2017 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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2017 NINTH CIRCUIT ENVIRONMENTAL REVIEW

NINTH CIRCUIT REVIEW EDITOR'S NOTE 527

CASE SUMMARIES 529

I. Environmental Quality 529

A. Clean Water Act 529

1. Southern California Alliance of Publicly Owned Treatment Works v. U.S. Environmental Protection Agency, 853 F.3d 1076 (9th Cir. 2017). 529
2. United States v. Robertson, 875 F.3d 1281 (9th Cir. 2017). 530

B. Clean Air Act 534

1. Yazzie v. U.S. Environmental Protection Agency, 851 F.3d 960 (9th Cir. 2017). 534
2. Hopi Tribe v. U.S. Environmental Protection Agency, 851 F.3d 957 (9th Cir. 2017). 536
3. Arizona *ex rel.* Darwin v. U.S. Environmental Protection Agency, 852 F.3d 1148 (9th Cir. 2017). 538
4. Sierra Club v. North Dakota, 868 F.3d 1062 (9th Cir. 2017). 540

C. Comprehensive Environmental Response, Compensation, and Liability Act 542

1. Asarco LLC v. Atlantic Richfield Co., 866 F.3d 1108 (9th Cir. 2017). 542

D. Resource Conservation and Recovery Act 546

1. Ecological Rights Foundation v. Pacific Gas & Electric Co., 874 F.3d 1083 (9th Cir. 2017). 546

E. Toxic Substances Control Act 549

1. *In re* A Community Voice, 878 F.3d 779 (9th Cir. 2017). 549

II. Natural Resources 551

A. Endangered Species Act 551

1. Wildwest Institute v. Kurth, 855 F.3d 995 (9th Cir. 2017). 551
2. Defenders of Wildlife v. Zinke, 856 F.3d 1248 (9th Cir. 2017). 553
3. Cascadia Wildlands v. Scott Timber Co., 2017 WL 5493908 (9th Cir. Nov. 16, 2017). 557

B. National Forest Management Act 559

1. *In re* Big Thorne Project, 857 F.3d 968 (9th Cir. 2017). 559
2. Alliance for the Wild Rockies v. Bradford, 856 F.3d 1238 (9th Cir. 2017). 561
3. Alliance for the Wild Rockies v. Pena, 865 F.3d 1211 (9th Cir. 2017). 562
4. Wild Wilderness v. Allen, 871 F.3d 719 (9th Cir. 2017). 564

C. Federal Insecticide, Fungicide and Rodenticide Act 567

1. Center for Biological Diversity v. U.S. Environmental Protection Agency, 847 F.3d 1075 (9th Cir. 2017). 567
2. Natural Resources Defense Council v. U.S. Environmental Protection Agency, 857 F.3d 1030 (9th Cir. 2017). 569
D. Magnuson-Stevens Fishery Conservation and Management Act 570
1. Turtle Island Restoration Network v. Department of Commerce, 878 F.3d 725 (9th Cir. 2017). 570
III. Miscellaneous 573
A. National Environmental Policy Act 573
1. Barnes v. Federal Aviation Administration, 865 F.3d 1266 (9th Cir. 2017). 573
B. Tribal Water Rights 576
1. Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, 849 F.3d 1262 (9th Cir. 2017). 576
2. Navajo Nation v. Department of the Interior, 876 F.3d 1144 (9th Cir. 2017). 578
C. Constitutionality of Environmental Ordinance 581
1. Pure Wafer Inc. v. City of Prescott, 845 F.3d 943 (9th Cir. 2017). 581

CHAPTERS 585
Wildfire Litigation: Effects on Forest Management and Wildfire Emergency Response 585
Elias Kohn

Tribal Rights to Groundwater: The Case of Agua Caliente 617
Zeslie Zablan

2017 NINTH CIRCUIT INDEX OF CASES AND STATUTES 641

NINTH CIRCUIT ENVIRONMENTAL REVIEW EDITOR'S NOTE

I am proud to present the 2017–2018 Ninth Circuit Environmental Review. This review contains twenty-three summaries of decisions by the United States Court of Appeals for the Ninth Circuit, opinions issued between January 2017 and January 2018, in cases that impact natural resources and the environment. This review also contains two chapters authored by Ninth Circuit Review members that more deeply explore legal issues affecting the Ninth Circuit.

In the first chapter, Zeslie Zaban examines the water rights of Native American tribes under the *Winters* Doctrine in light of the Ninth Circuit's recent decision to extend these rights to groundwater sources. After tracing the origins of the *Winters* Doctrine, this chapter summarizes two different applications of the doctrine to groundwater by state supreme courts. This chapter concludes by arguing that, should this issue ever reach the United States Supreme Court, the Court would be inclined to follow the approach taken by the Ninth Circuit this past year—though whether this would result in an unequivocal right to groundwater for tribes remains uncertain.

In the second chapter, Elias Kohn examines the abundance and variety of wildfire litigation and how these cases in turn shape wildfire management. This chapter argues that fire suppression, in addition to climate change and urbanization, contribute to the threat of large wildfires and that potential lawsuits for civil and criminal violations spur fire suppression efforts. As an alternative, this chapter proposes steps to reduce these areas of litigation, and encourages stakeholders to adopt a collaborative model viewing wildfire as a shared problem to be managed and mitigated.

The Ninth Circuit Review is composed of five members drawn from the ranks of *Environmental Law*. The research and case summaries that appear in this Review are their work, and I would like to thank this year's members—an articulate bunch—for their time and their commitment to our cause. We aim to provide practitioners, advocates, students, and anyone interested with a precise account of environmental law in the Ninth Circuit, a region of immense size and importance to our nation's resources.

I believe the following pages achieve that purpose. Thank you for reading.

Colton M. Totland
2017–2018 Ninth Circuit
Environmental Review Editor

CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Clean Water Act

1. Southern California Alliance of Publicly Owned Treatment Works v. U.S. Environmental Protection Agency, 853 F.3d 1076 (9th Cir. 2017).

The Southern California Alliance of Publicly Owned Treatment Works (SCAP) petitioned the United States Court of Appeals for the Ninth Circuit for review under the Clean Water Act (CWA).[1] SCAP argued that the Ninth Circuit had original jurisdiction to review an United States Environmental Protection Agency (EPA) letter that objected to draft permits for water reclamation plants in Los Angeles. The Ninth Circuit, reviewing the issue *de novo*, dismissed the petition.

California Regional Boards make the initial permitting decisions regarding the National Permit Discharge Elimination System (NPDES).[2] The Los Angeles Regional Board prepared and submitted draft NPDES permits for the water reclamation plants at issue to EPA for review. EPA responded to the draft permits with a formal objection letter. The Board, in response to the letter, revised the draft permit to satisfy EPA objections. The Board then proceeded to issue the revised permits for the water treatment plants. SCAP filed an administrative appeal of the Board's action. SCAP also filed the petition for review.

The initial issue was whether the Ninth Circuit had jurisdiction to review the letter. The CWA provides for judicial review of agency decisions under certain circumstances.[3] Here, SCAP made two separate arguments for jurisdiction. SCAP argued that the letter provided the court jurisdiction under the section of the CWA that provides for federal appellate review of EPA actions approving or promulgating effluent limitations.[4] The court declined jurisdiction on these grounds for three reasons. First, as EPA noted

1 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).
2 33 U.S.C. § 1342(b).
3 *See* 33 U.S.C. § 1369(b)(1)–(2).
4 *See* 33 U.S.C. § 1369(b)(1)(E).

in its argument, the Ninth Circuit already resolved this question in *Crown Simpson Pulp Co. v. Costle* (*Crown I*).[5] *Crown I* had rejected the proposal that an EPA veto of permits equals the promulgation of a new regulation. The court rejected SCAP's use of *Iowa League of Cities v. Environmental Protection Agency*[6] because factual differences made the analogy inapposite. In *Iowa League of Cities*, EPA responded to a general inquiry about the agency's policy. Here, however, EPA objected to a specific permit. The permit objection was an interim step, rather than a final binding order. In addition, the court reasoned that California, or the Los Angeles Board, could impose stricter restrictions on the treatment plants. If that occurred, EPA's objection letter would be irrelevant and moot.

Second, SCAP argued that the objection letter was subject to jurisdiction under subpart F,[7] which provides for review of EPA actions that issue or deny any permit under the NPDES program. SCAP argued that EPA's objection letter denied the permits. SCAP cited *Crown Simpson Pulp Co. v. Costle* (*Crown II*),[8] which held that an EPA objection to effluent limitations in a permit effectively was a denial of the permit.[9] EPA countered that *Crown II* was not applicable to this issue because Congress subsequently amended the CWA and revised the procedures relating to that very issue. The Ninth Circuit agreed that the amendments changed the CWA and found that under the current statute, an EPA objection is no longer functionally similar to denying a permit. Complaints about the objection letter are therefore premature. The court held that the objection letter did not constitute an issuance or denial of the draft permits at issue.

In sum, the Ninth Circuit found that SCAP's claims under the CWA lacked jurisdiction because the objection letter was neither an approval nor promulgation of a new rule nor an outright denial of the permit at issue in this case. Accordingly, the court denied the petition.

2. United States v. Robertson, 875 F.3d 1281 (9th Cir. 2017).

This action came as an appeal from a criminal conviction related to the extent of the government's jurisdiction to police United States waters under the Clean Water Act (CWA).[10] Joseph David Robertson (Defendant) appealed both an evidentiary finding in his first trial, which had resulted in a hung jury and mistrial, and his conviction in his second trial on several grounds. Defendant appealed after his second trial and conviction. Affirming in whole, the court reviewed *de novo* the challenged jurisdictional bounds of the CWA, the challenged evidentiary rulings, and the district court's decision to allow specific expert testimony for abuse of discretion.

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5 599 F.2d 897, 900–01 (9th Cir. 1979) (*Crown I*), *rev'd in part*, 445 U.S. 193, 196–97 (1980) (*Crown II*).

6 711 F.3d 844, 863 (8th Cir. 2013).

7 33 U.S.C. § 1369(b)(1)(F).

8 445 U.S. 193 (1980).

9 *Crown II*, 445 U.S. at 196.

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

Between October 2013 and October 2014, Defendant excavated and constructed a series of ponds, which resulted in the discharge of dredged and fill material into the surrounding wetlands, as well as an adjacent tributary that flows into Cataract Creek, a tributary of the Boulder River (which is itself a tributary of the Jefferson River). The excavation and construction took place on National Forest System Lands and on a privately owned mining claim called Manhattan Lode. During that time, a United States Environmental Protection Agency (EPA) Special Agent warned Defendant that he likely needed permits for his activities, but Defendant never got them. After the Forest Service learned of his activities, a grand jury charged Defendant with three criminal counts.[11] Following the mistrial, Defendant was ultimately convicted on all three counts.

The first of Defendant's five arguments on appeal was that the Government failed to establish proper CWA jurisdiction. The court started their examination with an extensive background on the statute and its congressionally stated purpose.[12] The court noted that the law in question was the CWA's prohibition on the discharge of dredge or fill material into "navigable waters" unless authorized by a permit from the Secretary of the Army through the United States Army Corps of Engineers (the Corps).[13] Violations carry possible penalties of fine, imprisonment, or both.[14] The main issue under examination by the court was the definition of "navigable waters" and the reach of the CWA. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."[15] For there to be CWA jurisdiction in Defendant's case, the areas that Defendant polluted had to be "waters of the United States."

The court examined the controversial history of the relevant case law, indicating that *Rapanos v. United States*[16] was the central case. *Rapanos* was decided in a difficult 4-1-4 split. The plurality opinion settled on a definition that included only those "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[17] The plurality opinion excluded "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[18] Most importantly, the plurality only included wetlands in CWA

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11 The three counts were: 1) knowingly discharging dredged or fill material from a point source into a water of the United States without a permit in violation of the CWA, 2) willfully injuring and committing depredation of property of the United States, namely National Forest Service land, causing more than $1,000 worth of damage to the property in violation of 18 U.S.C. § 1361, and 3) knowingly discharging dredged or fill material from a point source into water of the United States on private property without a permit in violation of the CWA.

12 "[T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

13 *Id.* §§ 1311(a), 1344(a).

14 *Id.* § 1319(c)(2).

15 *Id.* § 1362(7).

16 547 U.S. 715 (2006).

17 *Id.* at 739 (quoting *Waters*, WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1954)).

18 *Id.*

jurisdiction if two specific conditions were met: "the adjacent channels contains a 'wate[r] of the United States,'" and "the wetland has continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[19]

Justice Kennedy penned the concurrence that gave the plurality its weight, and his test was the one that would go on to be used by the lower courts and applied by the court here. Kennedy's test was simpler and narrower (thus giving more deference to the Corps' own determination); it stated that CWA jurisdiction existed over wetlands when there was "a significant nexus between the wetlands in question and navigable waters in the traditional sense."[20] The court went on to note that in *Northern California River Watch v. City of Healdsburg*,[21] it likewise held Justice Kennedy's opinion controlled.[22]

Defendant's main argument regarding the CWA jurisdiction issue was that Kennedy's test was not the controlling standard, and the trial court erred by basing the jury instructions on it. Defendant's argument was based on a recent Ninth Circuit decision, *United States v. Davis*,[23] which he claimed made the court's adoption of the Kennedy standard invalid.[24] The court disagreed with Defendant's argument, stating that the Supreme Court instructed the lower courts that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[25] The court also noted that they are allowed to consider dissenting opinions when conducting their analysis.

The court went on to conclude that the *Davis* case cited by Defendant did not preclude them from adopting the Kennedy standard. First, the court analyzed whether their adoption of the Kennedy standard in *City of Healdsburg* was "clearly irreconcilable" with *Davis* and found that it was not.[26] Second, the court considered whether Kennedy's standard was actually the narrowest grounds. The court concluded that, while the plurality and the concurrence were likely subsets of the dissent's opinion, Kennedy's was narrower because it restricted federal authority less.[27] Based on these determinations, the court concluded that the district court's finding of CWA jurisdiction was not in error.

The court then addressed Defendant's second argument that the statutory term "waters of the United States" was too vague to be enforced

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19 *Id.* at 742.

20 *Id.* at 779.

21 496 F.3d 993 (9th Cir. 2007).

22 *Id.* at 995.

23 825 F.3d 1014 (9th Cir. 2016).

24 *Id.* at 1021–22 (holding that the narrowest concurring opinion in a plurality decision should only be followed if the concurrence and plurality share common reasoning).

25 Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

26 Rodriguez v. AT & T Mobility Servs. LLC, 728 F.3d 975, 979 (9th Cir. 2013).

27 *Rapanos*, 547 U.S. at 810 n.14.

under due process because Defendant could not have had "fair warning" of the meaning of the term. Defendant asserted he had not had fair warning because *City of Healdsburg* was no longer good law in light of *Davis*. The court found that Defendant did have fair warning that his conduct was criminal, because his conduct occurred at a time after *City of Healdsburg* but before *Davis*, and because Defendant failed to challenge the underlying validity of the criminal portions of the CWA. The court explained that Defendant was on notice at the time of his excavation activities by *City of Healdsburg*, and the language of that case is what the jury was instructed on.

Defendant's third argument was that the district court should have granted his Federal Rule of Criminal Procedure 29(c)[28] motion to acquit after the hung jury at his first trial. Citing *Richardson v. United States*,[29] the court found that once the second trial occurred, any arguments about the insufficiency of the evidence in the first trial were foreclosed.[30] The court affirmatively held that a criminal defendant cannot challenge the sufficiency of the evidence presented at a previous trial following a conviction at a subsequent trial.

Defendant's fourth argument pointed at three reasons the district court erred in allowing the Montana State Program Manager for the Corps, and Supervisory Civil Engineer, Todd Tillinger, to testify as an expert witness. Defendant asserted that: 1) CWA jurisdictional law was unclear and so the subject of the witness's testimony was not suitable for expert witness consideration; 2) the witness's testimony was based on guidance documents which do not have the force of law; and 3) the witness's jurisdictional determination relied on criteria that was rejected by Kennedy as determinative. The court disagreed with Defendant, noting first that it is the district court, not the witness, who instructs the jury on the law. Second, the court stated that, according to the record, Tillinger based his evaluation on regulations, *Rapanos*, and the guidance documents, not just the guidance documents. Third, the court said that the jury, instead of the witness, made the final determination about jurisdiction, regardless of what criteria the witness discussed.

Defendant's final argument was that the district court erred in excluding two pieces of evidence: the U.S. Army Corps of Engineers Jurisdictional Determination Form Instruction Guidebook and the Crystal Mine Study. Defendant claimed that these documents should have been admitted to help show that the Corps was making its jurisdictional determination on a factor expressly forbidden by Kennedy's standard. The court dispensed with Defendant's argument by stating that the district court "has wide latitude" when considering the admissibility of evidence; at the trial, the district court found that the Guidance manual might confuse the jury and that the Mine Study had little probative value and was potentially prejudicial.

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28 FED. R. CRIM. P. 29(c) (allowing a defendant to move for an acquittal within fourteen days of his guilty verdict after the jury has been discharged).

29 468 U.S. 317 (1984).

30 *Id.* at 326.

In sum, the court affirmed the lower court on all issues, finding that there was CWA jurisdiction over the case, Defendant's challenges to his prior trial was without merit, Defendant had fair warning, it did not matter that the expert used regulation that lacked the force of law, the expert testimony properly considered criteria in his evaluation, and the district court did not abuse its discretion in excluding evidence.

B. Clean Air Act

1. Yazzie v. U.S. Environmental Protection Agency, 851 F.3d 960 (9th Cir. 2017).

Petitioner Vincent Yazzie, tribal organizations, and non-profit environmental organizations (Petitioners) sought final review of a United States Environmental Protection Agency (EPA) source-specific Federal Implementation Plan (FIP) under the Clean Air Act (CAA).[31] Reviewing EPA's action under the arbitrary and capricious standard pursuant to the Administrative Procedure Act (APA),[32] the United States Court of Appeals for the Ninth Circuit denied Petitioners' petitions.[33]

The proposed FIP occurred in February 2013 regarding the Navajo Generating Station (Station), a coal-fired plant located on the Navajo Nation Reservation in Arizona and the largest coal fired plant in the western United States. Under the proposed amended lease plan, the plant would operate until 2044. After that date, the Navajo Nation could continue the station as a "new source" that generates electricity without coal. After receiving comments on the proposed rule, EPA issued its final rule in August 2014,[34] which finalized the longer deadline for emission reductions and emission credits. In turn, Plaintiffs filed petitions challenging EPA's action.

