2014 NINTH CIRCUIT
ENVIRONMENTAL REVIEW

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2014 NINTH CIRCUIT ENVIRONMENTAL REVIEW

Editor
COREY MOFFAT

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NINTH CIRCUIT REVIEW INTRODUCTION

It is my privilege to present the 2014–2015 Ninth Circuit Environmental Review. This review contains twenty-nine summaries of Ninth Circuit Court of Appeals' decisions on environmental and natural resources topics, issued between March 2014 and March 2015. The review also includes two chapters authored by Ninth Circuit Review members. Both chapters closely examine issues raised by two summarized opinions.

In the first chapter, Lindsay Bregante Myers analyzes the Ninth Circuit's discretionary approach to preliminary injunctive relief exemplified in *League of Wilderness Defenders v. Connaughton*. Through a detailed discussion of each part of the four-factor test set forth in the Supreme Court's *Winter v. Natural Resources Defense Council* decision, she shows that the Ninth Circuit did not faithfully apply the Supreme Court's preliminary injunction standard. Ultimately, she concludes that environmental plaintiffs have benefited from the lack of clarity in the Ninth Circuit's approach to preliminary injunctions, but that those plaintiffs should be wary of unsettled legal standards when seeking preliminary injunctive relief.

In the second chapter, Nora Coon uses the Ninth Circuit's recent decision in *Montana Environmental Information Center v. Stone-Manning* as a lens to explore the elision of standing and ripeness in the Ninth Circuit. Through a review of Ninth Circuit cases, she demonstrates the court's frequent failure to distinguish between standing and ripeness issues. She argues that the Ninth Circuit should abandon the tripartite structure that it currently employs—standing, constitutional ripeness, and prudential ripeness. She concludes that the Ninth Circuit should instead recognize only two separate doctrines: a constitutional standing doctrine and a prudential ripeness doctrine.

The Ninth Circuit Environmental Review consists of five *Environmental Law* members. Each member is responsible for writing and editing complex summaries in addition to regular source-checking duties. This year's members displayed outstanding attention to detail and zeal for writing and editing. The format and scope of these summaries is intended to provide readers with an overview of each case to allow further investigation into those cases that may prove useful. This journal remains committed to chronicling how the Ninth Circuit addresses dynamic and ever-important environmental and natural resource issues.

Corey Moffat
2014–2015 NINTH CIRCUIT REVIEW EDITOR

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CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Clean Air Act

1. California ex rel. Imperial County Pollution Control Dist. v. U.S. Dep't of the Interior, 751 F.3d 1113 (9th Cir. 2014)

The Imperial County Pollution Control District and the County of Imperial (collectively, Imperial County) sued the Secretary of the Department of Interior (Secretary) in the United States District Court for the Southern District of California. Imperial County sued the Secretary under the National Environmental Policy Act (NEPA)[1] and the Clean Air Act (CAA),[2] challenging the adequacy of an Environmental Impact Statement (EIS) regarding water transfer agreements. The district court held that Imperial County lacked standing, and, in the alternative, that the Secretary did not violate NEPA. On appeal, the Ninth Circuit reversed the standing decision, but affirmed the NEPA merits decision. Additionally, the Ninth Circuit held that the record made clear that the Secretary did not violate the CAA.[3]

The case centered on the Salton Sea, which was created in 1905 when an irrigation canal from the Colorado River overflowed and flooded a basin in the California desert near the Mexican border. Subsequent irrigation runoff from California's Imperial and Coachella Counties has continued to replenish the Salton Sea. With water in short supply recently, the water districts in Imperial and Coachella Counties agreed to transfer some of their irrigation runoff to urban areas in southern California. The Secretary prepared an EIS regarding these agreements. While the EIS identified potentially serious environmental consequences for the Salton Sea, among other locations, the Secretary ultimately approved the agreements.

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

2 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

3 The Ninth Circuit amended its opinion to alter two sentences describing Imperial County's control of its water and to correct a citation to the Clean Air Act. California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior, 767 F.3d 781, 786 (9th Cir. 2014). The amendment does not appear to change the substance of the opinion.

Imperial County sued, alleging the Secretary violated both NEPA and the CAA by improperly preparing the EIS and by not performing a CAA conformity determination. Other local water districts intervened,[4] and the parties all cross-moved for summary judgment. The district court granted summary judgment for the Secretary and the water districts, holding that Imperial County did not have standing to sue, and, alternatively, the Secretary had not violated NEPA.[5] The Ninth Circuit reviewed the district court's grant of summary judgment de novo.

The Ninth Circuit first held that Imperial County had Article III standing to bring its claims under NEPA and the CAA. In the context of challenges to agency action under NEPA, Article III standing requires the challenging party to allege: 1) the Secretary has violated a procedural rule; 2) those rules were designed to protect the party's interests; and 3) the challenged action threatened concrete interests.[6] The Ninth Circuit concluded that Imperial County met all three elements for NEPA standing. As to the CAA claim, the Ninth Circuit held that Imperial County had properly asserted an enforcement action under the CAA, and that the Administrative Procedure Act (APA)[7] waived the Secretary's sovereign immunity.[8] As a result, the Ninth Circuit held that Imperial County had standing to challenge the actions under both NEPA and the CAA.

Second, the Ninth Circuit determined that the Secretary did not violate NEPA. Imperial County argued that the Secretary violated NEPA by incorrectly "tiering" and incorporating by reference previous EISs and non-NEPA documents into the EIS, by preparing two EISs, and by failing to prepare a supplemental EIS.[9] Agencies are encouraged to save time and resources by tiering an EIS with previous impact statements that addressed the same issues.[10] Similarly, agencies are encouraged to "incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action."[11] The Ninth Circuit held that the Secretary correctly "tiered" the EIS by summarizing previous EISs and other NEPA documents and also correctly incorporated those documents by reference. While Imperial County argued that the Secretary improperly "tiered" and incorporated by reference a number of non-NEPA documents, the Ninth Circuit held that those non-NEPA

4 Intervenors included the Imperial Irrigation District, San Diego County Water Authority, Coachella Valley Water District, and Metropolitan Water District of Southern California.

5 The district court did not rule on Imperial County's CAA claim.

6 Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 969–70 (9th Cir. 2003).

7 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

8 The Ninth Circuit held that the Secretary's approval of transfer was subject to judicial review under the APA, as there was no adequate remedy under the CAA. *See* S. Coast Air Quality Mgmt. Dist. v. FERC, 621 F.3d 1085, 1093, 1099 (9th Cir. 2010) (reviewing agency's failure to file a CAA conformity analysis under the arbitrary and capricious standard of review); Sierra Club v. U.S. Envtl. Prot. Agency, 346 F.3d 955, 961, *amended by* 352 F.3d 1186 (9th Cir. 2003); Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1020 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004) (assuming that APA authorizes judicial review of federal conformity violations).

9 The Ninth Circuit rejected Imperial's other NEPA arguments with minimal discussion, holding that the EIS adequately considered the impact on air quality, the impact on the Salton Sea reclamation project, and the interactions between population growth and the proposed agreement.

10 40 C.F.R. § 1502.20 (2014).

11 40 C.F.R. § 1502.21 (2014).

documents were simply incorporated by reference and so their inclusion did not violate NEPA.

Addressing Imperial County's other major arguments regarding the EIS, the Ninth Circuit held that the Secretary had not acted arbitrarily in preparing two separate statements for different agreements. The court rejected the notion that the Secretary attempted to circumvent unfavorable data by separating the analyses, and instead held that each statement had independent utility.[12] Furthermore, while Imperial County argued that the Secretary had abused her discretion by failing to prepare a supplemental EIS after adopting a new mitigation plan, the Ninth Circuit held that there was no abuse of discretion because the new plan was within the spectrum of alternatives originally discussed in the draft EIS.[13] Finally, reviewing the Secretary's discussion of alternative options,[14] the Ninth Circuit determined the Secretary had not acted arbitrarily and capriciously in comparing the impact of the planned agreements only to the impact of a total lack of action. The Ninth Circuit explained that since the parties had negotiated the disputed agreements, there was no need to consider alternatives no one had agreed to. Therefore, the Ninth Circuit concluded that the Secretary had not violated NEPA in her preparation of the EIS.

Third, the Ninth Circuit concluded that the Secretary had not violated the CAA by failing to perform a CAA conformity determination regarding the proposed plan. The Secretary is required to perform a conformity determination when the total of direct and indirect emissions of a criteria pollutant exceeds a certain level.[15] The Ninth Circuit held that the Secretary had not abused her discretion in concluding that, because the diversion of water would occur at dams far removed from the Salton Sea, the actions resulting out of these agreements would not directly cause increased emissions. Further, the court determined it was not an abuse of discretion to conclude that the agreements would not indirectly cause increased emissions by reducing the level of the Salton Sea, because the resulting emissions would not be "practically control[led]" by the Secretary.[16]

Ultimately, the Ninth Circuit held that while Imperial County had standing to bring its claims, the Secretary had not violated either NEPA or the CAA. Therefore,

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12 "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a) (2010). *See* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 969 (9th Cir. 2006) (quoting Wetlands Actions Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1118 (9th Cir. 2000) (applying an "independent utility" test to determine whether multiple actions are so connected as to mandate consideration in a single EIS).

13 Russell Country Sportsmen v. U.S. Forest Serv., 668 F.3d 1037, 1045 (9th Cir. 2011) (quoting Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,035 (1981)) (holding that a supplementation is not required if the new alternative is a minor variation of one of the alternatives originally discussed, and it is qualitatively within the spectrum of alternatives originally discussed).

14 An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (2010).

15 40 C.F.R. § 93.153 (2014).

16 40 C.F.R. § 93.152 (2011).

the Ninth Circuit reversed in part and affirmed in part the district court's grant of summary judgment.

2. WildEarth Guardians v. U.S. Envtl. Prot. Agency, 759 F.3d 1064 (9th Cir. 2014)

WildEarth Guardians (WildEarth)[17] sought review of the approval by the United States Environmental Protection Agency (EPA)[18] of Nevada's state implementation plan (SIP) for regional haze under the Clean Air Act (CAA).[19] WildEarth alleged that EPA erred in approving Nevada's SIP due to inadequate reasonable progress goals for improving visibility for the days on which visibility is most impaired, or "worst days," in the Jarbridge Wilderness Area. WildEarth also claimed that Nevada's SIP contained an improper best available retrofit technology (BART) determination for sulfur dioxide (SO_2) emissions from the Reid Gardner Generating Station (Reid Gardner).[20] The Ninth Circuit heard WildEarth's claims directly and reviewed them under an arbitrary and capricious standard of review. Holding that WildEarth lacked standing to challenge EPA's approval of Nevada's reasonable progress goals, and that EPA's approval of Nevada's SO_2 BART determination was entitled to deference, the Ninth Circuit dismissed the petition for review in part and denied the petition in part.

Under the CAA, EPA must promulgate regulations designed to improve visibility in mandatory Class I federal areas, including national wilderness areas and certain national parks.[21] EPA's Regional Haze Rule[22] ensures improved visibility in Class I federal areas by requiring SIPs to contain reasonable progress goals for improving visibility on worst days[23] and a BART determination for each BART-eligible pollution source.[24] EPA's BART Guidelines assist states in determining emissions limitations for these sources by providing an evaluation process based upon five statutory factors.[25] For smaller plants with a total generating capacity below 750 megawatts, the court concluded BART Guidelines are advisory.[26]

The BART-eligible pollution source in this case, Reid Gardner, had a generating capacity below 750 megawatts. Nevada hired the firm CH2M HILL to

17 Petitioner Wild-Earth Guardians is a nonprofit environmental organization.

18 Sierra Pacific Power Company, Nevada Power Company, and the State of Nevada Division of Environmental Protection intervened on behalf of the respondent, EPA.

19 42 U.S.C. §§ 7401–7671q (2012).

20 Reid Gardner is a generating station in southern Nevada.

21 40 C.F.R. §§ 51.308, 51.309(b)(1) (2014).

22 Regional Haze Regulations, 64 Fed. Reg. 35,714 (July 1, 1999) (to be codified at 40 C.F.R. pt. 51).

23 40 C.F.R. § 51.308(d)(1) (2014).

24 40 C.F.R. § 51.308(e) (2014). A pollution source with the potential to emit 250 tons per year or more of an air pollutant is BART-eligible. 40 C.F.R. § 51.301 (2014).

25 WildEarth Guardians v. U.S. Envtl. Prot. Agency, 759 F.3d 1064, 1069 (9th Cir. 2014) ("First, states identify all available retrofit control technologies. Second, states eliminate technically infeasible options. Third, states evaluate the effectiveness of the remaining control technologies. Fourth, states evaluate the impacts, including the cost of compliance, the energy impacts, any non-air quality impacts, and the remaining useful life of the facility. Finally, states evaluate the visibility impacts.").

26 *See* 40 C.F.R. § 51.308(e)(1)(ii)(B) (2014).

prepare the BART analysis for Reid Gardner and CH2M HILL recommended a 0.40 pounds per million British thermal units (lb/MMbtu) limitation on SO_2. Nevada reviewed and revised this limitation down to 0.15 lb/MMbtu. Nevada's SIP submission to EPA provided progress goals for improved visibility in Jarbridge Wilderness Area and established limitations on emissions of SO_2, nitrogen oxides, and particulate matter. WildEarth challenged Nevada's SIP as inadequate to improve visibility on the worst days in Jarbridge Wilderness and as improperly allowing an increase in SO_2 emissions from Reid Gardner.

Hearing the case directly, the Ninth Circuit first determined that WildEarth did not have standing to challenge EPA's approval of Nevada's progress goals for improved visibility in the Jarbridge Wilderness Area. WildEarth based its standing claim on the declaration of a member who lived in Colorado but regularly visited Nevada. However, the Ninth Circuit held that the member did not have standing, because even though she asserted displeasure in seeing pollution emitted by a Nevada power plant and expressed concern for her health, she had never visited Jarbridge Wilderness Area, nor did she have any future plans to do so. Therefore, the Ninth Circuit determined that the member failed to show a causal connection between EPA's approval of Nevada's reasonable progress goals for visibility in the Jarbridge Wilderness Area and her aesthetic displeasure or her health concerns. Additionally, the Ninth Circuit stated that the member did not show that a favorable decision would likely, as opposed to merely speculatively, redress her injuries.

Second, the Ninth Circuit held that EPA's approval of Nevada's SO_2 BART determination was not arbitrary and capricious. WildEarth argued that EPA erred in approving Nevada's SIP because it failed to document how each of the BART Guidelines factors was evaluated, and authorized an increase in SO_2 emissions from the Reid Gardner plant. However, the Ninth Circuit determined that CH2M HILL's report and Nevada's review and revision of that report showed that Nevada conducted the required analysis. The court also stated that WildEarth's objection to the SO_2 BART determination for Reid Gardner rested on a misinterpretation of the data. WildEarth based its contention on annual emission rates at the plant, but EPA asserted that annual emission rates are not comparable to the 24-hour average emission limitation in Nevada's SIP. The Ninth Circuit stated that it reviewed EPA's approval with considerable deference because Nevada's SO_2 BART determination involved a high level of technical expertise.

In sum, the Ninth Circuit held that WildEarth lacked standing to challenge EPA's approval of Nevada's reasonable progress goals for improved visibility on the worst days in the Jarbridge Wilderness Area because its injury was not traceable to EPA's action and it was not likely to be redressed by a favorable decision. Additionally, the Ninth Circuit disposed of the second issue by stating that EPA's approval of Nevada's SO_2 BART determination for Reid Gardner was not arbitrary and capricious because EPA is entitled to considerable deference with regard to areas of technical expertise.

3. Sierra Club v. U.S. Envtl. Prot. Agency, 762 F.3d 971 (9th Cir. 2014)

The Sierra Club, along with other environmental organizations (collectively, Sierra Club),[27] filed a petition for judicial review of the United States Environmental Protection Agency (EPA)[28] grant of a Clean Air Act (CAA)[29] permit to Avenal Power (Avenal) to construct a power plant. Sierra Club contended that EPA exceeded its authority when it granted Avenal's permit application under "previous regulations, which were less restrictive than the regulations it had adopted nationally." The Ninth Circuit granted the petition for review, holding that under the CAA EPA must apply the regulations in effect at the time a permit is issued. Accordingly, the Ninth Circuit vacated the decision to issue the permit and remanded the case to EPA for further proceedings.

In 2008, Avenal submitted a CAA permit application to EPA to construct a power plant within California's San Joaquin Valley Pollution Control District. Under the CAA, EPA must grant or deny such a permit within one year of the application.[30] Notwithstanding this requirement, EPA did not respond to the application within one year. While the Avenal permit application continued under consideration, EPA adopted more stringent requirements for nitrogen dioxide (NO_2), carbon dioxide (CO_2) and other greenhouse gas, and sulfur dioxide (SO_2) emissions. Due the more stringent EPA requirements, Avenal requested an expedited judgment on the pleadings in 2010 to avoid consideration of the new regulations for its permit. Initially, EPA fought this motion, arguing that the CAA requires an applicant to comply with current regulations before a permit may be granted. However, EPA later decided that it was appropriate to grandfather in Avenal's application under the former emissions requirements. EPA granted the permit in 2011.

Sierra Club initially appealed the decision to issue the permit to the Environmental Appeals Board, which declined to exercise its jurisdiction to review the decision. Subsequently, Sierra Club filed two petitions for judicial review. The Ninth Circuit held that it had jurisdiction to review the agency decision under 42 U.S.C. § 7607(b)(1) and consolidated the petitions for review. At this point, Avenal intervened in the action.

As an initial issue, the Ninth Circuit held that at least some of the Petitioners had associational standing.[31] The Ninth Circuit reached this conclusion because: 1) the interests at stake were germane to Petitioners' organizational interests;

27 Petitioners include the Sierra Club, Center for Biological Diversity, Greenaction for Health and Environmental Justice, and El Pueblo para el Aire y Agua Limpio.

28 Respondents include EPA, Lisa P. Jackson in her official capacity as Administrator of EPA, Gina McCarthy in her official capacity as Assistant Administrator of the Office of Air and Radiation of EPA, Avenal Power Center, and Jared Blumenfeld in his official capacity as Regional Administrator for Region IX of EPA.

29 42 U.S.C. § 7401–7671q (2012).

30 *Id.* § 7475(c).

31 The Ninth Circuit concluded that Greenaction for Health and Environmental Justice, Center for Biological Diversity, and El Pueblo para el Aire y Agua Limpio had associational standing. Citing Kaahumanu v. Hawaii, 682 F.3d 789, 798 (9th Cir. 2012), the court determined that a finding that at least one of the Petitioners had standing was sufficient.

2) personal participation by the Petitioners' members was not necessary; and 3) the individual members of the Petitioner organizations had standing. The Ninth Circuit explained that the organizations' members had standing because various individuals demonstrated credible, imminent injuries due to health concerns from air pollution, the power plant would generate large quantities of emissions, and the threat could be redressed by review of EPA's decision not to enforce the regulations against Avenal.

Next, the Ninth Circuit considered the merits and held that the CAA requires EPA to enforce current regulations for granting permits. EPA first argued that the CAA was ambiguous in that it required EPA to enforce current regulations, while also requiring EPA to act on applications within one year. Due to this asserted ambiguity, EPA argued that its decision to grandfather Avenal's permit was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[32] Sierra Club countered that the CAA was clear in its requirement that EPA enforce current regulations when approving a permit. The Ninth Circuit agreed with Sierra Club, finding no ambiguity in the statute and holding that EPA must enforce current regulations for permit applicants. The court noted that this interpretation was supported both by Supreme Court case law[33] and by the fact that the CAA outlined the consequences for EPA delay.[34]

EPA also argued that it had a long tradition of grandfathering permit applications to avoid revised regulations. However, the Ninth Circuit held that the previous instances of grandfathering were distinguishable from the current situation. In the past, EPA typically grandfathered a set of applications by specifying an operative date for each regulation and the process was open to formal notice and comment rulemaking procedures. The Ninth Circuit held that the current decision was made on an ad hoc basis, and that such a waiver of the regulations was beyond EPA's authority. While the Ninth Circuit recognized that the equities weighed in favor of Avenal due to EPA's errors, the court held that these equitable considerations could not outweigh the clear wording and purpose of the CAA.

In sum, the Ninth Circuit held that when evaluating a permit application under the CAA, EPA must apply the regulation current at the time the permit is to be granted. Accordingly, the Ninth Circuit vacated EPA's decision to issue the permit and remanded the case to EPA for proceedings consistent with the opinion. In addition, the Ninth Circuit granted costs and fees to Sierra Club.

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32 467 U.S. 837, 842–43 (1984).

33 *See* Ziffrin, Inc. v. United States, 318 U.S. 73, 78 (1943) (upholding the Interstate Commerce Commission's decision not to grandfather in a common carrier permit application when an additional requirement was added while the application was being considered); General Motors Corp. v. United States, 496 U.S. 530, 540 (1990) (holding that EPA was authorized to enforce the then-current State Implementation Plan, despite the fact that, if not for EPA's delay, a State Implementation Plan relieving the company of liability would be in effect).

34 42 U.S.C. § 7604(a)(2) (2012) ("[A]ny person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.").

4. Center for Community Action & Environmental Justice v. BNSF Railway Co., 764 F.3d 1019 (9th Cir. 2014)

The Center for Community Action and Environmental Justice, East Yard Communities for Environmental Justice, and Natural Resources Defense Council (collectively, CCAEJ), appealed an order of the United States District Court for the Central District of California. CCAEJ asserted that emissions from railyards owned by the Union Pacific Railroad and the Burlington Northern Santa Fe Railway Companies (collectively, BNSF) constituted the "disposal" of diesel exhaust, in violation of the Resource Conservation and Recovery Act (RCRA).[35] The district court held that emissions from Defendants' railyards are only regulated under the Clean Air Act (CAA),[36] and therefore CCAEJ failed to state a claim under RCRA. The Ninth Circuit affirmed, holding that BNSF's emission of diesel does not violate RCRA.

