss de novo.

The court first addressed whether CBD had standing to bring a claim against the CRA's reenactment provision, determining that CBD must establish standing for each individual claim. Because the legal challenge to the CRA is distinct from the other claims, the court performed a separate standing analysis. CBD argued that the reenactment provision prevents Interior from protecting wildlife, and therefore harms CBD's members by limiting their enjoyment of observing wildlife in the refuges. The court rejected this argument, holding it too speculative given it rests on the assumption that Interior *would* reissue a rule substantially similar to the Refuges Rule. CBD provided no facts supporting the suggestion that Interior in fact planned to reissue a rule, therefore the speculative nature of CBD's alleged injury-in-fact failed to meet the requirements of Article III. Therefore, the court dismissed the claim alleging the Reenactment Clause violates the constitution.

Next, the court examined whether the Joint Resolution unconstitutionally violates the Take Care Clause. The court held that the jurisdiction stripping provision in the CRA does not apply in to claims questioning the constitutionality of the statute, particularly because Congress must be explicitly clear when precluding judicial review of constitutional claims. Here, Congress knew of this high standard and failed to directly speak to judicial review of the statute's constitutionality, therefore the court upheld the presumption in favor of review. CBD argued that because Congress delegated rulemaking authority for wildlife management on federal lands to Interior, Congress cannot rescind that authority without modifying the statute under which Congress granted the rulemaking authority. The court dismissed this argument on two grounds. First, the court found Congress may amend a law under the CRA because the change to the law caused by invalidation constituted a substantive alteration. Second, the Joint Resolution avoids separation of powers issues because it satisfied the bicameral and presentment requirements for enacting a new law, particularly given the President agreed by signing the Joint Resolution to faithfully execute its contents. Because the Joint Resolution satisfies all the requirements of a newly enacted law, the court held that Congress need not specify the statute originally delegating the rulemaking authority when they alter an agency's ability to enact a regulation.

Finally, the court addressed CBD's statutory claims that the text of the CRA prevents Congressional review of a rule which has already taken effect and therefore, by adhering to the Joint Resolution stripping a rule already in place, Interior acted ultra vires in rescinding the

Refuges Rule. Because this claim arose from the text of the CRA, the court held that the CRA provides clear and convincing evidence of Congressional intent to preclude judicial review. Enacting the Joint Resolution constituted an action under the CRA. Accordingly, the court found it lacked jurisdiction to consider the claim.

In conclusion, the Ninth Circuit upheld Congress's ability to use the streamlined procedure of the CRA to invalidate federal regulations and to strip the federal courts of jurisdiction to hear claims arising under the statute. The Ninth Circuit affirmed the district court's order dismissing CBD's claims for lack of standing and failure to state a claim.

2. San Francisco Herring Ass'n v. Department of the Interior*, No. 18-15443, 2019 WL 7342999 (9th Cir. Dec. 31, 2019)*

In a prior appeal, the Ninth Circuit held that an association representing herring fishermen (Association),[304] that sued the United States Department of the Interior, National Park Service, and agency officials[305] challenging the Park Service's authority to proscribe commercial herring fishing in Golden Gate National Recreation Area (GGNRA) in San Francisco Bay, must be dismissed for failure to allege a final agency action. The Ninth Circuit remanded and the United States District Court for the Northern District of California allowed the Association to re-plead, but held that its proposed amendments still failed to allege final agency action. On appeal, the Ninth Circuit upheld the district court's decision to allow the Association to file an amended complaint, holding that neither the rule of mandate nor the rule of the case doctrines precluded re-pleading in this case, but reversed and remanded the district court's determination of final agency action, holding that the Association adequately pled final agency action so as to provide the district court with subject matter jurisdiction under the Administrative Procedure Act[306] (APA).

This action arose from changes in the Park Service's interpretation of the Golden Gate National Recreation Enabling Act,[307] which prohibited offshore fishing in certain areas of San Francisco Bay. In 2011, the Park Service issued a formal notice explaining that it has the responsibility of enforcing a 1983 Park Service regulation that prohibits commercial fishing in national parks except where specifically authorized by Federal statutory law.[308] Pursuant to this regulation, the

304 Plaintiffs were the San Francisco Herring Association.

305 Defendants included U.S. Department of the Interior, Ryan K. Zinke, in his official capacity as Secretary of the Interior, United States National Park Service, Michael Reynolds, in his official capacity as Acting Director of the National Park Service, and Laura Joss, in her official capacity as General Superintendent of the Golden Gate National Recreation Area.

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

307 Golden Gate National Recreation Enabling Act, 16 U.S.C. § 460bb (2012).

308 36 C.F.R. § 2.3(d)(4) (2019).