The statutory background of this case begins with the CAA's invitation for states to submit a "State Implementation Plan" (SIP) that sets emission limits and other necessary measures to make reasonable progress towards relevant goals.[35] If a state does not submit a SIP, or if EPA rejects the state SIP, EPA must generate a FIP to fill any resulting gaps.[36] SIPs that address regional haze must identify the best available retrofit technology (BART) to reduce emissions from certain major emission sources and then implement the technology within five years.[37] The Navajo Generating Station is a major source of coal emissions. EPA issued a final rule establishing a longer deadline for emission reductions at the plant. EPA provided for a more

31 42 U.S.C. §§ 7401–7671q (2012).

32 5 U.S.C. §§ 551–559, 701–706, 1305, 3344, 4301, 5335, 5372, 7521 (2012).

33 *Id.* § 706.

34 Approval of Air Quality Implementation Plans for Navajo Generating Station, 79 Fed. Reg. 46,514 (Aug. 8, 2014) (to be codified at 40 C.F.R. pt. 49).

35 42 U.S.C. § 7410(a).

36 *Id.* § 7410(c)(1)(A).

37 *Id.* § 7491(b), (g)(4); Approval of Air Quality Implementation Plans for Navajo Generating Station, 78 Fed. Reg. 8,274, 8,287–89 (Feb. 5, 2013) (to be codified at 40 C.F.R. pt. 49).

flexible extended compliance schedule due to the station's unusual and unique challenges and EPA's discretion under the Tribal Authority Rule (the TAR).[38]

The first issue turned on the appropriate standard of review. Petitioners argued that the government's partial financial interest in the Station counseled against judicial deference to EPA's interpretation. The court rejected this argument because EPA lacked a self-serving financial interest and its interpretation was not intended to protect the government's ownership in the station.

The next issue was the applicability of the emission reduction deadline to implement BART. Petitioners charged that EPA failed to implement BART under the statutory requirement as "expeditiously as practicable but in no event later than five years" after a SIP's approval or the promulgation of a FIP.[39] The court found that standard inapplicable because EPA applied a "better than BART" alternative.

The third issue looked at the regulatory deadline to implement a BART alternative. The parties disputed whether the regulatory deadline applies to the instant FIP, promulgated in place of a Tribal Implementation Plan (TIP) under the TAR, rather than under a SIP. Petitioners contended that EPA could not issue the FIP under the TAR because Navajo Nation contracted away its right to regulate the station. Therefore, the Navajo Station should not be eligible for "treatment as a State" and could not issue a TIP. The court disagreed and held that EPA reasonably concluded that the TAR applied because Navajo Nation had not submitted a TIP. The court deferred to EPA's interpretation that in the absence of a TIP, 40 C.F.R. § 49.11(a) provides EPA authority to promulgate a FIP for the station.[40]

The next issue was whether the state could bypass BART with a "better than BART" alternative. For the bypass to occur, a state implements a BART alternative where the SIP must require that all necessary emission reductions take place during the period of the first long-term strategy for regional haze.[41] The court concluded that the EPA determination, which stated that the section does not apply, was correct. The court deferred to EPA's interpretation, finding that it satisfied *Auer v. Robbins* and was not "plainly erroneous or inconsistent with the regulation."[42]

The court next reviewed EPA's determination that the FIP alternative results in greater reasonable progress toward emissions reductions than the BART technology, a so-called "better than BART" alternative.[43] Petitioners alleged that EPA failed to show by the "clear weight of the evidence" in its analysis that its alternatives would achieve greater reasonable progress than

38 Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7,254 (Feb. 12, 1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81).

39 42 U.S.C. § 7491(b)(2)(A), (g)(4) (2012).

40 *See generally* Auer v. Robbins, 519 U.S. 452 (1997) (noting that deference is usually given to a rule's originator); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (stating that Administrator interpretation is given deference).

41 40 C.F.R. § 51.308(e)(2)(iii) (2017).

42 *Auer*, 519 U.S. at 461 (1997).

43 *See* 40 C.F.R. § 51.308(e)(2)(i) (2017).

BART. The Ninth Circuit held that the "clear weight of the evidence standard" was inapplicable to the question at hand; rather, EPA was only required to show 1) that the distribution of emissions was not substantially different under BART, and 2) the alternative would result in greater emissions reductions.

Petitioners' first prong of the FIP argument, that the distribution of emissions was not substantially "different under the BART," contended that distribution of emissions should include the distribution of emissions over time. The court found that the plain language did not answer the question, and EPA's consistent interpretation of geographic distribution weighs against Petitioners' argument for temporal distribution. Referring again to *Auer*, the court concluded that the agency's interpretation was not plainly erroneous or inconsistent with the regulation and held in favor of EPA.

Petitioners' second prong of the FIP argument contended that EPA failed to show that the BART alternative "results in greater emissions reductions." Petitioners argued that the FIP's BART alternative did not actually result in greater emission reductions than BART. Therefore, the alternative does not demonstrate greater reasonable progress. This contention turned on whether it was reasonable for EPA to grant the station an emission credit when evaluating whether the BART alternative results in greater emission reductions. Petitioners argued this was unreasonable and inconsistent with prior EPA statements. The court rejected the premise underpinning Petitioner's argument and held that giving the station a credit when evaluating the BART alternative was reasonable. The Ninth Circuit again deferred to EPA's determination.

The final issue was Petitioners' charge that EPA unlawfully failed to conduct a BART analysis or include any BART emission limits for the station. EPA determined that it was not necessary or appropriate to conduct a BART determination for particulate matter emissions because those emissions were already well-controlled and because the Station would be required to further reduce emissions pursuant to additional rules. This also was a reasonable exercise of EPA discretion.

In sum, the Ninth Circuit denied the petitions. The court found that, in light of the unique circumstances of this case, EPA did not act arbitrarily or capriciously. *Auer* and *Chevron* deference supported the agency's interpretations.

2. Hopi Tribe v. U.S. Environmental Protection Agency, 851 F.3d 957 (9th Cir. 2017).

The Hopi Tribe sought review of the United States Environmental Protection Agency (EPA)[44] federal implementation plan (FIP) under the Clean Air Act (CAA)[45] for the Navajo Generating Station (Station) in Arizona.

44 The Salt River Project Agricultural Improvement and Power District, Navajo Nation, Central Arizona Water Conservation District, and Gila River Indian Community intervened on behalf of the respondent, EPA.

45 42 U.S.C. §§ 7401–7671q (2012).

The Hopi Tribe contended that the Tribe was not adequately consulted about its interests before the FIP was promulgated. The Hopi Tribe also argued that EPA failed to analyze five factors for determining best available retrofit technology (BART) under the CAA.[46] Holding that EPA did not violate any duty to consult and that EPA was not required to analyze the BART factors, the United States Court of Appeals for the Ninth Circuit denied the petition for review.[47]

"The Hopi Tribe is a sovereign nation located in northeastern Arizona."[48] Fifty percent of the people on the Hopi Reservation, including 54% of children, live in poverty. Unemployment on the Hopi Reservation is approximately 50%. The Station is the largest coal-fired plant in the western United States and burns coal from a mine located on both Navajo and Hopi Tribe lands.[49] Taxes and royalties from the coal represent a significant portion of the Tribe's revenue. The Station also is responsible for about 1,400 to 1,900 Hopi jobs, which amounts to about 50%–70% of all employment on the Hopi Reservation. However, the Station emits haze that hinders clear views of the Grand Canyon. The FIP, promulgated pursuant to the CAA, sought to reduce these emissions. Under federal regulations, reductions must be made by identifying BART and installing either BART or better technology, known as a BART alternative.[50]

EPA's rulemaking process in formulating the FIP took over five years, beginning with an Advance Notice of Proposed Rulemaking (ANPR) in 2009. At that time, EPA notified the Hopi Tribe of the ANPR and had multiple meetings and communications with Hopi Tribe representatives. EPA then issued a Supplemental Proposed Rule in 2013 that was developed primarily by other stakeholders, including the utilities that operated the Station. This group met as a Technical Working Group (TWG) that set an emissions cap for the future operation of the Station; the proposed rule that followed required the Station to be shut down either in 2044 or when the cap was reached, whichever occurred first. The final rule, issued in 2014,[51] matched this proposal. The Hopi Tribe, which had not been included in the TWG, objected to the potential closure of the Station, arguing that it was adverse to its economic interests.

On appeal to the Ninth Circuit, the Hopi Tribe first contended that its exclusion from the TWG negotiations violated a duty on the part of the U.S. government to consult with the Tribe. The Hopi Tribe argued that the duty to consult is binding on the United States as a single entity and stems from the

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46 *Id.* § 7491(g)(2).

47 In this opinion, the Ninth Circuit did not specify the standard of review. However, in its companion case, the Ninth Circuit specified that the FIP is a "final agency action" that will be upheld unless it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Yazzie v. U.S. Envtl. Prot. Agency, 851 F.3d 960, 968 (9th Cir. 2017) (citing 5 U.S.C. § 706(2)).

48 THE HOPI TRIBE, https://perma.cc/8DZL-FLHH (last visited July 14, 2018).

49 *Yazzie*, 851 F.3d at 965.

50 40 C.F.R. § 51.308(e) (2017).

51 Approval of Air Quality Implementation Plans for Navajo Generating Station, 79 Fed. Reg. 46,514 (Aug. 8, 2014) (to be codified at 40 C.F.R. pt. 49).

general trust relationship that the United States shares with Indian tribes. The Ninth Circuit disagreed, finding no authority supporting the contention that the general trust relationship may be treated as a duty to consult. The Ninth Circuit further reasoned that EPA did in fact consult with the Hopi Tribe throughout the rulemaking process, and so even if EPA were bound by such a duty, EPA surely complied.

Second, the Hopi Tribe challenged the FIP on the grounds that EPA failed to analyze each of the five factors required for determining BART when it analyzed the TWG proposal. On this issue, the Ninth Circuit held that there was no error. EPA was not required to analyze the five BART factors because the TWG proposal was a BART alternative, which is governed under separate regulations.

In sum, the Ninth Circuit denied the Hopi Tribe's petition for review because EPA did not violate any duty to consult with the tribe and EPA properly adhered to regulatory requirements in promulgating the FIP.

3. Arizona *ex rel.* Darwin v. U.S. Environmental Protection Agency, 852 F.3d 1148 (9th Cir. 2017).

Arizona Department of Environmental Quality (Arizona), CalPortland Company, Phoenix Cement Company (Phoenix),[52] and ASARCO LLC (Asarco) (together, Petitioners) petitioned the United States Court of Appeals for the Ninth Circuit for review of a Federal Implementation Plan (FIP) promulgated by the United States Environmental Protection Agency (EPA) to replace Arizona's deficient State Implementation Plan (SIP) pursuant to the Clean Air Act (CAA).[53] Petitioners asserted two ripe claims against EPA's FIP. Petitioners alleged 1) that EPA overstepped its authority by requiring selective non-catalytic reduction (SNCR) on CalPortland's cement kiln, and 2) that emissions limits imposed on copper smelters owned by Asarco and non-party Freeport-McMoran were arbitrary and capricious and the smelters should not be subject to best available retrofit (BART) controls. Reviewing EPA's FIP under an arbitrary and capricious standard,[54] the Ninth Circuit concluded that EPA's emissions-control measures were not arbitrary or capricious. The court dismissed in part and denied in part the consolidated petitions.

Section 169A of the CAA[55] protects air visibility in federal parks and forests by regulating emission of various pollutants from industrial sources by adopting certain emissions controls. Under this regulatory scheme, EPA requires states to create a SIP outlining its plans for improving air pollution within the state. If EPA determines that a SIP is deficient, the CAA requires EPA to promulgate its own plan, a FIP, to force compliance with Section 169A.

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52 Phoenix Cement Company is an enterprise division of the Salt River Pima-Maricopa Indian Community.

53 42 U.S.C. §§ 7401–7671q (2012).

54 Arizona *ex rel.* Darwin v. EPA, 852 F.3d 1148, 1152 (9th Cir. 2017).

55 42 U.S.C. § 7491(a)(1), (b)(2).

In 2011, Arizona submitted a SIP to EPA. EPA rejected portions of Arizona's SIP as inadequate and issued a proposed FIP to replace those rejected portions. After notice and comment, EPA promulgated a final FIP. The relevant portions of EPA's FIP required CalPortland to install selective non-catalytic reduction (SNCR) controls, imposing a 35% control-efficiency standard. Although EPA declined to impose additional control measures on the copper smelters, the FIP established annual nitrogen oxides emissions limits at forty tons per year for both smelters, particulate matter emissions limits at Asarco's smelter to be consistent with National Emission Standard for Hazardous Air Pollutants (NESHAPs),[56] and required control efficiency of about 99.8% on a 365-day rolling average for Asarco's double contact acid plant to limit sulfur dioxide emissions. Arizona, CalPortland, Phoenix, and Asarco filed a consolidated appeal challenging the legitimacy of EPA's FIP.

The Ninth Circuit first considered whether EPA overstepped its authority by imposing SNCR controls on CalPortland's cement kiln. Petitioners alleged that EPA erred by deemphasizing the potential improvement in visibility when considering whether the kiln should be required to adopt additional Reasonable Progress (RP) controls. Petitioners further asserted that when isolated, SNCR technology only marginally improves visibility, and thus would not achieve Congress's mandate of reasonable progress toward visibility. As to the first point, the court stated that EPA reasonably considered the relevant factors required under Section 169A and, as such, the court could not substitute its own judgment for the agency's. As to the second point, the court observed that according to EPA's models, the impact of SNCR technology on increased visibility would be far more substantial than petitioners asserted. The court did not view EPA's use of its own models as arbitrary or capricious. Accordingly, the court concluded that in promulgating the SNCR requirement, EPA acted within its authority.

The Ninth Circuit then considered a series of Petitioners' claims that EPA's regulations of nitrogen oxides, particulate matter (PM), and sulfur dioxide at the copper smelters were arbitrary and capricious. Petitioners argued that because Petitioners' existing nitrogen oxide emissions were below the FIP limit of forty tons per year, the limits imposed by EPA would not fulfill Congress's mandate to improve visibility. Second, Petitioners contended that the smelters at issue should not have been subject to BART at all because the smelters' nitrogen oxide emissions levels were below the 0.5 deciview threshold that triggers BART controls. The court rejected both arguments, stating first that because nothing was preventing the smelters from exceeding forty tons per year of nitrogen oxides in the future, EPA was within its authority to limit their potential to do so. Addressing the second point, the court observed that BART is required for stationary sources that "cause" or "contribute" to visual impairment, and such a determination is made on the basis of the source as a whole, not per pollutant. The court

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56 National Emission Standard for Hazardous Air Pollutants, 40 C.F.R. § 63.1 et seq., § 61.01 et seq. (2012).

stated that the copper smelters were undoubtedly BART-eligible and the nitrogen oxides contributed to the overall visual impairment attributable to the copper smelter. The court concluded that EPA was neither arbitrary nor capricious in limiting nitrogen oxides.

The Ninth Circuit then turned to Petitioners' challenge to EPA's limitation of PM emissions from Asarco's copper smelter. Petitioners argued that EPA's reliance on PM standards from NESHAPs,[57] another part of the CAA, was unlawful. The court disagreed, explaining that EPA's decision to incorporate emissions limitations and compliance requirements from NESHAPs was because Asarco itself had relied on those limits in its BART analysis and the limits were likely to improve visibility. The court concluded that EPA was neither arbitrary nor capricious in setting PM limits to match PM limits from other parts of the statute.

Finally, the court considered whether EPA's imposition of a 99.8% control-efficiency rate for sulfur dioxide emissions from Asarco's smelter was arbitrary or capricious. Petitioners argued that the 99.8% control efficiency rate was unsupported by evidence, was technically infeasible to achieve on a 365-day average because it did not allow for supply limitations nor startup and shutdown periods, and was arbitrarily imposed as a more rigorous standard on Asarco as compared to its competition. As to the first point, the court referred to information that Asarco itself provided to EPA describing an existing acid plant that currently recovers 99.8% of sulfur dioxide emissions. As to Asarco's second point, the Ninth Circuit stated that both EPA's independent findings and Asarco's own data supported the feasibility of a 99.8% efficiency rate. Addressing Asarco's final point, the court found that EPA treated both smelters alike in that EPA relied on the data that each source relied upon in establishing their own emissions limits. The court concluded that EPA's well-reasoned imposition of a 99.8% control efficiency rate on sulfur dioxide was neither arbitrary nor capricious.

In sum, the Ninth Circuit found that petitioners' challenges to EPA's FIP were without merit. Accordingly, the court dismissed in part and denied in part the consolidated petitions.

4. Sierra Club v. North Dakota, 868 F.3d 1062 (9th Cir. 2017).

North Dakota, along with several other states (the States), appealed a Consent Decree[58] between the United States Environmental Protection Agency (EPA) and both the Sierra Club and the Natural Resources Defense Council (Sierra Club). In 2013, EPA failed to meet its statutory deadline under the Clean Air Act (CAA)[59] to issue a national ambient air quality standard (NAAQS) for sulfur dioxide. The Sierra Club and the States sued to compel agency action. Subsequently EPA and the Sierra Club resolved their claims via the Consent Decree at issue. The United States Court of Appeals

57 National Emission Standards for Hazardous Air Pollutants for Primary Copper Smelting, 40 C.F.R. pt. 63 subpart QQQ (2002).

58 Proposed Consent Decree, Clean Air Act Citizen Suit, 79 Fed. Reg. 31,325 (June 2, 2014).

59 42 U.S.C. §§ 7401–7671q (2012).

for the Ninth Circuit, reviewing under the Supreme Court standard established by *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*,[60] concluded that the Consent Decree was a proper and valid resolution to the suit.

EPA and the Sierra Club reached a settlement, the Consent Decree, in 2014, that set out a promulgation designation schedule regarding NAAQS for EPA to follow. This agreement stated that the Sierra Club agreed to refrain from moving forward with its suit as long as EPA followed the given designation schedule. The States claimed that the Consent Decree 1) improperly disposed of their claims, 2) imposed duties and obligations on the States without their consent, and 3) was not "fair, adequate and reasonable" because the deadlines far exceed the Act's three-year period for promulgating designations.

