2010 NINTH CIRCUIT ENVIRONMENTAL REVIEW

CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Federal Water Pollution Control Act

1. Akiak Native Community v. United States Environmental Protection Agency, *625 F.3d 1162 (9th Cir. 2010).*

Petitioner Akiak Native Community (Akiak)[1] sought review of the United States Environmental Protection Agency's (EPA's)[2] decision to authorize the State of Alaska to administer portions of the National Pollutant Discharge Elimination System (NPDES)[3] pursuant to the Clean Water Act (CWA).[4] The United States Court of Appeals for the Ninth Circuit denied Akiak's petition for review, holding that EPA's decision to transfer authority to Alaska to administer the NPDES program was not arbitrary or capricious under the Administrative Procedure Act (APA).[5]

The NPDES program was established as part of the CWA to regulate discharges of pollutants into the waters of the United States.[6] Originally, EPA administered the NPDES program, granting permits and regulating dischargers, but the CWA requires that EPA transfer authority to states to administer the program when a state demonstrates it meets nine specific

[1] Petitioners included Akiak Native Community, Nunamta Aulukestai, Nondalton Tribal Council, Curyung Tribal Council, Cook Inletkeeper, Alaska Center for the Environment, Alaska Community Action on Toxics, Center for Biological Diversity, and the Center for Water Advocacy. The Ekwok Tribal Council, New Stuyahok Traditional Council, and Prince William Soundkeeper intervened. Akiak Native Cmty. v. U.S. Envtl. Prot. Agency, 625 F.3d 1162, 1162 (9th Cir. 2010).

[2] Respondents included EPA and Stephen L. Johnson, Administrator of the EPA. The State of Alaska intervened. *Id.* at 1162–63.

[3] Federal Water Pollution Control Act, 33 U.S.C. § 1342 (2006).

[4] *Id.* §§ 1251–1387.

[5] Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006). Challenges to EPA actions under Section 509(b) of the CWA are reviewed under the arbitrary and capricious standard of the APA. Am. Mining Cong. v. U.S. Envtl. Prot. Agency, 965 F.2d 759, 763 (9th Cir. 1992).

[6] 33 U.S.C. § 1342 (2006).

criteria.[7] Upon such a successful showing, the Administrator "shall approve each state submitted program unless he determines that adequate authority does not exist" under state law to issue permits that fulfill all criteria.[8] Although EPA must transfer authority upon a successful showing, it retains oversight and the power to revoke state authorization if the program is administered improperly.[9]

In May 2008, Alaska submitted a proposal to administer the Alaska Pollutant Discharge Elimination System (APDES).[10] In June 2008, EPA published notice of Alaska's proposal and held a sixty-day comment period and three public hearings. After receiving comments and publishing a "Response to Comments" document, EPA approved Alaska's proposal in October 2008. Akiak then filed a timely petition for review, challenging EPA's approval based on two of the required criteria: 1) the APDES did not provide for adequate judicial review as required by the CWA and 2) EPA failed to ensure that Alaska had adequate enforcement tools to abate violations of the APDES as required by the CWA.[11] The CWA requires that EPA encourage "[p]ublic participation in the development, revision, and enforcement of any regulation."[12] Furthermore, to become authorized, a state must demonstrate the ability to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement."[13] The court addressed these two criteria and then turned to Akiak's third claim—that EPA failed to comply with provisions of the Alaska National Interest Lands Conservation Act (ANILCA).[14]

The CWA's implementing regulations, which govern state authorization, dictate that the state "provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process."[15] The regulations further state that a program meets this requirement if state law allows for the same opportunity for judicial review as would be available in federal court for a federally issued NPDES permit.[16] However, a program will not meet this requirement if it "narrowly restricts the class of persons who may challenge the approval or denial of permits."[17] Akiak argued that this regulation *requires* that a state program provide the *same* opportunity for judicial review that is available in federal court.

To protect citizen involvement in public interest suits, the United States Supreme Court directed lower federal courts to award attorney fees to

7 *Id.* § 1342(b)(1)–(9).

8 *Id.* § 1342(b).

9 *Id.* § 1342(b)–(d).

10 Alaska submitted its original proposal in 2006, but EPA found it incomplete. *Akiak Native Cmty.*, 625 F.3d 1162, 1165 (9th Cir. 2010).

11 *Id.* at 1165–66, 1171.

12 33 U.S.C. § 1251(e) (2006).

13 *Id.* § 1342(b)(7).

14 Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 (2006).

15 40 C.F.R. § 123.30 (2010).

16 *Id.*

17 *Id.*

prevailing plaintiffs in normal circumstances, but to prevailing defendants only if the suit was "frivolous" or "unreasonable."[18] Alaska, however, has a "loser pays" rule that indiscriminately awards attorney fees to the prevailing party.[19] Akiak argued that Alaska's system "does not provide citizens the same opportunities for judicial review as are available under federal law" because the risk of paying out a substantial sum in the event that their suit fails will deter some plaintiffs.[20] The Ninth Circuit disagreed and concluded that the most logical reading of the regulation indicates that "providing an opportunity for judicial review equal to that available in federal court is defined to be acceptable, but is not necessarily required."[21] The court found that the regulations contemplate a range of acceptable judicial procedures between clearly sufficient—e.g., an opportunity identical to that provided by the federal system—and clearly insufficient—e.g., a system that narrowly restricts the class of persons who may seek review. The court further noted that even if it found the regulations ambiguous, EPA's interpretation of its own regulation is entitled to significant deference.[22]

Having found Alaska's system for judicial review permissible under the CWA, the court addressed whether Alaska's system met the general standard to "provide for, encourage, and assist public participation in the permitting process" as required by 40 C.F.R. § 123.30. The court agreed with EPA that the APDES, though not providing an opportunity for judicial review identical to the federal system, "still provides for meaningful public participation in the permitting process."[23] The court noted that although the Alaska system does not discriminate between plaintiffs and defendants in awarding attorney fees, Alaska Rule of Civil Procedure 82 allows courts to exercise discretion such that awards may "be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts."[24] In addition, fee awards in appeals from administrative agencies are governed by Alaska Rule of Appellate Procedure 508, which provides that "[a]ttorney's fees may be allowed in an amount to be determined by the court."[25] After briefly discussing the judicial and legislative history of Alaska procedural rules, the court acknowledged the state's pledge not to seek attorney fees from unsuccessful permit-challengers "unless the appeal was frivolous or brought simply for purposes of delay."[26] However, the court

18 Christiansburg Garment Co. v. U.S. Equal Emp't Opportunity Comm'n, 434 U.S. 412, 417, 421 (1978) (affirming the concept that "such awards should be permitted 'not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious'" (citing Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2d Cir. 1976))).

19 *Akiak Native Cmty.*, 625 F.3d 1162, 1167 (9th Cir. 2010).

20 *Id.*

21 *Id.*

22 Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation").

23 *Akiak Native Cmty.*, 625 F.3d at 1167.

24 ALASKA R. CIV. P. 82(b)(3)(I).

25 ALASKA R. APP. P. 508(e); Stalnaker v. Williams, 960 P.2d 590, 597 (Alaska 1998) ("A superior court hearing an appeal from an administrative agency awards attorney's fees under Appellate Rule 508, not Civil Rule 82.").

26 *Akiak Native Cmty.*, 625 F.3d at 1170.

determined that although Alaska is beholden to the pledge, such a promise would not apply to private defendants or third parties intervening as defendants.[27] Ultimately, the court was not concerned about such an outcome in light of an absence of evidence that Alaska courts award substantial fees to prevailing third party intervenors. Further, EPA's approval was reasonable considering its continued oversight and power to revoke authorization if the APDES program failed to meet CWA standards. Based on EPA's knowledge of the circumstances at the time it approved Alaska's program, the court held that EPA's decision was not arbitrary or capricious.

The court next addressed Akiak's challenge that EPA failed to ensure that Alaska possessed adequate enforcement tools to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement" as required by the CWA.[28] Akiak argued that Alaska's enforcement powers are inadequate under the CWA because, in contrast to EPA, Alaska officials lack authority to assess civil penalties administratively.[29] The court acknowledged that although the language of the CWA does not mention administrative penalties, the regulations provide that a state's assessment of administrative penalties are "not mandatory [but] highly recommended."[30] Furthermore, EPA recommended two other means for enforcement: "suing to recover costs of remedial efforts and suing for compensation for environmental damage."[31] In light of these approaches, the court found "no reason to conclude that Alaska lacks adequate enforcement remedies."[32]

Finally, the court addressed Akiak's claim that EPA failed to fulfill the federal government's duty under ANILCA to protect subsistence resources in Alaska's navigable waters.[33] Congress enacted ANILCA to "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."[34] The court expressed that in furtherance of that goal, the Act allows rural residents to participate in the management of wildlife on public lands, and requires the action agency to provide notice and a hearing in its evaluation of the effects of federal land use on subsistence resources.[35] Ultimately, the court held that the transfer of NPDES authority did not trigger the requirements of ANILCA for two reasons. First, compliance with ANILCA would require that Alaska meet a tenth criterion before EPA authorized its program under the CWA. The court held that such a condition runs contrary to Section 402(b)'s mandate that the authorization "'shall' be

27 *Id.*

28 Federal Water Pollution Control Act, 33 U.S.C. § 1342(b)(7) (2006).

29 *See* ALASKA STAT. § 46.03.760(e) (2010).

30 40 C.F.R. § 123.27(c) (2010).

31 *Akiak Native Cmty.*, 625 F.3d at 1172.

32 *Id.*

33 Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101(c) (2006).

34 *Id.*

35 *Id.* § 3120(a).

approved if the specified criteria are met."[36] ANILCA cannot control or nullify the CWA provisions because the CWA is a more specific statute with regard to NPDES authority transfer.[37] Second, the court found that ANILCA applies specifically to federal land management agencies—because EPA is not a land management agency and lacks "primary jurisdiction" over "public lands" in Alaska, ANILCA is not triggered and its provisions do not apply.[38]

In summary, the Ninth Circuit held that EPA's decision to authorize Alaska to administer the NPDES program was not arbitrary or capricious because the APDES provided adequate judicial review, Alaska possessed adequate enforcement tools, and EPA's transfer of NPDES authority did not trigger ANILCA.

2. Northwest Environmental Defense Center v. Brown, *640 F.3d 1063 (9th Cir. 2011).*

The Northwest Environmental Defense Center (NEDC)[39] brought suit against the State of Oregon officials and timber companies (collectively Brown)[40] regarding a violation of the CWA.[41] NEDC alleged that stormwater runoff from logging roads that was diverted through a system of ditches, culverts, and channels constituted a point source discharge and required a permit under the NPDES. The United States District Court for the District of Oregon dismissed the action with prejudice under Federal Rule of Civil Procedure 12(b)(6).[42] The United States Court of Appeals for the Ninth Circuit reversed the district court's decision, finding that this runoff constituted a point source discharge and that NPDES permits were required.

In the Tillamook State Forest, two logging roads—Trask River Road and Sam Downs Road—were constructed with systems of ditches, culverts, and channels to receive stormwater runoff and to deliver the water to nearby streams and rivers. The Oregon Department of Forestry and the Oregon Board of Forestry own the roads; however, the roads are used primarily by the timber industry. Timber sales contracts specify logging truck routes throughout the forest and impose road maintenance requirements on the users.

36 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 663 (2007) (holding that compliance with Section 7(a) of the Endangered Species Act would add an impermissible tenth criterion for a state program to meet to become authorized under Section 402(b) of the CWA).

37 *See* Morton v. Mancari, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

38 *See* 16 U.S.C. §§ 3102(12), 3112(3), 3120(d) (2006).

39 Intervenors included the Oregon Forest Industry Council and the American Forest & Paper Association.

40 Defendants included Marvin Brown (in his official capacity as Oregon State Forester); Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, William Heffernan, William Hutchison, Jennifer Phillippi (members of the Oregon Board of Forestry, in their official capacities); Hampton Tree Farms, Inc.; Stimson Lumber Company; Georgia-Pacific West Inc.; Swanson Group, Inc.; and Tillamook County.

41 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

42 FED. R. CIV. P. 12(b)(6) ("[F]ailure to state a claim upon which relief can be granted.").

The stormwater runoff contains large quantities of sediments, primarily as a result of timber hauling on the logging roads. As the trucks pass over the roads, gravel and dirt are crushed and precipitation events cause small rocks, dirt, and sand to wash off the roads into the systems of ditches, culverts, and channels, and finally into the rivers. Sediment is of concern because it reduces oxygen levels in waterways and impacts fish species by inhibiting feeding and smothering eggs. The timber companies using these roads had not applied for NPDES permits and NEDC brought an enforcement suit under the citizen suit provision of the CWA.[43]

The Ninth Circuit reviews a district court's Rule 12(b)(6) dismissal de novo, accepting allegations of material facts as true and construing them in the light most favorable to the non-moving party.[44] The court also reviews a district court's interpretation of the CWA de novo.[45] Deference to an agency's interpretation of its own regulations is required unless plainly erroneous, inconsistent with the regulation, or based on an impermissible statutory construction.[46] The court reviews the interpretation of the CWA by the EPA under *Chevron*,[47] looking first to whether there is an unambiguous congressional intent, and, if finding ambiguity, then to whether the EPA's interpretation is permissible and therefore controlling.[48]

NEDC asserted that the collected stormwater subsequently delivered to streams and rivers required NPDES permitting while Brown argued that the Silvicultural Rule exempted runoff or alternatively that the 1987 Clean Water Act Amendments exempted runoff. The Ninth Circuit concluded that NPDES permitting was required based on the definition of point source, the improper application of the silvicultural exception, and the 1987 Amendments. The Court addressed each independently.

Sections 301(a) and 402 of the CWA make it unlawful to discharge any pollutant into navigable waters of the United States.[49] Although Brown conceded that sediment discharges from the logging roads fit into the statutory definition of pollutant, he disputed whether the runoff constituted a point source, which is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . [but] does not include agricultural stormwater discharges and return flows from irrigated agriculture."[50] In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, the Ninth Circuit noted that "[a]lthough nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single

43 33 U.S.C. § 1365(a) (2006) (providing that "any citizen may commence a civil action on his own behalf . . . against any person" alleged to be in violation of the CWA).

44 Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

45 League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002).

46 *Auer*, 519 U.S. 452, 457, 461–62 (1997).

47 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

48 *Id.* at 842–43.

49 Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342 (2006).

50 *Id.* § 1362(14).

discrete source."[51] The court distinguished this identifiable nonpoint pollution with the stormwater collection from the logging roads. Specifically, the court noted that runoff is neither nonpoint source nor point source at its origin, but that its designation depends on whether it disperses naturally over the land and is thereby nonpoint, or whether it "is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances" and thus amounts to a point source discharge.[52] The Ninth Circuit found this distinction supported by extensive case law.[53]

The Ninth Circuit also reviewed the CWA's legislative history. Notably, Congress intended the application of different control mechanisms for point and nonpoint sources.[54] The Senate Committee recognized that point sources were more readily intercepted and more easily controlled than nonpoint source discharges, which required further technological advancements for control.[55] Both the House and the Senate committees advised that "point source" was not a term to be narrowly construed.[56] More importantly, Congress did not vest EPA with the authority to define the statutory terms, but directed EPA to provide guidance that would distinguish point from nonpoint sources.[57] Exceptions that would exempt point sources that are difficult to trace—for example, irrigated agriculture—were proposed and rejected.[58] The Ninth Circuit noted that eventually agriculture discharges were exempted through congressional amendment of the CWA, and that Congress has never granted any exemption for silvicultural discharges. The court—finding that these logging road discharges would constitute a point source—then addressed Brown's contention that a silvicultural exemption exists or that the 1987 Amendments would exempt this form of discharge from the permit system.

In 1973, EPA sought to exempt discharges from silvicultural activities, but this was met with significant opposition. In *Natural Resources Defense Center v. Train*,[59] the United States District Court for the District of Columbia held that the categorical exemption contained in the regulations contradicted the definition in Section 502(14) and was unauthorized.[60] EPA revised its regulations, subjecting limited forms of silvicultural activities to NPDES permitting and characterizing point source discharges as those

51 League of Wilderness Defender/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d at 1184.

52 *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011).

53 In *Natural Resources Defense Council v. California*, the court enforced an NPDES permit for stormwater runoff reaching storm drains. 96 F.3d 420, 421 (9th Cir. 1996). Similarly, runoff passing through storm sewer systems required NPDES permitting. Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 966 F.2d 1292, 1295 (9th Cir. 1992). In *Trustees for Alaska v. EPA*, the court explained the distinction as "whether the pollution reaches the water through a confined, discrete conveyance." 749 F.2d 549, 558 (9th Cir. 1984).

54 Pronsolino v. Nastri, 291 F.3d 1123, 1126 (9th Cir. 2002).

55 117 CONG. REC. 38,825 (Nov. 2, 1971) (statement of Sen. Muskie).

56 H.R.REP. NO. 92-911, at 125 (1971).

57 117 CONG. REC. 38805, 38816 (Nov. 2, 1971).

58 118 CONG. REC. 10765 (Mar. 29, 1972).

59 396 F.Supp. 1393 (D.D.C. 1975).

60 *Id.* at 1395–96.

occurring specifically "as a result of controlled water use[d] by a person."[61] However, this still exempted runoff from precipitation events processed through a "discernable, confined and discrete conveyance."[62] EPA's final rule was little changed from the contested rule, labeling natural runoff as a nonpoint source, even where it flowed through a "discernable, confined and discrete conveyance."[63]

The Ninth Circuit conducted a sentence-by-sentence analysis of EPA's comments accompanying the Silvicultural Rule, thereby demonstrating the weak justification for the rule. The court found that EPA mischaracterized the district court's assessment of the rule and that the rule contradicted the language of the CWA. The Ninth Circuit reasoned, that "it hardly follows that a system of ditches, pipes and channels that collects 'controlled water used by a person' and discharges it into a river is a point source, while an identical system that collects and discharges natural precipitation is not."[64]

In *Natural Resources Defense Council v. Costle*,[65] the United States Court of Appeals for the District of Columbia Circuit disapproved the rule indirectly by finding that the EPA did not have the authority to categorically exempt point sources from NPDES permitting requirements.[66] In response to EPA's concerns of unmanageable burdens, the court stated that "[e]ven when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement."[67] The current text of the Silvicultural Rule provides a smaller exemption than that originally proposed. Rather than exempting all discharges from silvicultural activities, the current rule exempts only those discharges from silvicultural activities resulting from natural runoff. This remains a categorical exemption of the type that the D.C. Circuit found to exceed EPA's authority. Given this, the Ninth Circuit considered whether this exemption in the current rule was a permissible interpretation of Section 502(14).

To determine the permissibility of this interpretation, the court turned to *Forsgren*, which addressed the rule in the context of aerial application of pesticides.[68] In *Forsgren*, the Ninth Circuit held that the position of EPA and the USFS "contravene[d] the will of Congress" and that the definition of point source "clearly encompasses an aircraft . . . spraying pesticide from mechanical sprayers directly over covered waters."[69] However, that case did not address the specific question of whether natural runoff becomes point source discharge upon control through ditches, culverts, and channels.

The Ninth Circuit addressed this question by reemphasizing the limited nature of EPA's ability to distinguish point from nonpoint source pollution under both *Forsgren* and *Costle*. Returning to the statutory definition, the

61 41 Fed. Reg. 6282, 6282 (Feb. 12, 1976).
62 *Id.*
63 40 C.F.R. § 124.85 (1976).
64 *Nw. Envtl. Def. Ctr.*, 640 F.3d 1063, 1077 (9th Cir. 2011).
65 568 F.2d 1369 (D.C. Cir. 1977).
66 *Id.* at 1377.
67 *Id.* at 1375–76.
68 *Forsgren*, 309 F.3d 1181, 1185–86 (9th Cir. 2002).
69 *Id.*

Ninth Circuit held that the definition stands independent of pollutant arrival at the discernable, confined and discrete conveyance. In analyzing the Silvicultural Rule, the court referred to the analysis in *Environmental Protection Information Center v. Pacific Lumber Co.*,[70] which, based on *Forsgren*, held that "once runoff enters a conduit like those listed in Section 502(14), the runoff ceases to be the kind of 'natural runoff' [the Silvicultural Rule] expressly targets."[71] The court found that the only proper reading of the Silvicultural Rule was an exemption of natural runoff that remains natural, and is not channeled in any capacity by a discernable, confined and discrete conveyance. Thus, the collection and release of stormwater from logging roads is not exempted by the rule and thus is a point source discharge requiring a permit.

Brown's final argument contemplated a permit exemption because the 1987 CWA Amendments implied congressional approval of the Silvicultural Rule. The Ninth Circuit found this argument unpersuasive. In instances where courts have identified congressional approval of longstanding administrative regulations by re-enactment of a statute, Congress made clear its awareness of existing interpretations in the legislative history and reenacted the statute without significant change.[72] Here, the legislative history makes no mention of the Silvicultural Rule. Further, the 1987 Amendments considerably altered the treatment of stormwater discharge in a manner directly contravening the Silvicultural Rule. The Ninth Circuit also recognized that, while in some circumstances Congress can acquiesce in agency regulations and interpretations, this must be decided "with extreme care" and supported by "overwhelming evidence."[73]

The Ninth Circuit found no such evidence. The 1987 Amendments added Section 402(p), creating a tiered process by which EPA was to permit stormwater discharge. Primarily, the Amendments sought to alleviate the administrative burden of requiring permits for all properties generating stormwater runoff.[74] While delaying permitting requirements for stormwater discharges from schools, churches, and residential properties, the Amendments required permits for five specific categories, including discharges "associated with industrial activity."[75]

EPA's subsequent rulemaking attempted to substantiate the exemptions of its Silvicultural Rule, by importing them to its new regulations. However, the court found that this contradicted the intent of Congress, holding in

70 No. C 01-2821 MHP, slip op. (N.D.Cal. Oct. 14, 2003).

71 *Id.* at 15.

72 The Ninth Circuit relied on *National Labor Relations Board v. Bell Aerospace Co.*, which stated that "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change." 416 U.S. 267, 274–75 (1974). This language is quoted and paraphrased in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846 (1986).

73 Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162, 169–70 (2001).

74 131 CONG. REC. 19846, 19850 (Jul. 22, 1985).

75 Federal Water Pollution Control Act, 33 U.S.C. § 1342(p)(2) (2006).

Natural Resources Defense Council v. U.S. Environmental Protection Agency[76] that EPA could not exempt permitting requirements for construction sites because construction was "industrial in nature."[77] Analogously, if silvicultural activity is industrial, then the 1987 Amendments specifically require NPDES permits for its stormwater discharge. To determine whether silvicultural activities qualify as industrial, the court looked to the definition of "industrial activity" in the Standard Industrial Classifications, which included logging.[78] Regulation also defined "stormwater discharge associated with industrial activity" as "storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products."[79] The preamble to the Phase I regulations further defined these roads as being "exclusively or primarily dedicated for use by the industrial facility."[80] Brown disputed that logging roads were "immediate access roads." While the roads have recreational users, the court held that because they would not exist without the logging industry, and because the upkeep of the roads is provided for in the logging contracts, the roads qualified as "immediate access roads." Brown's contention that logging sites were not "industrial facilities" did not persuade the court because "facility" is broadly defined.[81] The court held that the 1987 Amendments did not exempt logging road stormwater discharge from NPDES permitting.

As a final consideration, the court addressed the effect of *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*,[82] which resulted in a remand to EPA of a portion of its Phase II stormwater regulations.[83] The Ninth Circuit decided not to delay ruling because the remand dealt with Phase II permitting whereas the holding here applied to Phase I. Further regulation by EPA under Phase II will not affect NPDES permitting under Phase I. The court recognized that this outcome will require EPA to establish a permitting process to deal with stormwater discharge from ditches, culverts or channels, but given its similarity to existing processes, the permitting process should not impose an excessive burden on EPA.

In conclusion, the Ninth Circuit reversed the District Court, finding that stormwater runoff constituted a point source and required NPDES permitting based on the definition of point source, the incorrectness of the silvicultural exception, and the 1987 Amendments.

76 966 F.2d 1292 (9th Cir. 1992).
77 *Id.* at 1306.
78 40 C.F.R. § 122.26(b)(14)(ii) (1976).
79 *Id.*
80 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990).
81 40 C.F.R. § 122.26(b)(14)(iii), (v), (x) (1976).
82 344 F.3d 832 (9th Cir. 2003).
83 *Id.* at 863.

3. Sackett v. United States Environmental Protection Agency, *622 F.3d 1139 (9th Cir. 2010).*

Plaintiffs Chantell and Michael Sackett (the Sacketts) appealed the United States District Court for the District of Idaho's dismissal of their suit seeking injunctive and declaratory relief against EPA for its denial of a hearing prior to enforcement of the CWA[84] in a federal court.[85] The United States Court of Appeals for the Ninth Circuit affirmed the district court, finding that the CWA precludes pre-enforcement judicial review and that such preclusion comports with due process.

The Sacketts used sand and gravel to fill in most of a small parcel of undeveloped land in Idaho; six months later, EPA issued a compliance order against them. Alleging that the parcel is a wetland subject to the CWA and that filling the parcel without a permit violated the CWA, the order both directed the Sacketts to restore the parcel to its original condition and alerted them to possible civil or administrative fines. Wishing to challenge the finding that the parcel was subject to the CWA, the Sacketts requested and were denied a hearing by EPA.

They brought suit in the District Court of Idaho, challenging the compliance order on three grounds: 1) that it was arbitrary and capricious under the APA;[86] 2) that EPA's denial of a hearing violated due process; and 3) that the standard upon which the order was issued was unconstitutionally vague. The district court granted EPA's motion to dismiss for lack of subject matter jurisdiction[87] because it found that the CWA precludes pre-enforcement judicial review of compliance orders. The Sacketts appealed and, pursuant to 28 U.S.C. § 1291,[88] the Ninth Circuit had jurisdiction over the case. The court reconsiders dismissals for lack of subject matter jurisdiction under a de novo standard of review.[89]

In evaluating the Sacketts' case, the Ninth Circuit first determined whether express language in the CWA precludes judicial review. Under the CWA, EPA has its choice of three main civil enforcement options: administrative penalties,[90] civil enforcement actions,[91] and "compliance orders."[92] Under this scheme, EPA has to sue in federal court to enforce the compliance order; however, no language in the provision authorizing the

84 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

85 *Id.* § 1319(a)(3).

86 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006). The APA provides for review under an arbitrary and capricious standard in Section 706. *Id.* § 706(2)(A).

87 FED. R. CIV. P. 12(b)(1).

88 Final Decision of District Courts, 28 U.S.C. § 1291 (2006).

89 Mangano v. United States, 529 F.3d 1243, 1245 n.2 (9th Cir. 2008).

90 Federal Water Pollution Control Act, 33 U.S.C. § 1319(g) (2006).

91 *Id.* § 1319(g)(4).

92 *Id.* § 1319(a). "A compliance order is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." S. Pines Assocs. v. United States, 912 F.2d 713, 715 (4th Cir. 1990).

orders expressly precludes pre-enforcement judicial review.[93] Thus, finding no express language of preclusion, the court went on to apply the implied preclusion analysis as set out in *Block v. Community Nutrition Institute*.[94]

In order to determine whether the CWA impliedly precludes judicial review, the Ninth Circuit looked first to the statutory scheme and the nature of the administrative action involved.[95] It reasoned that preclusion here would not only eliminate the agency's choice of enforcement options, but also would disrupt Congress's intention that all challenges to the order are brought in a single proceeding. Second, the court looked to the objectives of the statutory scheme and determined that the CWA was intended to provide EPA with an efficient process for alerting violators of compliance issues without immediate entanglement in litigation. Third, it drew evidence of preclusion from the legislative history of the CWA as being modeled on the Clean Air Act (CAA),[96] during the legislative process of which the relevant committee deleted provisions that would have provided for pre-enforcement review.[97] In sum, the Ninth Circuit found it "fairly discernible" that Congress intended to preclude pre-enforcement review of the compliance orders.

The Ninth Circuit next turned to the Sacketts' due process complaint, which the Sacketts grounded in an Eleventh Circuit decision[98] taking issue with language in the CWA authorizing EPA to issue compliance orders "on the basis of any information available"[99] and subsequently imposing civil penalties for any violation of the order.[100] Finding that the provision in question—specifically the term "any order"—was fairly susceptible to an equally plausible interpretation and mindful of the Supreme Court's

93 33 U.S.C. § 1319(a)(3) (2006)("Whenever on the basis of any information available to him the Administrator finds that any person is in violation of Section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with [33 U.S.C. § 1319(b)].").

94 467 U.S. 340, 351 (1984) ("[T]he presumption favoring judicial review [is] overcome[] whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" (quoting Data Processing Serv. v. Camp, 397 U.S. 150, 157 (1970))). The preclusion of judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345.

95 In conducting its analysis, the court noted that the issue of whether the CWA precluded pre-enforcement review of compliance orders was an issue of first impression for the Ninth Circuit, and it turned to other circuits, which have found implied preclusion of judicial review. Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418 (6th Cir. 1994); Hoffman Grp., Inc. v. U.S. Envtl. Prot. Agency, 902 F.2d 567 (7th Cir. 1990); *S. Pines Assocs.*, 912 F.2d 713 (4th Cir. 1990).

96 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

97 Sackett v. U.S. Envtl. Prot. Agency, 622 F.3d 1139, 1144 (9th Cir. 2010) ("At least one court has inferred from this deletion that it was intended to preclude pre-enforcement judicial review of compliance orders." (citing Lloyd A. Fry Roofing Co. v. U.S. Envtl. Prot. Agency, 554 F.2d 885, 890 (8th Cir. 1977))).

98 Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1260 (11th Cir. 2003).

99 Federal Water Pollution Control Act, 33 U.S.C. § 1319(a)(3) (2006).

100 *Id.* § 1319(d) (providing that "any person who violates any order issued by the Administrator under [33 U.S.C. § 1319(a)], shall be subject to a civil penalty . . . for each violation").

admonition to construe statutes so as to save them from unconstitutionality,[101] the Ninth Circuit declined to adopt the Sacketts' reading, which would subject CWA violators to substantial penalties for violation of compliance orders issued on the basis of minimal and unreliable evidence. Instead, the court determined that Section 1319(d) merely allows EPA to issue compliance orders and not to also enforce the penalties—such enforcement has to be ordered by a court, by a preponderance of the evidence.

The Sacketts offered one additional argument in support of their due process claim: the nature of the civil penalties was so coercive that it left them with "a constitutionally intolerable choice."[102] However, this argument failed to persuade the Ninth Circuit that the dangers of disobeying compliance orders rise to such a level so as to "foreclose all access to the courts" for two reasons.[103] First, the Sacketts could simply apply for a permit, and once denied, seek review of that final agency action.[104] Indeed, the court notes that the CWA was intended to "channel[] judicial review through the affirmative permitting process."[105] Second, the actual penalties are committed to judicial, not administrative, discretion in accordance with several factors that give consideration to an array of case-specific equities.[106]

The Ninth Circuit concluded that the CWA impliedly precludes judicial review of EPA's issuance of compliance orders and that penalties assessed pursuant to such orders are subject to the "traditional rules of evidence and burdens of proof," in such a manner that they do not violate the recipient's due process rights.[107]

B. The Clean Air Act

1. Association of American Railroads v. South Coast Air Quality Management, *622 F.3d 1094 (9th Cir. 2010).*

Two railroad companies and a national trade association (collectively the Railroads) filed suit to enjoin the South Coast Air Quality Management District (the District) from enforcement of rules regulating air pollution

101 *Sackett*, 622 F.3d at 1145 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

102 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 218 (1994).

103 *Id.*

104 *See* 33 C.F.R. § 331.10 (2010); *see also* Administrative Procedure Act, 5 U.S.C. § 704 (2006).

105 *Sackett*, 622 F.3d at 1146; *see* Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 19, (2000) (noting distinction between preclusion and postponement of review); United States v. Dunifer, 219 F.3d 1004, 1008 (9th Cir. 2000) (distinguishing cases where there is no opportunity for judicial review) (citations omitted).

106 *See* Federal Water Pollution Control Act, 33 U.S.C. § 1319(d) (2006) (directing courts to assess penalties on these factors: 1) the seriousness of the violation, 2) the economic benefit resulting from the violation, 3) any history of CWA violations, 4) good-faith efforts to comply, 5) the economic impact of the penalty on the violator, and 6) such other matters as justice may require).

107 *Sackett*, 622 F.3d at 1147.

caused by idling trains.[108] After a bench trial, the United States District Court for the Central District of California held that the Interstate Commerce Commission Termination Act of 1995 (ICCTA)[109] preempted the state regulations. The United States Court of Appeals for the Ninth Circuit affirmed, finding that the federal statute expressly preempts local regulations when they are 1) not rules of general applicability or 2) lack "the force and effect of federal law"[110] under the CAA.[111]

In California, thirty-five air quality management districts have authority to promulgate rules with the force and effect of state law so long as they meet all procedural and other state law requirements.[112] Moreover, each district drafts and proposes an air quality management plan for its region that, if approved by the California Air Resources Board (CARB), becomes part of the statewide plan.[113] CARB in turn, submits the statewide plan to the EPA as part of the state implementation plan (SIP) under the CAA.[114] After EPA approves the rules, they "have the force and effect of federal law."[115]

The Railroads challenged three rules promulgated by the District; one limiting the emissions an idling train can produce through various alternative means and two others that impose reporting requirements and potential penalties on operators. In the district court, the Railroads argued, and the court agreed, that ICCTA, which deregulates the railroad industry, preempts the state agency's higher emission regulations.[116] The District timely appealed the district court's permanent injunction precluding enforcement of the California regulations and the Ninth Circuit reviewed the preemption question de novo.[117]

The Ninth Circuit affirmed the district court on several grounds. First, it found that ICCTA contains express language of preemption: "the remedies provided under this part with respect to regulation of rail transportation are exclusive and *preempt the remedies provided under Federal or State law*."[118] Second, on the basis of prior precedent (decisions by the Surface Transportation Board (STB) and by sister circuits) the Ninth Circuit found that Congress had intended to preempt most state and local regulation of

108 Plaintiffs include the Association of American Railroads, Burlington Northern Santa Fe Railway Company, and Union Pacific Railroad Company.

109 Interstate Commerce Commission of 1995, Pub. L. No. 104-88, 109 Stat. 803.

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

111 Clean Air Act, 42 U.S.C §§ 7401–7671q (2006).

112 CAL. HEALTH & SAFETY CODE § 40001 (West 2006).

113 *Id.* § 40460.

114 *Id.*; *see* Union Electric Co. v. U.S. Envtl. Prot. Agency, 427 U.S. 246, 249–50 (1976) (discussing the operation of state implementation plans under the CAA).

115 *Safe Air for Everyone*, 488 F.3d at 1091.

116 *See generally* DHX, Inc. v. Surface Transp. Bd., 501 F.3d 1080, 1082–83 (9th Cir. 2007).

117 J & G Sales v. Truscott, 473 F.3d 1043, 1047 (9th Cir. 2007).

118 Ass'n of Am. R.R. v. South Coast Air Quality Management, 622 F.3d 1094, 1097 (9th Cir. 2010) (quoting 49 U.S.C. § 10501(b) (2006)) (emphasis altered to highlight the final clause).

railroads.[119] Third, while courts should strive to harmonize any conflict between ICCTA and federal law that would, if possible, give effect to both,[120] the Ninth Circuit noted that different rules apply where it conflicts with state or local law.

The Ninth Circuit, as other circuits have done, rejected the argument that ICCTA preempts only economic regulation and not, as in this case, environmental regulation.[121] ICCTA does not generally preempt rules of general applicability that do not unreasonably burden interstate commerce.[122] However, ICCTA does preempt "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation."[123] According to the STB, this scheme maintains at least two roles for state and local agencies: 1) to the extent that state and local rules find approval under the CAA as part of a SIP,[124] courts will harmonize those rules with ICCTA and 2) so long as the state and local regulations do not burden railroad activity there would be no grounds for preemption despite those rules' lack of federal authority.[125]

The Ninth Circuit concluded that the District's regulations of idling trains' emissions does not carry the weight of federal law because it has not yet been submitted to CARB, and CARB has not yet submitted it to the EPA to be included in the SIP.[126] Thus, because the regulations are not yet a part of the SIP under the CAA, they have only the force and effect of state law. ICCTA preempts state law unless it is of general applicability with only incidental effects on railroad activity. Since "[t]he rules apply exclusively and directly to railroad activity," they "plainly cannot meet the test." Therefore, the Ninth Circuit held that ICCTA preempts these regulations, making the regulations invalid.

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119 *See, e.g.*, City of Auburn v. United States, 154 F.3d 1025, 1029–31 (9th Cir. 1998); *DHX, Inc.*, 501 F.3d at 1086 (applying *Chevron* deference to decisions of the Surface Transportation Board).

120 *In re* Bos. & Me. Corp., No. 33971, 2001 WL 458685, at *6 n.28 (S.T.B. Apr. 30, 2001) (citing Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996)); Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 133–34 (1974); Unocal Corp. v. Kaabipour, 177 F.3d 755, 769 (9th Cir. 1999).

121 *Ass'n of Am. R.R.*, 622 F.3d at 1098; *City of Auburn*, 154 F.3d at 1031; N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007).

122 *In re* Bos. & Me. Corp., 2001 WL 458685, at *4–6; *see also In re* Cities of Auburn & Kent, Wash., No. 33200, 1997 WL 362017, at *4–5 (S.T.B. July 1, 1997) (discussing ICCTA preemption of state and local laws).

123 Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001); *see also N.Y. Susquehanna & W. Ry. Corp.*, 500 F.3d at 252 (quoting the above language and concluding that "[w]hat matters is the degree to which the challenged regulation burdens rail transportation"); Franks Inv. Co. v. Union Pac. R.R. Co., 593 F.3d 404, 410 (5th Cir. 2010) (en banc) (agreeing with that "persuasive" interpretation of the scope of ICCTA preemption).

124 Clean Air Act, 42 U.S.C. § 7410 (2006).

125 *See, e.g.*, *In re* Bos. & Me. Corp. & Town of Ayer, Mass., 2001 WL 458685, at *5 ("[N]othing in Section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the [CAA and the federal clean water statutes].").

126 To carry the force and effect of federal law, all parts of a SIP must be approved by the EPA. Any part of the SIP not yet approved by the EPA does not carry the force and effect of federal law.

2. South Coast Air Quality Management District v. Federal Energy Regulatory Commission, *621 F.3d 1085 (9th Cir. 2010).*

The South Coast Air Quality Management District (South Coast) petitioned for review of orders of the Federal Energy Regulatory Commission (FERC)[127] approving a liquefied natural gas (LNG) pipeline expansion project to allow northward flow of foreign-sourced natural gas from Mexico into southern California. On direct review, the United States Court of Appeals for the Ninth Circuit denied South Coast's petition holding that FERC adequately considered the relevant environmental impacts in its environmental impact statement (EIS), reasonably relied on the state regulatory agency's natural gas quality standards, did not violate the Natural Gas Act (NGA),[128] and was not required to conduct a conformity determination for end-use burning under the CAA.[129]

The court addressed the National Environmental Policy Act (NEPA),[130] NGA, and CAA claims in turn. The court first explained natural gas standards, the LNG transport process, and FERC's narrow jurisdictional role in regulating natural gas under the NGA. The court explained how the Wobbe Index (WI) measures natural gas: Gas with a higher WI produces more heat because it burns at a higher temperature but as the WI increases so do emissions of nitrogen oxides (NO_x), which are a precursor to ozone and a regulated pollutant under the CAA. The project proposed by North Baja Pipeline, LLC (North Baja) would expand an existing pipeline that currently allows only the southward flow of natural gas from Arizona through California and into Mexico to allow natural gas extracted in Mexico to flow north to end-users in southern California. Because gases with different WI's are often mixed during transport, the exact WI of the mixture that would eventually be burned in California is unknown. However, FERC conditioned the project's approval on the requirement that gas being delivered by North Baja "meet[] the strictest applicable gas quality standards imposed by state regulatory agencies on downstream local distribution companies and pipelines."[131] This condition would require that the delivered gas have WI no higher than the 1385 limit set by the California Public Utilities Commission (CPUC). While the WI limit set by CPUC is 1385, the current average WI of gas burned in the relevant area is 1322.[132] Because the proposed project would ultimately allow for gas to be burned in the Basin with a WI higher than that currently being burned, South Coast claimed that

127 Intervening in support of FERC were Public Utilities Commission of the State of California, Sempra LNG Marketing Corp., North Baja Pipeline, LLC., Shell Energy of North America, San Diego Gas & Electric Company, and Southern California Gas Company.

128 Natural Gas Act of 1938, 15 U.S.C. § 717 (2006).

129 Clean Air Act, 42 U.S.C. §§ 7401–7674q (2006).

130 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

131 S. Coast Air Quality Mgmt. Dist. v. Fed. Energy Regulatory Comm'n, 621 F.3d 1085, 1093 (9th Cir. 2010).

132 The area of concern is the Basin Region of southern California, which consists mainly of Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernardino Counties. This area comprises the jurisdictional area of South Coast.

1) FERC was required to consider the effects of this end-use burning in its NEPA analysis, and 2) that it failed to adequately make this consideration in its EIS.

NEPA requires a federal agency, "to the fullest extent possible," to prepare a detailed EIS of the impacts of "major Federal actions significantly affecting the quality of the human environment."[133] Major federal actions are defined as "actions with effects that may be major and which are potentially subject to Federal control and responsibility."[134] NEPA does not require particular results, but only imposes a procedural requirement upon agencies to consider the environmental impacts of their actions.[135] The court reviewed FERC's NEPA decisions under the arbitrary and capricious standard to determine if the agency adequately considered and disclosed the environmental impacts of the proposed actions. This adequacy determination involved two separate issues; however, the court only considered the second issue of whether, assuming it was obligated to do so in its EIS, FERC adequately considered the impacts of burning North Baja gas by end-users in the Basin.[136] The court noted that FERC acknowledged the potential environmental effects stemming from the project, and determined that it be conditioned upon compliance with CPUC's maximum WI of 1385. FERC reasoned that consumption of gas meeting the 1385 standard set by CPUC, "*by definition*, should not result in a material increase in air pollutant emissions."[137] With this in mind, the court found that FERC explicitly considered the impact of downstream emissions by end-users and imposed what it believed to be effective mitigation measures. This explicit consideration coupled with what the court regarded as a "significant amount of uncertainty regarding the . . . ultimate impact of burning imported natural gas delivered by North Baja"[138] led the court to find FERC's NEPA analysis adequate with regard to these effects.

Having found FERC's analysis adequate, the court turned to whether FERC's reliance on the CPUC standards was arbitrary and capricious. South Coast attempted to show that the CPUC standards were insufficient, thereby rendering FERC's reliance on them arbitrary and capricious. After a detailed explanation of the process and reasoning CPUC employed in promulgating its standards, the court noted that even if CPUC's conclusions were incorrect, FERC's reliance on the CPUC standards must simply be

133 42 U.S.C. § 4321 (2006).

134 40 C.F.R. § 1508.18 (2010).

135 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

136 The first issue, the court explained, was whether FERC had an obligation to consider the impacts of end-use burning in the first place. Because the court found that FERC did adequately consider these impacts, it found no need to examine the question of whether or not this consideration was within the scope required by NEPA.

137 *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d 1085, 1093 (9th Cir. 2010) (emphasis in original).

138 *Id.* at 1094. Further uncertainties included: "1) the WI for the gas ultimately delivered to the Basin, due to blending of gasses with different WI values . . . at the North Baja facilities and within the California distribution system itself; and 2) the eventual end-users of the gas in the Basin area and the amount consumed." *Id.*

reasonable.[139] The court opined that the CPUC determination "was the subject of a lengthy decision making process subject to ample challenges by South Coast."[140] Accordingly, the court found that FERC's reliance on the CPUC standards was in no way unreasonable or an abuse of discretion.

The court next turned to South Coast's claim that FERC violated the NGA in authorizing the pipeline expansion project. Because "Congress has vested considerable discretion in FERC under the NGA, the burden is upon [the petitioner] to show it has been abused."[141] In evaluating a proposal for a certificate of public necessity to authorize a project such as this, FERC must balance several factors to determine that the proposed action is or will be required by public necessity.[142] "FERC must consider all factors bearing on the public interest . . . [including] the proposal's market support, economic, operational, and competitive benefits, and environmental impact."[143] The court will uphold FERC's determination if it is supported by "substantial evidence," which is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[144] The court reiterated that in FERC's NEPA analysis it adequately considered the environmental effects of the North Baja project. Furthermore, FERC determined that the project would have a positive supply-side economic effect making natural gas a more "attractive fuel when compared to more environmentally damaging alternatives."[145] With this in mind, FERC determined that the project, as conditioned upon compliance with the CPUC standards, would serve the public interest. The court found that substantial evidence supported this determination and held that South Coast had failed to meet its burden of showing that FERC abused its discretion under the NGA.

Finally, the court addressed South Coast's claim that FERC violated the CAA by not preparing a conformity analysis relating to the project. The CAA requires a conformity analysis when an agency's actions might result in "direct" or "indirect" emissions above EPA thresholds, thus impeding a state's ability to meet national ambient air quality standards.[146] The court

139 *See* Fuel Safe Wash. v. Fed. Energy Regulatory Comm'n, 389 F.3d 1313, 1332 (10th Cir. 2004) (concluding that FERC's failure to analyze all reasonably foreseeable earthquakes did not render its mitigation analysis inadequate; FERC considered the relevant state agency's view as it was obligated to do and made a reasoned decision between two conflicting views).

140 *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d at 1096. South Coast had challenged the CPUC decision process and the standards ultimately promulgated in a previous California State Court action. S. Coast Air Quality Mgmt Dist. v. Cal. Pub. Utils. Comm'n, No. S151156, 2008 Cal. LEXIS 8866 (Cal. July 16, 2008). The California Supreme Court's denial of South Coast's petition for review of the CPUC order in that case collaterally estopped South Coast from attacking the CPUC determination in this proceeding.

141 *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d at 1099 (quoting Cal. Gas Producers Ass'n v. Fed. Power Comm'n, 383 F.2d 645, 648 (9th Cir. 1967)).

142 Natural Gas Act, 15 U.S.C. § 717f(e) (2006).

143 *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d at 1099 (citing Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61227, ¶ 61743 (1999)).

144 Bear Lake Watch, Inc. v. Fed. Energy Regulatory Comm'n, 324 F.3d 1071, 1076 (9th Cir. 2003).

145 *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d at 1099.

146 40 C.F.R. §§ 93.150(b), 93.153(a)–(b) (2010).

reviewed FERC's determination that a conformity analysis was unnecessary under the arbitrary and capricious standard[147] but, because FERC is not the agency charged with administering the CAA, the court reviewed FERC's interpretations of the Act de novo.[148] EPA's rules define direct emissions as those that are caused by the action and occur at the same time and place as the action.[149] Indirect emissions are those that are caused by the action but occur later in time or are farther removed in distance, but are reasonably foreseeable, *and* are practicably controlled, and will remain controlled by the federal agency, due to the agency's continuing responsibility.[150] Here the court found, and FERC acknowledged that, but for the approval of the North Baja project, the resulting emissions by end-users would not occur. In addition, South Coast argued that FERC's requirement that North Baja report back on progress created a "continuing program responsibility."[151] However, because the CPUC, and not FERC, would maintain control over the delivered gas and subsequent emissions, FERC argued, and the court agreed, that the mere fact that North Baja must comply with the CPUC standards as a condition of FERC's approval, does not give rise to a continuing responsibility over emissions. FERC conditioned its approval on the delivered gas meeting the "strictest applicable . . . standards imposed by state regulatory agencies."[152] Concluding that ultimate control over the standards rests with the state, the court declined to agree that FERC exercised practicable and continuing control over the project.

In addition to FERC not retaining control, the court found that resulting emissions were not foreseeable because "reasonably foreseeable" emissions, by definition, must be identifiable at the time the conformity determination is made. As the court had already discussed, due to uncertainties regarding the amount of gas to be delivered, and the WI of the gas to ultimately be burned, such emissions are not identifiable, and thus by definition are not reasonably foreseeable. Having found that resulting emissions were not reasonably foreseeable and that FERC retained no control over such emissions, the court held that FERC was not obligated to perform a conformity analysis.

In summary, the court denied South Coast's petition for review of FERC's approval of the North Baja pipeline expansion, holding that FERC adequately considered the relevant environmental impacts in its EIS, reasonably relied on CPUC's natural gas quality standards, did not violate the NGA, and was not required to conduct a conformity determination for end-use burning under the CAA.

