2016 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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2016 NINTH CIRCUIT ENVIRONMENTAL REVIEW

NINTH CIRCUIT REVIEW EDITOR'S NOTE 939

CASE SUMMARIES 941

I. Environmental Quality 941
  A. *Clean Water Act* 941
    1. Natural Resources Defense Council, Inc. v. County of Los Angeles, 840 F.3d 1098 (9th Cir. 2016).
  B. *Clean Air Act* 942
    1. Arizona ex. rel. Darwin v. U.S. Environmental Protection Agency, 815 F.3d 519 (9th Cir. 2016).
    2. Bahr v. U.S. Environmental Protection Agency, 836 F.3d 1218 (9th Cir. 2016).
  C. *CERCLA* 948
    1. Pakootas v. Teck Cominco Metals, Ltd., 830 F.3d 975 (9th Cir. 2016).
  D. *Federal Land Policy Management Act* 949
    1. Great Basin Resource Watch v. Bureau of Land Management, 844 F.3d 1095 (9th Cir. 2016).
II. Natural Resources 953
  A. *Endangered Species Act* 953
    1. California Sea Urchin Commission v. Bean, 828 F.3d 1046 (9th Cir. 2016).
    2. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016).
    3. Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671 (9th Cir. 2016).
    4. Center for Biological Diversity v. Bureau of Land Management, 833 F.3d 1136 (9th Cir. 2016).
  B. *Marine Mammal Protection Act* 964
    1. Natural Resources Defense Council, Inc. v. Pritzker, 828 F.3d 1125 (9th Cir. 2016).
  C. *Magnuson-Stevens Fishery Conservation and Management Act* 966
    1. Glacier Fish Co. v. Pritzker, 832 F.3d 1113 (9th Cir. 2016).
    2. Pacific Dawn, LLC v. Pritzker, 831 F.3d 1166 (9th Cir. 2016).
  D. *Migratory Bird Treaty Act* 973
    1. Protect Our Communities Foundation v. Jewell, 825 F.3d 571 (9th Cir. 2016).
III. Miscellaneous 977
  A. *National Environmental Policy Act* 977
    1. City of Mukilteo v. U.S. Department of Transportation, 815 F.3d 632 (9th Cir. 2016).

2. Idaho Conservation League v. Bonneville Power Administration, 826 F.3d 1173 (9th Cir. 2016).
3. Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095 (9th Cir. 2016).
4. Japanese Village, LLC v. Federal Transit Administration, 843 F.3d 445 (9th Cir. 2016).
5. Oregon Natural Desert Ass'n v. Jewell, 823 F.3d 1258 (9th Cir. 2016).
6. San Diego Navy Broadway Complex Coalition v. U.S. Department of Defense, 817 F.3d 653 (9th Cir. 2016).

B. Preemption 990
1. Syngenta Seeds, Inc. v. County of Kauai, 842 F.3d 669 (9th Cir. 2016).

C. Mootness 992
1. Shell Offshore, Inc. v. Greenpeace, Inc., 815 F.3d 623 (9th Cir. 2016).

CHAPTERS 995

Climate Change and the PSD Program: Using BACT to Combat the Incumbency of Fossil Fuels 995
Sage Ertman

A Chronic Problem: Pritzker and the NOAA Roadmap's Deficiencies 1027
Giulia Rogers

2016 NINTH CIRCUIT INDEX OF CASES AND STATUTES 1057

NINTH CIRCUIT REVIEW EDITOR'S NOTE

I am pleased to present the 2016–2017 Ninth Circuit Review. This review contains twenty-one summaries of Ninth Circuit Court of Appeals decisions on environmental and natural resource topics issued between January 2016 and January 2017. In addition, the review includes two chapters authored by Ninth Circuit Review members. The chapters explore issues raised in the summarized opinions.

In the first chapter, Sage Ertman argues that the "redefining the source" doctrine under the Clean Air Act's Prevention of Significant Deterioration program allows polluters and regulators significant discretion to avoid implementing the stringent standards envisaged by that program's Best Available Control Technology standard for new and modified pollution sources. That problem is particularly acute, Sage argues, in the electricity sector. He argues that cases like the Ninth Circuit's *Helping Hand Tools v. U.S. Environmental Protection Agency* demonstrate that the courts have been complicit in allowing broad application of the "redefining the source" doctrine, which in turn exacerbates the adverse impacts of climate change associated with greenhouse gas emissions. Sage ultimately proposes remedying that problem either by restricting application of the "redefining the source" doctrine or, alternatively, by abolishing the doctrine altogether.

In the second chapter Giulia Rogers explores the problem of anthropogenic ocean noise pollution and its adverse impacts on marine mammals through the lens of *Natural Resources Defense Council, Inc. v. Pritzker*. That case highlights how the National Oceanic Atmospheric Administration (NOAA) has recently acknowledged the extent of the ocean noise pollution problem and has attempted to address that issue using existing statutory authority, such as the Marine Mammal Protection Act (MMPA). Giulia argues that *Pritzker* highlights how the MMPA can be an effective tool for NOAA to curb ocean noise pollution. But she also explores how *Pritzker* demonstrates the limits of that authority. Finally, she offers recommendations for expanding statutory authority to better tackle the problem of ocean noise pollution.

The Ninth Circuit Review is made up of five *Environmental Law* members. Each member writes and edits summaries throughout the course of the year. This year's members were thoughtful, attentive, and dedicated to producing quality summaries of often complex and challenging opinions. These summaries are intended to provide readers, including attorneys, academics, and anyone interested in the ever-evolving state of the Ninth Circuit's environmental jurisprudence, with a succinct overview of each case. The summaries are also meant to flag major issues to facilitate further investigation into those cases that may prove useful to our readers, professionally or otherwise.

The resolution of legal disputes involving environmental and natural resource issues is perhaps more important now than ever. Conservation and environmental protection efforts are increasingly pitted against intransigent industry groups and complacent regulators. How the courts resolve disputes

between those parties may mean the difference between a species' extinction and its preservation, mass deforestation and conservation, polluted waterways and clean ones, hazardous smog and breathable air, and climate change catastrophes and vital control of greenhouse gas emissions. The Ninth Circuit Review has long been, and remains, committed to chronicling how the Ninth Circuit Court of Appeals addresses those issues and others. Thank you for reading.

Dashiell Farewell
2016–2017 Ninth Circuit Review Editor

CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Clean Water Act

1. Natural Resources Defense Council, Inc. v. County of Los Angeles, 840 F.3d 1098 (9th Cir. 2016).

Natural Resources Defense Council and Santa Monica Baykeeper (collectively, NRDC) filed a lawsuit in 2008 against Los Angeles County and the Los Angeles County Flood Control District, alleging these defendants violated the terms of a 2001 National Pollutant Discharge Elimination System (NPDES) permit, issued under the Clean Water Act[1] (CWA), by discharging polluted stormwater into the region's waters. In 2013, the Ninth Circuit found that defendants violated the permit as a matter of law, based on pollution levels in the receiving waters.[2] However, by this point defendants had sought and received a new permit. On this basis, defendants filed a motion to dismiss in 2015, alleging that the challenge was moot. The district court, after finding that the new permit relaxed applicable standards and that defendants were in compliance with the new permit, granted defendants' motion.[3] The Ninth Circuit, reviewing the mootness determination de novo, reversed.

The Ninth Circuit stated that a motion to dismiss a case as moot must "demonstrate that it is absolutely clear that the allegedly wrong behavior could not reasonably be expected to recur."[4] Defendants argued that the 2012 permit changed compliance requirements, thereby supplanting the 2001

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

2 Nat. Res. Def. Council, Inc. v. County of Los Angeles, 725 F.3d 1194, 1196–97 (9th Cir. 2013).

3 Nat. Res. Def. Council, Inc. v. County of Los Angeles, No. CV 08–01467 BRO (PLAx), 2015 WL 1459476, at *1 (C.D. Cal. Mar. 30, 2015).

4 Nat. Res. Def. Council, Inc. v. County of Los Angeles, 840 F.3d 1098, 1102 (9th Cir. 2016) (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987)).

permit, and that present and future compliance with these requirements was undisputed.

The Ninth Circuit first noted that claims for injunctive relief do not become moot simply because a new permit is issued; rather, that new permit must also result in changes that render the requested injunction incapable of providing effective relief. The court stated that the relaxed standards in the new permit are contingent on the success of two watershed management programs, and that this contingency failed to satisfy the defendant's burden of "absolutely clear" evidence that a future permit violation would not occur. In addition, the Ninth Circuit determined that the district court had erroneously placed the evidentiary burden on NRDC, rather than on the defendants.

Applying the "absolutely clear" standard to the evidence presented by the defendants, the Ninth Circuit found that defendants could not satisfy the standard for two reasons. First, the court noted the relaxed standards in the 2012 permit might be invalidated in a future court proceeding, given that a concurrent proceeding filed by NRDC challenged the 2012 permit for violations of the CWA's "anti-backsliding" provisions. Second, regardless of the 2012 permit's validity, the Ninth Circuit noted defendants had not completed financing and implementing the watershed management programs required before the relaxed standards applied. Given the uncertainty surrounding these programs, the Ninth Circuit found that defendants had failed to establish that future injunctive relief would not be necessary.

In sum, the Ninth Circuit reversed the district court's approval of a motion to dismiss on mootness grounds. The court found that defendants failed to provide "absolutely clear" evidence that plaintiffs' lawsuit sought a remedy that was no longer necessary in light of the 2012 permit.

B. Clean Air Act

1. Arizona ex. rel. Darwin v. U.S. Environmental Protection Agency, 815 F.3d 519 (9th Cir. 2016).

The State of Arizona and a local power district (collectively, Arizona)[5] sued the United States Environmental Protection Agency (EPA) after EPA's decision to reject part of Arizona's air quality plan under the Clean Air Act[6] (CAA) in favor of a replacement federal plan. EPA issued a final rule in 2012 that negated a technology standard set by Arizona's State Implementation Plan (SIP) for regional haze and simultaneously enacted a different standard

[5] Plaintiffs included the State of Arizona and the Salt River Project Agricultural Improvement and Power District.

[6] 42 U.S.C. §§ 7401–7671q (2012).

under a Federal Implementation Plan (FIP).[7] Plaintiffs each filed petitions for review and the cases were consolidated, at which point environmental groups intervened on behalf of EPA.[8] Reviewing the rule under the arbitrary and capricious standard of the Administrative Procedure Act[9] (APA), the Ninth Circuit denied the petitions.

The Arizona SIP set technology standards for regional haze at three power plants: the Apache Generating Station, the Cholla Power Plant, and the Coronado Generating Station. Only the Coronado standard was at issue in this case. The CAA requires SIPs to determine the best available retrofit technology (BART) for certain major emission sources as a standard for reducing emissions.[10] Arizona's SIP established BART for the Coronado Station that EPA, upon review, found to be too lenient. EPA rejected the SIP and then imposed a higher BART requirement through the FIP. Arizona filed suit to challenge EPA's rejection of the SIP and promulgation of the FIP on both substantive and procedural grounds.

Regarding the SIP, Arizona first argued that EPA acted arbitrarily in proceeding to assess Arizona's BART determinations separately from the SIP as a whole. In particular, Arizona claimed that BART is just one aspect of broader "reasonable progress" goals for regional haze and cannot properly be evaluated as a standalone feature. The Ninth Circuit disagreed, stating that the CAA expressly allows EPA to approve or disapprove particular elements of a SIP.[11] Moreover, the court noted that BART determinations are subject to criteria that are independent from the goals of the SIP.[12] Therefore, the court found it appropriate for EPA to assess BART as a freestanding determination.

Second, Arizona claimed that EPA's decision to reject the SIP lacked support in the record. EPA concluded that the BART set by the SIP was deficient in its cost calculations and its evaluation of visibility improvements, among other factors. On each point, the Ninth Circuit found for EPA. The court held that Arizona was required to document cost calculations of BART compliance, and instead, it had relied on cost summaries from the power district. Next, the court held that Arizona needed to assess the degree to which the SIP would improve visibility but had failed to do so for the Gilas Wilderness Area, a heavily impacted area in the region. Lastly, the court held that Arizona needed to justify its BART decisions on the basis of specific factors and that the state, despite presenting information relevant to each factor, had failed to explain its determinations in the context of those factors.

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7 Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Arizona; Regional Haze State and Federal Implementation Plans, 77 Fed. Reg. 72,512, 72,512 (Dec. 5, 2012) (to be codified at 40 C.F.R. pt. 52).

8 Plaintiff-intervenors included the National Parks Conservation Association and the Sierra Club.

9 5 U.S.C §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

10 42 U.S.C. § 7491(b)(2)(A).

11 *Id.* § 7410(c)(1), (k)(3).

12 *Id.* § 7491(b)(2).

Arizona next challenged EPA's promulgation of the FIP. First, Arizona argued that EPA committed a procedural error by promulgating the FIP in the same rule that rejected the SIP. In particular, Arizona alleged that EPA misconstrued the deadline in a prior consent decree as requiring a FIP by 2012. The court dismissed this argument, finding that the CAA permits EPA to order a FIP "at any time" within two years of disapproving a SIP.[13] The court then noted that EPA was required to issue a FIP at the time of the 2012 final rule because, in this instance, the CAA required some type of regional haze plan to be in place.[14] Therefore, regardless of its understanding of the consent decree's requirements, EPA was obligated to issue the FIP under statutory requirements.

Finally, Arizona challenged the substance of the FIP. First, Arizona challenged EPA's visibility assessment, specifically taking issue with EPA's use of a cumulative approach to assess visibility at the region's Class I areas (referring to Arizona's national parks and wilderness areas). Second, Arizona challenged EPA's cost analysis, claiming EPA calculated the new BART standard without considering site-specific costs. Third, Arizona challenged the FIP on the basis that the FIP's emission limits were neither reasonable nor achievable. On the first two points, the court found for EPA. The court viewed the cumulative approach in the visibility assessment as a supplement to adequate computer modeling completed for each of the eleven Class I areas. Regarding site-specific costs, the court held that EPA reasonably relied on data from past Coronado projects and on cost estimates from the power district. The court refused to enter a ruling on the third point—the reasonableness of the FIP's emissions limit—because EPA recently proposed a revision to increase that limit.

In sum, the Ninth Circuit denied Arizona's petitions for review challenging EPA's final rule because EPA followed the appropriate procedure and had adequate support to both reject the SIP and promulgate the FIP. The court stayed proceedings on a final point, the feasibility of the FIP emission limits, pending further EPA action.

2. Bahr v. U.S. Environmental Protection Agency, 836 F.3d 1218 (9th Cir. 2016).

Sandra Bahr and David Matusow (collectively, Petitioners), two residents of Phoenix, Arizona, petitioned for review of the approval of Arizona's 2012 state implementation plan (SIP) by the United States Environmental Protection Agency (EPA). Petitioners first claimed that EPA acted contrary to the Clean Air Act[15] (CAA) by failing to require that Arizona include in its Five Percent Plan an updated analysis of best available control measures (BACT) and most stringent measures (MSM), and that EPA's failure constituted an "abuse of discretion" under the Administrative

13 *Id.* § 7410(c).

14 *Id.*; *see also* 40 C.F.R. § 51.309(a), (e), (g)(2) (2016).

15 42 U.S.C. §§ 7401–7671q.

Procedure Act[16] (APA).[17] Second, Petitioners claimed that EPA abused its discretion within the meaning of the APA when it permitted the exclusion of 135 exceedances from Arizona's air quality monitoring data when EPA labeled the exceedances as "exceptional events."[18] Finally, Petitioners claimed that EPA violated the CAA by allowing Arizona to satisfy the SIP "contingency measures" requirement with measures that had already been implemented rather than measures to be triggered if an area fails to meet requisite emissions targets. The Ninth Circuit rejected Petitioners' arguments as to their first two claims. The court agreed with Petitioners regarding their third claim and refused to defer to EPA's interpretation that the contingency measures requirement could be satisfied by measures implemented wholly in the past.

Under the CAA, Congress designated Maricopa County, Arizona, as a "moderate" PM-10 nonattainment area in 1990. After missing the first deadline by which it was to be in attainment of the National Ambient Air Quality Standards (NAAQS), EPA reclassified Maricopa County as a "serious" PM-10 nonattainment area. Under the CAA, "serious" nonattainment status required Arizona to prepare a SIP demonstrating Arizona's plan to meet the PM-10 NAAQS by 2001, and to explain how Arizona would implement the best available control measures (BACM) for PM-10.[19] In 2000, Arizona applied for a five-year extension to meet the PM-10 NAAQS and simultaneously submitted its required SIP. Arizona's SIP included the MSM, in addition to the BACM, for controlling PM-10 as required in order to be granted an extension.[20] In 2002, EPA granted the extension and approved Arizona's 2000 SIP, stating that the SIP met the CAA's BACM and MSM standards. After Maricopa County failed to meet the NAAQS by the 2006 extended deadline, Arizona had twelve months to submit required revisions to its SIP that would ensure achievement of the NAAQS for PM-10, ensure an annual 5% reduction in PM-10 for Maricopa County, and contain adequate contingency measures.[21]

Arizona submitted the requisite SIP revisions in 2007. After EPA proposed to disapprove of the revisions due to an agricultural control measure that failed the BACM standard, Arizona withdrew its SIP in 2011, and ultimately failed to make the required SIP revisions on schedule. As a result, the CAA required Arizona to prepare further SIP revisions, which it submitted in 2012.[22] The 2012 revised SIP (known as the Five Percent Plan) contained previously proposed control measures, as well as new control measure for dust, but excluded the agricultural control measure previously

16 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

17 *Id.* § 706(2)(A); 42 U.S.C. §§ 7513(e), 7513a(b)(1)(B).