First, the court determined that the Consent Decree did not impact the ongoing claims by the States because their claims were not referenced in the Consent Decree, the Decree did not limit EPA's rights in lawsuits against third parties, and the States were free to pursue earlier deadlines in their own actions. Further, the States had acknowledged in oral argument that they could pursue their pending claims in the North Dakota litigation; the court noted that the States could not attempt to block the Consent Decree by arguing that it improperly disposed of their claims while simultaneously arguing that they can continue to assert those claims in another forum such as the district court in North Dakota.

Second, the court found that the Consent Decree did not subject the States to any explicit obligations or state action, nor did it force indirect duties or obligations upon them. The States acknowledged that the Decree did not mandate explicit action but asserted that duties and obligations were being imposed. The court took this as an objection to the requirements imposed by the Data Requirements Rule,[61] rather than the Consent Decree. The Ninth Circuit noted that the Consent Decree does reference the Data Requirements Rule, but that it falls short of imposing the rule's obligations on the States. Because the Consent Decree does not place any burden on the States, and operates distinctly from the Data Requirements Rule, that component of the appeal was dismissed.

Finally, the Ninth Circuit found that the Consent Decree follows the appropriate remedy in a case involving EPA deadlines because it adheres to previous precedent on promulgation deadlines, and that the district court did not abuse its authority in concluding that the Consent Decree is fair and reasonable and in compliance with the CAA and other law.

In conclusion, the Ninth Circuit held that because the Consent Decree did not impede, impact, or resolve the ongoing claims by States, did not subject the States to any burden or obligation, and followed the proper

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60 478 U.S. 501 (1986).

61 Data Requirements Rule for the 2010 for the 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS), 80 Fed. Reg. 51,052, 51,064 (Aug. 21, 2015) (to be codified at 40 C.F.R. pt. 51).

remedy in an EPA deadlines case, the Consent Decree could not be blocked by the States.

C. Comprehensive Environmental Response, Compensation, and Liability Act

1. Asarco LLC v. Atlantic Richfield Co., 866 F.3d 1108 (9th Cir. 2017).

In 2012, Asarco LLC (Asarco) brought an action for contribution against Atlantic Richfield Company (Atlantic Richfield) for cleanup costs ordered by the United States Environmental Protection Agency (EPA) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[62] The United States District Court for the District of Montana granted summary judgment for Atlantic Richfield, holding that Asarco's contribution claim was time barred.[63] The district court found that Asarco entered into a settlement agreement with the United States under the Resource Conservation and Recovery Act (RCRA)[64] in 1998, which triggered the three-year statute of limitations for bringing a contribution claim under CERCLA. The United States Court of Appeals for the Ninth Circuit reviewed the district court's grant of summary judgment *de novo*. After ruling on three matters of first impression, the Ninth Circuit vacated and remanded, concluding that Asarco's claim was timely.

This case arose out of the contamination of the East Helena Superfund Site (the Site), an industrial area located in Lewis and Clark County, Montana. Asarco operated a lead smelter plant at the Site from 1888 until 2001, which resulted in the discharge of toxic compounds into the air, soil, and water. Atlantic Richfield's predecessor operated a nearby zinc fuming plant from 1927 to 1972. In the late 1980s, after adding the Site to the National Priories List under CERCLA, EPA identified Asarco and Atlantic Richfield's predecessor as potentially responsible parties (PRPs) for the contamination. EPA sought contribution only from Asarco.

In 1998, the United States brought claims against Asarco for civil penalties and injunctive relief under RCRA and the Clean Water Act (CWA).[65] Asarco settled the case with the United States. This settlement agreement (1998 RCRA Decree) assessed civil penalties against Asarco and also required Asarco to take remedial actions. However, Asarco failed to meet its cleanup obligations under the 1998 RCRA Decree and subsequently filed for bankruptcy in 2005. The United States and Montana filed proofs of claim in the bankruptcy proceeding, asserting joint and several liability claims under CERCLA. In 2009, the bankruptcy court entered a consent decree under CERCLA (CERCLA Decree) between Asarco, the United States, and

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[62] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675, 9613(f)(3)(B) (2012).

[63] Asarco LLC v. Atl. Richfield Co., 73 F. Supp. 3d 1285, 1286 (D. Mont. 2014).

[64] 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)).

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

Montana. Under the agreement, Asarco paid $99.294 million, which fully resolved and satisfied Asarco's obligations under the 1998 RCRA Decree.

In 2012, Asarco brought this action against Atlantic Richfield pursuant to CERCLA § 113(f)(3)(B),[66] seeking contribution for its financial liability under the CERCLA Decree. Atlantic Richfield filed a motion for summary judgment, arguing that the 1998 RCRA Decree triggered the three-year statute of limitations under § 113. The district court entered summary judgment for Atlantic Richfield,[67] concluding that the plain language of § 113(f)(3)(B) does not require settlement agreements to be entered into under CERCLA. Therefore, the 1998 RCRA Decree triggered the statute of limitations because it required a response action and Asarco incurred response costs as a result.

The Ninth Circuit addressed three novel issues. First, whether a settlement agreement entered into under an authority other than CERCLA may give rise to a CERCLA contribution action. Second, whether a corrective measure under RCRA qualifies as a response action under CERCLA. Third, what it means for a party to resolve its liability in a settlement agreement, as a precondition for bringing a contribution action under CERCLA § 113(f)(3)(B).

On the first issue, the Ninth Circuit began with the language of the statute to determine whether CERCLA § 113(f)(3)(B) applies to non-CERCLA settlement agreements. The Ninth Circuit first observed that the plain text requires an administrative or judicially approved settlement to impose a "response" action. While a response action is a statutorily defined term, it is not clearly a CERCLA-exclusive term. Further, while settlement agreements must be "administratively or judicially approved," the text says nothing about whether the agreement must settle CERCLA claims in particular. Expanding its analysis to the broader context of the statute, the Ninth Circuit observed that the companion provision, § 113(f)(1), expressly requires a CERCLA predicate.[68] Section 113(f)(1) allows PRPs to seek contribution from other PRPs during or following civil actions brought under CERCLA §§ 106 or 107(a) specifically.[69] Since Congress expressly required a CERCLA predicate in the companion provision but not in § 113(f)(3)(B), the Ninth Circuit concluded that Congress intended no such predicate in the latter.[70] The Ninth Circuit therefore held that a non-CERCLA settlement agreement may form the necessary predicate for a contribution action under CERCLA § 113(f)(3)(B).[71]

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66 42 U.S.C. § 9613(f)(3)(B).

67 *Asarco LLC*, 73 F. Supp. 3d at 1286.

68 42 U.S.C. § 9613(f)(1).

69 *Id.*

70 The Ninth Circuit further reasoned that this interpretation is consistent with CERCLA's broad remedial purpose, which is to expedite the settlement and cleanup process. An interpretation which would undercut a private party's incentive to settle would defeat this purpose without any possible benefit.

71 The Ninth Circuit noted that this interpretation aligns with the EPA's own view that non-CERCLA claims fit within § 113(f)(3)(B) so long as the settlement involves a cleanup activity

Second, the Ninth Circuit determined that the 1998 RCRA Decree required Asarco to take "response" actions within the meaning of CERCLA § 113(f)(3)(B). The Ninth Circuit found that the agreement clearly required Asarco to take "response" actions to clean up hazardous waste. The 1998 RCRA Decree specifically required Asarco to take "corrective action," which RCRA expressly defines as a type of "response measure."[72]

Third, the Ninth Circuit determined whether Asarco had resolved its liability under the 1998 RCRA Decree, which is the final condition necessary for triggering a contribution action under § 113(f)(3)(B). On this issue, Asarco argued that the 1998 RCRA Decree did not resolve its liability.[73] In addressing this argument, the Ninth Circuit analyzed at length what it means for a party to "resolve its liability" within the meaning of § 113(f)(3)(B). Beginning with the plain text of the statute, the Ninth Circuit reasoned that the common dictionary definitions of "resolve" imply an element of finality.

However, the Ninth Circuit observed that the question of whether liability may be resolved with the requisite degree of finality by a settlement agreement is further complicated by statutory provisions that allow the government to preserve future enforcement actions. For example, CERCLA § 122(f) allows EPA to include a covenant not to sue in a settlement agreement, conditioned by a PRP's completed performance.[74] Further, parties to settlement agreements often expressly refuse to concede liability. The Ninth Circuit noted that the Sixth Circuit and Seventh Circuit decided the reservation of rights in this context should be weighed against findings that a party has resolved its liability. Observing inconsistencies in the case law, however, the Ninth Circuit adopted a different approach. The court held that for a party to resolve its liability, the settlement agreement must determine a PRP's compliance obligations with "certainty and finality."[75] Further, the resolution of liability is not defeated by the government's preservation of rights to reserve future enforcement actions, covenants not to sue, releases from liability that are conditioned on completed performance, or a PRP's refusal to concede liability.[76]

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that qualifies as a response action. Niagara Mohawk Power Corp. v. Chevron, U.S.A., Inc., 596 F.3d 112, 126 n.15 (2nd Cir. 2010).

72 42 U.S.C. § 6928(h) (2012).

73 Atlantic Richfield contended that Asarco waived this argument by not raising it in the district court. The Ninth Circuit acknowledged that Asarco failed to raise the issue in the district court, but reached the issue in order to prevent a miscarriage of justice and further because the issue presented was purely one of law.

74 42 U.S.C. § 9622(f)(3) (2012).

75 Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1125 (9th Cir. 2017).

76 The court reasoned that if a covenant not to sue negates resolution of liability, then it is unlikely that a settlement agreement could ever resolve a party's liability. Moreover, this approach is consistent with congressional intent. The court cited legislative history in which the House had expressed an intent to authorize EPA to preserve future enforcement actions in crafting settlements. A PRP's refusal to concede liability also does not defeat CERCLA's purpose in encouraging prompt settlements, so long as the PRP commits to taking action. Conversely, requiring PRPs to concede liability in order to establish finality would discourage PRPs from entering into settlements.

Applying this test to the facts of the case, the Ninth Circuit determined that the 1998 RCRA Decree failed to resolve Asarco's liability for any of its response actions or costs. First, although the 1998 RCRA Decree contained a release from liability, that release was expressly limited to the government's claim for civil penalties and did not cover response actions mandated by the agreement. Second, the 1998 RCRA Decree contained numerous references to Asarco's continued legal exposure. Finally, the 1998 RCRA Decree expressly provided that Asarco would not be released from liability under CERCLA, even if Asarco fully complied with the agreement. Thus, the Ninth Circuit held that Asarco could not have brought a contribution action pursuant to the 1998 RCRA Decree, and therefore, the statute of limitations did not run with that decree.

In its consideration of the 2009 CERCLA Decree, however, the Ninth Circuit held that Asarco had resolved its liability.[77] The CERCLA Decree set forth a covenant not to sue that was effective immediately and covered all of Asarco's response obligations. The covenant further provided that Asarco was released from liability for all response obligations under prior settlements, including the corrective measures under the RCRA Decree, so long as Asarco funded the custodial trust accounts for the cleanup of the Site.[78] The CERCLA Decree also had not reserved the right to hold Asarco liable under any authority with respect to then-existing contamination, beyond its obligations under the decree, and capped Asarco's total financial obligations for past contamination. Lastly, the CERCLA Decree protected Asarco against contribution actions by non-settling parties. Under CERCLA § 113(f)(2), contribution protection applied only to parties that had resolved liability pursuant to a settlement agreement, providing further evidence that Asarco had resolved its liability.[79] Since the CERCLA Decree constituted a firm decision with the requisite degree of finality about Asarco's liability, the court found Asarco had resolved its liability under that agreement.

In sum, because Asarco met the three-year statute of limitations deadline in filing the action, the CERCLA Decree imposed response actions and costs, and the CERCLA Decree resolved Asarco's liability, the Ninth Circuit held that Asarco's contribution action was timely. It therefore remanded to the district court for further proceedings to determine whether Atlantic Richfield must pay contribution to Asarco. The Ninth Circuit also established a new test for determining whether a settlement agreement has

77 On this issue, Asarco argued that the CERCLA Decree unequivocally resolved its liability for all of its response costs. Atlantic Richfield contended that the CERCLA Decree merely served as a funding mechanism for Asarco's pre-existing commitments under the 1998 RCRA Decree. Therefore, Atlantic Richfield argued, holding that Asarco's contribution claim was timely would be unjust because it would essentially allow Asarco to incur cleanup obligations, sit on its rights, and then pursue a stale claim through bankruptcy. While the Ninth Circuit sympathized with Atlantic Richfield's position, it could not agree with Atlantic Richfield's conclusion. That Asarco was liable under RCRA did not change the fact that the agreement did not give rise to a right of contribution under CERCLA.

78 Asarco asserted that it did in fact fund the trust accounts and Atlantic Richfield conceded that point.

79 42 U.S.C. § 9613(f)(2).

resolved a party's liability within the meaning of CERCLA § 113(f)(B)(3), finding this to be so where a settlement agreement decides "with certainty and finality" a PRP's obligations for response actions. Neither covenants not to sue, releases from liability, nor a settling party's refusal to concede liability undermine the resolution.

D. Resource Conservation and Recovery Act

1. Ecological Rights Foundation v. Pacific Gas & Electric Co., 874 F.3d 1083 (9th Cir. 2017).

Ecological Rights Foundation (EcoRights), an environmental organization, filed suit against Pacific Gas & Electric Company (PG&E) under the citizen suit provisions of both the Clean Water Act (CWA)[80] and the Resource Conservation and Recovery Act (RCRA).[81] EcoRights alleged PG&E violated both the CWA and RCRA by discarding wood treatment chemicals at its facilities in ways that resulted in unlawful discharges into San Francisco Bay and Humboldt Bay (the Bays). After determining that EcoRights had organizational standing, the United States District Court for the Northern District of California granted summary judgment to PG&E on both the CWA claim and the RCRA claim.[82] Reviewing the RCRA claim alone, the United States Court of Appeals for the Ninth Circuit reversed.

According to the complaint, PG&E used its service facilities to store and handle new, used, and discarded wooden utility poles that had been treated with pentachloraphenol (PCP). PCP contains dioxins, which are chemical impurities known to increase cancer risks. EcoRights alleged that drilling, cutting, moving, and storing PCP-treated wood had resulted in the spread of chemically treated sawdust and woodchips on the grounds of PG&E facilities. In its first claim, EcoRights alleged that PG&E's activities violated the CWA by discharging pollution into the Bays without a permit. In its second claim, EcoRights alleged that PG&E violated RCRA by contributing to the handling, storage, or disposal of solid waste which may present an imminent and substantial endangerment to health and the environment in and around the Bays. EcoRights claimed that these violations occurred when PG&E's stormwater conveyance systems and company vehicle tires carried PCP-infused waste offsite, resulting in discharges into the bays.

On the issue of standing, the district court held and the Ninth Circuit affirmed that EcoRights had organizational standing to pursue its claims. EcoRights presented declarations from several of its members alleging particularized harms resulting from pollution of the Bays. Among these harms were reports that members were avoiding local seafood, avoiding recreational activities, and experiencing reduced enjoyment of sailing and

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

81 42 U.S.C. §§ 6901–6992k (2012).

82 Ecological Rights Found. v. Pac. Gas & Elec. Co., No. 10-CV-00121-RS, 2015 WL 537771, at *1 (N.D. Cal. Jan. 30, 2015).

bird-watching. PG&E argued that these allegations of injury were too generalized, as such injuries might be shared by millions of people who visit the Bays. The Ninth Circuit rejected this argument on the grounds that an impermissibly generalized grievance for standing purposes refers to an injury which is abstract or indefinite, not one that may be widely shared. In this case, the Ninth Circuit found that the alleged injuries were sufficiently concrete and particularized to the members' own recreational, aesthetic, and spiritual uses and enjoyment of the waters of the Bays. PG&E also argued that the EcoRights members were required to demonstrate that the alleged uses or enjoyment of the Bays were near PG&E facilities. The Ninth Circuit rejected this argument as well, finding that the injury requirement is satisfied in environmental cases where the individual shows 1) an interest in a particular place, and 2) that interest is impaired by a defendant's conduct. There is a proximity concern only where a plaintiff fails to demonstrate use of the area affected by the challenged activity. Whether the members use an area near the alleged source of the environmental damage is immaterial.

The Ninth Circuit then analyzed the RCRA claim, which turned on the overlap between the CWA and RCRA and whether discharges subject to the CWA may also be regulated under RCRA. The district court had found that the CWA applied to the stormwater discharges at issue because under the CWA, the United States Environmental Protection Agency (EPA) had the power to require permits for them, even though it had chosen not to do so. The district court then held that the RCRA claim failed because RCRA's "anti-duplication" provision precluded application of RCRA to discharges subject to the CWA.

First, the Ninth Circuit addressed PG&E's stormwater discharges. Beginning its analysis with the language of the statute, the Ninth Circuit observed that the anti-duplication provision limited the application of RCRA with respect to "any activity or substance which is subject to" the CWA, the Safe Drinking Water Act, the Atomic Energy Act, and the Marine Protection, Research and Sanctuaries Act.[83] The anti-duplication provision then laid out an exception, providing that RCRA could overlap with the four named statutes to the extent that its application was "not inconsistent with the requirements" of those statutes.[84] Using the plain meaning of "inconsistent" to construe the text, the Ninth Circuit reasoned that the anti-duplication provision does not bar RCRA's application, unless the overlapping requirements under RCRA and the CWA are mutually repugnant or contradictory, such that causing the application of one implies the abrogation or abandonment of the other.

The Ninth Circuit further explained that the context of the anti-duplication provision within RCRA supported that reading. Specifically, two other provisions in RCRA were meaningful only if the potential for waste regulation under CWA would not, on its own, bar RCRA's application. The first was RCRA's "integration" provision, which required EPA to administer

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83 42 U.S.C. § 6905(a).