147 *See* Vigil v. Leavitt, 381 F.3d 826, 833 (9th Cir. 2004).

148 Cal. Trout, Inc. v. Fed. Energy Regulatory Comm'n, 313 F.3d 1131, 1133–34 (9th Cir. 2002).

149 40 C.F.R. § 93.152 (2010).

150 *Id.*

151 *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d 1085, 1100 (9th Cir. 2010).

152 N. Baja Pipeline, LLC, 123 FERC ¶ 61073, ¶ 61627 (2008).

3. National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District, *627 F.3d 730 (9th Cir. 2010).*

The National Association of Home Builders (Home Builders) sued the San Joaquin Valley Unified Air Pollution Control District (District),[153] alleging that the CAA[154] preempted the District's rule adopting and enforcing emission control requirements for construction equipment. The United States District Court for the Eastern District of California held that the CAA did not preempt the rule and Home Builders appealed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling holding that the rule only regulated construction equipment "indirectly," and was therefore an indirect source review program not preempted by the CAA.[155]

The air in the San Joaquin Valley is of poor quality and contains dangerous levels of particulate matter and ozone pollution. Construction and development sites greatly contribute to levels of these pollutants in the Valley that far exceed federal air quality standards set by the EPA.[156] In order to fulfill its obligation under the CAA to bring the area into attainment of the federal air quality standards,[157] the District promulgated Rule 9510, which regulates emissions from certain development projects.[158] Rule 9510 requires a developer of a project to provide an "Air Impact Assessment" outlining the emissions produced by construction equipment "used or associated with the development project" and from the development itself, once it is up and running. Home Builders challenged Rule 9510 only as it applies to the regulation of construction equipment, arguing that the CAA preempts the provisions addressing emissions from such equipment. Rule 9510 requires that a developer determine a baseline level of emissions that would occur if an average amount of California construction equipment was employed to complete the project without mitigation effort. Rule 9510 then requires the developer to achieve an actual emission level that is equal to a 20% reduction in NO_x and a 45% reduction in PM_{10} emissions.[159]

The CAA regulates stationary and mobile sources of pollution separately, and gives EPA and the states various authority to carry out such regulation. Section 110(a)(5) of the CAA addresses "indirect sources" of pollution that do not fit neatly into either the stationary or mobile categories

153 Defendant–Appellees also included the Governing Board of the San Joaquin Valley Unified Air Pollution Control District. Environmental Defense Fund and Sierra Club intervened as Defendant–Intervenors–Appellees.

154 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

155 Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist. (*Home Builders*), 627 F.3d 730, 740 (9th Cir. 2010).

156 Contributing pollutants from these sites include particulate matter under 10 microns in diameter (PM_{10}) and nitrogen oxides (NO_x), which can be a chemical precursor to both ozone and particulate matter. *Id.* at 731–32.

157 42 U.S.C. § 7509(d) (2006).

158 *Home Builders*, 627 F.3d at 732; *see id.* at n.2.

159 Rule 9510 achieves this reduction in various ways, including the payment of fees to the District that it then uses to fund emission reductions elsewhere—thus, effectively purchasing air pollution offsets.

and allows states to develop "any indirect source review program."[160] The District adopted Rule 9510 under this Section.

The CAA defines an "indirect source" as "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution."[161] The District defended Rule 9510 based on the fact that it regulates emissions from construction sites, which constitute indirect sources. Home Builders, on the other hand, characterized Rule 9510 as a maneuver by the District to regulate emissions from nonroad vehicles, an undertaking prohibited by the CAA without EPA's approval. Home Builders relied on Section 209(e) of the CAA, that expressly prohibits states from adopting standards to control emissions from "[n]ew engines" smaller than 175 horsepower "which are used in construction equipment or vehicles."[162] In addition to this express preemption, subsection (2) of 209(e) creates an implied preemption of state regulations controlling emissions from "any nonroad vehicles or engines other than those referred to in [subsection (1)]" by requiring states to obtain EPA authorization prior to adopting such regulations.[163]

The court found that Section 209(e)(1) of the CAA only addresses regulations relating to "new" construction equipment—that is, "showroom new"—and that Rule 9510 does not regulate such "new" equipment.[164] Therefore, the court held that "Section 209(e) is inapplicable to Rule 9510 and cannot preempt it."[165]

The court further found that, though Section 209(e)(2) impliedly preempts regulations that "adopt and enforce standards and other requirements relating to the control of emissions from" construction equipment,[166] Rule 9510 does not regulate emissions from construction *equipment*, but, rather, regulates emissions from construction *sites*. The court found the fact that the District adopted Rule 9510 under the "indirect source review program" provision in Section 110(a)(5) of the CAA crucial to its holding that Section 209(e)(2) does not impliedly preempt Rule 9510.

Home Builders argued that Rule 9510 is not authorized under Section 110(a)(5) because it does not regulate construction sites, an indirect source, but rather directly regulates construction equipment, a direct source. The court disagreed with Home Builders, finding that Rule 9510 does in fact regulate sites because it calculates and regulates emissions on a site-specific

160 42 U.S.C. § 7410(a)(5)(A)(i) (2006).

161 *Id.* § 7410(a)(5)(C).

162 *Id.* § 7543(e)(1)(A).

163 *Id.* § 7543(e)(2); Pac. Merch. Shipping Ass'n v. Goldstene, 517 F.3d 1108, 1113 (9th Cir. 2008).

164 The court deferred to this definition of "new" in Section 209(e) based on EPA's interpretation of the term, upheld by the United States Court of Appeals for the D.C. Circuit under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–45 (1984). S*ee also* Engine Mfrs. Ass'n v. U.S. Envtl. Prot. Agency, 88 F.3d 1075, 1084–85 (D.C. Cir. 1996).

165 *Home Builders*, 627 F.3d 730, 735 (9th Cir. 2010).

166 42 U.S.C. § 7543(e)(2) (2006). Section 209(e)(2) addresses control of emissions from "any nonroad vehicles or engines other than those referred to in [Section 209(e)(1).]" *Id.* It was undisputed that construction equipment regulated by Rule 9510 qualifies as "nonroad vehicles or engines." *Home Builders*, 627 F.3d at 735.

basis, rather than on a vehicle- or engine-specific basis. The court found it important that Rule 9510 applies to certain types of developments, and not certain types of equipment. Thus, Rule 9510's requirements depend on the character of the site where the equipment is located, not on the character of the equipment itself. In light of this distinction, the court found that Rule 9510 regulates an "indirect source" and, thus, the plain language of Section 110(a)(5) affirmatively authorized the Rule.[167]

Before moving on to examine the substance of Home Builders's implied preemption claim, the court briefly discussed the history of the "indirect source review program," and the significant oddity that would occur if Section 209(e) of the Act nonetheless preempted the program. The court determined the relevant inquiry is not whether Rule 9510 creates a "standard," but whether the Rule creates a "standard or other requirement 'relating to the control of emissions from [construction equipment].'"[168] Home Builders focused its argument in favor of preemption on the fact that Rule 9510 created a standard; however the court found Home Builders's argument irrelevant in light of the relevant inquiry's focus on controlling emissions. Ultimately, the court found that though Rule 9510 does create a standard, this standard is aimed at emissions from an indirect source—the development site as a whole—not emissions from construction equipment. Home Builders characterized this distinction as a farce, pointing out that it was merely an indirect way to regulate construction equipment. However, the court found that the CAA itself necessarily contemplated this exact effect.[169] The court determined that Rule 9510's site-based regulations, rather than vehicle, engine, or fleet based regulations, not only affirmatively authorize Rule 9510 under Section 110(a)(5), but also allow it to avoid preemption under Section 209(e)(2) of the Act. The court held that because Rule 9510 measures emissions on a "facility-by-facility" basis rather than on an engine, vehicle, or fleet basis,[170] its regulation of construction equipment is indirect, and Section 209(e) of the Act does not preempt the Rule.

In summary, the Ninth Circuit found that Rule 9510 neither regulates "new" construction equipment, nor directly regulates individual vehicles or fleets of construction vehicles such that Section 209(e) of the CAA preempts the Rule.

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167 Again, an "indirect source" can be "real property," a "facility," "structure," or "installation." 42 U.S.C. § 7410(a)(5)(C) (2006). The court found construction sites fall within the ambit of the term "indirect source."

168 *Home Builders*, 627 F.3d at 739 (quoting 42 U.S.C. § 7543(e)(2)(A) (2006)).

169 *See id.* ("The Act, by allowing states to regulate indirect sources of pollution, necessarily contemplates imputing mobile sources of pollution to an indirect source as a whole.").

170 Home Builders also argued that Rule 9510 merely regulates groups or fleets or equipment rather than individual vehicles, a tactic similarly prohibited. The court agreed that group or fleet regulation is just as impermissible as individual vehicle regulation, but, again, reiterated that Rule 9510 regulated development sites, and only regulated equipment as an indirect consequence.

4. Association of Irritated Residents v. United States Environmental Protection Agency, *632 F.3d 584 (9th Cir. 2011).*

Interested entities[171] (collectively Petitioners) sought review of EPA's approval in part and disapproval in part of revisions to California's SIP concerning ozone nonattainment in the Los Angeles-South Coast Air Basin (South Coast) under the CAA.[172] Specifically, Petitioners argued that: 1) EPA's failure to require California to submit a revised attainment plan for the South Coast was arbitrary and capricious in light of the withdrawal of key control measures from the 2003 Attainment Plan; 2) the agency's approval of a control strategy (PEST-1), calling for continued implementation of a pesticide application element (Pesticide Element) of the 1997 and 1999 SIP revisions (1997/1999 SIP), violated the CAA since PEST-1 lacked enforceable control measures; and 3) the agency's failure to require transportation control measures (TCM)[173] violated the CAA because such measures were necessary to offset greater vehicle miles traveled (VMT). The United States Court of Appeals for the Ninth Circuit granted the petition as to each issue and remanded to EPA.

The Ninth Circuit first described EPA's and California's responsibility to improve South Coast air quality to meet National Ambient Air Quality Standards (NAAQS)[174] for ozone in light of the basin's designation as an area in *extreme* nonattainment.[175] To satisfy NAAQS, states establish region-specific SIPs that EPA ultimately approves, partially approves and partially disapproves, or conditionally approves; failure to submit or disapproval of a SIP tolls both a "sanctions clock" and a "Federal Implementation Plan (FIP) clock."[176] Further, the federal government may not support any state transportation project unless it conforms to the maximum amount of pollution, allocated in the motor vehicle emissions budget (MVEB),[177] and authorized in the SIP. Also, for nonattainment areas, states must submit a

171 Interested entities, the Association of Irritated Residents, El Comité para el Bienestar de Earlimart, and the Community of Children's Advocates Against Pesticide Poisoning (all unincorporated associations), petitioned respondents, the EPA, Lisa Jackson, Administrator of the EPA, and Laura Yoshii, Regional Administrator of Region IX of the EPA. The Natural Resources Defense Council, Inc. (NRDC), petitioned respondent EPA.

172 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006); Ass'n of Irritated Residents v. U.S. Envtl. Prot. Agency (*Irritated Residents*), 632 F.3d 584, 588 (9th Cir. 2011) ("Under the [CAA], states have primary responsibility for ensuring that the quality of their air satisfies the NAAQS, and they must detail their efforts in a [SIP] for each region within that state.").

173 42 U.S.C. § 7511a(d)(1)(A) (2006) (requiring the State to adopt enforceable "[TCMs] to offset any growth in emissions from growth in [VMT]").

174 *Id.* §§ 7408–7409.

175 1994 South Coast Ozone SIP-and State Strategy, 73 Fed. Reg. 63,408, 63,409 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52); 42 U.S.C. § 7407(d) (2006).

176 42 U.S.C. § 7509(a)–(b) (2006) (triggering a time period after which the state may face sanctions); *id.* § 7410(c)(1) (triggering a time period after which the EPA either approves the SIP or promulgates its own FIP).

177 *Id.* § 7506(c); 40 C.F.R. § 93.101 (2010).

SIP revision that includes an "attainment plan"[178] to achieve compliance and control measures to compensate for increased emissions due to greater VMT.[179]

Pursuant to the CAA, California submitted a SIP revision in 1994 and an updated version in 1999 that EPA subsequently approved (1997/1999 SIP). Having underestimated higher mobile source emissions and lower carrying capacities for ozone, California submitted a 2003 SIP Revision consisting of the "2003 Attainment Plan, PEST-1, and a demonstration that no transportation control measures were required"[180]—though, in 2008 California withdrew key control measures that were dedicated to offsetting increased vehicular emissions. Finally, in 2008 EPA proposed to approve what remained of the 2003 control measures (including PEST-1) and California's assertion that no TCMs were necessary in light of the state's "demonstration that there would be no growth in aggregate vehicle emissions."[181]

Petitioners presented three issues to the Ninth Circuit: 1) whether EPA's failure to evaluate the adequacy of California's existing 1997/1999 SIP was arbitrary and capricious, 2) whether EPA's approval of PEST-1 violated the CAA since PEST-1 lacks enforceable commitments, and 3) whether EPA violated the CAA by failing to require TCMs to compensate for greater vehicular emissions. First, rather than rely on California's attainment demonstration in the 1997/1999 SIP, EPA "knew, or should have known, of the inadequacy of the 1997/1999 SIP" when it partially disapproved the state's 2003 attainment demonstration that was based on updated emissions inventories. Moreover, the court highlighted EPA's "affirmative duty to evaluate the existing SIP and determine whether a new attainment demonstration was necessary to ensure California satisfies the [CAA's] attainment requirements."[182] The Ninth Circuit found support for such an affirmative duty in the CAA's requirement that EPA issue a FIP every time EPA disapproves a plan revision.[183] Relying upon the plain text of Section 7410(c)(1), controlling when EPA must issue a FIP, the court distinguished subsection (A)'s applicability to an instance when a state fails to make a *required* submission from subsection (B)'s applicability to *any* instance of EPA submission disapproval. Though the court agreed with EPA that it is irrational to require a FIP if the agency disapproves a state attempting to relax a stringent SIP, the court noted this was not such a case since EPA should have recognized the "serious deficiencies" in California's 1997/1999 SIP. The Ninth Circuit also referenced the legislative history of the CAA amendments in which a House Committee deleted language that would have

178 42 U.S.C. §§ 7410(a)(2)(A), 7511a(c)(2)(a), (d)–(e) (2006) (requiring that an attainment plan include 1) a control strategy and 2) an attainment demonstration showing how the strategy will achieve compliance within the statutory time frame).

179 *Id.* § 7511a(d)(1)(A).

180 *Irritated Residents*, 632 F.3d 584, 589 (9th Cir. 2011); *see also* Comité Para el Bienestar de Earlimart v. Warmerdam (*Warmerdam*), 539 F.3d 1062, 1072 (9th Cir. 2008) (holding that the enforceable element of the Pesticide Element was not included in the 1997/1999 SIP).

181 *Irritated Residents*, 632 F.3d at 590.

182 *Id.* (citing Hall v. U.S. Envtl. Prot. Agency, 273 F.3d 1146, 1159 (9th Cir. 2001)).

183 42 U.S.C. § 7401(c)(1) (2006).

granted EPA discretion to promulgate FIPs in the first instance.[184] Notwithstanding EPA's duty to promulgate a FIP under subsection (B), the court also held that since much of California's 2003 attainment plan was "required"[185] the agency had a duty to promulgate under subsection (A).

The court alternatively found support for EPA's affirmative duty to request a new attainment demonstration under the requirement that it issue a SIP call if it found an existing SIP was substantially inadequate.[186] In dismissing EPA's argument that Section 7410(k)(5) and case law[187] suggest the agency has sole discretion whether (or not) to evaluate an existing SIP, the court determined such authority merely indicates that the Administrator must make a finding and that she has some discretion in evaluating the SIP for inadequacy. In sum, EPA did not have unlimited discretion to ignore evidence in the 2003 SIP Revision indicating that the 1997/1999 SIP "might be substantially inadequate."[188] Rather, the agency had an affirmative duty to ensure that California comply with NAAQS through promulgating a FIP, issuing sanctions, or perhaps a SIP call. Thus, the Ninth Circuit held that EPA's failure to request a new attainment demonstration was arbitrary and capricious especially in light of the CAA's purpose: "ensuring states come into compliance with clean air standards."[189]

The Ninth Circuit next evaluated Petitioners second claim, that EPA's 2009 approval of the PEST-1 portion of the 2003 SIP Revision—a continuance of the original Pesticide Element from the 1997/1999 plan—was arbitrary and capricious. Citing *Hall v. EPA*,[190] the court dismissed EPA's argument that either approval or disapproval would result in continuance of a sufficient status quo and reiterated EPA's duty to review the whole plan. The court concluded that EPA's approval of PEST-1, in the face of certain knowledge that the Pesticide Element lacked enforceable commitments after the 2008 *Warmerdam* decision,[191] represented the causal link to Petitioners' injuries; and, disapproval of California's SIP on remand would toll the FIP and sanction clocks, thus affording sufficient redressability. In sum, the court held that on remand EPA must evaluate whether the Pesticide Element has sufficient enforceable commitments.

184 Coal. for Clean Air v. S. Cal. Edison Co., 971 F.2d 219, 223 (9th Cir. 1992) (citing S. 1630, 101st Cong., § 105 (1989)).

185 The court referenced California's duty to revise its SIP with updated emissions inventories every three years pursuant to Sections 7502(c)(3) and 7511a(1)(3)(A), and its obligation to ensure its MVEBs remain current pursuant to the transportation conformity provisions at Section 7506(c)(1)(B). 42 U.S.C. §§ 7502(c)(3), 7506(c)(1)(B), 7511a(1)(3)(A) (2006).

186 *Id.* § 7410(k)(5).

187 Sierra Club v. Johnson, 541 F.3d 1257, 1265–66 (11th Cir. 2008); Citizens Against Ruining the Env't v. U.S. Envtl. Prot. Agency, 535 F.3d 670, 677–78 (7th Cir. 2008).

188 *Irritated Residents*, 632 F.3d 584, 593 (9th Cir. 2011).

189 *Id.* at 593–94 (citing 42 U.S.C. § 7470 (2006)).

190 273 F.3d 1146, 1159 (9th Cir. 2001) (holding "EPA must be able to determine that, with the revisions in place, the whole 'plan as . . . revised' can meet the Act's attainment requirements" (quotes and omission in original)).

191 539 F.3d 1062, 1067 (9th Cir. 2008) (holding that the Wells Memorandum, which laid out enforceable commitments including the time period by which California would commit to adopting necessary regulations, was *not part* of the 1997/1999 SIP).

Finally, the Ninth Circuit assessed whether EPA's failure to require California to submit TCMs, to compensate for emissions from increased VMT, was arbitrary and capricious. Disagreement centered over whether the phrase "any growth in emissions" in Section 7511a(d)(1)(A) is measured in the aggregate[192] or solely from VMT. Under *Chevron*'s[193] two-step procedure, the court focused on the plain words of the statute and determined that EPA's interpretation erroneously gave effect to only the second clause.[194] Citing *United States v. Wenner*[195] for the proposition that specific provisions trump general provisions, the court determined that the first clause, unlike the second, considers using TCMs to reduce aggregate VMT—thus, Congress intended to use "motor vehicle emissions" in the context of aggregate emissions but "emissions from growth in [VMT]" in the context of VMT emissions.[196] The court next concluded that the legislative history also "clearly refutes" EPA's interpretation. First, a House Report explained that the correct baseline from which to determine whether a "growth in emissions" was due to increased VMT is the "level of vehicle emissions that would occur if VMT held constant in the area."[197] Second, a Senate Report also explained that "extreme areas are required to offset growth in [VMT] by implementing the [TCMs]."[198] Therefore, the Ninth Circuit held that since the statutory text and legislative history show that Congress spoke directly to the question at issue, the court need not defer to EPA's interpretation.

In summary the Ninth Circuit held that EPA's approval of the 2003 SIP Revision was arbitrary and capricious because the agency should have 1) required California to submit a revised attainment plan, 2) ensured that PEST-1 included enforceable commitments, and 3) required California to include TCMs. For these reasons, the court granted the petition for review and remanded to the EPA for further proceedings.

5. MacClarence v. United States Environmental Protection Agency, *596 F.3d 1123 (9th Cir. 2010).*

Petitioner Bill MacClarence sought review of the EPA Administrator's final order denying MacClarence's request that the agency object to the permit issued by the Alaska Department of Environmental Conservation (ADEC) under Title V[199] of the CAA[200] for pollutants emitted by the British Petroleum (BP) production facility, GC 1. MacClarence alleged that, pursuant to the CAA, ADEC should have aggregated all pollutant emitting

192 *Irritated Residents*, 632 F.3d at 595 (listing numerous variables, including "vehicle turnover, tailpipe control standards, and use of alternative fuels" affecting the EPA's calculation of aggregate motor vehicle emissions).

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

194 42 U.S.C. § 7511a(d)(1)(A) (2006) (specifically, "or numbers of vehicle trips in such area").

195 351 F.3d 969, 975 (9th Cir. 2003).

196 *Irritated Residents*, 632 F.3d at 597.

197 H.R. REP. NO. 101-490, pt. 1, at 242 (1990).

198 S. REP. NO. 101-228, at 44 (1989).

199 Clean Air Act, 42 U.S.C. §§ 7661–7661f (2006).

200 *Id.* §§ 7401–7671q.

sources in the Prudhoe Bay Unit (PBU) into one stationary source,[201] instead of aggregating well pads associated with GC 1.[202] The Administrator found that MacClarence "failed to provide adequate information"[203] supporting his aggregation theory and "failed to demonstrate"[204] how aggregating only GC 1's well pads was in violation of the CAA.[205] The United States Court of Appeals for the Ninth Circuit upheld the Administrator's denial of MacClarence's petition because the Administrator did not unreasonably construe the petitioner's burden, under 42 U.S.C. § 7661d(b)(2), to demonstrate the permit was in violation of the CAA and such interpretation was neither arbitrary nor capricious.

BP operates all facilities that extract, process, and distribute oil at the 300 square mile PBU on the North Slope of Alaska. Moreover, BP owns up to 50.7% of these facilities, including GC 1. As an EPA-approved permitting authority, ADEC is primarily responsible for protecting air quality from deleterious effects of large-scale oil production.[206] Title V of the CAA established a permit system by which each major source[207] of pollutants must apply for a permit from an authorized permitting authority.[208] Title V and the prevention of significant deterioration (PSD) provisions of the CAA may require the permitting authority to aggregate the effects of air pollution from several unique single stationary sources into one major source.[209] Under both Title V and PSD regulations stationary sources may be aggregated if the sources 1) belong to the same industrial grouping, 2) are located on contiguous or adjacent properties, and 3) are under common control.[210] Title V also allows for the public to comment on draft permits. [211] If the EPA

201 40 C.F.R. § 70.2 (2009) (distinguishing a "major stationary source" from a "stationary source").

202 "Well pads" are the improved surface areas on which oil drilling takes place; the crude oil pumped from these well pads flows to production facilities, known as "gathering centers," including GC 1. MacClarence v. U.S. Envtl. Prot. Agency, 596 F.3d 1123, 1125 (9th Cir. 2010); *see also* AIR PERMITS PROGRAM, ALASKA DEP'T OF ENVTL. CONSERVATION, STATEMENT OF BASIS OF THE TERMS AND CONDITIONS FOR PERMIT NO. 182TVP01 (Revision 1), at 2–5 (2004), *available at* http://www.dec.state.ak.us/air/ap/docs/182tvp01r1.pdf (describing the GC 1 site in depth).

203 *MacClarence*, 596 F.3d at 1129.

204 *Id.*

205 *Id.* (considering the court found that the Administrator's first reason for denial was reasonable, the court did not review the second reason).

206 Clean Air Act, 42 U.S.C. § 7401(a)(3) (2006).

207 40 C.F.R. § 70.2 (2009).

208 42 U.S.C. § 7661a (2006).

209 *See* 40 C.F.R. § 70.2 (2009) (defining "major source" requiring a permit under Title V as a "stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under the common control of the same person . . . belonging to a single major industrial grouping . . . .)"); *id.* § 51.166(b)(6) (2009) (PSD regulation defining "[b]uilding, structure, facility, or installation" as "all the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person"). When facilities are "aggregated," their emissions are counted together in determining whether they are required to seek a Title V permit or are subject to the requirements of the PSD program. *MacClarence*, 596 F.3d at 1127.

210 40 C.F.R. § 51.166(b)(6) (PSD regulation); *id.* § 70.2 (Title V regulation).

211 *Id.* § 70.7(h).

Administrator determines that provisions of the permit are in violation of the CAA, the Administrator is required to object to issuance of the permit.[212] In such cases, the issuing authority must then revise the applicable provisions to comply with the CAA.[213] However, if the Administrator determines that provisions are in conformance, and does not object to the issuance within forty-five days, the permitting authority may issue the permit.[214] Any person then has sixty days from the end of EPA's forty-five day period to petition the Administrator to object—should the Administrator object at this point, it may revoke, reissue, or modify the permit.[215]

In 1997, prior to BP control of GC 1, ARCO applied for a Title V permit for the facility. In February 2002, ADEC submitted a draft permit for public comment. The draft permit did not aggregate the effects of GC 1 with other PBU facilities. MacClarence submitted comments arguing that the permit should aggregate the polluting effects of all PBU facilities. Later in April, the Pacific Northwest Regional Office of the EPA (EPA Region 10) also submitted comments in support of aggregation, noting that the facilities were adjacent, interdependent and under common control. In March 2003, ADEC submitted a significantly revised Title V draft permit: ADEC would issue a non-aggregated Title V permit to BP on the condition that BP aggregate GC 1 with all PBU facilities for the purposes of the modification requirements of ADEC's parallel PSD program. However, four months later, in response to BP comments, ADEC issued another revised draft permit disavowing any aggregation condition for Title V or PSD purposes.

Seeking consensus, EPA, ADEC, and BPA engaged in a collaborative effort, the result of which was a revised draft permit ("Revision 1"), introducing a new "hub and spoke"[216] aggregation model for both Title V and PSD purposes that aggregated only those adjacent well pads that supplied GC 1 with crude oil. Ultimately, ADEC declined to aggregate the entire PBU because: 1) the expansive region was at odds with the notion of proximity, 2) the uncertain environmental benefit of aggregation did not justify the complexity of administering such an expansive site, and 3) no precedent existed for such an expansive site.[217] After MacClarence petitioned the EPA Administrator to object to issuance of Revision 1, EPA responded, emphasizing the issuance of Revision 1 and the substantive changes including the "hub and spoke" aggregation model. On April 14, 2004, MacClarence re-petitioned the EPA Administrator, asserting that Revision 1 failed to explain why ADEC adopted a limited aggregation approach contradicting its earlier requirement of aggregation for PSD purposes. The Administrator denied MacClarence's request for an objection to Revision 1 on April 20, 2007, and MacClarence promptly petitioned the Ninth Circuit for review. The Ninth Circuit reviewed the reasonableness of the

212 42 U.S.C. § 7661d(b)(2) (2006).
213 *Id.* § 7661d(b)(3).
214 *Id.* § 7661d(b)(1), (2).
215 *Id.* § 7661(b)(1)–(3).
216 *MacClarence*, 596 F.3d 1123, 1128 (9th Cir. 2010).
217 *Id.* at 1128–29.

Administrator's decision-making process under the arbitrary and capricious standard of the APA.[218]

The issue presented to the Ninth Circuit was whether the Administrator permissibly construed MacClarence's burden, under 42 U.S.C. § 7661d(b)(2), to demonstrate that the permit did not comply with the CAA. Stated differently, the court evaluated whether the Administrator's conclusion, that MacClarence's failure to provide adequate support for his claim constituted a failure to demonstrate the permit's non-compliance, was a permissible construction of 42 U.S.C. § 7661d(b)(2). The Ninth Circuit relied on decisions by the Second, Sixth, Seventh, and Eleventh circuits [219] to conclude that the word "demonstrate" in 42 U.S.C. § 7661d(b)(2) is ambiguous.[220] In short, the plain meaning of "demonstrate," in the CAA context, inadequately expresses the type of evidence and the burden of proof against which the evidence is evaluated.

In light of MacClarence's allegations, unsupported with "references, legal analysis, or evidence,"[221] the court opined that the Administrator's interpretation of MacClarence's burden under 42 U.S.C. § 7661d(b)(2) was both reasonable and persuasive. First, the Administrator's conclusion that MacClarence's petition should include supporting documentation, demonstrating why the hub and spoke aggregation model is deficient, aligns with *Webster's New International Dictionary* definition of "demonstrate." Second, the gravity of 42 U.S.C. § 7661d(b)(2) and (3)'s mandate—requiring that either the Administrator revoke and reissue the permit, or the permitting authority postpone issuance until the nonconformance is corrected—justifies the need for supporting documentation. In essence, the Administrator's insistence that MacClarence properly support his assertion that all facilities in the PBU should be aggregated is both reasonable and persuasive considering that a non-compliant permit triggers the Administrator's mandatory duty to object. Therefore, the court considered

218 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2007) (an agency decision may only be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

219 *See* Sierra Club v. U.S. Envtl. Prot. Agency, 557 F.3d 401, 406 (6th Cir. 2009) ("Even though § 7661d(b)(2) compels the EPA to object whenever a petitioner demonstrates noncompliance, it does not say what 'demonstrates' means."); Citizens Against Ruining the Env't v. U.S. Envtl. Prot. Agency, 535 F.3d 670, 677–678 (7th Cir. 2008) ("[N]either the CAA nor its regulations define the term 'demonstrates.' Thus, the EPA has discretion under the statute to determine what a petition must show in order to make an adequate 'demonstration.'"); Sierra Club v. Johnson, 541 F.3d 1257, 1266 (11th Cir. 2008) ("Neither the [CAA] nor its regulations define the term 'demonstrates' or give context to how the Administrator should make this judgment."); N.Y. Pub. Interest Research Grp. v. Johnson, 427 F.3d 172, 179 (2d Cir. 2005) (implicitly accepting that "demonstrate" is ambiguous and moving on to whether EPA's interpretation is entitled to *Chevron* deference).

220 A court reviewing an agency's interpretation of a statute that it administers must first determine whether the statute itself evinces the clear, unambiguous intent of Congress, and, if so, give effect to that intent. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–843 (1984). If the statute is ambiguous, then the court must defer to the agency's interpretation if that interpretation "is based on a permissible construction of the statute." *Id.* at 843.

221 *MacClarence*, 596 F.3d at 1131.

such a reasonable and persuasive interpretation of the petitioner's burden under 42 U.S.C. § 7661d(b)(2) neither arbitrary, nor capricious.

Finally, the Ninth Circuit detailed what the Administrator determined were specific deficiencies of MacClarence's petition. Central to the Administrator's denial was that MacClarence failed to address why the Revision 1 permit's hub and spoke aggregation model did not comply with the CAA. Moreover, ADEC took care to explain in the Revision 1 permit's Statement of Purpose why it reversed course from a PBU-wide aggregation model to a hub and spoke model: "[t]he complexity of administering . . . and operating . . . a stationary source as large as the PBU without clear corresponding environmental benefit argues against [the aggregation of the entire PBU]."[222] The Ninth Circuit rejected MacClarence's argument that the Administrator impermissibly required him to challenge the reasonableness of ADEC's hub and spoke model. The Ninth Circuit found valid the Administrator's expectation that MacClarence address ADEC's reasoning in, rather than the reasonableness of, the final permit.

In summary, the Ninth Circuit concluded that the Administrator permissibly interpreted MacClarence's burden under 42 U.S.C. § 7661d(b)(2) to demonstrate that ADEC's final permit did not comply with the CAA. The court also held that Administrator's decision in denying MacClarence's petition was neither arbitrary nor capricious.

C. Comprehensive Environmental Response, Compensation, and Liability Act

1. United States v. Aerojet General Corp., *606 F.3d 1142 (9th Cir. 2010).*

Intervenors–Appellants[223] (collectively Applicants) appealed the denial of their application for intervention in an action between the United States (on behalf of the EPA) along with the California Department of Toxic Substances Control (DTSC) (collectively Plaintiffs) and a group of ten defendants[224] (collectively G10) seeking to settle their potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act[225] (CERCLA). Plaintiffs brought suit against the G10 in United States District Court for the Central District of California, and Applicants sought intervention to contest the entry of a consent decree between Plaintiffs and the G10.[226] The lower court denied the Applicants' intervention

222 *Id.* at 1133 (alterations in original).

223 Intervenors-Appellants were Aerojet General Corp., Art Weiss, Inc., Astro Seal, Inc., Del Ray Industrial Enterprises, Inc., Shelley Linderman (as Trustee of the Linderman Trust), M&T Company, Multi Chemical Products, Inc., Quaker Chemical Corporation, Time Realty Investments, Inc., Don Tonks, Roy Tonks, Tonks Properties, and Art Weiss.

224 The G10 were APW North America, Cardinal Industrial Finishes, Eemus Manufacturing Corp., International Medication Systems, Ltd., Norf James Jebbia Testamentary Trust, Roc-Aire Corp., Janneberg Marital Trust, Smittybilt, Inc., Southern California Edison Co., and Andruss Family Trust.

225 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

226 United States v. Aerojet Gen. Corp., 606 F.3d 1142, 1147–1148 (9th Cir. 2010).

and entered the consent decree.[227] The United States Court of Appeals for the Ninth Circuit reversed the lower court's denial of intervention, holding that potentially responsible parties (PRPs) may intervene of right under both Rule 24(a)(2)[228] of the Federal Rules of Civil Procedure and CERCLA Section 113(i).[229]

The case arose from groundwater contamination found at the South El Monte Operable Unit (SEMOU), one of eight operable units comprising the San Gabriel Basin groundwater reservoir in eastern Los Angeles County. EPA discovered volatile organic compounds (VOCs) contaminating the SEMOU in 1979 and sent Notice of Liability Letters to PRPs during the 1990s. EPA formulated a response plan and, in 2000, issued an Interim Record of Decision (IROD) calling for water providers to pump, treat, and sell the contaminated water to arrest the spread of and remediate the contamination. EPA estimated the cost of this plan at $28 million. EPA then notified 67 PRPs by letter pursuant to CERCLA Section 122(e)[230] and demanded that the parties demonstrate good faith efforts to implement the IROD. The water providers tasked with remediating the groundwater contamination (collectively Water Entities) entered into an agreement with thirteen PRPs, who agreed to provide $4.7 million to fund the VOC remediation.

After issuing the IROD, EPA determined that perchlorate was also contaminating the groundwater in the SEMOU and updated the IROD to deal with the perchlorate contamination. EPA estimated that the new remedial plan would cost $87 million. In March 2007, EPA, DTSC, Water Entities, and the G10 (all of which were among the thirteen parties to the original agreement with the Water Entities) entered into an agreement whereby the G10 would provide an additional $3.4 million towards perchlorate remediation. EPA filed the instant action against the G10 and lodged a proposed consent decree, which, if entered by the lower court, would have barred other PRPs, including the Applicants, from seeking contribution from the G10 pursuant to CERCLA Section 113(f)(2).[231] The United States Department of Justice published a notice of the proposed consent decree in the Federal Register and invited comments on it. Applicants[232] submitted comments alleging that the EPA had not provided sufficient information to justify the allocation of remedial costs. Later, the Applicants sought intervention of right in the suit against the G10 under Rule 24(a)(2) of the Federal Rules of Civil Procedure and CERCLA Section 113(i). The lower court denied the application for intervention and entered the consent decree, which the Applicants timely appealed.

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227 *Id.* at 1148.

228 FED. R. CIV. P. 24(a)(2).

229 42 U.S.C. § 9613(i) (2006).

230 *Id.* § 9622(e).

231 *Id.* § 9613(f)(2).

232 See *supra* note 223 for named Applicants, most of whom were defendants in the previous SEMOU litigation, *Aerojet*, 606 F.3d at 1147 n.1, and sought contribution from the Group of 13 and other PRPs. The district court stayed discovery to facilitate settlement negotiations and ultimately entered judgment approving the settlement. *Id.* at 1147.

The Ninth Circuit requires that an applicant for intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure 1) make timely motion, 2) claim a "significantly protectable" interest relating to the subject of the action, 3) be so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest as a practical matter, and 4) show that its interest is inadequately represented by the other parties.[233] The Ninth Circuit interprets these requirements broadly in favor of intervention and is guided by practical and equitable considerations in applying them.[234] The requirements for intervention under CERCLA Section 113(i) are the same as those for Rule 24(a)(2), except that rather than the burden being on the applicant to demonstrate that the representation of its interests by other parties is inadequate, the government must demonstrate that the representation of the applicant's interests by other parties is adequate. The Ninth Circuit reviews the district court's determination of timeliness for abuse of discretion and reviews de novo the district court's determination of the other three elements.[235]

While it was a matter of first impression to the Ninth Circuit, other circuits and district courts had addressed the question of whether non-settling PRPs have a significant protectable interest supporting intervention of right in an action to enter a consent decree between the government and settling PRPs. The Eighth and Tenth Circuits, along with some district courts, determined that non-settling PRPs have such a significant interest,[236] while other district courts had determined that the non-settling PRPs' interest was not sufficient.[237] The Ninth Circuit ultimately agreed with the Eighth and Tenth Circuits, holding that the interest of non-settling PRPs is sufficient to support intervention of right.

The Ninth Circuit requires that an applicant for intervention show a significantly protectable interest; one that is protectable under some law and related to a plaintiff's claims.[238] The Applicants asserted an interest in protecting their rights to contribution from the settling G10. While a non-settling PRP may seek contribution from other PRPs under CERCLA Section

233 California *ex rel.* Lockyer v. United States, 450 F.3d 436, 440 (9th Cir. 2006).

234 United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004).

235 *Id.* at 918–19.

236 United States v. Albert Inv. Co., 585 F.3d 1386, 1397–98 (10th Cir. 2009); United States v. Union Elec. Co., 64 F.3d 1152, 1166–67 (8th Cir. 1995); United States v. Exxonmobil Corp., 264 F.R.D. 242, 246–48 (N.D.W.Va. 2010); United States v. Acton Corp. *ex rel.* Vikoa, 131 F.R.D. 431, 433–34 (D.N.J. 1990).

237 *See* United States v. Acorn Eng'g Co., 221 F.R.D. 530, 538 (C.D. Cal. 2004) (holding that CERCLA Section 113(i), granting a right of intervention, must not include the right of a non-settling PRP to intervene in order to harmonize with Section 113(f)); United States v. ABC Indus., 153 F.R.D. 603, 607 (W.D. Mich. 1993) (holding the language of Section 113(i) is similar to Rule 24 of the Federal Rules of Civil Procedure, and it requires the same showing of interest as Rule 24(a)(2) to allow for intervention); Arizona v. Motorola, Inc., 139 F.R.D. 141, 146 (D. Ariz. 1991) (holding that allowing intervention would be inconsistent with "CERCLA's statutory scheme favoring early settlements and joint and several liability").

238 *Lockyer*, 450 F.3d at 441.

113(f)(1),[239] CERCLA Section 113(f)(2) bars non-settling PRPs from seeking contribution from PRPs that have reached a judicially-approved settlement with the government.[240] Therefore, the Applicants, as non-settling PRPs, would be subject to joint and several liability under CERCLA Section 107(a)[241] for the remedial costs remaining after the G10 settlement, yet would not be able to seek contribution from the G10 for those costs. The Ninth Circuit found that this potential bar to contribution directly affected Applicants' interests in protecting their contribution rights and in ensuring that the allocation of the remedial costs was fair and reasonable. In so finding, the Ninth Circuit disagreed with certain district courts that had found the interest was not significantly protectable because it is contingent on the non-settling PRPs being found liable and is therefore speculative.[242] The Ninth Circuit noted that under the terms of CERCLA Section 113(f)(1), both liable parties and potentially liable parties may seek contribution,[243] meaning that a party's interest in contribution arises before that party is found liable.

The Ninth Circuit then turned to whether Applicants' interests were protected by some law and related to the claims of the Plaintiffs. The Ninth Circuit noted that CERCLA provides that settlements be substantively fair, making Applicants' interests protected by law.[244] The resolution of the dispute between the G10 and the Plaintiffs would have a direct effect on the ability of Applicants to seek contribution, and therefore was related to Applicants' interests in maintaining their contribution rights.

The Ninth Circuit ultimately found that the clear language of CERCLA Section 113(i)[245] and its lack of language forbidding intervention by non-settling PRPs provided non-settling PRPs a right to intervene. However, the Ninth Circuit still chose to address some of the policy and legislative intent arguments made by some district courts in denying intervention to non-settling PRPs.[246] Primarily, these arguments were based in CERCLA's encouragement of expeditious settlements between the government and PRPs and the leverage that CERCLA gives to the government to encourage such settlements. To these arguments the Ninth Circuit replied that CERCLA also displays a countervailing emphasis on fairness and ensuring that the costs of remediation are borne equitably by those responsible for the contamination. The Ninth Circuit also noted that approval of a settlement will still provide contribution protection to the settling PRPs, and so the government retains significant leverage to encourage such settlements.

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239 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(f)(1) (2006).

240 *Id.* § 9613(f)(2).

241 *See id.* § 9607(a).

242 *See* United States v. Vasi, Nos. 5:90 CV 1167, 5:90 CV 1168, 1991 WL 557609, at *5 (N.D. Ohio Mar. 6, 1991); *Motorola*, 139 F.R.D. at 146.

243 42 U.S.C. § 9613(f)(1) (2006).

244 *Id.*

245 *Id.* § 9613(i).

246 *See Acorn*, 221 F.R.D. 530, 536–37 (C.D. Cal. 2004); *Motorola*, 139 F.R.D. at 145; *Vasi*, 1991 WL 557609 at *4.

Having found that the Applicants had a significantly protectable interest, the Ninth Circuit then turned to whether as a practical matter the Applicants' ability to protect that interest would be impaired if intervention was not allowed. The Ninth Circuit quickly determined, based on its discussion of whether Applicants' interests were significantly protectable, that Applicants' interests would be impaired by approval of the consent decree and the bar to contribution that it would impose. However, Ninth Circuit precedent established that an interest may not be impaired if the applicant for intervention has other means to protect that interest even in the absence of intervention.[247] Appellees contended that the notice and comment procedure protected Applicants' interests, a proposition embraced by some district courts.[248] The Ninth Circuit disagreed, determining instead that the interests of Plaintiffs and G10 were aligned once the consent decree was reached and that comments provided after negotiation of the consent decree would not likely convince the government to reopen the settlement negotiations. The Ninth Circuit found further support for this proposition in the statutory scheme of CERCLA, which reflects an intent to involve the input of non-parties to the settlement in determining the settlement's fairness, reasonableness, and consistency with CERCLA.

The parties to the case did not dispute the issues of timeliness or adequacy of representation. As to timeliness, the Ninth Circuit noted that the Applicants filed their motion to intervene within four months of learning of the proposed consent decree and prior to its entry by the district court. As to the adequacy of representation, under Rule 24(a)(2) the Ninth Circuit considers whether the interest of a present party dictates that the present party will make all of the applicant's arguments and is capable and willing to do so, as well as whether the applicant would offer elements necessary to the proceeding which the present parties would neglect.[249] While the burden of proving the adequacy or inadequacy of representation shifts depending on whether intervention is sought under Rule 24(a)(2) of the Federal Rules of Civil Procedure or CERCLA Section 113(i), the Ninth Circuit found that under either standard, Applicants' interests were not represented by Plaintiffs or G10. Both Plaintiffs and G10 had an interest in approval of the consent decree. Approval would bar Applicants from obtaining contribution from G10. This opposition of interests meant that neither Plaintiffs nor G10 could adequately represent Applicants' interests.

The Ninth Circuit found that non-settling PRPs have a right under both Rule 24(a)(2) of the Federal Rules of Civil Procedure and CERCLA Section 113(i) to intervene in proceedings in which the government and settling PRPs are seeking approval of a consent decree that would affect the non-settling PRPs' contribution rights. The district court's denial of Applicants' motion to intervene was therefore in error, so the Ninth Circuit

247 *Lockyer*, 450 F.3d 436, 442 (9th Cir. 2006).

248 *See Acorn*, 221 F.R.D. at 538–39; United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 577 (W.D. Wis. 1990).

249 Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003).

reversed the district court's denial of intervention and remanded the case to the district court.

2. California Department of Toxic Substances Control v. Hearthside Residential Corp., *613 F.3d 910 (9th Cir. 2010).*

Hearthside Residential Corporation (Hearthside) and the California Department of Toxic Substances Control (Department) jointly requested the United States District Court for the Central District of California to certify for appeal this question of first impression: whether property ownership under CERCLA[250] tolls from the date of filing the lawsuit or from the time a response-recovery claim accrues. The district court held, and the United States Court of Appeals for the Ninth Circuit agreed, that the date of accrual is the applicable time to determine property ownership.

In 1999, Hearthside purchased PCB-contaminated[251] wetlands in Huntington Beach and in 2002 entered a consent decree with the Department, agreeing to remediate the contamination. Determining that PCBs had leaked into adjacent residential parcels, the Department held Hearthside responsible for cleanup there as well. Hearthside disagreed and the Department itself contracted to clean the residential parcels between July 2002 and October 2003. In December 2005, a month after the Department certified completion of Hearthside's wetlands cleanup, Hearthside sold the wetlands to the California State Lands Commission.

In 2006, the Department sought reimbursement for the cleanup of the residential site, alleging that the wetlands were the source of the contamination and that Hearthside owned the wetlands at the time the Department incurred the costs of cleanup. Hearthside denied liability, arguing that "owner" status is determined at the time of filing, not when costs accrue, and it was therefore not responsible because it had sold the wetlands before the Department filed suit. The district court granted partial summary judgment in favor of the Department on the issue of ownership measurement by looking to the purposes of CERCLA,[252] but unable to find supporting case law, certified the question for immediate review. The Ninth Circuit applied de novo review[253] and affirmed the district court's decision after discussing the parties' arguments and examining the statutory context and purposes of CERCLA.

The Ninth Circuit began by framing the issue of ownership, determining that the type of potentially responsible party[254] in dispute was "the owner and

250 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

251 Polychlorinated biphenyls (PCBs) are manmade substances considered toxic to humans and animals.

252 42 U.S.C. §§ 9601–9675 (2006).

253 Bjustrom v. Trust One Mortgage Corp., 322 F.3d 1201, 1205 (9th Cir. 2003).

254 Under CERCLA, 42 U.S.C. §§ 9601–9675 (2006), four classes of parties may be held strictly liable for contamination, *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1878 (2009), jointly and severally, *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 945 (9th Cir.

operator of a vessel of facility"[255] under CERLCA. The Ninth Circuit determined that this category refers to "current" owners or operators;[256] however, CERCLA's definition of "owner" fails to specify the proper date from which to measure ownership.[257] The Department argued that, "ownership is measured from the cleanup date,"[258] relying on decisions from the Sixth and Fourth Circuits,[259] while Hearthside argued that "ownership is measured from the date the recovery action is filed," relying on an Eleventh Circuit decision.[260] However, the Ninth Circuit rejected all case law presented because in each case the ownership date was never in dispute.[261] Finally, because of an absence of legislative history, the Ninth Circuit looked directly to "the statutory scheme and the purposes animating CERCLA to determine congressional intent."[262]

First, in considering CERCLA's broader context, the Ninth Circuit found that measuring ownership from the date of cleanup is most consistent with the applicable statute of limitations. Either the completion of a "removal" action or the initiation of a "remedial" action tolls the statute.[263] This rule affords defendants "predictability and promptness,"[264] and it would undermine those protections to toll the statute from filing.[265] Therefore, the Ninth Circuit concluded that the statute of limitations provided strong contextual evidence of Congress's intention to view the "current owner" as the owner at the time of cleanup.[266]

2002), so that any single party may be responsible for the whole amount but can also sue other parties for contribution. *Fireman's Fund Ins. Co.*, 302 F.3d at 945.

255 42 U.S.C § 9607(a)(1) (2006).

256 *See* Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 881 (9th Cir. 2001) (en banc); accord, e.g., United States v. Capital Tax Corp., 545 F.3d 525, 530 (7th Cir. 2008); ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 456 (6th Cir. 2007).

257 42 U.S.C. § 9601(20) (2006).

258 California Dept. of Toxic Substances Control v. Hearthside Residential Corp. (*Hearthside*), 613 F.3d 910, 913 (9th Cir. 2010).