Park Service listed various offshore areas of the Bay and set forth the legal rationale for the United States' asserted ownership of the waters for the purpose of a federal commercial fishing ban. In November 2012, the Park Service issued another notice addressed to "2012/2013 Commercial Herring Fishermen" and signed by the Recreation Area's General Superintendent in which the Park Service reiterated its commercial fishing ban was applicable to all units of the National Park System, including the waters of the GGNRA. Unlike the 2011 notice, however, the Park Service indicated it would be enforcing the fishing ban and that violations would be punishable by fines and up to six months in prison.

In response to both the 2011 and 2012 notices, the Association sent objection letters and attended meetings with the Park Service, during which time the Park Service consistently expressed its intentions to continue to enforce the prohibition on the fishing ban. In January 2013, the Park Service began enforcing the ban and confronted fishermen in the waters of the Recreation Area. The first complaint omitted the details of these enforcement actions and only described Park Service "patrols."

In April 2013, the Association sued defendants under the APA, alleging that the federal government lacked the statutory authority to prohibit commercial herring fishing in the GGNRA. The district court ruled in favor of the Park Service on the merits, though the Park Service did not argue at any point that the Association failed to allege final agency action, and the district court did not address the issue. On appeal, the Park Service argued that the Association failed to identify any final agency action and therefore the district court lacked subject matter jurisdiction over the case. The Ninth Circuit vacated the district court's judgment on the merits and remanded with instructions to dismiss, holding that the Park Service "patrols" in the GGNRA and the Service's refusal to promise non-enforcement were not final agency actions.

On remand, the district court dismissed the case, though allowed the Association to seek leave to file an amended complaint. In November 2017, the Association sought leave to file a second amended complaint, detailing specific enforcement activities against individual commercial fishermen in the GGNRA. In addition, the amended complaint included a new count for declaratory relief under the Declaratory Judgment Act.[309] The district court denied leave to amend, holding that the added information was not new, simply more detailed. The district court also denied leave to add the count under the Declaratory Judgment Act based on the evidence of undue delay. The Association appealed. The Ninth Circuit reviewed the final agency action question de novo, while it reviewed the district court's decision to permit addition of a new count in the amended complaint for abuse of discretion.

[309] Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 (2012).

The Ninth Circuit first held that the district court correctly determined that the Ninth Circuit's prior opinion did not prevent the Association from seeking leave to re-plead because the mandate in the prior appeal did not expressly address the possibility of amendment, nor was there indication of a clear intent to deny amendment seeking to raise new issues not decided by the prior appeal. To the contrary, the court explained that its mandate, in describing the Park Service's "patrols" as a merely the first step in the enforcement process, suggested that there may be further enforcement activities that could meet the final agency action requirement.

Second, the Ninth Circuit reversed the district court, holding that the law of the case doctrine did not bar the Association from filing the amended complaint because the Ninth Circuit's prior opinion did not encompass the Association's new allegations of enforcement, and thus left to the district court an issue not expressly or impliedly disposed of on appeal. The court reasoned that, because the Association's allegations of specific in-water enforcement orders were new since the previous case only addressed Park Service "patrols," the district court erred in treating the Ninth Circuit's prior opinion as dispositive.

Next, the Ninth Circuit held that the Park Service's actions constituted a reviewable final agency action because the Agency repeatedly asserted its authority over the GGNRA in formal notice, refused to alter its position after communications with the Association, and then enforced the ban against fishermen, subjecting them to penalties. The court explained that the Agency demonstrated finality in its decision-making process on the subject by unequivocally asserting authority over the waters of the GGNRA and by issuing multiple formal notices that made clear its position that herring fishing violated federal law and violators would be subject to penalties. In addition, the court explained, the orders that individual fishermen stop fishing in the GGNRA were final agency actions because they were actions "by which rights or obligations had been determined and from which legal consequences would flow."[310] Contrary to the Park Service's assertion that the orders were simply restatements of the law, the court held the orders created actual legal consequences for violators. Although the Park Service had not initiated enforcement proceedings, the court noted that parties need not await enforcement proceedings before challenging final agency action where such proceeding carry the risk of serious criminal and civil penalties.[311]

Finally, the Ninth Circuit affirmed the district court's denial, on the grounds of undue delay, the Association's proposed addition of a new count under the Declaratory Judgment Act. The court reasoned that, unlike the new factual allegations added, the Association's proposed count under the Declaratory Judgment Act adds only a new legal theory.

310 Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

311 U.S. Army Corps. of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016).

Therefore, due to the duplicative nature of the relief requested and the significant delay involved, the Ninth Circuit held the district court's refusal to allow the Declaratory Judgment Act count was not an abuse of discretion.

In sum, the Ninth Circuit affirmed the district court's decision to allow the Association to file an amended complaint, finding neither the rule of mandate nor the rule of the case doctrines precluded re-pleading. The Ninth Circuit also affirmed the lower court's denial of the Association's proposed addition of a new count under the Declaratory Judgment Act, but reversed and remanded the district court's determination of final agency action, holding that the Association adequately pled final agency action so as to provide the district court with subject matter jurisdiction.