84 *Id.*

RCRA in a coordinated manner that avoids duplication, "to the maximum extent practicable, with the appropriate provisions" of other environmental statutes, when doing so was "consistent with the goals and policies expressed" in RCRA and the other statutes.[85] The Ninth Circuit reasoned that the CWA's inclusion in the integration provision indicated Congress recognized there would be overlapping coverage between the CWA and RCRA. Thus, if all matters potentially open to regulation under the CWA were prohibited from regulation under RCRA, the integration clause would serve little purpose. The second provision that would be rendered meaningless was RCRA's definition of "solid wastes," which controlled its jurisdiction.[86] RCRA's definition of "solid wastes" specifically excludes industrial discharges which are point sources subject to permits under the CWA. The Ninth Circuit reasoned that if any potential regulation of any substance under the CWA were enough to trigger the anti-duplication provision and bar the application of RCRA, the exclusion of substances subject to CWA permits would be superfluous. Finally, the Ninth Circuit turned to persuasive authorities to support its reading of the anti-duplication provision, citing other federal courts as well as the Department of Justice's Office of Legal Counsel.[87] In light of this reading of RCRA's anti-duplication provision, the Ninth Circuit found unavailing PG&E's argument that EPA's decision not to impose CWA permit requirements barred the application of RCRA. Rather, because there were no legal requirements imposed on the stormwater discharges under the CWA, there was no legal requirement that could be inconsistent with RCRA. Thus, RCRA's application was not barred.[88]

Lastly, the Ninth Circuit addressed the second part of EcoRights' RCRA claim, in which EcoRights alleged that PG&E had discharged pollution into the Bays via "tire tracking."[89] On this issue, the district court had concluded that EcoRights had failed to provide sufficient evidence of actual transmission of pollutants through tire tracking. The Ninth Circuit affirmed the district court's holding.

In sum, the Ninth Circuit affirmed that EcoRights had organizational standing to pursue its claims and affirmed the district court's holding that there was insufficient evidence on the tire tracking theory under the RCRA claim. In reversing the district court's grant of summary judgment, the Ninth Circuit held that RCRA's anti-duplication provision did not bar the application of RCRA unless doing so would contradict a requirement

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85 *Id.* § 6905(b)(1).

86 *Id.* § 6903(27); *see also id.* § 6903(5).

87 The Ninth Circuit also noted that EPA filed a brief as amicus curiae in this case and appeared at argument in support of EcoRights, arguing that RCRA's anti-duplication provision did not restrict the reach of the citizen suit.

88 The Ninth Circuit also quickly disposed of PG&E's alternative argument that its stormwater discharges were subject to CWA requirements through municipal storm sewer system permits required by local government agencies. Any potential requirements under municipal permits were not relevant to RCRA's application.

89 Tire tracking occurs when vehicles pick up contaminants on their tires and carry them offsite.

imposed by the CWA or any other statute listed in the provision. Thus, the absence of a CWA permit requirement did not trigger RCRA's anti-duplication provision and EcoRights' RCRA claim as to PG&E's alleged stormwater discharges was not barred. The Ninth Circuit remanded for further consideration.

E. Toxic Substances Control Act

1. *In re* A Community Voice, 878 F.3d 779 (9th Cir. 2017).

Several environmental groups[90] brought a petition for writ of mandamus to compel the United States Environmental Protection Agency (EPA) to act upon a previously granted rulemaking petition concerning dust-lead hazards and lead-paint standards. The petition was brought under the Toxic Substances Control Act (TSCA),[91] the Residential Lead-Based Paint Hazard Reduction Act (Paint Hazard Act),[92] and the Administrative Procedure Act (APA).[93] The court reviewed final EPA rules for unreasonable delay under a six-factor balancing test.[94]

EPA, via the Paint Hazard Act, had been granted sole authority to establish a national dust-lead hazard standard, and had divided authority with the Department of Housing and Urban Development (HUD) to lower a congressionally established lead-based paint standard. Despite a directive to set dust-lead hazard standards within eighteen months of October 28, 1992, the rules were not established and finalized until 2001.

By 2009, the science behind lead paint hazards and dust-lead hazards had vastly improved, though the rules had not changed. In August 2009, four of the eight petitioners,[95] concerned that the standards established in 1992 were too lenient, filed an administrative petition with EPA asking for the agency to use its rulemaking authority to more adequately protect children from the hazards of lead by lowering the dust-lead hazard standards. In October, EPA sent a letter to the petitioners granting their request for rulemaking, but it did not commit to a specific outcome or date of implementation. Between 2009 and 2015, EPA took some action. EPA formed a Science Advisory Board Lead Review Panel (SAB Panel) and took comments from the SAB Panel on proposed methodology for dust-lead hazard standards in 2010. Between 2012 and 2015, EPA conducted a survey of housing to determine if lower lead clearance levels were feasible, but

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90 California Communities Against Toxics; Health Homes Collaborative; New Jersey Citizen Action; New York City Coalition to End Lead Poisoning; Sierra Club; United Parents Against Lead National; We Act for Environmental Justice, A Community Voice.

91 15 U.S.C. §§ 2601–2692 (2012).

92 42 U.S.C. §§ 4851–4856 (2012).

93 5 U.S.C. §§ 551–559, 701–706, 1305, 3344, 4301, 5335, 5372, 7521 (2012).

94 Telecomm. Research & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984).

95 Healthy Homes Collaborative, New Jersey Citizen Action, Sierra Club, and United Parents Against Lead National.

apparently did nothing after the conclusion of the survey. The petition for mandamus was filed nine months later in August 2016.

The court first determined that it had jurisdiction, noting that final EPA rules may be reviewed in the United States Court of Appeals for the D.C. Circuit or any United States Court of Appeals where the petitioner resides or has its principal place of business in the circuit.[96] The court also noted that any court which would have jurisdiction to review a final rule also has jurisdiction to determine the question of unreasonable delay.[97] The court found that, under the All Writs Act,[98] the court was allowed to issue any writs appropriate to aid the court's jurisdiction, and therefore it had jurisdiction to consider the petition.

The court then turned to whether the agency had a duty to act. Petitioners argued that two statutory frameworks established a duty for EPA to act. First, they argued that the TSCA and its Paint Hazard Act amendments established a clear duty. Second, Petitioners argued that the APA placed a clear duty on EPA to take final action. EPA argued that it had already done what was required of it by beginning a proceeding. The court agreed that both statutes established a clear duty and that EPA had to come to a final decision, not merely begin a proceeding. It held that the instructions by Congress under the TSCA and the Paint Hazard Act to identify lead-based paint hazards[99] indicated that this was an ongoing duty. Furthermore, the court noted that because Congress established that the regulations "may be amended from time to time as necessary," the duty was continuous.[100] The court also held that the APA established a duty to act because it required agencies to conclude matters presented to them within a reasonable time.[101] The court noted that "failing to find a duty would create a perverse incentive for the EPA"[102] because it would allow EPA to avoid judicial review by granting a petition and then taking no action.

Next, the court addressed whether there was an unreasonable delay justifying a writ of mandamus. It noted that the first factor of the six-factor test established in *Telecomm. Research & Action Ctr.* (*TRAC*)[103] was the most important, but not, by itself, determinative.[104] The court did not discuss each factor explicitly,[105] but held that the "clear balance of the *TRAC* factors

96 15 U.S.C. § 2618(a).

97 Crown Simpson Pulp Co. v. Costle (*Crown I*), 599 F.2d 897, 1094–95 (9th Cir. 1979), *rev'd in part*, 445 U.S. 193, 196–97 (1980) (*Crown II*).

98 28 U.S.C. § 1651 (2012).

99 15 U.S.C. §§ 2681(10), 2683.

100 *Id.* § 2687.

101 APA, 5 U.S.C. § 555(b) (2012).

102 *In re* A Community Voice, 878 F.3d 779, 785 (9th Cir. 2017).

103 750 F.2d 70 (D.C. Cir. 1984).

104 *See In re* Core Commc'ns, Inc., 531 F.3d 849, 855 (D.C. Cir. 2008).

105 The court considered: 1) the time agencies take to make decisions must be governed by a rule of reason; 2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; 3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; 4) the court should consider the effect of expediting delayed action on agency activities of a higher or

favors issuance of the writ."[106] It held the fact EPA delayed eight years favored Petitioners for the first factor, and that Congress's desire to have the threat of lead poisoning eliminated quickly favored Petitioners for the second factor. The court found the clear threat to human welfare posed by lead, and EPA's failure to identify any cases where a court has held that an eight-year delay was reasonable, supported granting the petition as well. Accordingly, the court granted the petition for the writ.

Finally, the court addressed the remedy. Petitioners asked the court to order EPA to issue proposed rules within ninety days and final rules within six months. EPA did not argue for a particular timeline but noted an intention to issue a proposed rule in four years, and a final rule in six years. The court first established that it had power and discretion to enforce a particular timeline. The court then held, in light of the severe risks to children of lead-poisoning under EPA's insufficient standards and the fact that EPA had already taken eight years, that the timeline be more in line with Petitioner's requests. It found that EPA must issue a proposed rule within ninety days of the court's decision becoming final and promulgate a final rule within one year of the issuance of the proposed rule, and that both deadlines would only be modified if EPA presented new information showing that a modification was required. The court also retained jurisdiction in order to ensure compliance.

In sum, the Ninth Circuit granted the rulemaking petition based on unreasonable delay and ordered EPA to promulgate new standards under the TSCA and Paint Hazard Act.

II. Natural Resources

A. Endangered Species Act

1. Wildwest Institute v. Kurth, 855 F.3d 995 (9th Cir. 2017).

Wildwest Institute and the Alliance for the Wild Rockies (Wildwest) appealed a summary judgment ruling[107] from the United States District Court for the District of Montana in favor of the Director of the United States Fish and Wildlife Service and the Secretary of the United States Department of the Interior (FWS), as well as the State of Wyoming. FWS listed the whitebark pine as relatively high for risk of extinction,[108] but found that listing it as a threatened or endangered species was "warranted but

competing priority; 5) the court should also take into account the nature and extent of the interests prejudiced by delay; and 6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. *See TRAC*, 750 F.2d at 80.

106 *In re A Community Voice*, 878 F.3d at 787.

107 Wildwest Institute v. Kurth, 855 F.3d 995, 996 (9th Cir. 2017).

108 Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Pinus albicaulis as Endangered or Threatened with Critical Habitat, 76 Fed. Reg. 42,631, 42,647 (July 19, 2011) (to be codified at 50 C.F.R. pt. 17).

precluded" under the Endangered Species Act (ESA).[109] Wildwest asserted that FWS's decision was arbitrary and capricious because FWS 1) did not strictly follow its listing priority guidelines, 2) considered factors outside of the guidelines, 3) found that listing the whitebark pine was precluded by species that did not face a higher degree of threat than the whitebark pine, while FWS did not give an individualized explanation for each precluding species, and 4) considered budget limitations, court orders, and statutory deadlines in making its determination. The United States Court of Appeals for the Ninth Circuit, reviewing under the arbitrary and capricious standard,[110] rejected the appeal and affirmed the district court's ruling.

In 2011, FWS issued its yearly finding, which included a finding that the whitebark pine's status as a threatened or endangered species was warranted but precluded under the ESA. FWS reached this finding despite threats from disease, insect predation, climate change, and habitat loss, among other factors, suggesting that the whitebark pine was in danger of extinction or likely to become so within the near future. The whitebark pine was assigned a Listing Priority Number (LPN) of 2, on a scale of 1 to 12, with 1 being the highest priority. In 2013, Wildwest filed a complaint for injunctive and declaratory relief against FWS, seeking review of this "warranted but precluded" finding.

First, the court decided that the case was not moot because it was "capable of repetition, yet evading review." In 2015, FWS issued a Candidate Notice of Review (CNOR) assigning the whitebark pine a lower-priority LPN.[111] FWS then moved to dismiss the appeal as moot because Wildwest's claims were based on an earlier, higher-priority LPN. FWS must make a new twelve month finding annually regarding a species status.[112] Because every CNOR up to 2015 found that the whitebark pine was "warranted but precluded," the court found it reasonable to expect that Wildwest will be subject to the same challenged action again, and that the annual finding therefore evades review.

Second, the Ninth Circuit looked to the language of the Endangered Species Act (ESA),[113] and determined that it did not require FWS to prioritize species based solely on the degree of threat established through the LPN. The court noted that Congress mandated the ranking system "to assist" in identifying species in need of priority review, that "assist" meant "to give support or aid," and thereby the ranking system was only one tool to be used in deciding on a listing priority. Further, in published guidelines, FWS stated that the priority system acted as a flexible guide rather than an inflexible framework. Thus, the court stated the guidelines did not prohibit FWS from

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109 Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B)(iii) (2012).

110 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

111 Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice on Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 80 Fed. Reg. 80,584, 80,586 (Dec. 24, 2015) (to be codified at 50 C.F.R. pt. 17).

112 16 U.S.C. § 1533(b)(3)(C)(i).

113 *Id.* § 1533(h)(3).

considering additional information outside the guidelines and listing other species with the same or higher LPNs before the whitebark pine did not render the "warranted but precluded" finding arbitrary or capricious.

Third, the court found that FWS had adequately explained the reasons and data for its finding that work upon pending petitions precluded listing of the whitebark pine. The ESA[114] and cases[115] within the Ninth Circuit require FWS to publish "a description and evaluation of the reasons and data" upon which the finding is based. Since FWS explained its budget, how it prioritizes actions, the criteria used to rank within a given LPN, and a listing of the specific species with pending proposals that preclude listing the petitioned species, it met the given requirements.

Finally, the court decided that FWS may properly consider its budget and court order or statutory deadlines related to pending proposals for other species when concluding that listing a given species is "warranted but precluded." Wildwest argued that FWS could not rely on self-imposed budget limitations or court-ordered or statutory deadlines for other species to delay in listing the whitebark pine. The court stated that the ESA does not require the Department of the Interior to make budget requests sufficient to eliminate the need for a "warranted but precluded" finding, that it is Congress, and not the Ninth Circuit, that can review an agency's budget request,[116] and that the ESA does not prohibit consideration of budget, court orders, or statutory deadlines in making "warranted but precluded" determinations.

In sum, the Ninth Circuit found that the case was not moot based on a newer finding lowering the whitebark pine's LPN, and that FWS was not arbitrary or capricious in considering factors outside of its guidelines, in listing equal or lower priority species before the whitebark pine, or in considering its budget and court-ordered or statutory deadlines in making its determination.

2. Defenders of Wildlife v. Zinke, 856 F.3d 1248 (9th Cir. 2017).

Plaintiff, the non-profit group Defenders of Wildlife, brought suit against the United States Fish and Wildlife Service (FWS) and the Bureau of Land Management (BLM) (collectively, Defendants), alleging violations of the Endangered Species Act[117] (ESA) and the Administrative Procedure Act[118] (APA) regarding a Biological Opinion (BiOp) analyzing the effect of an industrial solar project on a species of desert tortoise. The project developers[119] proceeded as intervenors in the action. Plaintiff sued to enjoin construction of a specific portion of the solar project, and the parties cross-

114 *Id.* § 1533(b)(3)(B)(iii).

115 *See, e.g.*, Ctr. for Biological Diversity v. Kempthorne, 466 F.3d 1098, 1102 (9th Cir. 2006); *see also* Ctr. for Biological Diversity v. Norton, 254 F.3d 833, 838–39 (9th Cir. 2001).

116 U.S. CONST. art. I, § 9.

117 16 U.S.C. §§ 1531–1544 (2012).

118 5 U.S.C. § 706(2)(A) (2012).

119 Silver State South Solar, LLC; Silver State Solar Power South, LLC; First Solar, Inc.; and Desert Stateline, LLC.

moved for summary judgment. The lower court found in favor of the government. The United States Court of Appeals for the Ninth Circuit reviewed the lower court's grant of summary judgment[120] *de novo*, analyzing the government's actions under the arbitrary, capricious, and abuse of discretion standard.[121]

Native to the Mojave and Sonoran deserts in southern California, southern Nevada, Arizona, and the southwestern tip of Utah, the desert tortoise is listed as "threatened." The entire habitat range of the desert tortoise is divided into six recovery units, 6.4 million acres of which is critical habitat. At issue in this case is the Eastern Mojave Recovery Unit.

In 2008, NextLight Renewable Power, LLC sought right-of-way to construct two solar power facilities, Silver State North (SSN) and Silver State South (SSS), to be built on unincorporated land in the Ivanpah Valley. In 2012, the BLM issued a Supplemental Environmental Impact Statement (SEIS) that evaluated three proposed layouts for the SSS facility. The Nevada field office of FWS recommended that the BLM reject all three layouts, expressing concern over SSS's potential impact on habitat fragmentation and genetic isolation of the desert tortoise, and the reduction in the width of the corridor between SSN and the Lucy Gray Mountains, an area important to the population connectivity[122] of the tortoise.

On February 11, 2013, the BLM initiated a formal consultation under the ESA for SSS. The consultation process, involving FWS and Silver State Solar Power South, LLC, a wholly owned subsidiary of the original applicant company, resulted in a new proposal that was authorized by the BLM in 2014, which reduced the project size and left a larger corridor. The SSS applicants agreed to fund a monitoring program in cooperation with the United States Geological Survey (USGS), that would track the effects of the SSS project on population connectivity.

On September 20, 2013, FWS released their BiOP, which was a formal review of the BLM approved plan, including the USGS cooperative plan. The BiOp designated the entire Ivanpah Valley as the "action area"[123] under review due to the potential effects on connectivity and came to several conclusions. First, SSS would not likely adversely affect the critical habitat of the desert tortoise, otherwise known as a "no adverse modification" determination. Second, SSS was unlikely to appreciably diminish the reproduction, numbers, or distribution of the desert tortoise in the action area, otherwise known as the "no jeopardy" determination. FWS also expressed some uncertainty about the effects of the reduced width of the corridor, but noted this would simply trigger re-initiation for corrective

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[120] Defs. of Wildlife v. Jewell, No. CV 14-1656-MWF (RZX), 2015 WL 12732431, at *15 (C.D. Cal. Mar. 30, 2015).

[121] 5 U.S.C. § 706(2)(A).

[122] Connectivity is "the degree to which population growth and vital rates are affected by dispersal" and "the flow of genetic material between two populations." *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1254 (2017). Connectivity "promotes stability in a species." *Id.*

[123] The Code of Federal Regulations defines an action area as "any area that might be affected by the project." 50 C.F.R. § 402.02 (2012).

action. Third, the BiOp concluded that SSS would not appreciably impede the long-term recovery of the desert tortoise. In February of 2014, the BLM issued their Record of Decision and granted the right-of-way for SSS. The record specifically approved the plan for SSS that the BLM considered.

The court considered the various parts of the BiOp, dividing their analysis into four main sections. First, the court analyzed the no jeopardy determination in the BiOp. Plaintiff objected to the no jeopardy determination, arguing that it impermissibly relied upon unspecified remedial measures. The court disagreed, reasoning that the no jeopardy finding did not rely on remedial or mitigation measures at all, as FWS expressly stated it was uncertain if the reduced width of the corridor would cause genetic or demographic instability. The court also stated that agencies may make decisions in the face of uncertainty and are not required to fill in scientific gaps; they may simply rely on the best information available at the time. The court further indicated that no precedent requires any mitigation measure to be identified or guaranteed if mitigation itself may be unnecessary. The court ultimately found that the BiOp's no jeopardy determination was neither arbitrary nor capricious.