259 *See, e.g.*, AM Int'l, Inc. v. Int'l Forging Equip. Corp., 982 F.2d 989, 997 (6th Cir. 1993) (stating in passing that property ownership is measured "at the time of its cleanup" in a case where the ownership date was not at issue); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 840–41, 845 (4th Cir. 1992) (stating that the current owner is the one who "undertakes the task of cleaning up the environmental hazard," though the ownership date was not at issue because the same owner both cleaned up the property and filed the reimbursement suit).

260 United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 (11th Cir. 1990).

261 *Hearthside*, 613 F.3d at 913 ("We regard these statements as dicta rather than as 'an intended choice of a rule,' and therefore decline to accord them persuasive weight.").

262 *Id.* at 914 n.4; *see, e.g.*, *Carson Harbor Vill.*, 270 F.3d 863, 880, 885 nn.13–14 (9th Cir. 2001).

263 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9613(g)(2) (2006).

264 United States v. Hagege, 437 F.3d 943, 955 (9th Cir. 2006).

265 Subsequent owners would have little or no notice to the fact of liability if the statute could toll at any later point when the party who has completed remediation seeks reimbursement.

266 *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2008) ("Statutes of limitations are intended to provide notice to defendants of a claim before the underlying evidence becomes stale.").

Second, because CERCLA encourages responsible parties to remediate contamination promptly[267] and settle early,[268] the court determined that "a rule that sets current ownership at the time cleanup occurs," would best serve those purposes.[269] While a landowner who knows he will eventually be responsible for cleanup would have no incentive to delay, under Hearthside's position the landowner could delay completion until finding a buyer to assume responsibility at the time of filing.[270] Moreover, such a rule would have the perverse effect of requiring a lawsuit in every case. The Ninth Circuit explained that it is critical to the CERCLA settlement process that the regulated entity has influence over the remediation plan for which he is eventually responsible, and it would be unfair to enforce a remediation plan on a subsequent purchaser who had no say in its design. Finally, while Hearthside's proposed interpretation would provide a clear and simple date from which to measure ownership, the Ninth Circuit did not find it difficult in this case to sift through the facts; it determined that future courts, faced with more complex situations, would similarly be up to the task.

In summary, the Ninth Circuit affirmed the district court's decision and remanded the case for further proceedings not inconsistent with the holding that the time of accrual of cleanup is the proper measurement for current ownership liability.

II. INDIAN TREATY RIGHTS

1. United States v. Confederated Tribes of the Colville Indian Reservation, *606 F.3d 698 (9th Cir. 2010).*

The Confederated Tribes and Bands of the Yakama Indian Nation (Yakama) and the Confederated Tribes of the Colville Indian Reservation (Colville) on behalf of their Wenatchi Constituent Tribe (Wenatchi) dispute the United States District Court for the District of Oregon's holding as to an 1894 treaty agreement that the Yakama and Wenatchi share fishing rights in common at the "Wenatshapam Fishery" near present-day Leavenworth, Washington. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, holding with regard to the Wenatshapam Fishery that: 1) the 1894 negotiations' intent was to grant the Wenatchi fishing rights there; 2) the Yakama did not sell their fishing rights; and 3) both tribes retain non-exclusive fishing rights at the Wenatshapam Fishery.

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267 *Fireman's Fund Ins. Co.*, 302 F.3d at 947 ("A fundamental purpose and objective of CERCLA is to encourage the timely cleanup of hazardous waste sites.").

268 *Id.* at 948 (noting that "early settlement" allows for "energy and resources to be directed at site cleanup rather than protracted litigation").

269 *Hearthside*, 613 F.3d 910, 916 (9th Cir. 2010).

270 *See generally*, Anthony R. Chase & John Mixon, *CERCLA: Convey to a Pauper and Avoid Cost Recovery Under Section 107(A)(1)*, 33 ENVTL. L. 293, 301–06 (2003) (presenting a scenario in which "an owner may avoid cost-recovery liability by conveying the site to a willing pauper after learning about contamination, but before becoming specifically and personally obligated for cost recovery").

Many treaties written during the mid-nineteenth century sought to quickly extinguish Indian title by consolidating several tribal entities to facilitate easier treaty-making. Indeed, the Treaty with the Yakamas[271] (1855 Treaty) recognized fourteen separate tribal entities as a single tribe. In addition to specifications of the size and boundaries of the Yakama reservation, the treaty granted exclusive rights to fishing in the waters on or adjacent to the reservation and also reserved, "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."[272] Article X of this treaty, at the behest of Wenatchi tribal leaders, set aside a second, smaller reservation at the Wenatshapam Fishery (Article X Reservation), which the terms of the treaty recognized would be surveyed sometime in the future by order of the President.

During the next forty years, the Wenatchi continued to fish at the Wenatshapam location, believing they would be secure in their possession of the fishery, though the Department of the Interior (DOI) never conducted any survey. In 1893, prompted by the Yakama Reservation Indian Agent, Lynch, the acting Secretary of DOI (Secretary) authorized a survey. However, due to complaints of the new Yakama Reservation Agent, Erwin, who ordered the destruction of the prior survey materials, the Article X reservation was never surveyed at Wenatshapam but instead was designated for lands further off in the mountains.[273]

In December of 1893, acting on the authorization of the Secretary of DOI,[274] Agent Erwin proposed to the four leaders present on the Yakama Reservation that the Wenatchi sell their mountain reservation in return for allotments in the Wenatchee Valley and federally protected fishing rights. He indicated that DOI intended for the Indians to retain "the lawful use of the fisheries in common with the white people."[275] Though hesitant to make a decision without consulting the tribe, the Wenatchi leaders eventually agreed to the transfer at $1.50 an acre.

In January, after the Wenatchi leaders had returned to Wenatshapam, 150 miles away, DOI proposed by telegraph a lump sum of $15,000 for the Article X reservation. In response to the Yakama leaders protesting the absence of the Wenatchi, Erwin promised, "[j]ust what we said to those Wenatchee Indians we will carry out."[276] Satisfied, a Yakama representative

271 Treaty with the Yakamas, June 9, 1855, 12 Stat. 951.

272 United States v. Confederated Tribes of the Colville Indian Reservation (*Confederated Tribes*), 606 F.3d 698, 701–02 (2010) (citing Treaty with the Yakamas, June 9, 1855, 12 Stat. at 953).

273 This injustice did not go unnoticed. Documents in the congressional record at that time evidence a recognition by both the Senate and settlers that the reservation was not "new," but rather "the fulfillment of a treaty obligation;" S. EXEC. DOC. NO. 67, at 8 (1894), and also that, despite the name "Yakama" in the treaty, the Wenatchi were the specific, intended beneficiaries of the Article X reservation land. *Id.* at 11.

274 This authorization provided both that Agent Erwin would employ a stenographer in order to keep a complete record of the negotiations, and that the "rights of such Indians [living near Wenatshapam] in land or fishing privileges should be taken into consideration and protected." *Id.* at 5.

275 *Id.* at 28.

276 *Id.* at 33.

counter-offered to relinquish all rights in Wenatshapam Fishery in return for $20,000. DOI accepted this offer and, along with 253 citizens of the Yakama Nation, signed the 1894 Agreement. In the first article, the treaty extinguished all Yakama rights in the Wenatshapam Fishery, while the second article indicates the consideration given for this relinquishment, and an acknowledgment that the Wenatchi would be allotted land in the vicinity of where they lived or elsewhere. The government again failed to make this allotment, and in 1902 and 1903 removed the Wenatchi to the Colville Reservation.

Modern litigation of the Yakama and Wenatchi fishing rights began in 1968 when the United States filed suit against the State of Oregon on behalf of four tribes[277] seeking a declaratory judgment on the rights to take fish from the Columbia River and various tributaries.[278] The District Court of Oregon then ruled that the four tribes were entitled to a "fair share" of the Columbia River salmon.[279] In the ensuing appeal, the State of Washington intervened in 1974, and the State of Idaho in 1983.[280] The District of Oregon then adopted a "comprehensive fish management plan" in 1988.[281]

In 1989, Colville sought to intervene on behalf of five of its constituent tribes, including the Wenatchi, on the grounds that these tribes were parties to the 1855 Treaty.[282] With no explanation as to why Colville had waited over twenty years to assert these rights and upon consideration of an extensive record amassed during a three-day bench trial, the court denied the intervention motion.[283] The Ninth Circuit affirmed the district court's denial thereby foreclosing the Wenatchi from exercising treaty fishing rights under the 1855 Treaty. To support its holding, the Ninth Circuit reasoned that while normally "rights under a treaty vest with the tribe at the time of the signing of the treaty,"[284] "Indians later asserting treaty rights must establish that their group has preserved its tribal status."[285] The district court found that the tribes had not maintained their tribal status because they had refused to relocate to the reservation, and only later were subsumed into the Colville Confederacy. The Ninth Circuit reasoned that such evidence was merely one factor in a larger factual inquiry, which was whether the group had maintained sufficient political continuity.[286]

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277 The tribes were: The Yakama Indian Nation, The Confederated Tribes and Bands of the Warm Springs Reservation of Oregon, The Confederated Tribes of the Umatilla Reservation, and the Nez Perce Tribe of Idaho. United States v. Oregon (*Oregon*), 29 F.3d 481, 482–83 (9th Cir. 1994).

278 *Id.* at 482–83 (citing Sohappy v. Smith, 302 F. Supp. 899, 903–04 (D. Or. 1969)).

279 *Sohappy*, 302 F. Supp. at 911.

280 *Oregon*, 29 F.3d at 483.

281 *Id.*

282 *Id.*

283 *Id.* at 482–83.

284 *Id.* at 484 (citing United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 502 F.2d 676, 692 (9th Cir. 1975)).

285 *Oregon*, 29 F.3d at 484.

286 *Id.*

Nevertheless, the Wenatchi never ceased fishing at the Wenatshapam Fishery during the entire course of the litigation. It was not until 2003 that the Yakama sought and obtained an injunction prohibiting the Wenatchi from using the fishery. The district court ruled that res judicata prevented the Wenatchi from arguing that they held rights under the 1894 Agreement as it found this later agreement to be an amendment to the prior treaty. However, the Ninth Circuit reversed this ruling; distinguishing between the 1855 Treaty and the 1894 Agreement, it found that the latter was not an amendment, but rather a contract for the sale of lands granting distinct benefits. On remand, the district court found that the 1894 Agreement provided fishing rights and land in exchange for the Article X Reservation.

The Yakama appealed the district court's decision to the Ninth Circuit and the Wenatchi cross appealed. The Yakama argued that the district court erred in finding what it characterized as an "implied agreement." On cross-appeal, the Wenatchi claimed that either the district court erred in finding any fishing rights for the Yakama or, in the alternative, that it erred by not finding the Wenatchi fishing rights superior. The Ninth Circuit applies separate standards of review to the factual findings of the district court, including issues of negotiator's intent, and to the district court's interpretation of treaties. Thus, it reviewed the historical record for clear error while reviewing the treaty interpretations de novo.[287]

As a preliminary matter, the Ninth Circuit enunciated relevant principles of interpretation in review of the treaty, documents, and letters before the court. In considering whether to limit its analysis of the 1894 Agreement to the "four corners" as Yakama suggested, the Ninth Circuit first returned to its 2006 opinion in which it found the relevant provisions of the agreement ambiguous. It then turned to the proposition that, given the language barrier and legal sophistication of the parties to the treaties, a court should construe treaty language as the Native Americans would have understood it, and resolve any ambiguities in favor of them.[288] Such an interpretative framework, the Ninth Circuit concluded, necessarily required it to look beyond the four corners of the 1894 Agreement.[289] Given that the Agreement itself is silent as to Wenatchi fishing rights, and therefore ambiguous, the Ninth Circuit considered the transcript of the negotiations to determine how the tribal leaders understood the terms of the agreement.

The Ninth Circuit's "clear error" review of the record supported the district court's finding that the Native American leaders present at the 1894 negotiations would have understood the terms to provide non-exclusive fishing rights to the Wenatchi at Wenatshapam. In order to support this

287 United States v. Washington, 157 F.3d 630, 642 (9th Cir. 1998).

288 Jones v. Meehan, 175 U.S. 1, 5 (1899) (holding that a treaty between the United States and an Indian tribe must be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians"); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (noting that the Court has often held that treaties with Indians should be interpreted as the Indians would have understood them).

289 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (citations omitted).

finding, the district court cited evidence of concerns by both Yakama leaders and United States negotiators that the Agreement would preserve the rights of the Wenatchi.[290] Thus, despite the ambiguity inherent in the 1894 Agreement itself, the Ninth Circuit concluded that its effect was to secure the Wenatchi rights.

With regard to the first Wenatchi cross-appeal, the Ninth Circuit held that the 1894 Agreement to sell the Article X Reservation did not extinguish the Yakama's fishing rights at Wenatshapam. The Wenatchi encouraged the court to read the qualifying phrase, "as set forth in article 10 of said treaty aforesaid," as mere surplusage describing the location at which the Yakama were ceding all rights.[291] However, the Ninth Circuit declined to adopt this interpretation, finding instead that the "qualifying language, 'as set forth in article 10,' identifies what 'right of fishery' is being ceded, not the location of the fishery itself."[292] As such, the Court determined that the Yakama's cession was limited to its Article X *exclusive* rights and did not extend to any rights not explicitly ceded. Adhering to the United States Supreme Court's holding in *United States v. Winans* that a treaty or agreement is "not a grant of rights to the Indians, but a grant of rights from them,"[293] the Ninth Circuit reasoned that the 1894 Agreement merely ceded the tribe's *exclusive* fishing rights reserved by the 1855 Treaty, but, as the later agreement would have been understood by the negotiating parties, the Yakama retained its *non-exclusive* fishing rights.

In response to the Wenatchi's alternative argument, the Ninth Circuit held that the Wenatchi did not hold rights superior to those of the Yakama, but that both tribes held non-exclusive fishing rights in common with the state. First, the court notes that the "primary rights" analysis developed in *United States v. Skokomish Indian Tribe* and *United States v. Lower Elwha Tribe*, depends upon an analysis of pre-treaty control of the contested rights when two tribes have signed treaties at the same "treaty time."[294] Since the 1894 Agreement secured the Wenatchi rights and the 1855 Treaty secured the Yakama rights, there was no common "treaty time," at which to determine primacy or control of the Wenatshapam Fishery. Secondly, the Ninth Circuit observed that the 1894 Agreement did not reserve Wenatchi rights in existence prior to 1855, but was a grant of new rights independent of the previous treaty. Thus, regardless of actual control of the

290 Including a promise made on the record by Agent Erwin that, "you shall have the lawful use of fisheries in common with the white people." S. EXEC. DOC. NO. 67, *supra* note 273, at 28.

291 *Confederated Tribes*, 606 F.3d 698, 712–13 (2010) (citing the 1894 Agreement, Article I, at 320 ("The said Indians hereby cede and relinquish to United States all their right, title, interest, claim, and demand of whatsoever name or nature of[,] in, and to all their right of fishery, *as set forth in article 10 of said treaty aforesaid*, and also all their right, title, interest, claim, or demand of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery.") (emphasis added)).

292 *Confederated Tribes*, 606 F.3d at 713.

293 198 U.S. 371, 381 (1905).

294 United States v. Skokomish Indian Tribe, 764 F.2d 670, 673 (9th Cir. 1985); United States v. Lower Elwha Tribe, 642 F.2d 1141, 1144 (9th Cir. 1981).

Wenatshapam Fishery prior to 1855, the Wenatchi would still lack the 1855 Treaty rights to prompt a "primary rights" analysis.

In conclusion, the Ninth Circuit held that both the Yakama and the Wenatchi, under the 1855 Treaty and 1894 Agreement, respectively, retain non-exclusive fishing rights at the Wenatshapam Fishery held in common with non-treaty and non-agreement fishermen.

III. NATURAL RESOURCES

A. Endangered Species Act

1. Wild Fish Conservancy v. Salazar, *628 F.3d 513 (9th Cir. 2010).*

The Wild Fish Conservancy (the Conservancy) brought a challenge to a United States Fish and Wildlife Service (FWS)[295] biological opinion (BiOp) addressing the effects of the Leavenworth National Fish Hatchery (Hatchery) on federally protected bull trout (*Salvelinus confluentus*), which is a species listed as "threatened" under the Endangered Species Act (ESA).[296] The Conservancy argued that FWS improperly determined that the Hatchery's operation and management plan would not jeopardize the federally threatened bull trout in violation of Section 7 of the ESA. The United States District Court for the Eastern District of Washington granted summary judgment for FWS, and the Conservancy appealed. Reviewing the district court's decision de novo, the United States Court of Appeals for the Ninth Circuit reversed and remanded, holding that FWS failed to demonstrate a rational connection between the facts found in the BiOp and the "no jeopardy" conclusion, and by improperly relying on the legally deficient BiOp the Hatchery failed to ensure that its operation would not violate the jeopardy provision in Section 7 of the ESA.

Through funding from the Mitchell Act[297] and under the management of FWS, the Hatchery operates on Icicle Creek (Creek), just south of Leavenworth, Washington, rearing spring-run Chinook salmon (*Oncorhynchus tshawytscha*) from returning adult brood stock.[298] As part of the salmon capture and rearing operation, the Hatchery's dams and weirs block fish passage on the Creek. This disruption in fish passage has shown

295 Defendants–Appellees included Kenneth L. Salazar, in his official capacity as Secretary of the Interior; FWS; Rowan W. Gould, in his official capacity as Acting Director of FWS; and Julie Collins, in her official capacity as Complex Manager for the Leavenworth National Fish Hatchery Complex.

296 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

297 Mitchell Act, ch. 193, 52 Stat. 345 (1938).

298 Returning adult salmon are captured in weirs, killed, and their gametes extracted and fertilized. Fertilized eggs are then incubated, hatched, and reared before the young fish are released back into the Creek. The purpose of the Hatchery is to mitigate the loss of salmon spawning grounds caused by the Grand Coulee Dam, which prevents salmon from reaching their spawning grounds.

to negatively affect migration and spawning activity of migratory bull trout.[299] Conscious of the problems created by impeding fish passage, beginning in 2001 FWS often altered management practices throughout the year in attempts to allow for the passage of more bull trout.

Section 7(a)(2) of the ESA requires all federal agencies to consult with FWS[300] on actions that could potentially affect an endangered or threatened species to insure that the action is not likely to jeopardize the continued existence of the species.[301] As part of the consultation, under Section 9 of the ESA, FWS must also determine whether or not the action will result in a "take" of the species.[302] Take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[303] If FWS determines jeopardy will occur, it must recommend "reasonable and prudent alternatives" to avoid jeopardy.[304] If FWS determines no jeopardy will result but that "take" may occur, it must issue an incidental take statement with the BiOp. Under the ESA, the Hatchery was obligated to engage in formal consultation with FWS regarding the Hatchery's operations once the bull trout was listed.

In 2008, FWS issued a BiOp that indicated FWS expected the negative trend in bull trout population to continue due to impediments to fish migration caused by the Hatchery.[305] Despite the projected downward trend, the 2008 BiOp concluded that improved passage conditions caused by the proposed action—operation and maintenance of the hatchery from 2006 through 2011—should improve the contribution of the Icicle Creek population to the survival of bull trout and thus was "not likely to appreciably reduce the likelihood of both the survival and recovery of the bull trout in the wild."[306] After a series of complaints, settlements, and challenges to previous BiOps, the Conservancy challenged this 2008 BiOp. The district court granted summary judgment to FWS, finding "that the 2008 BiOp was 'sufficiently well documented and explained'; that [FWS] 'appropriately defined and justified the 5-year term of the proposed action'; [and] that the 'no jeopardy' conclusion was not arbitrary and capricious."[307]

FWS argued that its choice of the five-year term (2006–2011) in analyzing the effects of Hatchery operations was not arbitrary and capricious because it anticipated the replacement of its water intake system

299 Bull trout may exhibit resident behavior in which an individual will remain in the local area for its entire life or migratory behavior in which an individual fish will migrate to a larger body of water and then return to its birthplace to spawn. Migratory individuals typically grow in excess of twenty-four inches while resident fish only grow to six to twelve inches at maturity. Migratory or resident behavior is not hereditary.

300 Federal agencies considering actions potentially affecting marine or anadromous species must consult with the National Marine Fisheries Service.

301 16 U.S.C. § 1536(a)(2) (2006).

302 *Id.* § 1538.

303 *Id.* § 1532(19).

304 *Id.* § 1536(b)(3)(A).

305 U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION FOR THE OPERATION AND MAINTENANCE OF THE LEAVENWORTH NATIONAL FISH HATCHERY THROUGH 2011 85 (2008).

306 *Id.* at 86–89.

307 Wild Fish Conservancy v. Salazar, 628 F.3d 513, 521 (9th Cir. 2010).

in 2010,[308] which would trigger a new initiation of consultation. Rejecting FWS's argument, and relying on Ninth Circuit precedent, the court held that FWS's obligation was to "analyze the effect of the *entire* agency action," not just the initial phase.[309] The court focused on the fact that separating the project into shorter-term phases could undermine the agency's ability to recognize an appreciable impact by segmenting that impact into smaller, unappreciable impacts. This type of approach, the court noted, could lead to the gradual eradication of a species, "so long as each step on the path to destruction is sufficiently modest" as to be unappreciable on its own.[310] The court did not indicate the temporal scope necessary to satisfy FWS's duty but only found that, given the Hatchery's seventy-year history of operation and a lack of indication that it may close in the foreseeable future, five years was not enough. The fact that changes to the operation might occur in the future and would trigger reinitiating of formal consultation did not, on its own, justify preparing a short-term BiOp because FWS is obligated "to use the best information available to prepare [a] comprehensive [BiOp] considering all stages of the agency action."[311] Although there exists an ongoing duty to reinitiate consultation if new information reveals effects of the action that affect the species in a manner not previously considered in the BiOp, this continuing duty "does not diminish [FWS]'s obligation to prepare a comprehensive biological opinion now."[312] In the absence of an adequate explanation of why a comprehensive effort was not undertaken, the court found FWS's decision to limit the scope of the BiOp to five years was arbitrary and capricious.

Alternatively, if FWS was justified in defining the action as a five-year period, the court determined that it still must examine its immediate and long-term effects and "articulate[] a rational connection between the facts found and the conclusions made."[313] The court found that FWS failed to fulfill this duty when it did not square its conclusion—that the action would not reduce appreciably the likelihood of both survival and recovery of bull trout—with the finding that the action would severely impair the ability of bull trout to reproduce effectively and stabilize the Icicle Creek population. The court pointed out that FWS's conclusion in the 2008 BiOp—that the "current distribution and abundance of bull trout in the action area" is "not likely to change"[314]—was dubious in light of its findings of a negative population trend which was expected to continue. The court held that FWS's

308 The court noted that replacement of the Hatchery's intake system has been delayed due to engineering difficulties but that FWS "now anticipates issuing a new [BiOp] 'before the close of 2011 at the latest.'" *Id.* at 519 n.2.

309 *Id.* at 522 (quoting Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988) (emphasis in original)).

310 *Id.* at 523 (quoting Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 930 (9th Cir. 2008)).

311 *Id.* at 525 (quoting *Conner*, 848 F.2d at 1454) (first alteration in original).

312 *Id.* at 525.

313 Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1090 (9th Cir. 2005) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983)).

314 U.S. FISH & WILDLIFE SERV., *supra* note 305, at 86.

failure to articulate a rational connection between the facts found in the 2008 BiOp and the "no jeopardy" conclusion rendered the BiOp legally deficient.

The court next addressed the Conservancy's challenge to the BiOp on the basis that FWS failed to consider the effects of pollutant discharges caused by runoff of solid wastes, removed from fish holding ponds, and spread over dry land. Wastes generated by captive fish are collected in a pollution abatement pond that is periodically cleaned, and the waste is spread out on dry ground.[315] The Conservancy was concerned that these wastes contained polychlorinated biphenyls (PCBs) and would runoff into the Creek during precipitation events. In the 2008 BiOp, FWS discussed the operation of the abatement pond and noted it had last been cleaned in 2007. It also pointed to previous studies showing no adverse impacts on PCB or pesticide levels in the Creek due to the Hatchery. Based on this brief discussion of the issue, the court found that, though FWS could have been more detailed in its discussion, its consideration was adequate being that it did not "entirely fail[] to consider an important aspect of the problem"[316] and, as such, rejected the Conservancy's argument that the BiOp was invalid on these grounds.

Moving to the Conservancy's next challenge, the court explained the ESA's requirement that an incidental take statement (ITS) issue if a federal action is likely to result in incidental take of a listed species. FWS issued an ITS limiting the Hatchery to: 1) one bull trout killed and one harmed by the water intake system; and 2) twenty migratory bull trout harmed by impaired fecundity due to inaccessible spawning habitat. The Conservancy challenged the ITS on two grounds: first, that the ITS did not account for the full extent of incidental take because it did not consider incidental take by tribal anglers who fish for salmon in the pool at the base of the Hatchery spillway; and second, that the ITS did not include adequate requirements to monitor incidental take. In response to the first argument, the court found it reasonable for FWS to exclude take by tribal anglers from consideration because take of bull trout in accordance with state and tribal fishing regulations is exempt from the ESA take prohibition.[317] Addressing the second argument, however, the court agreed with the Conservancy that absent any monitoring and reporting requirement, the twenty-fish limit on take—twenty bull trout prevented from spawning—was inadequate because FWS failed to "set a clear standard for determining when the authorized level of take ha[s] been exceeded."[318]

Finally, the court observed that Section 7 of the ESA imposes upon the Hatchery a substantive duty to ensure that its actions are not likely to

315 The Hatchery feeds about fifty tons of food to the salmon and accumulates about fifteen tons of waste per year.

316 *See* Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *abrogated in part on other grounds by* Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008).

317 *See* 50 C.F.R. § 17.44(w)(2) (2008).

318 Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1038 (9th Cir. 2007); *see also* Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129, 1187 (N.D. Cal. 2003) ("It is arbitrary and capricious to set the trigger at one animal unless defendants can adequately detect the taking of a single animal.").

jeopardize the continued existence of the bull trout and that "[a]rbitrarily and capriciously relying on a faulty [BiOp] violates this duty."[319] The court found that the 2008 BiOp was legally deficient because FWS "limit[ed] the scope of the action to five years; fail[ed] to articulate a rational connection between its findings in the 2008 BiOp and its no jeopardy conclusion; and issu[ed] an inadequate incidental take statement."[320] Because the court found the 2008 BiOp legally deficient, it also found the Hatchery's reliance on it to be arbitrary and capricious and thus a violation of the Hatchery's substantive duty under Section 7 of the ESA.

In summary, the court invalidated the 2008 BiOp as arbitrary and capricious because FWS limited the action to a five-year period, failed to articulate a rational connection between the facts found in the BiOp and its "no jeopardy" conclusion, and issued an inadequate ITS that lacked clear requirements for monitoring and reporting incidental take. In addition, the court held the Hatchery's reliance on the legally deficient BiOp was arbitrary and capricious and a violation of its substantive duty to insure that its actions would not jeopardize the continued existence of the bull trout. The court reversed and remanded to the district court to grant the Conservancy's motion for summary judgment and injunctive relief until FWS and the Hatchery comply with their statutorily mandated duties under the ESA.

2. Northern California River Watch v. Wilcox, *620 F.3d 1075 (9th Cir. 2010).*

Plaintiff–Appellants[321] (collectively River Watch) brought action against three employees[322] (collectively Defendants) of the California Department of Fish and Game (CDFG) under Section 9 of the ESA.[323] River Watch argued that Defendants unlawfully removed the endangered plant species Sebastopol meadowfoam (*Limnanthes vinculans*) because such removal constituted a "take"[324] of a listed species on "areas under federal jurisdiction."[325] The United States District Court for the District of Northern California granted Defendants' motion for summary judgment and River Watch appealed. The United States Court of Appeals for the Ninth Circuit affirmed, holding privately owned wetlands were not "areas under Federal jurisdiction" under the ESA.

319 Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 976 (9th Cir. 2005), *rev'd on other grounds by* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

320 *Wild Fish Conservancy*, 628 F.3d 513, 532 (9th Cir. 2010).

321 Plaintiffs were Robert Evans, an amateur naturalist, and the Northern California River Watch (River Watch), a non-profit environmental organization.

322 Defendants were CDFG employees Carl Wilcox, Gene Cooley, and Robert Floerke. Plaintiffs' second amended complaint added William R. Schellinger and Frank H. Schellinger, individually and doing business as Schellinger Brothers, and Scott Schellinger, Project Manager for the Site, alleging that the Schellingers "solicited or otherwise assisted" in removing the plants from the Site. N. Cal. River Watch v. Wilcox, 620 F.3d 1075, 1079 n.7 (9th Cir. 2010).

323 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

324 *Id.* § 1532(19) (defining take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct").

325 *Id.* § 1538(a)(2)(B).

The Schellinger brothers sought to develop twenty-one acres (the Site) of private property in Sebastopol, California that included 1.84 acres of United States Army Corps of Engineers (Corps) designated wetlands. The wetlands were situated adjacent to the Laguna de Santa Rosa, a tributary of the navigable Russian River. The CWA[326] defines "navigable waters"[327] as "waters of the United States"[328] which include wetlands adjacent to navigable waters.[329] In 2003, the Schellingers applied for a permit under Sections 401 and 404 of the CWA to fill in and pave over a portion of the wetlands. In 2005, Robert Evans discovered what he believed to be Sebastopol meadowfoam at the Site. A CDFG biologist later confirmed the presence of the endangered plant species at the site. During subsequent visits to the Site, CDFG employees disturbed the endangered plant species. First, CDFG Habitat Conservation Manager Carl Wilcox lifted the plants from the soil to examine whether they were naturally occurring. Second, CDFG biologist Gene Cooley removed and transported the plants to the CDFG office for evidentiary purposes.

In response to continued development of the Site, River Watch filed a complaint in 2006 seeking declaratory and injunctive relief. River Watch alleged Defendants' treatment and removal of plants violated Section 9(a)(2)(B) of the ESA.[330] River Watch claimed Defendants violated Section 9 when they removed the plants in "areas under Federal jurisdiction"[331] because the endangered plant species was found in wetlands adjacent to "waters of the United States."[332] The district court denied Defendants' initial motion for summary judgment finding "areas under Federal jurisdiction" may include non-federal land. The district court then granted Defendants' second motion for summary judgment and concluded River Watch's Section 9(a)(2)(B) claim must fail because, as a matter of law, the wetlands were not "areas under Federal jurisdiction." River Watch appealed there from. The Ninth Circuit reviewed de novo the district court's grant of summary judgment.[333]

The issue presented to the Ninth Circuit was "whether the land upon which the Sebastopol meadowfoam populations were discovered and removed is, as a matter of law, an 'area[ ] under Federal jurisdiction'"[334] per Section 9(a)(2)(B) of the ESA. River Watch and Defendants both argued the

326 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

327 *Id.* § 1362(7).

328 *Id.*

329 33 C.F.R. § 328.3(a)(7) (2009); *see also* Rapanos v. United States, 547 U.S. 715, 782 (2006) ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction . . . . [H]owever, the Corps must establish a significant nexus [between wetlands and navigable-in-fact waters] on a case-by-case basis when it seeks to regulate wetlands based on adjacency . . . .").

330 16 U.S.C. § 1538(a)(2)(B) (2006) (on "areas under Federal jurisdiction" it is unlawful to "remove, cut, dig up, or damage . . . any such [endangered] species").

331 *Id.*

332 33 U.S.C. § 1362(7).

333 Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1036 (9th Cir. 2007).

334 *N. Cal. River Watch*, 620 F.3d 1075, 1080 (9th Cir. 2010) (alteration in original).

text of Section 9(a)(2)(B) is clear: River Watch asserted the wetlands at issue plainly fell within federal jurisdiction while Defendants asserted the statutory text is plainly limited to federally owned lands. Conversely, the United States, as amicus curiae, asserted the statutory text is ambiguous and the construction of the ESA by the United States Fish and Wildlife Service (FWS) is entitled to *Chevron*[335] deference. Specifically, the United States argued that FWS's interpretation of Section 9(a)(2)(B) does not include privately owned land "merely subject to regulatory jurisdiction under a federal statute."[336]

The Ninth Circuit began its analysis by examining the phrase "areas under Federal jurisdiction" under the two-step procedure of *Chevron*.[337] Under step one, the court employed traditional tools of statutory construction to determine whether Congress spoke directly to the meaning of Section 9(a)(2)(B). The court analyzed the statutory purpose,[338] the specific context of Section 9, and the broader context.[339] Ultimately, analysis of the statute failed to elucidate the meaning of Section 9(a)(2)(B). River Watch argued if privately owned wetlands fall under CWA jurisdiction, they also fall under ESA jurisdiction as "areas under Federal jurisdiction" pursuant to Section 9. River Watch reasoned that Corps regulation of adjacent wetlands under the CWA[340] and the Corps's obligation to consult with FWS under Section 7 of the ESA[341] demonstrate that waters subject to CWA jurisdiction are "areas under Federal jurisdiction." The court found Congress did not plainly embrace River Watch's theory. Citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (*Sweet Home*),[342] the court concluded "Congress did not intend for Section 7 and Section 9 to be coextensive."[343]

In the absence of plain meaning, the Ninth Circuit analyzed the legislative history of Section 9. First, while a House Conference Report on the 1982 ESA Amendments spoke to "federal land," it failed to define that term.[344] The court determined "federal land" is ambiguous and did not mean "areas under Federal jurisdiction." Second, a Senate Report on the 1988 ESA Amendments indicated that "areas under Federal jurisdiction" might not include "private and other non-federal lands."[345] Yet, it similarly failed to

335 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. (*Chevron*), 467 U.S. 837, 842 (1984); *see also* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005).

336 *N. Cal. River Watch*, 620 F.3d at 1081.

337 *Chevron*, 467 U.S. at 842.

338 Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (2006).

339 *N. Cal. River Watch*, 620 F.3d at 1082 (both the phrase "areas of Federal jurisdiction" and the term "jurisdiction" are not statutorily defined).

340 N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 997 (9th Cir. 2007); *see also Rapanos*, 547 U.S. 715, 763 (2006); Defenders of Wildlife v. Bernal, 204 F.3d 920, 923 (9th Cir. 2000) (referring to wetlands subject to CWA as "jurisdictional wetlands" and "jurisdictional waters").

341 16 U.S.C. § 1536(a)(2) (2006) (describing federal agencies' obligation to consult with the FWS, as the expert agency, before undertaking action that may affect an endangered species).

342 515 U.S. 687, 702–03 (1995).

343 *N. Cal. River Watch*, 620 F.3d at 1083.

344 H.R. REP. NO. 97-835, at 35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2876.

345 S. REP. NO. 100-240, at 12 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2703.

evince whether Congress intended to limit Section 9 to federally owned land or to extend it to waters subject to federal jurisdiction under the CWA.

The Ninth Circuit next analyzed whether FWS's construction of the ESA, pursuant to the United States' amicus brief, satisfied the requirements of *United States v. Mead Corp.*[346] Under *Mead*, *Chevron* deference only applies if "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[347] The court concluded FWS is authorized to interpret the ESA when it promulgates rules carrying the force of law because Congress delegated to FWS authority to protect endangered species.[348] Comparing FWS expertise in administering the ESA to Corps expertise in implementing the CWA, the court reasoned FWS had an "adequate basis" to determine whether privately owned lands might be "areas under Federal jurisdiction."[349] Citing *Sweet Home*, the court expressed that ESA's broad purpose authorized the Secretary of the Interior to "extend protection against activities that cause the precise harms Congress enacted the statute to avoid."[350] Therefore, FWS's expertise in administering the ESA and its authority to make rules carrying the force of law satisfied the first requirement of *Mead*. Citing *Trout Unlimited v. Lohn*,[351] the court referenced its previous opinion that FWS rules regulating endangered species were promulgated in the exercise of expressly delegated authority.[352] Thus, FWS's construction of the ESA, in the promulgation of rules administering the ESA, was an exercise of delegated authority that satisfied the second requirement of *Mead*.

The Ninth Circuit proceeded to step two of *Chevron* and evaluated the reasonableness of FWS's construction of Section 9(a)(2)(B). Although the United States conceded that FWS did not expressly define "areas under Federal jurisdiction," it argued that FWS's interpretation of the phrase in three FWS rules was entitled to *Chevron* deference.[353] The court disagreed and concluded the rules did not provide an interpretation upon which to apply *Chevron* deference. The first rule failed to distinguish the phrase "areas under Federal jurisdiction" from "federal lands" and did not address the question of whether such areas included waters subject to federal jurisdiction under the CWA. Also, despite the second rule's reference to

346 533 U.S. 218, 226–27 (2001).

347 *Id.* at 226–27.

348 50 C.F.R. § 402.01(b) (2010).

349 *N. Cal. River Watch*, 620 F.3d 1075, 1085 (9th Cir. 2010).

350 *Sweet Home*, 515 U.S. 687, 698 (1995).

351 559 F.3d 946 (9th Cir. 2009).

352 *Id.* at 954 (finding the National Marine Fisheries Service's promulgation of the Hatchery Listing Policy was entitled to *Chevron* deference).

353 The rules were: Endangered or Threatened Status for Seven Central Florida Plants, 58 Fed. Reg. 25,746, 25,754 (Apr. 27, 1993) (codified at 50 C.F.R. pt. 17); Determination of Endangered Status for Three Plants, Blennosperma Bakeri (Sonoma Sunshine or Baker's Stickyseed), Lasthenia Burkei (Burke's Goldfields), and Limnanthes Vinculans (Sebastopol Meadowfoam), 56 Fed. Reg. 61,173, 61,180–81 (Dec. 2, 1991) (codified at 50 C.F.R. pt. 17); Determination of Endangered or Threatened Status for Five Desert Milk-vetch Taxa from California, 63 Fed. Reg. 53,596 (Oct. 6, 1998) (codified at 50 C.F.R. pt. 17).

Section 7's consultation process—affording protection to Sebastopol meadowfoam habitat on privately owned land—it did not indicate whether Section 9(a)(2)(B) provided similar protection on privately owned land. Finally, since the text of the third rule incorporated the non-limiting term "generally,"[354] the court concluded that the United States' explanation of how Section 9's protections are invoked was unavailing.

The court next considered the United States' argument that FWS's interpretation of Section 9(a)(2)(B) in a guidance manual (Handbook)[355] warranted *Chevron* deference. The Handbook outlined implementation of the incidental take permit program under Section 10 of the ESA. Citing *Christensen v. Harris County*,[356] the court opined, since agency manuals and enforcement guidelines do not have the force of law, any interpretations therein do not warrant *Chevron* deference. Moreover, the Handbook expressly stated it was not intended to supersede or alter any federal law or regulation; it was strictly a guidance manual.[357] Also, the court noted that of the four circuits to cite the Handbook, none afforded it *Chevron* deference. Further, the Handbook's singular reference to "areas under Federal jurisdiction" merely "restate[d] the statute."[358] The court concluded, since the FWS rules and Handbook "only tangentially" addressed the phrase and merely "parrot[ed]"[359] statutory language, the materials were also not eligible for either *Skidmore*[360] or *Auer v. Robbins*[361] deference.

In the absence of a viable agency interpretation of "areas under Federal jurisdiction" to which it could defer, the Ninth Circuit judicially construed the statute. First, the court found River Watch's proposed construction untenable: construing the phrase to include all waters subject to federal jurisdiction under the CWA would immediately grant FWS coextensive regulatory authority with the Corps. The court stressed the Supreme Court's concern for the Corps's over expansive jurisdiction in *Rapanos*.[362] The court hypothesized that adopting River Watch's over expansive construction of "areas of Federal jurisdiction" would thrust all private land subject to federal regulation under ESA jurisdiction, consequently nullifying the "third prong"

354 63 Fed. Reg. at 53,610–11 ("*Generally*, on private lands, collection of, or vandalism to, listed plants must occur in violation of State law to be a violation of section 9." (emphasis added)).

355 FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT HANDBOOK (1996), *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf.

356 529 U.S. 576, 587 (2000).

357 FISH & WILDLIFE SERV., *supra* note 355, at 1–3.

358 *N. Cal. River Watch*, 620 F.3d 1075, 1088 (9th Cir. 2010).

359 *Id.*

360 Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) (holding that an agency interpretation is afforded "respect proportional to its 'power to persuade'").

361 519 U.S. 452, 461 (1997) (holding that an interpretation of the agency's own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))). This level of deference is sometimes referred to as *Seminole Rock* deference based on the case of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

362 547 U.S. 715, 782 (2006).

of Section 9(a)(2)(B).[363] Since FWS had not yet addressed the issue, the court found it prudent not to construe wetlands adjacent to tributaries of navigable waters as "areas under Federal jurisdiction." Finally, the court cited *National Cable & Telecommunications Association v. Brand X Internet Services*,[364] and the "intertwined" purposes of the ESA and CWA, for the proposition that FWS retained authority to adopt an interpretation similar to that of River Watch at a future date.

In summary, the Ninth Circuit upheld the district court's rejection of River Watch's proposed interpretation and affirmed the district court's grant of summary judgment to Defendants.

3. Arizona Cattle Growers' Association v. Salazar, *606 F.3d 1160 (9th Cir. 2010).*

Plaintiffs–Appellants, Arizona Cattle Growers' Association (Association), challenged an FWS final rule designating 8.6 million acres of federal land as critical habitat for the Mexican Spotted Owl arguing that FWS impermissibly treated areas unoccupied by owls as "occupied" and applied an impermissible "baseline" approach that did not account for economic impacts of the designation. The United States District Court for the District of Arizona granted summary judgment in favor of FWS. The Association appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling, holding that 1) FWS did not arbitrarily treat unoccupied areas as occupied in designating critical habitat and 2) FWS properly applied a baseline approach in analyzing the economic impact of its designation.

The Mexican Spotted Owl was listed as a threatened species under the ESA[365] in 1993. Subsequent to that listing, a series of lawsuits alternately compelling and challenging FWS decisions to designate critical habitat ensued.[366] Ultimately, in 2004, FWS issued a final rule (2004 Final Rule) designating 8.6 million acres of federal land as critical habitat. The Association challenged the final 2004 designation.

In promulgating the 2004 Final Rule, FWS utilized habitat management areas outlined in a 1995 Recovery Plan for the owl species. In creating the designation, FWS included areas known as Protected Activity Centers

363 The "third prong" pertained to prohibitions applicable to non-criminal trespassers liable under State law, rather than under the ESA.

364 545 U.S. 967, 986 (2005).

365 *See* 58 Fed. Reg. 14,248, 14,248 (1973) (final rule and administrative findings regarding the Mexican Spotted Owl); *see also* 50 C.F.R. § 17.11 (2010) (full table of listed endangered species including the Mexican Spotted Owl). *See generally* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006) (provisions governing the listing of species as endangered).

366 The first suit was brought in 1995 to compel FWS to designate critical habitat, which resulted in a FWS final rule designating 4.6 million acres, but was quickly challenged and revoked in 1998. After another suit, FWS proposed a rule to designate 13.5 million acres in 2000, and in 2001 FWS issued a final rule again designating 4.6 million acres, which was struck down. Subsequently FWS reopened the comment period for the 2000 proposal, and in 2004 issued the final rule being challenged in this case.

(PACs), which contained known owl sites with the best nesting and roosting and foraging habitat, and areas just outside the PACs, known as restricted areas, that provided additional foraging habitat. The protected and restricted areas served as the starting point for critical habitat designation. The designation, however, excluded all tribal lands as well as certain areas not containing PACs, and "Wildland-Urban Interface" areas deemed at high risk of catastrophic wildfire.

The Association moved for summary judgment to set aside this rule on several grounds, all of which the district court rejected, but only two of which were appealed. First, the Association argued that FWS bypassed ESA requirements for designating unoccupied areas by impermissibly treating areas unoccupied by owls as "occupied" areas. Second, the Association argued that FWS used an impermissible "baseline" approach to determine the economic impact of the critical habitat designation. The Ninth Circuit reviewed the district court's grant of summary judgment de novo, reviewing the agency's decision under the arbitrary and capricious standard of the APA.[367] The court ruled that FWS's interpretation of "occupied" in the ESA as including areas the owl was likely to be present was a permissible one.

The Ninth Circuit first considered whether the owl "occupied" the designated areas, as defined by the ESA, therefore warranting the critical habitat designation. In reality, the level at which a species occupies a given area fluctuates along a spectrum; however, the ESA only allows for two options in making a critical habitat designation: "occupied" or "unoccupied."[368] In advancing a narrow interpretation of "occupied," the Association argued that the term unambiguously required a species to reside in a given area for that area to be considered "occupied."[369] In determining the occupancy status of a given area for purposes of critical habitat, the agency must use the best scientific evidence available.[370] However, the ESA does not demand that this determination be made with absolute certainty; as long as it is not based on pure speculation, the Act allows for determinations made with uncertainty.[371] The court found the term "occupied" to be ambiguous as to how often a species must be present in a given area to warrant a critical habitat designation. The court noted that determining if a

367 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006); *see also* Earth Island Inst. v. Hogarth, 494 F.3d 757, 766 (9th Cir. 2007) (finding that if the agency decision has a substantial basis in fact, and there is a rational connection between the facts found and the decision made, the court will defer to the agency's analysis, particularly in the agency's area of expertise).

368 The ESA defines "critical habitat" as "(i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A) (2006). Thus, unoccupied areas require specific findings by the Secretary of necessity to conservation of the species for inclusion in the designation.

369 The FWS argued for a broader interpretation: areas used often enough for likely owl presence were permissibly designated as occupied.

370 16 U.S.C. § 1533(b)(2) (2006).

371 *See, e.g.*, Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor, 557 F.3d 165, 176 (3d Cir. 2009); Greenpeace Action v. Franklin, 982 F.2d 1342, 1354–55 (9th Cir. 1992).

species uses an area with sufficient frequency is a highly fact dependent inquiry; therefore it is within FWS's area of expertise and is entitled to the standard deference given such agency determinations.[372] Thus, the court opined that FWS's determination was permissible even if the agency did not possess conclusive proof of the owl's presence, or if the owl's presence was only intermittent. In rejecting the Association's "resides in" interpretation, the court refused to accept that Congress intended a definition of "occupied" that would exclude areas regularly used by individuals and containing resources essential for the conservation of the species. The court reasoned that the "resides in" interpretation would be illogical as applied to nonterritorial, mobile, and migratory animals that may not "reside" in any one place. The Ninth Circuit also identified support for its findings in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, where the court invalidated a FWS interpretation that reduced the meaningfulness of designating critical habitat.[373] Furthermore, the Supreme Court has defined the term "occupied" broadly.[374] Finally, offering an excerpt from *Trout Unlimited v. Lohn*, the court opined that FWS's interpretation was supported by the purpose of the ESA "to prevent animal and plant species endangerment and extinction caused by man's influence on ecosystems, and to return the species to the point where they are viable components of their ecosystems."[375]

While the court found FWS's interpretation under these facts to be permissible, it warned that a determination that areas unused by owls were occupied merely because the areas were suitable for future occupation would conflict with the ESA's distinction of occupied and unoccupied areas, and would be impermissible.[376]

Having laid out the scope of permissibility in determining whether an area is occupied or unoccupied, the Ninth Circuit next reviewed whether FWS acted arbitrarily and capriciously by designating unoccupied areas as "occupied." The Association offered evidence that FWS has previously treated restricted areas as unoccupied and that the amount of land designated in the final rule was disproportionate to the number of owls present.

The court focused on FWS's use of the designated habitat management types and its refining process of adding and removing areas from the "occupied" list on the evidentiary basis of owl presence. Based on FWS's efforts to designate areas where owls were known to be and exclude areas where evidence suggested low owl population densities or poor habitat quality, the court held that FWS "did not arbitrarily and capriciously treat

372 *Earth Island Inst.*, 494 F.3d at 766 (considering such factors as frequency of use, how the species uses the area, necessity for conservation, and mobility and migration characteristics of the species).

373 378 F.3d 1059, 1070 (9th Cir. 2004).

374 Hynes v. Grimes Packing Co., 337 U.S. 86, 110–11 (1949) (extending the meaning of "public lands which are occupied by Indians or Eskimos" to include waters surrounding the land), *referenced by* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 547–48 n.14 (1987).

375 Trout Unlimited v. Lohn, 559 F.3d 946, 949 (9th Cir. 2009) (quoting H.R. Rep. No. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455 (internal quotations omitted)).