18 40 C.F.R. § 50.14(b)(1).

19 42 U.S.C. §§ 7513(b), 7513(c)(2), 7513(e), 7513a(b).

20 *Id.* § 7513(e).

21 *Id.* §§ 7502(c)(9), 7513a(d).

22 *See* Approval and Promulgation of Implementation Plans—Maricopa County PM-10 Nonattainment Area; Five Percent Plan for Attainment of the 24-Hour PM-10 Standard, 79 Fed. Reg. 7118, 7119 (Feb. 6, 2014) (to be codified at 40 C.F.R. pt. 52).

found to be inadequate by EPA. The Five Percent Plan also contained various contingency measures, all of which had already been accomplished and were in use throughout Arizona.

Arizona also acknowledged a number of PM-10 exceedances beyond what the NAAQS required in 2011 and 2012. However, Arizona asserted that the exceedances should be deemed "exceptional events," specifically high wind dust events, which would result in their exclusion from the NAAQS compliance determination. In 2014, EPA approved the Five Percent Plan.[23] EPA also concluded that each of the exceedances met the definition of "exceptional event" because the exceedances were not "reasonably controllable or preventable" and because Arizona had "reasonable controls" in place for anthropogenic sources of dust.[24] Excluding the 135 high wind exceedances, EPA found that Maricopa County had attained the PM-10 NAAQS. EPA also determined that Arizona's previously implemented contingency measures satisfied the CAA's contingency measure requirement.[25] Finally, EPA's 2014 Final Rule approving the Five Percent Plan included EPA's response to comments previously submitted by Petitioners in this case. In July 2014, after EPA dismissed all of Petitioners' arguments made in comments, Petitioners filed for review of the 2014 Final Rule in the Ninth Circuit.

The Ninth Circuit exercised its jurisdiction encompassing petitions for review of EPA actions in approving or promulgating any SIP.[26] In reviewing SIP approvals, the APA requires the Ninth Circuit to uphold the action unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27]

Petitioners first alleged that EPA acted contrary to the CAA and abused its discretion in failing to require Arizona to perform and include updated analyses of BACM and MSM in the Five Percent Plan. Second, Petitioners alleged that EPA abused its discretion and acted contrary to law—departing from EPA's own guidance without offering a reasonable explanation—by excluding 135 exceedances from the monitoring data as "exceptional events," and by failing to adequately address the controls in upwind areas. Finally, Petitioners argued that EPA violated the CAA by allowing Arizona to satisfy the CAA's "contingency measures" requirement with measures that were already in use in Arizona.[28]

The Ninth Circuit first held that, given the lack of any contrary statutory command in the CAA and given EPA's reasonable explanation for its approach, EPA did not abuse its discretion or act contrary to law by

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23 Approval and Promulgation of Implementation Plans—Maricopa County PM-10 Nonattainment Area; Five Percent Plan for Attainment of the 24-Hour PM-10 Standard, 79 Fed. Reg. 33,107 (June 10, 2014).

24 EPA concluded reasonable controls were in place by relying on the satisfaction of the BACM and MSM requirements in Arizona's 2000 SIP, approved 12 years prior in 2002.

25 42 U.S.C. §§ 7619(b)(1)(A), 7502(c)(9).

26 *Id.* § 7607(b)(1).

27 APA, 5 U.S.C. § 706(2)(A) (2012).

28 42 U.S.C. § 7502(c)(9).

declining to require updated demonstrations of BACM or MSM in the Five Percent Plan. The court looked to the CAA and found no language requiring EPA to reassess a state's controls in each SIP submission, and thus found that EPA's approach was consistent with the statute.

Next, the Ninth Circuit held that EPA reasonably interpreted the "exceptional events" exclusion and sufficiently provided a reasonable explanation as to why Maricopa County had the requisite reasonable controls for windblown dust when EPA excluded the 135 PM-10 exceedances from Maricopa County's NAAQS monitoring data.[29] Contrary to Petitioners' argument, the court found that nothing required EPA to review and approve windblown dust control measures as BACM before determining that dust is reasonably well controlled in a given area. The court deferred to EPA's scientific judgment that the dust source exceedances were reasonably well controlled and were thus excludable as "exceptional events."

The Ninth Circuit also held that EPA did not abuse its discretion by approving Arizona's description of upwind sources, or by concluding that the anthropogenic dust sources outside of Maricopa County but still within Arizona were reasonably well controlled. Dismissing Petitioners' argument that Arizona did not identify all contributing emission sources outside the Maricopa Area, the court found that Arizona had provided enough information to make EPA's conclusions reasonable. Additionally, the Ninth Circuit found that EPA provided a reasoned explanation for finding the anthropogenic dust sources outside of the County to be reasonably well controlled.

Finally, the Ninth Circuit held that EPA did violate the CAA by approving, as contingency measures, processes that Arizona had previously implemented. The Ninth Circuit relied on the CAA's plain meaning, rather than deferring to EPA's interpretation allowing past contingency measures to satisfy the contingency measure requirement. The court determined that the plain meaning required the contingency measures in the SIP to be undertaken in the future, triggered only by a state's failure to reasonably progress toward attainment or to attain the NAAQS by the prescribed deadline. Despite EPA's argument that its interpretation was consistent with the CAA's policy goals, the Ninth Circuit refused to defer to EPA and sided with Petitioners on this final claim.

Ultimately, the Ninth Circuit denied the petition as to the Petitioners' first two claims. The court first held that EPA did not act contrary to law by failing to require that Arizona include updated analyses of BACMs and MSMs in its Five Percent Plan. The court next held that EPA did not abuse its discretion by excluding 135 PM-10 exceedances from Arizona's monitoring data as "exceptional events." Finally, the Ninth Circuit remanded Petitioners' final claim to EPA for reconsideration of the inadequate contingency measures portion of the Five Percent Plan.

[29] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

C. CERCLA

1. Pakootas v. Teck Cominco Metals, Ltd., 830 F.3d 975 (9th Cir. 2016).

In this case, members of the Confederated Tribes of the Colville Reservation (collectively, the Tribe)[30] brought claims under the Comprehensive Environmental Response, Compensation, and Liability Act[31] (CERCLA) against Teck Cominco Metals, Ltd. (Teck Cominco), the owner-operator of a Canadian smelter, including claims to recover the cost of hazardous waste cleanup and natural resource damages in the State of Washington. All parties agreed that Teck Cominco could be held liable for costs and damages under CERCLA if Teck Cominco arranged for the "disposal" of hazardous substances—such as lead, arsenic, cadmium, and mercury compounds—when those substances entered the air from Teck Cominco's smelter stacks and were eventually deposited onto soil and water in Washington. Teck Cominco moved to strike the claims seeking cleanup costs and damages on the basis that CERCLA does not impose liability when hazardous substances travel through the air and eventually enter the land or water. The district court initially denied Teck Cominco's motion.[32] Teck Cominco filed a motion for reconsideration one month after the Ninth Circuit ruled that it was not "disposal" within the meaning of the Resource Conservation and Recovery Act[33] (RCRA) when hazardous material, emitted into the air, eventually enter the land or water. The district court again denied the motion.[34] However, because CERCLA cross-references RCRA's definition of "disposal" and no court had addressed whether aerial deposits constituted "disposal" under CERCLA, the district court certified the question to the Ninth Circuit for interlocutory appeal.[35]

The Ninth Circuit reviewed the district court's decision de novo. The court explained that, in order for the Tribe to prevail, it needed to prove that 1) Teck Cominco either released or had a threatened release of hazardous substances; and 2) the hazardous substances were found at a CERCLA "facility"—i.e., the site where a hazardous substance has been "disposed." The Tribe argued that Teck Cominco disposed of various hazardous substances in Washington after those substances were carried through the air from Teck Comico's smelter stacks in Canada and deposited onto the soil

30 Plaintiffs included Joseph A. Pakootas and Donald R. Michel, both enrolled members of the Confederated Tribes of the Colville Reservation, and the Confederated Tribes of the Colville Reservation were plaintiff-appellees. The State of Washington intervened as plaintiff-appellee.

31 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675.

32 Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-LRS, 2014 WL 12481339, at *1 (E.D. Wash. Mar. 7, 2014).

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

34 Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-LRS, 2014 WL 12480262, at *1 (E.D. Wash. July 29, 2014).

35 Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-LRS, 2014 WL 7408399, at *4 (E.D Wash. Dec. 31, 2014).

and water in Washington. The Ninth Circuit held that it was bound by its previous interpretation under RCRA that aerial emissions leading to deposit elsewhere did not constitute disposal. Accordingly, the court reversed the district court's ruling.

This case was one in a series of disputes regarding damages occurring within Washington caused by hazardous substances originating from Teck Cominco's smelter operation ten miles north of the United States-Canada border in Trail, British Columbia. The larger dispute centered on Teck Cominco dumping slag into the Columbia River. The appeal in this case focused on the hazardous substances Teck Cominco emitted into the air from the smelter's smokestacks. The Tribe alleged that Teck Cominco discharged hazardous substances into the atmosphere through its smelter stacks, and those hazardous substances were "deposited" within the United States after travelling through the air, causing continuing detrimental impacts to human health and the environment.

The Tribe argued that Teck Cominco allowed hazardous substance to be "deposited" in Washington through the air or by the wind, and cited dictionary definitions of "deposit" that included gradual accumulation through natural forces. Though the court found the Tribe's interpretation reasonable, it determined that prior rulings precluded it from adopting the Tribe's proffered definition.[36] In *Carson Harbor Village Ltd. v. City of Carson*, the Ninth Circuit concluded that "deposit" in the CERCLA context meant placement by a party and not "passive migration."[37] And in *Center for Community Action v. BNSF Railway*, the court held that, under RCRA, for airborne hazardous waste to have been "deposited" it must be first placed into or onto water or land before being emitted into the air.[38]

Based on its own controlling precedent, the Ninth Circuit was unable to adopt the Tribe's proposed interpretation of what constituted a "deposit" under CERCLA. The court reversed the district court's orders and remanded the case for further proceedings on the remaining claims.

D. Federal Land Policy Management Act

1. Great Basin Resource Watch v. Bureau of Land Management, 844 F.3d 1095 (9th Cir. 2016).

In 2012, the Bureau of Land Management (BLM) approved the Mt. Hope Project (the Project), an open-pit mining operation, partially located on federally owned land in Nevada. Two environmental groups, Great Basin Resource Watch and the Western Shoshone Defense Project (GBRW, collectively), challenged the approval in the United States District Court for the District of Nevada, arguing that BLM's approval of the project: 1)

36 Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry., 764 F.3d 1019 (9th Cir. 2014); Carson Harbor Vill., Ltd. v. City of Carson, 270 F.3d 863, 879 (9th Cir. 2001).

37 *Carson Harbor*, 270 F.3d at 879.

38 *Ctr. for Comm. Action*, 764 F.3d at 1025.

violated the National Environmental Policy Act[39] (NEPA); 2) violated the Federal Land Policy Management Act[40] (FLPMA); and 3) ignored requirements of the executive order known as Public Water Reserve No. 7 (PWR 7). GBRW initially sought a preliminary injunction to prevent construction of the mine. The district court denied GBRW's injunction and granted BLM summary judgment,[41] at which point GBRW appealed to the Ninth Circuit. The Ninth Circuit affirmed the district court in part, and reversed and remanded in part. In particular, the court approved BLM's NEPA mitigation analysis, but found aspects of BLM's NEPA air pollution analysis and cumulative impact analysis deficient.

The Project operator sought federal approval from BLM for the project in 2006, triggering BLM's NEPA analysis. In 2011, BLM released its draft environmental impact statement (DEIS), with the final environmental impact statement (FEIS) following in 2012. During both the DEIS and FEIS comment period, GBRW criticized BLM's impact analysis for failing to consider cumulative project impacts, as well as impacts to air and water quality. When BLM released its record of decision (ROD) adopting the FEIS shortly thereafter, GBRW challenged BLM's NEPA compliance in district court.

On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment de novo, and assessed BLM's NEPA compliance under an arbitrary and capricious standard.[42] To determine if an agency violated NEPA by issuing an allegedly inadequate EIS, the Ninth Circuit employs a "rule of reason," which requires the court to approve an EIS if the EIS "contains a reasonably thorough discussion" of likely environmental impacts, demonstrating that the agency has taken a "hard look" at the environmental consequences of the agency's decision.[43]

The Ninth Circuit first held BLM's analysis of air pollution impacts defective. GBRW argued that BLM failed to adequately determine baseline pollution levels in the affected area before determining the impact the Project would have on air quality. BLM's DEIS used baseline data from Clark County, Nevada, for certain pollutants, and the state's "default baseline values" for "unmonitored rural areas" for other pollutants. The FEIS, by contrast, assumed a baseline value of zero for some pollutants based on guidance from Nevada's Division of Environmental Protection (NDEP), relied on Clark County monitoring data to set baseline values for other pollutants, and adopted data from a national park (where air quality is more heavily protected and, therefore, more pristine) located some 100 miles from the Project site, for still other pollutants.

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

40 Federal Land Policy and Management Act of 1976, 43 U.S.C §§ 1701–1787 (2012). The court did not address this claim.

41 Great Basin Res. Watch v. U.S. Dep't of Interior, No. 3:13-CV-00078-RCJ-VPC, 2014 WL 3696661, at *18 (D. Nev. July 23, 2014).

42 APA, 5 U.S.C. § 706(2)(A) (2012).

43 *See* California v. Block, 690 F.2d 753, 761 (9th Cir. 1982).

GBRW challenged BLM's choice of baseline values. First, GBRW argued that BLM unreasonably selected a national park to establish certain baselines. The Ninth Circuit disagreed, finding that, even though BLM's baseline estimates may be low as a result of that choice, BLM adequately explained why the national park's baseline data was accurate enough to provide a reasonable baseline for the Project area. GBRW also challenged BLM's selection of a zero-baseline value for several pollutants. BLM insisted that a zero-baseline value was appropriate and justified by NDEP's guidance. The Ninth Circuit found that NDEP's guidance consisted only of one brief email, which failed to include any scientific rationale for selecting a baseline value of zero. The court explained that unsupported statements about scientifically complex issues like air pollution baselines would not be sufficient in an EIS, and therefore cannot be used to justify decisions made in an EIS. The source of the statement, in this case an "expert" within a relevant state agency, is irrelevant. The Ninth Circuit concluded that BLM could not show that it had taken the requisite "hard look" at air pollution impacts, and remanded back to BLM for further analysis.

Second, the Ninth Circuit found that BLM inadequately assessed the Project's cumulative impacts. GBRW argued that the FEIS merely mentioned cumulative impacts arising from the Project and other activities near the Project site, rather than discussing those impacts in detail or engaging in quantifiable analysis of those impacts. The Ninth Circuit began by explaining that NEPA's cumulative impact analysis requires the action agency to take a "hard look" at all actions that, in combination with the action under consideration, might affect the environment. Applying that standard, the court concluded that BLM failed to adequately assess cumulative impacts. While the FEIS identified actions that might factor into a complete cumulative impact analysis, the Ninth Circuit found that the FEIS thoroughly explored certain impacts but not others. Most significantly, the FEIS only cursorily assessed cumulative impacts on air pollution and air quality. The Ninth Circuit's determination flowed in part from the court's decision that BLM failed to support its baseline air pollution values, as described above.

Third, the Ninth Circuit rejected two of GBRW's challenges to BLM's mitigation measures to reduce the harm caused by the Project, and declined to resolve a third. First, GBRW argued that BLM should create a mitigation plan to reduce water quality impacts caused by a lake that would, over time, form in the open mining pit. The FEIS proposed to restrict access to the lake, and found a "low potential" for adverse ground water impacts, but contained no specific mitigation measures to prevent water quality impacts. The Ninth Circuit found that BLM complied with NEPA because the FEIS included adequate mitigation measures elsewhere in the document. The FEIS committed the mine operator to ongoing monitoring, and BLM pledged in comments to the DEIS to evaluate mitigation measures related to the lake on an ongoing basis. The Ninth Circuit cautioned that a "wait and see" attitude toward mitigation may not comply with NEPA in every instance, but concluded that such an approach was acceptable where, as here, the probability of adverse groundwater impacts was remote.

GBRW's second mitigation claim alleged that the FEIS failed to address funding via reclamation bonds for long-term reclamation efforts after the Project's lifespan. BLM responded that, while BLM required project operators to submit reclamation plans and cost estimates, as well as financial guarantees in the form of reclamation bonds to cover those estimates, reclamation financing need not be part of the FEIS because they are BLM regulatory requirements, not NEPA requirements. The Ninth Circuit disagreed with BLM's reasoning, and assumed without deciding that long-term mitigation and reclamation funding must be discussed in sufficient detail in an FEIS. Turning to the FEIS at issue, the court found a sufficiently thorough discussion of long-term mitigation and reclamation measures. While the Ninth Circuit expressed some concern that the treatment of reclamation funding appeared sparse, the court found that the FEIS nonetheless addressed the effectiveness of long-term mitigation and reclamation in sufficient detail.