BNSF operates sixteen railyards in California. These railyards, by way of various locomotive, truck, and other heavy duty vehicle engines, emit tons of small, solid particles found in diesel exhaust. CAAEJ sued BNSF pursuant to RCRA's citizen-suit provision alleging the BNSF's disposal of these wastes contributed to an "imminent and substantial endangerment to health or the environment."[37] CAAEJ sought a declaration that BNSF was violating RCRA and an order that BNSF reduce diesel particulate emissions. The district court granted BNSF's motion to dismiss. On appeal, the Ninth Circuit reviewed the district court's decision de novo.

The Ninth Circuit's determination that railyard emissions do not constitute a disposal of solid waste began with an analysis of RCRA's text. Under RCRA, "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water." The court noted that the term "emitting," while explicitly mentioned in other sections of RCRA,[38] is not included within the acts RCRA uses to define disposal. Additionally, the court interpreted the text as restricting the application of "disposal" to solid waste that is first placed onto land or water and then emitted into the air. The court refused to rearrange the wording and apply the statute, holding here that BNSF first emits diesel exhaust into the air from where it travels onto land and water.

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

36 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

37 *See* 42 U.S.C. § 6972(a)(1)(B) (2012). RCRA's citizen-suit provision authorizes private persons to sue "any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.*

38 *See id.* § 6991(8) (defining "release" as "spilling, leaking, emitting, discharging, escaping, leaching, or disposing . . . into ground water, surface water, or subsurface soils").

In support of its position that the emission of diesel exhaust does constitute "disposal," CCAEJ cited to decisions regarding aerosolized solid waste,[39] contending that similar reasoning should be applicable to railyard emissions. The Ninth Circuit dismissed this comparison because those cases did not first involve disposal of solid waste into the air. CCAEJ also argued that RCRA's citizen suit provision should be harmonized with its air emissions provision.[40] To give effect to both provisions, CCAEJ argued that the railyard emissions must be read into RCRA's definition of disposal. However, the court noted that while certain air emissions fall under the regulatory scope of RCRA, the act does not provide a private right of action under its citizen-suit provision for these emissions.

The Ninth Circuit then addressed a contrary decision by the Tenth Circuit Court of Appeals by reviewing the statutory and legislative histories of RCRA and the CAA.[41] The court observed that the only overlap between RCRA and the CAA is that RCRA regulates emissions of hazardous air pollutants from hazardous waste treatment, storage, and disposal facilities.[42] On the other hand, the CAA is the governing authority of locomotive and railyard emissions regulations, but the CAA also prohibits the federal regulation of "indirect sources" including railyards, except those that are federally owned or operated.[43] CCAEJ contended that this resulted in a regulatory gap and that the statutory schemes should be harmonized to ensure that railyard emissions remain within some scope of federal authority. The Ninth Circuit acknowledged that this gap may exist, but explained that if it does it is the product of reasoned decision-making by Congress. As such, the court deferred to congressional judgment and declined to fill the regulatory gap.

In conclusion, the Ninth Circuit determined that BNSF's railyard emissions did not constitute disposal of solid waste under RCRA. Thus, the court held that CCAEJ failed to state a plausible claim for relief under RCRA's citizen-suit provision and affirmed the district court's judgment.

5. Natural Res. Defense Council, Inc. v. U.S. Dep't of Transp., 770 F.3d 1260 (9th Cir. 2014)

The Natural Resources Defense Council (NRDC) brought this action against the United States Department of Transportation (DOT) contending that DOT violated the Clean Air Act (CAA)[44] and the National Environmental Policy Act (NEPA)[45] by failing to adequately evaluate the environmental effects of

39 *See* United States v. Power Engineering Co., 191 F.3d 1224, 1231 (10th Cir. 1999) (concluding that disposing of hazardous mist onto soil constituted illegal disposing of hazardous wastes); *see also* United States v. Apex Oil Co., No. 05-CV-242-DRH, 2008 WL 2945402 (S.D. Ill. July 28, 2008).

40 *See* 42 U.S.C. § 6924(n) (2012).

41 *See* Citizens Against Pollution v. Ohio Power Co., No. C2-04-CV-371, 2006 WL 6870564, at *3–*4 (S.D. Ohio July 13, 2006) (holding that flue gas emitted by plant is solid waste within the meaning of RCRA).

42 *See* 42 U.S.C. § 6924(n) (2012).

43 *See* 42 U.S.C. § 7410(a)(5)(C) (2012) (defining "indirect source" as "a facility . . . which attracts, or may attract, mobile sources of pollution").

44 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

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

constructing an expressway between the Ports of Los Angeles and Long Beach and the I-405 freeway. The United States District Court for the Central District of California granted summary judgment for DOT. On appeal, the Ninth Circuit reviewed the judgment de novo and affirmed.

Under the CAA, the United States Environmental Protection Agency (EPA) and DOT are required to work together to ensure the conformity of transportation plans, programs, and projects with their respective State Implementation Plans (SIP) for national air quality standards.[46] Pursuant to this objective, EPA requires a "hot-spot analysis," which estimates the localized effects of projects on the concentrations of various air pollutants including particulate matter less than 2.5 microns in diameter ($PM_{2.5}$).[47]

With regards to the expressway project at issue in this case, NRDC argued that DOT improperly conducted hot-spot analysis of $PM_{2.5}$ by gathering data from a receptor outside the immediate area of the project. Instead, NRDC relied on the CAA's use of "any area" in the SIP conformity provision[48] to argue the act required hot-spot analysis in every part of the area affected by project emissions. To support this interpretation of "area" as adjacent to the project, NRDC raised three arguments. First, NRDC pointed to an EPA regulation that defines "any area" as "a location or region"[49] and argued that "location" refers to an area smaller than the project area. Second, NRDC contended that the EPA regulation mandating hot-spot analysis at "receptor locations in the area substantially affected by the project" means the project's immediate vicinity.[50] Third, NRDC looked to EPA's response to comments for its proposed hot-spot rules, which explained that the CAA's intent is to prohibit the violation of standards in any area, not just based on public exposure.

However, NRDC was not able to persuade the Ninth Circuit that the CAA's use of "any area" limited the hot-spot analysis to the area immediately adjacent to the project site. The Ninth Circuit explained that DOT properly followed the Conformity Guidance,[51] which permits analysis of data from a surrogate monitor in a location with similar characteristics to the project location. The Ninth Circuit cited a District of Maryland case holding that the Conformity Guidance permits DOT's use of the monitor comparison method.[52] Additionally, the Ninth Circuit explained that the Federal Highway Administration endorsed data gathering from

46 42 U.S.C. § 7506(c)(4)(B) (2012).

47 *See* 40 C.F.R. § 93.101 (2012) (defining a "hot-spot analysis" as an "estimation of likely future localized . . . $PM_{2.5}$ pollutant concentrations").

48 42 U.S.C. § 7506(c)(1)(B) (2012).

49 40 C.F.R. § 93.101.

50 *Id.* § 93.123(c)(1).

51 The Conformity Guidance was published jointly by the EPA and the DOT to aid state and local agencies in meeting the requirements of hot-spot analysis. TRANSPORTATION AND CLIMATE DIVISION, OFFICE OF TRANSPORTATION AND AIR QUALITY & U.S. ENVT'L. PROT. AGENCY, EPA-420-B-13-053, TRANSPORTATION CONFORMITY GUIDANCE FOR QUANTITATIVE HOT-SPOT ANALYSES IN $PM_{2.5}$ AND PM_{10} NONATTAINMENT AND MAINTENANCE AREAS (2013).

52 Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp., 524 F. Supp. 2d 642, 701 (D. Md. 2007) (holding that DOT's use of the Muirkick monitor was not arbitrary and capricious).

surrogate monitors for hot-spot analysis in two projects. The Ninth Circuit therefore held that the agencies' interpretation of the appropriate hot-spot analysis governs.

The Ninth Circuit next determined that DOT was neither arbitrary nor capricious in its conclusion that the expressway project complied with the CAA's SIP conformity provision. The court explained that DOT showed satisfactory similarity between North Long Beach air monitoring station, selected by DOT as a surrogate, and the project area. Furthermore, the Ninth Circuit held that DOT adequately analyzed the data baseline to conclude that $PM_{2.5}$ emissions from the expressway project would be the same or less than not building. Since the Ninth Circuit accepted DOT's findings that the project would not cause a new violation, increase the severity of an existing violation, or delay the implementation of national air quality standards, the court held that DOT had not violated the CAA.

Finally, the Ninth Circuit held that DOT's Environmental Impact Statement (EIS) satisfied the disclosure requirements of NEPA. NRDC argued that DOT failed to explain whether a potential $PM_{2.5}$ increase would exceed current national air quality standards and did not fully disclose likely effects on public health. The Ninth Circuit held that DOT's EIS adequately discussed the new air quality standard and the failure to meet the new standard at the project area in the past three years. Additionally, the court noted that the EIS estimated no increase in $PM_{2.5}$ levels from the expressway project. Furthermore, the Ninth Circuit explained that the Health Risk Assessment within the EIS adequately disclosed the project's likely health effects. The court noted that the EIS included detailed study of estimated increases in cancer and other health risks, a diagram of risk increases by location, and recommendations to mitigate risk. The Ninth Circuit explained that DOT took the requisite hard look at the project's likely consequences and possible alternatives. Therefore the court held that DOT had satisfied NEPA.

In sum, the Ninth Circuit held that DOT satisfied the requirements of the CAA and NEPA and affirmed the grant of summary judgment.

6. WildEarth Guardians v. McCarthy, 772 F.3d 1179 (9th Cir. 2014)

WildEarth Guardians and other environmental conservation groups (collectively, WildEarth)[53] sued the United States Environmental Protection Agency (EPA) under the citizen suit provision of the Clean Air Act (CAA),[54] alleging that EPA failed to perform its nondiscretionary duty to issue revised ozone regulations under CAA section 166(a).[55] The United States District Court for the Northern District of California dismissed the claim for lack of subject matter jurisdiction on grounds that the CAA permits, but does not require, EPA to issue such regulations. The Ninth Circuit, reviewing the dismissal de novo, affirmed the district court.

53 Midwest Environmental Defense Center and Sierra Club were also plaintiffs.

54 42 U.S.C. §§ 7401–7671q (2012).

55 *Id.* § 7476(a).

The only issue on appeal was the scope of CAA section 166(a). This statutory provision has two sentences. The first sentence imposes a nondiscretionary duty to enact regulations by 1979 for four pollutants, including ozone.[56] The second sentence requires regulations for "pollutants for which national ambient air quality standards [NAAQS] are promulgated."[57] WildEarth argued that the two sentences should be read in concert—meaning the nondiscretionary duty is imposed not only when NAAQS are issued for newly regulated pollutants but also when NAAQS are revised for already regulated pollutants. Consequently, WildEarth argued that when EPA revised the NAAQS for ozone in 2008, it had a nondiscretionary duty to promulgate revised Prevention of Significant Deterioration (PSD) regulations. Alternately, EPA argued that the two sentences should be read as referring to two mutually exclusive sets of pollutants, and that the second sentence only imposes a duty for newly regulated pollutants other than the four listed in the first sentence.

The Ninth Circuit held that the statute is ambiguous and that both statutory interpretations are plausible. Consequently, the Court held that it did not have to decide whether a nondiscretionary duty was imposed because nondiscretionary requirements must be "clear-cut—that is, readily ascertainable from the statute allegedly giving rise to the duty."[58] As the duty was not readily ascertainable, WildEarth was precluded from relying on CAA's citizen-suit provision as a jurisdictional basis.

In sum, the Ninth Circuit affirmed the district court's dismissal of the case for lack of subject matter jurisdiction because the statute did not unambiguously provide EPA with a nondiscretionary duty.

7. California Dump Truck Owners Ass'n v. Nichols, 778 F.3d 1119 (9th Cir. 2015)

The California Dump Truck Owners Association (Dump Trucks)—a trade organization—brought suit against the California Air Resources Board (CARB), challenging the legality of the Truck and Bus Regulation (Regulation) under California's State Implementation Plan (SIP).[59] Dump Trucks alleged that the Regulation was preempted by federal standards. CARB responded that the United States Environmental Protection Agency's (EPA) approval of the SIP as a whole—and thus the Regulation in particular—removed subject matter jurisdiction from the United States District Court for the Eastern District of California.[60] The district court agreed and dismissed the suit for lack of subject matter jurisdiction. Dump Trucks filed both an appeal and a petition for review of EPA's approval of the regulation. The Ninth Circuit dismissed the petition as untimely and affirmed the district court.

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56 The statute lists "photochemical oxidants," which the court here describes as ozone pollutants. *Id.*

57 *Id.*

58 WildEarth Guardians v. McCarthy, 772 F.3d 1179, 1182 (9th Cir. 2014) (citation omitted).

59 CAL. CODE REGS. tit. 13, § 2025.

60 Clean Air Act, 42 U.S.C. § 7607(b)(1) (2012) (vesting exclusive jurisdiction in federal circuit courts of appeals).

Under the Clean Air Act (CAA),[61] each state must implement national air quality standards within its borders.[62] To do so, states must adopt a SIP for the "implementation, maintenance, and enforcement" of these standards.[63] After EPA approves a SIP, it becomes federal law.[64] CARB adopted the Regulation[65] as part of its SIP in 2008. The Regulation required pollution filters and low-emission engines on heavy duty diesel trucks.

Before the regulation took effect, Dump Trucks sought an injunction against the Regulation's enforcement and a declaration that the Regulation was pre-empted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA).[66] The National Resource Defense Council (NRDC) intervened as a defendant. While the suit was pending, CARB submitted the Regulation to EPA, and EPA issued a Notice of Proposed Rulemaking in July 2011.[67] In its Notice, EPA specifically recognized CARB's authority to implement the regulation and stated that EPA knew of "no obstacle under Federal or State law" to that implementation.[68]

EPA approved the Regulation in April 2012, and it took effect on May 4, 2012.[69] Shortly thereafter, NRDC alerted the district court of EPA's approval of the regulation, and both parties briefed the question of whether EPA's approval deprived the court of jurisdiction. The district court concluded that it lacked subject matter jurisdiction under CAA section 307(b)(1).[70] The Ninth Circuit reviewed the appeal de novo.

The Ninth Circuit began with a review of the statutory text. Under CAA section 307(b)(1), "[a] petition for review of . . . [EPA]'s action in approving or promulgating any implementation plan . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."[71] By its plain text, section 307(b)(1) thus deprives district courts of any jurisdiction over these claims. Dump Trucks argued that this section did not apply because it had challenged the Regulation before it was approved by EPA.

The Ninth Circuit rejected this argument. Reviewing cases from the Second, Fourth, and Eighth Circuits, the court explained that it would look not only to the facial allegations in the complaint, but also to the practical impact of the claim. In this case, the court determined that Dump Trucks' suit challenged the EPA approval of the SIP. Because an injunction against the enforcement of the state regulation would greatly undermine the power of the SIP, the court determined

61 *Id.* §§ 7401–7671q (2012).

62 *Id.* §§ 7409–7410.

63 *Id.* § 7410(a)(1).

64 Safe Air for Everyone v. U.S. Envtl. Prot. Agency, 488 F.3d 1088, 1091 (9th Cir. 2007).

65 CAL. CODE REGS. tit. 13, § 2025.

66 49 U.S.C. § 14501(c)(1) (2012).

67 Approval and Promulgation of Implementation Plans, 76 Fed. Reg. 40652 (proposed July 11, 2011) (to be codified at 40 C.F.R. pt. 52).

68 *Id.* at 40658.

69 Approval and Promulgation of Implementation Plans, 77 Fed. Reg. 20308 (Apr. 4, 2012) (codified at 40 C.F.R. pt. 52); 40 C.F.R. § 52.220(c)(410) (2012).

70 *See* 42 U.S.C. § 7607(b)(1) (2012).

71 *Id.*

that Dump Trucks' suit fell under section 307(b)(1) of the CAA and was therefore required to have been initiated in the Court of Appeals for the Ninth Circuit.

The Ninth Circuit further held that the claim fell under section 307(b)(1) because Dump Trucks' claim of preemption would challenge EPA's statement that it was not aware of any "obstacle under Federal of State Law in CARB's ability to implement" the Regulation.[72] The court did note that the case was unusual in that EPA's action *after* the complaint had divested the district court of jurisdiction, but explained that other circuits and the Supreme Court had suggested that subsequent agency action could deprive courts of jurisdiction.[73] The court explained that the policy goals of funneling all challenges to SIPs into the circuit courts of appeals was best served by applying section 307(b)(1) to the instant suit.

The Ninth Circuit also considered and rejected Dump Trucks' claim that it would be unfair to apply section 307(b)(1) to dismiss the suit because Dump Trucks would have no avenue for relief. When Dump Trucks filed the suit, the Ninth Circuit did not have jurisdiction because EPA had not taken final action. Further, Dump Trucks argued that the district court's dismissal occurring months after EPA's final action prejudiced Dump Trucks, as its subsequent petition for review of EPA's approval was denied as untimely. However, the court rejected those claims because Dump Trucks could have filed a timely petition for review of EPA's approval of the Regulation, and had simply failed to do so. Further, Dump Trucks failed to submit comments to EPA during the approval process. Given those failures to act, Dump Trucks was at least partly at fault for the lack of meaningful relief available. Accordingly, the Ninth Circuit affirmed the district court's dismissal of the claim for lack of subject matter jurisdiction.

8. Natural Resources Defense Council v. U.S. Envtl. Prot. Agency, 779 F.3d 1119 (9th Cir. 2015)

The Natural Resources Defense Council and Communities for a Better Environment (collectively, NRDC) petitioned for review of the United States Environmental Protection Agency (EPA) approval of the South Coast Air Quality Management District's adoption of alternative pollution controls within California's Clean Air Act (CAA)[74] required State Implementation Plan (SIP).[75] EPA approved Rule 317, which replaced a CAA section 185 fee scheme for major stationary sources of pollution with a new fee-generating rule focused on reducing pollution from mobile sources, like cars and trucks. NRDC argued that, under

72 Approval and Promulgation of Implementation Plans, 76 Fed. Reg. 40,658 (proposed July 11, 2011) (to be codified at 40 C.F.R. pt. 52).

73 Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1210 (2012) (explaining that respondents' Supremacy Clause challenges to state regulations were in a "different posture" after federal agency approved the regulations, potentially requiring respondents to instead seek review of agency action); City of Seabrook v. Costle, 659 F.2d 1371, 1373 (5th Cir. 1981) ("Even if we assume . . . that the district court had jurisdiction of plaintiffs' claim . . . the publication of the 'final rule' clearly left the district court without jurisdiction of the claim.").

74 42 U.S.C. §§ 7401—7671q (2012).

75 *Id.* § 7410(a)(1).

section 172(e) of the CAA,[76] EPA lacked authority to approve these alternative controls when air quality standards had been *strengthened*, rather than weakened. However, the Ninth Circuit concluded that EPA had reasonably interpreted section 172(e) of the CAA to give it the power to approve alternative "not less stringent" programs when air quality standards are tightened. Accordingly, the Ninth Circuit denied the petition for review.

The Ninth Circuit reviewed EPA's interpretation of its CAA authority using the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[77] *Chevron* requires a court to first determine if "Congress has directly spoken to the precise question at issue" in the text of the statute.[78] If Congress has done so, the inquiry ends. If Congress has not, the court proceeds to the second step of *Chevron* and determines "whether the agency's answer is based on a permissible construction of the statute."[79]

In step one of the *Chevron* analysis, the Ninth Circuit rejected NRDC's argument that the language of section 172(e) unambiguously applies only where air quality standards are weakened, and not where standards are strengthened. The Ninth Circuit looked to the D.C. Circuit's decision in *South Coast Air Quality Management District v. U.S. Environmental Protection Agency*,[80] which upheld EPA's use of section 172(e) after air quality standards were strengthened. The Ninth Circuit further noted that the text of section 172(e) did not explicitly state what should happen when standards are strengthened. Accordingly, the Ninth Circuit concluded that the language of section 172(e) was ambiguous.

The Ninth Circuit then proceeded to Step Two of the *Chevron* analysis. The court determined that EPA's interpretation of section 172(e), and its subsequent approval of the Rule 317 change to California's SIP, was reasonable based on both the text of section 172(e) and the congressional intent and policy behind it. The first part of the text of section 172(e) had already been extended to apply when air quality standards were strengthened, so it made textual sense to extend the second part of section 172(e) as well. Further, the Ninth Circuit held this interpretation was reasonable because Congress had specifically limited other portions of section 172, but had not included limiting language in section 172(e).[81] Finally, the court noted that the interpretation was reasonable because it allowed EPA to act flexibly in allowing states to address their specific pollution problems. The court noted that the major problem in the South Coast Air Quality Management District was pollution from cars and trucks, rather than from stationary sources that were already heavily regulated. As a result, it was reasonable to allow the implementation of Rule 317, which would address the

76 *Id.* § 7502(e).

77 467 U.S. 837 (1984).

78 *Id.* at 842.

79 *Id.* at 842–43.

80 472 F.3d 882 (D.C. Cir. 2006).

81 *See* United Transp. Union v. BNSF Ry. Co., 710 F.3d 915, 928 (9th Cir. 2013) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

most pressing pollution problems. The court rejected NRDC's claims that this would give EPA too much discretion because all alternative pollution controls would need to be "not less stringent" than the controls previously in effect.[82]

Finally, the Ninth Circuit briefly turned to the substance of Rule 317. It noted that NRDC had not actually challenged the substance of the rule; rather, NRDC had challenged only EPA's authority to establish any alternative controls under section 172(e) when air quality standards were strengthened.

Ultimately, the Ninth Circuit concluded that EPA had reasonably interpreted section 172(e) to allow alternative pollution controls when air quality standards are strengthened. Accordingly, the Ninth Circuit rejected the petition for review.

B. Comprehensive Environmental Response, Compensation, and Liability Act

1. Arizona v. City of Tucson, 761 F.3d 1005 (9th Cir. 2014)

The State of Arizona brought suit against numerous potentially responsible polluters (collectively, Polluters)[83] in the United States District Court for the District of Arizona. Arizona sought court approval of a proposed consent decree with the Polluters under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[84] and its state analog, the Arizona Water Quality Assurance Revolving Funds (WQARF).[85] The Ninth Circuit reversed the district court's approval of the consent decrees, holding that it had abused its discretion, and remanded the case so the district court could reconsider the issue.