376 Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1244 (9th Cir. 2001).

unoccupied areas as occupied."[377] The court found the apparent shift in FWS's treatment of different areas to be a permissible shift from an unnecessarily narrow perspective, considering only nesting sites, to a broader one entirely consistent with the proper definition of "occupied" and with the evidence of use by owls. The court found that the "analysis solidly demonstrates the connection between the designated areas and owl occupancy."[378]

Next, the court analyzed the calculations used by the Association to support its claim that the designated area was disproportionate to the number of owls, finding the calculations overly simple and inclusive of "only *known* owl sites" and exclusive of nonterritorial or juvenile birds. As such, the allegation that designated land was disproportionate to the number of owls could not withstand the "strong evidence that FWS was focused on designating areas occupied by owls."[379] The court further found that the specific designation in the North Kaibab Ranger District was not arbitrary and capricious because, although one study suggested the absence of owls, FWS had evidence of owl sightings, it diligently reviewed the designation, and its particular technical expertise was not to be second-guessed.

Having determined that FWS did not impermissibly interpret "occupied" or designate unoccupied areas as occupied, the court turned to the accusation that FWS did not properly consider the economic impacts of the designation. Listing a species as threatened or endangered under the ESA is made without consideration of the economic effects of that decision.[380] While the listing of species disallows economic considerations, the designation of critical habitat requires such considerations be taken into account.[381] The parties disagreed regarding which approach to use in analyzing the economic impacts. The approach supported by, and actually employed by FWS does not consider economic impacts that would occur independently of the habitat designation.[382] The Association, on the other hand, relying on the Tenth Circuit decision in *New Mexico Cattle Growers' Association*, argued that these economic impacts must be weighed regardless of whether or not they would occur anyway, despite the habitat designation.[383] The Ninth Circuit rejected the Tenth Circuit's approach in *New Mexico Cattle Growers' Association*, determining that the Tenth Circuit had relied on a faulty premise based on a FWS regulation that made no distinction between "adverse habitat modification" and actions that place a species in "jeopardy." Because this definition has been deemed "too narrow" by the Ninth Circuit and other courts, the Ninth Circuit held that FWS was permitted to apply the baseline approach in analyzing the economic impacts of the critical habitat designation. The court explained that applying the co-extensive approach

377 Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1167 (9th Cir. 2010).
378 *Id.* at 1170.
379 *Id.* at 1171.
380 N.M. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1282 (10th Cir. 2001).
381 Endangered Species Act of 1973, 16 U.S.C. § 1533(b)(2) (2006).
382 This method is known as the "baseline" approach.
383 This method is known as the "co-extensive" approach.

would render the cost/benefit analysis unrealistic by incorporating costs that would occur regardless of the decision to designate an area.

In summary, the Ninth Circuit upheld the district court's grant of summary judgment in favor of FWS's holding that FWS did not impermissibly interpret "occupied" or treat areas unoccupied by owls as "occupied." Additionally, the Ninth Circuit held that the "baseline" approach employed by FWS in its analysis of the economic impacts of the critical habitat designation was the appropriate approach.

4. Butte Environmental Council v. United States Army Corps of Engineers, *620 F.3d 936 (9th Cir. 2010).*[384]

The Plaintiff–Appellant, Butte Environmental Council (Council), brought this action against the United States Army Corps of Engineers (Corps) and the FWS challenging decisions to approve construction on protected wetlands. The United States District Court for the Eastern District of California granted summary judgment to the Corps and FWS. The Council appealed, and the United States Court of Appeals for the Ninth Circuit upheld the district court's ruling, holding that: the Corps applied the proper presumption under the CWA;[385] the Corps's decision to issue the permit was not inconsistent with its earlier criticism of the city's draft environmental impact statement (EIS); the Corps properly made an "independent determination" of the project's purpose; FWS did not apply an improper definition of "adverse modification" in issuing a biological opinion under the ESA;[386] the FWS's finding of no "adverse modification" did not conflict with its determination that the proposed project would destroy acreage of critical habitat; and FWS did not improperly fail to address the rate of loss of critical habitat.

The City of Redding, California decided to build a business park and, after a lengthy selection process, the City settled on a 678-acre tract of land that encompassed wetlands along Stillwater Creek. Because of the location of the business park and the implications its construction would have for wetlands and species, both the CWA and the ESA applied to the project.

The CWA requires that "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to Section 404."[387] The United States Supreme Court determined that the CWA also requires "permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'"[388] A permit may not issue if "there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the

384 Amending and superseding Butte Envtl. Council v. U.S. Army Corps of Eng'rs, 607 F.3d 570 (9th Cir. 2010).

385 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

386 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

387 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

388 *Id.* at 139.

alternative does not have other significant adverse environmental consequences."[389] Practicable alternatives are determined based on considerations of availability, cost, existing technology, and other logistics.[390]

Under the ESA, either the Secretary of Commerce or the Secretary of Interior determine whether a species is "endangered" or "threatened,"[391] and subsequently designates critical habitat for such species.[392] The ESA also specifically provides steps that federal agencies must take to ensure species' conservation:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, 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 which is determined by the Secretary . . . to be critical . . . .[393]

The Secretary's consultation ends with the drafting of a biological opinion expressing the Secretary's opinion of how the action will affect the species.[394]

The City, having determined that there were threatened and endangered species present, as well as designated critical habitat, drafted an EIS.[395] The final draft was released in February 2005. The EIS requirement adhered to the project because the City needed a Section 404 permit, under the CWA, from the Corps in order to fill the wetlands on the property and because the project involved federal grant money. In the EIS, the City concluded that the Stillwater site was the least environmentally damaging practicable alternative because it: 1) met the City's purpose; 2) matched cost, technological, and logistical feasibility criteria; and 3) had fewer effects on species than other possible locations. The Corps and the EPA both disagreed with the City's draft EIS, finding that the alternatives considered were too restrictive and the City lacked a compelling need for this particular location. The Corps also believed that further reductions in direct and indirect impacts were possible. In response, the City issued a supplemental draft EIS that defended its original selection and proposed additional mitigating strategies. The EPA's comments to this supplement suggested that the City should analyze the other sites more extensively and that the final EIS needed

389 40 C.F.R. § 230.10(a) (2010).

390 *Id.* § 230.10(a)(2).

391 16 U.S.C. § 1533(a)(1) (2006).

392 *Id.* § 1533(a)(3)(A)(i). Under the ESA, a species's "critical habitat" includes areas occupied by the species that are "essential to the conservation of the species" and that "may require special management considerations or protection." *Id.* § 1532(5)(A)(i).

393 *Id.* § 1536(a)(2).

394 *Id.* § 1536(b)(3)(A); *see* 50 C.F.R. § 402.14(h) (2010).

395 The proposed site contained threatened vernal pool fairy shrimp and slender Orcutt grass, endangered vernal pool tadpole shrimp, and critical habitat for the three species. The critical habitat consisted of vernal pools and upland areas that were unoccupied by those species but provided nutrients to the vernal pool ecosystem.

an off-site mitigation plan. The City addressed these concerns in its final EIS, which it published in February 2006.

The City formally applied for a Section 404 permit in March 2006, and the Corps completed its evaluation of the City's application in August 2007. The Corps accepted the City's purpose for the development and agreed with the City's review of alternative sites, determining that the proposed Stillwater site was the least environmentally damaging practicable alternative. Thus, the Corps granted the City a permit.

In addition to Corps permitting, the ESA required the City to consult with FWS, which it did in October 2006. The consultation resulted in the FWS's issuance of a biological opinion that considered direct, indirect, and cumulative effects of the proposed project against an environmental baseline. FWS determined that the proposed development would destroy 234.5 acres of the endangered vernal pool fairy shrimp's critical habitat, but that the City would offset these effects by creating, restoring, or preserving habitat at other on- and off-site locations. The action would also destroy 242.2 acres of critical habitat for the threatened slender Orcutt grass, but this would be similarly compensated. Despite the outright acknowledgment that critical habitat would be destroyed, FWS concluded that the proposed project would not jeopardize the continued existence of these species or result in the adverse modification or destruction of critical habitat.

This finding and the issuance of the Section 404 permit prompted suit by the Council, seeking judicial review of these agency actions under the APA.[396] The Ninth Circuit reviewed the district court's grant of summary judgment de novo.[397] Under the APA, the court must set aside agency action that is arbitrary or capricious.[398]

The court began its analysis by reviewing whether the Corps applied the proper presumption under the CWA. The regulations require that where a proposed activity is not water dependent, "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."[399] While the Corps recognized that the City's proposed project was not water dependent, it also found that the City had properly rebutted this presumption through a review of alternative sites and a showing that these sites were not practicable alternatives. Thus, the court found that the Corps acted appropriately.

The Council next alleged that the issuance of a permit contradicted the Corps's earlier criticism of the EIS. However, this allegation failed to

396 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006).

397 Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 946 (9th Cir. 2008).

398 5 U.S.C. § 706(2)(A) (2006). This standard of review is deferential and a court will not vacate an agency's decision unless it "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 651 (2007).

399 40 C.F.R. § 230.10(a)(3) (2009).

account for the evolution of the EIS that incorporated concerns voiced by the Corps and EPA. In *Friends of the Earth v. Hintz*, the Ninth Circuit allowed the agency to change its mind, finding that "[t]he Corps'[s] ultimate decision was not a reversal but simply the culmination of [years] of investigations, meetings, and reports."[400] Thus, as the court noted, "the process worked just as it should," and the mitigation plan within the EIS progressed properly.[401]

The Ninth Circuit found that the Corps properly made an "independent determination" of the project's purpose and did not defer to the City's judgment. Rather, the Corps initially critiqued the City's claims and required convincing throughout iterations of the EIS. Even though the Corps ultimately accepted the City's defined purpose, the court found that this was not unreasonable in light of the City's revised analysis.

The Council also criticized the Corps's rejection of the Mitchell site as a practicable alternative and the Corps's reliance on the existence of mitigation plans.[402] Neither argument persuaded the Ninth Circuit, which held that the cost considerations of the Mitchell site properly pertained to infrastructure not acquisition, and that compensatory mitigation did not replace the City's obligation to find the least environmentally damaging practicable alternative. In sum, the court found that the "Corps stated a rational connection between the facts found and the conclusion that the proposed Stillwater site was the least environmentally damaging practicable alternative."[403]

Turning to the Council's challenges of the FWS's findings, the court similarly determined that FWS did not act arbitrarily and capriciously. First, the court found that FWS did not apply an improper definition of "adverse modification." In *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, the Ninth Circuit invalidated the regulatory definition of "adverse modification."[404] The regulations defined "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species."[405] The court found this contrary to the ESA "[b]ecause it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species['s] survival."[406] Here, the court found nothing to suggest that FWS improperly relied on these invalidated regulatory definitions and, moreover, was persuaded by the agency's express acknowledgement that it did not rely on them.[407]

400 800 F.2d 822, 834 (9th Cir. 1986).

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

402 The Corps directed the City's attention to the Mitchell site, located directly north of the Stillwater site, during its review of the City's Section 404 permit; the City had not considered the Mitchell site among its alternatives.

403 *Butte Envtl. Council*, 620 F.3d at 947.

404 378 F.3d 1059, 1069 (9th Cir. 2004).

405 50 C.F.R. § 402.02 (2010).

406 *Gifford Pinchot Task Force*, 378 F.3d at 1069.

407 FWS expressly stated: "This biological opinion does not rely on the regulatory definition of 'destruction or adverse modification' of critical habitat at 50 CFR § 402.02. Instead, we have relied upon the statute and the August 6, 2004, Ninth Circuit Court of Appeals decision in

Second, the court found that the FWS's finding of no "adverse modification" did not conflict with its determination that the proposed project would destroy critical habitat. The FWS's consultation handbook states that adverse effects on individuals of a species or segments of critical habitat "generally do not result in jeopardy or adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species'[s] range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species."[408] The court did not express an opinion on whether this was the appropriate standard, but recognized that the FWS's determination of destruction was not contradictory to its finding of no adverse modification based on its definition of adverse modification. The court also rejected the Council's argument that a large-scale analysis masked localized risk, finding nothing in the record to support such a risk.

Lastly, the court found that FWS did not improperly fail to address the rate of loss of critical habitat. The court found this argument unconvincing because neither the ESA nor implementing regulations require such a calculation. FWS is only obligated to evaluate "the current status of the listed species or critical habitat," "the effects of the action," and the "cumulative effects on the listed species or critical habitat."[409] Finding that FWS conducted this analysis adequately, the court upheld the FWS's finding of no "adverse modification" as not arbitrary and capricious.

Thus, the Ninth Circuit found that both the Corps and FWS acted reasonably and not arbitrarily and capriciously in issuing the Section 404 permit and the biological opinion.

5. Home Builders Association of Northern California v. United States Fish & Wildlife Service, *616 F.3d 983 (9th Cir. 2010).*

The Home Builders Association of Northern California[410] (Home Builders) challenged the FWS's[411] designation of critical habitat for endangered or threatened vernal pool species.[412] The District Court for the Eastern District of California upheld the FWS's designation. On appeal, the

Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service (No. 03-35279) to complete the following analysis with respect to critical habitat." *Butte Envtl. Council*, 620 F.3d at 947.

408 U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT 4-34 (1998).

409 50 C.F.R. § 402.14(g)(2)–(3) (2009).

410 Plaintiffs included Building Industry Legal Defense Foundation, California Building Industry Association, California State Grange, and Greenhorn Grange. Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., 616 F.3d 983, 983 (9th Cir. 2010).

411 Additional defendants included the United States Department of the Interior; Gale A. Norton, in her official capacity as Secretary of Interior; H. Dale Hall, in his official capacity as Director of FWS; and Matthew J. Hogan, in his official capacity as Acting Director of FWS. *Id.* Butte Environmental Council, California Native Plant Society, and Defenders of Wildlife intervened on behalf of the defendants. *Id.*

412 *Id.* at 985.

United States Court of Appeals for the Ninth Circuit affirmed the critical habitat designation.

Vernal pools, a temporary wetland ecosystem, appear in the spring and dry over the remainder of the year.[413] The formation of the pools strongly depends on a climate of wet and dry seasons, impermeable soils, and shallow depressions that accumulate rainwater.[414] Vernal pool species are uniquely adapted to this extreme ecosystem—species have a dormant stage where plant seeds or fertilized eggs can remain viable for several years.[415] Development threatens vernal pool health and, subsequently, the species that reside there, many of which are listed as threatened or endangered[416] under the ESA.[417]

Concurrent with the listing of a species, the ESA requires FWS to designate critical habitat for that species.[418] Having listed four vernal pool species in 1994, the FWS declined to establish critical habitat, explaining that designation of critical habitat was "not prudent."[419] Originally, this rule was challenged in the District Court for the District of Columbia,[420] but after the plaintiffs dropped the claim, it was challenged in the District Court for the Eastern District of California, which eventually ordered FWS to designate critical habitat.[421] In compliance with that order, FWS issued a proposed rule, followed by a final rule on August 6, 2003.[422] Litigation regarding the rule ensued, and FWS moved for voluntary remand for reconsideration.

After another period of notice and comment and a reconsideration of economic exclusions, FWS issued a final designation of 858,846 acres of

413 Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 68 Fed. Reg. 46,684, 46,685 (Aug. 6, 2003) (to be codified at 50 C.F.R. pt. 17).

414 See *id.*

415 *Id.* at 46,687 (discussing the reproductive and dormancy adaptation responses of crustaceans in vernal pools); *id.* at 46,689 (discussing the annual lifecycle and dormancy adaptation responses of vernal pool plants).

416 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); *Home Builders Ass'n of N. Cal.*, 616 F.3d at 985–86 (noting that development threatens vernal pools and the species that reside there, and that as a result of development, fifteen of these species have been listed under the ESA).

417 16 U.S.C. §§ 1531–1544 (2006); *Home Builders Ass'n of N. Cal.*, 616 F.3d at 985–86 (noting that between 1978 and 1997, four crustacean and eleven vernal pool species have been listed as threatened or endangered under the ESA); *see, e.g.*, 62 Fed. Reg. 33,029 (June 18, 1997) (to be codified at 50 C.F.R. pt. 117) (listing four species of vernal pool plants as endangered under the ESA).

418 16 U.S.C. § 1533(a)(3)(A)(i) (2006).

419 59 Fed. Reg. 48,136, 48,151 (Sept. 19, 1994) (declining to list species because "such designation likely would increase the degree of threat from vandalism or other human activities").

420 Bldg. Indus. Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1241 (D.C. Cir. 2001).

421 Butte Envtl. Council v. White, 145 F. Supp. 2d 1180, 1185 (E.D.Cal. 2001).

422 *Home Builders Ass'n of N. Cal.*, 616 F.3d at 986 (noting that because of the holding in *Butte Envtl. Council*, FWS issued a proposed rule and then a final rule); 68 Fed. Reg. 46,684 (Aug. 6, 2003) (to be codified at 50 C.F.R. pt. 117); Critical Habitat Designation for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 67 Fed. Reg. 59,884 (proposed Sept. 24, 2002) (to be codified at 50 C.F.R. pt. 117).

critical habitat.[423] Suits issued from Butte Environmental Council (Council) and Home Builders. After granting summary judgment to FWS on Home Builders's claim, the district court remanded to FWS regarding the Council's claims that FWS failed to properly consider species conservation in contradiction to *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*.[424] The rule changed little after remand,[425] and Home Builders appealed. Council did not file its own appeal from the district court's final judgment, but it participated in the appeal as defendant–intervenor–appellee.

The Ninth Circuit reviews de novo the district court's grant of summary judgment.[426] Decisions of FWS are reviewed under the arbitrary and capricious standard of the APA.[427] The court cannot substitute its own judgment for that of the agency; however, the agency must provide a rational connection between the facts and its decision.[428]

Home Builders first challenged the designation of critical habitat that does not contain all of the elements essential to species conservation. "Physical or biological features," otherwise known as "primary constituent elements" (PCEs), are defined within the definition of occupied critical habitat: "the specific areas . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."[429] The FWS rule qualifies that PCEs "do not have to occur simultaneously . . . to constitute critical habitat for any of the 15 vernal pool species."[430]

Home Builders asserted that if an area can constitute critical habitat without all PCEs present, then those PCEs are not essential to species conservation. Alternatively, if PCEs are truly required for species

423 70 Fed. Reg. 46,924 (Aug. 11, 2005) (to be codified at 50 C.F.R. pt. 117) (making a final designation of critical habitat after re-evaluating the economic exclusions made in its previous rule and formally changing the acreage included in the final critical habitat designation); *see also* 71 Fed. Reg. 7118 (Feb. 10, 2006) (to be codified at 50 C.F.R. pt. 117) (describing the species-specific unit descriptions and maps for the fifteen species assigned critical habitat).

424 378 F.3d 1059 (9th Cir. 2004); Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., No. CIV. S-05-0629 WBS-GGH, 2006 WL 3190518, at *25 (E.D.Cal. Nov. 2, 2006) (rejecting the FWS interpretation of "destruction or adverse modification" offered in *Gifford Pinchot Task Force* because, as the court there had noted, it effectively reads the "recovery goal" out of the adverse modification analysis).

425 Clarification of the Economic and Non-Economic Exclusions for the Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 72 Fed. Reg. 30,279 (May 31, 2007) (to be codified at 50 C.F.R. pt. 117) (noting that after remand, FWS found that there was not sufficient new information to revise the critical habitat designations).

426 Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 875 (9th Cir. 2009).

427 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) (explaining that a court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law").

428 *Tucson Herpetological Soc'y*, 566 F.3d at 875.

429 Endangered Species Act of 1973, 16 U.S.C. § 1532(5)(A)(i) (2006). These physical or biological features are referred to by FWS as PECs. *See* 50 C.F.R. § 424.12(b) (2009) (referring to "physical and biological features" as "primary constituent elements").

430 Final Rule: Endangered and Threatened Wildlife Plants, 70 Fed. Reg. 46,924, 46,934 (Aug. 11, 2005).

conservation, then areas without PCEs cannot be essential habitat. The court recognized the flaw in this logic, especially given the special considerations of vernal pool ecology. Vernal pools require topographical features that both feed the pools and comprise depressions where pools can form. Both of these features are PCEs, but will "[q]uite obviously . . . be found in different areas."[431] Home Builders additionally asserted that the FWS limited itself to protecting PCEs; however, this ran contrary to *Gifford Pinchot*, which requires FWS to be more generous in designating critical habitat and does not mention the number of PCEs required to list an area as critical habitat.[432] Thus, the Ninth Circuit held that FWS did not act arbitrarily and capriciously when it designated critical habitat not containing all of the PCEs.

Based on the ESA's definition of conservation,[433] Home Builders next argued that FWS's determination of the PCEs is invalid because FWS failed to determine when the protected species will be conserved. Home Builders purported that if FWS does not know when the PCEs will be brought to a point of no longer being threatened or endangered, it cannot know what physical or biological features are required to bring the species there. Although a district court has adopted this approach,[434] the Ninth Circuit found it lacking legal support and in contravention of the ESA's text. The court agreed with the lower court's holding, which found no reason why FWS cannot know the PCEs without knowing exactly when conservation will be complete, when the text of the ESA requires a determination of PCEs before designating occupied critical habitat.[435] While the ESA requires FWS to determine criteria for measuring species conservation, that requirement applies in the context of preparing a recovery plan pursuant to a different portion of the ESA. The court noted that if Congress intended this requirement to apply to critical habitat designations, it would have applied the requirement in that part of the Act. However, the court noted the logic of Congress in thus assigning the requirement because "there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat."[436]

The court next agreed with FWS that critical habitat designation properly contains both occupied and unoccupied habitat. Home Builders alleged that FWS conflated the terms, but the statutory language provides that an area constitutes critical habitat if it meets the requirements of either occupied or unoccupied habitat. It does not require the classification of habitat as either type.[437] Given the transient nature of vernal pools, such

431 *Home Builders Ass'n of N. Cal.*, 616 F.3d 983, 988 (9th Cir. 2010).

432 *Gifford Pinchot Task Force*, 378 F.3d 1059, 1069–71 (9th Cir. 2004).

433 Conservation is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3) (2006).

434 Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., 268 F. Supp. 2d 1197, 1214 (E.D. Cal. 2003).

435 *See* Ariz. Cattle Growers' Ass'n v. Kempthorne, 534 F.Supp.2d 1013, 1025–26 (D. Ariz. 2008), *aff'd on other grounds*, 606 F.3d 1160 (9th Cir. 2010).

436 *Home Builders Ass'n of N. Cal.*, 616 F.3d at 989–90.

437 16 U.S.C. § 1532(5)(A) (2006).

classification would be impossible. Although unoccupied habitat—critical to the conservation of species[438]—presents a more demanding standard, [439] FWS is authorized to designate pursuant to such a standard.[440]

Next, the Ninth Circuit addressed Home Builders's argument that FWS included in its designation areas containing no PCEs. Home Builders based its argument on the FWS's acknowledgement that "[any] such structures inadvertently left inside critical habitat boundaries are not considered part of the unit."[441] Because the ESA requires designation of "specific areas,"[442] Home Builders alleged that this textual exclusion improperly addresses the ESA's requirements. The FWS has interpreted this to require "specific limits using reference points and lines as found on standard topographic maps."[443] The court noted the extensive analysis conducted by FWS and found that the ESA does not prescribe an exclusive method of designation. Further, Home Builders did not dissuade the court from deferring to the agency's interpretation of its own regulation, which is controlling unless erroneous or inconsistent with the regulation.[444] Thus, FWS met the requirement that "specific areas" be designated.

Finally, the court found that an economic analysis performed by an outside consultant sufficiently addressed the economic impact of designation. FWS is required to consider economic impact,[445] and its outside consultant utilized a baseline approach.[446] Home Builders argued for a "cumulative" assessment, similar to that required under NEPA.[447] The Ninth Circuit disposed of this argument, stating "the plain language of [the] ESA directs the agency to consider only those impacts caused by the critical habitat designation itself."[448] The court distinguished NEPA on the basis that it requires the consideration of environmental consequences before the government takes action, whereas the ESA imposes these requirements before taking environmentally protective actions. The court lastly noted that Home Builders's argument contradicted *Arizona Cattle Growers*, where the baseline approach was expressly approved.[449]

In summary, in upholding FWS's designation of critical habitat, the Ninth Circuit affirmed that critical habitat may be designated even though it

438 *Id.* § 1532(5)(A)(ii).

439 Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010).

440 *See, e.g.*, Brown v. S. Cal. IBEW-NECA Trust Funds, 588 F.3d 1000, 1002–03 (9th Cir. 2009) (recognizing that where a standard is unclear, application of the highest standard results in the same outcome).

441 70 Fed. Reg. at 46,930.

442 16 U.S.C. § 1532(5)(A) (2006).

443 50 C.F.R. § 424.12(c) (2009).

444 *Home Builders Ass'n of N. Cal.*, 616 F.3d 983, 991 (9th Cir. 2010); Chae v. SLM Corp., 593 F.3d 936, 948 (9th Cir. 2010) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

445 16 U.S.C. § 1533(b)(2) (2006).

446 The Ninth Circuit rejected a challenge to the FWS baseline approach. *Ariz. Cattle Growers Ass'n*, 606 F.3d 1160, 1172–74 (9th Cir. 2010).

447 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006); 40 C.F.R. § 1508.25(a)(2) (2010).

448 *Home Builders Ass'n of N. Cal.*, 616 F.3d at 992.

449 *Id.* at 992–93; 606 F.3d at 1174.

does not contain every PCE essential for conservation, and PCEs may be deemed necessary without knowing when conservation would be complete—a requirement applicable only to the recovery plan. Furthermore, this critical habitat designation properly encompassed both occupied and unoccupied habitat, meeting standards defined within the Act. FWS permissibly excluded certain areas textually, meeting the requirement that "specific areas" be designated, and the economic analysis performed by an outside consultant addressed the economic impact of designation.

6. Humane Society of the United States v. Locke, *626 F.3d 1040 (9th Cir. 2010).*

Claiming violations of the Marine Mammal Protection Act (MMPA),[450] NEPA,[451] the ESA,[452] and the APA,[453] plaintiffs[454] challenged the decision of the National Marine Fisheries Service (NMFS) authorizing Oregon, Washington, and Idaho to shoot sea lions in order to protect several ESA-listed salmonid populations.[455] The United States District Court for the District of Oregon granted the defendants'[456] summary judgment motion and plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit denied plaintiffs' motion for a stay pending appeal. However, the Ninth Circuit found that NMFS's decision violated the APA despite the fact that the agency was not required to prepare an EIS under NEPA.

According to data collected by the U.S. Army Corps of Engineers (Corps), sea lion predation of salmonids observed at Bonneville Dam rose from 0.4% to 4.2% of the salmonid run between 2002 and 2007.[457] While this

450 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421h (2006).

451 National Environmental Policy Act of 1969, 42 U.S.C §§ 4321–4347 (2006).

452 Endangered Species Act of 1973, 16 U.S.C §§ 1531–1544 (2006).

453 Administrative Procedure Act, 5 U.S.C §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006).

454 Plaintiffs included the Humane Society of the United States, the Wild Fish Conservancy, Bethanie O'Driscoll, and Andrea Kozil.

455 Humane Soc'y U.S. v. Locke (*Humane Society*), 626 F.3d 1040, 1044 (9th Cir. 2010) ("[The] ESA-listed salmonid populations . . . at issue here . . . [are] the Upper Columbia River Spring run of Chinook salmon, the Snake River Spring/Summer run of Chinook salmon, the Snake River Basin population group of steelhead, the Middle Columbia River population group of steelhead and the Lower Columbia River population group of steelhead. Each of these populations is listed as threatened or endangered under the ESA."); *see* Final Listing Determinations for 10 Distinct Population Segments of West Coast Steelhead, 71 Fed. Reg. 834, 859–60 (Jan. 5, 2006); Final Listing Determinations for 16 ESUs of West Coast Salmon, and Final 4(d) Protective Regulations for Threatened Salmonid ESUs, 70 Fed. Reg. 37,160, 37,193 (June 28, 2005).

456 The initial named defendants were Gary Locke, Secretary of Commerce, James W. Balsiger, and James Lecky. Washington State Department of Fish and Wildlife and State of Oregon Department of Fish and Wildlife intervened as defendants.

457 NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., DECISION MEMORANDUM AUTHORIZING THE STATES OF OREGON, WASHINGTON, AND IDAHO TO LETHALLY REMOVE CALIFORNIA SEA LIONS AT BONNEVILLE DAM UNDER SECTION 120 OF THE MARINE MAMMAL PROTECTION ACT (2008).

data accounts for all salmonid mortality caused by pinnipeds,[458] California sea lions account for 99% of all pinniped predation.[459] Reasoning that the California sea lions' actual consumption was probably greater than that which had been observed, NMFS calculated the potential consumption figure using a formula based on the bioenergetic needs of the individual California sea lions actually observed at the dam.[460] Between the observed predation rate and the potential predation rate, NMFS found a predation range for spring Chinook of 3.6% to 12.6% and for steelhead of 3.6% to 22.1%; both populations are ESA listed.[461] Past environmental and biological assessments issued by NMFS and other federal agencies had concluded that similar sized fishery- and dam-related takes of the salmonids did not have a significant adverse impact on the viability of Columbia River salmonids.[462]

In response to the States of Oregon, Washington, and Idaho's application for authorization under Section 120 of the MMPA[463] to lethally remove California sea lions, and in accordance with the requirements of that Act,[464] NMFS convened a task force to evaluate whether the California sea lions' predation was a significant negative impact on salmonid viability. Seventeen of the eighteen members recommended approval of the application. The Humane Society, a named plaintiff in the case, dissented. Upon receiving the recommendation, NMFS first issued an environmental assessment (EA) as required by NEPA,[465] finding no significant impact on the human environment, and then issued a partial approval of the states' MMPA application.[466]

NMFS devised a two-part test to determine "individually identifiable pinnipeds which are having a significant negative impact":[467] 1) decide whether pinnipeds have a negative impact collectively and 2) ascertain which specific pinnipeds are significant contributors to predation.[468] Significant contributors either have identifiable features or can be classified as predatory because of continued sightings despite nonlethal deterrence.[469] Finding both parts of its test satisfied, NMFS issued an initial authorization for five years, limiting the number of California sea lions taken to the lesser of either eighty-five per year or the number that would reduce salmonid predation to 1% of the run at Bonneville. NMFS described the reasoning

458 *Humane Society*, 626 F.3d at 1044 (describing pinnipeds as "marine mammals having fin–like flippers for locomotion").

459 *Id.* at 1044 n.1.

460 73 Fed. Reg. 15,483, 15,485 (Mar. 24, 2008).

461 *Id.*

462 *Humane Society*, 626 F.3d at 1045.

463 Section 120 "authorize[s] the intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks which . . . have been listed as threatened . . . or endangered species under the [ESA]." Marine Mammal Protection Act of 1972, 16 U.S.C. § 1389(b)(1) (2006).

464 *See id.* § 1389(c)(1).

465 *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006).

466 *See* 73 Fed.Reg. at 15,483.

467 16 U.S.C. § 1389(b)(1) (2006).

468 73 Fed.Reg. at 15,484.

469 *Id.* at 15,486.

behind this limitation as a balance between the policy values of protecting the salmonids under the ESA and protecting the California sea lions under the MMPA.[470]

Plaintiffs challenged this decision on several grounds. First, they asserted that the NMFS's application of the MMPA was arbitrary or capricious under the APA[471] because it represented a change in policy without sufficient explanation. Second, they argued that NMFS's failure to prepare an EIS violated NEPA. Third, plaintiffs challenged the district court's grant of the defendants' motion to strike records outside of the immediate record as an abuse of discretion. Finally, they argued that the use of bioenergetic modeling was also arbitrary or capricious under the APA.

The Ninth Circuit reviews de novo a district court's grant or denial of summary judgment;[472] the judicial review provisions of the APA[473] govern review of MMPA[474] and NEPA[475] claims; and the exclusion of extra record evidence by a district court is reviewed for an abuse of discretion.[476] Here, the Ninth Circuit agreed with plaintiffs' first and third arguments and denied the others, remanding to the district court to vacate NMFS's decision and remand to NMFS.

With regard to the MMPA claim, the Ninth Circuit held that NMFS did not offer an acceptable explanation for its action because it did not adequately explain its finding that California sea lion predation causes "significant negative impact." NMFS's finding was seemingly inconsistent with its previous findings that fisheries and dams that cause similar or greater mortality of salmonids did not have significant negative impacts.[477] NMFS offered several arguments that helped explain the apparent inconsistencies between the disparate assessments, including: 1) the 2005 assessment of fisheries covered a much larger area, not the take at a single

470 According to NMFS, the one percent predation target "is not equivalent to a finding that a one percent predation rate represents a quantitative level of salmonid predation that is 'significant' under [S]ection 120, and that less than one percent would no longer be significant," but rather "is an independent limit on the numbers of sea lions that can be lethally removed to address the predation problem and is intended to balance the policy value of protecting all pinnipeds, as expressed in the MMPA, against the policy value of recovering threatened and endangered species, as expressed in the ESA." *Id.*

471 Administrative Procedure Act, 5 U.S.C § 706(2)(A) (2006) (expressing agency decisions may be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

472 LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001).

473 5 U.S.C. §§ 701–706 (2006).

474 *See* City of Sausalito v. O'Neill, 386 F.3d 1186, 1205 (9th Cir. 2004); *see also* Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701, 707 (9th Cir. 2009).

475 *See* Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 858 (9th Cir. 2005) (holding that the APA governs a review of compliance with NEPA); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 640 (9th Cir. 2004) (finding that review under the APA also applies to an agency's decision not to prepare an EIS based on findings in the EA).

476 *See* Partridge v. Reich, 141 F.3d 920, 923 (9th Cir. 1998); Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996).

477 The Ninth Circuit pointed to four EAs prepared by NMFS between 2003 and 2007 that each allowed fisheries to take between 4% and 17% of salmonid runs and that found that such a take would not have significant impacts on salmonid populations.

location, 2) the 2003 and 2007 assessments of the fisheries prohibited take of wild species altogether, and 3) where fishing allows NMFS to regulate according to the size of the run, predation is unregulated. However, the Ninth Circuit declined to accept such post hoc rationalizations not offered during the course of the administrative process.[478]

In addition, the agency argued that the previous assessments, because they spoke to the impact of fisheries under NEPA as opposed to the impact of pinnipeds under MMPA, do not constitute a precedent from which it "swerved."[479] While the Ninth Circuit agreed that NMFS did not "swerve" from prior precedent, it ultimately categorized the previous assessments as "'relevant data,' such that it was incumbent on the agency to offer a 'satisfactory explanation' for its decision in light of earlier findings."[480] Moreover, the Ninth Circuit noted that these inconsistent assessments were controversial throughout the decision making process[481] and NMFS should have provided some explanation for the inconsistency at that time.

NMFS also failed to adequately explain why a predation rate greater than 1% would have a significant negative impact on the recovery of salmonids. Without such explanation as to how this particular level relates to a decline or recovery of salmonid species the Ninth Circuit was unable to determine whether NMFS had complied with the requirements of the MMPA. As with the inconsistencies in the relevant data regarding sea lion predation versus fishery and dam mortality, the Ninth Circuit paid particular attention to the fact that the Marine Mammal Commission had repeatedly voiced concerns about the linkage between the levels of pinniped take and predation of salmonids. The Ninth Circuit denied that requiring a better explanation would put undue burden on the agency, pointing out that the APA merely requires a "cogent explanation."[482] Section 120 of the MMPA provides for the priority of ESA-listed salmonids "over MMPA-protected pinnipeds *under certain circumstances*," and here, NMFS failed to determine the existence of those circumstances.[483] Without some explanation for this figure, the Ninth Circuit held it would be unable to engage in meaningful judicial review of NMFS's action.

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478 *See* Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 688 (9th Cir. 2007) ("[W]e 'may not accept appellate counsel's post hoc rationalizations for agency action.'" (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962))).

479 *Cf.* Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (holding that an agency has a duty to explain a departure from prior precedent).

480 *Humane Society*, 626 F.3d 1040, 1050 (9th Cir. 2010) (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

481 *See generally* PINNIPED FISHERY INTERACTION TASK: COLUMBIA RIVER, FINAL REPORT AND RECOMMENDATIONS OF THE MARINE MAMMAL PROTECTION ACT, SECTION 120: MINORITY OPINION app. B (2007), *available at* http://www.mediate.com/DSConsulting/docs/Appendix B minority opinion.pdf; *cf.* H.R.REP. NO. 103-439, at 47 (1994) ("[T]he Committee recognizes that a variety of factors may be contributing to the declines of these stocks, and intends that the current levels of protection afforded to seals and sea lions under the Act should not be lifted without first giving careful consideration to other reasons for the decline, and to all other available alternatives for mitigation.").

482 *Nw. Envtl. Def. Ctr.*, 477 F.3d at 691.

483 *Humane Society*, 626 F.3d at 1054 (emphasis in opinion).

Plaintiffs also challenged NMFS's interpretation of MMPA under *Chevron*,[484] but failed to persuade the Ninth Circuit that the agency's two-part test was contrary to the plain language and legislative history of the statute. Under *Chevron*, a court must first determine the intent of Congress and where that is unclear, defer to the agency interpretation.[485] Here, the Ninth Circuit noted some legislative history contrary to NMFS's interpretation, but nonetheless determined that it did not rule out the agency's two-part test.[486]

With regard to plaintiffs' second claim that NMFS had violated NEPA by failing to prepare an EIS, the Ninth Circuit found that the agency reasonably concluded from its EA that its actions would not significantly "affect[] the quality of the human environment."[487] The plaintiffs argued that finding a significant beneficial impact under MMPA compelled a similar finding under NEPA. As a matter of first impression, the court first considered whether a *beneficial* impact would even trigger the NEPA requirement[488] but declined to answer that question because plaintiffs' argument conflated fish populations with "human environment" and because the two statutes have distinct legal standards.[489]

In the alternative, plaintiffs presented three theories to bolster a claim that NEPA obligated NMFS to prepare an EIS for *adverse* impacts—all of which the Ninth Circuit found unpersuasive. First, plaintiffs argued that an EIS was required because of the controversial nature of the decision.[490] But, here the controversy had to do with the action itself, not whether an EIS was required.[491] Second, plaintiffs argued that the action created a potential danger for Steller sea lions that compelled an EIS, but the Ninth Circuit determined that NMFS had provided adequate safeguards. Third, plaintiffs argued that shooting the California sea lions would decrease viewing

484 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

485 *Id.* at 842–43.

486 The court cited one statement from the legislative history that "lends some support to plaintiffs' position" but found that "the language and purpose of [MMPA] as a whole do not preclude [NMFS's] two-part interpretation." *Humane Society*, 626 F.3d at 1055.

487 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006).

488 In addition, the court rejected the defendants' arguments that Bering Strait Citizens for Responsible Resource Development v. United States Army Corps of Engineers, 524 F.3d 938, 956 (9th Cir. 2008), decided this question, concluding that the plaintiffs' view was in line with authority from other circuits.

489 The court clarified this point by pointing out that the two standards are not unrelated, merely that a finding of significance under one does not automatically induce the same finding under the other. S*ee* 40 C.F.R. § 1508.27(b)(9) (2010) (providing that one factor an agency should consider in making the determination of whether to prepare an EIS under NEPA is "[t]he degree to which the action may adversely affect an endangered or threatened species").

490 *See id.* § 1508.27(b)(4) (describing that the agency should consider "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial"); *id.* § 1508.27(b)(5) (clarifying that the agency also should consider "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks").

491 Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982) ("The term 'controversial' refers 'to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.'").

opportunities at Bonneville Dam. The Ninth Circuit agreed, but concluded that viewing opportunities were not a factor sufficient to require an EIS.[492]

However, plaintiffs' third claim—that the district court erred in granting the defendants' motion to strike the conflicting EAs to the extent that they were not included in the administrative record—succeeded. Though courts are typically limited to the administrative record when reviewing agency decisions,[493] the Ninth Circuit allows for extra-record information that may be "necessary to determine 'whether the agency has considered all relevant factors and explained its decision.'"[494] The Ninth Circuit held that the prior EAs constituted relevant data, and as such, held that the district court should not have stricken the EAs and vacated the district court's order.

Plaintiffs' fourth and final claim was that NMFS's use of bioenergetic modeling was arbitrary or capricious under the APA. In upholding the model, the Ninth Circuit concluded that the record plainly and without controversy demonstrated that the Corps's estimates of predation, based solely on observations of pinnipeds rather than on estimations of pinnipeds present at the dam, had led to undercounting. NMFS's decision to seek out additional information was therefore reasonable.[495] Second, plaintiffs did not present any evidence that the formula used provided for inaccurate data—only that some of the agency's assumptions might be subject to dispute.[496] Moreover, NMFS relied on the modeling only to supplement the Corps's estimates and, therefore, such modeling was not material to its decision.

In conclusion, the Ninth Circuit affirmed the district court with regard to plaintiffs' NEPA claims, reversed with regard to plaintiffs' MMPA claim under the APA's judicial review provision, and vacated the motion to strike prior assessments from the record. The Ninth Circuit remanded the case to the district court to remand it to NMFS.

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492 *See* 40 C.F.R. § 1508.27(b)(8) (2010).

493 *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 142 (1973).

494 *Sw. Ctr. for Biological Diversity*, 100 F.3d 1443, 1450 (9th Cir. 1996) (quoting Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 703 (9th Cir. 1996)).

495 *See* Lands Council v. McNair, 537 F.3d 981, 993–94 (9th Cir. 2008) (en banc) ("[A]s non-scientists, we decline to impose bright-line rules on the [agency] regarding particular means that it must take in every case to show us that it has met the [statutory] requirements. Rather, we hold that the [agency] must support its conclusions that a project meets the requirements of the [statute] . . . with studies that the agency, in its expertise, deems reliable."), *abrogated in part on other grounds by* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

496 *See* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *see also* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983) (explaining that when an agency is "making predictions, within its area of special expertise . . . , as opposed to simple findings of fact, a reviewing court must generally be at its most deferential").

7. Modesto Irrigation District v. Gutierrez, *619 F.3d. 1024 (9th Cir. 2010).*

Modesto Irrigation District and other irrigation districts (collectively MID)[497] brought an action against the Secretary of Commerce, agencies within the Commerce Department, and agency officials (collectively Defendants)[498] under the APA.[499] MID argued that NMFS violated the ESA[500] when it listed steelhead, a type of Pacific salmon, as a threatened species. MID also claimed that NMFS failed to adequately explain its decision to classify steelhead in a distinct population segment (DPS)[501] separate from rainbow trout, which is also a Pacific salmon. The United States District Court for the Eastern District of California granted Defendants' motion for summary judgment[502] and MID appealed. The United States Court of Appeals for the Ninth Circuit affirmed, holding that NMFS was authorized to classify steelhead in a separate DPS from the rainbow trout and that NMFS adequately explained its decision to revise policy to classify interbreeding salmon species in separate DPSs.

Since the distinction between steelhead and rainbow trout—both members of *Oncorhynchus mykiss*—is central to the case, the Ninth Circuit first summarized characteristics unique to each fish. While steelhead and rainbow trout are both born in freshwater, steelhead undergo a biological transition that allows them to migrate to the ocean before returning to their native stream to spawn. The fresh-salt-fresh water migration pattern distinguishes the anadromous form of *Oncorhynchus mykiss*, steelhead, from the resident form of *Oncorhynchus mykiss*, rainbow trout. The migration distinction contributes to jurisdictional complexity as the FWS has jurisdiction over anadromous fish and NMFS has jurisdiction over freshwater fish. All parties agreed that the Central Valley of California steelhead population is in decline and despite a capacity to interbreed, data suggest that a viable rainbow trout population will not reestablish a lagging steelhead population.

The Ninth Circuit next reviewed the statutory and regulatory history of the ESA. In 1978, Congress created the term DPS for agencies to use to "provide different levels of protection to different populations of the same species."[503] However, NMFS struggled to apply the DPS concept to steelhead

497 Plaintiffs were Modesto, Turlock, Merced, Oakdale, and South San Joaquin Irrigation Districts and Stockton East Water District.

498 Defendants were Carlos Gutierrez, Secretary of Commerce, the National Oceanic and Atmospheric Administration (NOAA), NMFS, D. Robert Lohn, Regional Administrator of NMFS, Conrad Lautenbacher, Jr., Administrator of NOAA, William Hogarth, Assistant Administrator of NMFS, and Rodney McInnis, Regional Administrator of NMFS.

499 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006).

500 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

501 16 U.S.C. § 1532(16) (2006) (defining "species" as "any subspecies of fish or wildlife or plants, and any *distinct population segment* of any species of vertebrate fish or wildlife which interbreeds when mature" (emphasis added)).

502 Cal. State Grange v. Nat'l Marine Fisheries Serv. (*Grange*), 620 F. Supp. 2d 1111, 1176–77 (E.D. Cal. 2008).

503 Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 842 (9th Cir. 2003).

in the absence of a statutory definition or clear congressional guidance. In 1991, NMFS promulgated a Pacific salmon policy (ESU policy) that defined DPS in terms of an "evolutionary significant unit" (ESU)[504] and required that a salmon population be "substantially reproductively isolated"[505] to qualify as an ESU. In 1996, NMFS promulgated a broader policy (DPS policy) that deemphasized reproductive isolation in favor of a population's "marked[ ] separat[ion] from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors."[506] Ultimately, NMFS and FWS continued to apply ESU policy to Pacific salmon but DPS policy to other vertebrates. In light of steelhead and rainbow trout interbreeding, NMFS classified both members of *Oncorhynchus mykiss* in the same ESU.

In 1997, NMFS decided to list a subdivision of steelhead from the ESU partly due to threatened steelhead stock and partly due to FWS's desire not to list any ESU that contained nonthreatened rainbow trout stock.[507] However, in 2001 the United States District Court for the District of Oregon found that NMFS was precluded from listing a subdivision of an ESU—the ESA required agencies to list entire ESUs/DPSs.[508] In 2004, NMFS subsequently defined Central Valley *Oncorhynchus mykiss* ESU to include steelhead and rainbow trout.[509] Yet, NMFS was met with opposition when it promulgated listings pursuant to *Alsea Valley Alliance v. Evans* (*Alsea*):[510] environmentalists and FWS asserted that NMFS erred in not considering the biological differences of *Oncorhynchus mykiss* fish when defining ESUs.[511] Contemporaneous scientific data also demonstrated that a viable rainbow trout population was unlikely to reestablish a steelhead population.[512] Finally, in January 2006, NMFS announced it would change course and apply DPS policy—classification based on unique physiological, ecological, or behavior factors—to Pacific salmon.[513] NMFS cited FWS and NMFS shared jurisdiction over *Oncorhynchus mykiss* and previous application of DPS policy over Atlantic salmon in support of its policy change.[514] Shortly thereafter, NMFS classified Central Valley steelhead in a separate DPS and listed it as threatened under the ESA.

In response, MID filed suit under the APA claiming NMFS did not adequately justify its policy change and that classifying steelhead in a separate DPS violated the ESA because steelhead and rainbow trout were not sufficiently biologically different. In awarding summary judgment for the

504 56 Fed. Reg. 58,612, 58,618 (Nov. 20, 1991).

505 *Id.* at 58,612.

506 70 Fed. Reg. 67,130, 67,131 (Nov. 4, 2005) (codified at 50 C.F.R. pts. 223, 224).

507 *Id.* at 67,130.

508 Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1161–64 (D. Or. 2001).

509 69 Fed.Reg. 33,102, 33,115 (June 14, 2004).

510 161 F. Supp. 2d at 1161–64.

511 71 Fed. Reg. 834, 836 (Jan. 5, 2006) (codified at 50 C.F.R. pts. 223, 224).

512 *See* ROBERT E. BILBY ET AL., VIABILITY OF ESUS CONTAINING MULTIPLE TYPES OF POPULATIONS 29 (2005), *available at* www.nwcouncil.org/library/isab/isab2005-2.pdf.

513 71 Fed. Reg. at 836.

514 *Id.*

government, the district court found NMFS provided sufficient justification for its change to DPS policy. The district court also determined that the ESA's definition of species was ambiguous and did not clearly support MID's assertion that all interbreeding organisms must be classified in the same DPS.[515] Since Congress added the term DPS to provide agencies with more flexibility in classifying species, adopting MID's limited construction would frustrate Congress's intent. MID subsequently appealed.