The Ninth Circuit briefly addressed, but declined to resolve, GBRW's third mitigation claim. GBRW alleged that mitigation measures in the FEIS inadequately addressed impacts on surface and ground water quantity caused by pumping activities at the proposed mine. The Ninth Circuit noted that the FEIS seemed potentially incomplete with respect to water quantity impact mitigation, but suggested that the error might be harmless. Because neither party had briefed the harmlessness issue, however, and because the court was already remanding the FEIS to BLM on other grounds, the court declined to resolve this particular claim.

Fourth, and finally, the Ninth Circuit declined to rule on GBRW's claim that approving the Project would violate BLM's duty to protect public lands under executive order PWR 107. The court determined BLM should have the opportunity to correct the errors in its NEPA analysis, detailed above, before the court would resolve challenges to the project itself. In addition, the court was unable to determine BLM's position on whether the Project area was covered by PWR 107. The court remanded so that BLM could clarify its position and act accordingly under the terms of PWR 107.

In sum, the Ninth Circuit affirmed in part, reversed in part, and remanded the district court's grant of summary judgment to BLM. The Ninth Circuit found certain of BLM's air pollution baselines justifiable, but rejected other baseline decisions for lack of reasoning. The court additionally found BLM's cumulative impact analysis deficient, but found BLM's mitigation decisions adequate. Finally, the court declined to rule on claims stemming from PWR 107, an executive order related to management of certain federal lands.

II. NATURAL RESOURCES

A. Endangered Species Act

1. California Sea Urchin Commission v. Bean, 828 F.3d 1046 (9th Cir. 2016).

Four commercial fishing groups[44] (collectively, Plaintiffs) sued the United States Fish and Wildlife Service (FWS) under the Administrative Procedure Act[45] (APA) alleging that FWS acted outside its statutory authority when it terminated a translocation program for the southern sea otter, a "threatened" species under the Endangered Species Act.[46] In 1986, FWS received congressional authority to develop a management plan for the otter.[47] In 1987, FWS implemented a translocation program to relocate, manage, and increase the sea otter population. The program not only established an "experimental colony" of otters in southern California but also mandated that FWS maintain an otter-free "management zone" to protect fishing interests. In 2012, after determining that the translocation program was not achieving its goals, FWS promulgated a rule terminating the program, thus ending its obligation to enforce the otter-free management zone.[48] In 2013, Plaintiffs in this case brought suit alleging that FWS had no statutory authority to terminate the program. The United States District Court for the Central District of California dismissed Plaintiffs' claim as untimely under the APA's six-year statute of limitations, finding that Plaintiffs had brought a facial challenge to a rule dating back to 1987.[49] The Ninth Circuit, reviewing the dismissal de novo, reversed.

The only issue on appeal was the timeliness of Plaintiffs' claim. Under the APA, any claim for judicial review of an agency action must be filed within six years.[50] Plaintiffs argued that the termination of the translocation program in 2012 constituted such an action, and that their claim in 2013 therefore fell within the APA's statute of limitations. FWS responded by characterizing the termination decision not as a separate action but as the outgrowth of the 1987 rulemaking that implemented the translocation program, in which FWS expressly asserted its power to terminate the otter translocation program if certain criteria were met. FWS presented its

44 Plaintiffs included the California Sea Urchin Commission, California Abalone Association, California Lobster and Trap Fishermen's Association, and Commercial Fishermen of Santa Barbara.

45 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

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

47 Act of Nov. 7, 1986, Pub. L. No. 99-625, 100 Stat. 3500 (1986).

48 Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program; Final Rule, 77 Fed. Reg. 75,266, 75,266 (Dec. 19, 2012) (to be codified at 50 C.F.R. pt. 17).

49 Cal. Sea Urchin Comm'n v. Jacobson, No. CV 13-05517, 2014 WL 948501, at *1 (C.D. Cal. Mar. 3, 2014).

50 Federal Tort Claims Act, 28 U.S.C. § 2401(a) (2012).

original rule as the agency action at issue, not the 2012 termination, and argued that Plaintiffs had therefore brought their challenge 20 years too late.

The Ninth Circuit held that Plaintiffs' challenge was timely because it responded to a 2012 agency action. The court acknowledged that the program termination flowed from the criteria laid out in the 1987 rule, and agreed that Plaintiffs could not challenge the formation of those criteria now. The application of those criteria, however, constituted a separate agency action. To rule otherwise, the court reasoned, would imbue the APA's statute of limitations with unprecedented power over claims arising in present day, as agencies could evade legal challenge simply by tracing its action to an older controlling rule.

In sum, the Ninth Circuit reversed the district court's dismissal on timeliness grounds because the termination of the sea otter translocation program in 2012 amounted to a new agency action within the APA's statute of limitations. The court remanded the case to the district court to decide the merits.

2. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016).

In this case, the State of Alaska, various oil and gas trade associations, Alaska Native corporations, and Alaska Native villages (collectively, Alaska)[51] challenged the United States Fish and Wildlife Service's (FWS) critical habitat designation for Alaskan polar bears under the Endangered Species Act[52] (ESA). The United States District Court for the District of Alaska granted summary judgment to Alaska for two reasons.[53] First, the district court held that FWS failed to identify exactly where and how polar bears use the areas designated as critical habitat units two and three.[54] Second, the district court found that FWS failed to provide adequate justification to the State of Alaska for adopting a final rule that did not adequately address Alaska's comments on the proposed designation.[55] The district court vacated the designation as a whole.[56]

FWS and several intervenor environmental groups[57] appealed. FWS contended that the ESA did not require FWS to prove how and where existing polar bears used the designated habitat. Additionally, FWS argued that it adequately addressed the state's comments. The Ninth Circuit reviewed the district court's decision de novo. The Ninth Circuit ultimately agreed with FWS and reversed and remanded the district court's holding.

51 Plaintiffs included the Alaska Oil & Gas Association and the American Petroleum Institute, the State of Alaska, Alaska Native corporations, an Alaska Native tribal government, and the North Slope Borough.

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

53 Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974, 974 (D. Alaska 2013).

54 *Id.* at 999–1003.

55 *Id.* at 1003–04.

56 *Id.*

57 Defendant FWS was joined by three environmental groups: Center for Biological Diversity, Defenders of Wildlife, and Greenpeace.

Alaska cross-appealed in an effort to resurrect claims the district court had already rejected. The Ninth Circuit affirmed the district court's denial of those claims.

In 2008, FWS listed polar bears as "threatened" under the ESA. FWS then designated three units of polar bear critical habitat in Alaska. Critical habitat designation is partly based on the location of "primary constituent elements" (PCEs), elements essential to the listed species.[58] The ESA further mandates that critical habitat designation be based on the best available scientific data and that FWS take into consideration other potential impacts, including cost. In addition, FWS must give notice and seek feedback from impacted states regarding critical habitat designations. When FWS's final designation is not entirely in line with the state's comments, FWS is required to provide written justification for its choice of action.[59] In this case, FWS based its critical habitat designation for the polar bear on the best available science, including consultation with polar bear experts. Prior to issuing its Final Rule in 2010,[60] FWS considered the proposed designation's probable impacts, and held multiple public hearings and public comment periods.

On appeal, FWS argued that the district court incorrectly found that the ESA requires FWS to specify precisely where the PCEs were located within units two and three. The Ninth Circuit agreed and explained that the district court incorrectly held FWS to a stricter standard than is required under the ESA. The court reasoned that the district court's standard was contrary to the purpose of the ESA because it conflicted with the ESA's conservation goals. In support, the Ninth Circuit cited *Alliance for Wild Rockies v. Lyder*,[61] which held that FWS could designate critical habitat areas based on evidence that the listed species used a given area for reproductive purposes.[62]

The Ninth Circuit next addressed whether FWS's process for mapping unit two was arbitrary and capricious. In mapping and designating unit two, FWS relied on radio-telemetry data, which demonstrated that 95% of all known polar bear dens were located in a certain area east of the town of Barrow. Based on this information, FWS designated unit two as critical habitat and mapped the unit as an area extending between five and twenty miles from the coast, which encompassed most of the confirmed and probable denning sites. Plaintiffs argued that FWS's use of a five-mile measurement from the coast was arbitrary and capricious because FWS did not note precisely where within this area the denning habitats were located. The Ninth Circuit disagreed and found that Alaska was demanding a more

58 *See* ESA, 16 U.S.C. § 1532(5)(A) (2012).

59 *Id.* § 1533(i).

60 Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, 75 Fed. Reg. 76,086, 76,086 (Dec. 7, 2010) (to be codified at 50 C.F.R. pt. 17).

61 728 F. Supp. 2d 1126 (D. Mont. 2010).

62 *Id.* at 1134–35.

vigorous standard than required by the ESA.[63] The court found that FWS rationally mapped unit two to include the majority of denning sites. In addition, the court found that FWS's decision was based on FWS's work with the United States Geological Survey and that FWS took all of the appropriate information into account.

Next, the court addressed Alaska's claim that FWS did not adequately explain its decision to include areas adjacent to human activity within unit two. The Ninth Circuit held that, despite the occurrence of some human activity adjacent to unit two, it was reasonable for FWS to find that polar bears could still move through the area used by humans to establish denning sites.

Next, the Ninth Circuit addressed the issues arising from FWS's designation of critical habitat unit three, also known as the Barrier Island habitat. The district court found that FWS had failed to specifically identify where and how polar bears use unit three, and held that the only areas that qualified as critical habitat are areas FWS could demonstrate were presently used by polar bears. The Ninth Circuit found that the district court was requiring scientific certainty where the ESA does not. The Ninth Circuit noted that part of the confusion likely stemmed from the fact that the district court had misinterpreted the term "denning habitat." The district court interpreted the term to describe only the locations suitable for the actual dens.[64] However, FWS determined that "denning habitat" includes those areas essential to birthing as well as post-natal care and feeding. The Ninth Circuit found that it was reasonable for FWS to designate unit three based on this definition, and that it was inappropriate to limit critical habitat to just the areas used for actual dens. The Ninth Circuit held that FWS adequately explained its rationale for designating unit three, and that FWS had made a reasonable decision based on the best available scientific data.

The final issue in this case was whether FWS gave adequate notice to the State of Alaska, and whether FWS provided appropriate reasons for straying from the state's comments in the Final Rule. Under the ESA, FWS is required to provide notice to state agencies before designating critical habitat so as to give the state time to give input.[65] Additionally, the ESA requires FWS to justify in writing any decision to adopt plans inconsistent with state comments.[66] The Ninth Circuit concluded that the court could only review whether or not FWS actually provided written justification to the state. The court could not address the substance of the written justification because the ESA does not establish what the substance of the written justification must contain.

The Ninth Circuit disagreed with the district court's conclusion that FWS's response to Alaska's comments was inadequate. First, the court

63 The standard requires use of best available technology to focus on PCEs essential to protecting polar bears, regardless of whether polar bears are currently present in that habitat. *See* 16 U.S.C. § 1533(b)(2).

64 Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974, 1002 (D. Alaska 2013).

65 16 U.S.C. § 1533(b)(5)(A)(ii).

66 *Id.* § 1533(i).

found that the district court took issue with FWS's decision to only reference Alaska's comments rather than including them in whole in the Final Rule. The Ninth Circuit found that there was nothing in the ESA that prevented FWS from referencing public documents rather than including them word for word.

Second, the district court held that FWS violated the ESA because it sent its response letter to the Governor of Alaska and not the state agency that had submitted the comments.[67] The Ninth Circuit found that FWS action was not a violation of the ESA because the agency ultimately received the letter regardless.

Third, the Ninth Circuit rejected the claim that FWS neglected to include adequate responses to all of the Alaska Department of Fish and Game's comments. The Ninth Circuit held that FWS responded in some way to each of the state agency's comments. The court reasoned that FWS's response was consistent with the ESA because the statute does not create a guarantee that the state will find FWS's responses satisfactory.

Finally, the Ninth Circuit addressed several claims that Alaska attempted to resurrect on appeal. First, Ninth Circuit found that the district court correctly determined that the so-called "no-disturbance zone" was an important part of unit three because the zone provided a barrier against human disturbance. Second, Alaska contended that a critical habitat designation would not alter current polar bear conservation requirements. The Ninth Circuit explained that the existence of other programs or conservation requirements does not mean that FWS does not have to fulfill its responsibility to designate critical habitat. Third, Alaska argued that FWS acted arbitrarily and capriciously because FWS did not adequately take into account all costs associated with the designation. The Ninth Circuit disagreed, holding that FWS adequately examined relevant costs associated with the designation. Finally, Alaska contended that the ESA requires FWS to consult with impacted states prior to designating critical habitat. The Ninth Circuit held that consultation was not required during the initial designation process.

In sum, the Ninth Circuit held that the district court erred in striking down FWS's critical habitat designation. The Ninth Circuit reversed the district court's holding and remanded the case for entry of judgment in favor of FWS.

3. Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671 (9th Cir. 2016).

In 2009, the National Marine Fisheries Service (NMFS) concluded that the Okhotsk and Beringia, distinct population segments of Pacific bearded seals, warranted listing as "threatened" under the Endangered Species Act[68] (ESA) because the seals were likely to become endangered by the year 2095 as a result of the loss of sea ice. The Alaska Oil and Gas Association and

67 *Alaska Oil & Gas Ass'n*, 916 F. Supp. 2d at 1003.

68 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

others (collectively, Plaintiffs)[69] challenged the listing of both distinct population segments as arbitrary and capricious. Plaintiffs argued that 1) NMFS's decision was not based on the best scientific and commercial date available, as required by the ESA; 2) the bearded seal population was viable; 3) the lack of adequate seal population data made any ESA determination impossible; 4) NMFS's methods called for undue speculation; 5) NMFS unreasonably switched policy tactics from previous Arctic sea ice listing petitions; and 6) NMFS failed to demonstrate the requisite causal connection between the loss of sea ice and any impact on the seal populations.

The United States District Court for the District of Alaska found that Plaintiffs lacked standing to challenge the listing of the Okhotsk population, but granted Plaintiffs' motion for summary judgment on the Beringia population.[70] NMFS appealed the district court decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reviews a grant of summary judgment de novo to determine if the ESA listing decision was arbitrary, capricious, or otherwise a violation of law.

On appeal, Plaintiffs argued that NMFS's decision was arbitrary and capricious because it used unreliable climate models to predict the degree of warming beyond 2050. The Ninth Circuit disagreed with Plaintiffs. The court held that the International Panel on Climate Change (IPCC) models represented the best available scientific information, and the IPCC models reasonably supported NMFS's finding. Further, the Ninth Circuit held that NMFS provided a reasonable explanation for relying on the IPCC projections, which was all that the ESA required.

The Ninth Circuit agreed with Plaintiffs that there was more uncertainty with climate projections for the second half of the 21st century, but found that this uncertainty alone did not make NMFS's decision arbitrary or capricious. The court recognized that there was uncertainty as to the magnitude and speed of warming, and the effect of warming on the persistence of sea ice. But the court held that the ESA does not require NMFS to make decisions based on only absolutely certain data. Instead, the ESA mandates that NMFS make its decision based on the "best scientific and commercial data available."[71] The court concluded that NMFS provided a reasonable and scientifically supported basis for dealing with the inherent uncertainty in long-term climate projections, and that NMFS was forthcoming and open about any shortcomings its process may have had. This, the court held, is all the ESA requires.

Second, Plaintiffs argued that NMFS's use of the year 2095 instead of 2050 as the "foreseeable future" is an unreasonable deviation from previous policy decisions. The ESA allows NMFS to list a species as threatened only if

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69 Plaintiffs in this case were Alaska Oil and Gas Association; American Petroleum Institute; State of Alaska; North Slope Borough; Inupiat Community of the Arctic Slope; Northwest Arctic Borough; Arctic Slope Regional Corporation; and NANA Regional Corporation, Inc.

70 Alaska Oil & Gas Ass'n v. Pritzker, Nos. 4:13–cv–00018–RRB, 4:13–cv–00021–RRB, 4:13–cv–00022–RRB, 2014 WL 3726121, at *4, *16 (D. Alaska July 25, 2014).

71 16 U.S.C. § 1533(b)(1)(A).

the species is likely to become endangered in the "foreseeable future."[72] Plaintiffs contended that NMFS was precluded from considering 2095 as the foreseeable future because, in the past, NMFS had consistently used 2050 as the requisite deadline. In its listing criteria, NMFS acknowledged the change in its foreseeability analysis and justified this change as incorporating a more dynamic, species-specific, and evidence-based process. The Ninth Circuit held that as long as an agency provides a reasonable explanation for a new policy, as NMFS did in this case, then the agency is free to change its policies and does not have to show that any one policy is better than another.

Third, Plaintiffs argued that NMFS failed to establish the causal connection required between the loss of sea ice and the bearded seal population's survival. The Ninth Circuit disagreed with Plaintiffs. NMFS determined that sea ice was crucial to the survival of bearded seals because bearded seals use sea ice during critical stages of life such as breeding, nursing and raising pups, and mating. Further, the sea ice must form over shallow waters to allow bearded seals access to their food sources on the ocean floor. The Ninth Circuit held that NMFS clearly demonstrated that a decrease in sea ice was likely to negatively impact the bearded seal population. Further, the Ninth Circuit held that uncertainty as to the speed and magnitude of the negative impact does not render the decision invalid if data available in the record reasonably supports the agency's conclusions. An agency does not need to wait until a species' habitat has completely disappeared before determining that the habitat loss will negatively impact the species.