Second, the court turned to the no adverse modification decision, dividing their analysis into two primary subsections. Subsection one was an examination of Plaintiff's contention that the Defendants were required to analyze whether SSS would adversely modify the critical habitat within the valley. Plaintiff also contended that the inclusion of the critical habitat in the action area of the BiOp is a finding that the critical habitat would be affected. The ESA requires a BiOp to analyze the effects of proposed actions on listed species or critical habitats,[124] including indirect or direct effects on those things within the action area.[125] Both the BLM and FWS concluded, by informal consultation, that SSS would be unlikely to adversely affect any critical habitat. The court explained that no formal consultation is required if both the action agency and the consulting agency determine through informal consultation that the action is not likely to adversely affect the listed species. The court additionally noted that the entire Ivanpah Valley was designated as the action area due to the potential effect of SSS on connectivity, not the critical habitat unit.

Subsection two considered Plaintiff's contention that reduced connectivity is an adverse modification of a critical habitat and that the BiOp thus was obligated to perform an adverse modification analysis. Plaintiff argued that reduction in connectivity constitutes an adverse modification because it impacts a critical habitat's recovery value. The current regulatory language promulgated by FWS defines adverse modification of a critical habitat as "a direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species."[126] The parties relied on different versions of the regulations. Defendants argued that the adverse modification of a habitat required two

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124 *Id.* § 402.14(h)(2).
125 *Id.* § 402.02.
126 *Id.*

subparts: 1) modification of habitat (a change in the habitat), and 2) that the change be adverse. Defendants also argued that a change in connectivity was a change in the species, not the habitat. Conversely, Plaintiff argued that any action that adversely impacted the recovery value of a critical habitat constituted an adverse modification, relying on the phrase "result in" within section 7 of the ESA[127] to argue that Congress intended FWS to focus on consequences. The court sided with Defendants, breaking analysis of an adverse modification into two parts, relying on both the definitions in the code[128] and the regulation commentary.[129] After deciding to analyze adverse modification in this way, the court concluded that reduced connectivity could not constitute adverse modification because the construction of SSS would not have resulted in any alteration to the critical habitat. The court noted that the corridor was not itself part of the critical habitat, and construction would not have taken place in any part of the valley which did contain critical habitat. Again, the court found the BiOp's determination of no adverse modification was neither arbitrary nor capricious.

The third section of the analysis concerned allegedly inconsistent positions in the BiOp. Divided into two parts, the court first examined FWS Nevada field office's comments to the SEIS. Plaintiff argued that the BiOp was arbitrary and capricious because FWS's comments on the BLM draft SEIS were not addressed in the BiOp. These comments included recommendations on corridor width, connectivity, and impacts on recovery. The court disagreed with Plaintiff, noting that "[a]gencies are entitled to change their minds."[130] The court went on to explain that the determination of a local agency later overruled by a higher level within the agency does not make the decision-making process arbitrary or capricious. Further, only under certain circumstances would the agency's prior factual findings be considered relevant data that should have been satisfactorily explained. The court's decision in this subsection hinged on the fact that FWS did not make any factual or scientific findings in its comments on the SEIS, and that the BiOp examined a substantially different plan.

The second part of the court's analysis of the allegedly inconsistent positions in the BiOp was Plaintiff's allegation that the BiOp contained an internal inconsistency with regard to the necessary width of the corridor. The BiOp found that the corridor would need to be a minimum of 1.4 miles wide to accommodate a tortoise's lifetime utilization area, and the effective width of the corridor was likely less than the measured width. First, the court dispensed with Plaintiff's notion that 1.4 miles is the width necessary to maintain connectivity, noting the BiOp considered 1.4 miles an estimation that provided a means to characterize a potential minimum width, but that the actual linkage-width would be highly dependent on site-specific details, particularly based on edge effects reducing the effective width of the

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127 ESA, 16 U.S.C. § 1536(a)(2), (4) (2012).

128 *Id.*

129 Interagency Cooperation—Endangered Species Act of 1973; as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214, 7216 (Feb. 11, 2016).

130 Butte Envtl. Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936, 946 (9th Cir. 2010).

corridor. The court concluded that while an edge effect might reduce the effective width of the corridor at a single point below 1.4 miles, that fact was not inconsistent with the BiOp's determination that connectivity would not be disrupted. The court also found ample evidence in the record to show that the BiOp considered what effects the edge effects would have and included measures to mitigate those effects. The court stated that because it could discern the BiOp's reasoning in concluding that there would be no significant edge effects, the decision was not arbitrary or capricious.

The fourth finding the court made was in its analysis of Plaintiff's claim that the BiOp established an impermissibly vague trigger for reinitiating formal consultation. The reinitiation component of the BiOp hinged on the findings of the USGS monitoring program, where reinitiation of formal consultation would occur if the USGS monitoring survey found changes in demographic and genetic stability related to the SSS project. Plaintiff argued that reinitiation triggers must have clear criteria that do not give unfettered discretion to federal agencies. The court disagreed with Plaintiff's argument, stating that the agency did not have to identify *ex-ante* standards for determining how information will be evaluated based on the "new information" reinitiation trigger in the ESA.[131] Further, the court noted that the BiOp did in fact include criteria, specifically the initial measurement by the USGS and then subsequent taking of measurement and comparisons with the initial measurement.

In sum, the court affirmed the grant of summary judgment by the lower court in full, stating that the BiOp was neither factually nor legally flawed, and that the BLM permissibly relied upon the BiOp in approving the SSS right-of-way.

3. Cascadia Wildlands v. Scott Timber Co., 2017 WL 5493908 (9th Cir. Nov. 16, 2017).

Several environmental groups (Plaintiffs)[132] filed suit against Scott Timber Company and Roseburg Forest Products Company (Defendants) under the Endangered Species Act (ESA).[133] Plaintiffs alleged that Defendants' logging project in the Elliott State Forest in Oregon would result in a taking of the marbled murrelet. The United States District Court for the District of Oregon granted an injunction, and the United States Court of Appeals for the Ninth Circuit reviewed the decision for abuse of discretion. The Ninth Circuit reversed and remanded for further consideration.

As an initial matter, the Ninth Circuit affirmed the district court's finding that Plaintiffs had standing, recognizing the inability to view the marbled murrelet as an aesthetic and cognizable injury. Plaintiffs established that they had concrete plans to view the area in the future and thus the potential injuries were imminent.

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131 50 C.F.R. § 402.16(b) (2017).

132 Cascadia Wildlands Project, Center for Biological Diversity, and Audubon Society of Portland.

133 16 U.S.C. §§ 1531–1544 (2012).

For a preliminary injunction to be granted, plaintiffs must meet the four-part test laid out in *Winter v. Nat. Res. Def. Council Inc.*[134] These factors are 1) likelihood of success on the merits, 2) likelihood of irreparable harm in the absence of preliminary relief, 3) a balance of equities that favors plaintiffs, and 4) a demonstration that an injunction is in the public interest.[135]

In satisfying the first factor, a sliding scale approach is permissible; specifically, where "the balance of hardships strongly favor the plaintiff," a lesser showing of "serious questions going to the merits" will suffice.[136] The Ninth Circuit held that the district court did not abuse its discretion by applying this sliding scale and ruling that serious questions did exist. The Ninth Circuit also supported the district court's findings on the third and fourth factors, noting that those factors "tip heavily in favor of protecting the endangered species."[137]

The Ninth Circuit parted ways with the district court on the second factor, requiring a showing that irreparable harm was likely. On that issue, the Ninth Circuit found the district court erred by asserting that "[t]he first and second preliminary factors are inextricably intertwined."[138] In this instance, the district court reached that conclusion because success under both factors depended upon the same evidence; that is, a demonstration that marbled murrelets occupied the proposed project area.[139] Since Plaintiffs had shown that there were "serious questions going to the merits" for the first factor—merits of a claim based on the presence of marbled murrelets—the district court determined Plaintiffs had also demonstrated a likelihood of irreparable harm to Plaintiffs viewing the marbled murrelets under the second factor.[140]

The Ninth Circuit held that the district court misapplied *Winter*. The court stated that the sliding scale approach reduces the evidentiary burden for the first factor alone. In this context, the court found that the same evidence used to establish "serious questions going to the merits" under the first factor does not also necessarily show a likelihood of irreparable harm under the second. The Ninth Circuit noted that by applying the sliding scale to meet the first factor, the district court had merely established "serious questions" as to whether marbled murrelets inhabited the area. The court found this to be a lesser showing than "*likelihood* of harm" in the same way that "serious questions" was a lesser showing than "*likelihood* of success" under the first factor. For these reasons, the court held that more was needed to satisfy the second factor and remanded to the district court.

134 555 U.S. 7 (2008).
135 *Id.* at 20.
136 All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011).
137 Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1511 (9th Cir. 1994).
138 Cascadia Wildlands v. Scott Timber Co., 190 F. Supp. 3d 1024, 1035 (D. Or. 2016).
139 *Id.*
140 Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003).

In sum, the Ninth Circuit reversed and remanded for the district court to reapply *Winter* and reconsider whether a likelihood of irreparable harm exists where there are only "serious questions going to the merits."

B. National Forest Management Act

1. *In re* Big Thorne Project, 857 F.3d 968 (9th Cir. 2017).

Several environmental groups (Plaintiffs)[141] brought suit against the United States Forest Service (USFS), with the state of Alaska proceeding as an intervenor, in the United States District Court for the District of Alaska. Plaintiffs sued under the Administrative Procedure Act (APA)[142] and the National Forest Management Act (NFMA)[143] challenging the Big Thorne logging project in Alaska's Tongass National Forest. The district court granted summary judgment to the defendants, dismissing all claims,[144] and Plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit, reviewing under the arbitrary and capricious standard,[145] affirmed.

Approved by USFS to help revive the economy of southeastern Alaska, Big Thorne authorizes logging on nearly 6,200 acres and the construction of more than 80 miles of roads in old-growth rainforest on Alaska's Prince of Wales Island. These reductions in the number of old-growth trees will impact the Alexander Archipelago wolf because "a smaller forest will support fewer deer, which, in turn, will support fewer wolves." New roads create an additional pressure by allowing wolf and deer hunter greater access to the forest. While the Alexander Archipelago wolf is not listed under the Endangered Species Act,[146] it is protected under the Forest Plan.

Under NFMA, USFS is required to develop a forest plan which sets broad goals and guidelines for managing land and resources in each national forest.[147] Agency actions must comply with both that forest plan and NFMA.[148] In this case, the relevant provisions of the Forest Plan[149] recommended protecting the Alexander Archipelago wolf by maintaining a sustainable deer population and limiting road density. The two substantive issues were 1) whether the Forest Plan provided safeguards for the Alexander Archipelago wolf in compliance with NFMA, and 2) whether USFS's approval of Big Thorne complied with the Forest Plan.

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141 Southeast Alaska Conservation Council, Alaska Wilderness League, Sierra Club, National Audubon Society, Natural Resources Defense Council, Cascadia Wildlands, Greater Southeast Alaska Conservation Community, Greenpeace, Center for Biological Diversity, and the Boat Company.

142 5 U.S.C. §§ 551–559, 701–706, 1305, 3344, 4301, 5335, 5372, 7521 (2012).

143 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012).

144 *In re* Big Thorne Project, 93 F. Supp. 3d 1134, 1151 (D. Alaska 2015).

145 5 U.S.C. § 706(2)(A) (2012).

146 16 U.S.C. §§ 1531–1544 (2012).

147 *See* 16 U.S.C. § 1604(a), (e), (g).

148 *See id.* § 1604(i).

149 U.S. DEP'T OF AGRIC. & FOREST SERV. ALASKA REGION, TONGASS NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN AMENDMENT 24 (2008), https://perma.cc/N9LG-G2NV.

As an initial matter, the Ninth Circuit held Plaintiffs had standing to bring claims under NFMA. Standing can be established by demonstrating a particularized harm to "recreational" or even "mere esthetic interests."[150] Plaintiffs argued that their harms were particularized because the Forest Plan would impact their use of the forest for fishing, hunting, and their enjoyment of solitude. The court reasoned that Plaintiffs' numerous declarations sufficiently demonstrated particularized injuries that were "fairly traceable" to the actions under the Forest Plan.[151]

Next, the Ninth Circuit held that USFS had lawfully approved the Forest Plan and turned to whether USFS was required under the Forest Plan to maintain *viable* wolf populations or *sustainable* wolf populations. While NFMA regulations at the time required that the wolf be maintained at viable populations,[152] Plaintiffs argued that USFS violated a provision within the Forest Plan calling for a sustainable wolf population.[153] Plaintiffs further argued that if the sustainability standard were discretionary, as USFS asserted, then the Forest Plan violated NFMA by failing to provide an enforceable mechanism for maintaining even viable populations.

The Ninth Circuit held that consistent with NFMA, the sustainability provision was discretionary, and what mattered under the Forest Plan was that the agency maintained viable populations. The court reasoned that the inclusion of a superseded regulation in the Forest Plan required maintenance of viable wolf populations, whereas the sustainability provision only required USFS to consider protecting sustainable populations "where possible." This discretion allowed the Forest Service flexibility in its decision making congruent with NFMA, which required USFS to balance competing-use goals.[154]

The Ninth Circuit rejected Plaintiffs' argument that by adopting a forest plan with an unenforceable sustainability provision, USFS failed to meet its obligation under NFMA. The court reasoned that USFS met its obligation under NFMA to manage competing uses. With respect to the superseded regulation requiring the agency to maintain viable populations, the court held that USFS supplied a reasonable fit between its means and ends. USFS's Record of Decision reflects that in considering alternate forest plans, USFS concluded that all alternatives had at least a moderately high probability of protecting wolf viability. The court reasoned that under a deferential standard of review, USFS's discussion of viability was neither arbitrary nor capricious.

The Ninth Circuit then concluded that USFS's approval of Big Thorne was consistent with the Forest Plan's requirement to maintain viable wolf populations. The court reasoned that USFS was required to consider protecting sustainable populations only where possible. The Ninth Circuit held that USFS's decision to prioritize "jobs over wolves" balanced

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150 Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).

151 Cottonwood Envtl. Law Ctr. v. U.S. Forest Service, 789 F.3d 1075, 1081 (9th Cir. 2003).

152 36 C.F.R § 219.19 (2000).

153 U.S. DEP'T OF AGRIC. & FOREST SERV. ALASKA REGION, *supra* note 149, at 24.

154 *See* NFMA, 16 U.S.C. § 1604(g)(3)(B) (2012).

competing goals consistent with the Forest Plan and was neither arbitrary nor capricious.[155] The court reasoned that USFS supplied a reasonable fit between means and ends by explaining that Big Thorne satisfied USFS's multiple-use mandate. Further, achieving the sustainability minimums for the wolf populations was not possible, even absent the logging plan.

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment because neither the Forest Plan nor the Big Thorne Project violated the NFMA or the APA. The court reasoned that a sustainable wolf population was a discretionary duty under the Forest Plan, and USFS had otherwise met its legal obligation under NFMA to manage for a viable population.

2. Alliance for the Wild Rockies v. Bradford, 856 F.3d 1238 (9th Cir. 2017).

The Alliance for the Wild Rockies (Alliance) brought suit to enjoin the United States Forest Service (USFS) from constructing 4.7 miles of new roads in connection with the Pilgrim Creek Timber Sale Project (Pilgrim Project) in the Kootenai National Forest. Alliance sued under the National Forest Management Act (NFMA),[156] the Endangered Species Act (ESA),[157] and the National Environmental Policy Act (NEPA).[158] The United States District Court for the District of Montana had previously granted an injunction based on Alliance's suit, which was subsequently lifted after USFS amended their Record of Decision.[159] The Alliance appealed, and the United States Court of Appeals for the Ninth Circuit, reviewing the matter under the arbitrary and capricious standard of the Administrative Procedure Act (APA),[160] affirmed.

In 2011, Montana's Kootenai Forest Plan was amended by the Forest Plan Amendments for Motorized Access Management[161] within the Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones (Access Amendments). Design Element II(B) of the Access Amendments[162] caps the maximum linear miles of permanent road allowed in Kootenai National Forest. Standard II(B) further notes that temporary increases in linear miles of road are acceptable, and do not count toward a permanent increase in road miles, so long as the roads are not open for public use and remain closed in a manner that effectively prevents motorized access when their use by USFS ceases. In 2013, USFS approved the Pilgrim Project.

The Ninth Circuit held that it was not arbitrary and capricious for USFS to decide that roads closed to motorized access by their proposed barriers

155 APA, 5 U.S.C. § 706(2)(A) (2012).

156 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012).

157 16 U.S.C. §§ 1531–1544 (2012).

158 42 U.S.C. §§ 4321–4370h (2012).

159 All. for the Wild Rockies v. Bradford, 35 F. Supp. 3d 1246, 1253–54 (D. Mont. 2014), *aff'd sub nom.*, 856 F.3d 1238, 1241–42 (9th Cir. 2017).

160 5 U.S.C. § 706(2)(A) (2012).

161 U.S. DEP'T OF AGRIC., FOREST PLAN AMENDMENTS FOR MOTORIZED ACCESS MANAGEMENT WITHIN THE SELKIRK AND CABINET-YAAK GRIZZLY BEAR RECOVERY ZONES RECORD OF DECISION (2011).

162 *Id.* at 62–63.

would not count toward the maximum linear miles of total road under Design Element II(B). Alliance conceded that USFS had promised to use a berm, barrier, or other device to close the 4.7 miles of road to motorized access after completion of the work, but argued that the roads would continue to count as permanent increases to the linear miles of total road. The court noted Alliance put forward arguments that supported an alternative interpretation of Design Element II(B), but in the face of ambiguity the court defers to USFS's reading of their own Forest Plan, and Alliance's arguments did not render USFS's interpretation unreasonable.

The Ninth Circuit rejected Alliance's argument that USFS's planned closures would not effectively prevent motorized access as required under Design Element II(B). The court stated that Alliance had not put forward any evidence causing it to doubt that USFS would effectively barricade the road, but noted that if USFS were to fail in effectively preventing motorized access it would be in violation of Design Element II(B). For that reason, the court found that the initial injunction sought by Alliance was properly sustained, noting that USFS had not complied with the provision up to that point.

In sum, the Ninth Circuit affirmed the district court's lifting of the injunction on USFS's project. The court decided that Alliance had not put forward evidence to demonstrate that USFS's reading of the Access Amendments was arbitrary or capricious, nor to cause doubt in USFS's planned actions.