The first issue presented to the Ninth Circuit was whether the ESA requires similar treatment for steelhead and rainbow trout. MID reasserted that so long as steelhead and rainbow trout interbreed, the fish must be classified in the same DPS. In contrast, NMFS explained that interbreeding "is a necessary, but not a sufficient condition for classification as a DPS . . . organisms may be distinguished by other factors."[516] Under step one of *Chevron*,[517] the court analyzed the relevant text, "species includes . . . any *distinct population segment* of any species of vertebrate fish . . . which *interbreeds*,"[518] for Congress's intent. The court agreed with the district court that the statutory definition was ambiguous and Congress did not intend to limit the agency's discretion to define DPS. Citing *The Elements of Style*,[519] the court found support for the government's interpretation that the language "which interbreeds"[520] does not indicate interbreeding is the single definitive characteristic of a DPS. Citing *Northwest Ecosystem Alliance v. United States Fish and Wildlife Service*,[521] the court acknowledged it already concluded "DPS" is an ambiguous term and agency construction warranted *Chevron* deference. In essence, Congress's decision to include a specific term without attendant statutory definition indicated the agency had discretion to interpret the term. Thus, the court found that MID's argument was in contravention of both congressional intent and prior circuit law. The court also rejected MID's assertion that *Alsea* prevented NMFS from classifying a steelhead-specific DPS. The court distinguished *Alsea* from the present action relying on the fact that NMFS *subdivided* an ESU/DPS in *Alsea*, whereas NMFS did not subdivide but, rather, classified steelhead in a separate DPS in the decision at issue.

The second issue presented to the Ninth Circuit was whether NMFS provided an adequate rationale for changing its policy. While the court affirmed the district court's finding that NMFS sufficiently explained its policy change, it did so based on the recent United States Supreme Court decision *Federal Communications Commission v. Fox Television Stations, Inc.* (*FCC v. Fox*).[522] *FCC v. Fox* superseded the authority upon which the

515 *Grange*, 620 F. Supp. 2d 1111, 1174–76 (E.D. Cal. 2008).

516 Modesto Irrigation District v. Gutierrez (*Gutierrez*), 619 F.3d 1024, 1032 (9th Cir. 2010).

517 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. (*Chevron*), 467 U.S. 837, 842 (1984) (evaluating whether Congress spoke directly to the precise question at issue—if clear, the court must give effect to the statute's plain meaning).

518 Endangered Species Act of 1973, 16 U.S.C. § 1532(16) (2006) (emphasis added).

519 WILLIAM STRUNK, JR., & E. B. WHITE, THE ELEMENTS OF STYLE 59 (3d ed. 1979).

520 16 U.S.C. § 1532(16) (2006) (emphasis added).

521 475 F.3d 1136, 1141–44 (9th Cir. 2007).

522 129 S. Ct. 1800 (2009).

district court relied[523] and established new guidance for judicial review of an agency's policy change. In order to adequately explain a policy change under *FCC v. Fox*, the agency must 1) "display awareness that it *is* changing position"[524] and 2) "show that there are good reasons for the new policy . . . [b]ut it need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one."[525]

The Ninth Circuit opined that agencies have "considerable latitude"[526] to change policy if the agency "fully explain[ed] how its new construction is permissible under the statute, that there are good reasons for the new construction, and [it] believes the new interpretation to be better."[527] The Ninth Circuit concluded NMFS met the first criterion under *FCC v. Fox* because the agency explicitly recognized it was changing policy in the formal rule when it explained its decision to discontinue ESU policy in favor of DPS policy.[528] In addition, the court acknowledged its conclusion in *Northwest Ecosystem Alliance*—that DPS policy is a permissible construction of the ESA—satisfied the requirement in *FCC v. Fox* that the agency's new policy be a permissible construction of the controlling statute.[529]

The Ninth Circuit next analyzed whether NMFS met the second, more serious, criterion under *FCC v. Fox*. Namely, that the agency provided "good reasons"[530] for changing its policy. Citing *FCC v. Fox*, the court expressed it would uphold an agency explanation "of less than ideal clarity if the agency's path may reasonably be discerned."[531] The court found that NMFS's detailed notice and comment process constituted sufficient reason under *FCC v. Fox* because it chronicled the agency's evolving understanding of *Oncorhynchus mykiss*. In 1991, the agency acknowledged uncertainty surrounding the relationship of steelhead and rainbow trout. In contrast, by 2005 the agency had considered the extensive biological, ecological, and behavioral differences in its proposed rule.[532] Moreover, upon receiving additional data relating to the inability of rainbow trout to revive a lagging steelhead population, NMFS extended the relevant comment period to integrate the data into its explanation.[533] Since NMFS discussed the unique characteristics of *Oncorhynchus mykiss* at length, the court concluded "it may reasonably be discerned . . . that NMFS determined that *O. mykiss* is distinct from other

523 *See* Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

524 129 S. Ct. at 1811 (emphasis in original).

525 *Id.* (emphasis in original).

526 *Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010) (citing Ad Hoc Shrimp Trade Action Comm. v. United States, 596 F.3d 1365, 1372 (Fed. Cir. 2010) and Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n, 568 F.3d 985, 988–89 (D.C. Cir. 2009)).

527 *Ad Hoc Shrimp Trade Action Comm.*, 596 F. 3d at 1372.

528 71 Fed. Reg. 834 (Jan. 5, 2006) (codified at 50 C.F.R. pts. 223, 224).

529 *Gutierrez*, 619 F.3d at 1035; *see also Nw. Ecosystem Alliance*, 475 F.3d 1136, 1150 (9th Cir. 2007).

530 *FCC v. Fox*, 129 S. Ct. at 1811.

531 *Id.*

532 70 Fed. Reg. 67,130, 67,132 (Nov. 4, 2005) (codified at 50 C.F.R. pts. 223, 224).

533 70 Fed. Reg. 37,219, 37,220 (June 28, 2005) (codified at 50 C.F.R. pts. 223, 224).

types of Pacific salmon."[534] Citing *Trout Unlimited v. Lohn*,[535] the court affirmed its deference to a reasonable agency interpretation and rejected MID's argument that contradictory scientific evidence in the record invalidates NMFS's decision. In addition, the court acknowledged that NMFS's effort to adopt DPS policy that is consistent with precedent in instances of overlapping jurisdiction (e.g., Atlantic salmon) constituted another "good reason" for the policy change. Thus, NMFS's extensive description of its evolving understanding of *Oncorhynchus mykiss* demonstrates that its decision to change policy was not arbitrary or capricious.

Finally, the Ninth Circuit rejected MID's assertion that the court should have considered an alternative standard of deference because the cases on which MID relied[536] were decided prior to *FCC v. Fox* and applied an erroneous standard. While the court acknowledged that separate classification of two similar looking, co-occurring, fish present practical difficulties for irrigation district managers, it is for the agencies, not the courts, to respond to such concerns.

In summary, the Ninth Circuit affirmed the district court's finding that the ESA did not require NMFS to classify interbreeding steelhead and rainbow trout in the same DPS. The Ninth Circuit also upheld, under the recent framework of *FCC v. Fox*, the district court's determination that NMFS sufficiently explained its decision to apply DPS policy to *Oncorhynchus mykiss*.

B. The Wilderness Act

1. Wilderness Watch, Inc. v. United States Fish & Wildlife Service, *629 F.3d 1024 (9th Cir. 2010).*

Wilderness Watch, and other conservation groups (collectively Plaintiffs),[537] brought a challenge to a decision made by the FWS[538] to construct two water structures within the Kofa National Wildlife Refuge and Wilderness in Arizona. The Plaintiffs alleged that construction of the water structures on a portion of the Kofa Wilderness violated the Wilderness Act[539]

534 *Gutierrez*, 619 F.3d at 1036 (internal quotation marks omitted); *see also FCC v. Fox*, 129 S. Ct. at 1811.

535 559 F.3d 946, 958 (9th Cir. 2009).

536 *See* Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 686–90 (9th Cir. 2007); Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1171–78 (D. Mont. 2008); W. Watersheds Project v. Kraayenbrink, 538 F. Supp. 2d 1302, 1312–14 (D. Idaho 2008).

537 Additional plaintiffs included Arizona Wilderness Coalition, Sierra Club, Western Watershed Project, and Grand Canyon Wildlands Council.

538 Plaintiffs' complaint also named: H. Dale Hall, Director of FWS; Paul Cornes, Kofa Wildlife Refuge Manager; and Chris Pease, Regional Refuge Manager in their official capacities. The U.S. Sportsmen's Alliance Foundation, Arizona Desert Big Horn Sheep Society, Arizona Deer Association, Arizona Antelope Association, Foundation for the North American Wild Sheep, Yuma Valley Rod & Gun Club, Inc., Safari Club International, Safari Club International Foundation, National Rifle Association, and the State of Arizona intervened as defendants.

539 Wildnerness Act of 1964, 16 U.S.C. §§ 1131–1136 (2006 & Supp. II 2008), *amended by* Pub. L. No. 111-11, 123 Stat. 991 (2009).

and NEPA.[540] The United States District Court for the District of Arizona disagreed and granted summary judgment to FWS. On appeal, a divided panel of the Ninth Circuit determined that FWS failed to meet the Wilderness Act's requirement that structures be allowed only "as necessary to meet minimum requirements for the administration of the area for the purposes" of the Wilderness Act.[541] Therefore, the Ninth Circuit reversed the grant of summary judgment and remanded the case to the district court to determine an appropriate remedy. Since the court found for Plaintiffs on the Wilderness Act claim, it did not address Plaintiffs' NEPA claim. Circuit Judge Jay Bybee filed a dissent in which he accused the majority of ignoring the properly deferential standard of review for agency actions, grafting new requirements onto the Wilderness Act, and imposing an inappropriate remedy.

In 1939 President Franklin D. Roosevelt established the Kofa National Wildlife Refuge (Refuge) by executive order.[542] The Refuge, encompassing over 600,000 acres of Sonoran Desert in southwest Arizona, was subject to the Refuge Act.[543] In 1990 Congress designated 82% of the Refuge as wilderness, making it the Kofa National Wildlife Refuge and Wilderness.[544] That portion of the Refuge designated as wilderness is subject to both the Wilderness Act and the Refuge Act.[545] Pursuant to the Wilderness Act, FWS is "responsible for preserving the wilderness character of the area" while "administer[ing] such area for such other purposes for which it may have been established as also to preserve its wilderness character."[546] The Wilderness Act also prohibits building any "structure" within a wilderness area.[547] In 1997, after public review and comment, FWS and the Bureau of Land Management (BLM) issued the Kofa National Wildlife Refuge and Wilderness Interagency Management Plan (Management Plan). The Management Plan recognized the importance of the desert bighorn sheep[548] and provided that FWS would use "minimum tools" to "maintain[] an optimal bighorn sheep population."[549]

Due to the importance of water sources for bighorn sheep, the State of Arizona, nonprofit organizations, and the federal government build and maintain water structures to help restore the population of bighorn sheep. Throughout recent decades, the bighorn sheep population remained stable

540 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

541 16 U.S.C. § 1133(c) (2006 & Supp. II 2008).

542 Exec. Order No. 8039, 4 Fed. Reg. 438 (Jan. 25, 1939).

543 National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (2006), *amended by* the National Wildlife Refuge System Improvement Act of 1997 Pub. L. 105-57, 111 Stat. 1252–1260 (1997).

544 Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, § 301(a)(3), 104 Stat. 4469 (1990).

545 FWS manages the Refuge and Wilderness pursuant to an act of Congress. An Act to Amend the National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 94-223, 90 Stat. 199 (1966).

546 16 U.S.C. § 1133(b) (2006 & Supp. II 2008).

547 *Id.* § 1133(c).

548 A major purpose of establishing the refuge was to help conserve the desert bighorn sheep.

549 U.S. FISH & WILDLIFE SERV. & BUREAU OF LAND MGMT., KOFA NATIONAL WILDLIFE REFUGE AND WILDERNESS INTERAGENCY MANAGEMENT PLAN 53 (1997).

between 600 and 800 sheep.[550] However, such stability led FWS to use the area for purposes other than those necessary for the immediate restoration of the local sheep population.[551]

The stability of the sheep population[552] came to an abrupt and unforeseen end in 2006 when sheep numbers declined to 390, far below normal population levels. In 2007, FWS and the Arizona Game and Fish Department jointly prepared an Investigative Report addressing the abrupt decline. The Investigative Report identified a number of mortality factors, including most prominently: 1) the availability of water; 2) predation;[553] 3) translocations; 4) hunting; and 5) human disturbance caused by hiking. While it did not reach any conclusions as to the precise cause of the decline in sheep populations, the Investigative Report did identify strategies to assist in the recovery of the population. One strategy called for improving existing water sources and identifying locations of new water sources—these sources would primarily be located outside of Wilderness land and would require an EA and minimum requirement / minimum tool analysis pursuant to the 1997 Management Plan. Other strategies included removing mountain lions, stopping translocations, and closing hiking trails during lambing season to avoid disturbing the easily frightened sheep. Noting the high demand for hunting licenses and the income generated from auctioning those licenses at conservation group fundraisers, the Investigative Report recommended, without analysis, that hunting be maintained at current levels.

Though the Investigative Report did not compare the different strategies, it did prioritize the strategies but, without any analysis. Four out of the first five priorities related to controlling mountain lion populations and the sixth priority related to the installation of new water sources: the Yaqui and McPherson water tanks. The two tanks were primarily fabricated of aerated PVC pipe buried underground and designed to catch and channel water into concrete troughs,[554] each trough with a capacity of approximately 13,000 gallons. The entire McPherson tank system and several of the Yaqui tank's diversion weirs were located in the Wilderness area, subject to the Wilderness Act.

In preparation for the Yaqui and McPherson tank projects, FWS drafted a "Minimum Requirements Analysis," consisting of two pages of "yes or no" questions with small spaces on the second page for brief explanations of the responses. FWS completed that document, answering "yes" to a question that required a "Minimum Tools Analysis." The Minimum Tools Analysis was

550 Surveys performed in 1991 and 1997 led FWS to conclude that the maximum capacity of the area was 800 sheep.

551 FWS came to use the area as a source for sheep to translocate to other areas in Arizona, Colorado, New Mexico, and Texas. FWS also began to allow limited hunting—from nine to seventeen sheep per year—and hiking in lambing areas.

552 This temporary stability was partially due to a lack of natural predators such as wolves and mountain lions.

553 Predation of bighorn sheep in the area was primarily due to mountain lions that had reappeared in the area.

554 The troughs would be constructed of concrete but covered with local sand and rocks to better blend in with the natural environment.

intended to explain the proposed action and its necessity, compare alternative plans and analyze their effects, and more fully describe the chosen alternative. The three alternatives analyzed in the Minimum Tools Analysis included two methods of constructing the tanks, mechanized and non-mechanized means, as well as the no action alternative (NAA). FWS chose the mechanized alternative, finding the NAA unacceptable because it would not help the sheep, and that the non-mechanized alternative's longer schedule would disturb the wildlife and visitors. The Minimum Tools Analysis provided only two sentences of vague references to the purpose of the Refuge and the importance of sheep, and wildlife in general, but did not address the Yaqui and McPherson tanks in particular or even water in general.

FWS built the Yaqui and McPherson tanks over a three-day period in 2007. Plaintiffs filed their complaint after FWS completed the Yaqui tank but prior to completion of the McPherson tank,[555] alleging that the construction of the tanks violated the Wilderness Act's prohibition of structures within wilderness areas "except as necessary to meet minimum requirements for the administration of the area."[556] After the district court granted summary judgment to FWS on the Wilderness Act claim, Plaintiffs appealed.

On appeal, the parties stipulated that the water tanks were "structures" generally prohibited by the Wilderness Act. Thus, the Ninth Circuit was charged with determining whether the structures fell within the Wilderness Act's exception for structures "necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act]."[557] Plaintiffs advanced two arguments in opposition to the structure: 1) that the conservation of bighorn sheep is not a valid "purpose" recognized by the Wilderness Act; and 2) that the structures are not necessary to meet the minimum requirements for conservation of bighorn sheep.

Reviewing de novo under the arbitrary and capricious standard of the APA,[558] the Ninth Circuit carefully reviews the agency record to ensure that agency decisions are based on "a reasoned evaluation of the relevant factors," and are not "inconsistent with a statutory mandate," and do not "frustrate the congressional policy underlying a statute."[559] The court may not, however, substitute its judgment for the agency's judgment.[560]

First, the court determined the proper level of deference owed to FWS regarding the 1997 Management Plan, which made conservation of bighorn sheep a "purpose" of the Wilderness Act. The court contrasted the Wilderness Act's provisions that require maintaining wilderness areas in

555 Plaintiffs also alleged a NEPA violation arising out of FWS's failure to prepare an EA of the tanks. Plaintiffs sought to enjoin the completion of the McPherson tank but ultimately settled that issue with FWS, allowing the completion of the McPherson tank.

556 Wilderness Act, 16 U.S.C. § 1133(c) (2006 & Supp. II 2008).

557 *Id.*

558 Administrative Procedure Act of 1964, 5 U.S.C. § 706(2)(A) (2006). Review of a district court's grant of summary judgment is de novo. High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 638 (9th Cir. 2004).

559 Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003) (quoting Pub. Citizen v. U.S. Dep't of Transp., 316 F.3d 1002, 1020 (9th Cir. 2003)).

560 *Id.*

pristine condition[561] with those allowing, under certain conditions, structures, temporary roads, motorized vehicles, boats, aircraft, and mining.[562] The court first found that the Wilderness Act was ambiguous as to the manner in which FWS must manage wilderness areas. This finding of ambiguity appeared to be in conflict with the Ninth Circuit's decision in *Wilderness Society v. U.S. Fish & Wildlife Service*[563] where it determined that the Wilderness Act's prohibition on "commercial enterprises" within wilderness areas was unambiguous.[564] However, the court distinguished *Wilderness Society* on the grounds that the activity there was purely commercial and therefore fell within the Wilderness Act's prohibitions on commercial activities.[565] In contrast, the provisions of the Wilderness Act at issue in the instant case were at odds with each other, creating ambiguity where, in *Wilderness Society*, there was none.

Although the court found the Act to be ambiguous in its instructions to FWS, because the Management Plan, in which FWS interpreted the Act's "conservation" requirement as including bighorn sheep, was not subject to the formal requirements of rulemaking required for interpretations carrying the force of law—but more closely resembled "policy statements, agency manuals, and enforcement guidelines . . . lack[ing] the force of law,"[566]—the court determined that the Plan did not merit the highly deferential standard announced in *Chevron*[567], but, rather, the much less deferential standard articulated in *Skidmore*.[568]

The court's deference to the Management Plan therefore depended on the factors giving it persuasive power, including the thoroughness of its consideration, validity of its reasoning, and consistency with previous and later FWS pronouncements of FWS.[569] The court examined the Plan noting that it: 1) reflected a consistent goal of protecting bighorn sheep; 2) thoroughly addressed the additional requirements of the Wilderness Act; and 3) attempted to reconcile those requirements with the goal of protecting bighorn sheep. Finding that FWS's "reasoning was thorough, valid, consistent, and persuasive," the court deferred to FWS's interpretation that

561 16 U.S.C. §§ 1133(a), 1133(c) (2006 & Supp. II 2008), *amended by* Pub. L. No. 111-11.

562 *Id.* § 1133(c), (d).

563 353 F.3d 1051 (9th Cir. 2003) (en banc).

564 *Id.* at 1062 (holding the Wilderness Act unambiguously prohibited a FWS plan to allow a private corporation to remove sockeye salmon from the Kenai Wildlife Refuge and Wilderness in order to harvest the salmon eggs for eventual commercial sale).

565 *Id.*

566 Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

567 If the FWS interpreted the Wilderness Act pursuant to clear, congressionally delegated, authority to make rules with the force of law, and FWS exercised that authority in promulgating its interpretation, then *Chevron* deference would apply. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

568 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (noting if an agency's interpretation lacks the force of law, it is entitled to deference only to the extent it "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

569 Wilderness Soc'y v. U.S. Fish and Wildlife Serv. 353 F.3d 1051, 1060 (9th Cir. 2003).

the conservation of bighorn sheep was a "purpose" consistent with the Wilderness Act.[570]

Having deferred to FWS's interpretation of the Wilderness Act, the Ninth Circuit turned to the issue of whether FWS sufficiently explained the basis for its determination that building the structures was "necessary to meet minimum requirements for the administration of the area."[571] Citing *High Sierra Hikers Ass'n v. Blackwell*,[572] the court noted that though the Wilderness Act gives the administering agency wide latitude—and the court should defer to the agency—as to the form that its necessity finding takes, the finding of necessity is a required, but not dispositive condition.[573] In addition, the agency must authorize the otherwise prohibited activity *only to the extent necessary*.[574] Noting the similarities between the case at bar and *High Sierra Hikers*, the court found that FWS must not only make a generic finding of necessity, but also a showing that the structures at issue were "necessary" to meet the "minimum requirements for the administration of the area for the purpose of [conserving bighorn sheep]."[575]

Having already examined the 2007 Investigative Report, the Minimum Requirements Analysis, and the Minimum Tools Analysis, the court found that FWS failed to establish whether the structures were necessary at all. The court noted that while these documents established that FWS examined many different strategies to address the declining bighorn sheep population, the agency never explained why it chose water structure construction over other strategies—or, that FWS had even compared different strategies.[576] The court cited the 2007 Investigative Report, which noted that the reemergence of the mountain lion population corresponded precisely to the period seeing the decline in bighorn sheep populations and concluded that predation by mountain lions alone may thwart recovery of the bighorn sheep population. The Investigative Report therefore prioritized four separate strategies aimed at controlling mountain lion populations ahead of the strategy involving building the Yaqui and McPherson tanks. Notably for the court, the Wilderness Act does not preclude FWS from taking action as to the mountain lion population, hikers, hunters, or translocations, whereas the Wilderness Act does prohibit structures like the Yaqui and McPherson tanks. Despite this contrast in prohibited and non-prohibited strategies, the record did not show that FWS sufficiently considered any of the possible actions not prohibited by the Wilderness Act.

FWS's Minimum Requirements Analysis and Minimum Tools Analysis also demonstrated to the court that FWS had begun with the assumption that a strategy involving water structures was necessary and never

570 Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv., 629 F.3d 1024, 1036 (9th Cir. 2010).

571 Wilderness Act, 16 U.S.C. § 1133(c) (2006 & Supp. II 2008), *amended by* Pub. L. No. 111-11. 123 Stat. 991 (2009).

572 390 F.3d 630 (9th Cir. 2004).

573 *Id.* at 646–47.

574 *Id.* at 647.

575 16 U.S.C. § 1133(c) (2006 & Supp. II 2008).

576 These other strategies included controlling mountain lion populations, stopping translocations, limiting human disturbance by hikers, and ending hunting.

compared it to other strategies. While there was one "yes or no" question on the Minimum Requirements Analysis that asked whether other, less intrusive, measures would accomplish the same goal, the court dismissed FWS's "no" response as simply carrying forward the same underlying assumption that water structures were necessary. Given that FWS had options that would not conflict with the Wilderness Act, a single "no" answer did not demonstrate that water structures were necessary to meet the minimum requirements of conserving bighorn sheep. The court held that where there are several factors at play, FWS must at least explain why it chose to address one and not the others. And if addressing one of those other factors would lead to the recovery of the bighorn sheep population, it cannot be said that building structures, generally prohibited by the Wilderness Act, is necessary. Thus, since FWS "entirely fail[ed] to consider an important aspect of the problem,"[577] the court held FWS's decision was arbitrary and capricious and a violation of the Wilderness Act.

Having found a violation of the Wilderness Act, the Ninth Circuit reversed the district court's grant of summary judgment to FWS. The court did not address the issue of a remedy, but rather remanded to the district court with instructions to determine the proper remedy which might include: removing the structures, remanding the matter to FWS for reconsideration of the necessity finding, or other relief as the district court determines is appropriate.

In summary, a divided panel of the Ninth Circuit found that FWS's interpretation of the Wilderness Act as allowing conservation of bighorn sheep as a valid "purpose" was entitled to deference; however, FWS violated the Wilderness Act because it failed to establish that building the water structures was necessary to meet the minimum requirements of that purpose. Since the parties had not briefed or argued the remedy on appeal, a divided panel of the Ninth Circuit reversed the district court's grant of summary judgment to FWS and remanded the case to the district court for argument on the remedy.

Circuit Judge Jay Bybee issued a dissenting opinion arguing that the majority missed the mark on what should have been an easy case to determine. Citing *High Sierra Hikers* for the proposition that the Wilderness Act does not require the sort of formalized comparison that the majority called for,[578] Judge Bybee accused the majority of grafting additional requirements onto the Wilderness Act. The Judge also found fault with the majority's remand to the district court, arguing that both United States Supreme Court and circuit precedent instead require a remand to the agency.

Judge Bybee's finding that FWS did not violate the Wilderness Act stemmed from a very different reading of the three documents FWS claimed supported its necessity finding—the Investigative Report, the Minimum

[577] Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal quotation marks omitted), *overruled in other part as recognized by* Am. Trucking Ass'ns v. City of L.A., 559 F.3d 1046, 1052 (9th Cir. 2009).

[578] *See High Sierra Hikers Ass'n*, 390 F.3d at 647.

Requirements Analysis, and the Minimum Tools Analysis.[579] Judge Bybee, referring to FWS's circling of "no" on the Minimum Requirements Analysis, stated that FWS did find that the water structures were necessary. Judge Bybee reasoned that: 1) the three documents, when read together, provided more than enough analysis to support FWS's necessity finding; 2) the record showed that FWS had adequately addressed the majority's concerns; and, 3) the majority should have done no more than cite a few relevant passages of those documents. Therefore, in granting the FWS proper defernce, Judge Bybee would have upheld the FWS's determination.

Citing United States Supreme Court and circuit precedent, Judge Bybee contended that when the reviewing court is unable to evaluate an agency action based on the record before the court, the proper remedy is to remand to the agency for further development of the record.[580] Thus, according to Judge Bybee, the majority erroneously bestowed upon the district court the choice of the proper remedy, including the possibility of ordering FWS to remove the structures.

C. Federal Meat Inspection Act of 1906

1. National Meat Association v. Brown, *599 F.3d 1093 (9th Cir. 2010).*

Plaintiff, the National Meat Association (NMA),[581] brought suit challenging the validity of a California statute regarding the slaughter and handling of nonambulatory animals. Through NMA, federally regulated swine slaughterhouses asserted that the Federal Meat Inspection Act (FMIA)[582] preempted the California statute. The district court granted NMA a preliminary injunction, upon which the Defendants[583] filed an interlocutory appeal. The United States Court of Appeals for the Ninth Circuit vacated the decision, finding no preemption in regards to prohibiting the slaughter of nonambulatory animals, yet finding preemption in regulations pertaining to the humane handling of nonambulatory animals.

In 2008, the Humane Society released a video showing the mistreatment of nonambulatory cows, which are cows that cannot stand or walk themselves without assistance into the slaughterhouse.[584] Given that these

579 Judge Bybee analyzed each of the relevant documents and explained how they reflected adequate consideration by FWS and showed that the tanks were just one part of FWS's comprehensive plan.

580 Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); Humane Soc'y of the U.S. v. Locke, 626 F.3d 1040, 1053 (9th Cir. 2010).

581 The American Meat Institute joined plaintiff as an intervenor.

582 Federal Meat Inspection Act of 1906, ch. 3913, 34 Stat. 674 (1906), *amended by* 21 U.S.C. §§ 601–691 (2006).

583 Defendants included Edmund G. Brown, in his official capacity as Attorney General of California; Arnold Schwarzenegger, in his official capacity as Governor of California, and the State of California. Intervenors included the Humane Society of the United States, Farm Sanctuary, Inc., Humane Farming Association, and the Animal Legal Defense Fund.

584 The Humane Society video showed cows that are unable to stand or walk on their own being kicked, electrocuted, dragged with chains, and rammed with forklifts.

animals are more likely to suffer from diseases than animals that can walk, meat from these cows is correspondingly more likely to be diseased. Outfall from this video led to one of the largest beef recalls in United States history. In response, California amended its penal code[585] to prohibit both the receipt and slaughter of all nonambulatory animals[586] as well as to require humane handling of these animals.[587]

NMA, a trade association representing packers and processors of swine livestock and pork products, sought declaratory judgment and injunctive relief, claiming that Section 599f is preempted by FMIA, that it violates the dormant Commerce Clause, and that it is unconstitutionally vague. The Ninth Circuit addressed only the first of these issues, as it was the deciding factor for the district court in its grant of a preliminary injunction.

The Ninth Circuit reviewed the district court's decision for abuse of discretion.[588] Preemption, as a legal issue, was reviewed de novo.[589] To obtain a preliminary injunction, NMA must demonstrate that it is likely to succeed on the merits, that without relief it will suffer irreparable harm, that the balance of equities tips in its favor, and that this relief is in the public interest.[590]

The Ninth Circuit began by constructing a framework in which to analyze preemption. Federal preemption of a state law can occur in one of two ways—express or implied.[591] Express preemption is limited to situations where federal law explicitly preempts state law.[592] Implied preemption occurs when Congress intended to occupy the field, when conflict between state and federal laws precludes simultaneous compliance, or the state law creates an obstacle to accomplishing federal law purposes.[593] Whether alleging express or implied preemption, there exists a strong presumption against preemption, especially in areas typically regulated by the states, including health and animal welfare.[594] Statutes containing express preemption provisions will thus be narrowly interpreted.[595] The court's preemption analysis addressed the portion of the statute concerning the receipt and slaughter ban separately from that portion prescribing humane handling requirements.

The court first analyzed whether relevant federal laws expressly preempted state activity. FMIA requires the federal inspection of all animals

585 CAL. PENAL CODE § 599f (2009).

586 *Id.* § 599f(a)–(c) (prohibiting any slaughterhouse or similar operation from buying, selling, receiving, or processing or selling meat derived from, any nonambulatory animal, or from holding without taking immediate action to humanely euthanize such an animal).

587 *Id.* § 599f(e) (restricting the manner in which nonambulatory animals may be moved about an operation's premises).

588 Stormans, Inc. v. Selecky, 586 F.3d 1109, 1119 (9th Cir. 2009).

589 Am. Trucking Ass'ns v. City of L.A., 559 F.3d 1046, 1052 (9th Cir. 2009).

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

591 Barrientos v. 1801-1825 Morton LLC, 583 F.3d 1197, 1208 (9th Cir. 2009).

592 Altria Grp., Inc. v. Good, 129 S. Ct. 538, 543 (2008).

593 *See id.*; English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

594 Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009).

595 Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 496 (9th Cir. 2005).

prior to slaughtering,[596] with more extensive examination required for nonambulatory animals.[597] FMIA's express preemption provision provides: "Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided . . . which are in addition to, or different than those made under this chapter may not be imposed by any state . . . ."[598] However, this provision is qualified with an explicit preservation of power to the states: "This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter."[599]

The Ninth Circuit focused on whether the California statute regulated "premises, facilities and operations."[600] Looking to the language of the California statute, the court found that Section 599f(a)–(c) did not regulate in a manner prohibited by the express preemption clause. Instead, Section 599f entails a blanket prohibition on the slaughter of nonambulatory animals. According to the Ninth Circuit, this restricts the type of animal that can be slaughtered, but does not impose requirements of the sort preempted by FMIA. The court found support in two other circuits, which held that FMIA did not preempt state laws that regulate the kind of animal that may be slaughtered, but rather limits the states in their ability to govern meat inspection and labeling requirements.[601] The district court attempted to distinguish these cases by contemplating that once the slaughter of a species is allowed and regulated, it cannot face further restrictions. However, the Ninth Circuit reasoned that regulating the slaughter of types of animals requires a "host of practical, moral and public health judgments . . . the kinds of judgments reserved to the states."[602] While the FMIA has a specified inspection process at its slaughterhouses, "states are free to decide which animals may be turned into meat."[603] The Ninth Circuit qualified that there may be situations in which state regulation may go too far, such as effectively establishing a parallel state meat inspection, but the court ultimately declined to determine the limits of express preemption. The Court determined that Section 599f's prohibition does not require any additional or different inspections and it is not a regulation of the "premises, facilities and operations" of slaughterhouses. Therefore, Section 599f(a)–(c) is not expressly preempted.

As to implied preemption, the Ninth Circuit did not find a basis for NMA's allegations, especially given that it is a demanding standard and

596 Federal Meat Inspection Act of 1906, 21 U.S.C. § 603(a) (2006).

597 9 C.F.R. § 309.2(b) (2010).

598 21 U.S.C. § 678 (2006).

599 *Id.*

600 Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1098 (9th Cir. 2010).

601 *See* Cavel Int'l, Inc. v. Madigan, 500 F.3d 551, 554 (7th Cir. 2007) (holding that a state ban on horse slaughter is not preempted); *see also* Empacadora de Carnes de Fresnillo, S.A. v. Curry, 476 F.3d 326, 333 (5th Cir. 2007).

602 *Nat'l Meat Ass'n*, 599 F.3d at 1099.

603 *Id.*

courts will not seek out conflict where none clearly exists.[604] In the FMIA, Congress explicitly provides for state regulation and therefore did not intend to occupy the field. Furthermore, it is not a physical impossibility for a federally regulated slaughterhouse to comply with both FMIA and state regulations. The federal regulations require inspection of nonambulatory animals prior to slaughter for human consumption—they do not require that these animals be slaughtered. California can choose to preclude slaughter of these animals. In addition, California's statute does not obstruct slaughterhouses from achieving the FMIA's goals, either by preventing accomplishment of its goals or by entailing requirements that are so "onerous and confusing."[605] The purpose of the FMIA is to ensure that consumers receive properly labeled and wholesome, unadulterated foods, and not to preserve that all animals be slaughtered for human consumption.[606] California's Section 599f(a)–(c) requires immediate euthanization of a nonambulatory animal, and therefore does not contravene the FMIA's purpose. Further, a slaughterhouse should have no difficulty complying because the standard of immediate euthanasia is straightforward.

While the Ninth Circuit found neither express nor implied preemption in the ban on receipt and slaughter of nonambulatory animals, it found express preemption in the humane handling requirements. Section 599f(e) states that a nonambulatory animal "may not be dragged . . . or pushed at any time."[607] Federal law prohibits "the dragging of disabled animals and other animals unable to move, while conscious."[608] Further, the FMIA's humane handling requirements apply to all animals, and not just those destined for human consumption. Thus, Section 599f(e) has a requirement that federal law does not—the prohibition of dragging unconscious nonambulatory animals. Section 599f(e) also prohibits the use of certain equipment to move nonambulatory animals that is otherwise permitted under federal law.[609] The Ninth Circuit found that federal law has preempted regulation in this realm because the state regulation deals with "'operations' of an 'establishment at which [federal] inspection is provided' that [is] 'in addition to[] or different than' federal law, and is therefore expressly preempted."[610]

The Ninth Circuit opined that despite the likelihood of express preemption in Section 599f(e), NMA must show that a balance of the equities rests in its favor and that it is likely to suffer irreparable harm. Upon review of further appeals, the district court must review the possibility of harm to NMA.

In conclusion, the Ninth Circuit found an abuse of discretion by the district court and vacated its grant of a preliminary injunction, finding no

604 *English*, 496 U.S. 72, 90 (1990).
605 *Nat'l Meat Ass'n*, 599 F.3d at 1100.
606 *Cavel Int'l*, 500 F.3d at 554.
607 CAL. PENAL CODE § 599f(e) (2009).
608 9 C.F.R. § 313.2(d)(2) (2010).
609 CAL. PENAL CODE § 599f(e).
610 *Nat'l Meat Ass'n*, 599 F.3d at 1101 (quoting 21 U.S.C. § 678 (2006)).

preemption in Section 559f(a)–(c) and preemption without hardship in Section 599f(e).

D. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990

1. United States v. Bell, *602 F.3d 1074 (9th Cir. 2010).*

The United States, as plaintiff, and the Pyramid Lake Paiute Tribe (Tribe) as intervenor-plaintiff, brought several suits[611] against the Truckee-Carson Irrigation District (TCID)[612] to recoup diversions made by TCID from the Truckee and Carson Rivers in excess of the relevant operating criteria and procedures (OCAPs). The United States Court of Appeals for the Ninth Circuit upheld the district court's determination that the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 (Settlement Act)[613] authorized the suit, held that the district court's recoupment order was not irreconcilable with the *United States v. Orr Water Ditch Co.* (*Orr Ditch* decree)[614] and *United States v. Alpine Land and Reservoir Co.* (*Alpine* decree)[615] decrees, upheld the validity of the 1973 OCAP, held that the Settlement Act authorizes recoupment awards, and upheld much of the district court's recoupment order. However, the court remanded to the district court the issues of pre- and post-judgment interest, as well as the recalculation of the recoupment award in light of gauge error. Finally, the court upheld the district court's refusal to dismiss the water users and denial of attorney fees and costs to the water users.

Pursuant to the Reclamation Act of 1902,[616] TCID, under contract with the federal government, controls diversions from the Truckee and Carson Rivers in order to provide irrigation water. A 1944 court order known as the *Orr Ditch* decree originally set the maximum diversions from the Truckee River for agricultural uses and the 1980 *Alpine* decree established those limits for the Carson River. In 1967, concerns over the health of Pyramid Lake, which is fed by the Truckee and Carson Rivers, led the Secretary of the Interior to establish OCAPs for those rivers to limit diversions for agricultural uses.

The Tribe, which controls Pyramid Lake, successfully challenged those OCAPs in *Pyramid Lake Paiute Tribe of Indians v. Morton* (*Tribe v. Morton*),[617] which led to a more restrictive, court-ordered OCAP known as

611 United States v. Bell, 602 F.3d 1074, 1074–75 (9th Cir. 2010). In total, six cases were brought by the United States in the District Court for the District of Nevada, Judge Howard D. McKibben, Presiding; the Ninth Circuit designated the appeals Nos. 05-16154, 05-16157, 05-16158, 05-16187, 05-16189, and 05-16909 and issued one opinion as to all the appeals.

612 *Id.* The United States brought the suit against TCID and all agricultural users of water supplied by TCID, including Arthur W. Bell, IV, the lead defendant in all six cases; the State of Nevada was a named defendant as a water user.

613 Pub. L. No. 101-618, 104 Stat. 3289.

614 Equity No. A-3 (D. Nev. 1944).

615 United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nev. 1980).

616 Pub. L. No. 57-161, 32 Stat. 388.

617 354 F. Supp. 252 (D.D.C. 1972).

the 1973 OCAP. TCID challenged that OCAP in court, lost, but then refused to follow it. Congress attempted to resolve the dispute between TCID and the Tribe through the Settlement Act, which requires the Secretary of Interior to ensure compliance with relevant OCAPs and pursue recoupment of water diverted in excess of those OCAPs. The Settlement Act also provides that it should be construed in accordance with the *Orr Ditch* and *Alpine* decrees. The United States brought suit against the TCID in 1995 in the District of Nevada, suing TCID, its board members, and all of the water users as a class. The United States, and the Tribe as intervenors, sought recoupment of over one million acre-feet of water diverted in excess of applicable OCAPs from 1973 to 1988.

The district court found that TCID had willfully failed to comply with the 1973 OCAP, but awarded to the United States just 200,000 acre-feet of the over one million acre-feet of water. The district court found that TCID was only liable for excesses in 1974, 1975, 1978, and 1979 and for spills in 1979 and 1980, but found that TCID was not responsible for excess diversions after 1980 because the government failed to update the 1973 OCAP to reflect the 1980 *Alpine* decree. The district court also ordered that TCID "pay" to the United States post-judgment "water interest" at the rate of two percent per annum on the balance of water remaining to be recouped but denied the government's request for pre-judgment interest. The United States, TCID, the Tribe, and Nevada (as owner of some of the irrigated lands) all brought appeals and cross-appeals of the various determinations of the district court.

TCID's first challenge was to the propriety of the action itself, arguing that the Settlement Act empowers the Secretary of the Interior to initiate court actions only to prevent future violations of OCAPs and to settle past violations, and that the United States therefore lacks a cause of action against the defendants. The court found that the Settlement Act unambiguously provides for litigation in the event that settlement is impossible, directing the Secretary of the Interior to enforce compliance with all OCAPs, past, present, and future, and to pursue recoupment in court where necessary to restore Pyramid Lake. Given that Congress clearly intended for the Settlement Act to apply retroactively and address past violations, the district court was correct that the present action was authorized by the Settlement Act.

TCID and Nevada both argued that the recoupment provided for in the district court's decision conflicted with the *Orr Ditch* and *Alpine* decrees. Noting that the Settlement Act expressly ratifies the *Orr Ditch* and *Alpine* decrees, they argued that the requirements contained in those decrees and the goal of restoring Pyramid Lake are mutually exclusive given the limited water supply available. The court noted that the water allowances for farmers set in the *Orr Ditch* and *Alpine* decrees are subject to the principle of beneficial use,[618] and therefore the amounts to which the farmers are

618 *Alpine Land & Reservoir Co.*, 697 F.2d 851, 854–55 (9th Cir. 1983) (defining beneficial use as that amount of water necessary to irrigate the maximum amount of crops suitable for a given tract of land).

entitled under those decrees will vary based on the application of the concept of beneficial use. It further noted that TCID could implement water conservation measures that would result in "credit water" available to satisfy the judgment. The court remained unconvinced that the allocation requirements of the decrees and the recoupment ordered in the instant case would prove impossible to reconcile and, citing "TCID's past record of noncompliance," put the onus on TCID to make the best use of the available water in order to satisfy the decrees and the recoupment judgment.

TCID also challenged the validity of the 1973 OCAP which the district court found TCID to have violated. TCID argued that the 1973 OCAP was itself invalidated by the 1980 *Alpine* decree, which raised the 1973 OCAP's maximum diversions for farming. The court found that the Settlement Act expressly refutes this argument and validates both the 1973 OCAP and the decision in *Tribe v. Morton*.[619] The district court was therefore correct in concluding that the 1973 OCAP is valid.

The court summarily rejected several other arguments made by TCID. TCID maintained that the district court lacked the power to order TCID to transfer water to the United States and the Tribe because both lacked water rights. The court cited the requirements of the Settlement Act, which, given TCID's control over diversions of water from the Truckee and Carson Rivers, could not be effected without an order compelling TCID to make such diversions as necessary for the restoration of Pyramid Lake. The court likewise rejected TCID's argument that the district court's order constituted a contempt order, holding instead that the district court's recoupment order was a valid judgment under the Settlement Act and not an imposition of a penalty or finding of contempt.[620] TCID further argued that the government must be estopped from bringing the instant case because of alleged past government statements that the 1973 OCAP would not be enforced. The court found that none of the government's past conduct rose to the level of "affirmative misconduct" causing "serious injustice" required to preclude by estoppel the government's suit against the defendants.[621]

Having found no fault with the district court's determination that TCID was liable under the Settlement Act for violations of OCAPs, the court then turned to the issue of the amount of TCID's liability. The first issues were pre- and post-judgment interest, and the court found fault with the district court on both. The district court had originally denied both pre- and post-judgment interest to the Plaintiffs, but thereafter modified its decision without comment, requiring TCID to "pay" post-judgment "water interest" of two percent per annum on the outstanding amount of water due under the judgment. The court noted that there is no provision in the common law for post-judgment interest, which must be based in the statutory provision

619 354 F. Supp. 252, 258 (D.D.C. 1973) (directing the Secretary of the Interior to submit a regulation that provides "an effective means to measure water use, to minimize unnecessary waste, to end delivery of water within the District to land not entitled under the decrees, and to assure compliance by the District").

620 *Bell*, 602 F.3d 1074, 1082 (9th Cir. 2010).

621 W. Pioneer, Inc. v. United States, 709 F.2d 1331, 1339 (9th Cir. 1983).

providing for such post-judgment interest.[622] Here, the federal statute in question allows interest "on any money judgment in a civil case."[623] Rejecting the government's and Tribe's arguments that prior United States Supreme Court precedent[624] allowed for such "water interest," the court noted that the district court did not discuss any authority giving it the right to order such "water interest" and that any such award would need to be based in equity. The court therefore remanded the matter to the district court to determine if "water interest" is really necessary to compensate the Plaintiffs for the duration of time between the award of damages and their payment by TCID. The court further ordered the district court to explain the post-judgment interest rate of two percent per year.

The court also found fault with the district court's denial of pre-judgment interest. The common law, guided by the principle that awards do not fully compensate for an injury absent interest, provides for pre-judgment interest and is unrestrained by statute.[625] The district court had denied pre-judgment interest on the grounds that the government had unreasonably delayed in bringing the suit and that it had accidentally destroyed relevant documents. However, the Ninth Circuit found that the government's delay was reasonable: the Settlement Act only created the government's cause of action in 1990 and the government sought settlement of the dispute, in accordance with the Act's provisions, in the interim period between the Act's passage and the commencement of the instant action. The district court also failed to explain the significance of any documents lost by the government and how such loss justified denial of pre-judgment interest. Finally, the court noted the seeming contradiction in the district court's award of post-judgment interest but not pre-judgment interest. The Ninth Circuit therefore remanded the issue of pre-judgment interest to the district court for reconsideration.

The court next addressed the parties' displeasure with the district court's fixing of damages. The court first rejected TCID's arguments that the district court's award was not based on the record, noting that the award matched the estimates contained in TCID's own expert's reports and declined to second-guess the district court's determinations based on the extensive record before the district court.

The court agreed with the United States that the district court had erred in applying the gauge error. Gauge error, the measure of statistical uncertainty in the government's flow data, is represented by a "confidence interval" establishing the lower and upper bounds of potential flow given that uncertainty. The court found that the district court accounted for

622 Pierce v. United States, 255 U.S. 398, 406 (1921) ("At common law judgments do not bear interest; interest rests solely upon statutory provision.").

623 28 U.S.C. § 1961(a) (2006).

624 Texas v. New Mexico, 482 U.S. 124, 132 n.8 (1987) (explaining that "water interest" should not "be awarded unless and until it proves to be necessary").

625 City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 194 (1995) (reasoning that in the absence of a legislative determination regarding prejudgment interest, "the absence of a statute merely indicates that the question is governed by traditional judge-made principles").

uncertainty by subtracting the uncertainty from the flow data, essentially punishing the government and the Tribe for the uncertainty.[626] This was in error, and the court remanded to the district court to determine the amount of diversions based on the government's published flow data, which the district court had implicitly accepted as being reliable enough to meet the government's burden of proving damages in the first place.

The government and the Tribe took issue with the district court's recoupment award for the period between 1981 through 1984, arguing that they were entitled to recoupment for diversions. The issue was whether the 1973 OCAP levels were the proper base for an award of recoupment for diversions. The court found that the 1973 OCAP did not reflect the 1980 *Alpine* decree's upward reallocation of the farmers' water entitlements. Because the government did not alter the 1973 OCAP to comply with the *Alpine* decree,[627] it could not meet its burden of establishing that TCID had diverted water in excess of what the proper diversions would have been. The government also argued that it was entitled to recoupment for spills between 1981 and 1984, and here the court agreed, holding that TCID's water duties are limited by the principle of beneficial use and that the government's failure to update the 1973 OCAP was no excuse for spills between 1981 and 1984.

The final issues addressed by the Ninth Circuit related to arguments raised by TCID concerning the farmers in the case. The farmers had sought dismissal from the case on the grounds that they bore no individual liability. The district court refused to dismiss the farmers, finding it was necessary for the farmers to be bound by any judgment in order to prevent their collateral attack through another proceeding. TCID argued that this denial was an error of law, but the Ninth Circuit found that given the history of litigation surrounding the waters at issue,[628] the refusal to dismiss the farmers in order to prevent a collateral attack was justified even if the farmers had no personal liability.[629]

TCID, on behalf of the farmers, also argued that the farmers were entitled to attorney fees as prevailing parties under the Equal Access to

626 *Bell*, 602 F.3d 1075, 1085 (9th Cir. 2010) ("[T]he district court accounted for statistical uncertainty in the flow data by subtracting the confidence interval from the published quantities, effectively assigning all of the uncertainty against the Tribe.").

627 *Alpine Land & Reservoir Co.*, 697 F.2d 851, 860 (9th Cir. 1983) (decreeing that water for public recreation is subordinate to agricultural purposes especially considering the Lahontan Reservoir's construction took place under the federal Reclamation Act, thus relegating recreation use as incidental to irrigation).

628 *Bell*, 602 F.3d at 1077–78 ("The long, divisive history of this and related litigation over the waters of the Truckee and Carson Rivers, and the decline of Pyramid Lake, is best reflected in *Nevada v. United States*, 463 U.S. 110 (1983), and in several landmark opinions of this and other courts." (citing Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364 (9th Cir. 1989); Truckee-Carson Irrigation Dist. v. Sec'y of Dep't of Interior, 742 F.2d 527 (9th Cir. 1984); *Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983); *Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973))).