Finally, Plaintiffs argued that NMFS was required, and failed, to determine that the negative effects of climate change would render the species extinct by 2100. The Ninth Circuit rejected this argument because the court found that Plaintiffs had misinterpreted the ESA. The ESA mandates that the agency determine the likelihood of endangerment based on a list of factors, but it does not require an agency to determine the projected date of extinction.[73] The Ninth Circuit determined that NMFS conducted a thorough analysis of the best scientific and commercial data available, seriously considered all of the public comments it received, and generally complied with the spirit and letter of the ESA.

Separately, the State of Alaska argued that NMFS failed to comply with its obligation under the ESA to provide written notice and justification as to why NMFS failed to adopt regulations consistent with the state's comments.[74] The Ninth Circuit disagreed. After reviewing all of the public comments it received and prior to publishing its listing decision, NMFS wrote to the commissioner of the Alaska Department of Fish and Game

72 *Id.* § 1532(20).

73 *Id.* § 1533(a)(1)(A)–(E).

74 *See id.* § 1533(i) (stating that "the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition").

(ADFG), the lead agency for commenting. In that letter, NMFS notified ADFG of NMFS's decision regarding the bearded seal distinct population segments and addressed the substantive comments that Alaskan agencies had made. The court held that the ESA does not require separate state notification and that the ESA only requires that the justification for rejecting a state agency's comments be in writing. The court held that the record indicates that NMFS adequately and substantively responded to all of Alaska's arguments, and therefore, the State received the notice and process required by the ESA.

In sum, the Ninth Circuit rejected each argument offered by Plaintiffs as to why NMFS's bearded seal ESA listing was arbitrary and capricious. The court reversed the district court's grant of a summary judgment to Plaintiffs, and found instead for NMFS.

4. Center for Biological Diversity v. Bureau of Land Management, 833 F.3d 1136 (9th Cir. 2016).

The Center for Biological Diversity (the Center) and other environmental organizations[75] sued the Bureau of Land Management (BLM) and the United States Fish and Wildlife Service (FWS)[76] in the United States District Court for the Northern District of California for alleged violations of the Endangered Species Act[77] (ESA), the Clean Air Act[78] (CAA), the Federal Land Policy and Management Act[79] (FLPMA), the National Environmental Policy Act[80] (NEPA), and the Administrative Procedure Act[81] (APA). The district court granted summary judgment in favor of BLM on all but one issue.[82] On appeal to the Ninth Circuit, the Center challenged the grant of summary judgment against two of its original allegations. Specifically, the Center alleged that 1) the 2012 Biological Opinion (BiOp) issued by FWS was deficient because it did not include an Incidental Take Statement (ITS) for threatened plants; and 2) BLM failed to properly evaluate the impacts of its 2013 Recreation Area Management Plan (RAMP) on air quality. The Ninth Circuit affirmed summary judgment in favor of BLM.

The Imperial Sand Dunes Planning Area is a 227,000-acre tract of desert in Imperial County, California, largely managed by BLM. A 138,000-acre portion of that land is designated as the Imperial Sand Dunes Special

75 Plaintiffs included the Sierra Club, Public Employees for Environmental Responsibility, and Desert Survivors.

76 Defendant-intervenors included Blueribbon Coalition, California Association of 4 Wheel Drive Clubs, San Diego Off Road Coalition, Desert Vipers Motorcycle Club, High Desert Multiple Use Coalition, American Motorcycle Association, Off-Road Business Association, California Off-Road Vehicle Association, and American Sand Association.

77 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

78 42 U.S.C. §§ 7401–7671q (2012).

79 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2012).

80 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h.

81 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

82 Ctr. for Biological Diversity v. Bureau of Land Mgmt., 35 F. Supp. 3d 1137, 1149, 1155, 1159, 1163 (N.D. Cal. 2014).

Recreation Management Area (the Dunes) and is set aside for the protection of plants and wildlife, as well as for outdoor recreation.

In 2013, BLM adopted a new RAMP under which much of the Dunes would be open to off-road vehicle use, while less than a third of the Dunes would remain closed to off-road vehicles. BLM prepared an Environmental Impact Statement (EIS) to assess the impacts of the 2013 RAMP and, pursuant to section 7 of the ESA, consulted with FWS.[83] Consultation is necessary to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[84] Such consultation results in a Biological Opinion (BiOp), "summarizing the relevant findings and determining whether the proposed action is likely to jeopardize the continued existence of the species."[85] FWS's 2012 BiOp found that the 2013 RAMP "could result in direct death or injury of Peirson's milk-vetch," a threatened species of flowering plant listed under the ESA, but FWS ultimately concluded that the RAMP was not likely to jeopardize the plant's continued existence. Based on this determination, FWS did not prepare an Incidental Take Statement (ITS) for the milkvetch, interpreting the statute to only require an ITS for threatened animal species and not threatened plants.

BLM's RAMP decision to open much of the Dunes to off-road vehicles also relied on an air quality analysis. The analysis concluded that emissions resulting from visitors to the Dunes would not be increased impermissibly by opening it to off-road vehicle use.

The Center mounted a challenge, arguing that 1) the plain language of the ESA required the FWS BiOps to contain ITSs for threatened plants like the milkvetch, rather than for just fish and wildlife; and 2) BLM failed to comply with the CAA, FLPMA, NEPA, and the APA because its emissions analysis evaluating the impacts of the 2013 RAMP on air quality was inadequate and thus arbitrary and capricious. The Ninth Circuit reviewed the first claim under the two-step framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[86] The court reviewed the Center's second set of claims under the APA's highly deferential "arbitrary and capricious" standard.[87]

The Ninth Circuit first held that the text of the ESA clearly does not require BiOps to contain ITSs for threatened plants. Since the statute is unambiguous in that respect, the court ended its *Chevron* analysis at the first step and did not address whether FWS reasonably interpreted the statutory language. Pursuant to congressional amendments to the ESA in 1982, FWS "must issue an [ITS] if the [BiOp] concludes no jeopardy to listed

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

84 *Id.*

85 Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1239 (9th Cir. 2001) (citing 16 U.S.C. § 1536(b)).

86 467 U.S. 837, 838 (1984).

87 APA, 5 U.S.C. § 706(2)(A) (2012).

species or adverse modification of critical habitat will result from the proposed action, but the action is likely to result in incidental takings."[88] Section 9 of the ESA prohibits the taking of "fish or wildlife" only.[89] And while section 9 contains protections for plants, it does not use the term "take."[90] The Center argued that 1) under section 9, the requisite consultation is necessary for endangered or threatened "species," thus necessitating an ITS for all species, both plant and animal; and 2) the ESA defines "take" in a manner that does not exclude plants. The Ninth Circuit rejected both arguments, dismissing the first argument by determining that section 9 of the ESA must be read in the context of the overall statutory scheme rather than in isolation. The court dismissed the second argument after finding that prior to the 1982 amendments, which added the incidental take provisions, section 9 was the only provision using the term "take," and at the time, it was unquestionably limited to animals.

As to the Center's challenge of the air quality analysis, the Ninth Circuit held that BLM's decision to open additional land to off-road vehicles was not arbitrary and capricious under the APA,[91] and did not violate the CAA, FLPMA, or NEPA. Under the CAA, the United States Environmental Protection Agency (EPA) is authorized to establish "national ambient air quality standards" (NAAQS) for certain listed pollutants.[92] States are divided into "air quality control regions."[93] The governor of the state must designate a region as in "nonattainment" if it fails to meet the NAAQS.[94] EPA must also conduct a full "conformity determination" if the total emissions of any listed pollutant in a nonattainment area "caused by a federal action would equal or exceed" listed de minimis quantities.[95] Additionally, in developing and revising land use plans, FLPMA requires the Secretary of the Interior to ensure compliance with applicable state and federal pollution control laws.[96] Finally, before undertaking a proposed action, NEPA requires of a federal agency a "full and fair discussion of significant environmental impacts."[97]

The Dunes are part of the Imperial County Air Pollution Control District, which is classified as a "moderate" nonattainment area for ozone and a "serious" nonattainment area for "fugitive particulate" (PM-10). BLM's Final EIS made underlying assumptions regarding emissions of ozone and PM-10 that drastically differed from the assumptions relied upon in its Draft EIS. Because BLM's changes brought the projected emissions below listed

88 Or. Nat. Res. Council v. Allen, 476 F.3d 1031, 1036 (9th Cir. 2007) (citing 16 U.S.C. § 1536(b)(4)).

89 16 U.S.C. § 1538(a)(1).

90 *Id.* § 1538(a)(2).

91 5 U.S.C. § 706(2)(A).

92 CAA, 42 U.S.C. § 7401(b)(1) (2012).

93 *Id.* § 7407.

94 *Id.*

95 40 C.F.R. § 93.153(b) (2016).

96 FLPMA, 43 U.S.C. § 1712(c)(8) (2012).

97 W. Watersheds Project v. Abbey, 719 F.3d 1035, 1047 (9th Cir. 2013) (quoting 40 C.F.R. § 1502.1).

de minimis quantities, EPA was not required to, and thus did not, conduct a full conformity determination.

The Center first argued that the assumptions supporting BLM's ultimate conclusion—that implementation of the 2013 RAMP would not increase ozone emissions—was arbitrary and capricious. Specifically, the Center argued that opening additional areas of the Dunes to off-road vehicle use will necessarily attract more visitors, while BLM's Final EIS assumed no change in the number of visitors. BLM argued that the data did not support the conclusion that the number of visitors to the Dunes will change.

The Center also challenged BLM's assumptions regarding how visitors spend their time at the Dunes. The Ninth Circuit sided with BLM and held that the assumptions used in the Final EIS, though significantly different from those used in its Draft EIS, were supported by substantial evidence, and thus that BLM deserved deference. The court also found that BLM's revised assumptions regarding how visitors spend their time were irrelevant because overall pollution will not change absent an increase in visitation. The Ninth Circuit concluded that the Center failed to demonstrate that BLM's assumptions, relied upon in its emissions analysis, were arbitrary and capricious.

The Center next argued that BLM's procedure for evaluating the characteristics of the soil when calculating PM-10 emissions was impermissible because it did not conform to the Imperial County's Implementation Plan for achieving compliance with the relevant NAAQS. BLM countered that the county's method for soil sampling was designed for a specific purpose that differed from BLM's purpose for soil sampling and did not implicate PM-10 emissions. Based on that difference, the court sided with BLM and held that BLM was not required to comply with the county rule prescribing a specific method for analyzing soil characteristics. The Ninth Circuit found BLM's soil analysis permissible because the method chosen did not conflict with the county's implementation plan.

The Center finally argued that BLM impermissibly disregarded concerns raised by EPA and the Imperial County Air Pollution Control District regarding potential impacts to the environment. The court rejected this argument for three reasons. First, the ultimate responsibility for ensuring compliance fell to the agency undertaking the proposed action, in this case BLM.[98] Second, the fact that another agency preferred an alternative approach from the one used was insufficient to deem BLM's approach unreasonable. Finally, the record indicated that BLM adequately considered and responded to concerns raised by the other agencies as well as by the public. The Ninth Circuit thus held that BLM's treatment of input from other agencies was not arbitrary or capricious.

Ultimately, the court found that the record showed BLM "considered the relevant factors and articulated a rational connection between the facts

[98] *See* 42 U.S.C. § 7506(c) (stating that a federal agency may not engage in activity that does not conform to the implementation plan).

found and the choices made."[99] Therefore, the Center failed to demonstrate that BLM's emissions analysis was arbitrary and capricious. Because the FWS BiOp was not required to contain an ITS, and because BLM emission analysis was not arbitrary or capricious, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendants as to the issues raised on appeal.

B. Marine Mammal Protection Act

1. Natural Resources Defense Council, Inc. v. Pritzker, 828 F.3d 1125 (9th Cir. 2016).

The Natural Resources Defense Council and other environmental groups (collectively, NRDC)[100] challenged a rule issued by the National Marine Fisheries Service (NMFS), and sought injunctive relief against the United States Navy, seeking to limit the Navy's practice of employing low-frequency active (LFA) sonar during marine training exercises. NRDC alleged that the Marine Mammal Protection Act[101] (MMPA) required NMFS to develop mitigation measures, using a "least practicable adverse impact standard," to protect marine mammals that rely on sonar before approving the Navy's "military readiness activities" involving LFA sonar, because LFA sonar results in an "incidental take" of those marine mammals.[102] While NMFS developed mitigation measures, NRDC argued that the chosen measures failed to comply with the MMPA standard. The United States District Court for the Northern District of California granted summary judgment to NMFS on the question of MMPA compliance.[103] The Ninth Circuit, reviewing the grant of summary judgment de novo and employing an "arbitrary and capricious" standard to review NMFS's action,[104] found that NMFS had not met the "least practicable adverse impact" standard, and reversed and remanded the district court's grant of summary judgment.

The Ninth Circuit began by explaining that the MMPA was designed to combat the population decline in marine mammals caused by human activity. The MMPA prevents the unauthorized "take" of marine mammals, including "incidental" takes.[105] NMFS may authorize incidental takes, but may only do so after: 1) ensuring the activity at issue will have a "negligible impact" on affected marine species, and 2) developing mitigation measures

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

100 Other plaintiffs included the Humane Society of the United States, Cetacean Society International, and the Ocean Futures Society.

101 Marine Mammals Protection Act of 1972, 16 U.S.C. §§ 1361–1421h (2012).

102 *Id.* § 1371(a)(5)(A).

103 Nat. Res. Def. Council, Inc. v. Pritzker, 62 F. Supp. 3d 969, 980 (N.D. Cal. 2014).

104 APA, 5 U.S.C. § 706(2)(A) (2012).

105 16 U.S.C. § 1361(2), (13).

to reduce harm to marine mammals to the "least practicable adverse impact."[106]

Under the MMPA, the Navy's use of LFA sonar in naval combat training exercises constitutes an incidental take of various species of marine mammal. Accordingly, NMFS first authorized the incidental take in 2012 (the 2012 Rule) for a five-year period.[107] The 2012 Rule limits where, when, and how often the Navy may use LFA sonar. In addition, the 2012 Rule contains three mitigation measures designed to minimize the adverse impacts of LFA sonar on marine mammals. According to NRDC, the 2012 Rule's mitigation measures fell short of the "least practicable adverse impact" standard. Although the Ninth Circuit acknowledged that federal agencies have discretion to choose between available mitigation measures, the measures in the 2012 Rule were not available because they failed to adhere to the applicable standard.

The Ninth Circuit first held that NMFS was required to develop mitigation standards that satisfied the "least practicable adverse impact" standard. NMFS presented a variety of arguments for why the "least practicable adverse impact" standard was inapplicable. First, NMFS claimed that, because NMFS made a "negligible impact" finding before authorizing the incidental take of marine species via LFA sonar, NMFS was required by the MMPA to authorize the take regardless of the mitigation measures chosen. The Ninth Circuit disagreed. The court looked to the statutory text and concluded that the development of mitigation measures meeting the proscribed standard was an "independent, thresholds statutory requirement" and not a secondary issue to NMFS's negligible impact finding.[108] Without sufficient mitigation measures, the court determined, NMFS may not authorize the take regardless of impact.

NMFS next argued that the mitigation requirement was superfluous because NMFS had already determined that the impact of LFA sonar would be negligible. Looking to NMFS's own regulations, the Ninth Circuit rejected NMFS's contention. The court found that "negligible impacts" were defined by NMFS with respect to population-level effects. By contrast, mitigation measures under the MMPA must do more than preserve population levels. Thus, a "negligible impact" finding did not obviate the need to develop mitigation measures.

After concluding that NMFS was required to develop mitigation measures under a "least practicable adverse impact" standard before authorizing incidental takes caused by LFA sonar, the Ninth Circuit scrutinized the mitigation measures in the 2012 Rule for compliance with that standard. The court began by acknowledging that the "least practicable adverse impact" standard requires a balance between impact reductions

106 *Id.* § 1371(a)(5)(A).

107 Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar, Fed. Reg. 50,290, 50,290 (Aug. 20, 2012) (to be codified at 50 C.F.R. pt. 218).

108 Nat. Res. Def. Council, Inc. v. Pritzker, 828 F.3d 1125, 1133 (9th Cir. 2016).

with the Navy's need to conduct military-readiness training. But the court found nothing in the 2012 Rule addressing how the chosen mitigation measures met the applicable standard. Nor could the Ninth Circuit find any effort by NMFS to assess the impacts differing mitigation measures might have on Naval training exercises. In the court's eyes, NMFS paid "mere lip service" to the applicable standard and, in doing so, acted contrary to the law.[109] The Ninth Circuit held that NMFS should have considered the need for additional mitigation measures beyond the three adopted in the 2012 Rule.

The Ninth Circuit went on to discuss NMFS's chosen mitigation measures in detail, explaining why the evidence before the agency did not justify NMFS's mitigation decisions in the 2012 Rule. The court again acknowledged that an agency's technical assessment of matters within the agency's area of expertise generally warranted great judicial deference. But the court declined to "rubber stamp" NMFS's 2012 Rule when the Rule's mitigation measures were clearly inconsistent with the MMPA's mandate. Nor was the Ninth Circuit persuaded by NMFS's pledge to use "adaptive management" to develop more effective mitigation measures over time. The court found nothing in the 2012 Rule binding NMFS to that promise, and held that the "mere possibility of changing the rules to accommodate new information" fell short of the MMPA's mitigation requirements.[110]

In sum, the Ninth Circuit found that the 2012 Rule authorizing the incidental take of marine mammals caused by LFA sonar in Navy training exercises failed to comply with the MMPA's strict mitigation requirements. The MMPA requires, as a prerequisite to authorizing incidental takes, development by NMFS of a mitigation plan under a "least practicable adverse impact" standard. The court found that the mitigation measures in the 2012 Rule failed to meet this standard. Accordingly, the court reversed the district court's grant of summary judgment to NMFS and remanded for further proceedings.