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

Alliance for the Wild Rockies (Alliance) brought an action against the United States Forest Service (USFS).[163] Alliance sought a preliminary injunction of alleged violations of the National Forest Management Act (NFMA)[164] and the National Environmental Policy Act (NEPA).[165] The district court concluded that Alliance failed to satisfy any of the required factors for the issuance of a preliminary injunction.[166] Reviewing for clear error, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the District of Eastern Washington's opinion not to grant a preliminary injunction.

Under NEPA, if an agency's environmental assessment (EA) reveals that a proposed action will significantly affect the environment, the agency must prepare an environmental impact statement (EIS). USFS issued an EA for a forest restoration project and determined that the project did not require an EIS. The North Fork Mill Creek A to Z forest restoration project

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163 Defendants included Jim Pena, in his official capacity as Regional Forester of Region Six and Rodney Smoldon, in his official capacity as Supervisor of the Colville National Forest. Stevens County, Northeast Washington Forestry Coalition, and Pend Oreille County intervened as defendants.

164 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012).

165 42 U.S.C. §§ 4321–4370h (2012).

166 All. for the Wild Rockies v. Pena, No. 2:16-CV-294-RMP, 2016 WL 6123236, at *1 (D. Wash. Oct. 19, 2016).

(A to Z Project)[167] involved commercial timber harvests, road maintenance, stream restoration, and culvert replacements on 12,802 acres within the Colville National Forest in Washington. Alliance sought a preliminary injunction of the project. A party seeking a preliminary injunction must meet the original *Winter*[168] standard or the variant "sliding scale" test.[169] The Ninth Circuit found that Alliance did not satisfy either test because the group did not demonstrate a likelihood of success or raise serious questions about the NFMA and NEPA claims.[170]

The court rejected Alliance's three claims. First, Alliance alleged USFS violated the Colville Forest Plan and NEPA by using improper proxy analyses to conclude that the forest project would not significantly impact the viability of the pine marten and fisher species. Alliance primarily argued that the pine marten had not been spotted in the project site since 1995, and that such a prolonged absence meant the species was an unreliable proxy. The Ninth Circuit disagreed. The court found the proxy reliable because the absence of a species does not necessarily invalidate the proxy analysis and because Alliance failed to "level specific criticisms at the Forest Service's habitat methodology."[171] For this reason, the court found that Alliance raised no serious NEPA or NFMA questions regarding the EA's proxy analysis.

Second, Alliance alleged that the project violated the Colville Forest Plan and NEPA by failing to recognize the decrease in snow-intercept cover and the increase in open road density as significant environmental impacts. The challenge to the snow-intercept analysis was two-fold. Alliance first presented scientific evidence that it claimed demonstrated a significant environmental impact. Alliance also argued that the EA had only analyzed snow-thermal cover in two areas of the forest, instead of the full winter range for big game animals as recommended in the Colville Forest Plan document. The Ninth Circuit rejected the scientific evidence claim because it found USFS methodology supported the agency decision, and the court's role is not to weigh competing scientific analysis presented by an environmental group and an agency. On the second issue, the Ninth Circuit found that the decision to analyze only two areas of the forest for effects on snow coverage did not violate the Colville Plan. An analysis of the entire winter range was a "suggested solution" of a monitoring report, not a requirement. Finally, regarding the road density analysis, the Ninth Circuit

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

168 A party must show "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

169 Under the sliding scale variant test of the *Winter* standard, "if a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied." Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011)).

170 Because Alliance did not meet the first of the required factors regarding its NFMA and NEPA claims, the court found it did not need to weigh the additional factors.

171 Friends of the Wild Swan v. Weber, 767 F.3d 936, 949–50 (9th Cir. 2017).

rejected the claim that the EA violated NEPA or NFMA because only a small portion of the proposed 30 miles of roads would be built on the relevant area and all of these roads would be decommissioned once the project came to an end.

Alliance's final allegation was that USFS violated NEPA by making an arbitrary and capricious determination that sediment accumulations in streams within the project site did not constitute a significant environmental impact. The Ninth Circuit upheld USFS's determination for four reasons. First, the court noted that federal agencies may consider the effect of mitigation measures in determining whether preparation of an EIS is necessary. Second, the court found that USFS properly weighed the net benefit of sediment reduction and the sequence of sediment reduction followed by sediment increases to determine that the project would not create a significant net environmental impact. Third, rejecting Alliance's argument that sediment reduction measures will not affect all areas of sediment accumulation, the court reasoned that mitigation measures must not completely compensate for environmental impacts. USFS's selection of "hot spots" accounted for two-thirds of annual sediment delivery, thus rendering Alliance's argument unavailing. Fourth, the court found that USFS expressly considered potential sediment impact from grazing in the project area, and the agency nevertheless approved the proposal to authorize the grazing. Accordingly, the Ninth Circuit found that this claim, like the others, failed to show either serious questions or a likelihood of success on the merits. Thus, the claim did not warrant a preliminary injunction.

In sum, the Ninth Circuit affirmed the decision of the district court, finding that it did not abuse its discretion in concluding that Alliance failed to demonstrate either serious questions or a likelihood of success with respect to the merits of any of its NFMA or NEPA claims.

4. Wild Wilderness v. Allen, 871 F.3d 719 (9th Cir. 2017).

Wild Wilderness, Winter Wildlands Alliance, and Bend Backcountry Alliance (collectively, Wild Wilderness) sued the United States Forest Service (USFS) in the United States District Court for the District of Oregon. Oregon State Snowmobile Association and other pro-snowmobile groups[172] (collectively, Snowmobile Association) joined the case as defendant-intervenors. Wild Wilderness brought the action under the Administrative Procedure Act (APA),[173] alleging that USFS's approval of the Kapka Sno-Park, a parking lot in the Deschutes National Forest in Central Oregon, violated the National Environmental Policy Act (NEPA)[174] and the National Forest Management Act (NFMA).[175] The district court entered summary

[172] Intervenor Oregon State Snowmobile Association was joined by Snowmobile Associations, Ken Roadman, and Elk Lake Resort.

[173] 5 U.S.C. §§ 551–559, 701–706, 1305, 3344, 4301, 5335, 5372, 7521 (2012).

[174] 42 U.S.C. §§ 4321–4370h (2012).

[175] 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012).

judgment in favor of USFS.[176] The United States Court of Appeals for the Ninth Circuit, reviewing *de novo*, affirmed.

This controversy involved USFS's response to conflicts between cross-country skiers and snowmobilers in the Cascade Lakes Highway area of Deschutes National Forest. In 2004, USFS banned snowmobiles from approximately 1,375 acres of the forest in an effort to reduce conflicts over parking as well as the noise and tracks left by snowmobiles. In 2006, USFS proposed building a new sno-park to reduce parking congestion and user conflicts over the area. While Kapka Butte Sno-Park would be primarily for motorized users, the neighboring Dutchman Sno-Park and its immediate surroundings would close to motorized use.

USFS then narrowed its focus. In 2009, it issued a new proposal addressing only the parking shortage near the Dutchman area. USFS issued a Draft Environmental Impact Statement (EIS) in April 2011 with a stated purpose of providing additional parking capacity and trails for Nordic skiers with dogs. No alternatives that would have limited motorized use were considered.

In 2012, days after deciding to jointly lead the EIS with Federal Highway Administration (FHWA), USFS withdrew the Draft EIS and issued a Finding of No Significant Impact (FONSI) and an Environmental Assessment (EA) instead. Two months later, USFS issued its final EA. The final project consisted of a parking lot with a capacity for seventy vehicles with trailers and two connector trails. The trails were not opened to dogs. Wild Wilderness filed administrative appeals, which were denied, and then filed this suit. USFS has since completed construction of Kapka Snow-Park.

As a preliminary matter, the Ninth Circuit first analyzed Snowmobile Association's argument that the case was moot since construction of Kapka Sno-Park had been completed. Pointing to several available remedies identified in Wild Wilderness's brief, the court held that the case was not moot because Snowmobile Association had failed to establish that no effective relief remained. Relatedly, the court considered whether Wild Wilderness's claims lacked redressability. Arguing that Wild Wilderness's true goal was to reduce the areas available to snowmobiles, Snowmobile Association claimed that no remedy was available because the contested action did not result in more areas opened to snowmobile use. The court concluded that Wild Wilderness's claims did not lack redressability because the court could still grant some effective relief.

The Ninth Circuit next considered the merits of the case. Wild Wilderness argued that USFS violated the NFMA by approving Kapka Sno-Park in a manner inconsistent with the Deschutes Forest Plan. First, Wild Wilderness claimed that USFS failed to comply with steps that would "generally be taken" when conflicts developed between non-motorized groups, including closing the area to motorized use. Wild Wilderness argued that the provision mandated closure to motorized users in times of conflict and forbade USFS from building extra parking because user conflicts

[176] Wild Wilderness v. Allen, 12 F. Supp. 3d 1309, 1330 (D. Or. 2014).

persisted. Reasoning that these steps were merely aspirational, the court held that the plan did not mandate closure of any area to motorized use. The court found no evidence in the record to show that USFS had ever interpreted the Forest Plan this way.

Second, Wild Wilderness argued that under the NFMA, Kapka Sno-Park was inconsistent with the Forest Plan's Recreation Opportunity Spectrum. Wild Wilderness asserted that the parking area was improperly sited in a "Scenic Views" area because "[p]arking facilities . . . will normally be placed where they are not visible from significant viewer locations."[177] Like the first provision, the court found this language to be nonbinding guidance on USFS.

Third, the Ninth Circuit analyzed Wild Wilderness's claims under NEPA. Wild Wilderness first claimed that USFS violated NEPA by issuing the Draft EIS only to reverse course and issue a FONSI and a final EA instead. Wild Wilderness argued that USFS was required to issue a reasoned explanation of its decision to issue an EA instead of an EIS. Furthermore, they asserted that USFS improperly withdrew the EIS so the FHWA would not have to sign a Record of Decision required of both joint-lead agencies on the EIS. The court disagreed. It concluded that USFS was obligated to explain why the EIS was no longer necessary, present a summary or an EA, and publish a withdrawal notice in the Federal Register—all steps taken by the agency. However, it found no support for a procedural requirement to explain why it chose to reverse course or how it planned to comply with its own procedural requirements.

Wild Wilderness also claimed that USFS violated NEPA by failing to provide a convincing statement of reasons that Kapka Sno-Park would not significantly affect the environment. Wild Wilderness argued that the degree to which the project would affect the environment was likely to be highly controversial, satisfying the "intensity" factor of the significance test. The court again disagreed, finding that Wild Wilderness's anecdotal evidence did not satisfy the sort of scientific controversies needed for this factor to undermine the reasonableness of USFS's conclusions.[178]

Finally, the Ninth Circuit considered Wild Wilderness's claims that the EA's Statement of Purpose and Need as well as range of alternatives for Kapka Sno-Park were unreasonably narrow because they ignored on-snow user conflicts. Wild Wilderness argued USFS itself had determined the issues of parking shortage and user conflicts could only be adequately addressed together. However, the court found no evidence in the record to support such a conclusion. The court held that given the agency's discretion to articulate an action's Statement of Purpose and Need, USFS was not unreasonable to tackle only parking congestion. Thus, since the Statement of Purpose and Need was not unreasonably narrow, the court concluded that neither was the range of alternatives. The court reasoned that by considering four significantly distinct alternatives in detail, along with seven

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177 U.S. DEP'T OF AGRIC., RECORD OF DECISION FOR DESCHUTES FOREST PLAN (1990).

178 Wild Wilderness also argued that the action threatened a violation of federal law, the NFMA. Having already concluded that the Kapka Sno-Park did not violate the NFMA, the court held that the action did not threaten a violation of federal law.

briefly considered additional alternatives, the agency satisfied its requirement to evaluate alternates reasonably related to the purpose of the action.[179]

In sum, the Ninth Circuit held that USFS acted within the Forest Plan and NFMA when it approved construction of the Kapka Sno–Park, and USFS complied with the procedural and substantive requirements under NEPA in doing so. For these reasons, the court affirmed the district court's grant of summary judgment.

C. Federal Insecticide, Fungicide and Rodenticide Act

1. Center for Biological Diversity v. U.S. Environmental Protection Agency, 847 F.3d 1075 (9th Cir. 2017).

The Center for Biological Diversity (CBD) filed suit against the United States Environmental Protection Agency (EPA) and intervenors[180] on February 2, 2017, in the United States District Court for the Northern District of California. CBD alleged Endangered Species Act (ESA)[181] and Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[182] violations. Specifically, CBD challenged EPA's reregistration eligibility determinations (REDs) for different pesticides, alleging that EPA failed to consult with relevant agencies before issuing the REDs. According to CBD, approving the pesticides through the REDs "may affect" various listed endangered species or their habitats. On appeal by defendants, the United States Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded.

The ESA seeks to protect and conserve endangered and threatened species and their habitats. The statute requires federal agencies to consult with National Marines Fisheries Service and Fish and Wildlife Service to ensure their discretionary actions do not jeopardize endangered and threatened species, or adversely modify a listed species' critical habitat. FIFRA charges EPA with the obligation to register and reregister pesticide active ingredients and pesticide products. FIFRA provides a comprehensive regulatory scheme for the use, sale, and labeling of pesticide active ingredients and pesticide products. In this case, CBD alleged consultation violations with 382 pesticides through thirty-one claims for relief in its

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179 Wild Wilderness further argued that the project may cause cumulatively significant effects. The court rejected this argument, too, because the EA examined the cumulative effects with related actions and none of the related potential actions appeared to compound on-snow user conflicts.

180 Responsible Industry for a Sound Environment, Southern Crop Production Association, Western Plant Health Association, Midamerica Croplife Association, American Farm Bureau Federation, American Chemistry Council, National Agricultural Aviation Association, National Alliance of Forest Owners, National Corn Growers Association, National Cotton Council, National Council of Farmer Cooperatives, National Potato Council, Oregonians for Food and Shelter, USA Rice Federation, and Washington Friends of Farms and Forests.

181 16 U.S.C. §§ 1531–1544 (2012).

182 7 U.S.C. §§ 136–136y (2012).

amended complaint. The district court ruled in favor of EPA but granted CBD leave to amend or add facts regarding impermissible collateral attacks.[183] Instead of amending, CBD appealed the decision. The Ninth Circuit affirmed all the dismissals but one; the court concluded that the district court erred regarding the collateral attack doctrine.

The court analyzed CBD's claim in four categories to determine whether each category constituted an agency action. First, category one dealt with the claims on EPA's issuance of the RED or amended RED. Second, category two dealt with EPA's continued discretionary control and involvement in the pesticide's active ingredients and registration. Category three dealt with EPA's completion of pesticide product reregistration for specific active ingredients. Last, category four dealt with EPA's approvals of pesticide products containing a pesticide's active ingredient.

The first issue was whether to apply a statute of limitations for a Section 7 citizen suit[184] filed in a district court that challenges EPA's decision to register or reregister a pesticide ingredient or product. This raised a statute of limitations question of first impression for the court. CBD argued for no limitations because EPA had a continuing duty to comply. The court disagreed and dismissed the category one sub-claims because when a statute does not specify a limitation, federal courts must apply the general statute of limitations that most closely addresses the basis for plaintiff's claim.

The next issue was whether subject matter jurisdiction existed for the district court to properly hear sixteen remaining category one sub-claims. The court held that, for purposes of FIFRA, a Section 7 claim raised after EPA undertakes public notice and comment must comply with FIFRA's jurisdictional provisions. The claims did not comply, and so the provisions supported the district court's dismissal of the sixteen remaining sub-claims for lack of subject matter jurisdiction.

Next, the court turned to category two sub-claims. CBD alleged that the continued discretionary control and involvement in these pesticide registrations constituted ongoing agency action. CBD reasoned that EPA's "ongoing violation" provides an adequate basis for a Section 7 claim, and consequently, a plaintiff should not be required to identify a separate and affirmative discretionary action for a Section 7 claim to accrue. The court disagreed, finding that an ESA claim accrues only when an agency takes discretionary, affirmative action. Here, the court found that CBD had "conflate[d] an ongoing duty with an ongoing violation."[185]

The court next reviewed the category three sub-claims alleging that EPA's completion of all pesticide product reregistration for a particular pesticide active ingredient created an affirmative agency action triggering Section 7 consultation. The court held that completion of a pesticide product reregistration differed from the official act of seeking registration. The court

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[183] Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency, 65 F. Supp. 3d 742, 772 (N.D. Cal. 2017).

[184] 16 U.S.C. § 1536(n).

[185] Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1087 (9th Cir. 2003).

described the completion of reregistration as nothing more than "a date," and held it cannot trigger Section 7 consultation.

In the final category of four sub-claims, CBD contended that EPA's approval of individual pesticide products was an affirmative agency action triggering ESA Section 7 consultation. On this issue, the court agreed with the district court that pesticide product reregistration was an affirmative agency action. The court also disagreed that these claims were a collateral attack on the publication of the REDs. The court reasoned that publication of a RED for a pesticide active ingredient was not the agency's final decision on reregistration of a pesticide product. Since a RED does not contain all the research upon which EPA relied when reaching its decision, the reregistration of an individual pesticide product was its own triggering action. The court further reasoned that the collateral attack doctrine did not apply because CBD did not seek to unravel a prior agency order or attempt to challenge any of the analyses contained in the REDs. Based on this analysis, the Ninth Circuit reversed the district court's dismissal of all category four sub-claims.

In sum, the Ninth Circuit affirmed the dismissal of all category one, two, and three sub-claims and reversed the dismissal of all category four sub-claims.

2. Natural Resources Defense Council v. U.S. Environmental Protection Agency, 857 F.3d 1030 (9th Cir. 2017).

The Natural Resources Defense Council (NRDC)[186] petitioned the United States Court of Appeals for the Ninth Circuit for review of a pesticide registration promulgated by the United States Environmental Protection Agency (EPA). NRDC challenged EPA's conditional registration of NSPW-L30SS (NSPW) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[187] NRDC argued that EPA failed to substantially support its finding that use of NPSW was in the public interest. Reviewing the grant of conditional registration for substantial evidence, the Ninth Circuit concluded that EPA failed to adequately support its public interest finding. The court vacated the registration in whole.