629 Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co., 400 F.3d 774, 780 (9th Cir. 2005) (holding "we have elsewhere found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise").

Justice Act (EAJA).[630] The court disagreed, noting that Ninth Circuit precedent requires that a party obtain a judicially sanctioned material alteration of the relationship between the parties to the case and be awarded some relief by the court in order to be considered a prevailing party. The district court's judgment was entirely in favor of the United States and the Tribe, and while the judgment did not impose liability on the parties, it did bar any collateral challenge by the farmers and did fault TCID for diversions that benefitted the farmers, meaning that the farmers were not prevailing parties in the case.

The Court therefore remanded to the district court the issues of pre- and post-judgment interest and the calculation of recoupment amounts without including the gauge error. It also required the district court to determine the amount of water spilled. The court affirmed the district court's findings of law pursuant to the Settlement Act and its authorization of the government's suit. Finally, it also affirmed the recoupment awarded by the district court and affirmed the denial of the water users' dismissal and their claims relating to attorney fees and costs.

E. Service Decisionmaking and Appeals Reform Act

1. Wilderness Society v. Rey, *622 F.3d 1251 (9th Cir. 2010).*

The Wilderness Society (TWS), and fellow plaintiffs,[631] challenged USFS[632] regulations implementing the Forest Service Decisionmaking and Appeals Reform Act (ARA)[633] that limit the availability of public notice, comment, and appeals of USFS decisions. The United States District Court for the District of Montana ruled in favor of TWS, declaring two of the regulations invalid and imposing a nationwide injunction prohibiting the USFS from acting under the third regulation. The USFS appealed the decision and the United States Court of Appeals for the Ninth Circuit dismissed TWS's claims, holding that it lacked Article III standing to challenge the regulations. The Ninth Circuit found that TWS's standing affiant failed to allege a concrete and particularized injury as required to establish Article III standing, and that the ARA provision requiring public notice and comment did not create an informational right sufficient to establish standing.

The National Forest Management Act of 1976[634] directs the USFS to develop "land and resource management plans for units of the National

630 Equal Access to Justice Act, 28 U.S.C. § 2412(b) (2006).

631 Plaintiffs included The Wilderness Society, Inc., American Wildlands, and Pacific Rivers Council.

632 Named defendants consisted of Mark Rey, Ann Veneman, and Dale Bosworth, Chief, USFS.

633 Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (codified at 16 U.S.C. § 1612 note (2006)).

634 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

Forest System."[635] In 1992 Congress enacted the ARA, which requires the Secretary of Agriculture (Secretary) to establish notice and comment procedures for decisions related to "projects and activities implementing land and resource management plans," and to modify the appeals procedure for decisions regarding these actions.[636] The USFS adopted regulations pursuant to the ARA and later revised these regulations in 2003. TWS brought suit, challenging three sections of the regulation as impermissibly limiting the notice, comment, and appeals requirements of the ARA.[637] While TWS's suit was pending, a district court in California, in an unrelated action, granted injunctive relief with respect to Sections 215.20(b) and 215.12(f) of the challenged regulations.[638] TWS amended its complaint to request declaratory relief with respect to the enjoined regulations, and continued pursuit of its claim for a nationwide injunction of Section 215.13(a). The district court granted TWS's motion for summary judgment and declared Sections 215.20(b) and 215.12(f) invalid. Additionally, it imposed a nationwide injunction prohibiting the USFS from acting under Section 215.13. The USFS appealed, arguing that intervening Ninth Circuit and United States Supreme Court case law rendered TWS's challenge nonjusticiable.

The Ninth Circuit first discussed the intervening case law, reviewing the Supreme Court's decision in *Summers v. Earth Island Institute*[639] that overruled the Ninth Circuit's ruling in *Earth Island Institute v. Ruthenbeck*[640] on both standing and ripeness grounds. In *Summers*, the federal government sought review of the question whether the Earth Island Institute could challenge the regulations controlling a salvage sale of timber and whether a nationwide injunction was appropriate relief. Respondents (led by the Earth Island Institute) argued that they have standing because "they . . . suffered a procedural injury, namely that they [were] denied the ability to file comments on some Forest Service actions and will continue to be so denied."[641] The Supreme Court found that Earth Island lacked standing because 1) an affiant's general desire for future use of forest land did not establish a concrete and particularized injury that was actual or imminent, and 2) a procedural injury—being denied the right to comment—could not,

635 *Id.* § 1604(a).

636 Pub. L. No. 102-381, § 322, 106 Stat. 1419.

637 The regulations challenged were 36 C.F.R. § 215.12(f) (2010) which exempts those projects that the USFS determines do not have a significant effect on the environment from appeal, 36 C.F.R. § 215.13(a), which limits the right of appeal to those that submit substantive comments, and *36 C.F.R.* § 215.20(b), which exempts decisions of the Secretary of Agriculture and Under Secretary of Natural Resources and Environment from notice, comment, and appeals processes.

638 *See* Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005).

639 129 S. Ct. 1142, 1149 (2009).

640 490 F.3d 687, 699 (9th Cir. 2007) (affirming the United States District Court for the Eastern District of California's decision in *Pengilly* that invalidated Sections 215.12(f) and 215.4(a) and the nationwide injunction against their enforcement; remanding the injunction of the remaining regulations, except Section 215.18(b)(1), with instruction to vacate for lack of ripeness).

641 *Id.* at 1151.

on its own, establish a sufficient injury.[642] As a result of the stricter standing doctrine laid out in *Summers*, TWS revised its argument and claimed it had standing regarding Section 215.12(f) "because that challenge is specifically tied to a location and to a particular project, and because one of its members suffered an aesthetic or recreational injury-in-fact."[643]

Reviewing Article III standing de novo, the Ninth Circuit addressed aesthetic and recreational injury-in-fact. The court recognized that injury would be satisfied if TWS's standing affiant, Michael Anderson, "had repeatedly visited an area affected by a project, that he had concrete plans to do so again, and that his recreational or aesthetic interests would be harmed if the project went forward without his having the opportunity to appeal."[644] However, despite the fact that Anderson had demonstrated "extensive past use of the Umpqua National Forest," and authored a hiking book about the area, "his *general* intention to return *not just* to the Umpqua National Forest, but to *several* national forests in both Oregon *and* Washington state . . . [was a mere] 'some day' general intention" and was "too vague to confer standing" absent a showing that he would likely encounter an *affected* area in his future visits.[645] The court indicated that in order to overcome this type of vagueness, an affiant must allege future use of a specific tract of land that is immediately threatened by agency action. The court pointed out that, absent a concrete injury, a procedural harm "*in vacuo*" would not satisfy the injury-in-fact prong of Article III standing.[646]

After failing to meet the threshold for aesthetic and recreational injury, TWS pointed the court to its alleged informational injury. TWS claimed, as the district court found, that it had "suffered an informational injury resulting from 'the violation of the obligation to provide notice.'"[647] The Ninth Circuit observed that courts have found that the deprivation of statutory rights to information is sufficiently concrete and particularized for purposes of Article III standing under the Federal Election Campaign Act,[648] Freedom of Information Act (FOIA),[649] Fair Housing Act,[650] CWA,[651] and the Federal Advisory Committee Act (FACA).[652] To anchor standing on an informational injury, the relevant statute must grant a right to information capable of

642 *Id.* at 1150–51.

643 Wilderness Society v. Rey, 622 F.3d 1251, 1255 (9th Cir. 2010).

644 *Id.* at 1256.

645 *Id.* (emphasis added).

646 *See Summers*, 129 S. Ct. 1142, 1151 (2009).

647 *Wilderness Society*, 622 F.3d at 1258.

648 Federal Election Campaign Act, 2 U.S.C. §§ 431–442 (2006); *see* Fed. Election Comm'n v. Akins, 524 U.S. 11, 11 (1998).

649 Freedom of Information Act, 5 U.S.C. § 552 (2006); *see* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 440 (1989).

650 Fair Housing Act, 42 U.SC. §§ 3601–3619 (2006); *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 363 (1982).

651 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006); *see* Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 538 (6th Cir. 2004).

652 Federal Advisory Committee Act, 5 U.S.C. app. (2006); *see* Cummock v. Gore, 180 F.3d 282, 284 (D.C. Cir. 1999).

supporting a lawsuit.[653] Here, the Ninth Circuit found that, while the ARA granted the public rights to process and participation, which involve the divulgence of information, it does not grant a right to information *per se*. The court distinguished the ARA from FOIA and FACA by pointing to the goals of the respective statutes. The goals of both FOIA and FACA are to provide information to the public to allow for an informed citizenry and for public scrutiny of the government. In contrast, the ARA is intended to provide for a "systematic channel for public participation."[654] Because of the distinguishable intentions of the ARA, the Ninth Circuit, agreeing with the reasoning by the United States Court of Appeals for the Seventh Circuit in a similar ARA case, declined to find any right to information as granted by the Act.[655]

In summary, the Ninth Circuit found that, in light of *Summers*, absent a concrete and particularized injury that is actual or imminent, a procedural injury alone is insufficient to establish Article III standing, and that absent any explicit or implicit statutory right to information, the denial of notice, comment, or appeal, does not establish an "informational injury" for purposes of Article III standing's injury-in-fact requirement.

F. National Historic Preservation Act

1. Te-Moak Tribe of Western Shoshone of Nevada v. United States Department of the Interior, *608 F.3d 592 (9th Cir. 2010).*

Public interest groups and the Te-Moak Tribe of Western Shoshone of Nevada (Plaintiffs)[656] appealed the United States District Court for the District of Nevada's denial of their motion for summary judgment and grant of summary judgment to federal agencies and a mining company (Defendants).[657] Plaintiffs claimed that the approval by the BLM of the amended operations plan for Cortez Gold Mine (Cortez), which would expand exploratory mining activities in the Horse Canyon/Cortez Unified Exploration Project (HC/CUEP) area, violated NEPA,[658] the National Historic Preservation Act (NHPA),[659] and the Federal Land Policy and Management Act (FLPMA).[660] The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling on Plaintiffs' NHPA and FLPMA claims and reversed and remanded on the NEPA claim for further proceedings.

653 *See generally* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 642–43 (1999) (concluding that, post *Akins*, the principle question for injury-in-fact is whether Congress has granted the litigant a right to sue).

654 138 CONG. REC. S11, 643 (daily ed. Aug. 6, 1992) (statement of Sen. Fowler).

655 *See* Bensman v. U.S. Forest Serv., 408 F.3d 945, 947 (7th Cir. 2005).

656 Plaintiffs were the Te-Moak Tribe of Western Shoshone of Nevada (Tribe), Western Shoshone Defense Project (WSDP), and Great Basin Mine Watch (GBMW).

657 Defendants were the Department of the Interior, Bureau of Land Management (BLM), several BLM officers, and Cortez Gold Mines, Inc. as a defendant–intervenor.

658 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4335 (2006).

659 National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 to 470x-6 (2006 & Supp. I 2007).

660 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006).

Cortez submitted a proposal to amend the operations plan controlling an existing exploration project on 30,548 acres in Eureka and Lander Counties in northeastern Nevada. Exploratory activities on the HC/CUEP project proceed in three phases: Phase I involves less-intrusive activities on 150 drill sites; Phase II incorporates several drill rigs within 125 drill sites; and Phase III utilizes approximately 100 drill holes within existing Phase II drill sites. In 2001, BLM permitted Cortez to disturb fifty total acres throughout all phases. In 2003, Cortez proposed to amend its original operations plan in order to disturb 250 total acres in the same project area. In response, BLM prepared an EA pursuant to NEPA, assessing whether the increased disturbed acreage might impact environmental and cultural resources. The present EA incorporated "tiered"[661] EIS and EAs from the original HC/CUEP project. While assessing the original HC/CUEP project, BLM consulted with the Te-Moak Tribe, as required by both NEPA and the NHPA, to determine whether their well-established cultural and religiously significant sites might be affected. BLM then designated Horse Canyon, the top of Mount Tenabo and the "White Cliffs" of Mount Tenabo as "properties of cultural and religious importance" (PCRI)[662] which are eligible for listing on the National Register of Historic Places.

In 2004, BLM reapproached the Tribe to solicit concerns regarding the amendment. In a letter, BLM also referenced previous analysis of PCRIs in the project area. In the absence of Tribal comment, BLM submitted a draft EA for public comment in September 2004. In October, BLM responded to requests for additional information made by public interest organizations but was unable to provide locations of drill holes or access roads because the amendment was conditionally approved subject to Cortez submitting maps identifying those surface-disturbing activities. Ultimately, BLM's EA for the amendment incorporated previous assessments and found that increased exploratory activities would not significantly affect the environment. On October 22, 2004, BLM issued a decision record (DR) and a finding of no significant impact (FONSI) (together a DR/FONSI). After Plaintiffs petitioned the State BLM Director for review, the Director affirmed a modified version of the DR/FONSI in November. The modified DR/FONSI required an exclusion zone protocol (EZP) to further protect PCRIs eligible for listing on the National Register. Dissatisfied with the modified DR/FONSI, Plaintiffs sought judicial review of BLM's final action under the APA[663] in May 2005. The district court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for summary judgment, and

661 "Tiering" is the practice of incorporating by reference the general matters of a broader EIS into a subsequent environmental analysis of an action taken within that broader scope. 40 C.F.R. § 1508.28 (2010).

662 Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dept. of Interior, 608 F.3d 592, 608 (9th Cir. 2010). The Western Shoshone traditionally used the top of Mount Tenabo for prayer and meditation, and it remains associated with Western Shoshone beliefs, customs, and practices. *Id.* at 597. The White Cliffs are a white quartz ledge on the south face of Mount Tenabo. *Id.* at 611.

663 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006).

the Plaintiffs appealed. The Ninth Circuit reviewed de novo the district court's grant of summary judgment.[664]

On appeal, Plaintiffs argued that BLM's approval of the amendment violated NEPA, the NHPA, and FLPMA. The issue presented to the Ninth Circuit was whether BLM's final action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," under the APA.[665] To determine whether BLM's action was arbitrary or capricious, the court evaluates 1) whether the agency took "the requisite hard look at the environmental consequences of its proposed action" and 2) whether the "agency decision is founded on a reasoned evaluation of the relevant factors."[666]

The court first turned to Plaintiffs' assertion that BLM violated NEPA's procedural requirement to make information on environmental impacts available to interested parties prior to agency final action. NEPA requires federal agencies to prepare an EIS for activities that "significantly affect[] the quality of the human environment."[667] However, an agency may first prepare an EA to determine whether an EIS is required and may issue a FONSI if an EIS is not required.[668] Thus, BLM was obligated to take a "hard look" at the amendment's cultural and environmental impacts in the EA. Plaintiffs alleged that BLM violated NEPA by 1) approving all three phases in the absence of specific information on each phase, 2) not conducting sufficient analysis of reasonable alternatives, and 3) not conducting sufficient analysis of cumulative impacts.[669]

Regarding BLM's duty to take a "hard look," Plaintiffs argued that BLM should have required Cortez to identify the precise location of surface-disturbing activities. Defendants argued that avoidance and mitigation measures were sufficient in light of the project's exploratory nature. The court cited *Great Basin Mine Watch*[670] and acknowledged that it may affirm BLM's approval of a phased exploration project under NEPA without specific details of Phase II and III activities. BLM is empowered to balance the uncertainties of an exploratory project against NEPA's requirement to analyze impacts. Specifically, it must evaluate the potential impact of surface-disturbing activities and mitigate potential adverse environmental effects. The court reasoned that the failure to identify the location of access roads did not constitute insufficient information because specific locations will likely change given exploratory developments. Further, BLM evaluated the impacts of access road and drilling site construction across the *entire* project area. The court also approved of BLM's effective avoidance and mitigation strategy.[671]

664 Or. Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997).

665 5 U.S.C. § 706(2)(A) (2006).

666 Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992).

667 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006).

668 40 C.F.R. § 1508.9(a)(1) (2010).

669 Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2005).

670 159 IBLA 324, 354, 2003 WL 21999346, at *23 (IBLA 2003).

671 Pursuant to these avoidance and mitigation measures, Cortez was obligated to submit 1:24,000 scale maps of the areas to be disturbed and could conduct exploration only if past surveys did not identify cultural resources in the area. An archaeologist and Native American

Plaintiffs also claimed that BLM failed to consider reasonable alternatives within its EA. NEPA requires federal agencies to disclose environmental considerations so that the public may comment on less environmentally harmful alternatives.[672] Plaintiffs argued that BLM should have considered the alternative of approving only Phase I. However, the court found that mitigation measures, applicable to all phases, ensured that BLM's approval would have the same environmental impact as Plaintiffs' alternative. The court next dismissed Plaintiffs' claim that BLM failed to consider seriously a "No Action Alternative" (NOA). The court concluded that BLM was not obligated to vet the NOA thoroughly since its EA incorporated the previous project EA by reference. An NOA would simply extend existing HC/CUEP project activities. Further, since the EA is less burdensome than an EIS, the court found that BLM needed only to discuss the NOA briefly.

Plaintiffs next argued that BLM failed to consider sufficiently the cumulative impacts of the amendment in light of other "past, present and reasonably foreseeable future actions" as required by NEPA.[673] The court explained that the cumulative impacts analysis required of the BLM the consideration of the reasonably foreseeable effects of the existing Pediment/Cortez Hills (P/CH) project together with the amendment's effects. While BLM acknowledged that the P/CH project was a reasonably foreseeable activity, it did not provide sufficiently detailed information in the Cultural Resources and Native American Religious Concerns sections of the EA. The court found that BLM's emphasis on the *direct* effects of the amendment, to the exclusion of the *cumulative* effects, did not constitute sufficient information. While BLM referred to cumulative impacts, it failed to describe *how* such impacts would affect cultural resources and Native American religious concerns. The court compared BLM's vague, conclusory analysis to similar inadequate analysis in *Klamath-Siskiyou Wildlands Center. v. Bureau of Land Management.*[674] The Ninth Circuit required a quantitative showing of the degree of impact from cumulative effects. The court acknowledged that BLM adequately discussed its mitigation strategy but failed to describe how that strategy would mitigate compounding effects of reasonably foreseeable projects in the cumulative effects area (e.g., P/CH). The court disagreed with Defendants' assertion that cumulative effects do not exist. Citing *City of Carmel-By-The-Sea v. U.S. Department of Transportation*,[675] the court emphasized that the plaintiff need not show which cumulative impacts would occur, but rather that the *potential* for

observer would conduct any further surveys required by BLM. All activities within 100 meters of any cultural resources discovered by Cortez must cease until BLM determines whether the site is eligible for the National Register and must be protected by an exclusion zone. *Te-Moak Tribe of W. Shoshone of Nev.*, 608 F.3d 592, 601 (9th Cir. 2010).

672 42 U.S.C. § 4332(E) (2006).

673 40 C.F.R. § 1508.7 (2010).

674 387 F.3d 989, 995 (9th Cir. 2004) (rejecting an agency's use of "check-boxes" to indicate whether cumulative effects would affect specific environmental factors).

675 123 F.3d 1142, 1161 (9th Cir. 1997) (holding that the plaintiff's burden in raising a cumulative impacts claim under NEPA is not great).

cumulative impacts exist. Thus, Plaintiffs in the case easily met their burden by demonstrating how amended exploratory activities might contribute to a "total impact that is greater than that caused by either the [P/CH] project or the [a]mendment."[676] Consequently, the court concluded that BLM's inadequate assessment of the potential cumulative impacts to Western Shoshone cultural resources constituted a failure to take the requisite "hard look." Since the district court erred in granting summary judgment for Defendants, the court remanded the decision with instructions to award summary judgment for Plaintiffs. Finally, in approving the Amendment without sufficiently discussing the cumulative impacts as required under NEPA, the court concluded that BLM's final action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[677]

Turning to NHPA, Plaintiffs asserted that BLM violated Section 106 of the NHPA by not sufficiently evaluating the amendment's effect on Western Shoshone cultural and religious sites. NHPA implementing regulations require that BLM consult with tribes early in the planning process to determine whether the proposed action might affect religious and culturally significant historic properties.[678] BLM initially consulted with the Tribe in 2000 regarding the HC/CUEP project. Based on this consultation and ethnographic reports, BLM identified two PCRI sites eligible for listing on the National Register: 1) Horse Canyon and 2) the top of Mount Tenabo and the White Cliffs of Mount Tenabo.[679] In light of comprehensive avoidance measures outlined in the original EA, BLM concluded that the exploratory activities would not impact cultural resources. After complaints by the Tribe, the State BLM Director reviewed the DR/FONSI and modified it to include EZP to further protect cultural and religious sites.

On appeal, Plaintiffs first argued that BLM violated NHPA by failing to initiate consultation in a timely manner.[680] Plaintiffs highlighted the one-year period from when Cortez submitted the amendment to when BLM contacted the Tribe. The court disagreed with Plaintiffs and explained that BLM had already engaged in significant consultation regarding the original HC/CUEP project and that the amendment would not enlarge the project area. The court also opined that Plaintiffs failed to demonstrate how earlier consultation "would have prevented any adverse effect on any yet-to-be identified National Register eligible PCRI."[681] For these reasons, the court concluded BLM adequately consulted the Tribe under NHPA.

676 *Te-Moak Tribe of W. Shoshone of Nev.*, 608 F.3d at 605–06.

677 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

678 36 C.F.R. § 800.2(c)(2)(ii)(A) (2010).

679 *Te-Moak Tribe of W. Shoshone of Nev.*, 608 F.3d at 608. The two sites on Mount Tenabo were combined into one PCRI. *Id.*

680 Plaintiffs also alleged that the BLM violated NHPA by failing to respond to GBMW's and WSDP's requests for information on the project; the court dismissed that argument summarily, noting that neither organization is a federally recognized tribe or a representative of a federally recognized tribe, and therefore the NHPA implementing regulations do not require BLM to consult with those organizations. *Id.* at 608 n.19.

681 *Id.* at 609.

Plaintiffs next argued that BLM's "no effect" determination of a phased project was invalid under NHPA. The court disagreed and explained that wholesale approval of a phased project does not always violate NHPA. The court referenced its treatment of Plaintiffs' claim under NEPA and, citing *Great Basin Mine Watch*,[682] explained that the previous survey of an entire project area for cultural properties compensates for the uncertainty associated with final locations of access roads and drill sites. The court also dismissed Plaintiffs' second argument that the EZPs do not offer adequate protection to cultural resources. While the PCRI areas are quite large, NHPA does not require that the *entire* PCRI area be protected.[683] The court explained that NHPA aims to preserve the *essential* characteristics of a PCRI from alterations that jeopardize its listing on the National Register. The court reasoned that since the EZP sufficiently protects such characteristics (e.g., white quartz ledges, a network of caves, and burial locations) from exploratory activities, BLM's "no effect" determination under the NHPA was valid.

Turning to Plaintiffs' claims under FLPMA, Plaintiffs charged that BLM failed to comply with its surface management rules that regulate mining. Specifically, Plaintiffs argued that BLM contributed to the "unnecessary or undue degradation of [federal] lands"[684] when it approved an operations plan that allegedly lacked specific performance standards. The court dismissed Plaintiffs' claim since the performance standards at issue only pertained to *mining* activities, rather than *exploratory* activities.[685] In dismissing Plaintiffs' second claim, the court found that the amendment did include a complete description, schedule of operations, and monitoring plan. Therefore, the court found that the plan's level of detail would prevent unnecessary or undue degradation. Finally, the court also rejected Plaintiffs' assertion that BLM could not approve an amendment without maps identifying precise locations of surface-disturbing activities. Citing *Great Basin Mine Watch*,[686] the court concluded that BLM's previous analysis of the entire project and Cortez's obligation to provide maps identifying surface-disturbing activities ensured that no unnecessary or undue degradation would occur.

Plaintiffs also argued that, because Cortez failed to meet performance standards under FLPMA, BLM erred in approving the amendment. The court explained that while the regulation does require an operations plan to specify the location of access roads, BLM may conditionally approve the plan subject to Cortez submitting such information before undertaking surface-disturbing activities. Plaintiffs also argued that BLM failed to enforce another performance standard intended to protect cultural resources pursuant to 43 C.F.R. § 3809.420(b)(8). The court disagreed with Plaintiffs' assertion and noted two BLM conditions that satisfied the performance standard, pursuant to Sections 3809.420(b)(1) and 3809.420(b)(8): 1) BLM's

682 159 IBLA 324, 356, 2003 WL 21999346, at *24 (IBLA 2003).
683 16 U.S.C. § 470f (2006); 36 C.F.R. §§ 800.6(b), 800.16 (2010).
684 Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (2006).
685 43 C.F.R. § 3809.401(b)(2)(ii) (2010).
686 159 IBLA at 347-348, 2003 WL 21999346, at *18.

duty to evaluate and protect cultural resources near surface-disturbing activities identified on Cortez's maps, and 2) Cortez's duty to halt construction immediately upon discovery of cultural resources. Consequently, the court affirmed the district court's award of summary judgment for Defendants on the FLPMA claims.

In summary, the Ninth Circuit reversed the district court's award of summary judgment for Defendants on the NEPA claim and remanded with instructions to enter summary judgment in favor of Plaintiffs. The Ninth Circuit affirmed the grant of summary judgment in favor of Defendants on the NHPA and FLPMA claims.

G. Groundwater Allocation

1. United States v. Orr Water Ditch Co., *600 F.3d 1152 (9th Cir. 2010).*

Plaintiffs, the Pyramid Lake Paiute Tribe of Indians (collectively Tribe),[687] appealed Ruling 5747[688] of the Nevada State Engineer (Engineer) arguing that allocations of groundwater in the Tracy Segment Hydrographic Basin (Basin) adversely affect the Tribe's water rights under the *Orr Ditch* decree (Decree).[689] The Engineer and Orr Water Ditch Co. (collectively Appellees)[690] argued that the United States District Court for the District of Nevada did not have jurisdiction over the appeal because the Decree only adjudicated the surface rights to the river. The district court dismissed the Tribe's appeal for lack of subject matter jurisdiction[691] and the Tribe appealed. The United States Court of Appeals for the Ninth Circuit reversed and remanded, holding that the Decree prohibits groundwater allocations that adversely affect the Tribe's decreed rights and the district court has jurisdiction over an appeal from an allocation that has such an effect.

Originating in Lake Tahoe, the Truckee River travels 105 miles[692] before terminating at Pyramid Lake—a lake encompassed by the Pyramid Lake Paiute Tribe Reservation.[693] The history of the Decree began in 1902 when the United States established the Newlands Reclamation Project (Project), pursuant to the Reclamation Act,[694] to irrigate a swath of western Nevada

687 The Pyramid Lake Paiute Tribe of Indians, Petitioner-Appellant, was joined by the United States as Plaintiff.

688 Applications Filed to Appropriate the Public Waters of an Underground Source Within the Tracy Segment Hydrographic Basin (83), Storey County, Nevada, Ruling 5747 (June 27, 2007) (Tracy Taylor, P.E., State Engineer), *available at* http://images.water.nv.gov/images/rulings/5747r.pdf?CFID=962327&CFTOKEN=19133319.

689 United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev. 1944) (allocating rights to the water in the Truckee River).

690 The State Engineer, Respondent–Appellee, and Orr Water Ditch Co., named Defendant, were joined by Grand Slam Enterprises, LLC, Tri Water, and Sewer Company as real-parties-in-interest-Appellees.

691 United States v. Orr Water Ditch Co. (*Orr Ditch III*), 600 F.3d 1152, 1154 (9th Cir. 2010).

692 Div. of Water Res., Dep't of Conservation & Natural Res., State of Nev., Truckee River Chronology, http://water.nv.gov/mapping/chronologies/truckee/part1.cfm (last visited July 5, 2011).

693 *Orr Ditch III*, 600 F.3d at 1154.

694 National Irrigation Act of 1902, ch. 1093, 32 Stat. 388 (codified at 43 U.S.C. §§ 371–431 (2006)).

with water from the Truckee and Carson Rivers. In 1913, the United States initiated the *Orr Ditch* litigation when it filed an action to quiet title to existing water rights in the Project area amongst irrigators and the Tribe. In 1924 a Special Master issued a proposed decree that later served as the foundation of the district court's final *Orr Ditch* decree in 1944. Under the decree, the Tribe owns the two most senior water rights on the Truckee River: Claims No. 1 and No. 2. In 2007, the Engineer granted applications to groundwater in the Basin, an area through which the Truckee River is recharged by approximately 6,000 to 11,000 acre-feet of groundwater each year.[695] The Tribe opposed the allocation, arguing it would interfere with its decreed water rights because the groundwater was already over-allocated. The Engineer concluded that even if over-allocation caused a diminution of the base flow in the Truckee River, it would not conflict with the Tribe's water rights since the Decree did not contemplate a right to groundwater. The Engineer also claimed that a 1998 ruling under state law, that established the Tribe's right to all of the water remaining in the Truckee River after other rights were satisfied, did not entitle the Tribe to Basin groundwater. On appeal to the federal district court, the court granted the Engineer's motion to dismiss for lack of subject matter jurisdiction holding that although it has exclusive jurisdiction over rulings of water rights *derived from* federal decrees,[696] it does not have jurisdiction over rulings that might *affect* decreed water rights. The court explained that acknowledging jurisdiction would mistakenly impart exclusive jurisdiction on multiple courts when a decision to allocate water from one decreed stream was protested by the owner of water rights on a different decreed stream. The Tribe appealed the district court's dismissal and the Ninth Circuit reviewed de novo the district court's dismissal for lack of subject matter jurisdiction.

The two-part issue presented to the Ninth Circuit was whether the Decree forbids an allocation of groundwater that adversely effects the Tribe's decreed rights and, if so, whether the district court has subject matter jurisdiction over the appeal of a ruling that conflicts with the Decree. The Ninth Circuit first acknowledged that while the Decree does not expressly protect the Tribe's water rights from diminution of the flow from groundwater allocation, it does indicate that the Tribe's rights granted in Claims No. 1 and No. 2 were intended to fulfill the purpose of the Tribe's reservation by reserving a reasonable amount for use on the reservation. The court concluded it would be inconsistent for the Engineer to allocate groundwater if it diminishes that amount available under Claims No. 1 and No. 2.

The Ninth Circuit next explained that the district court entering the Decree would have known about the interrelationship between groundwater and surface water in light of the United States Supreme Court's discussion of

695 *Orr Ditch III*, 600 F.3d at 1155.

696 *Id.*; *see* United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 853 (9th Cir. 1983) (decreeing that amount of water that may be allocated from the Carson River (*Alpine* decree)).

the matter in *Kansas v. Colorado*[697] and in *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*[698] In addition, the Ninth Circuit highlighted a relevant law review article, published only two years prior to the Decree.[699] Finally, the court referenced the federal reserved water rights doctrine outlined in *Winters v. United States*[700] for the notion that in the absence of express language in the agreement establishing the reservation, sufficient water was reserved to meet the needs of the Indians.[701] Therefore, the Ninth Circuit held that the Decree protects the Tribe's water rights granted under Claims No. 1 and No. 2 from adverse allocations of groundwater.

The Ninth Circuit next addressed the issue of subject matter jurisdiction over appeals from the Engineer. First, the Ninth Circuit referenced its approval of the novel jurisdictional arrangement in *United States v. Alpine Land & Reservoir Co.*,[702] explaining that it was established as an adjunct to the district court's jurisdiction over the original quiet title action filed by the United States.[703] The Ninth Circuit then highlighted Section 533.450(1) of the Nevada Revised Statutes[704] that requires that appeals of decisions of the Engineer "on stream systems where a decree of court has been entered . . . be initiated in the court that entered the decree."[705] Therefore, in light of its intermediate holding—that the Decree protects the Tribe's water rights from groundwater allocations—the court concluded that Section 533.450(1) provides for appellate review in the United States District Court for the District of Nevada insofar as Ruling 5747 adversely affects the Tribe's decreed rights.

However, the Ninth Circuit concluded that the district court does not have jurisdiction over the Tribe's appeal of Ruling 5747 insofar as it may adversely affect the Tribe's rights under the Engineer's 1998 ruling because the 1998 ruling was based on state law. In essence, the court reasoned that the Tribe's rights under state law are distinct from its decreed rights under Claims No. 1 and No. 2 such that the district court need only analyze whether Ruling 5747 adversely affects the Tribe's decreed rights. Should it adversely affect the rights, the court will instruct the Engineer to re-allocate

697 206 U.S. 46, 114–15 (1907) ("It cannot be denied, in view of all the testimony . . . that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas . . . .").

698 260 U.S. 596, 598 (1923) ("The amount of water so naturally finding its way underground into the springs, and thence into the stream, has been materially diminished by the tunnel; the diminution conforming substantially to the discharge at the portal.").

699 C. F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 OR. L. REV. 113, 129 (1942) (discussing the hydrological connections between surface and subsurface waterbodies that necessarily exist due to the fact that no static subsurface waterbodies are known to exist).

700 207 U.S. 564 (1908).

701 *Id.* at 576–77 (holding that ambiguities within agreements or treaties with the Indians will be resolved in favor of the Indians also applies to the assumption that enough water was reserved to meet the needs of the Indians on the reservation).

702 697 F.2d 851 (9th Cir. 1983).

703 *Id.* at 858.

704 NEV. REV. STAT. § 533.450(1) (2009).

705 *Id.*

groundwater to eliminate that effect. If Ruling 5747 does not adversely affect the Tribe's rights, the district court will simply affirm the Engineer's ruling. Finally, the Ninth Circuit acknowledged that while prudent, the principle of water law that one court should have exclusive jurisdiction over an interrelated system of water rights is not inviolable. The court highlighted present litigation of the Engineer's 1998 ruling in state court as an example of an appeal of a decision allocating surface waters of the Truckee River, under state law, in a separate court.

In summary, the Ninth Circuit held that the Tribe's decreed water rights to the Truckee River may not be adversely affected by groundwater allocations in the Basin and that the district court has subject matter jurisdiction to hear the Tribe's appeal of Ruling 5747 with respect to the allocations' alleged effect on the Tribe's decreed rights under Claims No. 1 and No. 2.

H. National Forest Management Act

1. Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960 (9th Cir. 2010), amended by 622 F.3d 1045 (9th Cir. 2010).*

Alliance for the Wild Rockies (AWR) and Native Ecosystems Council (collectively Plaintiffs) filed suit in the United States District Court for the District of Montana against the USFS.[706] Plaintiffs alleged that the USFS violated the Appeals Reform Act (ARA),[707] NFMA,[708] and NEPA[709] when it approved and then solicited bidding for a salvage-logging project within the Beaverhead-Deerlodge National Forest in Montana (the Project). Plaintiffs additionally sought a preliminary injunction to stop work on the Project pending resolution of the case. In denying the application for preliminary injunction, the district court stated that Plaintiffs did not demonstrate a likelihood of success on the merits or a likelihood of irreparable harm in the absence of a preliminary injunction. AWR appealed the denial of the preliminary injunction. On appeal, the Ninth Circuit reversed the district court's decision, faulting the district court's finding as to the likelihood of irreparable harm as well as the district court's failure to apply the Ninth Circuit's "serious questions" test to the likelihood of success on the merits.

The Project contemplated the salvage-logging of trees within approximately 1,652 acres of the approximately 27,000 acres of forest burned in the Rat Creek Wildfire in August and September of 2007. In April of 2009, the USFS released the EA required by NEPA for public comment. Subsequently, the Acting Forest Supervisor for the Beaverhead-Deerlodge

706 Defendant was Jane L. Cottrell in her official capacity as acting Regional Forester.

707 Forest Service Decisionmaking and Appeals Reform Act § 322, Pub. L. No. 102-381, 106 Stat. 1374, 1419 (codified at 16 U.S.C. § 1612 (2006)).

708 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

709 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

National Forest and the Regional Forester requested from the Chief Forester an Emergency Situation Determination (ESD), which would eliminate the administrative appeals process and expedite commencement of the Project.

The Chief Forester approved the ESD on July 1, 2009, specifically citing the projected cost to the government of $16,000 caused by the potential deterioration of trees within the Project during the delays occasioned by the administrative appeals, as well as the significantly increased likelihood that the USFS would not receive any bids for the Project after such delays. A complete lack of bids on the Project would cost the government $70,000 and would render impossible two principal goals of the Project: the planting of Douglas fir trees and the control of dwarf mistletoe. The Chief Forester also noted the Project's anticipated economic benefits for the local economy of Southwest Montana. On July 22, 2009, the USFS issued the final EA for the Project, together with a Decision Notice and Finding of No Significant Impact (DN/FONSI) that rendered an EIS unnecessary. Just over a week after issuing its final EA and DN/FONSI, the USFS released the Project for bidding and chose Barry Smith Logging as the highest bidder.

AWR filed suit in district court alleging violations of the ARA, NFMA, and NEPA and seeking a preliminary injunction. The district court denied AWR's request for preliminary injunction on August 14, 2009. The district court's order found that the issuance of a preliminary injunction was not proper because Plaintiffs did not show a likelihood of success on the merits or of irreparable harm if the injunction did not issue. The district court then denied Plaintiffs's motion to stay the ruling and enjoin the Project pending appeal to the Ninth Circuit. AWR timely appealed the district court's decision. In the meantime, the Project commenced, and Barry Smith Logging completed 49% of the logging operations prior to halting its operations for the season due to the onset of winter weather. Given that 51% of the logging remained to be completed, the Ninth Circuit held that the appeal was not moot.

The Ninth Circuit reviews for abuse of discretion a district court's denial of a preliminary injunction and will find an abuse of discretion where the district court bases its decision on erroneous conclusions of law or clearly erroneous findings of fact.[710] *Winter v. Natural Resources Defense Council* provides that, in order for a preliminary injunction to issue, a plaintiff must show 1) a likelihood of success on the merits; 2) a likelihood of irreparable harm to the plaintiff if the preliminary injunction does not issue; 3) that the balance of equities tips in the plaintiff's favor; and 4) that the public interest favors a preliminary injunction.[711] In *Winter*, the United States Supreme Court specifically addressed and rejected the Ninth Circuit's prior standard which provided that, in some circumstances, the plaintiff need only show a "possibility" of irreparable harm, rather than a likelihood of that harm.[712] However, the majority opinion in *Winter* did not explicitly

710 Lands Council v. McNair, 537 F.3d 981, 986–87 (9th Cir. 2008) (en banc), *abrogated on other grounds by* American Trucking Ass'ns v. City of L.A., 559 F.3d 1046, 1052 (9th Cir. 2009).

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

712 *Winter*, 555 U.S. at 22.

address the approach taken by the Ninth Circuit and other circuits which provided for a sliding scale, allowing a balancing of the elements so that an especially strong showing on one element of the preliminary injunction test would balance out a relatively weaker showing on another element. Here, the Ninth Circuit analyzed whether the sliding scale approach retains vitality after *Winter*.

After citing a dissent from *Winter* and surveying the approaches taken by other circuits and some lower courts within the Ninth Circuit, the Ninth Circuit concluded that the "serious questions" test survived the Supreme Court's decision in *Winter* and is still applicable within the four-element *Winter* test. The "serious questions" test in the Ninth Circuit is a form of sliding scale approach, providing that if a plaintiff can show that the balance of hardships tips sharply in the plaintiff's favor, then the plaintiff need only show that it has raised serious questions as to the merits of the case in order to satisfy the "likelihood of success" requirement.[713] The Ninth Circuit noted Justice Ginsburg's argument in her *Winter* dissent, stating that the majority did not explicitly reject the sliding scale approach. The Ninth Circuit went further, noting that some of the language in the *Winter* majority opinion implicitly suggests that the sliding scale approach is still appropriate.

While the Ninth Circuit had not directly addressed the question since *Winter*, at least seven circuits and some lower courts within the Ninth Circuit have addressed whether sliding scale approaches survived *Winter*. Though the Fourth Circuit held that the sliding scale approach is invalid after *Winter*,[714] the Second and Seventh Circuits agreed that the sliding scale survived post *Winter*.[715] The Ninth Circuit also found support for the continued vitality of the sliding scale in dicta from the Tenth and D.C. Circuits and in a decision from the Northern District of California.[716] The Ninth Circuit accepted the reasoning of the circuits embracing the sliding

713 Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810, 813 (9th Cir. 2003).

714 Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346–347 (4th Cir. 2009) ("The *Winter* requirement that the plaintiff clearly demonstrate that it will likely succeed on the merits is far stricter than the *Blackwelder* requirement that the plaintiff demonstrate only a grave or serious question for litigation." (emphasis omitted)), (*vacated on other grounds by* Real Truth About Obama, Inc., v. Fed. Election Comm'n, 130 S. Ct. 2371 (2010)).

715 Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) ("[T]he more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."); Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010) ("We have found no command from the Supreme Court that would foreclose the application of our established 'serious questions' standard as a means of assessing a movant's likelihood of success on the merits.").

716 Roda Drilling Co. v. Siegal, 552 F.3d 1203, 1208–09 n.3 (10th Cir. 2009) (noting that the Tenth Circuit employs a test similar to the serious questions test without questioning that test's validity post-*Winter*); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009) (noting that *Winter* did not "squarely discuss whether the four factors are to be balanced on a sliding scale"); Save Strawberry Canyon v. Dep't of Energy, 2009 U.S. Dist. LEXIS 38180, *8–10 (N.D. Cal. Apr. 22, 2009) (justifying sliding scale on need for judges to have ability to maintain status quo during litigation).

scale and concluded that the Ninth Circuit's serious questions test remains viable after *Winter*.

In an amendment to the original opinion, the Ninth Circuit clarified its position on the serious questions test. The amendment states that contrary to any prior case law from the Ninth Circuit suggesting otherwise, the serious questions test must be a part of the four-element test provided by *Winter* and may not stand alone. Thus, the plaintiff does not satisfy the serious questions test by showing that the balance of hardships tips sharply in its favor and that it has raised serious questions about the merits. The plaintiff must also meet the other two prongs of the four-element *Winter* test and show that the injunction is in the public interest and that irreparable harm would flow to the plaintiff absent the injunction.

Since the serious questions test survived *Winter*, the failure of the district court in the instant case to apply the serious questions test was an error of law. Having made this determination, the Ninth Circuit then addressed each of the four elements required for the issuance of a preliminary injunction.

The Ninth Circuit found that AWR demonstrated a likelihood of irreparable harm in the absence of a preliminary injunction. AWR asserted that its members' occupational and recreational use of the Project area would be irreparably harmed by the Project. While the USFS argued that AWR's members would not be harmed because they would still be able to enjoy other, undisturbed parts of the forest, the Ninth Circuit found that "this argument proves too much" and would logically lead to the proposition that an irreparable injury will never arise from environmental harm to a forest area so long as other areas of the same forest remain undisturbed. [717] The injury asserted by AWR was sufficient to show a likelihood of irreparable harm to AWR's members and therefore satisfied that element of the preliminary injunction test.

The Ninth Circuit held that the AWR's challenge to the USFS's issuance of the ESD for the Project had raised serious questions as to the merits of its claim under the ARA and the USFS's regulations implementing ARA. USFS regulations provide for the issuance of an ESD, which allows for immediate commencement of a project without the normal administrative appeals, only when the immediate commencement of the project is necessary for relief of human or natural resources health and safety hazards or when delay would result in substantial economic loss to the government.[718] The Ninth Circuit found fault with all three of the USFS's justifications of the ESD. The $16,000 loss that the USFS claimed the delays would cause was not significant enough to satisfy the USFS regulation, and the Ninth Circuit dismissed as speculative the $70,000 loss that might arise if the USFS did not receive any bids on the Project due to delays. Because the risk of not receiving any bids on the Project due to delays was only speculative, the Ninth Circuit also dismissed the potential loss of the opportunity to plant Douglas firs and

717 Alliance for Wild Rockies v. Cottrell, 622 F.3d 1045, 1053 (9th Cir. 2010).

718 36 C.F.R. §§ 215.2, 215.10(c) (2010).

perform dwarf mistletoe abatement. While the interest of the local economy was an acceptable factor for consideration by the courts in determining whether the public interest favored an injunction, it was not a factor the USFS regulations authorized the Chief Forester to consider in determining whether an ESD is proper. Lastly, the Ninth Circuit noted that the USFS never explained the reason for an almost two-year lapse between the Rat Creek Wildfire and the request for an ESD arising out of conditions caused by that fire. Since the Ninth Circuit determined that AWR had therefore met its burden to raise serious questions as to the merits of its claim regarding the issuance of the ESD, it did not need to address Plaintiffs's claims arising under NEPA and NFMA.

The Ninth Circuit determined that the balance of hardships also tips sharply in favor of AWR, specifically citing the irreparable loss of the occupational and recreational opportunities of the Project area. The Ninth Circuit further noted that AWR had suffered a sort of procedural hardship occasioned by the elimination of the administrative appeals process, which might have resulted in changes to the Project before final approval by the USFS. The USFS's alleged hardships, consisting of potential revenue loss of $16,000 and the speculative loss of $70,000 and the benefits of the Project, were insufficient to counter the harm caused to AWR.

Lastly, the Ninth Circuit determined that the public interest favored the issuance of the preliminary injunction. In favor of the preliminary injunction were the public's interests: 1) in preserving nature and avoiding environmental injury, 2) in the careful consideration of potential impacts prior to governmental action, and 3) in the government's continued observance of the law. The competing public interest counseling against a preliminary injunction was in the economic benefits it would derive from the Project. Here, the Ninth Circuit determined that the projected benefits to the local economy would end with the Project and were therefore outweighed by the public interests favoring the preliminary injunction.

Having found that Plaintiffs demonstrated a likelihood of irreparable injury in the absence of a preliminary injunction, serious questions on the merits of the ARA claim, that the balance of hardships tips sharply in favor of Plaintiffs, and that the public interest favors issuance of a preliminary injunction, the Ninth Circuit concluded that the district court erred in denying the request for a preliminary injunction. The Ninth Circuit therefore reversed the district court's decision not to issue the preliminary injunction and remanded the case to the district court for further proceedings.

Judge Michael W. Mosman, United States District Judge for the District of Oregon (sitting by designation), penned a concurring opinion. Judge Mosman addressed the continued survival of the sliding scale approach and the serious questions test and explains his approval of them and their importance to lower court judges. Judge Mosman points out that while the United States Supreme Court's decision in *Winter* restricted the flexibility of lower courts in applying the likelihood of harm element of the preliminary

injunction test,[719] differing treatment of the likelihood of success element is warranted and desirable. While the potential harm of a denied preliminary injunction is more evident to the lower court, predicting the likelihood of success on the merits is far more difficult on the expedited briefing and hearing schedule of a preliminary injunction. Lower courts' predictions at the preliminary injunction phase therefore lack the clarity that would be possible at a summary judgment or trial phase of a case. He concluded that in "many, perhaps most, cases" the serious questions inquiry will have a legitimate answer while the likelihood of success question often will not.[720]

2. League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, *615 F.3d 1122 (9th Cir. 2010)*.

Defendant–Appellant USFS[721] sought review of a decision from the United States District Court for the District of Oregon that invalidated the USFS's approval of the Five Buttes Project (Project), a forest treatment project within the Davis Late Successional Reserve (Davis LSR) of the Deschutes National Forest. The district court agreed with Plaintiff–Appellee League of Wilderness Defenders Blue Mountain Biodiversity Project (Conservation Groups)[722] that the USFS's approval of the Project violated the NFMA[723] and the NEPA.[724] A divided panel of the Ninth Circuit sided with the USFS, finding that the Project did not violate NFMA or NEPA. The panel reversed the district court's decision, vacated the district court's injunction, and remanded to the district court with instructions to enter judgment for the USFS on both the NFMA and NEPA claims.

Under NFMA, the USFS must promulgate a forest plan for each unit of the forest system; actions taken by the USFS must comply with that forest plan.[725] The Northwest Forest Plan (NWFP) is the forest plan for the Pacific Northwest and Northern California and is a compromise between competing economic and environmental concerns. It apportions certain forest areas for logging and other areas, known as late-successional reserves (LSRs), for conservation. The NWFP established the Davis LSR to preserve and improve conditions of late-successional and old growth forests that provide habitat to certain species, including the northern spotted owl. Within LSRs, including the Davis LSR, commercial logging is not allowed unless the logging "will clearly result in greater assurance of long-term maintenance of habitat," is

719 *See Winter*, 555 U.S. 7, 22 (2008) (plaintiffs must show that "irreparable injury is likely," and the Ninth Circuit's "possibility of harm" standard is too lenient).

720 *Alliance for Wild Rockies*, 622 F.3d at 1057.