This case concerned the pollution of the Broadway Patano Landfill Site, which was predicted to require thirty years of cleanup at a cost of $75,000,000.[86] Under the proposed consent decree, the Polluters would pay agreed upon damages and would be released from any further liability. The consent decrees also released Polluters from any obligation to pay contribution to nonsettling parties in the future. After Arizona filed public notice of its intent to enter into these consent decrees, multiple non-settling potentially responsible parties (PRPs) intervened in

82 Clean Air Act, 42 U.S.C. § 7502(e) (2012).

83 This group included Ashton Company Incorporated Contractors and Engineers; Baldor Electric Company; Don Mackey Oldsmobile Cadillac, Inc.; Dunn–Edwards Corporation; Durodyne, Inc.; Fersha Corporation; Fluor Corporation; General Dynamics Corporation; Goodyear Tire & Rubber Company; Lockheed Martin Corporation; Holmes Tuttle Ford, Inc.; Industrial Pipe Fittings, LLC; Tucson Foundry & Manufacturing Incorporated; Rowe Enterprises Incorporated; Pima County Community College District; Rollings Corporation; Textron Incorporated; ABB Incorporated; Combustion Engineering Incorporated; Texas Instruments, Inc.; Tucson Dodge Incorporated; Warner Propeller & Governor Company, LLC; and Fluor Enterprises, Inc.

84 42 U.S.C. §§ 9601–9675 (2012).

85 ARIZ. REV. STAT. ANN. § 49–281 (2012).

86 Arizona v. Ashton Co., CIV 10-634-TUC-CKJ, 2012 WL 569018, at *1, *2 n.4, *4 (D. Ariz. Feb. 22, 2012) *aff'd in part, vacated in part sub nom.* Arizona v. City of Tucson, 761 F.3d 1005 (9th Cir. 2014).

the action.[87] The Intervening Polluters argued that Arizona failed to offer enough information for the parties or the court to determine whether the consent decree was "fair, reasonable, and consistent with CERCLA's objectives."[88] The district court reviewed the judgment based on an abuse of discretion standard and rejected the PRPs' arguments, approving the consent decrees.

Reviewing the district court's decision for abuse of discretion, the Ninth Circuit first identified the district court's obligation under CERCLA to scrutinize the terms of the settlement to ensure that they are "fair, reasonable, and consistent with CERCLA's objectives."[89] The Ninth Circuit explained that such scrutiny should involve a comparison of the total projected costs that Polluters would pay to Polluters' liability, with some reasonable discount for time saved in avoiding litigation. The Ninth Circuit also explained that there must be sufficient evidence in the record to support this assessment, and the district court must explain its assessment. Second, the Ninth Circuit concluded that the district court had failed to substantively analyze the terms of the proposed settlement. The Ninth Circuit pointed out that the district court relegated its numerical analysis to a footnote. Furthermore, the Ninth Circuit noted that, instead of independently analyzing the evidence, the district court stated that it must defer to Arizona's judgment regarding the reasonableness of the settlement "unless it [wa]s arbitrary, capricious, and devoid of any rational basis."[90] The Ninth Circuit rejected this position, reasoning that the district court effectively accorded the state agency the same deference to which federal agencies were entitled.

Third, the Ninth Circuit held that a state agency is not entitled to deference in its assessment of the fairness of the settlement terms. In doing so, the Ninth Circuit distinguished what it referred to as the "double-swaddling" approach typically applied to CERCLA consent decrees in which the United States Environmental Protection Agency (EPA) is a party.[91] In such cases, a district court must defer to EPA's expertise in the CERCLA arena, and an appellate court reviews that determination only for an abuse of discretion. However, the Ninth Circuit held that this approach applied only to cases in which the federal government, charged with enforcing the statute, rather than the state government, was a party. As a result, the Ninth Circuit held that the district court had abused its discretion in deferring to Arizona's assessment of the reasonableness of the settlement terms. The Ninth Circuit noted that the district court's failure to scrutinize the consent decree in this case would have been an abuse of discretion even had EPA been a party.

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87 The intervening nonsettling parties included Raytheon Company; Pima County; University of Arizona; Arizona Board of Regents; Tomkins Industries, Inc.; Tucson Airport Authority; and Tucson Electric Power Company.

88 Arizona v. City of Tucson, 761 F.3d 1005, 1009 (9th Cir. 2014) (citing United States v. Montrose Chem. Corp. of Cal., 50 F.3d 741, 748 (1995)). In their briefing before the district court, Intervening Polluters also requested a court order declaring that Arizona could not hold them jointly and severally liable for cleanup costs later. Both the District Court and the Ninth Circuit concluded that this request for declaratory relief was not properly before the court.

89 *Id.* at 1015 (citing *Montrose*, 50 F.3d at 748).

90 *Id.* at 1013.

91 *Montrose*, 50 F.3d at 746.

Ultimately, the Ninth Circuit concluded that the district court had abused its discretion in approving the consent decrees without independently scrutinizing them. Therefore, the Ninth Circuit remanded to the district court so it could properly assess the consent decrees.

In dissent, Judge Callahan argued that the majority had incorrectly determined the level of deference appropriate for the Arizona Department of Environmental Quality (ADEQ) decision to enter into consent decrees. The dissent focused first on the role of states in the enforcement of CERCLA, asserting that Congress intended the states to play "crucial" and "central" roles in the enforcement of CERCLA.[92] Second, the dissent argued that the "double-swaddling" approach to review of consent decrees to which EPA is a party should apply with similar force to state agency opinions because the factors that warrant such deference also apply to state agencies. The dissent noted that several circuits accorded at least some level of deference to state agency decisions regarding consent decrees or the enforcement of federal environmental law.[93] Third, the dissent concluded that Intervening Polluters had failed to show any abuse of discretion. While the dissent recognized that the ADEQ had not identified the specific settlement and liability shares for each Polluter, the dissent argued that the district court did not abuse its discretion in failing to "wade deep into the abyss of liability allocation."[94] Thus, the dissent would have affirmed the district court's approval of the consent decrees.

2. ASARCO, LLC v. Union Pacific Railroad Company, 765 F.3d 999 (9th Cir. 2014)

ASARCO, LLC (Asarco) sued Union Pacific Railroad Co. and Union Pacific Corp. (collectively, Union Pacific) for contribution towards Asarco's $482 million settlement with the United States for environmental cleanup costs in the Coeur d'Alene River watershed. Asarco brought its action under section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[95] in the United States District Court for the District of Idaho. Union Pacific moved to dismiss the claim as barred by both CERCLA's statute of limitations and a prior settlement agreement between the parties. The district court held that the claim was not barred by the statute of limitations, but dismissed the claim because of the prior agreement. On appeal, the Ninth Circuit reversed the district court's dismissal based on the prior agreement and remanded the case.

92 *City of Tucson*, 761 F.3d at 1018 (Callahan, J., concurring in part, dissenting in part).

93 City of Bangor v. Citizens Commc'ns Co., 532 F.3d 70, 94 (1st Cir. 2008) (according "some deference" to state agency decision to enter into consent decree); Comm'r of the Dep't of Planning & Natural Res. v. Esso Standard, Oil S.A., Ltd. (*In re* Tutu Water Wells CERCLA Litig.), 326 F.3d 201, 207 (3d Cir. 2003) (according deference to territorial agency, without specifying level of deference); Comfort Lake Ass'n v. Dresel Contracting, Inc., 138 F.3d 351, 357 (8th Cir. 1993) (according "considerable deference" to state agency agreement under Clean Water Act).

94 *City of Tucson*, 761 F.3d at 1026.

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

Asarco and Union Pacific engaged in mining operations in the Coeur d'Alene River watershed of the northern Idaho panhandle for over a century. The Coeur d'Alene site is a 1,500 square mile area where Asarco operated more than twenty mines and Union Pacific built and operated rail lines to transport ore and other materials to regional mining and smelting facilities. In 1983, the United States Environmental Protection Agency (EPA) placed the Coeur d'Alene site on the CERCLA National Priorities List, which led to thirty years of pollution cleanup. In 2003, the district court consolidated actions brought by the United States, the State of Idaho, and the Coeur d'Alene Tribe against Asarco and other mining companies for cleanup costs and natural resource damages at the site. The district court apportioned liability based on the volume of mining waste released and held Asarco at least 22% liable for the pollution. However, before the damages portion of that case concluded, Asarco filed for bankruptcy, seeking to resolve billions of dollars in environmental liabilities across the country. As a result, Union Pacific and the United States separately entered into settlements with Asarco resolving Asarco's contribution to CERCLA response costs.

In the district court action leading to this appeal, Asarco sued Union Pacific for contribution towards its settlement with the United States, claiming it overpaid its share as a result of its previous agreement with Union Pacific. The Ninth Circuit reviewed the district court's dismissal of the claim de novo.

First, the Ninth Circuit considered the timeliness of Asarco's complaint. Union Pacific argued that Asarco's amended complaint failed to relate back to the date of the original complaint under Federal Rule of Civil Procedure 15(c)(1)(B) and that Asarco filed one day too late under CERCLA's three year statute of limitations for claims seeking contribution post-settlement.[96] As an issue of first impression, the Ninth Circuit determined that an amended pleading could relate back even when it included allegations expressly disclaimed in the original pleading. The court explained that Rule 15(c) balances a liberal relation-back doctrine with protection for defendants against stale claims by limiting subsequent claims to the "same conduct, transaction, or occurrence" as the original pleading. The court analogized to its decision in *Rural Fire Protection Co. v. Hepp*[97] where it held that plaintiffs' amended complaint related back to the original pleading because the claim to an additional period of wages was based on the same transaction, would be proved with the same kind of evidence, and gave defendant adequate notice. The court emphasized that change in scope of relief by a plaintiff adding claims either missing or expressly disclaimed in the original pleading is permissible as long as the defendant has notice of the particular transaction or occurrence being litigated. The Ninth Circuit held that Asarco's original complaint put Union Pacific on notice that the litigation concerned the Coeur d'Alene site, and sought contribution based on the same agreements settling Asarco's liability for CERCLA response costs with Union Pacific and the United States.

96 Asarco's original complaint asserted exclusion of "the drainage of the North Fork of the Coeur d'Alene River" while the amended complaint included "the watersheds of the North Fork and the South Fork of the Coeur d'Alene River." ASARCO, LLC v. Union Pacific Railroad Co., 765 F.3d 999, 1003 (9th Cir. 2014).

97 366 F.2d 355, 362 (9th Cir. 1966).

The Ninth Circuit next considered the timeliness of Asarco's original complaint under CERCLA section 113(g)(3), which sets the statute of limitations at three years for contribution actions after the entry of a judicially approved settlement. Union Pacific argued that section 113(g)(3) specifies the date when the statute begins to run, indicating that time must be computed by the calendar-date method, making Asarco's claim one day late. The court disagreed and explained that Federal Rule of Civil Procedure 6(a)'s anniversary method applies to any statute that does not specify a method to compute timeliness. The court analogized to its precedent in *Patterson v. Stewart*,[98] in which it applied Rule 6(a)'s method to a statute that similarly defined the trigger for the limitations period, but not a method for computing the period's end date. Therefore, the Ninth Circuit held that Asarco's original complaint was timely.

Finally, the Ninth Circuit considered whether the mutual release provision in the settlement agreement unambiguously released Union Pacific from contribution.[99] Union Pacific argued that the provision broadly released it from CERCLA response costs it incurred. On the other hand, Asarco argued that the provision reserved, rather than released, its claims against Union Pacific for CERCLA response costs incurred by Asarco. The court explained that the agreement's repeated references to release of Union Pacific's claims supported Asarco's interpretation. However, the court determined that Union Pacific's interpretation rendered superfluous the language specifically releasing claims for costs incurred by Union Pacific. Therefore, the court held that the mutual release provision language was ambiguous because both Asarco's more narrow interpretation of the release and Union Pacific's broader interpretation maintain the mutuality of the provision.

In sum, the Ninth Circuit agreed with the district court and held that the amended pleading was timely, but concluded that the district court erred in dismissing Asarco's claim based on the settlement agreement. Consequently, the Ninth Circuit remanded the case for further proceedings on the basis of ambiguity in the mutual release provision.

3. United States v. Coeur D'Alenes Co., 767 F.3d 873 (9th Cir. 2014)

The Federal Resources Corporation (FRC) intervened in an enforcement suit brought by the United States Environmental Protection Agency (EPA) against Coeur D'Alenes Co. (CDA) to challenge an agreed-upon consent decree that resolved CDA's liabilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[100] FRC objected to the consent decree

98 251 F.3d 1243, 1245–46 (9th Cir. 2001).

99 The "mutual release" provision stated, "ASARCO agrees . . . to hereby release [Union Pacific] . . . from any and all damages . . . arising out of or in any way connected with . . . Remaining Sites Costs." *ASARCO, LLC,* 765 F.3d at 1002–03 (emphasis removed). The agreement separately defined "Remaining Sites Costs" as "costs of response under CERCLA incurred by [Union Pacific]." *Id.* at 1003 (emphasis removed).

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

because it did not apportion liability based on CDA's degree of fault, but rather focused on CDA's ability to pay. Further, FRC objected that the consent decree did not consider CDA's insurance. The United States District Court for the District of Idaho rejected FRC's objections and entered the consent decree. On appeal, the the Ninth Circuit affirmed the district court's ruling.

In 2011, EPA sued CDA, FRC, and other potentially responsible parties for cleanup costs at the Conjecture Mine Site in Bonner County, Idaho. Generally, CERCLA imposes joint and several liability on all polluters, but allows liable parties to seek contribution from other responsible parties. Here, EPA proposed a consent decree with CDA that required CDA to pay $350,000, but absolved CDA of ongoing liability. EPA based the settlement figure on CDA's ability to pay, not on its proportionate share of liability. The Ninth Circuit reviewed the district court's dismissal of FRC's claims for abuse of discretion.

The Ninth Circuit first rejected FRC's arguments that the consent decree did not consider the relative fault of the parties. FRC cited Ninth Circuit precedent, which held that consent decrees must be both procedurally and substantively "fair, reasonable, and consistent with CERCLA's objectives."[101] FRC contended that the consent decree would require it to pay more than its proportional share of the cleanup costs. The Ninth Circuit rejected this argument for two reasons. First, CERCLA expressly allows the government to consider a party's ability to pay when calculating a settlement. As a policy matter, this encourages settlement and does not put companies out of business. Second, a district court may, but is not required to, consider the settlement's effect on non-settling parties. The Ninth Circuit explained that it did not want to limit the district court's discretion by requiring it to consider this factor. Therefore, the Ninth Circuit held that the district court did not err by not considering the relative faults of the parties.

Next, the Ninth Circuit rejected FRC's argument that the district court erred by not considering CDA's insurance. The Ninth Circuit explained that this argument was speculative and that the government had considered the CDA's financial viability. Specifically, the Ninth Circuit noted that experts from both EPA and CDA evaluated CDA's ability to pay, and CDA's expert did not find evidence of any existing coverage when it turned its evaluations over to EPA. The Ninth Circuit further explained that, by the terms of the consent decree, CDA would lose its statutory protection from contribution claims if it misrepresented the existence of insurance policies. Therefore, the Ninth Circuit held that the district court did not abuse its discretion by failure to require a more thorough investigation for an insurance policy.

In sum, the Ninth Circuit affirmed the district's court approval of the consent decree because the district court did not abuse its discretion by declining to consider the fairness of allowing CDA to pay less than its share or by not conducting a more thorough investigation for insurance.

101 United States v. Montrose Chemical Corp. of Cal., 50 F.3d 741, 748 (9th Cir. 1995).

C. Clean Water Act

1. Alaska Community Action on Toxics v. Aurora Energy Services LLC, 765 F.3d 1169 (2014)

Alaska Community Action on Toxics (ACAT)[102] filed a citizen suit against Aurora Energy Services (Aurora)[103] under the Clean Water Act (CWA).[104] ACAT alleged that Aurora violated the CWA due to its unpermitted discharge of nonstormwater coal into Resurrection Bay. The United States District Court for the District of Alaska held that the discharge was covered by Aurora's National Pollutant Discharge Elimination System (NPDES) permit and accordingly granted summary judgment for Aurora. On appeal, the Ninth Circuit held that the discharge was not covered by the permit, reversed the grant of summary judgment, and remanded the case.

Aurora operates the Seward Coal Loading Facility (the Facility) on the shore of Resurrection Bay in Seward, Alaska. The Facility receives coal by train and loads the coal onto ships by conveyor. ACAT alleged that during this process coal spills into the bay in violation of the CWA. The CWA prohibits "the discharge of any pollutant by any person" into navigable waterways, unless the discharge is otherwise authorized under the CWA.[105] One form of authorization is the issuance of an NPDES permit.[106] A general NPDES permit allows for the discharge of a broad class of materials within a specified geographic area.[107] The Facility was issued a NPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (Stormwater Permit) in 2001.

The sole issue on appeal was whether the Stormwater Permit allowed the Facility's alleged discharge of coal into the bay. The Ninth Circuit reviewed this question *de novo*.

In evaluating the conduct permitted under the Stormwater Permit, the Ninth Circuit looked to the plain text of the permit. Because the Stormwater Permit explicitly authorized eleven categories of nonstormwater discharge, but not the type of coal discharge at issue, the Ninth Circuit held that the discharge was not authorized by the Stormwater Permit. Aurora argued that the list of approved discharges was not intended to be exclusive because: 1) other types of discharge were authorized in separate sections of the permit; and 2) provisions in the permit prohibiting specific types of discharge would be superfluous if the list was exclusive. However, the Ninth Circuit responded that the other authorization sections applied to different types of facilities, and that the plain text of the Stormwater Permit was sufficiently clear to justify an interpretation resulting in surplusage. Thus, the Ninth Circuit held that the discharge of coal by Aurora was not covered by the Stormwater Permit. The Ninth Circuit noted it would have

102 Plaintiff-appellants include ACAT and the Alaska Chapter of the Sierra Club.

103 Defendant-appellees include Aurora and Alaska Railroad Corporation.

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

105 *Id.* § 1311(a).

106 *Id.* § 1342(a).

107 General Permits, 40 C.F.R. § 122.28(a)(1) (2014).

reached the same conclusion under the analysis applied to individual permits,[108] although the court declined to reach the issue of whether that analysis applied to the general permit in this case.

In sum, the Ninth Circuit held that the district court erred in granting summary judgment to Aurora because the Facility's coal discharge was not authorized under its Stormwater Permit. Accordingly, the Ninth Circuit reversed the grant of summary judgment and remanded the case for further proceedings.

D. Natural Gas Act

1. Columbia Riverkeeper v. U.S. Coast Guard, 761 F.3d 1084 (9th Cir. 2014)

Columbia Riverkeeper, Columbia-Pacific Common Sense, and Wahkiakum Friends of the River (collectively, Riverkeeper) petitioned for review of a letter of recommendation issued by the United States Coast Guard to the Federal Energy Regulatory Commission (FERC). Riverkeeper contended that the Ninth Circuit had jurisdiction under section 717r(d)(1) of the Natural Gas Act, which authorizes judicial review of agency orders and actions that "issue, condition, or deny any permit, license, concurrence, or approval. . . ."[109] The Ninth Circuit held that it lacked jurisdiction as the letter was not an agency order or action under section 717 of the Natural Gas Act, and dismissed the petition for review.

In 2007, LNG Development Company (Oregon LNG), began a prefiling process with FERC to site and construct a liquefied natural gas (LNG) facility on the East Skipanon Peninsula, near Warrenton, Oregon. As the exclusive siting authority and lead agency for LNG facilities under the Natural Gas Act,[110] FERC required Oregon LNG to file a letter of intent and waterway suitability assessment with the Coast Guard pursuant to the pre-filing process.[111] Oregon LNG filed a formal application in 2008, and FERC issued a notice of application. Subsequently, Riverkeeper intervened in the FERC proceedings.

In response to Oregon LNG's application, the Coast Guard Captain of the Port issued a letter of recommendation and an analysis of the proposed LNG facility in 2009. By its terms, the letter was not enforceable. However, the letter stated that its findings would provide additional guidance regarding necessary mitigation measures for the risks involved in LNG transit. Later that year, Riverkeeper requested reconsideration of the letter pursuant to Coast Guard regulations,[112]

108 Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md., 268 F.3d 255, 259 (4th Cir. 2001) (holding that a permittee is not liable under the CWA if it: 1) complies with the terms of the permit and with the CWA's disclosure requirements; and 2) discharges pollutants that were disclosed to the permitting authority and that the permitting authority would have reasonably contemplated during the permitting process).

109 Natural Gas Act of 1938, 15 U.S.C. § 717r(d)(1) (2012).

110 *Id.* § 717b(e)(1), n(b)(1).

111 33 C.F.R. § 127.007 (2009) (requiring the facility to submit a letter of intent); 18 C.F.R. § 157.21(a)(1) (2009) (requiring the facility to submit a Preliminary Waterway Suitability Assessment).

112 "Any person directly affected by an action taken under this part may request reconsideration by the Coast Guard officer responsible for that action." 33 C.F.R. § 127.015(a) (2014).

contending that the Coast Guard had failed to comply with the National Environmental Policy Act (NEPA)[113] and the Endangered Species Act (ESA).[114]

The Coast Guard denied Riverkeeper's request for reconsideration as well as Riverkeeper's subsequent administrative appeals in 2010 and 2012. In its 2012 decision, the Coast Guard concluded that the issuance of the letter was neither an agency action under the ESA or Administrative Procedure Act (APA),[115] nor a major federal action under NEPA. The Coast Guard explained that the letter neither was legally binding nor had an impact on vessel traffic. Ultimately, Riverkeeper filed a petition for review with the Ninth Circuit under section 717r(d)(1) of the Natural Gas Act, challenging both the letter and the Coast Guard's 2012 decision on the ground that the Coast Guard had failed to comply with NEPA and ESA.[116] Oregon LNG intervened in the proceedings.

Initially, the Ninth Circuit determined that section 717r(d)(1) of the Natural Gas Act gave the court jurisdiction to review final agency orders and actions that "issue[d], condition[ed], or den[ied]" a permit *de novo*.[117] Additionally, the Ninth Circuit concluded that the plain meaning of the phrase "permit, license, concurrence, or approval," limits the application of section 717r(d)(1) to agency determinations that have the legal effect of granting or denying permission to take some action.