C. Magnuson-Stevens Fishery Conservation and Management Act

1. Glacier Fish Co. v. Pritzker, 832 F.3d 1113 (9th Cir. 2016).

The National Marine Fisheries Service (NMFS)[111] created a cost recovery program pursuant to the Magnuson-Stevens Fishery Conservation and Management Act[112] (MSA) and imposed a fee upon a member of a catcher-processor fishing cooperative under this program. The member,

109 *Id.* at 1135.

110 *Id.* at 1142.

111 Defendant-appellees included Penny Pritzker, in her official capacity as Secretary of United States Department of Commerce, National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service.

112 16 U.S.C. §§ 1801–1891d (2012).

Glacier Fish Company LLC (Glacier),[113] brought an action in the United States District Court for the Western District of Washington challenging the fee on multiple grounds. The parties filed cross-motions for summary judgment, and the district court entered summary judgment for NMFS.[114] Glacier timely appealed. The Ninth Circuit reviewed the district court's grant of summary judgment for NMFS de novo, and held that 1) NMFS reasonably determined that the co-op permit was a limited access privilege authorizing the collection of fees, and that the member was therefore a limited access privilege holder; 2) NMFS correctly applied the statutory cost accounting methodology in imposing the fee; and 3) NMFS's cost recovery fee calculation was inconsistent with its own regulations.

The Ninth Circuit first reviewed NMFS's interpretation of the MSA under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[115] Here, Congress directed NMFS to promulgate a fishery management plan and implement regulations with the force of law.[116] Therefore, the court was required to defer to NMFS's reasonable interpretations of any ambiguous statutory provisions. Upon review of the MSA, the court concluded that Congress had not spoken directly to the issues of whether a limited access privilege could include a co-op permit, but found that NMFS's determination was a plausible construction of the MSA.

The MSA created eight Regional Fishery Management Councils, each of which created a fishery management plan containing conservation and management measures, as well as assessments of each fishery's maximum sustainable yield.[117] In 2007, Congress re-authorized the MSA with amendments intended to encourage market-based fishery management through "limited access privilege programs" (LAPPs) under which fishery participants obtain a federal permit to harvest certain amounts of the total catch within particular species.[118] Fishery participants could implement this program through quotas, though participants retained the discretion to implement differently. The MSA further required any council electing to implement a LAPP to implement a cost recovery program to cover the costs of management, data collection, and enforcement.[119] The program fee could not exceed 3% of the value of fish harvested by a particular vessel under any such program.[120]

The Pacific Fishery Management Council (Pacific Council) covers, among others, the Pacific groundfish fishery, which is comprised of three sections: the shoreside sector, the mothership sector, and the catcher-

113 Glacier Fish Company LLC, the plaintiff-appellant, is a Washington limited liability company.

114 Glacier Fish Co. v. Pritzker, No. C14-40 MJP, 2015 WL 71084, at *1 (W.D. Wash. Jan. 6, 2015).

115 467 U.S. 837, 838 (1984).

116 16 U.S.C. § 1854.

117 *Id.* §§ 1852(a), 1853(a).

118 *Id.* § 1802(26).

119 *Id.* § 1853a(e).

120 *Id.* § 1854(d)(2)(B).

processor (C/P) sector. The Pacific Council developed the Pacific Coast Groundfish Fishery Management Plan (Groundfish Management Plan) in 1982.[121] In 1994, an Amendment to the Groundfish Management Plan limited participation in the Pacific groundfish C/P sector in a number of ways, which led to a "race for fish."[122] In an attempt to curb this race, C/Ps formed a private cooperative in 1997, called the Pacific Whiting Conservation Cooperative (PWCC), and agreed to apportion shares of the whiting allocation in advance. In 2003, the Pacific Council and NMFS initiated a LAPP for the whole groundfish fishery to implement a quota system for the shoreside sector. In 2004, NMFS published a notice of proposed rulemaking stating that the Pacific Council was considering implementing a "trawl rationalization program," a type of LAPP, for the Pacific groundfish fishery, which was eventually adopted in 2010.[123]

During this process, NMFS reportedly determined that the C/P co-op program was a LAPP, as it required a federal permit for exclusive co-op use to harvest a portion of the total allowed.[124] As the C/P sector had been successfully operating as a cooperative under the PWCC, the MSA allowed the co-op members to obtain a single "co-op permit," which formally registered the co-op and its associated members. After the adoption of this amendment and trawl rationalization program, the Pacific Council developed a cost recovery program as required by statute,[125] which was published in 2013.[126] The final regulations required members of a C/P co-op to pay fees to NMFS calculated by a percentage of revenue earned by each vessel.[127] In 2013, PWCC obtained a permit for its C/P sector, made up of American Seafoods, Trident Seafoods, and Glacier Fish, to harvest 100% of the Pacific Whiting and non-whiting allocated to the sector, or 34% of the total allowable catch. NMFS calculated the cost recovery program fees owed by each C/P co-op program participant to be 1.1% of its 2014 revenue.

Glacier made three arguments when challenging NMFS's fee decision. First, Glacier argued that NMFS can only collect cost recovery fees from "limited access privilege holders," which Glacier did not consider itself to be.[128] Glacier argued that not only was the co-op permit not a limited access privilege as defined by the MSA, it was held by the cooperative, PWCC, not

121 Pacific Coast Groundfish Fishery and Foreign Fishing; Fishery Management Plan, 47 Fed. Reg. 6043 (Feb. 10, 1982) (to be codified at 50 C.F.R. pts. 611, 663).

122 Pacific Coast Groundfish Fishery, 57 Fed. Reg. 54,001, 54,006 (Nov. 16, 1992) (to be codified at 50 C.F.R. pt. 663); Glacier Fish Co. v. Pritzker, 832 F.3d 1113, 1117 (9th Cir. 2016).

123 Fisheries off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program, 75 Fed. Reg. 60,868, 60,868 (Oct. 1, 2010) (to be codified at 15 C.F.R. pt. 902 and 50 C.F.R. pt. 660).

124 50 C.F.R. § 660.160 (2016).

125 16 U.S.C. § 1853a(e)(1).

126 Fisheries Off West Coast States; Pacific Groundfish Fishery; Trawl Rationalization Program; Cost Recovery, 78 Fed. Reg. 75,268, 75,268 (Dec. 11, 2013) (to be codified at 15 C.F.R. pt. 660).

127 50 C.F.R. § 660.115.

128 16 U.S.C. § 1853a(e)(2).

by Glacier itself. Second, Glacier argued that NMFS did not correctly implement the cost accounting methodology laid out in the MSA.

NMFS argued both that Glacier waived these arguments by failing to raise them in its comments to the proposed cost recovery rules, and that NMFS reasonably determined that the C/P co-op program was a LAPP. The court disagreed that Glacier had waived the arguments, stating that Glacier's arguments were either raised with sufficient clarity in the comments or were raised by NMFS itself. However, the court then held that NMFS reasonably determined that the co-op permit was a limited access privilege authorizing the collection of fees, and that each member was, as a result, a limited access privilege holder. The court also held that NMFS correctly applied the statutory cost accounting methodology in imposing the fee.

Third, Glacier argued that NMFS's calculation of the fee at issue was inconsistent with NMFS's regulations. Based on a review of the record, the Ninth Circuit determined that NMFS did not develop or apply reasonable methods for determining: 1) the actual additional costs of the trawl rationalization program; 2) which of the additional costs were directly attributable to each of the three sectors; or 3) if costs had been reduced as a result of implementing the co-op permit program. While the court generally defers to an agency's interpretation of its own regulations, the Ninth Circuit in this instance held that NMFS did not properly determine the "actual incremental costs . . . directly related to the management, data collection, and enforcement of each sector" for assessment on the sector members.[129] As a result, NMFS's cost recovery fee calculation was inconsistent with its own regulations.

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment for NMFS on the first two issues and reversed and remanded for consideration on the final issue. The court found that NMFS reasonably determined: 1) the co-op permit was an LAPP; 2) Glacier was a "limited access privilege holder"; and 3) the agency correctly applied the statutory cost accounting methodology in imposing the fee. But the court held that NMFS's fee calculations were inconsistent with its own cost recovery fee regulations.

2. Pacific Dawn, LLC v. Pritzker, 831 F.3d 1166 (9th Cir. 2016).

Pacific Dawn, LLC, a fish harvester, and Jessie's Ilwaco Fish Co., a fish processor, (collectively, Plaintiffs)[130] brought this action against Penny Pritzker, the Secretary of the United States Department of Commerce and the National Marine Fisheries Service (NMFS) (collectively, Defendants)[131]

129 Glacier Fish Co. v. Pritzker, 832 F.3d 1113, 1127 (9th Cir. 2016) (citing 50 C.F.R. § 660.115(b)(1)(I)).

130 Plaintiffs included Pacific Dawn LLC, Jessie's Ilwaco Fish Company, Ocean Gold Seafoods, and Chellissa LLC.

131 Defendants for this matter were Penny Pritzker, Secretary of the United States Department of Commerce; National Oceanic and Atmospheric Administration; and National Marine Fisheries Service.

after a 2013 NMFS decision involving catch quotas for Pacific whiting.[132] Plaintiffs argued that NMFS's 2013 decision to allocate quotas based on fishing practices prior to 2003 and 2004 was arbitrary and capricious.[133] Specifically, Plaintiffs asserted that NMFS failed to take into account present participation and dependence upon the fishery, as required by the Magnuson-Stevens Fishery Conservation and Management Act[134] (MSA). The Ninth Circuit held that NMFS's decision was not arbitrary and capricious because NMFS gave careful consideration to all relevant factors and justified its decision for affording present participation and dependence less weight.

The MSA requires that the regional fisheries management councils create a Fishery Management Plan (FMP) for each fishery within its zone of operation.[135] FMPs must be consistent with both statutory requirements and national standards found in the MSA.[136] In 1982, the Pacific Fishery Council, which regulates fisheries in California, Oregon, Washington, and Idaho, promulgated its Groundfish Management Plan (GMP) in order to manage more than ninety species of fish, including the Pacific whiting. Objective 14 of the GMP directed that the council should, when considering a change in fishery management practices, "choose the [management] measure that best accomplishes the change [in management practice] with the least disruption of current domestic fishing practices."[137]

From 1982 until 2004, the Pacific Council set annual total allowable catch (TAC) limits for the Pacific whiting fishery, allowing fishers to fish until the TAC was reached. In 2004, the Pacific Council announced via a proposed rulemaking that it was considering an Individual Fishing Quota (IFQ), which would allocate the annual TAC between permit holders. Each permitee would have the ability to catch its designated share of the TAC at any time during an open season. The Pacific Council further announced that the initial quota allocation would be divided up based on each current participant's catch history in the fishery, such that fishers with larger catch histories would receive a larger share of the initial quota. In order to avoid a sudden increase in fishing efforts while the rulemaking process was ongoing, NMFS announced that only the catch record prior to 2003 would be analyzed for the initial quota share allocation. In 2005, NMFS clarified that the 2003 control date would apply to fish harvesters, while fish processors would have a 2004 control date.

132 Fisheries Off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Trawl Rationalization Program; Reconsideration of Allocation of Whiting, 78 Fed. Reg. 72, 72 (Jan. 2, 2013) (to be codified at 50 C.F.R. pt. 660).

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

134 16 U.S.C. §§ 1801–1891d (2012).

135 *Id.* § 1853(b)(1)(A).

136 *Id.* § 1853(a)(1)(C).

137 PAC. FISHERY MGMT. COUNCIL, PACIFIC COAST GROUNDFISH FISHERY MANAGEMENT PLAN 9 (2016), https://perma.cc/4JWL-LJDQ (describing how the Council develops decisions for management of the groundfish fishery).

In 2009, NMFS submitted the IFQ fishery plan—GMP Amendment 20—to the Secretary of Commerce. After a notice and comment period, Amendment 20 was adopted and went into effect on January, 1, 2011. Thereafter, a group of fishing companies brought suit in the United States District Court for the Northern District of California challenging NMFS's initial allocation based on the 2003/2004 control dates. The district court agreed with Plaintiffs and remanded the matter back to the agency for further consideration.[138]

On remand, NMFS and the Pacific Council considered alternative control dates but ultimately published a second proposed rule maintaining the initial 2003/2004 control dates. Soon thereafter, this suit was commenced in the United States District Court for the Northern District of California. Plaintiffs alleged that NMFS had acted arbitrarily and capriciously by failing to consider relevant factors under the MSA and the GMP. Various fish harvesters and processors intervened as defendants.[139] The district court rejected the Plaintiffs' arguments, and granted the Defendants' motion for summary judgment.[140] This appeal followed.

Plaintiffs presented two main arguments as to why NMFS's 2013 decision was arbitrary and capricious. First, they argued that NMFS failed to take into account present participation in the fishery. Second, they argued that NMFS failed to account for dependence upon the fishery. The Ninth Circuit disagreed with Plaintiffs on both counts and upheld the district court's grant of summary judgment.

The court held that the record clearly established that NMFS had adequately considered present participation in the fishery when it decided to keep the 2003/2004 control dates. The court found that NMFS gave present participation less weight than other relevant factors, which was justified because NMFS had carefully explained its process on multiple occasions. Therefore, the court concluded that NMFS's decision was not arbitrary and capricious because NMFS had "articulated a rational connection between the facts found and the choice made."[141]

Plaintiffs challenged NMFS's conclusion that current participation would only have a minor impact on quota allocations because, in Plaintiffs' view, 20% of the permit holders eligible to receive a quota no longer participated in the fishery. The Ninth Circuit rejected this argument because NMFS had determined that, in actuality, only 1.5% of the permit holders were truly inactive, while the other 18.5% had been participating in other sectors or were holding permits as investments until fishing improved.

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138 Pac. Dawn, LLC v. Bryson, No. C10-4829 TEH, 2012 WL 554950, at *4 (N.D. Cal. Feb. 21, 2012).

139 Intervenors in this matter were Midwater Trawlers Cooperative; Trident Seafoods Corporation; Dulcich, Inc. doing business as Pacific Seafood Group; Arctic Storm Management Group, LLC; and Environmental Defense Fund.

140 Pac. Dawn, LLC v. Pritzker, No. C13-1419 TEH, 2013 WL 6354421, at *17 (N.D. Cal. Dec. 5, 2013).

141 Pac. Dawn, LLC v. Pritzker, 831 F.3d 1166, 1173 (9th Cir. 2016).

Plaintiffs further challenged NMFS's decision to adopt a different end date for processors and harvesters. The court deferred to NMFS for two main reasons. The court noted that it was not clear to NMFS until 2005 if the 2003 control date would also apply to processors at all. Therefore, NMFS had reasonably concluded that the 2004 control date was necessary to account for the increased investments processors had put into the Pacific whiting fishery that had not manifested itself as qualifying history until after 2003.

Plaintiffs' second main argument was that NMFS failed to account for dependence on the fishery, as required by the MSA. Plaintiffs argued that because NMFS's decision allocated quotas to fishers who had not fished for years, its decision was arbitrary and capricious. The Ninth Circuit disagreed with the Plaintiffs and held that NMFS had provided a thorough explanation of its decision-making process. NMFS explicitly recognized that a small percent of quotas would go to harvesters who had left the fishery since 2003, but determined that this was outweighed by other factors. Finally, the court found that NMFS had reasonably determined that the proposed allocation was fair and equitable for both processors and harvesters.

To counter NMFS's arguments, Plaintiffs raised three further points. First, they argued that NMFS's decision was inconsistent with National Standards 5 and 7 of the MSA, which require fishery councils to "consider efficiency in the utilization of fishery resources" and "minimize costs and avoid unnecessary duplication," respectively.[142] The Ninth Circuit rejected this argument after concluding that NMFS had reasonably determined that the proposed program, as a whole, minimized cost and efficiently used fishery resources. Second, Plaintiffs argued that NMFS's decision was contrary to objective 14 of the GMP, which requires fishery councils to "choose the measure that best accomplishes the change with the least disruption to current fishing practices."[143] Here, Plaintiffs argued that the 2003/2004 control dates would disrupt current fishing practices. This argument failed before the Ninth Circuit because the court found that NMFS had rationally concluded that the 2003/2004 control dates provided the least disruptive option. Finally, Plaintiffs argued that NMFS's decisions were contrary to its practices in other fisheries. This argument failed because the court determined that NMFS had adequately justified its decision to deviate from its practice in other fisheries.

In sum, the Ninth Circuit affirmed the district court's decision granting summary judgment to the Defendants. The court upheld NMFS's 2013 decision to maintain its 2003/2004 qualifying period control dates for quota allocations in the Pacific whiting fishery based largely on the highly deferential standard afforded to agency decisions. The court found that NMFS had established a rational connection between the facts found and the choice made, and that the record showed that NMFS had adequately considered the relevant factors required by the MSA and the GMP.