721 John P. Allen was named as a defendant in his official capacity as Forest Supervisor of the Deschutes National Forest.

722 Plaintiffs–Appellees included the Cascadia Wildlands Project and the Sierra Club.

723 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476).

724 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

725 16 U.S.C. § 1604(a) (2006).

"clearly needed to reduce risks," and will not prevent the LSRs "from playing an effective role in the objectives for which they were established."[726]

The USFS devised the Project to combat the threat of large-scale losses within the Davis LSR from insect attack and wildfires like the 2003 fire that consumed approximately 22,000 acres of forest. The Project contemplated management and treatment, including commercial logging, of approximately 5,522 acres, including 618 acres of spotted owl nesting, roosting and foraging (NRF) habitat. According to the USFS, the Project would accelerate the growth of large trees and enhance NRF habitat for the northern spotted owl, as well as protect the forest from large-scale stand-replacing wildfires and insect infestations.

The USFS prepared and circulated a draft EIS for the Project as required by NEPA.[727] The EIS compared the Project to two other alternatives, the "No Action" alternative, which allowed the continuation of existing conditions, and an alternative project that contemplated management activities and commercial logging on a much larger scale than the Project. Because computerized simulations demonstrated that the Project would reduce average burn probability by forty percent over the "No Action" alternative, the USFS ultimately selected the Project, because it would best advance the goals of protecting and enhancing the Davis LSR from wildfire and disease. Public comments, however, expressed concern over long-term effects to northern spotted owl habitat and harvest of larger trees. The USFS responded that all affected NRF habitat would return to suitable habitat conditions within two to five decades and, based on computerized modeling, harvesting only smaller trees would not adequately reduce fire risk. The Regional Ecosystem Office (REO) and the FWS also reviewed the Project. REO concluded that it served the ends of the NWFP and FWS concluded that it would not jeopardize the northern spotted owl. On June 8, 2007, the USFS approved the record of decision (ROD), which incorporated the Project EIS.

After USFS approved the Project, Conservation Groups filed suit in the district court alleging that the Project violated the NWFP, and therefore NFMA, as well as NEPA. The district court found that the USFS's "findings in the ROD are not strong enough" to establish the conditions required by the NWFP for logging within LSRs, and therefore held that the Project violated NFMA. The district court also agreed with the Conservation Groups that the USFS's EIS did not adequately detail the cumulative impacts of the Project, but it did not reach the Conservation Groups' contention that the EIS did not adequately disclose opposing scientific viewpoints. Having entered summary judgment for the Conservation Groups on both the NFMA and NEPA claims, the district court enjoined further activities on the Project and remanded to the USFS to prepare a new ROD that would satisfy the requirements of NFMA and NEPA. On the request of Intervenors for Pacific and American

726 REG'L ECOSYSTEM OFFICE, REG'L INTERAGENCY EXEC. COMM., STANDARDS AND GUIDELINES FOR MANAGEMENT OF LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL C-13 (1994), *available at* http://www.reo.gov/library/reports/newsandga.pdf.

727 42 U.S.C. § 4332(2)(C) (2006).

Forest Resource Council, the district court modified its injunction to allow for the removal of downed logs and the preparation of affected areas for winter. The USFS appealed the district court's judgment on both the NFMA and NEPA claims.

In determining whether the USFS complied with the requirements of NFMA, the Ninth Circuit applies the arbitrary and capricious standard of the Administrative Procedure Act.[728] Under this standard, the Ninth Circuit will only set aside an agency decision where "the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[729] The Ninth Circuit is most deferential to the agency when considering technical analysis and judgments evaluating complex scientific questions within that agency's expertise.[730] Ninth Circuit review of NEPA claims employs a "rule of reason" standard to ascertain whether an EIS "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."[731] The purpose of the review is to ensure "that the agency has taken a 'hard look' at the environmental consequences of the proposed action."[732] The court must uphold an agency decision where the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made."[733] The Ninth Circuit reviews de novo a lower court's grant of summary judgment.[734]

The Conservation Groups' first NFMA claim alleged that the Project would not "clearly result" in better long-term maintenance of habitat, as required by the NWFP. To support their position, Conservation Groups relied on a portion of the EIS that purportedly expressed concerns that the Project may directly and indirectly reduce suitable habitat for the northern spotted owl. However, the Ninth Circuit noted that this statement was not a finding or determination by the USFS, but was merely an identification of a potential issue with the Project. The court concluded that the USFS adequately detailed the short-term negative effects the Project may have on NRF habitat for the northern spotted owl and reached a reasonable determination the long-term benefits outweighed the short-term detrimental effects. The USFS was required by the NWFP to perform precisely this sort of balancing, and, in any event, complete avoidance of detrimental effects

728 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006). The arbitrary and capricious standard is found at 5 U.S.C. § 706(2)(A).

729 Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal quotation marks and citations omitted), *overruled on other grounds by* Am. Trucking Assoc., Inc. v. City of L.A., 559 F.3d 1046, 1052 n.10 (9th Cir. 2009).

730 *Id.* at 993.

731 Ctr. for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1166 (9th Cir. 2003) (internal quotation marks omitted).

732 *Id.* (quoting Churchill Cnty. v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001)).

733 Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 953–54 (9th Cir. 2003) (quoting Wash. Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1441 (9th Cir. 1990)).

734 Feldman v. Allstate Ins. Co., 322 F.3d 660, 665 (9th Cir. 2003).

was impossible since even the "No Action" alternative would also result in detrimental effects to the northern spotted owl.

The second NFMA claim made by the Conservation Groups was that the USFS did not consider one of its own scientific studies, which allegedly contradicted the USFS's determination that the Project was clearly necessary to reduce the risks to the Davis LSR. However, the Ninth Circuit noted that the study was not published until after the development and approval of the Project and found that the study did not contradict the USFS's findings, but actually supported those findings. The study at issue related to modeling capabilities and was not intended to examine the appropriateness of any particular treatment within the Davis LSR. While the Conservation Groups were correct the study found that a slightly higher fire risk reduction might be accomplished without logging within LSRs, the Conservation Groups failed to acknowledge the study only contemplated logging activities *outside* spotted owl habitat. In addition, the study evaluated logging activities on twenty percent of the Project area, compared to the Project's logging activities on only six percent of the Project Area. The study also acknowledged that allowing some logging within LSRs would lead to greater decreases in fire risk over logging activities conducted wholly outside the LSR. Given these facts, the study did not contradict the USFS's conclusion that the Project was clearly necessary to prevent the risk of wildfire within the Project area and therefore was consistent with the NWFP.

Finally, the Conservation Groups alleged that the harvest of larger diameter trees was not clearly necessary to reduce the risk of wildfire because limiting the harvest to smaller trees would accomplish the same result. The Conservation Groups brought this concern to the USFS's attention during the EIS process, and the USFS addressed these concerns in the EIS and ROD. In particular, the USFS responded that its modeling considered limiting the harvest to smaller trees but found that such limited thinning would not result in considerable change in fire behavior, and that reduction in larger trees would reduce competition between them, resulting in reduced risk of loss due to insects and disease. These findings satisfied the Ninth Circuit's review of this claim as well. Having rejected all three of the Conservation Groups' NFMA claims and reiterated its highly deferential standard of review, the Ninth Circuit concluded that the Project complied with the NWFP and that the decision to proceed with the Project was therefore not arbitrary or capricious. The Ninth Circuit reversed the district court's decision and held that the Project was not a violation of NFMA.

The first NEPA claim advanced by the Conservation Groups' alleged the EIS for the Project was deficient because it did not adequately consider the cumulative impacts of the Project—specifically, it lacked detailed and quantitative consideration of past projects. The Ninth Circuit rejected these allegations, stating that case law on which the Conservation Groups and the district court relied was superseded by subsequent guidance from the Council on Environmental Quality (CEQ). Although the Ninth Circuit previously required detailed data as to the "time, place, and scale" of past projects in the cumulative effects analysis of an EIS, the CEQ sent a

memorandum to the agencies in 2005 stating that it was not necessary to list or analyze each individual past action's effects.[735] CEQ instead embraced what is referred to as the "aggregate effects" approach. The Ninth Circuit subsequently reviewed this approach and determined it was not plainly erroneous or inconsistent with NEPA, and upheld the CEQ's interpretation.[736] The USFS relied on this CEQ guidance when it analyzed the cumulative effects of the Project in the EIS and restricted its analysis to the current aggregate effects. The district court erred when it applied the old standard rather than the new standard supplied by the CEQ, and it was the application of the old standard that led the district court to its determination that the EIS was deficient. The Ninth Circuit reviewed the Project EIS's cumulative effects analysis and found that when the proper standard was applied, the cumulative effects analysis was consistent with the CEQ guidance and, therefore, with NEPA.

The second NEPA claim raised by the Conservation Groups alleged that the EIS did not adequately disclose and consider opposing scientific views on the Project's impact. In particular, the USFS allegedly did not consider the opinion that thinning of smaller trees should take priority over larger trees, that the debris associated with logging larger trees could result in greater fire risk, and that the forests would be further damaged by roads built for the Project. The Ninth Circuit reiterated that the USFS concluded that thinning of smaller trees alone would not reduce the risk of catastrophic crown fires or susceptibility to insects and disease. The Conservation Groups' concerns about debris leading to greater risk of fire were adequately addressed by the USFS, which found that the debris removal and maintenance schedule imposed through the Project would ameliorate the risks posited by the Conservation Groups. Finally, the USFS addressed the concerns about roads, noting that they would be temporary, blocked off when not in use, and subsoiled. The USFS's consideration of the opposing views raised by the Conservation Groups was therefore adequate.

In summary, the divided panel of the Ninth Circuit upheld the USFS's determination that the Project was consistent with the NWFP and, therefore, NFMA. Furthermore, the treatment of cumulative effects and opposing viewpoints in the EIS was adequate and in compliance with NEPA. The district court was therefore in error when it awarded summary judgment to the Conservation Groups on their NFMA and NEPA claims. The Ninth Circuit reversed the award of summary judgment to the Conservation Groups and remanded the case to the district court with instructions to enter summary judgment for the USFS. Since the award of summary judgment was in error, the Ninth Circuit vacated the injunction prohibiting the USFS from continuing the Project.

Judge Paez concurred in the panel majority's rejection of the Conservation Groups' NEPA claims but dissented from the majority's conclusion that the Project was not in violation of the NWFP. After a lengthy

735 Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir. 2005).

736 League of Wilderness Defenders/Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1217–18 (9th Cir. 2008).

discussion of the history of the NWFP and the goals that it set for the LSRs created by it, Judge Paez turned to the requirements for logging activities within LSRs and determined that the USFS failed to establish that the Project met any of them. Since the USFS had not complied with NFMA, Judge Paez would have upheld the district court's grant of summary judgment and leave in place the district court's injunction.

Judge Paez's first conclusion was that the USFS failed to establish the Project would "clearly result" in greater assurance of maintaining habitat in the long-term, as required by the NWFP. Judge Paez faulted the USFS for a single-minded focus on reduction in fire risks and downplaying of impacts to northern spotted owl habitat, which together resulted in a predisposition towards logging. The USFS never adequately explained or quantified the risk of fire and, indeed, presented two inconsistent findings regarding the risk of fire. Without an analysis of the risk of fire it was impossible to balance the costs with the benefits of the Project and establish that the Project will result in greater assurances of the long-term health of the forest. Since the USFS failed to establish that the Project would clearly result in better long-term health of the LSR, as required by the NWFP, its approval of the Project was arbitrary and capricious.

Judge Paez next concluded that the USFS also failed to establish that the Project was clearly needed to reduce risks to the Davis LSR. The NWFP's requirement that maintenance activities be "clearly needed" to reduce risks places the burden of proof on the USFS. However, the USFS's treatment of this requirement of the NWFP consisted of only four unsupported and conclusory sentences in the EIS. Since the USFS utterly failed to quantify the risk of fire to the LSR, it would be impossible to determine that the Project was clearly needed to reduce that risk. The USFS's finding that the Project was clearly needed was therefore arbitrary and capricious.

Finally, Judge Paez determined that the USFS did not establish that the Project would not prevent the Davis LSR from "playing an effective role in the objectives for which [it was] established," as required by the NWFP. Noting that the NWFP placed emphasis on retaining existing areas of late-successional forests and preventing degradation of them, Judge Paez found the Project accomplished neither of these goals. Moreover, the Project will impact 600 acres of northern spotted owl habitat and will render that habitat unsuitable for two to five decades. The USFS's analysis highlighted the destruction to northern spotted owl habitat without establishing how the Davis LSR could continue to serve the purposes for which it was established. In sum, Judge Paez concluded that the USFS's approval of the Project therefore violated the NWFP and, accordingly, NFMA.

3. Buckingham v. Secretary of the United States Department of Agriculture, *603 F.3d 1073 (9th Cir. 2010).*

Plaintiff, rancher Kenneth Buckingham, sought review of the summary judgment ruling of the United States District Court for the District of Nevada on his challenge to the cancellation of his grazing permit in the Humboldt-Toiyabe National Forest. Buckingham complained that Defendant, the

USFS[737], violated his due process rights under the Fifth Amendment and his rights to adequate notice of noncompliance and opportunity to achieve compliance under the APA.[738] The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision holding that Buckingham 1) failed to exhaust his administrative remedies; 2) retained his due process rights; 3) received both adequate notice of, and opportunity to repair, his permit violations; and 4) that the USFS's consideration of past violations was not arbitrary or capricious.

Under the National Forest Management Act of 1976,[739] the USFS manages vast tracts of woodland resources by developing Forest Plans for each unit of the National Forest System and implementing these plans through the approval and disapproval of various uses. Pursuant to the Federal Land Policy and Management Act of 1976,[740] one such use is the creation of "allotments" for the grazing of livestock. The USFS permits this grazing by way of a three-step process. First, it issues ten-year term permits that describe the exact nature and extent of the use; next, it develops an "allotment management plan" (AMP) that describes how the particular permitted use will achieve the USFS's objectives for the allotment;[741] and finally, the USFS issues annual operating instructions (AOIs) that translate the broader AMP objectives into specific instructions for the permit holder.

The USFS issued Buckingham a permit in 1983 to graze livestock within the Buttermilk Allotment in the Santa Rosa Ranger District of the Humboldt-Toiyabe National Forest. This permit, like the others that followed, specified the pastures, acceptable number of animals, and dates during which grazing was allowed. Buckingham renewed his permit in 1989 and again in 1999. The 1989 permit included a map detailing the boundaries of the Buttermilk Allotment, but the 1999 permit did not. However, the USFS incorporated AOIs into the permits every year, some of which included maps. "A persistent pattern of permit violations," between January 1998 and June 2004 resulted in a partial cancellation of Buckingham's grazing rights under the 1999 permit.[742] This action decreased the number of cow/calf pairs Buckingham could graze by one quarter; his 2005 permit and AOI reflected this change.

On July 25, 2005, the District Ranger observed Buckingham's cattle in a prohibited pasture and issued a notice of noncompliance. Having observed Buckingham's livestock still grazing in the prohibited pasture on August 12 and 13, the USFS sent Buckingham notice of a three-year suspension of twenty-five percent of his authorized use under the 2005 permit, as well as

737 Plaintiffs included the Secretary of the United States Department of Agriculture, the Chief of the USFS, the Regional Forest Supervisor for the Humboldt-Toiyabe National Forest, and the District Ranger for the Santa Rosa Ranger District. Buckingham v. Sec'y of the U.S. Dep't of Agric. (*Buckingham*), 603 F.3d 1073 (9th Cir. 2010).

738 Administrative Procedure Act, 5 U.S.C. § 558(c) (2006).

739 National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (2006).

740 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2006).

741 The AMP is either directly incorporated into the permit in its entirety or the relevant terms and conditions are included. *Buckingham*, 603 F.3d at 1077.

742 *Id.* at 1078.

instructions to remove the livestock immediately on August 18. On September 9, the USFS again sent notice that they had observed livestock in the prohibited pasture on August 23 and 25. The USFS continued to document the unauthorized grazing on nine separate occasions in September and November. Then, on November 18, the USFS canceled Buckingham's permit altogether. Prior to the 2005 incidents, the USFS sent Buckingham ten notices of noncompliance, suspended his permit three times, and canceled it twice.

Pursuant to the Code of Federal Regulations,[743] this cancellation constituted a final agency action upon which Buckingham filed suit in district court claiming that the USFS: 1) erroneously enforced a permit lacking clearly defined pasture boundaries; 2) violated his due process rights by not affording him adequate pre- or post-deprivation procedures; 3) failed to give him notice and an opportunity to prove compliance as required by the APA; and 4) improperly considered his history of noncompliance when making its decision. The district court upheld the agency's decision ruling in favor of the USFS's motion for summary judgment. Buckingham appealed; the Ninth Circuit reviewed de novo the district court's grant of summary judgment,[744] applying the arbitrary and capricious standard as appropriate under the APA,[745] and it reviewed de novo the questions of law, including the due process claims.

First, the Ninth Circuit addressed Buckingham's claim that USFS's action was arbitrary and capricious because the 2005 permit and AOI lacked maps that would provide clear boundaries for pastures authorized under his permit. In doing so, the court reviewed the district court's decision not to reach the merits of the claim when it determined that Buckingham failed to exhaust his administrative remedies. The district court reasoned that Buckingham failed to raise the boundaries argument to the agency and that he merely claimed that the other ranchers' noncompliance with their permits precluded his compliance. In reviewing the exhaustion issue, the Ninth Circuit relied on two previous decisions that clarify the standard for administrative exhaustion. Claimants before an agency are not required to use precise legal terms but are free to make general arguments so long as there is "sufficient clarity" so that the agency can understand the argument and make a reasoned judgment.[746] Additionally, the court requires that the claimant's federal complaint "be so similar" to his administrative appeal that

743 "A Regional Forester's decision on a second-level appeal constitutes the final administrative determination of the Department of Agriculture on the appeal and is not subject to further review by a higher level officer under this subpart." 36 C.F.R. § 251.87(e)(3) (2009). Here, the Forest Supervisor and the Regional Forester both affirmed the District Ranger's decision to cancel the permit.

744 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998). The scope of the review "is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

745 Irvine Med. Ctr. v. Thompson, 275 F.3d 823, 830–31 (9th Cir. 2002) (finding that although the court may look into the factors that led to the agency decision, the "arbitrary or capricious" standard "is highly deferential, presuming the agency action to be valid").

746 Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 965 (9th Cir. 2002).

the agency would have had a prior opportunity to decide it.[747] Because Buckingham failed to raise his argument to USFS "with sufficient clarity to allow [the agency] to understand and rule on the issue raised,"[748] the Ninth Circuit affirmed the district court's holding of non-exhaustion of administrative remedies.

Second, the Ninth Circuit considered Buckingham's due process argument,[749] in which he claimed that USFS deprived him of his property without a proper hearing. As a preliminary matter, the court noted the requirement that a claimant have a protected property interest.[750] However, the court did not reach whether Buckingham's 2005 grazing permit constituted a property interest—a contested issue at the district court—because it found that USFS had, in fact, provided adequate procedural due process, and it was therefore unnecessary to reach the property interest question. Applying the *Mathews v. Eldridge* three-part test,[751] the court found that while both parties had a substantial interest in a favorable outcome,[752] Buckingham's was not a situation where USFS denied him "an opportunity to be heard 'at a meaningful time and in a meaningful manner'"[753] because there is no requirement that this opportunity occur *before* the deprivation.[754] Therefore, such due process evaluations are "flexible."[755]

The Ninth Circuit reasoned that USFS afforded ample opportunity for Buckingham to challenge the agency's evidence and decisions both before and after the cancellation of the permit. Buckingham argued insufficiency of process on the basis of having never received an evidentiary hearing with

747 Native Ecosystems Council v. Dombeck, 304 F.3d 886, 899 (9th Cir. 2002) (quoting Kleissler v. U.S. Forest Serv., 183 F.3d 196, 202 (3d Cir. 1999)).

748 See *Idaho Sporting Cong.*, 305 F.3d at 965.

749 U.S. CONST. amend. V, § 3, cl. 2–3 (forbidding the government to deprive persons of "life, liberty, or property, without due process of law").

750 Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (holding that a parolee's liberty involves significant values within the protection of due process, and revocation of parole requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation).

751 424 U.S. 319, 335 (1976) (holding that a court must balance: 1) private interest affected by the action, 2) any risk of erroneous deprivation and the value of additional procedural safeguards, and 3) the government's interest).

752 Buckingham's interest lies in protecting his livelihood, which depends, at least in part, upon the right to graze his livestock on National Forest lands. Likewise, the Government has an interest in managing grazing on these lands in order to preserve the lands and their resources. Buckingham v. Sec'y of the U.S. Forest Serv., 603 F.3d 1073, 1082 (9th Cir. 2010).

753 Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 984 (9th Cir. 1998) (holding that school officials are entitled to immunity from monetary damages where neither plaintiff's First Amendment rights nor his procedural due process rights were "clearly established") (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (holding that the opportunity to be heard at a meaningful time in a meaningful manner is a fundamental requirement of due process)); *see also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

754 Parratt v. Taylor, 451 U.S. 527, 540 (1981), *overruled in part on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

755 *Mathews*, 424 U.S. at 334 (quoting *Morrissey*, 408 U.S. at 481).

cross-examination. This argument was unpersuasive since an examination of the record revealed that prior to the cancellation of his grazing permit, the USFS notified Buckingham of his noncompliance and the charges against him, gave him chances to respond, and spoke over the telephone and in person with him. Further, once USFS canceled his permit pursuant to regulation,[756] USFS allowed him oral arguments at the first review, written arguments and evidence at both the first and second reviews, and the assistance of counsel on both occasions. The Ninth Circuit concluded that the USFS provided procedural safeguards that resulted in the adjudicator making an informed decision, and, therefore, it did not violate Buckingham's due process rights.

Third, the Ninth Circuit addressed whether USFS satisfied the notice requirements under the APA, which requires "notice by the agency in writing of the facts or conduct which may warrant the action; and opportunity to demonstrate or achieve compliance."[757] Buckingham relied on *Anchustegui v. U.S. Department of Agriculture*,[758] in which the Ninth Circuit determined that a single letter could not act as both the notice of noncompliance and the agency's decision regarding the same instance of noncompliance.[759] The court distinguished this case by appealing to the record; here, the July 25, 2005, notice of noncompliance served as an initial notice and laid the foundation for the August 18 suspension, which, in turn, paved the way for the November 18 cancellation of the grazing permit. Buckingham argued in response that the instances of noncompliance referred to in the July 25 notice were different from those upon which the August suspension was predicated and should have restarted the clock on his opportunity to come into compliance. The court denied that this is the effect of Section 558(c) of the APA. Instead the court reasoned, it is only intended to provide a "second chance," not unlimited chances.[760] The Ninth Circuit decided that the original July 25 notice was adequate notice for both later decisions under the APA and provided Buckingham with ample opportunity to prove compliance.

Finally, the court answered whether the USFS acted arbitrarily and capriciously when it considered past violations in its decision to cancel the permit. Buckingham argued that past noncompliance under a prior permit could not form the basis for the cancellation of a later permit. He argued that, under USFS regulations, term permit holders who have fully complied with their permits have first priority in applications for later permits.[761] From this, he inferred that the granting of his 2005 permit mooted all of his previous noncompliance. The court, while recognizing the creativity of this argument, denied its persuasive effect on two grounds.[762] First, the USFS

756 36 C.F.R. § 251.87(c)(1)–(2) (2009). Under this regulation, the appeal for initial review is filed with the Forest Supervisor; the appeal for a second level of review is filed with the Regional Forester.

757 Administrative Procedure Act, 5 U.S.C. § 558(c) (2006).

758 257 F.3d 1124 (9th Cir. 2001).

759 *Id.* at 1129.

760 Air N. Am. v. Dep't of Transp., 937 F.2d 1427, 1438 (9th Cir. 1991).

761 36 C.F.R. § 222.3(c)(1)(ii) (2007).

762 *Buckingham*, 603 F.3d 1073, 1088 (9th Cir. 2010).

generally has "broad authority" to suspend and cancel permits, as indicated directly on the permit Buckingham signed in 2005.[763] Additionally, the *Forest Service Handbook* explains that it would be impermissible to cancel a permit based on an isolated offense for the very reason that such noncompliance is "generally cumulative."[764] Finally, Buckingham conceded that the USFS could consider his 2005 infractions, and the court found that those alone—independent of past non-compliance—provide a reasonable basis for cancellation of his 2005 grazing permit.

In conclusion, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the USFS holding that the agency neither acted arbitrary and capricious in cancelling Buckingham's permit, nor denied him adequate procedure under the Fifth Amendment or the APA.

4. Earth Island Institute v. United States Forest Service, *626 F.3d 462 (9th Cir. 2010)*.

Earth Island Institute (Earth Island) filed suit in the United States District Court for the Eastern District of California against the USFS,[765] alleging violations of NFMA,[766] NEPA,[767] and USFS guidelines binding on the Moonlight-Wheeler Project (the Project) in the Plumas National Forest. Earth Island sought to enjoin USFS from implementing the Project pending resolution of Earth Island's substantive claims. The district court denied the request for a preliminary injunction, finding that Earth Island failed to demonstrate a likelihood of success on the merits or a likelihood of irreparable harm and that when balancing the equities, the public interest tips in favor of the Project moving forward. Earth Island filed an interlocutory appeal of the district court's denial of the preliminary injunction. On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit upheld the district court's denial of a preliminary injunction. The Ninth Circuit held that the district court had applied the correct standards and did not abuse its discretion in finding that Earth Island failed to demonstrate a likelihood of success or a likelihood of irreparable harm. The Ninth Circuit also found that the district court did not abuse its discretion in finding that when balancing the equities, the public interest weighed against issuing the preliminary injunction. Dissenting,

763 Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003); *see* 36 C.F.R. § 222.4(a)(4) (2007).

764 U.S. FOREST SERV., *Grazing Permit Administration Handbook*, *in* FOREST SERVICE HANDBOOK 3, 6 (1992), *available at* http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?2209.13 (follow "2209.13 16-19.rtf" hyperlink). The *Forest Service Handbook* explains, as the court noted, that total cancellation of a permit may be justified in first offense cases if the violation is "flagrant and willful." *Id.*

765 Earth Island's complaint also named as defendants Alice B. Carlton, Forest Supervisor for Plumas National Forest, and Randy Moore, Regional Forester for Region 5 of the USFS, in their official capacities. Earth Island Inst. v. U.S. Forest Serv., 626 F.3d 462, 462 (9th Cir. 2010).

766 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

767 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

Judge Reinhardt argued that Earth Island had demonstrated a likelihood of success on the merits of two of its claims and was therefore entitled to a preliminary injunction.

The 2007 Moonlight and Wheeler fires—which burned approximately 88,000 acres, about 78% of which were located in the Plumas National Forest—prompted USFS to develop the Project. Its goals were to burn trees that posed a roadside safety hazard, recover the economic value of burned trees, and restore the forest through replanting. The Project replaced a prior USFS proposal to remove roadside trees only. In response to Earth Island's challenge of the previous proposal, USFS agreed to re-evaluate the roadside tree removal as part of its EIS for logging of trees that did not present a hazard. After settling, USFS issued a Draft Revised EIS relating to both the roadside hazard removal and other salvage logging. USFS issued a Revised Final EIS analyzing five different project alternatives after public comment in which Earth Island participated. Then USFS chose an alternative that contemplated ground- and air-based harvest of fire-killed trees on approximately 14,755 acres out of the approximately 41,000 acres of burn areas, and signed the Record of Decision (ROD) for the Project. The Project was to commence immediately upon signature of the ROD due to an Emergency Situation Determination[768] issued by USFS, citing the public safety threat posed by the trees as well as the frustration of economic and restoration goals that would be caused by delays to the Project.

Earth Island was concerned that the Project posed a threat to the viability of the black-backed woodpecker, a Management Indicator Species (MIS) for the Sierra Nevada area.[769] The black-backed woodpecker relies on "snag forest habitat,"[770] and fire suppression and post-fire salvage logging have led to its scarcity throughout the Sierra Nevadas. USFS estimated that the Project would result in reduction of up to 27% of snag forest habitat on public lands in the Sierra Nevadas, while Earth Island estimated the resulting reduction at 30% to 50% of snag forest habitat throughout the Sierra Nevadas. After the USFS signed the ROD for the Project, Earth Island sued USFS and moved for a preliminary injunction to prevent USFS from implementing any part of the Project. The district court denied the motion for preliminary injunction, and Earth Island filed an interlocutory appeal of the district court's denial of the preliminary injunction.

The Ninth Circuit reviews a district court's denial of a preliminary injunction for abuse of discretion.[771] This standard of review is "limited and

768 *Earth Island Inst.*, 626 F.3d at 468 (describing how the Chief of the USFS determined that an Emergency Situation Determination was warranted considering "threats to public and employee safety and the fact that any delay in the implementation of the project would result in substantial loss of economic value and jeopardize other restoration and recovery objectives").

769 *Id.* at 482. The USFS chooses an MIS to serve for environmental assessment purposes as a proxy for larger groups of species that rely on similar habitat. *See* Earth Island Inst. v. U.S. Forest Serv. (*Earth Island II*), 442 F.3d 1147, 1173 (9th Cir. 2006).

770 Forest habitat that is burned in high-intensity forest fires and is important to a number of other species besides the black-backed woodpecker. *Earth Island Inst.*, 626 F.3d at 467.

771 *Earth Island II*, 442 F.3d at 1156.

deferential;"[772] the Ninth Circuit will overturn the district court's decision only where the district court relies on an erroneous legal standard or clearly erroneous finding of fact.[773] The Ninth Circuit used the APA's arbitrary and capricious standard to determine whether Earth Island would likely prevail on the merits of its case.[774] This standard of review is deferential to agency decisions, which may only be reversed where agencies consider or fail to consider proper factors and important aspects or offer an implausible explanation in its decision.[775]

The United States Supreme Court in *Winter v. Natural Resources Defense Council* lays out four elements that a party must demonstrate in order for a preliminary injunction to issue: 1) the moving party will likely succeed on the merits, 2) it is likely to suffer irreparable harm if the injunction does not issue, 3) the balance of equities tips in favor of issuing the injunction, and 4) issuing the injunction is in the public interest.[776] Earth Island appealed the district court's determination that Earth Island had failed to demonstrate any of these elements. The Ninth Circuit dealt with each element in turn.

First, citing *Winter*, Earth Island argued that the district court imposed an unreasonably high burden on Earth Island. The Ninth Circuit, however, agreed with the district court's assessment, in dicta, that plaintiffs seeking a preliminary injunction bear a high burden and found that the district court applied the proper legal standard for judging the likelihood of success on the merits. The Ninth Circuit then addressed the district court's findings as to the likelihood of success of each of the three claims that Earth Island made: 1) that USFS failed to meet the species viability requirements of NFMA and the Forest Plan for Plumas National Forest, 2) that USFS failed to respond adequately to Earth Island's comments on the Draft Revised EIS, and 3) that USFS violated allegedly binding guidelines for marking trees for logging.

The Ninth Circuit agreed with the district court's determination that Earth Island had not demonstrated a likelihood of success on the merits of Earth Island's claim that the Project would violate species viability requirements of NFMA and the Forest Plan for Plumas National Forest. While acknowledging that NFMA requires that agency actions accord with relevant Forest Plans, the Ninth Circuit disagreed that the Plumas Forest Plan required USFS to analyze the Project's effects on the viability, rather than the distribution, of the black-backed woodpecker. Rather, the Ninth Circuit agreed with USFS that the Forest Plan required only that USFS provide analysis of the distribution of species like the black-backed

772 Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam).

773 Lands Council v. McNair, 537 F.3d 981, 986 (9th Cir. 2008) (rehearing en banc denied).

774 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

775 *Lands Council*, 537 F.3d at 987 ("[W]e will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (citing *Earth Island II*, 442 F.3d at 1157)).

776 129 S. Ct. 365, 374 (2008).

woodpecker, and not the continued viability of those species. USFS met this requirement in its MIS Report for the Project, which noted that all alternatives analyzed by USFS, including the Project, left the majority of snag habitat area untreated and would support an upward trend in black-backed woodpecker populations. Furthermore, the district court was correct that these distribution requirements did not apply at the specific project level but rather at the greater Sierra Nevada bioregional level.[777] The Forest Plan for Plumas National Forest did not incorporate portions of a 1982 USFS rule that would have imposed species viability requirements. Since there was no species viability requirement relevant to the Project, the district court correctly determined that Earth Island was not likely to prevail on the merits of this claim.

The district court found, and the Ninth Circuit agreed, that Earth Island also failed to demonstrate a likelihood of success on the merits of its claim that USFS failed to respond adequately to comments submitted by Earth Island on the Draft Revised EIS, specifically those comments made by Earth Island's experts. NEPA's implementation regulations require that an agency must respond in a final EIS to "any responsible opposing view which was not adequately discussed in the draft statement."[778] The district court noted that in the Revised Final EIS there were extensive, specific responses to Earth Island's comments. While the district court recognized that there was a dispute between experts, it concluded that Earth Island failed to establish a violation of NEPA. The Ninth Circuit therefore found that the district court did not abuse its discretion in finding that USFS met its obligations under NEPA.

Finally, Earth Island argued that USFS violated its own guidelines for marking trees for removal. The district court determined that the guidelines were not binding on USFS and therefore could not be violated. The Ninth Circuit agreed that the guidelines were interpretive, for the purposes of internal guidance only, and, therefore, lacked the force and effect of law. Furthermore, Earth Island failed to show that USFS promulgated the guidelines pursuant to a specific grant of rulemaking power from Congress. Even if the guidelines did have the force and effect of law, Earth Island failed to show that USFS violated them, since the Project reflected the sort of balancing of equities that the guidelines required. Therefore, the district court did not abuse its discretion in finding that Earth Island failed to demonstrate a likelihood of success on the merits of this claim.

The Ninth Circuit likewise upheld the district court's analysis of the likelihood of irreparable harm in the absence of a preliminary injunction. First, the Ninth Circuit rejected Earth Island's argument that the district court abused its discretion by conflating the likelihood of success and likelihood of irreparable harm analyses, noting that the two issues significantly overlap. Second, the Ninth Circuit found that the district court properly analyzed both the possibility of harm and its alleged severity when

777 *Earth Island Inst.*, 626 F.3d 462, 471 (9th Cir. 2010).

778 40 C.F.R. § 1502.9(b) (2010).

it determined that Earth Island demonstrated only a *possibility*, rather than a *likelihood* of irreparable harm. *Lands Council v. McNair* rejected arguments similar to Earth Island's, that logging necessarily results in irreparable environmental harm.[779] Finally, the Ninth Circuit rejected Earth Island's contention that the district court abused its discretion in requiring Earth Island to demonstrate harm to the viability of the entire population of black-backed woodpeckers, finding that this contention had no basis in the record.

The Ninth Circuit analyzed together the district court's findings as to the balance of equities and the public interest and found that the district court did not abuse its discretion when it determined that neither of these elements favored issuing a preliminary injunction. Noting that the issuance of a preliminary injunction is within the equitable discretion of the district court, which alone is responsible for weighing the particular harms and interests, the Ninth Circuit found that the district court balanced all competing interests at stake. There was no clear error in the district court's determination that the value to the local economy and the public interest outweighed the environmental harm. Even if Earth Island had requested in the alternative a limited injunction that would allow for the removal of trees that posed a safety hazard—and the Ninth Circuit questioned whether Earth Island had in fact so requested[780]—the district court did not abuse its discretion in concluding that safety concerns favored denying the request for preliminary injunction. The district court likewise did not abuse its discretion in considering the loss to the public of the benefits of the Project's reforestation efforts.

The Ninth Circuit rejected each of Earth Island's arguments on appeal and, consequently, affirmed the district court. The district court did not abuse its discretion when it decided that Earth Island failed to demonstrate a likelihood of success on the merits or a likelihood of irreparable harm. The district court's determination that the balance of equities and the public interest favored not issuing the preliminary injunction sought by Earth Island was likewise not an abuse of discretion. Therefore, the district court's denial of the preliminary injunction was not an abuse of discretion, so the Ninth Circuit affirmed the district court's decision.

Circuit Judge Stephen Reinhardt filed a separate opinion in dissent. The dissent faulted the majority and the district court for "two fundamental errors."[781] The first was the conclusion that USFS was not bound to ensure the viability of the black-backed woodpecker in the Plumas National Forest. The dissent claimed that the district court recognized that portions of a since-superseded 1982 USFS rule requiring USFS to maintain species viability were in fact incorporated into the Forest Plan for the Plumas National Forest. Contrary to the majority's assertion, Judge Reinhardt

779 537 F.3d at 1005.

780 *Earth Island Inst.*, 626 F.3d 462, 475 n.4 (9th Cir. 2010) ("This alleged request took the form of Earth Island's statements on page 24 of its memorandum in support of the preliminary injunction that it did not 'object to structurally damaged imminent hazard trees being felled and left on site.' It was thus not the clear request for alternative relief that Earth Island contends.").

781 *Id.* at 476 (Reinhardt, J., dissenting).

asserted that the viability requirement applies on the project-specific level, and therefore USFS must prove that the Project complies with the viability requirements. Since USFS failed to comply with the species viability requirements, the Project violated the Forest Plan for Plumas National Forest and NFMA. Judge Reinhardt next argued that the majority's second fundamental error was its conclusion that the tree marking guidelines are not binding on USFS. The guidelines are phrased in mandatory language and the USFS adopted the guidelines pursuant to its authority under NFMA to promulgate forest plans. By incorporating the guidelines into the Forest Plan for Plumas National Forest, USFS rendered the guidelines enforceable.

The dissent further faulted what it deemed the district court's failure to analyze the last three elements of the *Winter* test for preliminary injunctions—likelihood of irreparable injury, balance of equities, and public interest—separately from its analysis of the likelihood of success on the merits. Since the district court's conclusion as to the likelihood of success was erroneous, its conclusions as to the other three elements were equally suspect. Given the irreversible nature of environmental harm, there was an absolute certainty of irreparable injury. The district court likewise paid short shrift to the balance of equities because it had already found that Earth Island was not likely to succeed on the merits. Earth Island's motion for preliminary injunction would allow for the removal of trees that posed a safety hazard, leaving the economic benefits to the government and community and the benefits of reforestation as the only competing interests with which to balance the irreparable environmental harm that the Project would cause. Since Earth Island had demonstrated a strong likelihood of success on the merits and of irreparable harm, and since the balance of equities and public interest favored preliminary injunction, Judge Reinhardt argued, Earth Island was entitled to a preliminary injunction pending resolution of the case on its merits.

5. Fence Creek Cattle Company v. United States Forest Service, *602 F.3d 1125 (9th Cir. 2010).*

Plaintiff–Appellant, Fence Creek Cattle Company (Fence Creek),[782] filed action in the United States District Court for the District of Oregon against the USFS[783] after the USFS cancelled Fence Creek's grazing permits. Fence Creek initiated review with the USFS and appealed to the district court upon a final decision by the agency. The district court granted summary judgment in favor of the USFS, at which point Fence Creek appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit

782 Plaintiff–Appellants include Gazelle Land and Timber, LLC, King Williams, and Michael G. Smith. Fence Creek Cattle Co. v. U.S. Forest Serv. (*Fence Creek*), 602 F.3d 1125, 1125 (9th Cir. 2010).

783 Defendant–Appellees include Mary Deaguero, in her official capacity as District Ranger, Eagle Cap-HCNRA District, Wallowa-Whitman National Forest and Barbara Walker, in her official capacity as District Ranger, Wallowa Valley District, Wallowa-Whitman National Forest. *Id.* at 1125.

affirmed the district court's grant of summary judgment, finding substantial evidence in support of the USFS's decision to cancel the permits and holding that the cancellation did not deprive Fence Creek of due process rights under the APA.[784]

In September 2003, Gazelle Land and Timber (Gazelle) purchased 27,000 acres, 1,459 cows, and 92 bulls from Garnet Lewis. This transaction deeded a portion of the lands to Fence Creek and included a transfer of grazing permit waivers. As a part of this commercial endeavor, Gazelle and Fence Creek pursued a joint venture with several individuals, but this venture dissolved in a lump-sum buyout on June 17, 2005. Meanwhile, Fence Creek applied for and obtained, on February 6, 2004, a term grazing permit, which allowed Fence Creek to graze cattle on four allotments (Chesnimnus, Log Creek, Dodson-Hass, and Middlepoint) in the Wallowa-Whitman National Forest. Grazing permits allow the permit holder to graze livestock on specific allotments, under terms and conditions specified in the permit.[785] A permit does not necessarily accompany the sale of cattle, but if a permittee sells its livestock, a purchaser can only obtain a new term permit if the original permittee waives his term grazing permit in favor of the purchaser.[786] The terms of the permit authorized only Fence Creek cattle to graze the allotments.

In June 2005, the USFS began to investigate permit compliance after a USFS employee observed cattle on the Fence Creek allotment bearing a brand not registered on the permit. The owner of the cattle claimed that the cattle had been sold to Fence Creek, and bore the correct brand, but that the brand was smaller, harder to see, and affixed as an impermanent brand. After a series of telephone calls, meetings, and written communications, the USFS still questioned the ownership of the cattle and sent a letter on June 28, 2005, requesting further documentation verifying ownership. At this point, the joint venture fractured and Mr. King Williams asserted control over Fence Creek. However, the USFS declined to accept a waiver of the grazing permit to Mr. Williams until Fence Creek could prove its purchase of the cattle. On September 6, 2009, the USFS again contacted Mr. Williams, requesting information to validate the grazing permit. In this letter, the USFS specifically stated that without the necessary documentation, in the form of cancelled checks, bills of sale, or Oregon State brand inspections, the grazing permits would be cancelled. The USFS gave Mr. Williams a deadline of September 30, 2005. Responses from the parties, including an assertion of ownership of the base property, were unsatisfactory to the agency, and on December 9, 2005 the USFS sent notification canceling the grazing permit for the Log Creek allotment for failure to comply with the conditions of the permit. Grazing rights on the Chesnimnus allotment were reduced and then canceled for allowing livestock not owned by the permittee to graze on the permitted allotment.

784 *Id.* at 1133, 1136.
785 36 C.F.R. § 222.1(b) (2009).
786 *Id.* § 222.3(c).

Fence Creek administratively appealed its permit cancellation. On the first level appeal the Deputy Forest Supervisor upheld the USFS decision, finding sufficient support in the record for the cancellation, and on the second level appeal the Regional Forester upheld the decision on similar grounds. Having exhausted its administrative remedies, Fence Creek filed a complaint in the United States District Court for the District of Oregon alleging violations of the APA and statutory and constitutional due process guarantees. Furthermore, Fence Creek wanted to expand the administrative record, seeking to compile files from twenty-five other grazing permit cases. Both parties sought summary judgment and the district court found for the USFS, denying the expansion of the record, finding that the cancellation decision was not arbitrary and capricious, and finding no deprivation of due process requirements. The Ninth Circuit reviewed the district court's decision not to expand the record for an abuse of discretion and reviewed the grant of summary judgment de novo.

The Ninth Circuit began by evaluating the denial of expanding the administrative record. Judicial review of an agency decision is limited to the administrative record used by the agency to make its decision. The four, narrowly construed, exceptions allowing an expansion of the record are: 1) if expansion is necessary to determine if the agency has considered all factors and explained its decision; 2) if the agency relied on documents not in the record; 3) if needed to explain technical terms or complex subjects; or 4) if plaintiffs have shown bad faith on the part of the agency.[787] Having failed to convince the district court of necessity or explaining its failure to supplement, Fence Creek argued that files from the twenty-five permits would show that the USFS overreacted in canceling the permits. The Ninth Circuit contemplated this as an allegation of bad faith, one of the four recognized exceptions; however, it agreed with the district court that Fence Creek had failed to meet this heavy burden. The Ninth Circuit did not find Fence Creek's arguments persuasive, which alleged that the actions of the USFS in regards to the unrelated grazing permits would demonstrate bad faith in this case.[788] Further, the court found that the "voluminous record . . . is sufficient to conduct the necessary review under the APA."[789]

The Ninth Circuit then considered the grant of summary judgment upholding the decision to cancel the grazing permits, looking to the arbitrary and capricious standard of the APA for guidance.[790] While the court must ensure that an agency articulates a rational reasoning for its decision based

787 Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005).

788 Since Fence Creek was unable to show gaps in the record, the Ninth Circuit found the *Lands Council* exceptions unavailing. *Fence Creek*, 602 F.3d 1125, 1131 (9th Cir. 2010) ("These limited exceptions operate to identify and plug holes in the administrative record." (quoting *Lands Council*, 395 F.3d at 1030)).

789 *Fence Creek*, 602 F.3d at 1131.

790 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) (requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law").

on relevant factors, and does not demonstrate a clear error of judgment, the court cannot substitute its own judgment for the agency's decision.[791]

Fence Creek challenged the cancellation of its permits on two grounds. First, it argued that the decision was a clear error in judgment because there was no finding of knowing and willful misrepresentation regarding the permits. The Ninth Circuit found that Fence Creek misunderstood the basis for the USFS decision in relying on authority granted to the agency to "[c]ancel or suspend the permit if the permittee knowingly and willfully makes a false statement or representation in the grazing application or amendments thereto."[792] Instead, different subsections of 36 C.F.R. § 222.4 authorized cancellation of Fence Creek's permits. Thus, the Ninth Circuit did not need to address the argument that the USFS failed to determine whether Fence Creek acted "knowingly and willfully."

Second, Fence Creek asserted that it had adequately proven its ownership of the cattle necessary for waiver of the permit, and the agency's decision was therefore arbitrary and capricious. The USFS has authority to cancel a permit "if the permittee does not comply with provisions and requirements in the grazing permit."[793] The grazing permit specifically disallowed grazing on the Chesnimnus allotment by livestock owned by anyone other than the permittee. When cattle ownership was called into question, Fence Creek was unable to produce relevant documentation. The USFS was able to identify temporary hair brands,[794] but they were insufficient to prove ownership. The Ninth Circuit found that this lack of documentation provided substantial evidence to support the agency's determination of non-ownership, which in turn enabled it to cancel the grazing permits for a failure to comply with permitting terms. The agency's decision was therefore not arbitrary and capricious.

As to the Log Creek allotment, the Ninth Circuit acknowledged that the USFS can cancel a grazing permit "in the event the permittee . . . [r]efuses or fails to comply with eligibility or qualification requirements."[795] The USFS canceled this permit when it determined that Fence Creek was not in compliance with the waiver—Fence Creek could not prove its purchase of the 247 head of cattle previously permitted to graze on the allotment. Fence Creek failed to produce brand inspection certificates, bills of sale, canceled checks or receipts in support of its contentions that it owned the livestock. An affidavit of the former owner was not conclusive. As to the argument that Fence Creek meets waiver eligibility requirements because it owns the base property, the Ninth Circuit agreed that even if the incomplete waiver asserted this reason for the waiver, the record does not establish that Fence Creek purchased the base property. A statutory warranty deed lists

791 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

792 36 C.F.R. § 222.4(a)(5) (2010).

793 *Id.* § 222.4(a)(4).

794 The court explained that "[a] hair brand is a temporary brand because it only burns the hair and does not damage the skin. Because it simply burns the animal's hair, it only lasts until the bovine sheds its hair." *Fence Creek*, 602 F.3d at 1129.

795 36 C.F.R. § 222.4(a)(2)(ii).

purchasers who have never submitted a waiver or applied for grazing permits, and who were never partners in the failed joint venture. Thus, the USFS's conclusion that Fence Creek did not own the cattle or the base property finds substantial evidentiary support in the record and provides an adequate basis for permit cancellation. Again, the Ninth Circuit found that the USFS did not act arbitrarily and capriciously.