After determining the scope of section 717r(d)(1), the Ninth Circuit held that the Coast Guard's letter was not a permitting action or order and had no legal effect. The court noted that the Coast Guard's permitting authority was restricted by its own regulations, and that Congress did not require FERC to consider such letters of recommendation as anything more than expert advice. While Riverkeeper had argued that this interpretation would render other provisions superfluous, and that the letter should be considered a final agency action or order as a practical matter, the Ninth Circuit rejected that argument.

First, looking to similar court constructions and provisions in the statute that exemplify which federal agency action is subject to review, the court held that its interpretation was consistent with section 717 of the Natural Gas Act. Second, although the court agreed that the practical effects of some recommendation letters might qualify them as actions or orders, it disagreed that the Coast Guard letter was an order with any legal effect. Riverkeeper contended that the letter was a necessary prerequisite for the siting of an LNG facility. However, the court held that the letter did not produce legal consequences and was not backed by any enforcement authority. Riverkeeper also argued that the letter would effectively regulate vessel traffic because, on its face, it would compel compliance with the risk mitigation measures. The court rejected Riverkeeper's argument, noting that in its 2012 administrative decision, the Coast Guard had stated that

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

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

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

116 *See* 15 U.S.C. § 717r(d)(1) (2012) (granting exclusive jurisdiction to the federal courts for judicial review).

117 *Id.*

the mitigation measures were not binding, and that it could not practically regulate all vessels that failed to obtain an approval letter.

In sum, the Ninth Circuit held that Riverkeeper did not carry its burden of showing that the Coast Guard's letter of recommendation was a final agency order or action. Because section 717r(d)(1) of the Natural Gas Act restricts judicial review to final orders and actions, and because the letter of recommendation was not a final order or action, the Ninth Circuit dismissed the petition for judicial review.

E. Alaska National Interest Lands Conservation Act

1. Sturgeon v. Masica, 768 F.3d 1066 (9th Cir. 2014)

John Sturgeon brought an action against various individuals associated with the National Park Service (collectively, NPS)[118] challenging the enforcement of 36 C.F.R. § 2.17(e), which bans the operation of hovercraft on NPS lands and waters. The State of Alaska intervened on behalf of Sturgeon, and both parties alleged that section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA)[119] precludes the enforcement of NPS regulations on state-owned lands and waters. On appeal, the Ninth Circuit affirmed the district court's grant of summary judgment to NPS.

Sturgeon's claim arose out of a moose hunting trip in 2007 in which he used a hover craft on the Nation River. While on the trip, Sturgeon was approached by NPS agents who warned him that under NPS regulations, hovercrafts could not be operated within the Yukon-Charley Rivers National Preserve. Sturgeon removed his hovercraft and after extended communication, sued NPS in federal court. Sturgeon challenged the hovercraft ban on the ground that it violated ANILCA and so could not be enforced against him. Alaska, as an intervenor, challenged NPS's authority to require Alaska to obtain research permits. The United States District Court for the District of Alaska granted summary judgment to NPS, finding that the plain language of ANILCA section 103(c) did not support the interpretation advanced by Sturgeon and Alaska. Sturgeon and Alaska appealed. The Ninth Circuit reviewed the district court's grant de novo and its factual findings for clear error.

The Ninth Circuit began by analyzing standing.[120] While NPS had not raised the issue below, the Ninth Circuit held that they could nonetheless raise it on appeal. NPS contended that Sturgeon failed to show probable enforcement of the regulations and, thus, did not establish an injury-in-fact. However, the Ninth

118 The other defendants in this case were Greg Dudgeon; Andee Sears; Sally Jewell, Secretary of the Interior; Jonathan Jarvis, Director of the National Park Service; the National Park Service; and the United States Department of the Interior.

119 16 U.S.C. §§ 3101–3233 (2012).

120 Article III standing requires the plaintiff to demonstrate a "concrete and particularized" injury that is "actual or imminent," show that the injury is fairly traceable to the challenged action, and show that a favorable decision would likely redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

Circuit determined that Sturgeon established injury by demonstrating the credible threat of prosecution under NPS regulations for his "intention to engage in a course of conduct arguably affected with a constitutional interest."[121] The Ninth Circuit also held that Sturgeon's subsequent decision to refrain from using a hovercraft on the river was "fairly traceable" to the NPS regulation and the threat of its enforcement by NPS.[122] Therefore, because NPS did not contend that Sturgeon's injury was unredressable, the court determined that Sturgeon had standing.

However, the Ninth Circuit held that the State of Alaska lacked standing. The Ninth Circuit acknowledged that NPS's requirement that Alaska obtain permits to conduct studies of chum and sockeye salmon constituted a concrete injury in the form of additional time expended. However, the Ninth Circuit explained that, because Alaska had already concluded its salmon studies, a favorable court decision would not redress its injury. Alaska tried to establish standing in another way by arguing that NPS's regulations violated its sovereign rights to control its land and waters. However, because Alaska failed to identify any specific conflict between the NPS regulations and Alaska law, the Ninth Circuit held that Alaska had not demonstrated a concrete injury to its sovereign interests. Finally, Alaska attempted to rely on the Secretary of the Interior's denial of its petition for new administrative proceedings. However, the Ninth Circuit explained that participation in agency proceedings is insufficient for Article III standing purposes.[123] Thus, the Ninth Circuit concluded that Alaska lacked standing and therefore dismissed it as a party for lack of jurisdiction.

Next, addressing the merits of Sturgeon's challenge, the Ninth Circuit determined that ANILCA did not prevent the application of NPS's hovercraft ban. First, the court examined ANILCA section 103(c), which exempts state-owned lands from regulations specific to the conservation system units (CSUs). CSUs are units of the National Park System, set aside for protection of natural resource values by permanent federal management.[124] Sturgeon argued that section 103(c) removes the state-owned waterway at issue from NPS regulatory reach. However, the court explained that while the state-owned land in CSUs is indeed exempt from "regulations applicable *solely* to public lands within [CSUs]," the hovercraft ban is a regulation applied to all federal land and water that the NPS administers.[125] Therefore, the court explained that even if the Nation River is state-owned, it still would not be exempt from the hovercraft ban.

The Ninth Circuit also addressed Sturgeon's arguments that the Secretary of the Interior had exceeded her authority and implicated significant constitutional problems in promulgating the hovercraft ban. First, the court reviewed sections

121 *See* Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334, 2342 (2014) (internal quotation marks and citation omitted) (emphasizing that threatened enforcement actions may suffice to create Article III injuries).

122 *See Lujan*, 504 U.S. at 560.

123 *See* Gettman v. Drug Enforcement Admin., 290 F.3d 430, 433 (D.C. Cir. 2002) (citing Fund Democracy, L.L.C. v. Sec. & Exch. Comm'n, 278 F.3d 21, 27 (D.C. Cir. 2002)).

124 Nat'l Audubon Soc'y v. Hodel, 606 F. Supp. 825, 827–28 (D. Alaska 1984).

125 Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3103(c) (2012) (emphasis added).

1a–2(h) of the Park Service Administration and Improvement Act[126] and concluded that the Secretary had authority to regulate recreational uses of water administered by the National Park Service. Second, the court noted that while Sturgeon argued that NPS's actions implicated the Property and Commerce Clauses, he had failed to offer any specific arguments. Therefore, the court dismissed Sturgeon's arguments regarding the Secretary overstepping her authority.

Thus, the Ninth Circuit held that NPS's hovercraft ban was permissible and affirmed the district court's grant of summary judgment to NPS.

F. Administrative Procedure Act

1. Organized Village of Kake v. United States Department of Agriculture, 746 F.3d 970 (9th Cir. 2014)

This case arose from the United States Department of Agriculture's 2003 rule change allowing the building of roads in the Tongass National Forest, which had previously been designated as a roadless area. In response to this rule change, various environmental organizations and Alaskan villages (collectively, Kake)[127] sued the United States Department of Agriculture, United States Forest Service, and several other government officials (collectively, USDA),[128] arguing that the rule change was arbitrary and capricious. The State of Alaska and the Alaska Forest Association intervened on behalf of USDA. On appeal the Ninth Circuit reversed the district court, held that the 2003 rule change was not arbitrary and capricious, and upheld the rule change.

In 2001, USDA promulgated the Roadless Area Conservation Rule (Roadless Rule),[129] which initially covered the Tongass. In 2003, however, USDA issued a Record of Decision (ROD)[130] that temporarily exempted the Tongass from the Roadless Rule. The USDA provided three reasons for the change in policy. First, USDA believed that the rule change would put an end to ongoing litigation in Alaska. Second, the Roadless Rule needed to be changed to meet projected timber demand. Finally, the Roadless Rule was creating socioeconomic hardship because of its impact on isolated communities.

126 National Park Service Organic Act, 16 U.S.C. §§ 1–4 (2012).

127 Plaintiffs were Organized Village of Kake, the Boat Company, Alaska Wilderness Recreation and Tourism Association, Southeast Alaska Conservation Council, Natural Resources Defense Council, Tongass Conservation Society, Greenpeace, Wrangell Resource Council, Center for Biological Diversity, Defenders of Wildlife, Cascadia Wildlands, and Sierra Club.

128 Defendants were United States Department of Agriculture; United States Forest Service; Tom Vilsack, in his official capacity as Secretary of Agriculture; Harris Sherman, in his official capacity as Under Secretary of Agriculture of Natural Resources and Environment; Tom Tidwell, in his official capacity as Chief; USDA Forest Service. Alaska Forest Association Inc. and the State of Alaska intervened.

129 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

130 Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294).

Kake challenged the ROD in the United States District Court for the District of Alaska, asserting that it violated the Administrative Procedure Act[131] because the USDA's reasons were arbitrary and capricious. Upon cross-motions for summary judgment, the district court granted Kake's motion and entered an order reinstating the Roadless Rule to the Tongass and vacating all previously-approved timber sales that were in conflict. Only Alaska appealed the decision.[132] On appeal, the Ninth Circuit reviewed the grant of summary judgment de novo and the ROD to determine whether it was arbitrary and capricious.

The Ninth Circuit held that the ROD was not arbitrary and capricious. To avoid an arbitrary and capricious rule change, the agency must acknowledge its change in policy and give "a reasoned explanation for the adoption of the new policy."[133] The Ninth Circuit noted that USDA had expressly acknowledged the ROD and had set forth three persuasive rationales. While only one rationale was needed to justify the rule change, the court nevertheless held that each was individually sufficient.

First, the Ninth Circuit analyzed the USDA's argument that the ROD would end previous litigation. In prior litigation, Alaska sued USDA alleging that the Roadless Rule violated federal law. Consequently, USDA supported the ROD by explaining that it satisfied a settlement condition of prior litigation. Kake argued that this rationale was arbitrary and capricious because the ROD did not reduce the number of lawsuits or litigation costs, and USDA had won a similar case in Wyoming eight years later. Nevertheless, the Ninth Circuit held this rationale was not arbitrary and capricious because courts should not review whether the agency decision "was the *best* or *correct* way to avoid litigation," but only whether "the agency *believe[d]* it to be better."[134] Since the Ninth Circuit accepted that the agency believed this when the decision was made, the Ninth Circuit held that this rationale was not arbitrary and capricious.

Second, the Ninth Circuit analyzed USDA's contention that it needed to exempt the Tongass from the Roadless Rule to accommodate future timber demand. Kake contended that the most recent data from 2001 to 2003 showed depressed timber demand and therefore asserted the USDA's decision was speculative. Kake also argued that the short term ROD could not affect long term timber production. However, the Ninth Circuit held that USDA's rationale was not arbitrary and capricious because courts should defer to agency expertise to determine future timber demand.

Finally, the court analyzed USDA's rationale that it had changed the Roadless Rule because of the socioeconomic hardships the rule caused. USDA noted in the ROD that twenty-nine of the thirty-two communities in the region were not connected to national highways, and asserted that continuing to apply the Roadless Rule to these communities would continue their isolation. Kake countered that the ROD did not highlight any new facts from the Roadless Rule,

131 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

132 The Alaska Forest Association filed an amicus brief supporting Alaska.

133 Organized Vill. of Kake v. U.S. Dep't of Agric., 746 F.3d 970, 974 (9th Cir. 2014) (citing Fed. Commc'ns Comm'n v. Fox Television Stations, 556 U.S. 502, 515–16 (2009)).

134 *Id.* at 978 (quoting *Fox Television Stations*, 556 U.S. at 515) (alterations in original).

and consequently that a divergent finding was arbitrary and capricious. Nevertheless, the Ninth Circuit held that the explanation was within the agency's expertise and the agency could change its policy determination.[135] Therefore, the Ninth Circuit held that the rationale was not arbitrary and capricious.

In sum, the Ninth Circuit held that the USDA's reasons for changing the Roadless Rule were not arbitrary and capricious because the USDA acknowledged that it was changing the rule and offered three sufficient justifications. Because the district court had held the ROD was arbitrary and capricious, it did not determine if an Environmental Impact Statement was needed. Consequently, the Court remanded the case to determine whether a Supplemental Environmental Impact Statement was required.

In dissent, Judge McKeown argued that the administrative record did not support the rule change. The dissent analyzed the decision under a higher standard, performing a "'thorough, probing, in-depth review' of the USDA's decision, not a cursory quick look."[136] First, the dissent challenged Alaska's heavy reliance on the notion that the rule change was necessary to comply with two federal laws.[137] The dissent argued that this contention was unsupported by the administrative record because the USDA had not cited this reason in the ROD. Second, the dissent argued that USDA had offered insufficient justifications for the rule change. The dissent would have deferred to the district court's finding that the rule change to limit litigation was "implausible" because the Roadless Rule was designed to limit litigation and this temporary exemption was sure to provoke more litigation.[138] The dissent would also have held that the administrative record did not offer adequate reasons for adopting the temporary exemptions or adequate support for the alleged benefit to local communities. Consequently, the dissent would have affirmed the district court's ruling.

G. Energy Reorganization Act

1. Tamosaitis v. URS, Inc., 781 F.3d 468 (9th Cir. 2015)

Walter L. Tamosaitis, Ph.D. filed suit against the United States Department of Energy (DOE), URS Energy & Construction (URS E&C), and URS Corporation (URS Corp) (collectively, URS). Tamosaitis alleged that DOE and URS had violated the whistleblowers protection provision of the Energy Reorganization Act (ERA)[139] when they allegedly punished him for submitting a study related to construction

135 *Fox Television Stations*, 556 U.S. at 519, 530 ("[T]he fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so.").

136 *Organized Village of Kake*, 746 F.3d at 981 (McKeown, J., dissenting) (quoting Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003)).

137 Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 (2012); Tongass Timber Reform Act, 16 U.S.C. § 539d (2012). Compliance with these two laws was the basis for Alaska's prior suit against USDA.

138 *Organized Village of Kake*, 746 F.3d at 983 (McKeown, J., dissenting).

139 Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801–5891 (2012).

of a Waste Treatment Plant (WTP) at the Hanford Nuclear Site.[140] On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded to the district court.

Tamosaitis's report listed fifty environmental and safety concerns concerning the WTP at the Hanford Nuclear Site and was submitted to URS E&C, several WTP consultants, and Bechtel National, Inc. (Bechtel)—a subcontractor of DOE. URS E&C subsequently fired Tamosaitis from the WTP project and reassigned him to a nonsupervisory role in one of its facilities. Tamosaitis filed his discrimination suit in the United States District Court for the Eastern District of Washington under an opt out provision in the ERA allowing employees working at nuclear energy sites to bring anti-retaliation claims to federal court after one year of agency inaction.[141] The district court granted DOE's motion to dismiss on the ground that Tamosaitis had not waited the full year required by the ERA opt-out provision and so had not exhausted his administrative remedies against DOE. As to the claims against URS Corp and URS E&C, the district court awarded summary judgment for URS on the ground that Tamosaitis had not exhausted his administrative remedies. Finally, the district court held that Tamosaitis had a right to a jury trial.

Hearing the case on appeal, the Ninth Circuit first affirmed the district court's dismissal of Tamosaitis's complaint against DOE for failing to exhaust his administrative remedies. The ERA whistleblower protection provision requires plaintiffs to wait one year after filing a complaint with the United States Department of Labor, Occupational Safety and Health Administration (OSHA) before they may take their retaliation cases to federal district court under the opt-out provision.[142] Tamosaitis amended the OSHA complaint to add DOE on December 15, 2010 and filed his complaint in federal court on November 9, 2011. The Ninth Circuit explained that adding a new respondent to an administrative complaint restarts the one-year exhaustion clock as to that respondent.

The court supported its holding with four points. First, the ERA whistleblower protection provision structure and language indicate that the administrative exhaustion period is linked to a particular respondent. Second, OSHA regulations assume that the ERA whistleblower administrative complaint will name particular respondents who will have an opportunity to participate in the agency's complaint review process. Third, the opt-out provision suggests that Congress intended review of the case and parties to be subject to the agency proceedings. Fourth, it would frustrate Congress's intent that OSHA resolve whistleblower claims if respondents have no opportunity to participate in the administrative process before plaintiffs file in district court. Therefore, the Ninth Circuit held that Tamosaitis could not file suit against DOE in district court until one year after naming DOE in the amended administrative complaint.

Although the Ninth Circuit also affirmed the district court's award of summary judgment to URS Corp. for lack of administrative exhaustion, the Ninth Circuit reversed the district court's grant of URS E&C's motion for summary judgment. The Ninth Circuit held that Tamosaitis adequately implied URS E&C as

140 *Id.* §§ 5841–5852.

141 *Id.* § 5851(b)(4) (opt-out provision).

142 *Id.*

the respondent in the original administrative complaint even though he named URS Inc. The Ninth Circuit explained that URS E&C did not assert Tamosaitis's naming mistake in its answer; rather, it responded to his complaint on the merits. In addition, the Ninth Circuit stated that OSHA permits plaintiffs to amend their complaints throughout the agency investigation as long as it "falls within the scope of the original complaint."[143] The court held that where neither the respondent nor the agency had difficultly identifying the intended respondent, the precise name should not be dispositive. On the other hand, since Tamosaitis failed to reference URS Corp. in an identifying manner in the complaint, the Ninth Circuit concluded that administrative remedies were not exhausted in regards to URS Corp.

Next, the Ninth Circuit reversed the district court's award of summary judgment to URS E&C because Tamosaitis introduced sufficient evidence that his whistleblowing activity contributed to adverse employment action taken by URS E&C against him. The Ninth Circuit explained that Tamosaitis had to establish the following in a prima facie case of ERA retaliation: 1) he "engaged in a protected activity"; 2) "[t]he respondent knew or suspected" that he engaged in a protected activity; 3) he "suffered an adverse action"; and 4) "[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action."[144] The Ninth Circuit concluded that Tamosaitis introduced plenty of evidence that Bechtel encouraged URS E&C to remove Tamosaitis from the WTP site because of his whistleblowing. Additionally, the Ninth Circuit held that a reasonable factfinder could conclude that URS E&C did not show clear and convincing evidence that it would have taken the same action had Tamosaitis not engaged in whistleblowing.[145] Furthermore, the Ninth Circuit stated that a retaliatory action taken by URS E&C to placate Bechtel did not justify the action and even a contractual obligation to remove whistleblowers could be void as against public policy. The Ninth Circuit also held that Tamosaitis presented evidence that his compensation, terms, conditions, or privileges of employment changed after his transfer from WTP.

Finally, the Ninth Circuit concluded that Tamosaitis had a right to a jury trial because he sought money damages against URS E&C. The Ninth Circuit cited *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[146] for the proposition that plaintiffs have a right to a jury for statutory claims that "'soun[d] basically in tort,' and seek legal relief."[147] The court explained that Tamosaitis's whistleblower suit was sufficiently analogous to the tort claim of wrongful discharge and that the ERA expressly authorizes compensatory damages. In applying the factor of whether the plaintiff's suit vindicates a private or public right, the Ninth Circuit stated that the district court mistakenly conflated two separate issues. The Ninth Circuit

143 U.S. DEP'T OF LABOR, CPL 02-03-003, OSHA INSTRUCTION: WHISTLEBLOWER INVESTIGATIONS MANUAL 3-13 (Sept. 20, 2011).

144 29 C.F.R. § 24.104(f)(2) (2014).

145 *See* 42 U.S.C. § 5851(b)(3)(D) (2012) (burden of proof shifted to employer after prima facie case).

146 526 U.S. 687 (1999).

147 *Id.* at 709 (quoting Curtis v. Loether, 415 U.S. 189, 195–96 (1974)).

explained that even though Congress gave DOL–OSHA the first opportunity to resolve the dispute, the district court that obtained jurisdiction after one year was not precluded from granting a jury trial to Tamosaitis.

In sum, the Ninth Circuit affirmed the district court's dismissal of DOE from the suit and the grant of summary judgment for URS Corp., but reversed the grant of summary judgment for URS E&C and remanded for further proceedings.

H. Surface Mining Control and Reclamation Act

1. Black Mesa Water Coalition v. Jewell, 776 F.3d 1055 (9th Cir. 2015)

Black Mesa Water Coalition (Black Mesa)[148] challenged a coal mining permit revision that the Federal Office of Surface Mining Reclamation and Enforcement (OSM) granted to Peabody Western Coal Company. The case was originally heard by an Administrative Law Judge (ALJ), who consolidated ten separate challenges to the permit revision, granted two motions for summary decision for co-plaintiff Kendall Nutuyma, and denied Black Mesa and the other parties' motions as moot. Black Mesa appealed the ALJ's denial of costs and expenses, including attorney's fees and witness fees. The Interior Board of Land Appeals (IBLA) and the United States District Court for the District of Arizona affirmed the ALJ's decision. However, the Ninth Circuit reversed in part, vacated in part, and remanded to the district court.