142 MSA, 16 U.S.C. § 1851(a)(5)–(7) (2012).

143 PAC. FISHERY MGMT. COUNCIL, *supra* note 137.

D. Migratory Bird Treaty Act

1. Protect Our Communities Foundation v. Jewell, 825 F.3d 571 (9th Cir. 2016).

Protect Our Communities Foundation, Backcountry Against Dumps, and Donna Tisdale (collectively, Plaintiffs) sued the Bureau of Land Management (BLM), the Department of Interior, and various officials of those agencies (collectively, BLM) in the United States District Court for the Southern District of California, seeking injunctive and declaratory relief under the Administrative Procedure Act[144] (APA). Plaintiffs challenged BLM's decision to grant Defendant-Intervenor Tule Wind, LLC, (Tule) a right-of-way on federal lands in southeast San Diego County, allowing Tule to construct and operate a wind energy project. Plaintiffs challenged the adequacy of BLM's Environmental Impact Statement (EIS) for the project under the National Environmental Policy Act[145] (NEPA), and also claimed that the project would harm birds in violation of the Migratory Bird Treaty Act[146] (MBTA) and the Bald and Golden Eagle Protection Act[147] (Eagle Act). The district court rejected Plaintiffs' challenges and granted BLM's motion for summary judgment on all claims.[148] Two separate notices of appeal were filed from the district court's judgment and were consolidated before the Ninth Circuit. The Ninth Circuit affirmed the district court's grant of summary judgment in favor of BLM.

BLM, an agency within the Department of the Interior, is charged with the management of federally owned land.[149] Among BLM's responsibilities is the discretion to grant rights-of-way for the use of such lands.[150] BLM granted a right-of-way to Tule to construct and operate a wind energy facility on 12,360 acres of land in the McCain Valley, seventy miles east of San Diego (the Project). After releasing a draft EIS for public comment, BLM's final EIS and Record of Decision (ROD) granted a right-of-way for the development of a modified and expanded version of the original project. The right-of-way was expressly conditioned on the implementation of certain mitigation measures as well as "the issuance of all other necessary local, state, and Federal approvals, authorizations and permits."[151] Included among the requisite mitigation measures were the Project Specific Avian and Bat Protection Plan (the Protection Plan). Tule developed the plan in conjunction with BLM and the United States Fish and Wildlife Service (FWS), based on scientific literature and research studies. If implemented,

144 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

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

146 16 U.S.C. §§ 703–712.

147 *Id.* §§ 668–668d.

148 Protect Our Cmtys. Found. v. Jewell, No. 13CV575 JLS (JMA), 2014 WL 1364453, at *1 (S.D. Cal. Mar. 25, 2014).

149 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1702(c), 1731(a) (2012).

150 *Id.* § 1761(a).

151 Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 577 (9th Cir. 2016).

the Protection Plan would mitigate the impacts of the Project on bird and bat species. As part of an adaptive-management plan, the Protection Plan provided for continuous monitoring and inspection. BLM's final EIS incorporated the Protection Plan by reference and required Tule's adherence to the Plan's mitigation measures.

The Ninth Circuit reviewed the grant of summary judgment de novo. Under the APA, the Court reviewed BLM's grant to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with the law."[152]

Plaintiffs alleged that BLM failed to comply with NEPA in preparing the final EIS. First, Plaintiffs asserted that the scope of the Project's "purpose and need" statement was too narrow under NEPA.[153] Second, Plaintiffs asserted that the EIS failed to adequately examine viable alternatives under NEPA,[154] including a distributed generation alternative involving the use of rooftop solar panels. Third, Plaintiffs asserted that the Project's proposed mitigation strategies were too vague and speculative to satisfy the requirement to consider "appropriate mitigation"[155] under NEPA. Finally, Plaintiffs asserted that BLM failed to take a "hard look" at the environmental impact of the Project in the EIS.[156] Specifically, plaintiffs noted that the EIS omitted a comprehensive discussion of the impacts of Project-related noise on bird species, and that BLM failed to conduct a survey of nighttime migratory birds. Plaintiffs also claimed that the EIS did not fairly address the impacts of inaudible noise,[157] electromagnetic fields, and stray voltage on humans. Finally, Plaintiffs asserted that the EIS did not adequately address the consequences of the Project on greenhouse gas (GHG) emissions, and failed to take into account the emissions generated by the manufacture and transportation of equipment to the Project area.

The Ninth Circuit held first that the district court properly determined that the EIS's "purpose and need statement" was adequately broad. Courts afford agencies "considerable discretion to define a project's purpose and need" and review it for reasonableness.[158] The Ninth Circuit found that BLM's statement was fully consistent with the agency's duty to consider federal policies and that it constituted a reasonable formulation of Project goals. A statement "will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained."[159] Here, the court found that BLM's "purpose and need" statement adequately permitted the agency to consider a range of alternatives to the Project proposal.

152 APA, 5 U.S.C. § 706(2)(A) (2012).

153 40 C.F.R. § 1502.13 (2016).

154 NEPA, 42 U.S.C. § 4332(2)(C)(iii) (2012).

155 *Id.* § 4332(2)(C)(ii).

156 *See* 40 C.F.R § 1502.2.

157 Loren D. Knopper & Christopher A. Ollson, *Health Effects and Wind Turbines: A Review of the Literature*, 10 ENVTL. HEALTH 78, 84 (2011).

158 Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 1084 (9th Cir. 2013).

159 *Id.*

The Ninth Circuit next held that BLM properly acted within its discretion in dismissing alternative proposals. The court found that because BLM evaluated all reasonable and feasible alternatives in light of the ultimate purposes of the Project, the range of alternatives considered was not impermissibly narrow. The court looked to Council on Environmental Quality regulations in determining that the EIS need only "briefly discuss" the reasons for eliminating an alternative not selected for detailed examination.[160] In dismissing the distributed generation alternative, BLM reasoned that the private installation and use of rooftop solar systems presented significant feasibility issues, and the effectiveness of the rooftop solar alternative was too speculative. The Ninth Circuit ultimately held that BLM did not impermissibly dismiss the distributed generation alternative.

Next, the Ninth Circuit held that the proposed mitigation measures, including the Protection Plan, provided ample detail and adequate baseline data for BLM to evaluate the overall environmental impact of the Project. The court found that BLM's use of an adaptive management plan as one component of a comprehensive set of mitigation measures did not render the EIS inadequate. The court noted that the continuous monitoring system included within that plan might actually better complement and help refine other mitigation measures over time, and provide flexibility in responding to environmental impacts.

As to the adequacy of BLM's "hard look" at environmental impacts, the Ninth Circuit first held that the agency's assessment of avian impacts was sufficient and that the failure to conduct a nighttime migratory bird survey was a reasonable discretionary judgment based on available scientific data. The court found that merely because BLM could have included more detail in its discussion of noise impacts on bird species did not mean that the analysis impermissibly misconstrued the existing data or that it forced the public or policymakers to speculate concerning the relevant impacts. Finally, the court explained that when an agency determination is based on reasonable inferences from available scientific data, as it was here, a reviewing court will not "substitute its judgment for that of the agency."[161] Because BLM's decision not to conduct a nighttime migratory-bird survey was based on reasonable inferences from scientific data, that decision was also reasonable.

The Ninth Circuit next held that BLM did not fail to adequately address the impacts of inaudible noise on humans. Plaintiffs based their claim on a 2011 study that concluded inaudible noise might have an adverse effect on humans. BLM considered this study in conjunction with numerous others in reaching the opposite conclusion. The Ninth Circuit concluded that Plaintiffs had not presented any reason to deviate from the rule that courts

160 Environmental Impact Statement, 43 Fed. Reg. 55,994, 55,996 (Jan. 3, 1978) (to be codified at 40 C.F.R. § 1502.14(a)).

161 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983).

defer to the agency's discretion in regard to the "evaluation of complex scientific data within the agency's technical expertise."[162]

Next, the Ninth Circuit held that the EIS conformed to NEPA's requirements in regard to Plaintiffs' claims on the effects of electromagnetic fields and stray voltage. The court found that BLM properly canvassed the available literature on electromagnetic fields and reasonably determined that any fields created by the Project did not present public health risks. The court also found that BLM analyzed the risk of stray voltage and appropriately addressed related mitigation measures, and therefore reasonably discounted this risk in light of mitigation plans.

Finally, the Ninth Circuit held that BLM adequately addressed GHG emissions resulting from the Project. First, the court found that the potential emissions reduction projections on which BLM relied were reasonable and were not required to be supported by conclusive proof. Second, the court was not swayed by Plaintiffs' argument that BLM failed to take into account the emissions generated by the manufacturing and transportation of equipment to the Project area, based on BLM's reasoning that these emissions were speculative and largely outside of Tule's control. The court ultimately found that BLM was entitled to choose among various methodologies when estimating emissions.

In Plaintiffs' next set of claims, they asserted that Defendants were liable under the MBTA, the APA, and the Eagle Act. The MBTA and the Eagle Act both prohibit, among other things, the "take" of any bird covered under the respective statute absent a permit from FWS.[163] FWS is tasked with issuing permits and ensuring compliance with both statutes. Although the Eagle Act provides for both criminal and civil enforcement, the MBTA is a criminal statute. However, through the APA's prohibition against unlawful agency action, plaintiffs may bring a civil suit to compel agency compliance with the MBTA.[164]

Plaintiffs first asserted that BLM, acting in its regulatory capacity, was liable under the MBTA for the unpermitted "take" of birds due to inevitable migratory bird fatalities.[165] Second, Plaintiffs asserted that BLM's regulatory authorization was "not in accordance with law" within the meaning of the APA.[166] Finally, since the Eagle Act provides for civil enforcement, Plaintiffs argued that the same unlawful "take" of birds under that Act directly exposed Defendants to further liability.[167]

In response, the Ninth Circuit held that BLM was acting in a purely regulatory capacity, and thus was not subject to indirect liability under the MBTA for Tule's future actions. Relying on rules promulgated by FWS,[168] the

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

163 MBTA, 16 U.S.C. § 703(a) (2012); Eagle Act, 16 U.S.C. § 668(b).

164 *See* City of Sausalito v. O'Neill, 386 F.3d 1186, 1203 (9th Cir. 2004).

165 16 U.S.C. § 703(a).

166 APA, 5 U.S.C. § 706(2)(A) (2012).

167 16 U.S.C. § 668(a)–(b).

168 Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

court agreed that agencies are not subject to the prohibitions of the MBTA when acting only in their regulatory capacities. The court concluded that BLM only authorized Tule to construct and operate a wind energy facility on public lands and that this regulatory act did not result in a "take" of migratory birds within the meaning of the MBTA. As a result, BLM's action was not independently proscribed under the APA because it was too far removed from the ultimate potential legal violation.

Finally, the Ninth Circuit held that the same reasoning that defeated BLM's liability under the MBTA applied also to Plaintiffs' claims under the Eagle Act. Again the court relied on FWS rules in asserting that parties who obtain permits from government agencies are responsible for their own compliance with the Eagle Act. The court further explained that agencies need only obtain a permit for a "take" that results from actions undertaken by the agency itself. Ultimately, the Ninth Circuit refused to impose indirect liability on BLM under the Eagle Act for violations that might be independently committed by Tule.

In sum, the Ninth Circuit concluded that BLM was not liable under NEPA, the MBTA, the Eagle Act, or the APA for its regulatory decision to grant Tule a right-of-way to develop and operate a renewable wind energy project. The Ninth Circuit therefore affirmed the district court's grant of summary judgment in favor of Defendants.

III. MISCELLANEOUS

A. National Environmental Policy Act

1. City of Mukilteo v. U.S. Department of Transportation, 815 F.3d 632 (9th Cir. 2016).

The City of Mukilteo and others (collectively, the City)[169] challenged the 2012 determination of the United States Department of Transportation, Federal Aviation Administration (FAA) that an Environmental Impact Statement (EIS) was not necessary for the commercial expansion of Paine Field, an airfield in the State of Washington. Petitioners contended that the FAA 1) unreasonably restricted the scope of its assessment; 2) failed to consider any "connected actions"; and 3) decided the result before performing its analysis. The Ninth Circuit rejected each of the City's arguments.

In 2012, the FAA conducted an Environmental Assessment (EA), according to its obligations under the National Environmental Policy Act[170] (NEPA), on the proposed Paine Field expansion. The FAA determined that the project would have no significant environmental impact, and accordingly

169 Plaintiffs included the City of Mukilteo, Washington; the City of Edmonds, Washington; Save our Communities; Michael Moore; and Victor M. Coupez.

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

issued a Finding of No Significant Impact (FONSI). In June 2014, the Ninth Circuit heard oral arguments on the City's concerns. After oral arguments, both parties requested a stay of the proceedings because the expansion project was cancelled. The proceedings were stayed until September 2015, when the expansion project was renewed. The Ninth Circuit's opinion followed.

The Ninth Circuit reviews an agency's NEPA analysis to determine whether the agency acted arbitrarily and capriciously, based on the agency's administrative record.[171] Here, the Ninth Circuit determined that it was still appropriate to use the 2012 administrative record, and that no supplemental EA was required because the current project would be substantially similar to the proposed action considered in the original EA.

First, the City argued that the FAA unreasonably restricted the scope of the EA because the FAA was required to analyze all "reasonably foreseeable" environmental impacts, which it failed to do.[172] The City argued that the FAA failed to analyze what environmental impacts would occur if additional airlines, beyond the two considered in the EA, decided to conduct commercial activities at Paine Field. The FAA determined, and the Ninth Circuit agreed, that the only reasonably foreseeable environmental impacts were those related to the two airlines involved in the proposed expansion project and considered in the EA. If, in the future, any additional airline proposed conducting commercial flights from Paine Field, the FAA may have to conduct a separate EA on that proposal, but for now, the Ninth Circuit found the City's challenge premature. The Ninth Circuit held that the FAA's determination was not arbitrary and capricious,[173] and deferred to the FAA's expertise.

Next, petitioners argued that the FAA failed to consider any "connected actions," as required by NEPA's implementing regulations promulgated by the Council on Environmental Quality,[174] by failing to consider additional airline activity that might occur at Paine Field in the future. In the EA, the FAA determined that there were no connected actions. The Ninth Circuit agreed with the FAA, and held that the City had not proved anything beyond mere speculation.

Finally, the City argued that the FAA was biased in the EA and that the FONSI was a predetermined result. The City argued that the FAA had made statements favorable to the expansion project prior to conducting the EA, and gave the outside firm hired to perform the EA a schedule including the date on which a FONSI could be issued. The Ninth Circuit rejected both arguments. First, the Ninth Circuit held that the FAA was required to conduct the NEPA process in good faith, but that it was not prevented from expressing a favored outcome. Moreover, the FAA's enabling legislation charges the FAA with "promotion, encouragement, and development of civil

171 *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

172 *See* 40 C.F.R. § 1508.9 (2016); *see also id.* § 1508.8(b).

173 5 U.S.C. § 706(2)(A).

174 40 C.F.R. § 1508.25.

aeronautics" throughout the United States,[175] indicating that such a preference was acceptable. Next, the Ninth Circuit held that the schedule that included a date when a FONSI could be issued did not obligate the consulting firm, or the FAA itself, to actually issue a FONSI. The schedule merely laid out an optimistic timeframe for the NEPA process, and did not force any specific determinations.

The Ninth Circuit found that the FAA conducted a careful, thorough, and proper NEPA analysis, in good faith, before issuing its FONSI. Thus, the Ninth Circuit held that the FAA's EA resulting in a FONSI was neither arbitrary nor capricious, and that an EIS was not required for the Paine Field expansion.

2. Idaho Conservation League v. Bonneville Power Administration, 826 F.3d 1173 (9th Cir. 2016).

In 2011, the Bonneville Power Administration (BPA), the federal agency Congress tasked with selling power generated from the Federal Columbia River Power System (FCRPS), decided to alter its winter operation of the Albeni Falls Dam. BPA determined that altering the winter dam operations would not have a significant impact on the environment and therefore an Environmental Impact Statement (EIS) was not required. The Idaho Conservation League (the League) challenged BPA's decision as not in compliance with the National Environmental Policy Act[176] (NEPA). The United States Court of Appeal for the Ninth Circuit, hearing the case under original jurisdiction,[177] concluded that BPA's decision did not require an EIS.

The Albeni Falls Dam sits on a tributary to the Columbia River and is jointly managed by the United States Army Corps of Engineers, BPA, and the Bureau of Reclamation. From the dam's completion through 1997, BPA allowed the water level maintained behind the dam to fluctuate during the winter months in order to generate electricity to meet electrical demand. By contrast, from 1997 until 2011, in order to protect Kokanee salmon populations, BPA maintained a constant water level during the winter months. In 2009, BPA began advocating for a return to the more flexible dam management strategy, and in 2011 published an Environmental Assessment (EA) calling for flexible winter power operations in order to meet increased power demand. The 2011 EA concluded that the proposal would not have a significant environmental impact and did not require an EIS to further assess environmental impacts.

NEPA requires an EIS for all "major federal actions significantly affecting the quality of the human environment."[178] When an agency decides to operate a facility according to the policy outcomes that were originally

175 Federal Aviation Act of 1958, §§ 102–103, 72 Stat. 731, 740 (codified as amended at 49 U.S.C. § 40101(14) (2012)).

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

177 Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839f(e)(5) (2012) (giving original jurisdiction to the Ninth Circuit for challenges to BPA decisions).