The Ninth Circuit addressed Fence Creek's assertion that the USFS violated statutory due process requirements. The APA requires that an agency give written notice to a licensee of a pending suspension or revocation of a license, detailing relevant facts and giving an opportunity to demonstrate compliance with license requirements "before the institution of agency proceedings."[796] In *Anchustegui v. United States Department of Agriculture*,[797] the Ninth Circuit applied these protections to grazing permits.[798] In that case, the USFS first contacted a permittee with a show cause letter, which stated that the permit would be canceled unless the permittee could show why cancellation was not appropriate. The court held that the USFS had instituted agency proceedings because it had already determined that the grazing permit should be canceled. The USFS thus did not give the permittee "an opportunity to achieve compliance or to demonstrate that he had achieved compliance before the institution of agency proceedings."[799]

Fence Creek asserted that these facts were similar to its case. However, more than five months passed between the first investigations by the USFS and its final cancellation decision. The initial letter in June was not a show cause letter, and did not indicate that the agency contemplated canceling the permit. Further communication specified why the USFS concerns about livestock ownership remained and requested specific documents. In September, the letter warned that cancellation could result, but it did not threaten that it would result. Fence Creek also asserted that it was deprived of a meaningful opportunity to comply with the terms of the grazing permit because the USFS began its investigation more than one year after the permit was issued. The Ninth Circuit found that timing does not invalidate the cancellation decision, and furthermore found that the USFS could not have begun earlier because it had no reason to investigate until after the observation of unauthorized brands. The court held that "[h]ad Fence Creek actually fulfilled the requirements of obtaining a grazing permit, it would not have been difficult to provide responsive documents to assuage the USFS's concerns."[800] Thus, the USFS fully complied with APA due process requirements—it gave notice, a fair opportunity to address concerns and show compliance, and advised of facts leading to investigation, all before agency proceedings.

796 Administrative Procedure Act, 5 U.S.C. § 558(c) (2006).

797 257 F.3d 1124 (9th Cir. 2001).

798 *Id.* at 1129.

799 *Id.*

800 *Fence Creek*, 602 F.3d 1125, 1136 (9th Cir. 2010).

In conclusion, the Ninth Circuit affirmed the district court's grant of summary judgment, holding that the USFS did not act arbitrarily and capriciously in canceling Fence Creek's grazing permits, and that the USFS provided adequate due process to Fence Creek as required by the APA.

6. Hapner v. Tidwell, *621 F.3d 1239 (9th Cir. 2010).*

Environmental public interest groups (Plaintiffs)[801] challenged the USFS's Smith Creek Project (Project) in the Gallatin National Forest arguing that it violated NEPA[802] and NFMA.[803] After enjoining the USFS from implementing the Project for failing to adequately map elk habitat, the United States District Court for the District of Montana dissolved the injunction and granted the USFS summary judgment approximately one year later. Plaintiffs timely appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment as to three claims under NEPA and four of five claims under NFMA; with respect to the fifth claim, the court held that the Project violates NFMA because it did not comply with elk-cover requirements in the Gallatin National Forest Plan (Gallatin Plan).

The Project area, located within Gallatin National Forest in Montana and adjacent to the north and west boundaries of Yellowstone National Park, provides habitat for a number of wildlife species including migratory and resident herds of elk and Yellowstone cutthroat trout populate. Although large-scale, stand-replacing wildfires help maintain this habitat, logging and the attendant road construction contribute to soil disturbance and riparian damage. In addition, the USFS identified a high fire risk to local residents because of combustible fuel build up and limited road access.

The USFS designed the Project to reduce wildfire intensity, expand habitat diversity by preserving meadow and aspen areas, and reduce potential tree diseases by allowing up to 810 acres of logging and prescribed burning on 300 acres. Logging would help prevent "crown fires,"[804] slow the spread of wildfire, remove conifers near aspens in some areas, and decrease tree density from 3,000 per acre to 300 to 500 per acre in other areas. Techniques identified to minimize damage include removing trees by helicopter, limiting ground-based harvest to the winter when frozen ground or snowpack mitigates soil disturbance, and temporarily reopening roads (rather than building new roads). Subject to fund availability, the Project would also provide for road improvements and distribution of wood debris to rehabilitate disturbed soil.

801 Sharon Hapner, Alliance for the Wild Rockies, and Native Ecosystems Council. Hapner v. Tidwell, 621 F.3d 1239, 1239 (9th Cir. 2010).

802 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

803 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

804 "Crown fire" is defined as "fire that climbs to, and spreads through, the tops of trees." *Hapner*, 621 F.3d at 1242.

After providing notice and comment on an environmental assessment (EA) of the Project, the USFS issued a finding of no significant impact (FONSI) and a final decision that implemented the third of three alternative proposals for the Project. In June 2008, Plaintiffs brought suit in the district court, arguing that the Project violated provisions of NFMA and NEPA. The district court granted summary judgment to the USFS on all but one claim, enjoined the Project for failure to map elk habitat according to the Gallatin Forest Plan, and remanded to the agency for appropriate action. By March 2009, the USFS issued a second EA that included elk information, another FONSI, and a final decision to re-approve the Project. Plaintiffs filed a new complaint, renewing previous claims and challenging the March decision. Joining the two cases, the district court dismissed duplicative claims, noting that all of Plaintiffs' claims remained available on appeal, and granted summary judgment to the USFS for compliance with the previous court order, dissolving the injunction.

The Ninth Circuit reviews a grant of summary judgment de novo,[805] and reviews agency compliance with federal law under the APA[806] to determine whether its decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[807] Here, Plaintiffs alleged two series of complaints against the USFS: 1) procedural violations under NEPA,[808] and 2) procedural and substantive violations under NFMA.[809]

The Ninth Circuit first considered Plaintiffs's arguments under NEPA, addressing Plaintiffs's claim that the USFS did not take the "hard look" required by NEPA because the EA failed to "discuss and consider" evidence in the scientific debate questioning whether tree-thinning actually lowers wildfire intensity.[810] Distinguishing this instance from cases where true

805 *See* United States v. City of Tacoma, Wash., 332 F.3d 574, 578 (9th Cir. 2003).

806 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006).

807 *Id.* § 706(2)(A); *Hapner*, 621 F.3d at 1244 ("A decision is arbitrary and capricious if the Service 'relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (citing Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc))).

808 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006). Designed to encourage informed agency decisions, NEPA "does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004) (internal quotation marks omitted). Prior to the requirement that agencies make EISs for "actions significantly affecting the . . . environment," 42 U.S.C. § 4332(C) (2006), agencies must conduct an EA "to determine whether the environmental impact of the proposed action is significant enough to warrant an EIS." *High Sierra Hikers*, 390 F.3d at 639–40 (citing 40 C.F.R. § 1508.9 (2009)).

809 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)). Under NFMA, which has both procedural and substantive requirements, the USFS must develop and implement forest plans. *See* Ecology Ctr. v. Castaneda, 574 F.3d 652, 656 (9th Cir. 2009) (citing 16 U.S.C. § 1604(a) (2006)). Those plans must provide certain protections of habitat and wildlife. *See* 16 U.S.C. § 1604(g)(3) (2006).

810 Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998).

controversy existed regarding the efficacy of the method,[811] the Ninth Circuit affirmed the district court's grant of summary judgment. The court determined that the USFS relied upon adequate scientific evidence to support the claim that the Project would reduce, though not eliminate, potential fire severity.

Second, Plaintiffs argued that the Project was arbitrary and capricious because it "failed to consider an important aspect of the problem"—global warming.[812] Noting, however, that agencies should focus on issues "significant to the action in question"[813] and discuss them in proportion to that significance,[814] the Ninth Circuit found the "direct effects [on the environment] would be meaningless."[815] Moreover, the USFS discussed climate change in the December 2007 notice of final decision, giving the subject adequate consideration.

Finally, Plaintiffs argued that the USFS should have more thoroughly evaluated the Project's soil disturbance mitigation methods by preparing an EIS. The Ninth Circuit rejected this argument, disagreeing that the EA provided only a "perfunctory description of mitigating measures,"[816] and finding instead that the EA was consistent with other agency analysis[817] and Best Management Practices (BMP).[818]

Under NFMA, and its implementation through the Gallatin Plan, the Plaintiffs alleged five additional claims: 1) the Project violates applicable soil standards;[819] 2) it fails to monitor northern goshawk and pine marten, which are designated management indicator species (MIS), and therefore fails to determine the Project's effect on old growth MIS; 3) it would increase sediment levels in streams, endangering Yellowstone cutthroat trout; 4) its application would perpetuate adverse affects of road density; and 5) it would reduce elk-cover to less than the required two-thirds of current hiding cover.

The Ninth Circuit rejected the first argument regarding soil quality because applicable standards allow logging where it would not cause a net

811 *See* Sierra Club v. Eubanks, 335 F. Supp. 2d 1070, 1074, 1077–78 (E.D. Cal. 2004) (describing a dispute between plaintiffs and the USFS over the most effective means to thin forests in an attempt to prevent forest fires); Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 979–80 (N.D. Cal. 2002).

812 *Lands Council*, 537 F.3d at 987 (en banc) (citation and internal quotation marks omitted).

813 40 C.F.R. § 1500.1(b) (2009).

814 *Id.* § 1502.2(b).

815 *Hapner*, 621 F.3d 1239, 1245 (9th Cir. 2010) (citing U.S. FOREST SERV., CLIMATE CHANGE CONSIDERATIONS IN PROJECT LEVEL NEPA ANALYSIS 3 (2009), *available at* http://www.fs.fed.us/emc/nepa/climate_change/includes/cc_nepa_guidance.pdf).

816 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998).

817 *Cf.* League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1192 (9th Cir. 2002) (finding lack of analysis and contradictory statements in the USFS's EIS and other project documents).

818 *See* Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1015–16 (9th Cir. 2006) (approving of reliance on specifically identified BMPs); *cf. Blue Mountains Biodiversity Project*, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding BMPs not appropriate for specific circumstances of project).

819 National Forest Management Act of 1976, 16 U.S.C. § 1604(g)(3)(E)(i) (2006) (allowing timber harvesting only where "soil, slope, or other watershed conditions will not be irreversibly damaged").

increase in soil disturbance, and here the EA accounted for the Project's soil disturbance with a woody debris restoration method that, though speculative, is affordable. In response to the second claim contesting the USFS's consideration of effects on MIS, the Ninth Circuit first found that annual population studies of the pine marten and viability surveys of the northern goshawk constituted sufficient monitoring. Second, the court determined that the USFS's reliance on a proxy approach was not arbitrary and capricious because it provided for a reasonable measure of existing habitat and demonstrated that the Project would have little effect on MIS.[820] Plaintiffs countered that the methodology used to determine the habitat was flawed because the agency did not field-verify the old growth stands; the court found that such verification is not only unnecessary in light of other reliable methodologies, but would "inhibit the [USFS] from conducting projects in the National Forests."[821]

Plaintiffs's third argument, claiming the project would raise sediment levels in violation of the Gallatin Plan, failed on the court's finding that the proposed Project would actually improve roads and reduce sediment levels. Further, even if those improvements remain unfunded, the court could find no "likelihood of increased long-term sediment levels."[822] Moreover, though the USFS also has to consider short-term effects,[823] the Project describes several mitigation measures and the EA shows that even in the most severely affected areas, streams would permit a population ninety percent of the size of natural capacity. Plaintiffs's fourth argument challenged the lawfulness of a 2006 amendment to the Gallatin Plan, which reversed restrictions on road density to allow construction of more roads. However, the Ninth Circuit declined to reach the merits of this claim "because the Project would reduce, not increase, long-term road density in the area."[824]

With regard to Plaintiffs's fifth claim, the Ninth Circuit agreed that the Project failed to comply with the provisions of the Gallatin Plan, pertaining to the maintenance of two-thirds of elk-cover, thereby violating NFMA. Though the USFS relied on two separate measurements of elk cover, neither provided an adequate measurement of elk cover as defined by the Gallatin

820 *Lands Council*, 537 F.3d 981, 996 (9th Cir. 2008) (en banc) (describing the proxy approach as evaluating the "amount of suitable habitat for a particular species as a proxy for the viability of that species").

821 *Id.* at 994, 997.

822 *Hapner*, 621 F.3d 1239, 1249 (2010).

823 *See* Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1092, 1095 (9th Cir. 2005) (finding that the agency failed to provide analysis showing that "the coho would receive sufficient protection against jeopardy under the proposed plan"); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 935 (9th Cir. 2008) (determining that the proposal at issue "would have significant negative impacts on each affected species' critical habitat," and the agency analysis failed to "demonstrate that these impacts would not affect the fishes' survival and recovery, in light of their short life-cycles and current extremely poor habitat conditions").

824 *Hapner*, 621 F.3d at 1250 (noting that the court "consider[s] challenges to the lawfulness of a forest plan only to the extent that the contested portion of the plan 'plays a causal role with respect to the [Project]'" (quoting Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 734 (1998); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1067 (9th Cir. 2002))).

plan.[825] USFS argued that its interpretation that the regulations only require it to maintain two-thirds of *then-existing* cover is authoritative. Noting that, "[a]gencies are entitled to deference to their interpretation of their own regulations, including Forest Plans,"[826] the Ninth Circuit nevertheless found this interpretation "plainly erroneous," because it would allow the service to eventually reduce cover to nearly nothing so long as each successive action only removed a third of the cover at that time.[827] In the alternative, USFS argued that the elk-cover violation was a harmless error because of the Project area's large elk population; however, the Ninth Circuit relied on statements by USFS scientists to the effect that reduction of habitat effectiveness is an inappropriate means of population control. In addition, the court disagreed that Montana's objectives for elk population could supplant federal forest management objectives.

In conclusion, the Ninth Circuit remanded the case back to district court for the USFS's failure to comply with the Gallatin Plan's elk-cover requirements, but affirmed the grant of summary judgment on all other issues.

7. Lands Council v. McNair, *629 F.3d 1070 (9th Cir. 2010).*

The Lands Council and the Wild West Institute[828] (collectively Council) challenged the USFS's[829] decision to allow thinning of old-growth forest in the Idaho Panhandle National Forest (IPNF). Council claimed that the Mission Brush Project (Project), which would thin 227 acres of old-growth forest, violated NFMA,[830] the IPNF Plan, and NEPA.[831] After several administrative and judicial challenges and appeals,[832] the United States District Court for the District of Idaho granted USFS's motion for summary judgment. Reviewing de novo under the arbitrary and capricious standard of the APA,[833] the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.

825 *Hapner*, 621 F.3d at 1250.

826 Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005).

827 *Hapner*, 621 F.3d at 1251.

828 Wild West Institute was a plaintiff but did not join in the appeal.

829 Named Defendants included Ranotta McNair, Forest Supervisor for the Idaho Panhandle National Forests and the USFS. Boundary County, City of Bonners Ferry, City of Moyie Springs, Everhart Logging, Inc., and Regehr Logging, Inc., intervened in the case as defendants.

830 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resource Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

831 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

832 *See* Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005); Lands Council v. McNair, 494 F.3d 771 (9th Cir. 2007); Lands Council v. McNair (*Lands Council I*), 537 F.3d 981 (9th Cir. 2008) (en banc).

833 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006). "Review under the arbitrary and capricious standard is narrow and [the court] do[es] not substitute [its] judgment for that of the agency." *Lands Council I*, 537 F.3d at 987. The court will uphold the agency decision so long as it "considered the relevant factors and articulated a rational connection between the facts found and the choices made." Arrington v. Daniels, 516 F.3d 1106, 1112 (9th Cir. 2008).

As a way to manage for what it determined to be healthier forests, USFS decided to thin 277 acres of old-growth forest as part of a 3,839 acre harvest plan in the Project area. In its supplemental final environmental impact statement (SFEIS) USFS found that, as the forest composition had shifted, the younger, more densely stocked stands seen today "are causing a general health and vigor decline in all tree species." The plan did not involve cutting of any larger trees over twenty-one inches in diameter, but sought to thin younger understory trees and fuel ladders.[834] On appeal, Council claimed that USFS's decision to approve the Project was arbitrary and capricious because it relied on flawed methodology, flawed databases, and flawed habitat suitability models.

The USFS manages National Forests pursuant to NFMA, which requires it to develop guidelines promoting plant and animal diversity and forest plans for each unit in the National Forest system.[835] The IPNF Plan is one such forest plan, and the Project is required to comply with its goals and standards.[836] Section 10(b) of the Plan provides that "[a]pproximately ten percent of the Forest will be maintained in old growth as needed to provide for viable populations of old-growth dependant species."[837] The Plan also requires USFS to "[m]anage the habitat of species listed in the Regional Sensitive Species List to prevent further declines in populations which could lead to federal listing under the Endangered Species Act."[838] In addition to the requirements of NFMA, NEPA requires federal agencies to prepare an EIS and to take a "hard look" at potential impacts on the environment caused by any federal actions "significantly affecting the quality of the human environment."[839]

After first addressing the issue of exhaustion,[840] the court examined Council's first challenge: that the methodology relied on by USFS, proxy-on-proxy, was flawed. Council argued that the 10% old-growth standard was insufficient to meet the IPNF Plan's goal of maintaining 40% population potential. Because the forest was historically about 35% old-growth, Council argued that a 40% population potential would require a 14% old-growth standard.[841] The court disagreed however, finding that the 40% population potential is an objective of the Plan, not a requirement. The court further

834 Fuel ladders are understory vegetation that convey fire from the ground to the old growth canopy.

835 *See* 16 U.S.C. § 1604 (2006).

836 *See id.* § 1604(g)(1).

837 U.S. DEP'T OF AGRIC., FOREST PLAN, IDAHO PANHANDLE NATIONAL FORESTS, at II-5 (1987).

838 *Id.* at II-28. *See also* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

839 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (2006); Or. Natural Res. Council v. Bureau of Land Mgmt., 470 F.3d 818, 820 (9th Cir. 2006).

840 Although Council's argument on appeal was more developed than it was below, because Council had challenged the sufficiency of the 10% old-growth habitat standard and the reliability of the proxy-on-proxy methodology at the administrative and district court levels, the Service was on notice that the standard was being challenged, and as such, Council had exhausted its argument that the 10% standard was insufficient. Lands Council v. McNair (*Lands Council II*), 629 F.3d 1070, 1076 (9th Cir. 2010).

841 Thirty-five percent of historical acreage multiplied by 40% of that population potential maintained equals 14%.

noted that while it is not required to meet a 14% old-growth level, the area where the Project is located actually does meet the 14% threshold. The court also rejected the argument that because levels of old-growth forest were significantly higher prior to European settlement, a 10% standard is not enough to support viable populations.[842]

In addition to arguing that the 10% old-growth standard was insufficient, Council also argued that, because the databases used by USFS were unreliable, it could not ensure that the Project would comply with the 10% standard. The databases[843] and methodology relied upon by USFS estimated with 90% certainty that, in 2004, the IPNF was 12.85% old-growth with a variance from 10.55% to 15.27%.[844] In contrast, the 2006 report estimated the IPNF at 11.8% old-growth with a variance from 9.5% to 14%, leaving open the possibility that the 10% standard was not being met.[845] However, USFS found the databases to be statistically sound and scientifically reliable—a conclusion the court found to be supported by expert opinion. In light of the conflicting views, the court held that USFS "is entitled to reasonably rely on its own scientific data and analysis . . . [and] is not mandated to follow a particular methodology in determining whether or not the Project is in compliance with the 10% [standard]."[846] Furthermore, the two separate and independent databases used by USFS verified each other's inventory estimates of approximately 12% old-growth forest. The court found that although the TSMRS database had been held unreliable in *Lands Council v. Powell*,[847] subsequent updates and field verifications to this independent database made it reasonable for USFS to rely on it, and the FIA database, to determine that the 10% standard was being met. Thus, the court held that USFS's reliance on the two databases was not arbitrary and capricious.

Before addressing Council's final challenge, the court pointed out that it was of significant importance that the Project would only harvest smaller-diameter trees and would not remove any old-growth forest. Citing the earlier *Lands Council v. McNair (Lands Council I)*,[848] the court noted that the Project itself could not violate the IPNF Plan's 10% requirement because it did not remove any old-growth trees.[849]

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842 This argument was made based on a study that the Ninth Circuit rejected in a similar challenge based on the Kootenai National Forest Plan. *See* Ecology Ctr. v. Castaneda, 574 F.3d 652, 659 (9th Cir. 2009) (finding that the study's conclusion "does not bear directly on the 'viable population' standard" and "in no way disproves the conclusion that ten percent is enough to support 'viable populations'").

843 The Service used the Forest Inventory and Analysis (FIA) Database and the Timber Stand Management Record System (TSMRS) database to conduct its survey and analysis.

844 *Lands Council II*, 629 F.3d at 1077.

845 *Id.* at 1078.

846 *Id.*; *see also id.* at 1077 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive.").

847 395 F.3d 1019, 1036 (9th Cir, 2005).

848 537 F.3d 981 (9th Cir. 2008) (en banc).

849 *See id.* at 1000.

Finally, the court moved on to address Council's third challenge, that USFS applied flawed habitat suitability models. USFS relied on the proxy-on-proxy methodology to assess the viability of old-growth dependant species using the flammulated owl (*Otus flammeolus*) as a management indicator species (MIS). Forest plans must "provide for diversity of plant and animal communities . . . in order to meet overall multiple-use objectives."[850] The IPNF plan requires the management of regional sensitive species in a manner to prevent population declines that could lead to federal listing under the ESA, as well as monitoring of MIS population trends and evaluation of possible effects of a project on such populations.[851] Relying on *Native Ecosystems Council v. Tidwell*,[852] Council argued that because USFS relied on the proxy-on-proxy methodology but did not detect any members of the MIS over a ten-year period, USFS's analysis was unreliable. The court distinguished this case from *Tidwell* based on USFS's citing of "monitoring difficulties" in the instant case. USFS considered available scientific literature and possible effects of the Project on relevant species[853] in its analysis and found that all would remain viable. Thus, even though the MIS was not detected, the proxy-on-proxy method is valid where the MIS is difficult to detect and USFS used available scientific data to reach its conclusions.[854]

In summary, the Ninth Circuit held that because the methodology, databases, and habitat suitability models relied on by USFS were reliable, USFS's decision to approve the Mission Brush Project, which would thin 227 acres of old-growth forest, was not arbitrary and capricious and would not violate the NFMA, IPNF Plan, or NEPA.

8. Native Ecosystems Council v. Tidwell, *599 F.3d 926 (9th Cir. 2010)*.

Plaintiff–Appellants (collectively NEC)[855] sought review of a USFS approval of a project to update grazing allotments for a 48,000-acre parcel located in Beaverhead-Deerlodge National Forest (BDNF) in southwest Montana. NEC argued that the USFS failed to satisfy its obligation under the NFMA[856] to ensure species diversity and also failed to conduct an adequate EA as required by NEPA.[857] The United States District Court for the District

850 National Forest Management Act of 1976, 16 U.S.C. § 1604(g)(3)(B) (2006).

851 *Lands Council II*, 629 F.3d at 1081.

852 599 F.3d 926, 933–35 (2010) (holding unreliable the proxy-on-proxy method where the MIS had not been detected in the project area for fifteen years and the USFS had not cited any "monitoring difficulties").

853 Council alleged that old-growth dependant species such as the northern goshawk (*Accipiter gentilis*), fisher (*Martes pennanti*), marten (*Martes Americana*), pileated woodpecker (*Dryocopus pileatus*), and black backed woodpecker (*Picoides arcticus*) could suffer from effects of the Project.

854 *See Lands Council I*, 537 F.3d 981, 998 (9th Cir. 2008).

855 Plaintiff–Appellants included Native Ecosystems Council, Alliance for the Wild Rockies, and WildWest Institute.

856 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

857 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

of Montana entered summary judgment in favor of the Defendant–Appellees (collectively USFS)[858] finding that the USFS had in-fact complied with both NFMA and NEPA. Both Madison and Beaverhead counties intervened as defendants at the district and appellate court levels and several ranchers and industry associations intervened as appellees at the appellate level.[859] The United States Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment in favor of the defendants and remanded to USFS to prepare a new or supplemental EA that complies with both NFMA and NEPA.

The Antelope Basin/Elk Lake project area (PA) is a 48,000-acre parcel located within BDNF and comprised mainly of mountainous sagebrush and grassland ecosystems with scattered timber stands along streams. The main USFS activities affecting the PA include herbicide application and burning to control sagebrush densities, and sheep and cattle grazing. The project proposal divided the PA into eleven grazing allotments and proposed an updated Allotment Management Plan (AMP),[860] which would dictate where and when livestock can graze and provided specific guidelines controlling grazing intensity. [861] The proposal, which is governed by the BDNF Land Resources Forest Plan (Forest Plan),[862] identified the goals of the Forest Plan, which included the maintenance of sufficient habitat to support native wildlife while simultaneously providing for grazing by domestic livestock. The Forest Plan designates certain wildlife species as management indicator species (MIS), which are monitored and used as a proxy to monitor the status of other wildlife species and corresponding habitat, as well as the effects of various activities on these species and corresponding habitat. The sage grouse, which is entirely dependent on sagebrush habitat, is a MIS for the Antelope Basin/Elk Lake PA. However, sage grouse are effectively absent from the entire PA. While approximately 43% of the PA is considered potential sage grouse habitat and 4% is considered to have potential nesting and rearing habitat, only two possible sightings of sage grouse have occurred in the PA in the past fifteen years and the nearest known active breeding site is eleven miles from the PA.

The USFS conducted an initial EA on the proposed AMPs and issued a revised EA in response to public comments. The revised EA considered three alternatives for the AMPs: 1) Alternative A, which included continuing

858 Defendants–Appellees included Tom Tidwell, the Northern Region Regional Forester, Bruce Ramsey, the Supervisor for the BDNF, Mark Petroni, the District Ranger of the BDNF, and USFS.

859 Intervenors–Appellees included Sitz Angus Ranch, Gary L. Clark, Moose Creek Grazing Association, Max L. Robinson, Sr., Max L. Robinson, Jr., Montana Stockgrowers Association, and Montana Wool Growers Association.

860 An AMP describes the manner of livestock operations on public lands and how to achieve various needs and objectives in compliance with federal law. Native Ecosystems Council v. Tidwell, 599 F.3d 926, 929 n.1 (9th Cir. 2010). It is written in coordination with lessees or permittees. *Id.*

861 *Id.* at 929–30.

862 USFS, as required by the NFMA, develops a forest plan for each unit in the National Forest System. National Forest Management Act of 1976, 16 U.S.C. § 1604(a) (2006).

current management practices; 2) Alternative B, which included various actions to modify the AMPs to protect riparian habitat while allowing for grazing; and 3) Alternative C, which eliminated grazing altogether. The USFS approved Alternative B and the District Ranger determined that an EIS was not needed because the project was not a major federal action with a significant effect on the quality of human environment.

NEC filed an administrative appeal of the District Ranger's decision that no EIS was needed; the Regional Forester subsequently upheld the District Ranger's decision. NEC appealed to the district court; the court granted summary judgment in favor of the USFS and intervenors; NEC promptly appealed to the Ninth Circuit. The Ninth Circuit reviewed the district court's decision de novo, and reviewed agency decisions for compliance with NFMA and NEPA under the arbitrary and capricious standard of the APA.[863]

NFMA specifies requirements by which the USFS must manage all lands in the National Forest System.[864] All management activities must comply with the Forest Plan, which must comply with NFMA.[865] Under NFMA, the USFS has an obligation to maintain a diversity of plant and animal life based on the suitability of a specific land area.[866] At the time the USFS issued its final decision, regulations in place required the Service to manage fish and wildlife habitat "to maintain viable populations of existing . . . species."[867] The regulations required the selection of a MIS and provided that population trends of the MIS be monitored and relationships to habitat changes be determined.[868] The Forest Plan designated the sage grouse as the MIS, which the USFS was to monitor in order to determine the effects of management activities in the PA on corresponding habitat to ensure the maintenance of viable plant and animal populations within the PA. However, because the sage grouse is absent from the PA, the EA looked to the sagebrush habitat in order to assess the viability of the sage grouse, which in turn was used to assess the viability of other species. This method is known as the proxy-on-proxy approach.[869] Use of the proxy-on-proxy approach is permissible only when it will "'reasonably ensure[]' that the proxy results mirror reality."[870] The method assumes that maintaining the amount of habitat needed to support the MIS will, in fact, ensure species survival.[871] The proxy-on-proxy

863 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362 7521 (2006). Under the APA an agency decision must be set aside as unlawful if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* § 706(2)(A). The court will not substitute its judgment for that of the agency so long as the agency demonstrates a rational connection between the facts found and the decision made. Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 875 (9th Cir. 2009).

864 Lands Council v. McNair, 537 F.3d 981, 988 (9th Cir. 2008) (en banc).

865 Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 962 (9th Cir. 2002).

866 16 U.S.C § 1604(g)(3)(B) (2006).

867 36 C.F.R. § 219.19 (2000).

868 *Id.* § 219.19(a)(6).

869 *Lands Council*, 537 F.3d at 997.

870 Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1066 (9th Cir. 2004) (citing *Idaho Sporting Cong.*, 305 F.3d at 972–73, and Ariz. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1250 (9th Cir. 2001)).

871 Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1017 (9th Cir. 2006).

method is applicable "only where both the Forest Service's knowledge of what quality and quantity of habitat is necessary to support the species and the Forest Service's method for measuring the existing amount of that habitat are reasonably reliable and accurate."[872]

The court reasoned that because no sage grouse can be found in the PA, there is no basis to evaluate the USFS's determination that the sagebrush habitat is sufficient to maintain viable sage grouse populations. The court admitted that monitoring difficulties do not render a habitat-based analysis unreasonable, but indicated that USFS did not cite any monitoring difficulties, and, further, resorted to a habitat-based analysis because there were in fact no sage grouse present in the PA. Since the Forest Plan required monitoring of the MIS, the court concluded that the proxy-on-proxy approach was inappropriately applied because the sage grouse could not be reliably monitored. Furthermore, any conclusions about the diversity of other species drawn from the attempted monitoring of the MIS would not be reasonably accurate or reliable.[873] The court cited *Earth Island Institute v. United States Forest Service*,[874] noting that where a Forest Plan called for species population monitoring, a habitat monitoring approach was not acceptable.[875] The court stated that it would hold the agency to its statutory responsibilities of fully studying the effects of agency actions and maintaining viable populations of existing species. The court stated that the agency could not meet these responsibilities by selecting, as a proxy, a MIS that is not present in the PA. In order to comply with NFMA, USFS must study the site-specific effects of agency actions. If a selected MIS is absent from the specific study site, it is difficult to show how an assessment of that MIS demonstrates that the agency actions comply with NFMA or the Forest Plan.

In developing its biological assessment, USFS relied on the *Connelly Guidelines*[876] to determine whether sage grouse habitat was sufficient. However, the court noted that at least some of the *Guidelines* assumed that grouse were present as indicators of habitat health and specifically noted that "quantitative data from population and habitat monitoring are necessary to implement the guidelines correctly."[877] Additionally, in the Conservation Assessment issued after the *Connelly Guidelines*, Connelly noted that due to extirpation from various areas throughout its range, distribution of the sage grouse is no longer closely aligned with that of the sagebrush.[878] This greatly

872 Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1250 (9th Cir. 2005).

873 The court indicated that monitoring difficulties do not nullify a habitat-based analysis, but current scientific data must be used in the analysis. However, as here, when the USFS's methodology of the proxy-on-proxy approach evades the directive to monitor the MIS, which is simply absent from the PA, the approach is misapplied.

874 442 F.3d 1147 (9th Cir. 2006).

875 *Id.* at 1175–76

876 John W. Connelly et al., *Guidelines to Manage Sage Grouse Populations and their Habitats*, 28 WILDLIFE SOC'Y BULL. 967 (2000).

877 *Id.* at 975.

878 JOHN W. CONNELLY ET AL., CONSERVATION ASSESSMENT OF GREATER SAGE-GROUSE AND SAGEBRUSH HABITATS 4–15 (2004).

undermines USFS's assertion that monitoring of the sagebrush habitat in the absence of the sage grouse meets its obligation under NFMA to maintain viable populations of sage grouse and other sagebrush obligates. The court found that "[i]n applying the proxy-on-proxy approach to evaluate whether the project complied with the Forest Service's duty to ensure wildlife diversity, the Forest Service did not adequately consider evidence that . . . the sage grouse population continued to trend downwards over several decades."[879] This omission, the court reasoned, indicates that USFS "failed to consider an important aspect of the problem" or offered explanations for its decision that were not supported by evidence in the record, thus rendering its decision arbitrary and capricious.[880] Other discrepancies between the USFS's conclusions and the *Connelly Guidelines* such as the presence and suitability of nesting habitat in the PA, as well as time frames for grouse nesting and breeding, indicated that the USFS's approach to measuring sagebrush habitat was neither accurate nor reliable. The court held that where the population of the MIS has been in consistent decline and is absent from the PA, and where the agency conclusions conflict with those of the scientific experts, use of the proxy-on-proxy approach is insufficient to ensure compliance with the requirements of NFMA.

In addition to finding that the USFS did not comply with NFMA, the court also held that the USFS failed to engage in the necessary procedures in order to comply with NEPA. If a federal action may significantly affect the human environment, the agency must prepare an EIS.[881] As a preliminary step, the agency may conduct an EA to determine whether a significant environmental impact is likely and a more detailed EIS is needed.[882] If the EA concludes that no significant impact is likely, the agency may issue a finding of no significant impact (FONSI), and "supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant."[883] This statement of reasons is the main evidence in determining if the agency has discharged its duty to take a "hard look" at the potential impacts of the project in order to comply with NEPA.[884] Because the EA employed flawed methodology in using a non-existent MIS as a proxy, the court reasoned that the USFS's efforts necessarily did not constitute the requisite "hard look" as required by NEPA.[885] Additionally, the USFS's failure to supplement the EA, following Connelly's findings regarding nesting and rearing habitat, fails to

879 Native Ecosystems Council v. Tidwell, 599 F.3d 926, 935 (9th Cir. 2010).

880 Motor Vehicle Mfrs. Ass'n. of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

881 Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1185 (9th Cir. 2008).

882 *Id.*

883 *Id.* at 1220 (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)).

884 *Ctr. for Biological Diversity*, 538 F.3d at 1220.

885 The court referred to its holding in *Native Ecosystems Council v. United States Forest Service*, which found that when USFS relied on incorrect assumptions or data it violated NFMA and concurrently did not fulfill NEPA's "hard look" requirement. 418 F.3d 953, 964–65 (9th Cir. 2005).

comply with its obligation under NEPA to supplement the EA when new information relevant to the project or its impacts becomes available.[886]

In summary, the court held that USFS failed to employ appropriate methods in order to appropriately measure the potential impacts of the proposed project on the sagebrush habitat and its corresponding obligate species. Such a failure caused the USFS's decisions to be arbitrary and capricious and its actions to be non-compliant with both NFMA and NEPA and thus unlawful. Accordingly, the court reversed the district court's grant of summary judgment and remanded for USFS to prepare a new or supplemental EA in compliance with NFMA and NEPA. The court noted that a new EA addressing the appropriate issues might result in findings that necessitate preparation of an EIS.

In dissent, Chief Judge Kozinski argued that the USFS's decision could not possibly be arbitrary and capricious considering that it issued a 216 page EA, engaged in six sage grouse PA surveys, and "a bevy of supplemental reports." The dissent explained that a Forest Plan is developed for an entire forest, not just a single PA, that a MIS is chosen for the entire forest, and that for BDNF, the sage grouse is the MIS for all sagebrush obligates within the entire forest.[887] Additionally, USFS analyzed the potential effects on the Forest Plan as required by NFMA and did so by using the sage grouse as the MIS as was required by the Forest Plan. Therefore, USFS acted in accordance with its obligations, and as such its decision could not have been arbitrary and capricious.

9. Greater Yellowstone Coalition v. Lewis, *628 F.3d 1143 (9th Cir. 2010)*.

Greater Yellowstone[888] challenged the agencies'[889] decision to approve expansion of a mine on federal land, alleging a violation of NEPA[890], the CWA,[891] and NFMA.[892] The United States District Court for the District of

886 USFS contested findings in the Connelly Assessment regarding breeding habitat because the report relied on the quality of the habitat and not actual evidence of breeding. However, this contradicts the USFS's own use of the proxy-on-proxy approach. Furthermore, the court noted that the revision accounting for potential nesting habitat and impacts of cattle grazing are significant because these findings may lead to a determination that the EA is insufficient and that an EIS is necessary.

887 BDNF is a 3.36 million acre forest, and at 48,000 acres, the PA makes up a mere 1.4% of the entire forest.

888 Plaintiff groups included the Greater Yellowstone Coalition, Natural Resources Defense Council, Sierra Club, and Defenders of Wildlife.

889 BLM and USFS are the agencies at issue. Named defendants included Wilma A. Lewis; Tom Tidwell; Robert V. Abbey; Thomas J. Vilsack; Ken Salazar; and Brent Larson, Supervisor, Caribou-Targhee National Forest. J.R. Simplot Company; United Steelworkers Local 632; City of Pocatello; City of Chubbuck; City of Soda Springs; Power County; Caribou County; Bannock County; Idaho Farm Bureau Federation; Town of Afton, Wyoming; and Lincoln County, Wyoming intervened as defendants in district court when the Plaintiff groups sought to enjoin the mine expansion.

890 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

891 Federal Water Pollution Control Act, 33 U.S.C §§ 1251–1387 (2006).

Idaho held that the approval was not arbitrary or capricious in violation of the CWA and NFMA, that the agencies did not violate NEPA's "hard look" or public disclosure requirements, and that the mine operator, J.R. Simplot Co. (Simplot), was not required to obtain Section 401 certification under the CWA.[893] The United States Court of Appeals for the Ninth Circuit affirmed each of the district court's rulings. Senior Circuit Judge Fletcher dissented.

Simplot's Smoky Canyon Mine occupies about 5,000 acres of the Caribou National Forest from which it has acquired phosphate ore since 1984. Mining operations produce waste rock with a high selenium concentration and, as a result of percolation through waste rock, nearby streams show highly toxic levels of selenium. In response to an "ongoing site investigation . . . under the Comprehensive Environmental Response, Compensation, and Liability Act" (CERCLA),[894] Simplot proposed and, as of 2007, implemented remedial diversions of the affected streams. In the meantime, Simplot sought approval from the Bureau of Land Management (BLM) and the USFS for two additional mineral leases for mines adjacent to the existing mine.[895] The agencies published a Draft Environmental Impact Statement (DEIS) in 2005 and a Final Environmental Impact Statement (FEIS) in 2007 approving the expansion of the mining operation.

Because of Simplot's past remediation efforts and its proposed cover system, the agencies concluded that the expansion would "not contribute to violations of water quality standards."[896] Though Simplot's initial cover method proposal did not meet agency approval, its subsequent cover—the Deep Dinwoody Cover System, consisting of topsoil, material from the Dinwoody Formation, and chert—did eventually meet approval. To test this cover, Simplot hired an independent environmental consultant who conducted two studies. Due to concern that these studies failed to account for the seasonal variability of snow melt and precipitation, the agencies convened a six-scientist team charged with the review of water quality issues. This team asked another independent firm to determine whether the studies adequately accounted for seasonal effects. Though the results "led to uncertainty . . . about the short term accuracy," the team concluded that the long-term effects were accurate and further testing would not be necessary.[897] In addition, the agencies collaborated with the Idaho

892 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

893 33 U.S.C § 1341 (2006).

894 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

895 The existing mine contained five panels for resource extraction, labeled A–E; the additional mineral leases would open two new panels, labeled F and G, adjacent to the existing panels. BLM and USFS share jurisdiction in regulating mines, such as the one at issue here, which operate on federal land and require special use permits. *See* 30 U.S.C § 211 (2006) (describing BLM jurisdiction over all phosphate mining leases on public lands); 36 C.F.R. § 251 (2010) (authorizing USFS to issue special use permits for mining that occurs on forest service lands).

896 Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1146 (9th Cir. 2010).

897 *Id.* at 1148.

Department of Environmental Quality (IDEQ), which agreed that the Dinwoody cover would be adequate.

Greater Yellowstone objected during the notice and comment period and, upon approval, proceeded to exhaust its administrative remedies. It finally brought suit in the district court alleging violations of the CWA, NFMA, and NEPA, and seeking a preliminary injunction. Simplot and other interested parties intervened and the district court denied the injunctive motion and granted the defendants' motion for summary judgment. Greater Yellowstone timely appealed and, pursuant to its jurisdiction under 28 U.S.C. § 1291, the Ninth Circuit affirmed.

The standard of review of a district court's grant of summary judgment is de novo.[898] The court may set aside agency action where it is arbitrary or capricious;[899] however, agencies reserve discretion to rely on their own experts, "even if [the court] find[s] contrary evidence more persuasive"[900]—ultimately, the "standard of review is a narrow one."[901] Here, Greater Yellowstone presented three arguments on appeal: 1) the agencies violated NEPA, the CWA, and NFMA by acting arbitrarily or capriciously; 2) the agencies violated NEPA's hard look and disclosure requirements; and 3) the agencies violated the CWA's Section 401 certification requirement.

First, Greater Yellowstone argued that the agencies relied on inadequate evidence. Under the CWA, federal agencies may not approve actions that would violate state water quality standards.[902] NFMA likewise requires that the USFS develop forest management plans[903] and that subsequent actions conform to the governing plan.[904] With regard to phosphate mining, the Caribou National Forest Plan requires that "[o]verburden and soil materials shall be managed according to state-of-the-art protocols to help prevent the release of hazardous substances in excess of state and/or federal regulatory standards."[905] Greater Yellowstone first argued that the agencies' examination failed to consider sources of selenium contamination other than the two known sources. However, the FEIS identified the known sites as the two major sources of selenium contamination and determined that remediation efforts there would sufficiently offset contamination from the mine expansion. Therefore, the

898 Arakaki v. Hawaii, 314 F.3d 1091, 1094 (9th Cir. 2002).

899 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006); Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) ("[W]e will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.") (quotations and citations omitted), overruled on other grounds by Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008).

900 *Greater Yellowstone Coal.*, 628 F.3d at 1148 (citing Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)).

901 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

902 Federal Water Pollution Control Act, 33 U.S.C § 1323(a) (2006).

903 National Forest Management Act of 1976, 16 U.S.C § 1604(a) (2006).

904 *Id.* § 1604(i).

905 U.S. FOREST SERVICE, REVISED FOREST PLAN FOR THE CARIBOU NATIONAL FOREST 4-83 (Feb. 2003).

agencies decided that the mine expansion would not increase overall pollution in violation of state or federal law. The Ninth Circuit found that the agencies' decision was "founded on a rational conclusion between the facts found and the choices made."[906]

In addition, Greater Yellowstone argued that the agencies arbitrarily relied upon studies that did not account for seasonal variations, and therefore, "failed to consider an important aspect of the problem."[907] However, the Ninth Circuit pointed out that "[a]ll of the experts agreed that the model effectively accounted for seasonal variations in the long-term," and therefore, the agencies' decision to rely upon the model was reasonable, notwithstanding uncertainties as to its short-term accuracy.[908]

Second, Greater Yellowstone challenged the agencies' decision under NEPA's "hard look" and disclosure requirements, which compel an agency to "consider every significant aspect of the environmental impact of a proposed action," and "inform the public that it has indeed considered environmental concerns in its decision-making process."[909] With regard to the requisite "hard look," Greater Yellowstone proffered two separate arguments: 1) that the agencies should have required further modeling to account for the seasonal variations, and 2) that the agencies should have identified other pre-existing sources of selenium contamination. The first argument failed, as the Ninth Circuit reasoned, because the agencies had already met the "hard look" requirement with the initial model and, furthermore, the agencies conditioned their approval on future testing which they would be able to monitor. The court found that the second argument failed because NEPA only requires an evaluation of *future* impacts, and the evaluation here only investigated existing pollution as it related to remediation efforts.

With regard to Greater Yellowstone's disclosure argument, the Ninth Circuit disagreed that the agencies failed to disclose internal uncertainties about the model's short-term accuracy, or that they publicly denied such uncertainty. While noting that an agency must respond to significant uncertainties, the court declined to place an affirmative requirement on agencies to respond to every uncertainty.[910] Here, the Ninth Circuit found the plaintiffs' reliance on one statement indicating uncertainty misplaced. The court distinguished the present situation from that in *Lands Council v. Powell*,[911] where the court found USFS to have violated NEPA by relying on a flawed model and failing to disclose the model's limitations. The court

906 Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1243 (9th Cir. 2001).

907 Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co., 463 U.S. 29, 43 (1983).

908 *Greater Yellowstone Coal.*, 628 F.3d 1143, 1150 (9th Cir. 2010).

909 Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983) (quotations omitted).

910 *Greater Yellowstone Coal.*, 628 F.3d at 1151–52 (citing Lands Council v. McNair, 537 F.3d 981, 1001 (9th Cir. 2008) ("[T]o the extent our case law suggests that a NEPA violation occurs every time [an agency] does not affirmatively address an uncertainty in the EIS, we have erred. After all, to require the [agency] to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the [agency] from acting due to the burden it would impose.")).

911 395 F.3d 1019, 1031–32 (9th Cir. 2005).

distinguished the two scenarios on the grounds that the *Powell* model was inadequate because it lacked relevant input variables while the objections made to the present model were made based on output variables.[912] In sum, the court determined that any uncertainty that resulted from the model was not "significant" as contemplated under *McNair*.[913]

Finally, the Ninth Circuit held that Simplot's failure to obtain Section 401 certification did not violate the CWA. Only a pollutant discharged from a point source requires certification.[914] However, the mining pits at issue were not point sources; the CWA defines "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[915] Moreover, the court noted that case law on the subject required some collection or channeling to classify an activity as a point source. Here, there were two potential discharges: a storm drain system that collected water from the top of the cover, for which Simplot had applied for and received Section 401 certification, and a discharge associated with water seeping through the cover and being diverted away from the pits. Since the second diversion involved no confinement or containment and would instead freely enter surface water after seeping through the ground, it did not qualify as a point source.[916]

In conclusion, the Ninth Circuit affirmed the district court's grant of summary judgment on all three issues: finding no violation of NEPA, NFMA, and the CWA by acting arbitrarily or capriciously; finding no violation of NEPA's hard look and disclosure requirements; and finding no violation of the CWA's Section 401 certification requirement.

Senior Circuit Judge Betty Fletcher (Judge Fletcher) filed a dissenting opinion arguing that the majority failed to acknowledge underlying local interests affecting the agencies' decisions, and that the agencies violated the CWA, NFMA, and NEPA by 1) authorizing the expansion project on the basis of admittedly incomplete information without any indication that such information was not reasonably obtainable; 2) by relying on the results of concededly inadequate modeling to predict the water quality impacts of the expansion project; and 3) by adopting a scheme, that relies on post-

912 The Powell model lacked input data (input variables) and thus failed to adequately consider relevant issues; however, the model at issue in *Greater Yellowstone* did not lack input data, but rather produced results (output variable) which Greater Yellowstone found to be undesirable.

913 *See McNair*, 537 F.3d at 987.

914 Federal Water Pollution Control Act, 33 U.S.C. § 1341(a)(1) (2006) ("Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates."). The CWA defines "discharge" as including "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). *See* Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1095–97 (9th Cir. 1998).

915 33 U.S.C. § 1362(14) (2006).

916 *See* Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176, 1181–82 (9th Cir. 2010) ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source.").

decisional modeling rather than additional, pre-approval modeling to evaluate the expansion's environmental impacts.[917]

According to Judge Fletcher, there were two key background facts that the majority neglected to mention. First, the record provided no evidence that Simplot had complied with the CERCLA order issued by the EPA, the USFS, and IDEQ, under which it was obligated to develop and implement a comprehensive plan to remove the contamination from the existing mine operations. Second, the court did not mention the fact that Simplot and the other intervenors represent significant economic interests that hold powerful sway over the industries and governments of Idaho.

Furthermore, Judge Fletcher argued that the record belies the agencies' description of the two contaminant sources as the two *major* sources. Rather, they are simply two of the *known* sources. This information, the Judge argued, was necessary for the agencies to make the "reasoned decision among alternatives" which NEPA requires.[918] The Judge accused the majority of downplaying the significance of uncertainties regarding seasonal variations, which the record indicates were of central concern to an analysis of the cover's efficacy. Judge Fletcher further criticized the majority's acceptance of a plan that allows the agencies to "defer consideration of cumulative impacts to a future date,"[919] which is contrary to NEPA's "look before you leap" requirement[920] and unsupported in case law. Finally, Judge Fletcher noted that while the mine expansion may provide Simplot with another fourteen to sixteen additional years of phosphate extraction, the full extent of the pollution it caused will not be known for many years to come, at which point Simplot may be "long gone."[921]

Judge Fletcher's dissent attacks the majority for failing to require a more probing analysis of potential environmental harm in light of a "record . . . [that] reveals significant omissions and woefully inadequate assessments"[922] and concludes by asserting that the court should have found violations of federal law.

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917 *Greater Yellowstone Coal.*, 628 F.3d 1143, 1150 (9th Cir. 2010).

918 *See* 40 C.F.R. §§ 1502.22, 1502.22(a) (2010).

919 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998)

920 Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 947 (9th Cir. 2008) (quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983)).

921 *Greater Yellowstone Coal.*, 628 F.3d at 1158.

922 *Id.*