NSPW is an antimicrobial materials preservative incorporated into plastics and textiles to suppress the growth of bacteria, algae, fungus and mold.[188] The active ingredient in NSPW is nanosilver, a version of conventional silver with a much smaller particle size. Although silver is the active ingredient in other registered materials preservatives, the FIFRA Scientific Advisory Panel cautioned that its hazard profile may differ from

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186 Petitioners included Center for Food Safety and International Center for Technology Assessment.

187 7 U.S.C. §§ 136–136y (2012).

188 Under FIFRA, pesticides include "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u). Pests include, among other organisms, fungus, virus, bacteria, or other microorganisms. *Id.* § 136(t).

conventional silver and recommended that EPA treat nanosilver as different from other forms of silver.

In 2015, EPA determined that NSPW would not cause unreasonable adverse effects on the environment and granted NSPW conditional registration. EPA found that compared to conventional silver preservatives, NSPW used less silver and was less likely to release silver into the environment in detectable quantities. Reasoning that NSPW had the potential to reduce risks caused by silver, EPA found that granting conditional registration was in the public interest. NRDC opposed the conditional registration during public notice and comment and petitioned the Ninth Circuit for review of EPA's decision.

Noting the absence of any prior decision considering the public interest requirement under FIFRA, the court derived a test by consulting the text of the statute and the legislative history. The statute sets forth that EPA may conditionally register a pesticide for the limited period of time that data is gathered only if EPA first determines that "use of the pesticide is in the public interest."[189] The legislative history further indicates that the conditional registration should be reserved for a truly exceptional case, and that the public interest requirement is a more stringent test.

The Ninth Circuit then considered whether EPA's finding that NSPW's potential to reduce the amount of silver released into the environment satisfied the public interest test. NRDC argued that EPA's conclusion relied on two unsubstantiated assumptions: 1) that current users of conventional silver pesticide would switch to NSPW, and 2) that NSPW would not be incorporated into other new products. To the first point, EPA argued that as a logical matter NSPW would be substituted for conventional silver. For support, EPA referenced a 1983 Federal Register entry suggesting that, given the finite and inelastic nature of the pesticide market, increased competition may shift demand from one product to another. To the second point, EPA argued only that no evidence suggested NSPW would be incorporated into new products. While the Ninth Circuit did not foreclose the possibility that EPA could have proven these assumptions, the court found that EPA had failed to support its public interest finding with substantial evidence.

In sum, the Ninth Circuit found that, in granting NSPW with conditional registration, the EPA failed to support the required public interest finding with substantial evidence. Accordingly, the Ninth Circuit vacated the conditional registration.

D. Magnuson-Stevens Fishery Conservation and Management Act

1. Turtle Island Restoration Network v. Department of Commerce, 878 F.3d 725 (9th Cir. 2017).

Turtle Island Restoration Network and the Center for Biological Diversity (Plaintiffs) challenged the decision of the National Marine

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[189] *Id.* § 136a(c)(7).

Fisheries Service (NMFS) allowing a Hawaiian swordfish fishery to increase efforts, which may result in unintentional deaths of endangered sea turtles. Plaintiffs also challenged the decision of the United States Fish and Wildlife Service (FWS) to issue a "special purpose" permit to NMFS authorizing the fishery to incidentally kill migratory birds. Plaintiffs sued under the Magnuson-Stevens Fishery Conservation and Management Act (the Act),[190] the Endangered Species Act (ESA),[191] the Migratory Bird Treaty Act,[192] and the National Environmental Policy Act (NEPA).[193] Reviewing under the arbitrary and capricious standard,[194] the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the United States District Court for the District of Hawaii's grant of summary judgment in favor of NMFS.[195]

The Act tasks NMFS and other entities with developing plans for the nation's fisheries, consistent with the national standards within the Act and any other applicable law. The ESA requires that agency action that is authorized, funded, or carried out is "not likely to jeopardize the continued existence" of ESA-listed species.[196] Agencies must consult with either the NMFS or the FWS for a review of the proposed action, and the preparation of a biological opinion (BiOp) that evaluates whether, and to what extent, the action may impact the species.[197] If the proposed action would not jeopardize a species' existence, then the NMFS or FWS issues a "taking" permit for a specific number of protected animals, as long as the taking is incidental to the activity. The FWS has further authority to enforce the MBTA, which governs the taking of any migratory bird protected by the Endangered Species Act except under a valid permit issued by the Secretary of the Interior.[198]

In 2008, NMFS proposed an amendment to the plan for the Pelagic Fisheries of the Western Pacific Region allowing increased fishing activity. NMFS produced a BiOp concluding that the amendment would not jeopardize the sea turtles at issue, and then issued a final rule implementing the amendment. Plaintiffs sued, prompting NFMS to withdraw the 2008 BiOp and issue a new 2012 BiOp with another no jeopardy conclusion for the sea turtles. NMFS at the same time applied to FWS for a permit allowing the fisheries involved to take migratory seabirds; in 2012, FWS issued a finding of "no significant impact" and granted a three-year permit authorizing a certain number of migratory bird killings. In response to these actions, Plaintiffs filed the lawsuit considered here, with the district court ruling in favor of defendants on all claims. Plaintiffs appealed. As a preliminary

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190 16 U.S.C. §§ 1801–1891d (2012).
191 16 U.S.C. §§ 1531–1544 (2012).
192 16 U.S.C. §§ 703–712 (2012).
193 42 U.S.C. §§ 4321–4370h (2012).
194 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).
195 Turtle Island Restoration Network v. U.S. Dep't. of Commerce, No. 12-00594 SOM-RLP, 2013 WL 4511314, at *1 (D. Haw. Aug. 23, 2013).
196 16 U.S.C. § 1536(a)(2).
197 16 U.S.C. § 1536(b).
198 16 U.S.C. § 703(a).

matter the court first noted that, distinct from the arbitrary and capricious standard, it is required to give deference to an agency's interpretation of statutes and regulations that define the scope of its authority.[199]

The Ninth Circuit first considered the decision by FWS to issue a special purpose permit to NMFS on behalf of a commercial fishery, a decision that it found was arbitrary and capricious. The court stated that ordinarily FWS's interpretation of 50 C.F.R. § 21.27[200] would deserve deference, but that in this instance the plain language of the regulation was not reasonably susceptible to FWS's interpretation. FWS argued that the phrase "related to migratory birds" was not a restriction on its permitting authority and that longline fishing was "related to migratory birds" because it incidentally interacted with them. The court disagreed, holding that it was not reasonable to say that every activity risking the lives of migratory birds related to them.

Second, the Ninth Circuit disagreed with the determination by NFMS in the 2012 BiOp that the loggerhead turtle population would remain "large enough to retain the potential for recovery."[201] The court found this decision arbitrary and capricious because NMFS had not articulated a rational connection between the best available science and the conclusion that the loggerhead turtles would not be affected by increased fishing efforts. NMFS's model showed the loggerhead turtles heading toward extinction and, when matched with other evidence of the decline of species viability, the proposed action would impermissibly accelerate that decline.

Third, the court held that NMFS did not act arbitrarily and capriciously in determining that the fishery would have no appreciable effect on the leatherback turtle population. Plaintiffs argued that NMFS erred in limiting the timeframe of the analysis, but because an agency has discretion between available scientific models[202] and the court is not intended to act in the place of scientists,[203] the Ninth Circuit decided the constraints in available data reasonably justified the choice.

Finally, the court decided that the consideration of climate change in the 2012 BiOp by NMFS was neither arbitrary nor capricious and was not contrary to NMFS's obligation to utilize the best scientific data obtainable in its decision. Plaintiffs argued the 2012 BiOp had not evaluated the impact of climate change and NMFS acted arbitrarily by dismissing the effects of global warming on sea turtles without further study. The Ninth Circuit held that NMFS had in fact considered several ways global warming might affect sea turtles, and a decision that the data was indeterminate was permissible because the court could not insist on perfection if there was no superior data available.

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199 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

200 *See* 50 C.F.R. § 21.27 (relating to special purpose permits).

201 NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT – SECTION 7 CONSULTATION: BIOLOGICAL OPINION 108 (January 30, 2012), https://perma.cc/F23F-8V79.

202 San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 997 (9th Cir. 2014).

203 The Lands Council v. McNair, 537 F.3d 981, 988 (9th Cir. 2008).

In sum, the court found that the FWS grant of an incidental take permit to NMFS was arbitrary and capricious because FWS did not properly interpret 50 C.F.R. § 21.27, and the NMFS 2012 BiOp finding of no jeopardy to loggerhead sea turtles was arbitrary and capricious because of the insufficient explanation regarding the difference between the opinion and the evidence. On these counts, the court reversed the district court's decision to grant summary judgment. The Ninth Circuit affirmed the remainder of the district court's grant of summary judgment upon finding the defendants' other decisions reasonable and justified.

A dissenting opinion from Judge Callahan challenged the majority's holding that FWS issuance of a special purpose permit under the MBTA for the incidental take of migratory birds was impermissible. The dissent stated that the court misapplied the standard of review under *Auer v. Robbins*[204] because both 50 C.F.R. § 21.27 and the MBTA allowed the FWS decision. Additionally, the special permit was in keeping with past practices of FWS. The FWS incidental take policy toward ESA-listed migratory birds does not preclude the agency from issuing permits for non-ESA-listed migratory birds. The dissent stated that the permit issuance reflected considered judgment, which is another basis for deference under *Auer*. Further, because the agency interpretation of § 21.27 could be reconciled with the text of the regulation, *Auer* provided that the court defer to FWS. Finally, the dissent reasoned that the issuance of the permit aligned with the MBTA's conservation purpose.

The dissent also stated that the majority erred in rejecting the 2012 BiOp's assessment of the effect on loggerhead turtles by substituting its own judgement for that of the agency. The dissent posited that NMFS reached a reasonable conclusion regarding the loggerhead turtles, and properly applied the decision from *National Wildlife Federation v. National Marine Fisheries Service*[205] by considering the incremental impact of the proposed action along with the degraded baseline conditions.

III. MISCELLANEOUS

A. National Environmental Policy Act

1. Barnes v. Federal Aviation Administration, 865 F.3d 1266 (9th Cir. 2017).

Oregon Aviation Watch and several individuals[206] (collectively, Plaintiffs) brought suit against the Federal Aviation Administration (FAA) challenging an order that determined an airport runway expansion project at the Hillsboro Airport in Oregon would have no significant impact on the environment. The owner of the airport, Port of Portland, intervened in the case. The United States Court of Appeals for the Ninth Circuit granted the

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204 Auer v. Robbins, 519 U.S. 452, 461 (1997).

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

206 Michelle Barnes, Patrick Conry, Blaine Ackley, David Barnes, and James Lubischer.

petition for review and remanded to FAA for further consideration of the concern that a new runway would increase the number of takeoffs and landings. Upon remand, the FAA prepared a supplemental environmental assessment which again found no significant environmental impact. Plaintiffs, in turn, filed a second petition for review. The Ninth Circuit, reviewing under the arbitrary and capricious standard of the Administrative Procedure Act (APA),[207] denied the petition.

Hillsboro Airport (HIO) is located in Hillsboro, Oregon, approximately eighteen miles outside of Portland. In 2005, HIO began working on a Master Plan for the airport, including the runway expansion at the center of the suit. The modifications were funded partially by FAA grants and, because of these grants, the environmental effects of the project required assessment. In 2010, after examining the report compiled by the Port, the FAA made its initial finding of no significant impact.

Plaintiffs challenged this initial finding, petitioning the Ninth Circuit for judicial review. Upon remand, pursuant to the requirement that the Port examine the issue of increased flight traffic, the Port created and produced a supplemental environmental assessment (SEA). Based on the SEA, the FAA made the same determination of no significant impact. Plaintiffs' main contention in their request for review of the second FAA conclusion was that the FAA did not fulfill the requirement to take a "hard look" at the environmental impacts of the additional air traffic under the National Environmental Policy Act (NEPA).[208] Plaintiffs also contended that the circumstances of the project required a full environmental impact statement (EIS), and that the FAA did not comply with a requirement under the Airport and Airways Improvement Act (AAIA)[209] to ensure that the new runway complied with the plans of local agencies.

The court made three determinations of law. First, Plaintiffs' were incorrect in challenging the SEA as insufficient to constitute a "hard look" under NEPA. Second, Plaintiffs' arguments related to the "significance" of the project were insufficient to trigger the requirement for an EIS. Third, Plaintiffs' argument that the FAA must ensure the project complies with local agency plans failed because the FAA had considered the applicable city zoning ordinances.

When the court addressed Plaintiffs' challenge to the SEA as insufficient under NEPA, it addressed six different claims. First, it examined the challenge to the pollution forecasting methodologies the FAA considered, and agreed with the FAA's assessment that even with the worst possible forecast pollution, increases would not exceed a *de minimis* amount. Second, the court examined the contention that the FAA did not assess the existing amount of lead in the soil and water in the area surrounding the airport, agreeing with the FAA conclusion that increased air traffic would have little to no effect on the lead levels in the surrounding

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207 5 U.S.C. § 706(2)(A) (2012).

208 42 U.S.C. §§ 4321–4370h (2012); Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

209 49 U.S.C. § 47106(a)(1) (2012).

area. Third, the court looked at Plaintiffs' claim that the FAA did not adequately examine the impact increased lead emissions would have on children. The court found that the FAA properly used EPA's lead limit regulations when considering the maximum emissions amounts and the FAA's determination that the lead emissions fell below the limits for "sensitive" populations was correct. Fourth, the court inspected Plaintiffs' claim that the SEA did not adequately account for the amount of lead that would be emitted in a typical flight. The court determined that the FAA was entitled to deference for its emissions calculation methodology and did not seek to impose another methodology. Fifth, the court dispensed with Plaintiffs' claim that the SEA did not account for water pollution by noting that the SEA discussed these items in detail. Finally, Plaintiffs argued that the SEA should have included twenty years of emissions projections rather than ten. The court disagreed, finding that it was within the agency's discretion to limit the temporal scope of the SEA.

The court divided its analysis of the challenge to the "significance" of the project into four main sections. First, the court found that, consistent with prior case law, a full EIS is not required merely because an SEA reveals the potential for a minor impact. Second, the court rebuked Plaintiffs' contention that the project would have some kind of unique impact on children because of its location, citing its earlier discussion of lead impacts on children. Third, the court dispensed with Plaintiffs' argument that the location had "unique geographical characteristics," stating "[Plaintiffs] provided no reason to conclude there is anything unique about an airport near a residential area."[210] Plaintiffs' last argument that the project's effects were likely to be "highly controversial" were similarly dismissed. The court found that there was no controversy because the difference in results between two lead analyses was the result of a calculation error since corrected, not a difference in opinion among examiners.

The challenge to the project under the AAIA was given short shrift in comparison to Plaintiffs' other claims. The court concluded that, despite Plaintiffs' success in having the two implicated airport zoning ordinances invalidated, the city intended to correct and reinstate the ordinances and the FAA's consideration of these plans was not arbitrary or capricious.

In sum, the court concluded that by adopting the SEA, issuing the finding of no significant impact, and determining that HIO complied with the requirements of the AAIA, the FAA did not act in an arbitrary or capricious manner. Therefore, the court denied the petition for review.

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[210] Barnes v. Fed. Aviation Admin., 865 F.3d 1266, 1275 (9th Cir. 2017).

B. Tribal Water Rights

1. Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, 849 F.3d 1262 (9th Cir. 2017).

The Agua Caliente Tribe (the Tribe)[211] brought an action for declaratory and injunctive relief against the Coachella Valley Water District (CVWD) and the Desert Water Agency (DWA) in the United States District Court for the Central District of California. The Tribe requested a declaration that it had a federally reserved right to the groundwater underlying its reservation. The district court granted in part and denied in part the plaintiffs' and defendants' cross motions for partial summary judgment, holding that the federal reserved rights doctrine applied to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation.[212] The water agencies appealed. The United States Court of Appeals for the Ninth Circuit affirmed, agreeing that the reserved rights doctrine applies to groundwater and holding that the Tribe had a reserved right to the groundwater underlying its reservation because of the purpose for which the reservation was established.

The Tribe has lived in the Coachella Valley since before California became a state. The Agua Caliente Reservation was established primarily by two presidential executive orders, with some lands held in trust for the Tribe by the United States. The executive orders provided that these lands be set aside "for the permanent use and occupancy of the Mission Indians in southern California" and for "Indian purposes."[213] Government reports made prior to the executive orders indicate that, in establishing the reservation, the United States sought to "secure the Mission Indians permanent homes, with land and water enough."[214]

However, the Coachella Valley is arid, with surface water practically nonexistent for the majority of the year. Almost all of the water consumed in the region comes from the Coachella Valley Groundwater Basin. Since demand for the groundwater is high, the basin has been in a state of overdraft since the 1980s. Rather than pump groundwater on its reservation, the Tribe has been purchasing groundwater from CVWD and DWA.

The Tribe also receives a small amount of surface water. Pursuant to a 1938 California Superior Court adjudication,[215] which attempted to address water rights for users of the river system as a matter of state law, the Tribe is entitled to an allotment of surface water. However, the amount of water reserved for the Tribe under this adjudication was minimal, providing enough water to irrigate only 360 acres.[216] Moreover, most of this allotment

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211 The United States intervened as a plaintiff.

212 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. EDCV 13-883-JGB, 2015 WL 13309103, at *11 (C.D. Cal. Mar. 24, 2015).

213 Exec. Order of May 15, 1876; Exec. Order of Sept. 29, 1877.

214 COMM'R OF INDIAN AFF., ANN. REP. 37 (1877).

215 *See* United States v. Ahtanum Irr. Dist., 236 F.2d 321, 330–31 n.12 (9th Cir. 1956) (discussing the legal and factual history of the 1938 California Superior Court decree).

216 The Agua Caliente Reservation consists of approximately 31,396 acres.

was filled outside of the growing season because the river system's flow peaks in the winter months. Thus, the Tribe's main water source is the groundwater supplied by CVWD and DWA. The Tribe's growing concerns over diminishing groundwater resources led to this action for declaratory and injunctive relief.

The Ninth Circuit reviewed the district court's grant of partial summary judgment *de novo*, focusing on the sole issue of whether the Tribe had a federal reserved right to the groundwater.[217] Following the doctrine from *Winters v. United States*,[218] the Ninth Circuit structured its analysis in three steps.

First, the Ninth Circuit considered whether the United States intended to reserve water when it created the Tribe's reservation. The water agencies argued that, on this question, the court must determine whether the water was necessary to fulfill the primary purpose of the reservation. If not, then the court should conclude that Congress did not intend the water to be impliedly reserved under a federal water right. The water agencies further contended that if other available sources of water can meet the reservation's water demands, then the purpose of the reservation would not be defeated. In such situations, the water agencies argued that Congress intended to defer to state water law.