178 42 U.S.C. § 4332(2)(C).

available for that facility, that decision is not a major action.[179] Similarly, when an agency decision would simply maintain the status quo of a facility, an EIS is not necessary.[180] Therefore, according to the Ninth Circuit, if the status quo at the Albeni Falls Dam allowed for fluctuating winter water levels, continuing that policy would not require an EIS. The question, as a result, became whether holding the water level constant from 1997 to 2011 changed the status quo of the facility.

The Ninth Circuit found that BPA never lost its discretion to change the winter water levels behind the dam, and therefore, the status quo of moderating the levels in response to demand never changed. Because keeping the water level constant could not be considered a change in the status quo of dam operations, BPA's decision to return to a more flexible winter water level maintained the status quo. As a result, the court concluded that, despite a change in the management strategy for a period of years, BPA's decision to revert to a more flexible management strategy was not a major federal action, and therefore did not require an EIS.

Additionally, the League argued that BPA arbitrarily limited the scope of its EA by failing to consider how the overall operation of the FCRPS contributes to the spread of the invasive flowering rush, an invasive aquatic plant. The League alleged that the EA impermissibly analyzed the rush's impact incrementally, rather than looking at system-wide impacts. The Ninth Circuit noted that the Plaintiffs might have a colorable claim, but held that the claim was not properly before the court. The League sought review of the winter water level management decision at the Albeni Falls Dam, and not of the FCRPS operation as a whole, and because on appeal a court generally will not consider matters "not specifically and distinctly argued," the Ninth Circuit decided to not review this claim.[181]

In sum, the Ninth Circuit, exercising original jurisdiction over the dispute, held that BPA did not violate NEPA when, after preparing an EA, it concluded that an EIS was not necessary prior to renewing a policy of allowing for fluctuating water levels behind the Albeni Falls Dam to accommodate increased winter power demands. The court declined to rule on whether the EA sufficiently assessed system-wide impacts of the flowering rush, an invasive species of plant.

3. Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095 (9th Cir. 2016).

Idaho Wool Growers Association and other ranchers and sheep industry representatives (collectively, Idaho Wool Growers)[182] sued the United States Forest Service under the National Environmental Policy Act[183]

179 Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990).

180 *Id.*

181 *See* Laboa v. Calderon, 224 F.3d 972, 985 (9th Cir. 2000).

182 Plaintiffs included Idaho Wool Growers Association, American Sheep Industry Association, Public Lands Council, Wyoming Wool Growers Association, Colorado Wool Growers Association, Shirts Brothers Sheep, and Carlson Company, Inc.

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

(NEPA) after the Forest Service reduced grazing in the Payette National Forest by roughly 70%. Idaho Wool Growers sought declaratory and injunctive relief, claiming that the Forest Service provided inadequate justification for the reduction in its Final Supplemental Environmental Impact Statement (FSEIS) and Record of Decision (ROD). In response, intervening environmental groups[184] filed a cross-motion for summary judgment. Idaho Wool Growers' motion was denied, and the latter motion granted, by the United States District Court for the District of Idaho.[185] On appeal, the Ninth Circuit affirmed the ruling after reviewing the Forest Service's decision under the Administrative Procedure Act's (APA) arbitrary and capricious standard.[186]

The call to restrict grazing in the Payette National Forest (the Forest) came in 2010 after years of NEPA analyses by the Forest Service. That analysis stemmed from a 2003 Final Environmental Impact Statement (FEIS) and ROD prepared by the Forest Service for the Southwest Idaho Ecogroup Land and Resource Management Plan, which increased domestic grazing throughout the Forest. Environmental groups promptly appealed the FEIS and ROD out of concern that extensive grazing might eliminate the area's population of bighorn sheep through disease. In response, the Forest Service engaged in further analysis of the impact that grazing might have on the bighorn population, in particular the transmission of various bacteria known to cause pneumonia. The Forest Service returned with draft supplemental environmental impact statements in 2008 and 2010, each generating over 10,000 public comments, before issuing its FSEIS, in which it reduced grazing to mitigate the risk of domestic sheep spreading disease throughout the bighorn sheep population. Idaho Wool Growers filed suit, challenging the adequacy of the FSEIS.

Idaho Wool Growers raised three arguments on appeal. First, it claimed that the Forest Service violated NEPA by not consulting the Agricultural Research Service (ARS) before restricting grazing in the Forest. Idaho Wool Growers cited to the requirement under NEPA that federal agencies consult with any other agency "which has jurisdiction by law or special expertise" when making environmental assessments.[187] Idaho Wool Growers argued that ARS has special expertise in the transmission of disease by domestic sheep, illustrated by Department of Agriculture regulations that delegate to ARS the research of the "causes of contagious, infectious and communicable diseases" in domesticated animals.[188] Idaho Wool Growers claimed the Forest Service's failure to consult with ARS constituted an error because ARS would have informed the agency of the uncertainty of disease transmission between the two sheep species.

184 These groups included Wilderness Society, Western Watersheds Project, and Hells Canyon Preservation Council.

185 Idaho Wool Growers Ass'n v. Vilsack, 7 F. Supp. 3d 1085, 1088 (D. Idaho 2014).

186 5 U.S.C. § 706(2)(A) (2012).

187 42 U.S.C. § 4332(2)(C).

188 7 C.F.R. § 2.65(a)(4) (2016).

In response, the Forest Service argued that, regardless of ARS's expertise as to domestic sheep, ARS has no expertise in wildlife management, which is the context in which this disease transmission was being considered. The Ninth Circuit found that ARS does offer some relevant expertise in that area, and cautioned the Forest Service against reading NEPA's consultation mandate too narrowly, but the court concluded that the Forest Service's failure to consult ARS was harmless error because the Forest Service already had obtained ample public input regarding the uncertainty of disease transmission between the two species.

Next, Idaho Wool Growers alleged that the Forest Service erred by not supplementing the FSEIS with the results of new research from the 2010 "Lawrence Study," which examined disease transmission between domestic and bighorn sheep. In support, Idaho Wool Growers relied on the regulation governing environmental impact statements that requires agencies to supplement their statements if new information bears significantly on the proposed action.[189] The Ninth Circuit found that, to the extent that comments by one of the Lawrence Study's authors supported Idaho Wool Growers' claim, the Forest Service acted reasonably in not supplementing its FSEIS once the study was published. First, the court pointed out that the Forest Service cited several times to the Lawrence Study in its unpublished form. Second, the court noted that the responses of other authors and the study's express findings regarding transmission of disease between domestic and bighorn sheep contradicted the comments cited by Idaho Wool Growers. Finally, the court held that supplementation is not required where the impacts of new research are not significantly different. The Ninth Circuit concluded that the Forest Service did not act arbitrarily or capriciously when it declined to further supplement the FSEIS.

Finally, Idaho Wool Growers claimed that the Forest Service's risk-of-contact and disease modeling was arbitrary and capricious, the former because it failed to account for obstacles that hinder the bighorn sheep population's mobility, and the latter because it failed to address the timing of disease transmission. Idaho Wool Growers argued that, because NEPA requires agencies to guarantee the scientific integrity of environmental impact statements,[190] reliance on inaccurate models violated NEPA. The Ninth Circuit disagreed. First, the court explained that agencies are entitled to "greater-than-average deference" when it comes to the choice of technical methodologies. Due to the fact that the model depicting bighorn sheep mobility was based on actual herd movements, the court found that the agency's choice to use that model was reasonable. In addition, the fact that the model depicting disease transmission ignored the effects of time was reasonable to the court in light of the model's purpose. The disease model did not intend to accurately predict the chance of disease transmission; rather, it assumed disease transmission, at set probabilities ranging from 5%–100%, to help predict whether bighorn sheep might be eradicated.

189 40 C.F.R. § 1502.9(c)(1)(ii) (2016).

190 *Id.* § 1502.24.

Therefore, the court found that reliance on the models was not arbitrary or capricious.

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment to the defendant-intervenors against Idaho Wool Growers' suit seeking to challenge the adequacy of the Forest Service's research. The court found the Forest Service's actions either harmless error or reasonable under the circumstances.

4. Japanese Village, LLC v. Federal Transit Administration, 843 F.3d 445 (9th Cir. 2016).

This case addressed an appeal from the United States District Court for the Central District of California's grant[191] of a motion by the Federal Transit Administration (FTA) and others (collectively, FTA)[192] for summary judgment on claims brought by Japanese Village, LLC (Japanese Village) and Today's IV, Inc., doing business as Westin Bonaventure Hotel (Bonaventure). The claims at issue arose under the National Environmental Policy Act[193] (NEPA), and related to an underground light rail construction project in the Los Angeles area. Japanese Village and Bonaventure challenged various aspects of FTA's Environmental Impact Statement (FEIS), including whether FTA properly addressed mitigation measures and reasonable alternatives. The Ninth Circuit, reviewing de novo, affirmed the district court's grant of summary judgment in favor of FTA on each claim.[194]

The Ninth Circuit first addressed Japanese Village's claim that the FEIS inadequately addressed construction-related noise and vibration. While the Ninth Circuit acknowledged that the FEIS itself might have lacked a thorough analysis of mitigation measures, the court found that the ROD demonstrated that vibration-related mitigation measures had been researched, discussed, and then adopted.

Next, the court addressed whether temporary relocation of affected businesses during construction activities in Japanese Village was a permissible mitigation measure under NEPA. Japanese Village argued that NEPA includes an exclusive list of the possible mitigation measures,[195] and that relocation was not included on that list. FTA argued that the proposed relocation mitigation could fit within subsection (e) of the list, because relocation involves "providing substitute . . . environments."[196] The Ninth

191 Today's IV, Inc. v. Fed. Transit Admin., Nos. LA CV13–00378 JAK (PLAx), LA CV13–00396 JAK (PLAx), LA CV13–00453 JAK (PLAx), 2014 WL 3827489, at *1 (C.D. Cal. May 29, 2014).

192 Defendants included Carolyn Flowers, in her official capacity as Acting Administrator of the Federal Transit Administration; Leslie T. Rogers, in his official capacity as Regional Administrator of the Region IX Office of the Federal Transit Administration; U.S. Department of Transportation; Anthony Foxx, in his official capacity as Secretary of the U.S. Department of Transportation; and Los Angeles Metropolitan Transportation Authority, a California–chartered Regional Transportation Planning Agency.

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

194 *Today's IV, Inc.*, 2014 WL 3827489, at *1.

195 *See* 40 C.F.R. § 1508.20.

196 *Id.* § 1508.20(e).

Circuit declined to decide whether relocation is invalid as a matter of law because NEPA required FTA only to take a hard look at various alternatives.[197] FTA not only considered a variety of mitigation measures, it also went so far as to adopt and implement several. This, the Ninth Circuit concluded, satisfied NEPA's requirements regardless of whether relocation was implicitly included in NEPA's list of mitigation measures.

Japanese Village then argued that FTA violated NEPA by failing to require "isolated slab track" technology to mitigate noise and vibration from underground trains. Japanese Village supported its claim with an engineering report advocating use of that technology that postdated the EIS. The Ninth Circuit noted that once an EIS is complete, an agency does not need to revisit it every time new information comes to light. The court then held that the argument was moot because mitigation measures that included "isolated slab track" technology were ultimately adopted at a later date.

Japanese Village next argued that FTA's subsidence mitigation plan lacked sufficient detail, and that, as a result, the mitigation impacts could not be properly evaluated. The Ninth Circuit held that although the measures were somewhat lacking in detail, the mitigation analysis, in conjunction with an expert study addressing the effectiveness of potential mitigation tactics, demonstrated that FTA adequately considered and addressed subsidence mitigation.

Finally, Japanese Village argued that FTA did not properly consider how the increased demand for parking resulting from the project would impact the Japanese Village parking structure. FTA argued that its analysis was adequate, citing a comprehensive FTA transportation study that included a parking-impacts analysis. The court noted that NEPA lacks a "threshold for determining the significance of parking impacts," and pointed out that Japanese Village had failed to cite to any cases in which a court had found an EIS inadequate based on an analysis of impacts to existing parking structures. Given that FTA plainly addressed parking impacts and mitigation measures, and considering NEPA's procedural, non-substantive scope, the Ninth Circuit ultimately concluded that FTA took the "requisite hard look" at parking impacts prior to approving the project.

The Ninth Circuit then addressed Bonaventure's arguments. The court first acknowledged that an EIS is inadequate when it does not examine a viable alternative. Bonaventure claimed that FTA failed to adequately consider as an alternative a construction process called "closed-face tunnel boring machine (TBM)." Bonaventure argued that FTA's finding that the alternative was not feasible was in error because the three identified obstacles to implementing "closed-face TMB" had been eliminated before FTA issued its FEIS. After reviewing the record, the court found that, in actuality, two of the identified obstacles had not been eliminated before FTA issued the FEIS, and FTA need not have included that alternative in the FEIS as a result.

197 *See id.* §§ 1502.2, 1508.20.

Bonaventure then alleged that, because FTA found that "closed-face TBM" was feasible after issuing the FEIS, the FEIS was itself deficient for failing to include that alternative. The Ninth Circuit held that FTA's later feasibility determination does not render the FEIS procedurally deficient. In addition, the court noted that a finding in Bonaventure's favor would discourage agencies from fostering public participation and considering public comments after issuing an FEIS, which would be contrary to NEPA's goal of well-informed agency decision making.

Next the court turned to Bonaventure's claim that FTA did not properly address certain impacts and mitigation measures. First, Bonaventure argued that FTA's analysis of "grade separation" was insufficient under NEPA. The Ninth Circuit found the FEIS was adequate because FTA took the requisite "hard look" at grade separation impacts. Bonaventure argued that grade separation was a significant issue requiring thorough analysis, but the Ninth Circuit found that Bonaventure failed to provide evidentiary support for its claim. As a result, only a "brief discussion" of grade separation impacts was required.[198]

Bonaventure next argued that construction would obstruct emergency vehicle access to the adjacent property, and that FTA failed to explore mitigation measures to ensure access. The Ninth Circuit disagreed, noting a variety of applicable mitigation measures in the FEIS. Finally, Bonaventure claimed that FTA impermissibly deferred certain monitoring and mitigation measures required by NEPA. Bonaventure argued that several proposed mitigation measures were too vague because the FEIS used language that allowed the measures to be developed at a later time. The Ninth Circuit disagreed again, finding that this arrangement was not overly vague but rather permissibly described an "adaptive management plan that [would] provide flexibility in responding to environmental impacts."[199]

Finally, Bonaventure argued that FTA should have created a supplemental EIS analyzing the impacts from nighttime construction after FTA sought noise ordinance variances from the City. The Ninth Circuit discussed when agencies must prepare a Supplemental EIS, and found that one was not necessary in this case. In particular, the court determined that the FEIS already took into account noise and light impacts from potential nighttime construction, and that significant additional impacts not addressed in the FEIS were unlikely in the event that the variance application was approved.

In sum, the Ninth Circuit affirmed in full the district court's grant of summary judgment for FTA. The court concluded that FTA had not acted in an arbitrary and capricious manner when preparing its NEPA analysis for the proposed light rail construction project.

198 *Id.* § 1502.2(b).

199 Japanese Vill., LLC v. Fed. Transit Admin., 843 F.3d 445, 461 (9th Cir. 2016).

5. Oregon Natural Desert Ass'n v. Jewell, 823 F.3d 1258 (9th Cir. 2016).

In this case, the Oregon Natural Desert Association and the Audubon Society of Portland (collectively, ONDA)[200] sued the Secretary of the Interior, Sally Jewell, as well as the Bureau of Land Management (collectively, BLM) in the United States District Court for the District of Oregon. ONDA challenged a wind-energy development project under the National Environmental Policy Act[201] (NEPA) on the ground that BLM's environmental impact statement (EIS) did not adequately assess the project's impact on the greater sage grouse.[202] Columbia Energy Partners (the project developer) and Harney County intervened as defendants. The district court granted summary judgment in favor of the defendants.[203] On appeal, the Ninth Circuit reversed in part and remanded to the district court.

In April 2007, Columbia Energy Partners obtained a conditional use permit from Harney County in Oregon to develop the Echanis Wind Energy Project (the Project). Because the proposed right-of-way for the Project's transmission line crossed public lands administered by BLM, the Project was subject to review under NEPA, which in turn mandated that BLM prepare an Environmental Analysis and, if necessary, an EIS.[204] BLM eventually prepared and published a Final EIS (FEIS) approving a new overhead electric transmission line on BLM-managed land connected to wind turbines on a 10,500-acre tract of privately owned land on Steens Mountain. Steens Mountain lies at the center of one of the last remaining "strongholds of contiguous sagebrush habitat essential for the long-term persistence of greater sage-grouse."[205]

BLM's draft EIS suggested that the proposed turbines, transmission lines, and associated access roads would likely physically divide and fragment sage grouse habitat. The draft EIS also found that the transmission line would provide perches for predatory raptors such as hawks and eagles. ONDA submitted comments in response to the draft EIS. In the FEIS, BLM surveyed sage grouse populations at two similar sites near the Project site, but conducted no such survey at the site itself. ONDA challenged the FEIS as inconsistent with NEPA.[206] Specifically, ONDA alleged that 1) BLM had erred by failing to evaluate the baseline conditions at the Project site, having relied instead on extrapolations based on nearby sites; and 2) in the FEIS, BLM erred by failing to assess genetic connectivity between each sage

200 Plaintiffs included the Oregon Natural Desert Association and the Audubon Society of Portland.

201 National Environmental Policy Act of 1969, 42 U.S.C. §§ 432–4370h (2012).

202 40 C.F.R. § 1502.15.