As a matter of first impression, the Ninth Circuit addressed the question of the appropriate standard of review for agency fee determinations made under the Surface Mining Control and Reclamation Act (SMCRA)[149] administrative fee-award provision. Black Mesa argued that the court reviews agency "eligibility" determinations de novo and "entitlement" determinations for abuse of discretion. On the other hand, the Secretary of the Interior argued that the court may only set aside an agency fee award decision under the deferential standard of the Administrative Procedure Act[150] if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Ninth Circuit found the Fourth Circuit's reasoning in *West Virginia Highlands Conservancy, Inc. v. Norton*[151] persuasive and therefore held that whether a party succeeds on the merits should be reviewed de novo, and the factual question of whether a party substantially contributed to determining the issues should be reviewed for substantial evidence. Therefore, the Ninth Circuit reviewed the "eligibility" determination involving success on the merits de novo and the "entitlement" determination involving substantial contribution for substantial evidence.

148 Plaintiff-appellants included Black Mesa Water Coalition, Dine Hataalii Association, Nizhoni Ani, Dine Alliance, Caquifer for Dine, Sierra Club, Center for Biological Diversity, and Natural Resources Defense Council.

149 Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2012).

150 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

151 343 F.3d 239 (4th Cir. 2003).

On the merits, the Ninth Circuit first held that Black Mesa was "eligible" for costs and expenses. The court explained that Black Mesa achieved some degree of success on the merits because it raised the same arguments on which Nutumya prevailed, and it raised them early enough in the merits stage of the administrative proceedings to show participation. The court also noted that Black Mesa and Nutumya sought the same relief, leading the ALJ to dismiss Black Mesa's claim as moot. The Ninth Circuit rejected the notion that whenever an agency dismisses one party's motion as moot because it already granted relief to another party, the former party cannot claim success on the merits, as it would negate the permissive quality of SMCRA's administrative fee provision. Therefore, the Ninth Circuit reversed the district court's holding and concluded that Black Mesa was "eligible" for fees.

The Ninth Circuit declined to reach the issue of whether Black Mesa was "entitled" to fees and remanded the issue of "entitlement" to the district court with instructions to remand to the agency. The court stated that it could not predict how the agency would view substantial contribution in light of the court's ruling on eligibility. The Ninth Circuit explained its discomfort with the possibility that entitlement only results from parties duplicating each other's arguments in their briefs, thereby increasing the overall litigation costs in order to preserve their entitlement to fees. A better approach, the court stated, would be to grant a fee award equal to the party's contribution to the result if it substantially contributed to the full and fair resolution of the issues. Additionally, the court rejected Black Mesa's argument that the Secretary of the Interior waived any challenge to the reasonableness of an award of costs and expenses, if granted on remand.

In sum, the Ninth Circuit held that Black Mesa was "eligible" for costs and expenses, but declined to reach whether it was "entitled" to the fees and remanded this issue to the district court to remand to the agency to reconsider.

II. ANIMALS

A. Endangered Species Act

1. San Luis & Delta-Mendota Water Authority v. Jewell, 747 F.3d 581 (9th Cir. 2014).

San Luis & Delta-Mendota Water Authority, along with various water districts, water contractors, and agricultural consumers (collectively, San Luis),[152] sued various federal officials and agencies (collectively, Federal Defendants),[153]

[152] Plaintiffs also included Westlands Water District; Stewart & Jasper Orchards; Arroyo Farms, LLC; King Pistachio Grove; State Water Contractors; Metropolitan Water District of Southern California; Coalition for a Sustainable Delta; Kern County Water Agency; and Family Farm Alliance. In addition, California Department of Water Resources intervened on behalf of Plaintiffs.

[153] Defendants included Sally Jewell, as Secretary of the United States Department of the Interior (DOI); DOI; U.S. Fish and Wildlife Service (FWS); Daniel M. Ashe, as Director of FWS; Ren Lohoefener, as

seeking to enjoin the implementation of a 2008 Biological Opinion (2008 BiOp). The 2008 BiOp addressed the impact of California's water projects on the endangered delta smelt (*Hypomesus transpacificus*). The United States District Court for the Eastern District of California entered an order invalidating the 2008 BiOp. On appeal, the Ninth Circuit held that the 2008 BiOp was valid, but that the United States Bureau of Reclamation (BOR) had failed to comply with the National Environmental Policy Act (NEPA)[154] by not preparing an environmental impact statement. Therefore, the Ninth Circuit affirmed in part, reversed in part, and remanded.

Although the case presents a long and complex factual history, the issue arises from the simple fact that 70% of the water in California originates north of Sacramento, while 70% of the demand is in the south of the state. Because of this tension, California and the federal government run two large water projects to transfer water from the northern parts of the state to the central and southern parts of the state. BOR runs the Central Valley Project (CVP), which is the largest federal water project in the country. California runs the State Water Project (SWP), the largest state-run project in the country.

Because both the CVP and SWP have major water-pumping stations near the Bay-Delta estuary (Delta), the two water projects significantly affect fish within the Delta. While both stations have louvers to prevent fish from entering the pumping stations, fish still enter in a process known as entrainment. While some entrained fish are salvaged and transported to a nearby river, smaller fish—especially those in their juvenile or larval stage—are killed by the pumps. Additionally, as water is diverted from the Delta, the salinity of the Delta and surrounding estuaries increases due to saltwater intrusion from the San Francisco Bay.

Pursuant to the Endangered Species Act of 1973 (ESA),[155] BOR sought a biological opinion concerning the CVP and SWP and their effects on the delta smelt. The delta smelt is a small, two-to-three inch fish listed as an endangered species—in 2008, the delta smelt population was estimated at 1.5% of its total from 1980. The United States Fish and Wildlife Service (FWS) conducted the BiOp in 2005 and found that the continuing operation of the CVP and SWP would not negatively impact the health and recovery of the smelt or its habitat. However, in subsequent litigation, the National Resources Defense Council successfully challenged the 2005 BiOp as arbitrary and capricious. As a result, FWS entered a

Regional Director of FWS, Pacific Southwest Region; Bureau of Reclamation (BOR); Michael L. Connor, as Commissioner of BoR; David Murillo, as Director of BoR, Mid–Pacific Region; Mark Cowin, as Director of California Department of Water Resources; Department of Justice; United Staes Environmental Protection Agency (EPA); Gina McCarthy, as Administrator of EPA; Department of Transportation; Anthony Foxx, as Secretary of Transportation; Maritime Administration; Paul N. Jaenichen, Sr., as Acting Maritime Administrator; Department of Homeland Security; Jeh Johnson, as Secretary of Homeland Security; Federal Emergency Management Agency; William Craig Fugate, as Administrator of the Federal Emergency Management Agency; United States Army Corps of Engineers (Corps); Thomas P. Bostick, as Commanding General and Chief of Engineers. In addition, Natural Resources Defense Council and The Bay Institute intervened on behalf of Defendants.

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

155 16 U.S.C. §§ 1531–1544 (2012).

new BiOp in 2008, which found that the operations of the CVP and SWP operations "are likely to jeopardize the continued existence of the delta smelt and adversely modify delta smelt critical habitat."[156]

FWS included five components within its 2008 BiOp. Two of them form the basis for the litigation here. First, the 2008 BiOp required that the CVP and SWP maintain certain average river flows for the Old and Middle Rivers (OMR) during those parts of the year when delta smelt are found in the salvage facilities. Second, the CVP and SWP were required to provide sufficient outflow in the fall to improve delta smelt habitat. As noted above, United States District Court for the Eastern District of California found these components to be arbitrary and capricious.

On appeal, the Ninth Circuit applied several standards of review. First, it reviewed the lower court's ruling on summary judgment de novo. Second, the court reviewed the ESA and NEPA claims under the arbitrary, capricious, or abuse of discretion standard. Third, the court acknowledged that FWS must base its determination of the ESA claims on the "best scientific and commercial data available."[157] The court noted its traditional deference to agency expertise in this determination, but explained that the agency could not rely on incomplete or insufficient evidence if superior information was available. Finally, the Ninth Circuit noted that its review was confined to the administrative record, and that the trial court erred by allowing outside experts, employed for background understanding, to debate the merits of the 2008 BiOp.

In deciding the case, first the Ninth Circuit held that the 2008 BiOp's reliance on raw salvage figures to set upper and lower flow limits was not arbitrary or capricious. When flow rates are too high, the flow of the river reverses, fish are entrained, and some are killed in the pumps. The 2008 BiOp imposed limits on these negative flows between 1,250 and 5,000 cubic feet per second, depending on the number of delta smelt salvaged. San Luis contended that the use of raw data, rather than normalized data, did not take into account the relative size of the delta smelt population. While the district court agreed, the Ninth Circuit found three errors in the district court's conclusion. First, the Ninth Circuit noted that the more conservative model was based on substantial evidence. FWS based its decision to use raw data on a determination that the maximum number of entrained fish affects the long-term viability of the species. Second, the Ninth Circuit explained that the 2008 BiOp based its flow limits on multiple sources of data. Whereas the district court held that the 2008 BiOp confined its analysis to two specific charts, the Ninth Circuit held that the 2008 BiOp relied on other studies and models to come to its conclusion. Finally, the Ninth Circuit reasoned that the flow limits were just one component of a dynamic monitoring system. The flow limits work in tandem with the Incidental Take Statement (ITS)[158] to form

156 San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 597 (9th Cir. 2014) (quotations omitted).

157 *Id.* at 601–02.

158 An incidental take statement specifies the impact an incidental taking will have on a species. An incidental taking is a taking that is the result, but not the purpose of, carrying out lawful activity conducted by a federal agency or applicant.

a complex and dynamic system that accounts for the overall delta-smelt population. Therefore, the Ninth Circuit concluded that FWS's decision to use raw data was not arbitrary or capricious.

The Ninth Circuit next held that FWS's recommendation that BOR and the California Department of Water Resources (DWR) provide sufficient delta outflow to maintain X2's location no more than seventy-four kilometers eastward from the Golden Gate in wet years and eighty-one kilometers eastward in above normal years was not arbitrary or capricious.[159] The Ninth Circuit deferred to this determination for two reasons.

First, the Ninth Circuit held that FWS's scientific determination to use both Dayflow[160] and Calsim II[161] was entitled to deference. FWS relied on these two computer models to determine the CVP and SWP's effect on the location of X2. San Luis argued that FWS should have made a Calsim II to Calsim II comparison. While the Ninth Circuit recognized that under ideal circumstances FWS would have more thoroughly addressed possible issues from its choice to use both computer models, the Ninth Circuit held that an explanation of every potential issue was not required to support FWS's decision.

Second, the Ninth Circuit held that FWS's determination of X2's location was based on ample evidence in the record. The 2008 BiOp explained that X2's upstream shift due to the CVP and SWP's removal of fresh water in the fall caused a decrease in habitat area for the delta smelt. FWS used Dayflow and Calsim II to compare X2's median historic location to the median projected location. The 2008 BiOp also considered natural and manmade factors affecting X2's location, as well as factors that result in less suitable delta smelt habitat. The district court held that FWS needed to explain why X2's location should be maintained at a range of seventy-four kilometers to eighty-one kilometers from the Golden Gate. However, the Ninth Circuit held that FWS did not need to explain the decided range for X2's target location beyond what was presented in the record.

The Ninth Circuit next held that FWS's use of differing data sets was not arbitrary or capricious. FWS prepared an ITS that set take limits for larval/juvenile delta smelt and adult delta smelt. The ITS explained that FWS used data from 2006–2008 for adult delta smelt and 2005–2008 for juvenile delta smelt because those years best approximated expected salvage. FWS chose to incorporate an additional year of data on larval/juvenile delta smelt because apparent abundance was the lowest on record starting in 2005 and there was greater uncertainly in calculating juvenile incidental take. The district court held that the ITS was arbitrary and capricious because FWS did not explain its decision to use different data sets for the separate limits. However, the Ninth Circuit held that the ITS adequately explained the use of separate data sets to determine limits for juvenile

159 X2 is the location in the Bay-Delta estuary where the salinity is two parts per thousand, and is the center point of LSZ, which is suitable spawning habitat for the delta smelt.

160 Dayflow is a computer model developed by DWR. It establishes a historic baseline for X2 using past river flow, export pumping, precipitation, and estimated agricultural diversion from 1967–2007.

161 Calsim II is a computer simulation model developed by DWR and Reclamation. It simulates CVP and SWP operations using Central Valley hydrologic records from 1922–2003.

and adult delta smelt and that FWS had discretion to use a more conservative data set to determine the juvenile take limit.

The Ninth Circuit next held that FWS's decision to use an average cumulative salvage index to create its Concern Level fell within the agency's discretion and was therefore entitled to substantial deference. The Concern Level indicates when salvage levels approach the take threshold, and reaching that threshold could trigger restrictions in OMR flows based on recommendations from the Smelt Working Group. FWS explained that averaging counteracts the uncertainties inherent in its analyses and leads to more conservative data. The district court determined that FWS failed to explain its use of an average cumulative salvage index to set the Concern Level. The Ninth Circuit held that FWS's decision to use an average cumulative salvage index to create its Concern Level fell within the agency's discretion and was therefore entitled to substantial deference.

The Ninth Circuit next held that the record supported the 2008 BiOp's conclusion that cumulative indirect effects harmed the delta smelt. The 2008 BiOp explained that the CVP and SWP operations would likely have indirect effects—such as limiting food supply, increasing pollution and contaminants, and bolstering other stressors including predation, aquatic macrophytes, and microcystis. The district court did not find support in the record for the 2008 BiOp's conclusions and found that the causal connection between CVP and SWP operations and other stressors was ambiguous. The Ninth Circuit reversed, concluding that the 2008 BiOp analysis was sufficiently clear and thorough, and therefore it was not arbitrary and capricious. Furthermore, the Ninth Circuit held that the 2008 BiOp's analysis was based on the best available science.

The Ninth Circuit held that FWS appropriately concluded that the CVP and SWS operations affect the delta smelt's food supply. The 2008 BiOp explained that entrainment of the delta smelt's primary food source, *Pseudodiaptomus forbesi* (*P. forbesi*), adversely impacts the delta smelt. Additionally, the 2008 BiOp concluded that high water exports reduce flows that would otherwise transport *P. forbesi* to the delta smelt's habitat. However, the district court pointed to limitations of FWS's study and held that FWS therefore failed to use the best available science. While recognizing these limitations, the Ninth Circuit held that FWS permissibly chose not to base its conclusion on this study, and that FWS had no obligation to conduct its own study. Accordingly, the Ninth Circuit held that FWS based its analysis on the best available science, and that the 2008 BiOp's conclusion in regards to the CVP and SWP's affect on the delta smelt's food supply was sufficiently supported.

The court also held that water contamination caused by project operations indirectly affect the delta smelt. The 2008 BiOp explained that the CVP and SWP constrict the delta smelt habitat, thereby increasing and intensifying their exposure to harmful contaminants. The district court held the 2008 BiOp was unclear in linking CVP and SWP operations to the impact of contaminants. Conversely, the Ninth Circuit held that even when the indirect effects are not well understood, FWS could determine with reasonable certainty that the effects are harmful and will result from the CVP and SWP operations. Therefore, the Ninth Circuit held that FWS's conclusion was not arbitrary and capricious.

Finally, the Ninth Circuit held that FWS provided sufficient scientific support for its conclusion that three other stressors affected or controlled by CVP and SWP operations adversely impacted the delta smelt. First, the 2008 BiOp explained that delta smelt predation increased when X2 shifted further upstream and exposed the delta smelt and their eggs and larvae to inland predators. The district court faulted FWS for not commenting on whether predation should be considered significant and cited a California Department of Fish & Game (Fish & Game) report that appeared to be contrary.[162] The Ninth Circuit disagreed and held that no conflict existed between the Fish & Game report and the 2008 BiOp. Furthermore, the Ninth Circuit deferred to FWS to determine what qualifies as a significant mortality rate and which studies to rely upon. Second, the 2008 BiOp indicated that CVP and SWP operations likely exacerbated the presence of macrophytes[163] in the Delta by impacting hydrologic conditions and reducing seasonal flushing flows. The district court found a lack of support in the record for FWS's conclusion. However, the Ninth Circuit held that FWS drew rational conclusions that were not arbitrary and capricious, despite uncertainty in the scientific evidence. Third, the 2008 BiOp indicated that high microsystis[164] toxin levels had an indirect effect on the delta smelt by poisoning their food supply. The 2008 BiOp explained that the CVP and SWP operations' effect on water flow was associated with microsystis blooms. The district court found no connection in the 2008 BiOp between microsystis and the CVP and SWP operations. However, the Ninth Circuit disagreed, holding that the evidence in the 2008 BiOp was sufficient and that FWS's conclusions were not arbitrary and capricious. In doing so, the Ninth Circuit emphasized the importance of encouraging agencies to recognize the limitations of science or their knowledge.

The Ninth Circuit next addressed the 2008 BiOp's reasonable and prudent alternatives (RPAs). By FWS regulation, the RPAs should consider three non-jeopardy factors.[165] However, the Ninth Circuit explained that neither the FWS regulations nor the Administrative Procedure Act[166] requires an explanation of non-jeopardy factors.[167] According to FWS's Consultation Handbook, if certain alternatives are available that would avoid jeopardy and adverse modification, but these alternatives fail to meet one of the other three elements in the definition of

162 The 1999 Fish & Game report estimated that striped bass annually consumed about 5.3% of the smelt population. The report explained that though there is substantial habitat overlap, smelt are primarily on the surface and striped bass forage near the bottom.

163 Macrophytes are aquatic plants that grow in or near water.

164 Microsystis is a cyanobacterium that produces toxins throughout its life, especially when the population dies in September or October.

165 The three jeopardy factors are as follows: RPAs must be "(1) consistent with the purpose of the underlying action; (2) consistent with the action agency's authority; and (3) economically and technologically feasible." San Luis & Delta-Mendota Water Authority v. Jewell, 747 F.3d 581, 635 (9th Cir. 2014).

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

167 Non-jeopardy factors are elements one through three in the definition of reasonable and prudent alternatives that the secretary suggests in the belief that they will not jeopardize the species or adversely modify its habitat.

RPA, FWS should document the alternatives in the BiOp to show they were considered. The district court held that FWS failed to explain the connection between the record and the conclusion that the RPA meets the three non-jeopardy elements. The district court also held that FWS improperly failed to consider the cost of limiting water supply to those who depend on the CVP and SWP operations under the economically feasible factor of the RPA analysis.

The Ninth Circuit declined to impose this procedural requirement that FWS support non-jeopardy factors because it was neither required by the agency itself nor a relevant statute. Additionally, the Ninth Circuit explained that the third non-jeopardy factor, the economically and technologically feasible analysis, goes to whether BOR can impliment the RPA, not whether it will affect its consumers. Therefore, the Ninth Circuit held that FWS sufficiently considered the non-jeopardy factors in finding the RPA consistent with the purpose of regulating water that the CVP and SWP export from the Delta.

In addition to the Federal Defendants' claims on appeal, San Luis also raised three claims on cross-appeal before the Ninth Circuit. First, San Luis alleged that FWS violated the ESA by failing to separate discretionary and nondiscretionary actions in setting the environmental baseline. When an agency is likely to jeopardize a critical or endangered species or a critical habitat, FWS must "[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat."[168] As part of this evaluation, FWS must set an "environmental baseline" to evaluate the discrete effect of the action and insure that it will not jeopardize the species or habitat.[169]

San Luis asserted that FWS erred by considering both discretionary and nondiscretionary effects when evaluating whether San Luis's actions would jeopardize the smelt. The Ninth Circuit rejected this argument, holding that an agency is not required to distinguish between discretionary and nondiscretionary actions when setting the environmental baseline. Instead, the Ninth Circuit held that agencies must comply with the ESA if doing so would not be inconsistent with its other statutory obligations. Accordingly, the Ninth Circuit found no evidence that San Luis was unable to comply with the ESA due to competing statutory obligations, making this argument largely insignificant.

San Luis' second claim on cross-appeal was that BOR acted arbitrarily and capriciously in accepting the 2008 BiOp. However, because the Ninth Circuit had determined that the 2008 BiOp was not itself arbitrary and capricious, the Court similarly held that BOR's reliance on the 2008 BiOp was not arbitrary and capricious.

Finally, San Luis claimed that FWS and BOR violated NEPA by failing to prepare an environmental impact statement (EIS) for the 2008 BiOp. Intervenors responded that NEPA should not apply because it conflicted with the ESA's preservation efforts by imposing additional procedural requirements. However, the Ninth Circuit rejected that argument, pointing out that while Congress specifically exempted some statutory schemes from the requirements of NEPA, it

168 50 C.F.R. § 402.14(g)(3) (2014).

169 *Id.* § 402.02; Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2012).

did not exempt the implementation of the 2008 BiOp. Moreover, the Ninth Circuit reasoned that the implementation of a BiOp does not fit within the other two categories of actions exempted from the EIS.[170] Accordingly, the Ninth Circuit held that the Federal Defendants must produce an EIS because the implementation of the 2008 BiOp would have significant effects on the human environment.

Despite determining that the Federal Defendants were required to produce an EIS, the Ninth Circuit held that multiple agencies need not produce an EIS for the same action. Therefore, only the implementation of the 2008 BiOp would trigger the EIS obligation. As such, FWS was not required to prepare an EIS because the mere production of the 2008 BiOp was not a major federal action, and another agency, BOR, would perform the actual implementation of the 2008 BiOp that would trigger NEPA. Consequently, the Ninth Circuit remanded this portion of the case in order for BoR to prepare an EIS.

Circuit Judge Arnold of the Eighth Circuit, sitting by designation, concurred in part and dissented in part. Judge Arnold argued that the OMR flow limits and the determinations of X2 in the 2008 BiOp were arbitrary and capricious because they were not based on the best available science and did not reflect sound reasoning. In addition, Judge Arnold believed that it was appropriate to admit expert testimony in regard to these two determinations because the matters were highly technical and required explanation. Like the majority, Judge Arnold found no requirement that FWS address and analyze whether an RPA meets the non-jeopardy elements. Still, Judge Arnold would have affirmed the district court on that issue because the record demonstrated concerns about the feasibility and purpose of the RPAs, and he believed that FWS was required to address those concerns. Finally, Judge Arnold also asserted that BOR should be liable for its reliance on a legally flawed BiOp.

Judge Rawlinson also concurred in part and dissented in part. Judge Rawlinson did not believe that BOR's implementation of the 2008 BiOp triggered NEPA obligations. Judge Rawlinson argued that the implementation of RPAs designed to decrease the harm caused by ongoing water projects did not constitute a "major Federal action" under NEPA.[171] In addition, because the 2008 BiOp thoroughly addressed the issue of harm to the environment and was actually designed to improve the environment, Judge Rawlinson would have held that an EIS was unnecessary.