The Ninth Circuit disagreed, reasoning that Congress did not defer to state water law with respect to reserved rights. The Ninth Circuit emphasized that the federal purpose for which land was reserved is the driving force behind the reserved rights doctrine. The question was not whether water is necessary at some point in time to maintain the reservation, but rather whether the purpose underlying the reservation envisions water use. Further, water was reserved only for primary purposes, or purposes which are directly associated with the reservation of the land. In this case, although the purposes set forth in the executive orders were imprecise, the Ninth Circuit recognized that the general purpose "to provide a home for the Indians" is a broad one that must be liberally construed.[219] The Ninth Circuit reasoned that water was inherently tied to the Tribe's ability to live on the reservation, especially considering the arid nature of the Coachella Valley. Without water, the purpose of the reservation to support the Tribe as an agrarian society would be entirely defeated. Thus, the Ninth Circuit held that the United States implicitly reserved a right to water when it created the Tribe's reservation.

Second, the Ninth Circuit considered whether the reserved rights doctrine encompasses groundwater. On this question, the Ninth Circuit first observed that the reserved rights doctrine limits reserved rights only to those waters which are "appurtenant" to the reservation.[220] The Ninth Circuit

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[217] The district court also held that the Tribe does not have an aboriginal right to the groundwater. The Tribe did not appeal this second holding, and thus the Ninth Circuit did not review the issue.

[218] Winters v. United States, 207 U.S. 564 (1908).

[219] Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

[220] Cappaert v. United States, 426 U.S. 128, 136–37 (1976).

then reasoned that appurtenance refers generally to waters that are attached to the reservation. In other words, appurtenance does not limit reserved rights to surface water only. Thus, the Ninth Circuit held that the reserved rights doctrine reaches both surface water and groundwater that is appurtenant to reserved land. In this case, the creation of the Tribe's reservation therefore established an implied right to use groundwater from the Coachella Valley Groundwater Basin.[221]

Finally, the Ninth Circuit considered whether the Tribe's existing water rights under state law impacted its federal reserved right. On this point, the water agencies argued that a federal reserved right was unnecessary in light of the Tribe's correlative right to groundwater under California state law, the Tribe's failure to drill for groundwater on its reservation, and the Tribe's entitlement to surface water. The Ninth Circuit rejected the water agencies' arguments, observing that reserved water rights are superior to the rights of future appropriators. Further, as federal water rights, reserved water rights preempt conflicting state law. Additionally, reserved rights are not lost through non-use. The Ninth Circuit thus concluded that entitlements under state law do not impact the Tribe's federally reserved water right.

In sum, the Ninth Circuit affirmed the decision of the district court, holding that the Tribe has a federal reserved right to the groundwater underlying its reservation and that this right is not supplanted by existing rights under state law. The United States Supreme Court denied certiorari.[222]

2. Navajo Nation v. Department of the Interior, 876 F.3d 1144 (9th Cir. 2017).

The Department of the Interior (Interior or the Secretary) manages the waters of the Colorado River. In 2001 and 2008, Interior published guidelines clarifying how the Secretary makes water surplus and water shortage determinations from year to year. The Navajo Nation (Nation), a federally recognized Indian tribe, has repeatedly asserted rights to water from the Colorado River, but these rights have never been adjudicated. Following the passage of the guidelines, the Nation filed suit under the Administrative Procedure Act (APA).[223] First, the Nation alleged that Interior violated the National Environmental Policy Act (NEPA)[224] by failing to consider the impact of the guidelines on the Nation's potential water rights in the Colorado River. Second, the Nation alleged that Interior breached its trust duties to the Nation by failing to account for or safeguard the Nation's interests in and rights to Colorado River water. The United States District Court for the District of Arizona granted the motion to dismiss the Nation's complaint[225] and denied the Nation's motion for relief from the judgment.[226]

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221 The Ninth Circuit also noted that the parties did not dispute appurtenance, as the groundwater basin clearly underlies the Tribe's reservation.

222 Agua Caliente Band of Cahuilla v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017), *cert. denied*, 86 U.S.L.W. 3263 (U.S. Nov. 27, 2017) (No. 17-42).

223 5 U.S.C. §§ 551–559, 701–706, 1305, 3344, 4301, 5335, 5372, 7521 (2012).

224 42 U.S.C. §§ 4321–4370h (2012).

225 Navajo Nation v. U.S. Dep't of the Interior, 34 F. Supp. 3d 1019, 1021 (D. Ariz. 2014).

The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, agreeing that the Nation lacked standing to pursue its NEPA claims but holding that the Nation's breach of trust claim was not barred by sovereign immunity.

The Navajo Reservation is the largest Indian reservation in the United States and lies almost entirely within the drainage basin of the Colorado River. Aside from the federal government, the Nation is the largest riparian landowner along the Colorado, with the Nation's tribal lands and resources held in trust by the United States. The waters of the Colorado River are allocated and managed according to a complex legal regime consisting of federal statutory law and regulations, Supreme Court decrees, interstate compacts, state and federal common law, and treaties. In 1964, the Supreme Court issued a decree clarifying rights to water from the Lower Basin of the Colorado.[227] The Decree parceled out the relative shares that Lower Basin states would receive in years in which, "as determined by the Secretary of the Interior," there was surplus water available. The Decree also provided that if the Secretary determined in a given year that there was a shortage of water, the United States Bureau of Reclamation would first provide for satisfaction of present perfected rights in order of priority dates without regard to state lines. Then, after consultation with parties to major water contracts and State representatives, the Secretary may apportion the amount remaining available for consumptive use in such manner as is consistent with federal law. The 1964 Decree further adjudicated the federal reserved water rights of five Indian tribes under *Winters v. United States*,[228] but did not reach the claims of twenty other tribes, including the Navajo Nation's. The Decree provided, however, that it did not affect the rights or priorities of any Indian reservation.

Aggrieved by its lack of enforceable rights to Colorado River water, the Nation filed its original complaint against Interior, the Bureau of Reclamation, and the Bureau of Indian Affairs in 2003, challenging Interior's 2001 Surplus Guidelines. Various states and local government entities from California, Arizona, Nevada, and Colorado intervened as defendants. In 2004, the district court stayed proceedings to allow for settlement negotiations. In 2013, after almost a decade of unsuccessful negotiations, the district court lifted the stay. The Nation amended its complaint to add a challenge to Interior's 2008 Shortage Guidelines. The district court then granted motions to dismiss the amended complaint without prejudice, holding that the Nation lacked standing to bring its NEPA claims and that its breach of trust claim was barred by sovereign immunity. The Nation filed a motion for relief from the final judgment pursuant to Federal Rules of Civil Procedure Rule 60(b)(6),[229] contending that because the relevant statute of limitations had

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226 Navajo Nation v. U.S. Dep't of the Interior, No. CV-03-00507-PCT-GMS, 2014 WL 12796200, at *1 (D. Ariz. Oct. 1, 2014).

227 *See* Arizona v. California, 376 U.S. 340 (1964).

228 Winters v. United States, 207 U.S. 564 (1908).

229 *Navajo Nation*, 2014 WL 12796200, at *1.

run, the dismissal was effectively with prejudice. The district court denied that motion, and the Nation appealed both orders to the Ninth Circuit.

On appeal, the Ninth Circuit first addressed the question of standing to bring the NEPA claims. On this issue, the district court had reasoned that the alleged harm to the Nation's unquantified *Winters* rights was too speculative to confer standing. The Ninth Circuit observed, however, that the Nation had proposed two discrete types of injuries: 1) the guidelines do not account for the Nation's unquantified water *rights*, and 2) the guidelines disregard the Nation's unmet *needs* for water. The former alleged injury arises out of the Nation's potential reserved water rights, while the latter is an interest in an adequate water supply that exists regardless of the lack of a decreed right to water.

With respect to the alleged injury to the Nation's reserved rights, the Ninth Circuit stated that *Winters* rights are sufficiently concrete interests which may give rise to standing under NEPA if such rights are impaired by a procedural violation. The precise scope and status of possible *Winters* rights are irrelevant; it is enough to demonstrate that the rights are threatened. On this occasion, the Ninth Circuit concluded that the Nation could not make this demonstration. Noting that the guidelines do not act directly upon the Nation's unquantified water rights, the court rejected the Nation's argument that the guidelines foster third-party reliance on these waters, creating controversies that then frustrate the future development of Indian water rights. The Ninth Circuit found this theory of standing too speculative and emphasized that the Nation did not allege that the guidelines legally impaired any rights it may have in the Lower Basin water.

Addressing the alleged injury to the Nation's unmet needs for water, the Ninth Circuit observed that a generalized interest in the availability of water for use on one's land can qualify as a sufficiently concrete interest for standing purposes. The Ninth Circuit held, however, that the Nation failed to trace a reasonably probable link between its interest in water availability and the guidelines and so lacked standing under that theory of injury as well. Even construed as liberally as possible in the Nation's favor, the complaint did not show how the guidelines threatened injury to the interest in water availability; the court found the Nation's references to the "risk of overlooking harmful effects"[230] and the effect on the outcome of the efforts of the Nation to secure water to be too general. Thus, the Ninth Circuit affirmed the dismissal of the NEPA claims, holding that the Nation lacked standing because it failed to show that it was reasonably probable that the new Guidelines threatened its reserved rights or its interest in obtaining adequate water.

The Ninth Circuit next addressed the breach of trust claim, which the district court had dismissed on the grounds that the United States had not waived sovereign immunity for that claim.[231] The Nation alleged that Interior breached its trust duties by failing to determine the extent and quantity of

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230 Navajo Nation v. U.S. Dep't of the Interior, 876 F.3d 1144, 1166 (9th Cir. 2017).

231 *Navajo Nation*, 34 F. Supp. 3d at 1029–30.

water rights or otherwise determine the amount of water which the Nation required from the Lower Basin to meet its needs. The Ninth Circuit observed that the breach of trust claim was thus predicated on a failure to act, not an affirmative action. In this case, the waiver at issue appears in APA § 702, which provides that an "action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States."[232] Resolving confusing precedent as to the proper interpretation of § 702, the Ninth Circuit construed the statute in line with *Veterans for Common Sense v. Shinseki*,[233] holding that § 702 waives sovereign immunity for all non-monetary claims.[234] Because the Nation's breach of trust claim against Interior seeks relief other than money damages in its failure to act claim, the court found that the waiver of sovereign immunity in § 702 therefore applies. The Ninth Circuit thus remanded to the district court for consideration of the breach of trust claim on the merits.

Finally, the Ninth Circuit addressed the district court's denial of the Nation's motion for relief from the final judgment. Because the Ninth Circuit reversed the dismissal of the breach of trust claim, the appeal from the denial of the Rule 60(b) motion was moot to the extent that the Nation sought to amend its complaint to plead additional or alternative waivers of sovereign immunity. As to the NEPA claims, the Ninth Circuit determined that the district court did not abuse its discretion in denying leave to amend the complaint, as the Nation had ample opportunity to correct the deficiencies.

Thus, the Ninth Circuit affirmed that the Nation lacked standing for its NEPA claims but reversed the dismissal of the breach of trust claim on the grounds that the claim was not barred by sovereign immunity under § 702 of the APA. Since the dismissal was unwarranted, the Ninth Circuit remanded to the district court for further consideration.

C. Constitutionality of Environmental Ordinance

1. Pure Wafer Inc. v. City of Prescott, 845 F.3d 943 (9th Cir. 2017).

Pure Wafer Incorporated[235] (Wafer) brought suit against the city and officials[236] of Prescott, Arizona (Prescott), claiming the city's 2013

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232 APA, 5 U.S.C. § 702 (2012).

233 Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

234 *See* 5 U.S.C. § 704, which requires final agency action and constrains only actions brought under the APA.

235 Pure Wafer, Incorporated, a Delaware corporation, successor in interest to Exsil, Inc., a Delaware corporation.

236 City of Prescott, an Arizona municipal corporation; Marlin Kuykendall; Craig McConnell; Alan Carlow, in his capacity as a Member of the Prescott City Council; Jim Lamerson, in his capacity as a Member of the Prescott City Council; Steve Blair, in his capacity as a Member of the Prescott City Council; Charlie Arnold, in his capacity as a Member of the Prescott City Council; Chris Kuknyo, in his capacity as a Member of the Prescott City Council; Len Scamardo,

ordinance[237] limiting discharge of fluoride and requiring Wafer to pretreat wastewater violated the contracts clause of both the federal and state constitutions.[238] In the alternative, Wafer alleged that Prescott breached its contract with Wafer in violation of an implied covenant of good faith and fair dealing. On this point, Prescott counterclaimed seeking declaratory judgment that the ordinance was an environmental regulation of the sort that Wafer had expressly agreed to in its contract with Prescott. The United States District Court for the District of Arizona found the ordinance unconstitutional and therefore declined to rule on the contracts claims.[239] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. Reviewing *de novo*, the Ninth Circuit found that the ordinance did not violate the Contract Clause but sustained judgment on the grounds that Prescott had breached its contract with Wafer.

The controversy between Wafer and Prescott involves interpretation of a contract called the Development Agreement (Agreement). In 1997, Wafer agreed to build a facility for cleaning silicon wafers in Prescott, bringing with it jobs, economic growth, and tax revenue. In exchange, Prescott agreed to provide Wafer with the sewage infrastructure needed to carry its large volumes of effluent to the city's Airport Water Reclamation Facility (AWRF), one of the cities three wastewater treatment plants. Wafer's reclaiming service removes oxide nitrates from the wafers before cleaning them for reuse, a process that generates up to 195,000 gallons per day of effluent. AWRF treats that wastewater before discharging either to golf courses downstream or to the recharge basins that replenish Prescott's aquifer. The controversy centers on the fluoride concentrations in Wafer's effluent and the challenged city ordinance that imposes limits on water pollutants including fluoride. The ordinance caps fluoride releases at 16.3 mg/L, and requires industrial users to obtain a permit from Prescott for any pretreatment waste water with a fluoride concentration in excess of 16.3 mg/L.

The central issue in this case is driven by three contract provisions in the agreement between Prescott and Wafer. The first provision states that Prescott will provide 19,000 gallons of sewer capacity per day, Prescott may not raise Wafer's sewer usage fees as long as the fluoride concentration in its effluent remains at or below 100mg/L, and Prescott will bear the costs of "augmenting such facilities as necessary to accept or accommodate Pure Wafer's effluent."[240] The second provides that Pure Wafer will operate the facility in accordance with all local, state, and federal environmental regulations. The third is an integration clause.

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in his capacity as a Member of the Prescott City Council; Mark Nietupski, in his capacity as Public Works Director of the City of Prescott; Joel Berman, in his capacity as Utilities Manager of the City of Prescott, Defendants-counter-claimants-Appellants.

237 *See* Prescott, Ariz. City Code § 2-1-9 (2014); Pure Wafer, Inc. v. City of Prescott, 14 F. Supp. 3d 1279, 1289–90 (D. Ariz. 2014).

238 U.S. CONST. art. I, § 10, cl. 1; ARIZ. CONST. art. II, § 25.

239 *Pure Wafer Inc.*, 14 F. Supp. 3d at 1302.

240 *See* Exhibit A at 5, *Pure Wafer Inc.*, 14 F. Supp. 3d 1279 (D. Ariz. 2014) (No. 3:13-cv-08236-JAT).

The Ninth Circuit first considered the constitutional claims together. As a threshold issue, the court set out the differences between a *breach* of contract and *impairment* of a contract's obligation. Under both state and federal law, the critical difference turns on whether a court-ordered remedy remains available if either party fails to perform as promised. "If the offended party retains the right to recover damages for the breach, the Contracts Clause is not implicated; if, on the other hand, the repudiation goes so far as to extinguish the state's duty to pay damages, it may be said to have impaired the obligation of contract."[241] Arguing against a claim under the Contracts Clauses, Prescott represented that the ordinance does not dissolve its binding obligation, and if Wafer prevailed on its contract claims then Prescott would pay money damages. Persuaded that Prescott had not rendered Wafer's rights to recovery unenforceable, the court held that the district court's judgment could not stand because Wafer had no claim under the Contract Clauses.

The court then considered the breach claims, deciding first the threshold issue of jurisdiction. Although the district court had not ruled on the breach claims, the Ninth Circuit reasoned that because the lower court had thoroughly discussed the Agreement, considered extensive testimony, and made findings of fact and conclusions of law sufficient to resolve the issue, the court proceeded to the merits.[242] Wafer insisted that its most important objective during negotiations was to contractually protect the company from being thwarted by future changes in city regulations. Wafer offered testimony that after a prior experience requiring expensive infrastructure retrofits to accommodate an ordinance passed after opening a facility in San Jose, Wafer clearly communicated its needs which were inputted into the contract. Wafer asserted that Prescott promised to accept its effluent so long as the fluoride concentration remained below 100mg/L and to bear the cost of conforming to any future regulations. Wafer described the contract as a "regulatory contract," under which the government must pay damages if it breaches its promise to maintain regulatory stability. Prescott counterclaimed that the ordinance was an environmental regulation of the sort Wafer had promised to obey when it expressly agreed to obey all local, state, and federal environmental regulations. Prescott further asserted that the reserved powers doctrine required the city adopt regulations necessary to protect public safety; the city could not promise that it would refrain from adopting such regulations.

The court concluded that Prescott had breached the contract. The court reasoned that under governing Arizona law, which enforces a contract according to parties' intent, the evidence supported that both parties intended that Wafer was allowed to discharge up to 100 mg/L. The court

241 Horwitz-Matthews v. City of Chicago, 78 F.3d 1248, 1251 (7th Cir. 1996).

242 The dissent wrote that the Ninth Circuit should have remanded to the district court to decide whether to exercise supplemental jurisdiction and to make factual findings on the breach claim. He reasoned that because the district court had dismissed the breach claim as moot, the Ninth Circuit must allow the lower court the opportunity to make factual determinations.

agreed with the district court that it would have been "madness" for Wafer to have agreed to terms that would have put its business in jeopardy the moment the contract was signed. In response to the reserved doctrine argument, the court explained that giving a contractual remedy for breach did not abrogate the City's police power.

In sum, the court held that Wafer did not have a claim under the Contract Clauses because Prescott had not impaired Wafer's right to recovery. However, the court sustained the district court's judgment because it found Prescott had breached its contract with Wafer. Accordingly, the Ninth Circuit remanded the case to the district court to decide the appropriate remedy.