203 Or. Nat. Desert Ass'n v. Jewell, No. 3-12-cv-00596-MO, 2013 WL 5101338, at *1 (D. Or. Sept. 11, 2013).

204 40 C.F.R. §§ 1508.18, 1502.15.

205 Or. Nat. Desert Ass'n v. Jewell, 823 F.3d 1258, 1261 (9th Cir. 2016).

206 40 C.F.R. §§ 1500.1, 1502.15.

grouse population.[207] The Ninth Circuit, reviewing BLM's actions under the Administrative Procedure Act's (APA) "arbitrary and capricious" standard,[208] determined that the data collected from at least one of the alternative sites was not only inaccurate, but that it reflected an opposite conclusion than the one drawn by BLM.[209]

First, the Ninth Circuit held that the FEIS did not comply with NEPA. The court explained that BLM had a duty to assess the actual baseline conditions at the Project site because impacts to sage grouse were the principle concern during the environmental review. The court found that BLM erred not only due to its reliance on habitat data only from nearby sites, but also because some of the data collected was inaccurate. The court held that these errors rendered BLM's conclusions based on that data arbitrary and capricious. In addition, the court held that BLM's errors were not harmless because the incomplete and inaccurate data materially affected the outcome of the environmental review process.

The Ninth Circuit rejected the defendants' argument that mitigation measures adopted in the FEIS cured prejudice resulting from the faulty analysis. The court reasoned that the mitigation measures did not cure the errors' adverse impact on informed decision making and public participation in the review process, and also that BLM did not know what impacts to mitigate since those impacts were not properly established. As such, the Ninth Circuit reversed the district court's entry of summary judgment for the defendants.

Second, the Ninth Circuit held that the issue of genetic connectivity was not subject to review since ONDA failed to exhaust administrative remedies as required by the APA.[210] ONDA argued that it had no obligation to specifically raise the issue of cross-population genetic connectivity at the administrative review stage because the draft EIS's flaws were "so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."[211] However, the court reasoned that because ONDA did not use the phrase "genetic connectivity" anywhere in its comments or raise any specific concern regarding "genetic interchange" between separate sage grouse populations,

207 *Id.* ONDPA argued that "genetic connectivity" refers to "the extent to which separate populations of a species are able to share genes and thereby to maintain a healthy genetic diversity within each population." *Or. Nat. Desert Ass'n*, 823 F.3d at 1267.

208 5 U.S.C. § 706(2)(A) (2012).

209 BLM's FEIS concluded there were no sage grouse present following the winter months at either of the nearby sites and thus it assumed there also would not be sage grouse present at the Project site. However, the court determined there were in fact sage grouse present at one of the nearby sites following the winter months suggesting that BLM's assumption concerning the Project site was not only based on inaccurate data, but was incorrect.

210 5 U.S.C. § 704.

211 *Or. Nat. Desert Ass'n*, 823 F.3d at 1269; *see* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 765 (2004) (stating that an "agency bears the primary responsibility to ensure that it complies with NEPA . . . and an EA's or an EIS's flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action").

ONDA did not put BLM sufficiently on notice that it should address the issue in the FEIS. As such, the Ninth Circuit held that BLM appropriately responded to comments regarding habitat connectivity and fragmentation.

In sum, the Ninth Circuit held that the district court erred in granting summary judgment in favor of the defendants because BLM's environmental review did not adequately assess baseline sage grouse numbers during winter at the Project site, and that BLM's error was not harmless. The court finally held that because ONDA did not bring the issue of genetic connectivity between sage grouse populations to BLM's attention during the agency's review process, BLM's failure to respond specifically to that issue was not subject to review.

6. San Diego Navy Broadway Complex Coalition v. U.S. Department of Defense, 817 F.3d 653 (9th Cir. 2016).

The San Diego Navy Broadway Complex Coalition (the Coalition), a civic group based out of San Diego, California, sued the United States Department of the Defense and other federal defendants related to the United States Department of the Navy (collectively, the Navy), alleging that the Navy violated the National Environmental Policy Act[212] (NEPA) by producing an incomplete environmental impact statement (EIS) related to redevelopment activities at a Navy-owned site on the San Diego waterfront (the Complex). The Coalition sued the Navy in the United States District Court for the Southern District of California, arguing that the Navy should have produced a supplemental environmental impact statement (SEIS) addressing potential impacts stemming from a hypothetical terrorist attack on the Complex. The district court granted the Navy's motion for summary judgment and the Coalition appealed.[213] The Ninth Circuit affirmed the grant of summary judgment after finding that the Navy took the requisite "hard look" at the relevant environmental impacts of the redevelopment project.

The dispute centered on efforts by the Navy to redevelop, in partnership with the City of San Diego, the Navy Broadway Complex, a fifteen-acre waterfront installation housing Navy administrative offices on the San Diego waterfront. The redevelopment process began in the early 1980s, with the Navy preparing an initial EIS in 1990 and a Record of Decision (ROD) in 1991. The proposed redevelopment would include mixed civilian and military infrastructure. While the project was formally approved through a formal Development Agreement between the Navy and the city in 1992, unavoidable delays prevented the project from moving forward for over a decade.

In 2006, the Navy finally began to move forward with the project. The Navy first completed an Environmental Analysis (EA) under NEPA to assess the environmental impacts of the 1992 Development Agreement. The EA

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

213 San Diego Navy Broadway Complex Coal. v. U.S. Dep't of Def., 904 F. Supp. 2d 1056, 1056 (S.D. Cal. 2012).

process ended in late 2006 when the Navy made a finding of no significant impact (FONSI). At that point, the Coalition filed its first suit against the Navy, alleging a failure to comply with NEPA's public notice requirements. The district court found the Navy's NEPA compliance insufficient, and then "instructed the Navy to address the insufficiency."[214]

In response to the district court's order, the Navy prepared and published a new draft EA in 2008, and published a final EA in 2009. Included in the 2009 EA was a determination by the Navy that no known terrorist threats existed against the Complex, and that the threat of a terrorist incident at the Complex was too "speculative [and] remote" to warrant a full environmental analysis of the impacts of such an attack. The Navy then issued a second FONSI. In 2011, the Coalition sued the Navy again. Among other claims, the Coalition alleged that the Navy's failure to prepare an SEIS assessing the impacts of a potential terrorist attack on the Complex violated NEPA. Reviewing cross-motions for summary judgment, the district court determined that the Navy took the requisite "hard look" at the potential impacts of a hypothetical terrorist attack to address related concerns raised by the Coalition and others.[215] The district court then granted summary judgment to the Navy,[216] and the Coalition appealed.

Reviewing the district court's grant of summary judgment to the Navy de novo, and applying an "arbitrary and capricious" standard to assess the Navy's NEPA compliance,[217] the Ninth Circuit affirmed. The Ninth Circuit first explained that its precedent required the court to assess whether a challenged EA resulting in a FONSI "adequately considered and elaborated the possible consequences of the proposed . . . action when concluding that it will have no significant impact on the environment."[218] In addition, the court must ensure that the EA is the result of informed decision making and informed public participation.

The Ninth Circuit concluded that NEPA required regulatory agencies to consider, at least to some extent, the environmental impacts of potential terrorist attacks when preparing an EA and/or EIS, at least in the context of military facilities. The court first noted that the Navy itself mentioned a "general threat" of terrorism in the United States in its 2009 EA, and then found that the general threat identified by the Navy coupled with the Complex's location in downtown San Diego required the Navy to consider the risks of a potential terrorism incident targeting the Complex in its NEPA analysis.

With that requirement in mind, the Ninth Circuit then turned to the 2009 final EA and FONSI. The court concluded that the Navy satisfied its NEPA obligations to assess the risk of a possible terrorist attack on the Complex.

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214 San Diego Navy Broadway Complex Coal. v. U.S. Dep't of Def., 817 F.3d 653, 657 (9th Cir. 2016).

215 *San Diego Navy Broadway Complex Coal.*, 904 F. Supp. 2d at 1067.

216 *Id.*

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

218 *San Diego Navy Broadway Complex Coal.*, 817 F.3d at 659 (quoting San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 635 F.3d 1109, 1119 (9th Cir. 2011)).

The court noted that the Navy held multiple public meetings and received public comments, including many raising terrorism-related concerns. The Navy modified the 2009 EA in response to those comments. The Navy's modifications included a more explicit incorporation of various federal safety and security protocols designed to prevent terrorist attacks, and to mitigate the adverse impacts of attacks that do occur, through planning, design, and operational standards. In addition, the Navy conducted a threat assessment on the Complex and found that no known threats against the Complex existed. The Ninth Circuit took issue with the Navy's threat assessment, admonishing the Navy that terrorism-related risks could arise at any time and that the lack of risk at any given time did not absolve the Navy of its responsibility to assess the potential impacts of a possible attack. Despite the Navy's flawed reasoning, the Ninth Circuit found the Navy's incorporation of federal terrorism-related standards and protocols sufficient.

The Ninth Circuit assessed the Navy's modifications to the 2009 EA made in response to public comments and concluded that the Navy satisfied NEPA's goals of informed agency decision making and informed public participation in the agency decision-making process. While the court took some issue with the Navy's decision to incorporate terrorism and security-related protocols by reference only, rather than including those measures in the EA itself, the court nonetheless found that the Navy fulfilled its statutory obligations and took the requisite "hard look" at the risks associated with a potential terrorist attack on the Complex through its incorporation of those protocols and standards. The Ninth Circuit thus held that the Navy's decision to issue a FONSI, rather than an SEIS, was not arbitrary or capricious.

Judge Carr dissented, arguing that the Navy ought to have considered the impacts of a potential terrorist attack on the Complex more thoroughly. Judge Carr noted that the Navy incorrectly found the risk of such an attack too speculative, and pointed out that the Navy itself acknowledged that terrorism was a major threat generally. Judge Carr believed that the Navy was capable of assessing the environmental impacts of various terrorism scenarios and, given the not entirely remote potential of such an attack occurring, was obligated to do so.

B. Preemption

1. Syngenta Seeds, Inc. v. County of Kauai, 842 F.3d 669 (9th Cir. 2016).

Syngenta Seeds, Inc., and four other companies[219] (collectively, Syngenta) that supply seeds for genetically engineered plants sued the County of Kauai (the County) after the County enacted notice requirements for pesticide use and the cultivation of genetically engineered crops. The

219 Plaintiffs included Syngenta Seeds, Inc.; Syngenta Hawaii, LLC; Pioneer Hi-Bred International, Inc.; Agrigenetics, Inc.; and BASF Plant Science LP.

United States District Court for the District of Hawaii found the County provisions impliedly preempted by state law and declined to certify the preemption question to the Hawaii Supreme Court.[220] Reviewing the preemption decision de novo and the noncertification decision for abuse of discretion, the Ninth Circuit affirmed the district court's ruling.

Kauai County passed Ordinance 960 in 2013.[221] The ordinance imposed several requirements on commercial farming operations, including warning signs prior to and following the application of pesticide, weekly notices to people living within 1,500 feet of the area, and "buffer zones" around properties such as schools and waterways.[222] State law in Hawaii also regulates the use of pesticides, including a separate set of notice requirements and locations of permissible use.[223]

As a preliminary matter, the Ninth Circuit applied Hawaii case law to find a strong presumption against state preemption of county regulations, which may be overcome by a showing that the legislature clearly intended for a particular state regulation to preempt local regulations.[224] Syngenta argued that the Hawaii pesticides regulation preempted the County ordinance, given the comprehensive nature of the state regulation. The court applied a three-element test used to resolve field-preemption claims under Hawaii law: 1) whether the state and local laws address the same subject matter; 2) whether the state law comprehensively regulates this subject matter; and 3) whether the legislature intended the state law to be uniform and exclusive.[225] The court concluded that the state regulation impliedly preempted the local ordinance.

First, the Ninth Circuit found the state pesticide regulation regulated the same subject matter as the County ordinance. The state regulation included a list of prohibited acts, and the state law authorized the state Department of Agriculture to establish additional standards for pesticides as necessary to avoid unreasonable harm to the environment.[226] Hawaii's ongoing role in the pesticide regulations indicated to the Ninth Circuit that the state regulation governs the same issues as those addressed in the County ordinance.

Second, the Ninth Circuit found the state regulation to be comprehensive after considering the breadth of the statute's provisions. The state regulation regulated every stage of pesticide use, from initial research efforts to the appropriate methods of disposal.

For similar reasons, the Ninth Circuit found that the state law satisfied the third element of the field preemption test because the

220 Syngenta Seeds, Inc. v. County of Kauai, Civ. No. 14-00014 BMK, 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014).

221 Kauai County, Haw., Ordinance 960 (Nov. 16, 2013).

222 *Id.*

223 HAW. REV. STAT. § 46-1.5 (2016).

224 Stallard v. Consol. Maui, Inc., 83 P.3d 731, 736 (Haw. 2004).

225 *Id.*

226 *See* HAW. CODE. R. §§ 4-66-23(9), 4-66-32, 4-66-54, 4-66-62(c), 4-66-64, 4-66-66 (LexisNexis 2016).

comprehensiveness of the statute suggests that the state legislature intended to leave no regulatory role for the counties, and that the state law was thus meant to be uniform and exclusive.

The Ninth Circuit also upheld the district court's decision not to refer the preemption question to the Hawaii Supreme Court. The court found the three-element field preemption test under Hawaii state law to be well defined, and concluded that the district court was able to apply the test and make an informed decision without input from the Hawaii Supreme Court.

In sum, the Ninth Circuit affirmed the district court's decision finding Kauai County Ordinance 960 impliedly preempted by state law because the comprehensiveness of the Hawaii Pesticide Law indicated a clear intent by the legislature to preclude any regulation by counties in the state. The Ninth Circuit also affirmed the decision not to certify the preemption question to the Hawaii Supreme Court, given the clear standard under Hawaii law for deciding preemption issues.

C. Mootness

1. Shell Offshore, Inc. v. Greenpeace, Inc., 815 F.3d 623 (9th Cir. 2016).

In this case, Greenpeace Inc. (Greenpeace) appealed the United States District Court for the District of Alaska's grant of preliminary injunction and preliminary order of civil contempt in favor of Shell Offshore Inc. (Shell).[227] Greenpeace challenged the injunction on several grounds. The Ninth Circuit did not address the claims because the court held that, because the injunction had expired, the challenge was moot. The court dismissed the appeal and remanded for further proceedings.

In 2012, Greenpeace activists involved in that organization's "Stop Shell" campaign unlawfully boarded several exploration vessels that were used in Shell's activities in the Arctic. In response, Shell brought suit in the District of Alaska, where it received a preliminary injunction barring Greenpeace from coming within a certain distance of Shell's ships.[228] In addition, the injunction prohibited Greenpeace from engaging in other torts and acts of trespass against Shell's exploration fleet.[229] Greenpeace appealed the ruling, and the Ninth Circuit affirmed.

In January 2015, Shell renewed its plans to drill in the Arctic. In response, Greenpeace activists boarded one of Shell's vessels in protest. Shell reacted by bringing the instant action seeking a preliminary injunction and claims for monetary damages. The district court granted the injunction and Greenpeace appealed.[230] While the appeal was pending, Greenpeace activists in Portland, Oregon, suspended themselves from the St. John's

227 Shell Offshore, Inc. v. Greenpeace, Inc., No. 3-15-cv-00054-SLG, 2015 WL 2185111, at *1 (D. Alaska May 8, 2015).

228 *Id.*

229 *Id.* at *6.

230 *Id.* at *1.

Bridge in an effort to stop a Shell vessel from leaving the Portland harbor. Greenpeace's actions were deemed unlawful because the vessel was covered by the preliminary injunction. Shell moved for the district court to enforce the injunction and sought damages. After an emergency hearing, the district court entered a preliminary order of civil contempt imposing monetary sanctions on Greenpeace so long as the activists continued "to hang from the St. John's Bridge in Portland," in violation of the injunction.[231]

In September 2015, Shell announced that it would cease its exploration and drilling activities in the Arctic. On November 1 of the same year, the preliminary injunction expired on its own terms. Shell did not seek renewal of the injunction. The Ninth Circuit held that, as a result, the instant case challenging the injunction was moot because the injunction was no longer enforceable against Greenpeace. The court reasoned that, as a result, there was no longer a "legally cognizable interest" in the case. Further, the court was not able to grant any relief as a result of the expiration.

Regarding the sanctions, the Ninth Circuit found that the district court had issued the sanctions primarily to bring Greenpeace into compliance with the preliminary injunction. The court explained that because the sanctions were designed to coerce compliance with the preliminary injunction, they were civil sanctions rather than criminal sanctions. The court held that the sanctions were mooted when the preliminary injunction expired, noting that when an injunction expires there is no longer anything left to coerce the parties covered by the injunction to do, and so the sanction no longer serves any purpose. Accordingly, the court vacated the pending contempt proceeding in the lower court and simultaneously declared Greenpeace's challenge to those proceedings moot.

The court remanded the remaining issues to the district court, including Shell's complaint seeking damages for injuries caused by Greenpeace during its "Stop Shell" campaign. In sum, the Ninth Circuit dismissed Greenpeace's appeal of the preliminary injunctions for mootness due to the expiration of the injunction and Shell's subsequent decision not to seek renewal. The court vacated the district court's contempt order resulting in the sanctions and remanded the case back to the district court.

231 Shell Offshore, Inc. v. Greenpeace, Inc., 815 F.3d 623, 627 (9th Cir. 2016).