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170 The two exempted categories are: 1) where complying with NEPA would create an irreconcilable conflict with a substantive statute, *see* Flinto Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 791 (1976) (holding that when statutory duties conflict, "NEPA's impact statement requirement is inapplicable"); and 2) where a substantive statute has displaced NEPA requirements. Douglas Cnty. v. Babbitt, 48 F.3d 1495, 1503 (9th Cir. 1995) (finding that the requirements of the ESA "displace[] NEPA's procedural and informational requirements").

171 *See* 42 U.S.C. § 4332(2)(C) (2012) (requiring an EIS for all "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment").

2. Natural Resources Defense Council v. Jewell, 749 F.3d 776 (9th Cir. 2014)

The Natural Resources Defense Council, along with other nonprofit environmental action groups (collectively, NRDC),[172] appealed a final judgment of the United States District Court for the Eastern District of California. The district court held that NRDC lacked standing to challenge certain water-supply agreements renewed by the Bureau of Reclamation (BOR). For the remaining agreements at issue, the district court held that BOR was not required to engage in the consultation requirement contained in section 7 of the Endangered Species Act (ESA).[173] The Ninth Circuit reversed, holding that the appeal was not moot, NRDC had standing, and BOR was required to consult with the Fish and Wildlife Services (FWS).

BOR manages California's Central Valley Project, a water storage and distribution system that diverts water for California water users from the California River Delta. The California River Delta is home to the delta smelt (*Hypomesus transpacificus*), a fish listed as a "threatened" species under the ESA.[174] According to FWS, delta water diversions—including the Central Valley Project—are a significant cause of decline in the delta smelt population.[175] In the early 2000s, BOR consulted with FWS regarding the renewal of water-supply agreements pertaining to the Central Valley Project. The agreements consisted of the Delta-Mendota Canal Unit Water Service Contracts (DMC Contracts) and the Sacramento River Settlement Contracts (Settlement Contracts). In 2004 and 2005 FWS issued Biological Opinions as a result of its consultation with BOR. The opinions concluded that the renewal would not jeopardize the delta smelt, but both were ultimately invalidated.

However, before this invalidation, BOR also prepared a biological assessment, concluding that the renewal of the DMC and Settlement Contracts would not adversely affect delta smelt populations. FWS concurred with this determination via a series of letters but did not evaluate the agreements' potential effects beyond what was invalidated in the Biological Opinions. Based on these concurring letters, BOR renewed 141 Settlement Contracts and 18 DMC Contracts.

FWS issued a revised Biological Opinion in 2008, which concluded that the agreements' renewal *would* jeopardize delta smelt populations. During that same year, NRDC challenged the validity of certain Settlement and DMC Contracts they deemed most harmful to the delta smelt. NRDC argued that BoR violated section 7 of the ESA by failing to adequately consult with FWS before renewing the agreements. The district court granted BOR's motion for summary judgment, and the Ninth Circuit granted a rehearing en banc. The Ninth Circuit reviewed the district court's grant of BOR's summary judgment motion de novo.

172 Natural Resources Defense Council, California Trout, San Francisco Baykeeper, Friends of the River, and the Bay Institute all appeared as Plaintiff-Appellants.

173 Endangered Species Act Amendments of 1982, 16 U.S.C. § 1536(a)(2) (2012).

174 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12,854, 12,855 (Mar. 5, 1993) (to be codified at 50 C.F.R. pt. 17).

175 *Id.* at 12,859–60.

The Ninth Circuit first rejected BOR's claim that intervening events rendered the action moot. BOR argued that its FWS consultation leading to the 2008 Biological Opinion provided NRDC with the relief they sought, and no actual controversy remained.[176] However, the Ninth Circuit explained that the 2008 Biological Opinion only assessed BOR's general renewal plan, and not the impact of BOR's decision to renew the specific agreements at issue. These specific agreements were renewed based on the previous, invalidated Biological Opinions, and BOR neither reconsulted with FWS nor amended the challenged agreements to acknowledge the 2008 Biological Opinion. Since NRDC sought an injunction requiring reconsultation and amendments, the Ninth Circuit concluded that relief remained available.

The Ninth Circuit also rejected BOR's claim that NRDC lacked Article III standing to challenge the DMC Contracts. BOR argued that NRDC's injury was not fairly traceable to the alleged violation.[177] A provision within the DMC Contracts absolved BOR of liability if it breached certain contractual provisions to meet legal obligations, such as section 7 of the ESA. Due to this provision, BOR contended there was no causal link between the agreements and harm to the delta smelt. The Ninth Circuit dismissed this reasoning, explaining that NRDC only needed to show that compliance with section 7 *might* result in protecting its concrete interests.[178] The provision did not expressly require any actions to protect the delta smelt; and even if it was read to do so, there remained other contractual methods that would provide protection. As further consultation and amendments to the DMC Contracts could lead to such methods, the Ninth Circuit held that the NRDC had standing to challenge the DMC Contracts.

Lastly, the Ninth Circuit rejected BOR's claim that it was not required to consult FWS to renew the Settlement Contracts. BOR argued that Article 9(a) of the Settlement Contracts substantially limited the agency's discretion when renewing the agreements with regard to "the quantities of water and the allocation thereof. . . ."[179] Therefore, BOR contended that the section 7 consultation requirement was not triggered.[180] The Ninth Circuit held this reasoning erroneous, stating that an agency only lacks discretion if another legal obligation makes it impossible to exercise that discretion. After reviewing the challenged agreements, the court held that BOR was not required to renew the Settlement Contracts, and if it was, the provision still allowed the agency to

176 *See* Forest Guardians v. Johanns, 450 F.3d 455, 461 (9th Cir. 2006) ("The party asserting mootness bears the burden of establishing that there is no effective relief that the court can provide.").

177 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (holding that a party must demonstrate, in part, that its injury is fairly traceable to the challenged conduct to establish Article III standing).

178 An alleged violation under section 7(a)(2) of the ESA is a procedural violation. *See* Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 957 (9th Cir. 2005) (requiring both substantive and procedural harm for a violation of section 7(a)(2)). To establish standing for a procedural violation, a litigant need only demonstrate that compliance may protect his concrete interests. *Id.*

179 Natural Resources Defense Council v. Jewell, 749 F.3d 776, 784 (9th Cir. 2014).

180 Section 7's consultation requirement is triggered if a federal agency retains "some discretion" to take action for the benefit of a protected species. Karuk Tribe v. U.S. Forest Serv., 681 F.3d 1006, 1024 (9th Cir. 2012).

renegotiate other terms. In both instances, the court held BOR retained discretion that could benefit the delta smelt and was therefore required to consult FWS.

In conclusion, the court reaffirmed that federal agencies must adhere to the consultation requirement of section 7 of the ESA prior to taking any agency action that could affect an endangered or threatened species or its critical habitat. Thus, the Ninth Circuit reversed the district court's judgment and remanded the case for further proceedings.

3. League of Wilderness Defenders v. Connaughton, 752 F.3d 755 (2014)

Plaintiffs League of Wilderness Defenders, Blue Mountains Biodiversity Project, and Hells Canyon Preservation Council (collectively, Wilderness Defenders) brought suit against the United States Forest Service (USFS) and Fish and Wildlife Service (FWS) in the United States District Court for the District of Oregon.[181] Wilderness Defenders alleged that a proposed timber sale violated both the National Environmental Policy Act of 1969 (NEPA)[182] and the Endangered Species Act of 1973 (ESA),[183] and therefore sought a preliminary injunction. The district court denied the preliminary injunction on grounds that Wilderness Defenders' claims were unlikely to succeed on the merits. On appeal, the Ninth Circuit held that Wilderness Defenders was likely to succeed on the merits of one of its NEPA claims and therefore granted the preliminary injunction. The Ninth Circuit otherwise affirmed the district court's decision.

Under NEPA, federal agencies must make a "full and fair" analysis of the ways that proposed activities affect the environment and notify the public by conducting an environmental impact statement (EIS).[184] An EIS must consider the cumulative impacts of the proposed action, including "past, present, and reasonably foreseeable future actions."[185] Agencies must prepare a supplemental EIS whenever new circumstances or information of significance come to light that bear on the proposed action or impacts.[186] Further, under the ESA, agencies must ensure that their actions do not harm endangered or threatened species.[187] Accordingly, agencies must determine whether any endangered or threatened species are present in the proposed project area, using the best scientific data available.[188]

The USFS planned to log part of the 29,000-acre Snow Basin area of Whitman-Wallowa National Forest in northeastern Oregon. USFS issued both a

181 Intervening as defendants-appellees were Baker County, Union County, Boise Cascade Wood Products, American Forest Resource Council, Chary Mires, and Oregon Small Woodlands Association.

182 42 U.S.C. §§ 4321–4370h (2012).

183 16 U.S.C. §§ 1531–1544 (2012).

184 40 C.F.R. § 1502.1 (2013).

185 40 C.F.R. § 1508.7 (2013).

186 40 C.F.R. § 1502.9(c)(1) (2013).

187 *See* 16 U.S.C. § 1536(a)(2) (2012) ("Each Federal agency shall . . . 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 habitat of such species. . . .").

188 *Id.* § 1536(c)(1).

draft EIS and a final EIS (FEIS) that removed 170 acres of logging from the plan. Shortly after the FEIS was adopted, the Forest Supervisor withdrew a Travel Management Plan (TMP) intended to regulate motorized travel and roads within the forest, which was mentioned in the FEIS's discussion of mitigating environmental harms.

Wilderness Defenders challenged the proposed project on four grounds. First, Wilderness Defenders alleged that USFS and FWS were required to conduct a supplemental EIS after the withdrawal of the TMP. Second, Wilderness Defenders asserted that the FEIS did not consider the cumulative effects of a proposed additional 130-acre logging project. Third, Wilderness Defenders alleged that the FEIS did not consider the symbiotic relationship between increases in stream sediment and thermal stress placed on fish living in those streams. Fourth, Wilderness Defenders argued that USFS and FWS erroneously concluded that there were no bull trout present in Eagle Creek and so did not consider the potential effects of the project on that species.

In reviewing the district court's denial of a preliminary injunction for abuse of discretion, the Ninth Circuit applied the familiar four part analysis set forth in *Winter v. Natural Resources Defense Council.*[189] To succeed on a motion for a preliminary injunction, plaintiffs must prove: 1) their claim is likely to succeed on the merits; 2) they are likely to suffer irreparable harm without a preliminary injunction; 3) the balance of equities tips in their favor; and 4) an injunction will serve the public interest.

The Ninth Circuit proceeded through each of the *Winter* factors in analyzing Wilderness Defenders' claims. First, the Ninth Circuit concluded that Wilderness Defenders were likely to prevail on their claim that USFS and FWS were required to conduct a supplemental EIS to account for the removal of the TMP. The court reasoned that the USFS's review of the project's environmental impacts was intermingled with statements indicating at least a partial reliance on the TMP to mitigate harms to the local elk population. With the TMP withdrawn, the court stated that the lack of clarity as to the true environmental impact of the project was likely to render the FEIS deficient. Accordingly, the Ninth Circuit reversed the district court's denial of a preliminary injunction on this ground.

Second, the Ninth Circuit concluded that plaintiffs were unlikely to prevail on their claim that USFS must perform a cumulative impacts analysis as to the 130-acre logging project that USFS had proposed for group selection treatment. The court reasoned that USFS did not yet have a defined timetable for the action and that USFS was not actively preparing to make a decision. Accordingly, the Ninth Circuit explained that any environmental impacts were speculative, and so USFS need not consider those impacts as cumulative effects in the EIS at issue.

Third, the Ninth Circuit also concluded that Wilderness Defenders could not prevail on their claim that the FEIS failed to consider the symbiotic relationship between increased sediment in streams and thermal stress on fish caused by the stream temperatures. The court stated that because the two streams within the project area already exceeded their target temperature, and because the project

189 555 U.S. 7, 20 (2008).

would add low to moderate amounts of sediment to the streams, thermal stress was part of the environmental baseline already. Accordingly, the Ninth Circuit concluded that no analysis of cumulative effects of sedimentation was necessary.

Fourth, the Ninth Circuit rejected Wilderness Defenders' claims that USFS and FWS violated both NEPA and the ESA in relying upon studies that were over fifteen years old to determine that bull trout were absent from the streams in the project area. While noting that in some contexts NEPA may require new scientific studies, the court held that no reliable evidence showed that bull trout were likely to be present. As a result, the court held that USFS and FWS had not acted arbitrarily and capriciously in relying upon the studies when conducting the EIS.[190]

Having determined that plaintiffs met the first *Winter* element by showing a likelihood of success on one of their claims, the Ninth Circuit proceeded to analyze the other elements. USFS and FWS conceded that the harms would be irreparable, satisfying the second *Winter* element. While the county defendants-intervenors challenged whether the harm would be irreparable, the court rejected that challenge and concluded that, if the project proceeded, the environmental harms presented could not be remedied.

As to the third *Winter* element, the balance of equities between parties, the Ninth Circuit balanced the irreparable environmental harms with the economic interests of the intervenors, noting that defendants USFS and FWS did not raise any equitable interests specific to themselves. The court concluded that because Wilderness Defenders would suffer irreparable harm, and because the intervenors would merely face a temporary delay of their economic interests, the balance of equities tipped toward Wilderness Defenders.

Finally, the Ninth Circuit assessed the fourth *Winter* element, whether a preliminary injunction would serve the public interest. USFS, FWS, and the local county defendants-intervenors argued that an injunction would harm the public interest because the delay in logging would increase the risk of forest fires and insect infestations. However, the court noted that the FEIS predicted that even without logging, fire suppression was expected to continue and be highly successful. The court therefore held that, in the absence of evidence of an imminent threat, the delay of mitigation of fire and insect risks during the period of a preliminary injunction would not harm the public interest.

In sum, the Ninth Circuit concluded that Wilderness Defenders had met all four elements of the *Winter* test for a preliminary injunction, and thus remanded to the district court for entry of a preliminary injunction to protect the status quo while USFS and FWS completed a supplemental EIS.

190 *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2012) (establishing "arbitrary, capricious [or] abuse of discretion" standard of review for substantive agency decisions).

4. Friends of the Wild Swan v. Weber, 767 F.3d 936 (9th Cir. 2014)

Friends of the Wild Swan and the Swan View Coalition (collectively, Wild Swan)[191] sought preliminary injunctions against the United Staes Forest Service (USFS)[192] to enjoin two logging projects in Montana's Flathead National Forest. Wild Swan claimed that the proposed logging projects violated the National Environmental Policy Act of 1969 (NEPA),[193] the National Forest Management Act of 1976 (NFMA),[194] and the Endangered Species Act of 1973 (ESA).[195] The United States District Court for the District of Montana granted summary judgment for the Forest Service on both injunctions, and Wild Swan appealed. On appeal, the Ninth Circuit affirmed the district court's holding.

The contested logging projects in this action—the Soldier Addition Project and the Spotted Bear River Project—are each around 3,000 acres. Although Wild Swan had some initial success appealing the Soldier Addition Project, the Forest Service eventually conducted Environmental Assessments (EA) and issued Findings of No Significant Impact (FONSI) with regard to each project. The EAs referenced one another but determined there would be no significant, cumulative effects. Wild Swan therefore challenged the authorization of both projects in district court and sought preliminary injunctions. A preliminary injunction requires the party to show that it "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest."[196] Where a moving party can only show "serious questions going to the merits," rather than likelihood of success, it may still obtain an injunction if "the balance of hardships tips *sharply* in the plaintiff's favor."[197] The Ninth Circuit reviewed the district court's denial of the preliminary injunctions for abuse of discretion.

The Ninth Circuit first analyzed Wild Swan's NEPA claims to determine whether they were likely to succeed on the merits. Wild Swan argued that the EAs did not satisfy NEPA because they did not assess the project's cumulative impacts. Wild Swan believed the geographic scope of the EAs was too narrow and consequently did not correctly assess the impacts on lynx, grizzly bear, and fisheries. USFS responded that it had discretion to determine the scope of the assessment based on practicality, and that analyzing too large an area, rather than the specific area affected, could dilute the magnitude of the impact. The Ninth Circuit held that USFS had not arbitrarily set the scope of the EAs under NEPA. As a result, the Ninth Circuit determined that Wild Swan had failed to show a likelihood

191 Plaintiffs are local environmental protection nonprofits devoted to advocating for the environmental health of the area surrounding the Swan Range, which falls within the Flathead National Forest.

192 Defendants also include Chip Weber, Forest Supervisor for Flathead National Forest, Vicki Christiansen, Acting Regional Forester for the Forest Service; Daniel M. Ashe, Director of U.S. Fish and Wildlife Service.

193 42 U.S.C. §§ 4321–4370h (2012).

194 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012).

195 16 U.S.C. §§ 1531–1544 (2012).

196 Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008).

197 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added).

of success, or even a serious question on the merits, and therefore denied the preliminary injunction on NEPA grounds.

The Ninth Circuit next analyzed Wild Swan's claims under NFMA. Wild Swan made two arguments that USFS did not comply with its forest plan. Wild Swan first argued that USFS violated its lynx management plan—which banned logging in habitat areas for favored lynx prey—by using an impermissible new methodology for classifying whether certain areas were actually habitat. However, the Ninth Circuit held that USFS's methodology was entitled to deference, and that therefore the district court did not abuse its discretion in holding that the logging projects did not violate the Lynx management plan. Wild Swan next challenged USFS's use of fisher habitat as a proxy for determining the effect of the logging plans on the fisher.[198] However, USFS argued that fisher population is difficult to measure because they are solitary creatures and that surveys conducted over the past decade showed no evidence of fisher population decline. The Ninth Circuit deferred to the USFS's determination regarding an adequate fisher population in the project area because USFS had used the best available scientific methods. Consequently, the Ninth Circuit held that, because Wild Swan failed to show that there was a likelihood of success or even a serious question on the merits of its NFMA claims, the district court did not abuse its discretion by denying a preliminary injunction.

Lastly, the Ninth Circuit analyzed Wild Swan's ESA claim. Wild Swan argued that USFS had considered too narrow an area when assessing the impacts of the proposed projects on bull trout, lynx, and grizzly bear. It argued that USFS should instead have considered the entire area of the proposed projects. The Ninth Circuit held that its reasoning regarding the NEPA claims applied with equal force to the ESA concerns for the lynx and grizzly bear. As to the bull trout, the Court held that an informal consultation between USFS and United States Fish and Wildlife Service satisfied the ESA requirements.

In sum, the Ninth Circuit held that the district court did not abuse its discretion in denying the preliminary injunctions. First, the court held that Wild Swan had failed to show a likelihood of success on the merits of its NEPA claims because the EAs on the various potentially affected species satisfied NEPA. Second, the court held that Wild Swan had also failed to show a likelihood of success on the merits of the NFMA claims because USFS had relied on the best science available and because its methods were entitled to deference. Finally, the Ninth Circuit held that Wild Swan had failed to show a likelihood of success or a serious question regarding the ESA claims, relying on the same analysis it used for the NEPA claims. Accordingly, the Ninth Circuit affirmed the district court's denial of a preliminary injunction.

198 The Ninth Circuit described the fisher as "a medium-sized, forest-dependent member of the weasel family." Friends of the Wild Swan v. Weber, 767 F.3d 936, 948 (9th Cir. 2014).

5. Alliance for the Wild Rockies v. U.S. Dep't of Agriculture, 772 F.3d 592 (2014)

Alliance for the Wild Rockies (Alliance), an environmental organization, brought this action, concerning the hazing or herding of bison in Yellowstone National Park, against the United States Department of Agriculture, other federal agencies, and the Montana Department of Livestock (collectively, Defendants).[199] Alliance alleged that the Defendants: 1) failed to issue a Biological Opinion (BiOp) in violation of the Endangered Species Act of 1973 (ESA);[200] 2) failed to prevent the "take" of an endangered species in violation of the ESA; 3) failed to issue a supplemental environmental impact statement (EIS) in violation of the National Environmental Policy Act of 1969 (NEPA);[201] and 4) did not act in conformity with the Gallatin National Forest Plan in violation of the National Forest Management Act of 1976 (NFMA).[202] The United States District Court for the District of Montana held that Alliance lacked standing to sue under NEPA and the ESA and granted summary judgment in favor of Defendants on all claims. On appeal, the Ninth Circuit reversed the district court's decision as to standing, but otherwise affirmed the district court, again granting summary judgment for Defendants.

The Yellowstone region provides habitat for Yellowstone bison. Because these bison carry brucellosis, a disease that is deadly to cattle, Defendants issued an Interagency Bison Management Plan in 2000 to address the issue of brucellosis transmission. The Management Plan authorized the Montana Department of Livestock to use hazing or herding by riders on horseback, vehicles, or helicopters to encourage bison migration. However, because Yellowstone's grizzly bear population (*Ursus arctos horribili*) is protected under the ESA,[203] the Management Plan also indicated that if there was any indication of grizzly presence, the hazing should stop.

Initially, the Management Plan predicted that the hazing would primarily take place in the fall and spring, when the grizzlies would be in dens. As required by section 7 of the ESA,[204] Defendants prepared a BiOp for the planned action and determined that the Management Plan was not likely to affect the Yellowstone grizzlies. However, after 2000, the hazing began to extend into the summer months, when the grizzlies were active. On May 11, 2011, Alliance sent defendants a notice of intent to sue under the ESA. On May 18, 2011, Alliance filed a complaint against Defendants under the Administrative Procedure Act, alleging that the helicopter harassment of the grizzlies violated NEPA and NFMA. Alliance amended the complaint on July 14, 2011, after the 60-day ESA notice

199 Defendant-appellees also include United States Animal and Plant Health Inspection Service, United States Forest Service, Leslie Weldon in her official capacity as Regional Forester of Region One of the U.S. Forest Service, United States Department of the Interior, United States Fish and Wildlife Service, and United States National Park Service. Rancher Bill Myers also intervened in the action as a defendant-appellee.

200 16 U.S.C. §§ 1531–1544 (2012).

201 42 U.S.C. §§ 4321–4370h (2012).

202 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012).

203 50 C.F.R. § 17.11 (2013).

204 16 U.S.C. § 1536 (2012).

period had concluded, in order to add the ESA claims. Subsequently, Defendants issued a new BiOp in 2012, again concluding that the hazing activities would not adversely affect the Yellowstone grizzly bears.

The district court granted summary judgment for Defendants, holding that 1) Alliance lacked standing to pursue its claims; 2) Alliance failed to meet the 60-day notice requirement for its ESA claims; 3) the ESA section 7 claim was moot; 4) the ESA section 9 claim lacked merit; 5) there was no violation of NEPA; and 6) there was no violation of NFMA. Alliance appealed to the Ninth Circuit. On appeal, the Ninth Circuit conducted a de novo review of the standing, mootness, and summary judgment issues.

As a threshold matter, the Ninth Circuit determined that Alliance did have standing to bring its ESA and NEPA claims against Defendants, reversing the holding of the district court. Article III standing requires that a plaintiff show 1) an injury in fact; 2) a causal connection between the injury and the conduct; and 3) a likelihood that the injury will be redressed by a favorable decision.[205] Here, Defendants did not question Alliance's claims of injury in fact. Rather, the federal agencies argued that they did not have control over the hazing operation, and could not redress the harm at issue. However, the Ninth Circuit determined that the injury at issue was a procedural injury, and therefore the alleged injuries could be redressed by compliance with the procedural requirements of the ESA and NEPA.

The Ninth Circuit also reversed the district court's holding as to the sixty day notice requirement. Before bringing a citizen suit under the ESA, plaintiffs must alert the agencies in question of the alleged violation at least sixty days before filing suit.[206] Defendants argued that Alliance failed to give sufficient notice because it filed NEPA and NFMA claims before the 60-day period had run. However, based on a plain text reading of the statute, the Ninth Circuit determined that the fact that Alliance gave notice sixty days before filing the ESA claims was sufficient to meet the requirement because the notice provision did not explicitly prohibit filing other claims during the notice period.

The Ninth Circuit affirmed the District Court's holding as to the remaining issues. The court held that Alliance's ESA section 7 claim that Defendants had failed to issue a revised BiOp was mooted when Defendants issued a revised BiOp in 2012. The Ninth Circuit also rejected Alliance's ESA section 9 claim. Section 9 of the ESA prohibits the "taking" of endangered species.[207] Among other things, to "take" is defined as "to harass."[208] Alliance alleged that the helicopters harassed the grizzlies by displacing the bears from feeding activities and disrupting their behavioral patterns. Because Alliance did not submit specific evidence of the helicopters affecting the bears or even of the helicopters continuing operations when there were signs of grizzly presence, the Ninth Circuit concluded that there was no evidence of a "taking" of the Yellowstone grizzly bears.

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

206 16 U.S.C. § 1540(g)(2)(A) (2012).

207 *Id.* § 1538(a)(1)(B).

208 *Id.* § 1532(19).

The Ninth Circuit also held in favor of Defendants on the NEPA claim. Under NEPA, federal agencies must complete an EIS if they take an action "significantly affecting the quality of the human environment."[209] If, after the initial EIS, "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," then the agency must draft a supplemental EIS.[210] Alliance alleged that Defendants had violated NEPA by failing to develop a supplemental EIS when the timing of the hazing changed because the additional hazing during the grizzly's active season constituted new circumstances or information. However, the Ninth Circuit held that Defendants had addressed the possibility of such additional contact in the initial EIS and were not required to issue a supplement.

Finally, the Ninth Circuit affirmed the grant of summary judgment for Defendants as to the NFMA claim without discussion. Ultimately, the Ninth Circuit reversed the district court's standing determinations and, reaching the merits, granted summary judgment to Defendants on all claims.

6. Conservation Congress v. Finley, 774 F.3d 611 (9th Cir. 2014)

Conservation Congress and the Environmental Protection Information Center (together, Conservation) brought an action against the United States Forest Service (USFS) and the United States Fish and Wildlife Service (FWS) alleging inadequate consideration of the Beaverslide Project's effects on the Northern spotted owl (*Strix occidentals caurina*), a threatened species.[211] Conservation contended that USFS and FWS violated the Endangered Species Act (ESA)[212] and the National Environmental Policy Act (NEPA).[213] The United States District Court for the Northern District of California granted summary judgment in favor of the government agencies, and Conservation appealed. The Ninth Circuit reviewed the grant of summary judgment de novo and affirmed.

First, the Ninth Circuit addressed the government agencies' arguments. USFS and FWS argued that Conservation failed to provide sufficiently specific notice of its claims sixty days prior to filing its complaint. The Ninth Circuit disagreed and explained that Conservation satisfied the notice requirements under the ESA. Additionally, USFS and FWS contended that Conservation's ESA claim was moot because the agencies' new consultation represented the remedial actions obtainable under the ESA. The Ninth Circuit rejected this mootness argument, stating that the agencies merely continued the same behavior challenged by Conservation and the new consultation did not remedy the alleged failures in prior consultations.

Second, the Ninth Circuit held that the agencies complied with the ESA. Under the ESA, USFS must consult with FWS to prepare a Biological Opinion if the agency's planned action will destroy or modify "critical" habitat or "jeopardize" a

209 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2012).

210 40 C.F.R. § 1502.9(c)(1)(ii) (2011).

211 The Beaverslide Project is a lumber thinning and fuel reduction project in northern California.

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

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

threatened species.[214] Conservation alleged that USFS did not consider new information in a 2011 Recovery Plan for the owl—in particular, the short-term effects of the project on the owl, a study on the threat of invasive barred owls (*Strix varia*), and recommendations for protecting habitat. The Ninth Circuit noted that USFS's Biological Assessment addressed several short-term effects on the owl's habitat and prey. Furthermore, the court explained that USFS had authority to omit the study on barred owls from the Biological Assessment and that recommendations in a plan or study do not bind an agency to act. Finally, in response to Conservation's assertion that the agencies failed to use the "best scientific . . . data available" in their consultation,[215] the Ninth Circuit explained that it must defer to the agency's selection of scientific data, because it relates to the agency's special expertise.

Finally, the Ninth Circuit held that USFS and FWS complied with NEPA. Under NEPA, agencies must prepare an environmental impact statement for actions affecting the quality of the environment and propose alternatives to the actions.[216] Conservation argued that USFS failed to take a "hard look" at environmental impacts as required by NEPA because it did not consider short-term effects on the owl and the threat of barred owls.[217] The Ninth Circuit disagreed and explained that USFS discussed numerous short-term effects on the owl and concerns about barred owls in its two environmental impact statements. Thus, the court held that USFS took the requisite hard look at potential effects of the project on owls.

In sum, the Ninth Circuit held that Conservation did not carry its burden to show that USFS and FWS failed to comply with the ESA and NEPA. Because USFS and FWS consultations and conclusions satisfied ESA and NEPA regarding effects of the Beaverslide Project on the Northern Spotted Owl, the Ninth Circuit affirmed the district court's grant of summary judgment.

7. San Luis and Delta-Mendota Water Authority v. Locke, 776 F.3d 971 (9th Cir. 2014)

San Luis and Delta-Mendota Water Authority (San Luis)[218] filed suit against the Secretary of Commerce Gary Locke (Locke)[219] under the Endangered Species

214 16 U.S.C. § 1536(a)(2) (2012).

215 *Id.*

216 42 U.S.C. § 4332(C) (2012).

217 W. Watersheds Project v. Abbey, 719 F.3d 1035, 1047 (9th Cir. 2013).

218 In addition to San Luis and Delta-Mendota Water Authority, plaintiffs include Westlands Water District, Stockton East Water District, Metropolitan Water District of Southern California, Oakdale Irrigation District, South San Joaquin Irrigation District, Kern County Water Agency, Coalition for a Sustainable Delta, and State Water Contractors. California Department of Water Resources also joined the action as an intervening plaintiff.

219 In addition to Locke, defendants include the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, James W. Balsiger, Rodney R. McInnis, U.S. Department of the Interior, United States Bureau of Reclamation, Michael L. Connor, Donald R. Glaser, Jane Lubchenco, and Sally Jewell. In addition, intervenor-defendants are The Bay Institute; California Trout; Friends of the River; Natural Resources Defense Council; Northern California

Act of 1973 (ESA)[220] and the Administrative Procedure Act (APA).[221] San Luis challenged the legality of a 2009 Biological Opinion (BiOp) prepared by the National Marine Fisheries Service (NMFS) under the directive of the Department of Commerce regarding water extractions from the San Joaquin River Delta. The United States District Court for the Eastern District of California held that some provisions of the BiOp violated the APA because they were arbitrary and capricious. On appeal, the Ninth Circuit reversed in part, affirmed in part, and remanded. The Ninth Circuit primarily held that the district court failed to grant NMFS the appropriate level of deference under the APA.

The San Joaquin River Delta (Delta), located in Central California, is formed by the convergence of the Sacramento and San Joaquin Rivers. Upstream of the Delta, the State Water Project and the Central Valley Project (the Water Projects) pump water for irrigation and drinking purposes. The Water Projects are two of the largest water projects in the nation, providing water to more than 25 million consumers. In addition to pumping, the Water Projects also control the volume of water flow in the rivers.

This case arises out of the fact that the Delta is home to various endangered species. The five species at issue here are: 1) the endangered Sacramento River winter-run Chinook salmon; 2) the threatened Central Valley spring-run Chinook salmon 3) the threatened Central Valley steelhead; 4) the threatened Southern Distinct Population Segment of North American green sturgeon; and 5) the endangered Southern Resident orca whale.[222] The Water Projects affect the ability of the anadromous species—the first four fish listed—to return to inland rivers and lakes for reproduction by increasing pollution, encouraging non-native species growth, causing water shortages in the river, and regulating flows in a way that makes the river less suitable for reproduction. These fish also struggle to pass through the Water Project impediments, such as dams and pumps, and are sometimes caught in the pumps and killed.

Under the ESA, a federal agency may not take any action that is "likely to jeopardize the continued existence" of an endangered species or cause the "destruction or adverse modification" of the species's critical habitat.[223] If an agency pursues a project that could result in either of these effects, the agency must consult NMFS.[224] As part of this consultation process, NMFS must prepare a BiOp analyzing the risk to the endangered species.[225] If the proposed action will jeopardize species or critical habitats, NMFS must also propose "reasonable and

Council of the Federation of Fly Fishers; San Francisco Baykeeper; Sacramento River Preservation Trust; Winnemem Wintu Tribe; Pacific Coast Federation of Fishermen's Associations, Inc.; and Institute for Fisheries Research.

220 16 U.S.C. §§ 1531–1544 (2012).

221 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

222 A "critical prey base for the Southern Resident orca" whales is Chinook salmon. Thus any reduction in population of the prey-base also jeopardizes whale populations. San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 998 (9th Cir. 2014).

223 16 U.S.C. § 1536(a)(2) (2012).

224 *Id.*; *see* U.S. FWS SERV., ESA BASICS: 40 YEARS OF CONSERVING ENDANGERED SPECIES 1–2 (2013) (noting that agencies must "consult with the FWS and NMFS, as appropriate").

225 16 U.S.C. § 1536(b)(3) (2012).

prudent alternatives" (RPAs) that would allow the agency to proceed without negatively affecting endangered species.[226] In developing its BiOp, NMFS must use the "best scientific and commercial data available."[227] If NMFS fails to adhere to the best science standard, it violates the APA.[228] Under the APA, a court should reverse an agency's action only if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[229]

In this case, NMFS prepared the BiOp in 2009 in response to a 2006 request from the Bureau of Reclamation (BOR). In the BiOp, NMFS determined that endangered species would be jeopardized by the agency action and that the critical habitat of the fish would be destroyed or adversely modified. As a result, NMFS proposed over seventy RPAs by which the agency could avoid negatively affecting endangered species.

In the district court, both parties moved for summary judgment, and the court found that various provisions of the BiOp were arbitrary and capricious. The Ninth Circuit reviewed the grant of summary judgment and the district court's evaluation of agency actions de novo. The Ninth Circuit reviewed the district court's decision to admit extra-judicial evidence for abuse of discretion.

As a threshold matter, the Ninth Circuit addressed whether the district court erred by admitting extra-record scientific opinions to aid in its evaluation of the BiOp. The Ninth Circuit concluded that the district court erred because, under *Lands Council v. Powell*[230] and *San Luis & Delta-Mendota Water Authority v. Jewell*,[231] the court may only admit extra-judicial evidence to help the court to develop a framework for the issue—not to call the agency's decision into question. Because the experts debated the merits of the BiOp at the district court and the district court used these declarations to question NMFS's judgment, the Ninth Circuit held that the extra-record evidence was inappropriate.

The Ninth Circuit next explained the requisite deference to the agency under the APA and the ESA. Noting that the ESA does not have its own standard of judicial review, the Ninth Circuit stated that the district court should have applied the APA's arbitrary or capricious standard. Furthermore, the court noted that it defers most to an agency when the agency action requires a high level of technical expertise. Under the ESA, the court must give deference to the agency's scientific determinations in formulating the BiOp.

Turning to the merits, the Ninth Circuit began by addressing the district court's objections to NMFS's consideration of the raw number of fish salvaged during periods when the Water Project's pumping resulted in negative flow. NMFS used this raw salvage data to develop several of the RPA proposals, which regulated negative flows to enhance the likelihood of salmonids avoiding entrainment. The district court held that NMFS should have used scaled salvage numbers—which would better adhere to accepted biostatistical principles—

226 *Id.* § 1536(b)(3)(A).
227 *Id.* § 1536(a)(2).
228 *See* 5 U.S.C. § 706(2)(A) (2012).
229 *Id.*
230 395 F.3d 1019 (9th Cir. 2005).
231 747 F.3d 581 (9th Cir. 2014).

instead of the raw data.[232] The Ninth Circuit rejected this conclusion, relying on its controlling decision in *San Luis & Delta-Mendota Water Authority*. In that case, the Ninth Circuit determined that the use of raw salvage data was appropriate for three reasons, all of which were similarly present in this case.[233] First, NMFS adequately explained how the raw data assisted it in identifying the relationship between negative flow velocity and fish loss. Second, NMFS did not just use the raw data—it supplemented its findings with other studies to create the flow prescriptions. Third, the RPAs implemented data from incidental take statements, working in tandem with these findings to account for population-level impacts. Because all three bases existed in the present case, the Ninth Circuit held that NMFS properly exercised its discretion.

The Ninth Circuit next examined the NMFS jeopardy opinion and the specific components invalidated by the district court. The Ninth Circuit held that none were arbitrary and capricious. Regarding the winter-run Chinook finding, the Ninth Circuit held that NMFS properly relied on several studies in characterizing the species as not viable in its BiOp. This conclusion led to NMFS finding that Southern Resident orca are also jeopardized, as the Chinook is a critical food source. The district court remanded this finding and held that NMFS had failed to consider an apparently contrary 2009 Orca BiOp, which concluded that the commercial harvest of salmon would not jeopardize Southern Resident orca whales.[234] However, the Ninth Circuit held that NMFS sufficiently distinguished those findings in the BiOp at issue and that this effort was sufficient to show consideration of the 2009 Orca BiOp.

Another component of the jeopardy opinion was the adverse effect on steelhead spawnable area and spawning gravel—both elements of the steelhead's critical habitat. The district court held that NMFS's use of maximum habitat as a benchmark for spawnable area and its conclusion that Water Project operations led to gravel degradation were arbitrary and capricious. However, the Ninth Circuit held that NMFS's reliance on a study with the goal of maximizing habitat was not abandonment of ESA's prescription to avoid jeopardy. Additionally, the Ninth Circuit concluded that NMFS provided adequate support for its finding that Water Project operations negatively affected spawning gravel quality and quantity.

Finally, the Ninth Circuit addressed the NMFS findings of indirect mortality factors, such as the creation of favorable conditions for invasive species and increased exposure to pollution. The district court held that NMFS's conclusions were arbitrary or capricious because they inadequately explained the connection between Water Project operations, invasive species, and harm to salmonid species. Although the Ninth Circuit acknowledged that NMFS's analysis was not perfect, the court found that NMFS adequately connected these factors to the

232 *See In re Consolidated Salmonid Cases*, 791 F. Supp. 2d 802, 827 (E.D. Cal. 2011) ("The agency is required to apply generally recognized and accepted biostatistical principles, which constitute best available science, in reaching its decisions.").

233 *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 608–16.

234 *See In re Consolidated Salmonid Cases*, 791 F. Supp. 2d at 864–65.

Water Projects by citing to sufficient scientific evidence. As such, the agency's analysis was reasonably discernable and not arbitrary or capricious.[235]

Next, the Ninth Circuit addressed the RPA proposals invalidated by the district court. In recognizing that the district court applied the incorrect legal standards, the Ninth Circuit again relied on *San Luis & Delta-Mendota Water Authority* for guidance. Contrary to the district court's opinion, neither ESA section 7 nor 50 C.F.R. § 402.02 requires the agency to explain how each RPA is essential to avoiding jeopardy or to articulate compliance with non-jeopardy factors. Instead, the agency's choice will be upheld if it is reasonably supported by the record that the RPAs do not further jeopardize the listed species or adversely affect critical habitat. Having established this more deferential standard, the court reviewed each particular action in turn and held that they were sufficiently supported by the corresponding evidence procured by the agency.[236] As such, the Ninth Circuit held that the district court erred in invalidating the RPA proposals.

Lastly, the Ninth Circuit addressed San Luis's cross-appeal on three issues and reviewed the district court's opinion in which it upheld the BiOp. First, the court rejected San Luis's argument that NMFS was required to separate discretionary from nondiscretionary aspects of the Water Projects when defining the BiOp's environmental baseline.[237] Second, the court rejected the argument that NMFS was required to make effect findings for the Water Projects' indirect mortality factors.[238] The Ninth Circuit agreed with the district court that indirect mortality factors constituted direct effects—they are directly and concurrently caused by the Water Projects instead of merely being more likely or probable due to the agency action. Third, San Luis also argued that Reclamation was independently liable under the ESA for a legally unsound BiOp. However, as the Ninth Circuit held that the BiOp was legally sound, it dismissed this issue of independent liability.

Overall, the Ninth Circuit reversed the district court's invalidation of NMFS's BiOp and affirmed its judgment upholding the BiOp. Therefore, the Ninth Circuit remanded for entry of summary judgment in favor of Locke.

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235 *See* Bowman Transp. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974) (noting that the Court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

236 The challenged RPA proposals were the following: Action IV.2.1, Action IV.2.3, Action IV.3, Action IV.4.2, Action III.1.2, Action III.1.3, and Action III.2.2.

237 Under ESA § 7, a consulting agency must analyze an agency action in relation to an environmental baseline when preparing a BiOp. 50 C.F.R. § 402.02 (2014). This environmental baseline is the status of the species at a particular moment in time before the agency action. *See* Lawrence R. Liebesman & Rafe Petersen, ENDANGERED SPECIES DESKBOOK 46 (2d ed. 2010).

238 The effect of a proposed action includes both direct and indirect effects. 50 C.F.R. § 402.02 (2014). Regarding indirect effect findings, an agency is required to show that the effect is caused by the action, that it is later in time than the action, and that it is reasonably likely to occur. *Id.*

B. Wild Free-Roaming Horses and Burros Act

1. In Defense of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. United States Department of the Interior, 751 F.3d 1054 (9th Cir. 2014)

In Defense of Animals (IDA),[239] a nonprofit dedicated to advocating for animals, filed a claim against the Bureau of Land Management (BLM)[240] in the United States District Court for the Eastern District of California. IDA alleged that BLM violated the Wild Free-Roaming Horses and Burros Act (WFRHBA)[241] and the National Environmental Policy Act (NEPA)[242] when it conducted a roundup of wild horses and burros in the Twin Peaks Herd Management Area (Twin Peaks HMA) in order to thin the herd. The district court held that the roundup did not violate either statute and therefore granted summary judgment to BLM. On appeal, the Ninth Circuit affirmed the district court's ruling.

The WFRHBA was passed in 1971 to preserve wild, free-roaming horses and protect them from "capture, branding, harassment, or death."[243] Under the WFRHBA, BLM is responsible for maintaining a "thriving natural ecological balance" in the herd management areas (HMAs).[244] In order to achieve this purpose, BLM must determine the horse and burro population that constitutes an appropriate management level for any given HMA.[245] If the herd population comes to exceed the appropriate management level, the WFRHBA directs BLM to reduce the herd population in a specific order of priority: first by destroying old, sick or lame animals; then by capturing horses and burros for private maintenance; and finally by destroying any remaining excess animals.[246]

In 2010, the appropriate management levels for the Twin Peaks HMA were 448–758 horses and 72–116 burros. Notwithstanding these limits, the herd consisted of approximately 2,303 horses and 282 burros. With such an excess quantity of animals, BLM expressed concern about the degree of foraging conducted by the animals and the resulting effects on the Twin Peaks HMA ecosystem and cultural sites.

Before proceeding with the 2010 roundup—or "gather"—BLM conducted an Environmental Assessment (EA), which resulted in a Finding of No Significant Impact (FONSI). However, IDA sought to enjoin BLM from conducting the gather and filed suit. The district court denied IDA's motion for a preliminary injunction,

239 In addition to IDA, plaintiffs-appellants also included Dreamcatcher Wild Horse and Burro Sanctuary (Dreamcatcher), a non-profit dedicated to protecting the wild horses and burros, and members of IDA and Dreamcatcher: Barbara Clarke, Chad Hanson, and Linda Hay.

240 Along with the BLM, defendants-appellees included the United States Department of the Interior (DOI), Sally Jewell in her capacity as the Secretary of DOI, Neil Kornze in his capacity as Director of the BLM, and Ken Collum in his capacity as Field Manager of Eagle Lake Field Office. The Safari Club International and the Safari Club International Foundation also intervened as defendants-appellees.

241 16 U.S.C. §§ 1331–1340 (2012).

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

243 16 U.S.C. § 1331 (2012).

244 *Id.* § 1333(a).

245 *Id.* § 1333(b)(1).

246 *Id.* § 1333(b)(2).

and the Ninth Circuit affirmed that denial. The roundup took place in August and September of 2010.

During the roundup, BLM gathered 1,639 horses and 160 burros. Afterwards, 793 horses and 160 burros were permitted to remain in the Twin Peaks HMA and the remaining animals were either made available for private adoption or sale, or placed in holding facilities. Of those horses returned to the wild, all of the mares were injected with an immunocontraceptive, Porcine Zona Pellucida (PZP), to reduce fertility. The horses were also returned at a 60:40 male-to-female ratio to reduce fertility.

After the denial of the preliminary injunction by the Ninth Circuit, the parties resumed the pursuit of their claims in district court. The district court subsequently granted BLM's motion for summary judgment, and IDA appealed. On appeal, the Ninth Circuit reviewed BLM's actions to determine whether they were arbitrary or capricious.

IDA's claims against BLM fell into two general categories: WFRHBA violations and NEPA violations. The WFRHBA claim, in turn, broke down into five distinct arguments. First, IDA argued that BLM failed to determine whether there were excess wild horses and burros in the Twin Peaks HMA. IDA argued that "excess" should not be based on the number of animals present, but instead on whether the animal population is too high to maintain a "thriving natural ecological balance."[247] Because BLM did not show that the horse and burro population was negatively affecting the ecosystem, IDA claimed that BLM did not demonstrate that there was an excess population. However, the Ninth Circuit rejected this argument, holding that the WFRHBA determines the existence of an excess population through the appropriate management level standards, not through any actual effect on the ecosystem. IDA's interpretation would require the destruction of an ecosystem before BLM could interfere to preserve the ecosystem.

Second, IDA argued that BLM had violated the order and priority of removal specified under the WFRHBA. IDA asserted that the order and priority provision in the WFRHBA required the removal of old, sick, or lame animals before other animals could be captured or removed, while BLM had captured all of the animals simultaneously. BLM responded that a temporary gather to determine which animals should be removed comported with the WFRHBA. The Ninth Circuit agreed, holding that the temporary roundup did not fall under the order and priority provision of the WFRHBA, and that this procedure was the most effective way to adhere to the WFRHBA's instructions.

Third, IDA asserted that BLM violated the WFRHBA by holding the needs of grazing livestock above the interests of the wild horses and burros. The WFRHBA requires that an HMA be maintained for the welfare of wild horses and burros and that "ranges" be designated as "sanctuaries for their protection and preservation."[248] IDA read this language as requiring BLM to promote the welfare of the horses and burros ahead of other animal interests. However, the Ninth Circuit held that the Twin Peaks HMA had never been designated as a "range,"

247 16 U.S.C. § 1333(a) (2012).

248 *Id.*

making any argument that BLM violated its duties under that provision inapplicable.

Fourth, IDA argued that BLM failed to manage the herd at a "minimal feasible level" as required by the WFRHBA.[249] IDA based this argument on the fact that BLM pursued the animals with helicopters, captured 100% of the wild horses, removed 80% of the herd, injected the mares with PZP, and skewed the sex ratio of the horses that were returned to the Twin Peaks HMA. Nonetheless, the Ninth Circuit rejected this argument, deferring to BLM's expertise in its determination that its actions were necessary to protect the Twin Peaks HMA ecosystem.

Finally, IDA alleged that maintaining captured horses at a long-term private holding facility violated the WFRHBA. IDA argued that the holding facilities constituted "public lands" under the WFRHBA because they were administered by BLM, and the WFRHBA prohibits the relocation of burros to public lands where they did not then exist.[250] The Ninth Circuit held that the facilities did not fall under the definition of "public land" because they were primarily administered by private entities. Therefore, the Ninth Circuit held that the relocation was permitted under the WFRHBA.

IDA also brought two claims under NEPA. First, IDA alleged that BLM violated NEPA by failing to prepare an environmental impact statement (EIS), which NEPA requires for federal actions "significantly affecting the quality of the human environment."[251] However, the Ninth Circuit held that BLM did not need to issue an EIS in this situation because the thorough EA was sufficient to address the environmental concerns, and the FONSI was accurate. Furthermore, the Ninth Circuit held that BLM appropriately considered the relevant intensity factors, which indicated the roundup was not a significant government action.[252] IDA had claimed the intensity factors did support the issuance of an EIS because the gather was "highly controversial"[253] due to its large scope; the effects on the herd were "highly uncertain or involve[d] unique or unknown risks"[254] due to conflicting research on the use of PZP; and the gather would "establish a precedent for future actions with significant effects" by allowing for similar large-scale future gathers.[255] The Ninth Circuit rejected each of these arguments, holding that IDA did not demonstrate that the gather was "highly controversial,"[256] but rather that it was simply opposed; that the effects of PZP, although not certain, were not highly uncertain, as they had been used similarly since 1992 and were supported by scientific studies; and that there was no risk of setting a precedent because, under Ninth Circuit law, EAs cannot set binding precedent.

IDA's final argument was that BLM violated NEPA by failing to respond to contrary evidence regarding PZP. Two studies cited by IDA indicated that the use

249 *Id.*
250 *Id.* § 1339.
251 42 U.S.C. § 4332(2)(C) (2012).
252 *See* 40 C.F.R. § 1508.27(b) (2014) (listing intensity factors).
253 *Id.* § 1508.27(b)(4).
254 *Id.* § 1508.27(b)(5).
255 *Id.* § 1508.27(b)(6).
256 *Id.* § 1508.27(b)(4).

of immunocontraceptives like PZP in wild horse populations could have negative effects on herd behavior and genetic diversity. However, the Ninth Circuit held that BLM addressed those concerns in the EA by citing to scientific evidence that demonstrated that PZP did not pose any risk to the herd. BLM did not reference the particular studies cited by IDA, but the Ninth Circuit held that the failure did not violate NEPA because BLM addressed the underlying factor and was not required to address every piece of evidence relating to that factor.

Accordingly, the Ninth Circuit held that there was no violation of either the WFRHBA or NEPA in BLM's gather and removal of wild horses and burros in the Twin Peak HMA. Consequently, the Ninth Circuit affirmed the district court's grant of summary judgment to BLM.

In dissent, Judge Rawlinson objected to the majority's holding that BLM did not violate the WFRHBA. The dissent would have held that the WFRHBA did not authorize a capture of the entire herd and that that action violated the "minimal feasible level" as well as the order and priority provisions of the WFRHBA.[257] In fact, the dissent determined that this action violated the entire purpose of the WFRHBA by allowing for the capture and harassment of wild horses. Consequently, the dissent concluded that BLM abused its discretion in interpreting the WFRHBA and conducting the gather as it did.

III. CONSTITUTIONAL ISSUES

A. Article III Standing

1. Montana Environmental Information Center v. Stone-Manning, 766 F.3d 1184 (9th Cir. 2014)

The Montana Environmental Information Center and the Sierra Club (collectively, MEIC) sued the Director of the Montana Department of Environmental Quality (Director)[258] under the citizen-suit provision of the Surface Mining Control and Reclamation Act (SMCRA).[259] MEIC sought declaratory and injunctive relief preventing the Director from approving a pending surface coal mining and reclamation permit for the Rosebud Mine in southern Montana. MEIC argued that, before granting the permit, the Director must require both a cumulative hydrologic impact assessment and a finding that the mining plan would not cause material damage to the hydrologic balance beyond the permit area. MEIC alleged that the Director and her predecessors had engaged in a pattern of approving permits without complying with these statutory duties in the

257 Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1333(a), (b)(2) (2012).

258 Along with the Director, defendant-appellees include the intervening parties Spring Creek Coal Company LLC; Great Northern Properties Limited Partnership; Crow Tribe of Indians; International Union of Operating Engineers, Local 400; Western Energy Company; Westmoreland Resources, Inc.; and Natural Resources Partners L.P.

259 Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(a)(2) (2012).

past, and that this pattern showed that the Director would violate SMCRA when considering the Rosebud Mine permit. The United States District Court for the District of Montana granted the Director's motion to dismiss on multiple grounds, holding: 1) MEIC's suit was barred by the Eleventh Amendment; 2) the Director's duties were discretionary; 3) MEIC's suit was not yet ripe; and 4) MEIC had not exhausted its administrative remedies. The Ninth Circuit affirmed on standing and ripeness grounds.

The Ninth Circuit held that MEIC had not established standing to bring its claim. For Article III standing, a plaintiff must: 1) demonstrate a "concrete and particularized" injury that is "actual or imminent"; 2) show that the injury is "fairly traceable to the challenged action"; and 3) show that a favorable decision would likely redress the injury.[260] The Ninth Circuit explained that even if the court accepted all of MEIC's allegations regarding a pattern of illegal approvals, MEIC had still failed to show a "substantial risk" of harm because its complaint lacked sufficient allegations that the Director would approve the permit for the Rosebud Mine. Without an "actual or imminent" injury, the Ninth Circuit held that MEIC did not have standing to bring its claim against the Director.

The Ninth Circuit also held that MEIC's claim was not ripe. A claim is ripe if it "present[s] 'concrete legal issues, presented in actual cases, not abstractions.'"[261] The court recognized that under its "firm prediction" rule, claims are ripe if injuries are almost certain to occur.[262] However, the Ninth Circuit explained that it could not make a firm prediction that the Director would approve the Rosebud Mine permit because MEIC had failed to offer any allegations about the likelihood of approval. Thus, there was no inevitable injury for the court to address.

In sum, because MEIC lacked standing and because MEIC's claim was not ripe, the Ninth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction.

2. Shell Gulf of Mexico, Inc. v. Center for Biological Diversity, Inc., 771 F.3d 632 (9th Cir. 2014)

Shell Gulf of Mexico, Inc., and Shell Offshore (collectively, Shell) filed a lawsuit against the Center for Biological Diversity and other environmental groups (collectively, the Center)[263] seeking a declaratory judgment that their oil spill response plan met the requirements of the Oil Pollution Act (OPA)[264] and that its approval by the Bureau of Safety and Environmental Enforcement (BSEE) did not

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

261 Colwell v. Dep't of Health and Human Servs., 558 F.3d 1112, 1123 (9th Cir. 2009) (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947)) (internal quotation marks and citation omitted).

262 Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor (AFL–CIO) v. Immigration and Naturalization Servs., 306 F.3d 842, 861–62 (9th Cir. 2002).

263 Defendant-Appellants also included Redoil, Inc.; Alaska Wilderness League, Natural Resources Defense Council, Inc.; Northern Alaska Environmental Center; Pacific Environment and Resources Center; The Wilderness Society; Ocean Conservancy, Inc.; Oceana, Inc.; Greenpeace, Inc.; Sierra Club; and National Audubon Society, Inc.

264 Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2012).

violate the Administrative Procedure Act (APA).[265] The District Court denied the Center's motion to dismiss. However, the Ninth Circuit held that Shell's preemptive lawsuit against parties who might later challenge their actions did not satisfy Article III's case or controversy requirement and therefore remanded the case to be dismissed.[266]

Alaska's Arctic coast is home to not only a rich ecosystem, but also to a wealth of natural resources. In particular, the presence of oil and gas has provided a constant source of contention between Shell and environmental groups. The present dispute arose over Shell's compliance with the OPA,[267] which requires Shell to file an oil spill response plan with the BSEE and obtain approval before handling, storing, or transporting oil. Shell alleged that it was virtually certain the environmental groups would challenge the BSEE's approval and therefore filed an action seeking a declaratory judgment that the approval was lawful. CBD moved to dismiss the claim, arguing that the action did not satisfy Article III's case or controversy requirement, but the district court denied their motion to dismiss.[268] CBD appealed and the Ninth Circuit reviewed the district court's denial de novo.

The Ninth Circuit first explained that while the Declaratory Judgment Act is a mechanism used to remove the threat of impending litigation, it does not expand the jurisdiction of federal courts.[269] As such, the court explained, an action brought under the Act must still present a justiciable case or controversy.[270] To determine whether a case or controversy is justiciable, the alleged facts must show a substantial controversy between parties who have adverse legal interests.[271] Therefore, the court's analysis focused on whether Shell and CBD had adverse legal interests.

To determine whether Shell and CBD had adverse legal interests, the Ninth Circuit analyzed the underlying law: the APA. The court stated that under the APA, a challenge to the validity of an agency action can only be asserted against the agency. Thus, the court concluded that only BSEE and CBD had adverse legal interests. Shell argued that it had legal interests adverse to CBD by emphasizing the legal disagreement and the substantial economic effect an unfavorable judgment would cause. However, the court rejected this argument, explaining that

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

266 The Ninth Circuit reiterated that federal courts are limited to granting declaratory judgments when there are controversies "in the constitutional sense." *Shell Gulf of Mexico, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014) (quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240 (1937)). *See* Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2012).

267 Federal Water Pollution Control Act, 33 U.S.C. § 1321(j)(5)(F) (2012).

268 Some of the environmental groups did file a lawsuit challenging the BSEE's approval of the plans. That lawsuit was consolidated with this case, and the district court entered summary judgment against the groups.

269 *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

270 *See Aetna Life Ins. Co.*, 300 U.S. at 239–40 (1937) (explaining that a federal court may only grant declaratory judgment in "controversies which are such in the constitutional sense").

271 Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941).

neither differing views of the law[272] nor a practical interest in the lawsuit's outcome[273] are enough to satisfy Article III requirements.

In sum, the Ninth Circuit concluded that it lacked jurisdiction to hear the case because Shell's declaratory judgment action did not present a justiciable Article III case or controversy. Therefore, the Ninth Circuit reversed the district court's denial of CBD's motion to dismiss and remanded with instructions for the district court to dismiss.

B. Supremacy Clause

1. Boeing Co. v. Movassaghi, 768 F.3d 832 (9th Cir. 2014)

Boeing Corporation brought this action against the California Department of Toxic Substances Control (Department) challenging California Senate Bill 990 (SB 990),[274] which prescribed cleanup standards for both radioactive and chemical contamination. The United States District Court for the Central District of California granted summary judgment to Boeing, holding that the statute was preempted by the federal regulation of nuclear safety and, alternatively, violated the Supremacy Clause and the doctrine of intergovernmental immunity because it regulated Department of Energy's (DOE) cleanup activities without congressional authorization.[275] The Ninth Circuit affirmed.

Shortly after World War II, the federal government began making and testing rockets, nuclear reactors, and various nuclear applications at the Santa Susana Field Laboratory (Santa Susana) in Ventura County, California. Boeing owned the majority of the site, and the National Aeronautics and Space Administration (NASA) owned the remainder. Boeing also leased a portion of the site to DOE. Boeing worked as a contractor to both agencies, assisting in nuclear research and testing. Eventually, this work and on-site accidents led to tremendous environmental harms caused by radioactive contamination. The record showed that the federal government was solely responsible—there was no identifiable contamination that resulted from private activity, and if there was, it was undistinguishable from federal contamination. Currently, operations at the site are limited to cleanup. Initially, the federal government supervised the cleanup of radioactive contamination, and the Department supervised the cleanup of chemical contamination. In 2007, however, California passed SB 990 to extend its control of cleanup to radioactive pollutants. SB 990 required that the site be made suitable for suburban residential or rural residential, agricultural use, whichever would result in lower permissible residual concentration for each found contaminant.[276] Until this standard was met, it was a crime for the land to be

272 Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013).

273 Collin Cnty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods, 915 F.2d 167, 171 (5th Cir. 1990).

274 S.B. 990, 2007 Reg. Sess., ch. 729 (Cal. 2007).

275 *See* Mayo v. United States, 319 U.S. 441, 445 (1943) (noting that the Supremacy Clause requires that federal activities be free from state regulation).

276 CAL. HEALTH & SAFETY CODE § 25359.20(c).

transferred by sale, lease, sublease, or other alienation. It was not disputed that reaching this standard could take as long as 50,000 years.

Boeing challenged the validity of SB 990, and the district court granted its motion for summary judgment. The Ninth Circuit reviewed the Department's appeal, but also allowed the federal government to file an amicus brief. The government agreed with the district court that SB 990 was preempted by Congress and, in the alternative, was unconstitutional under the Supremacy Clause. The Ninth Circuit reviewed the summary judgment decision de novo.

The Ninth Circuit first held that Boeing had established the injury-in-fact requirement of its standing analysis.[277] Despite Boeing being paid as a federal contractor, SB 990 still affected Boeing as a landowner because it was prohibited from transferring its property. Further, the Department conceded that Boeing would bear a portion of the cleanup expenses. As a result, the Ninth Circuit held that injury-in-fact was established.

The Ninth Circuit next addressed intergovernmental immunity and whether SB 990 was invalid under the Supremacy Clause. First, the court found that SBB 990 regulated DOE's cleanup activities directly. DOE was a responsible party under the statute, and the agency was compelled to adhere to SB 990's more stringent cleanup procedures, rather than what is required by federal law. Boeing's position as a private contractor did not affect this analysis,[278] and the Ninth Circuit held that SB 990's interference with federal government functions violated intergovernmental immunity *unless* there was clear and unambiguous congressional authorization.[279] The court examined various applicable acts[280] and found that none provided a congressional grant of authority, and therefore held that SB 990's regulation was in violation of the Supremacy Clause.

Second, the court found that SB 990 was discriminatory as it singled out the Santa Susana site, as well as Boeing, DOE, and NASA as responsible parties for more stringent cleanup schemes than applied elsewhere in California. Again, it did not matter that Boeing was a private entity: when a state law is discriminatory, private entities or individuals who are subjected to this discrimination can assert intergovernmental immunity.[281] As SB 990 applied more stringent standards to this isolated incident, as opposed to generally applicable state environmental

277 The Department did not challenge Boeing's standing, but certain advocacy groups as amici curiae did.

278 *See* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 181 (1988) (holding that "a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation").

279 *See id.* at 180 ("It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation.") (quoting U.S. Envtl. Prot. Agency v. State Water Res. Control Bd., 426 U.S. 200, 211 (1976)) .

280 The court concluded that the Atomic Energy Act, 42 U.S.C. §§2011–2297 (2012), the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2012), and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9765 (2012) do not grant the Department authority to regulate DOE's cleanup.

281 North Dakota v. United States, 495 U.S. 423, 435 (1990).

laws, the Ninth Circuit held that the statute was invalid under the intergovernmental immunity doctrine and violated the Supremacy Clause.

Lastly, the Ninth Circuit held that the terms of SB 990 were not severable, as the provisions regarding chemical cleanup and radioactive cleanup were closely intertwined. As such, the Ninth Circuit affirmed the judgment of the district court, holding that SB 990 was unconstitutional under the Supremacy Clause and the doctrine of intergovernmental immunity.

C. 11th Amendment

1. Lacano Investments, LLC v. Balash, 765 F.3d 1068 (9th Cir. 2014)

Plaintiffs Lacano Investments, LLC, Nowell Avenue Development, and Ava L. Eads (collectively, Lacano) sued the Alaska Department of Natural Resources (the Department) alleging fee simple ownership in certain streambeds under the authority of land patents issued before Alaska entered the Union in 1959. In 2010 and 2011, the Department determined that the waterways above the disputed streambeds were currently navigable and had been navigable at the time Alaska became a state, and therefore claimed that title and ownership of all land beneath navigable waterways had vested in the state pursuant to the Submerged Lands Act of 1953.[282] Lacano sued the Department for a declaratory judgment that the navigability determination violated the Submerged Lands Act and an injunction to prevent the Department from taking title to the land. The United States District Court for the District of Alaska granted the Department's motion to dismiss for lack of subject matter jurisdiction. Reviewing the dismissal de novo, the Ninth Circuit affirmed.

Lacano based its argument on the claim that, because the Ninth Circuit must accept all factual allegations as true on appeal, it must reverse the district court's dismissal. However, the Ninth Circuit explained that while Lacano had framed its assertions regarding ownership in factual terms, they were essentially legal conclusions that Lacano owned the land at issue. The court did not accept those *legal* conclusions contained in Lacano's complaint as true. Because Lacano failed to present any factual allegations, the Ninth Circuit held they could not escape the motion to dismiss

Next, the Ninth Circuit determined that state sovereign immunity under the Eleventh Amendment barred Lacano's action. Following the Supreme Court's rationale in *Idaho v. Coeur d'Alene Tribe of Idaho*,[283] the Ninth Circuit characterized Lacano's suit as the functional equivalent of a quiet title action, which required the state's consent. Accordingly, the Ninth Circuit affirmed the district court's dismissal. However, in affirming the dismissal, the Ninth Circuit departed from the district court's attempt to analyze whether Alaska had enough of an interest in the submerged lands to warrant immunity under the Eleventh Amendment. Rather, the court explained that Alaska need not demonstrate its

282 43 U.S.C. §§ 1301–1315 (2012).

283 521 U.S. 261 (1997).

interest because ownership of the submerged lands was presumed essential to the sovereign.

Lacano set forth three arguments. First, Lacano contended that the Supreme Court had overruled *Coeur d'Alene* with a "straightforward inquiry" approach in *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*[284] The Ninth Circuit disagreed, noting that the Supreme Court had recently reaffirmed *Coeur d'Alene* in *Va. Office for Prot. and Advocacy v. Stewart*,[285] and held that regardless of any tension between the approaches, *Coeur d'Alene* directly controlled based on the facts.

Second, Lacano argued that the facts presented here were the reverse of those in *Coeur d'Alene* because there the State of Idaho had longstanding title, and in this case Lacano had longstanding title. However, the Ninth Circuit held that length of title was irrelevant and instead focused on the importance to the sovereign state of the lands beneath the navigable waters.

Third, Lacano argued that regulatory deprivation posed a concern in *Coeur d'Alene* only because the Coeur d'Alene Tribe was a separate sovereign. The Ninth Circuit explained that although the majority in *Coeur d'Alene* discussed the threat of tribal sovereignty to the state's regulatory control, the characterization of the suit as equivalent to a quiet title action determined Eleventh Amendment immunity. Therefore, the Court held that it did not have subject matter jurisdiction over Lacano's claim.

In sum, the Ninth Circuit held that the Eleventh Amendment barred the suit because it was the functional equivalent of a quiet title action. Additionally, the Ninth Circuit held that the district court's denial of leave to amend the complaint was not an abuse of discretion since an amended complaint could not have overcome the lack of subject matter jurisdiction.

284 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'").

285 131 S. Ct. 1632, 1639 (2011).