2020 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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NINTH CIRCUIT ENVIRONMENTAL REVIEW EDITOR'S NOTE

The 2020–2021 Ninth Circuit Environmental Review provides summaries of twenty-seven cases issued by the United States Court of Appeals for the Ninth Circuit between January and December 2020. Each summarized opinion concerns cases and questions of law relating to natural resources, energy, the environment, and tribal rights. Additionally, it features two chapters authored by Ninth Circuit Review members, each of which discuss important topics rooted in the impacts of recent cases from the Ninth Circuit.

In the first chapter, Dara Illowsky addresses the impacts of greenhouse gas emissions on the ever-increasing severity of wildfires in the western United States and proposes the federal government use the National Environmental Policy Act (NEPA) as a tool to implement tangible and effective requirements to achieve healthy forest management practices. In this discussion, this chapter looks at the Ninth Circuit case *Bark v. United States Forest Service* and proposes that the Biden Administration revive and update NEPA regulations rescinded under the Trump and Obama Administrations, focusing on the incorporation of greenhouse gas emission impacts and tribal and public involvement in forest management decisions. This chapter provides timely, intuitive suggestions on how to move forest management practices forward to meet the challenges of fire management in the face of climate change.

In the second chapter, Skye Walker writes about the seemingly unchecked ability of the federal government, namely the Department of Defense and Department of Homeland Security, to skirt environmental regulations in the name of national security. This chapter highlights instances of the judiciary granting the executive branch "military super-deference," starting with the 2020 companion cases from the Ninth Circuit, *Sierra Club v. Trump* and *California v. Trump*, concerning the environmental impacts of the border wall. This chapter delves into a discussion at the forefront of today's environmental and social justice movements: can altering government funding achieve the progress and solutions advocates seek?

The Ninth Circuit Review is made possible by the hard work of its six members, selected annually from the *Environmental Law* member base. The case summaries appearing herein are the result of their commitment, in the face of a global pandemic, to ensuring that practitioners, advocates, fellow law students, and anyone with

a related interest receive an accurate review of the state of environmental law in the Ninth Circuit.

We hope you enjoy this issue, thank you for reading!

Anna Laird
2020–2021 NINTH CIRCUIT
ENVIRONMENTAL REVIEW EDITOR

CASE SUMMARIES

I. ENVIRONMENTAL QUALITY

A. Clean Air Act

1. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., Env't Prot. Comm'n of Hillsborough city of v. Volkswagen Grp. of Am., 959 F.3d 1201 (9th Cir. 2020)

Various counties from different states (collectively, "Counties")[1] sued group company car manufacturer Volkswagen Aktiengesellschaft and its subsidiaries (collectively, "Volkswagen")[2] in the United States District Court for the Northern District of California.[3] Counties sought to impose penalties on Volkswagen for violation of their laws prohibiting tampering with emissions control systems in vehicles. The district court agreed with Volkswagen that the Clean Air Act (CAA)[4] preempted Counties' claims. Counties appealed. The Ninth Circuit affirmed in part and reversed in part, ultimately concluding that the CAA does prevent Counties from enforcing their anti-tampering laws against Volkswagen for *pre-sale* vehicles but does not prevent such enforcement regarding *post-sale* vehicles.

Between 2009 and 2015, Volkswagen installed "defeat devices" in new cars for the purpose of evading federally mandated emissions standards. Volkswagen later updated those devices post sale to better avoid detection and compliance. Volkswagen sold approximately 585,000 new vehicles containing a defeat device in the United States during this period. Meanwhile Volkswagen also deliberately misled regulators and consumers by marketing the cars as "clean diesel." After the U.S. Environmental Protection Agency (EPA) discovered the violations in 2017, Volkswagen settled with the EPA for civil and criminal violations of the CAA. Volkswagen's criminal plea agreement did not protect

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[1] Environmental Protection Commission of Hillsborough County, Florida; Salt Lake County, Utah.

[2] Parent company Volkswagen Aktiengesellschaft and its several subsidiaries including Volkswagen Group of America, Inc.; Audi of America, LLC; and Porsche Cars North America, Inc.

[3] *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., 310 F. Supp. 3d 1030 (N.D. Cal. 2018).

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

Volkswagen from prosecution by state or local governments. Volkswagen's civil settlement similarly did not release Volkswagen of liability from any state or local government (except California). Volkswagen's resulting liability exceeded $20 billion. Concurrent with the federal litigation, states and counties brought separate lawsuits against Volkswagen for violating state and local anti-tampering laws. In 2016, the multidistrict litigation judicial panel transferred these actions to the United States District Court for the Northern District of California. In 2017, the district court dismissed a suit brought by Wyoming and held that the CAA preempted the state's claim that Volkswagen violated Wyoming law by installing the defeat device in pre-sale vehicles. Subsequently, Counties amended their respective complaints to allege facts relating to both Volkswagen's tampering with pre-sale vehicles and post-sale vehicles. The district court then held (1) the CAA expressly preempts state and local government efforts from applying anti-tampering laws to pre-sale vehicles, and (2) the CAA impliedly preempts such efforts regarding post-sale vehicles. The Ninth Circuit reviewed the District Court's preemption analysis de novo.

The main question on appeal was whether Counties' anti-tampering regulations were expressly or impliedly preempted by the CAA's motor vehicle emission standards. The Ninth Circuit began its analysis by iterating Supremacy Clause case law and noting that Congress may expressly preempt state law by enacting a clear statement to that effect. The court explained that Congress may also implicitly preempt state law if the federal legislation's stated purpose is so clearly preemptive as to overcome the presumption of retaining historic police powers to the states. Laws can clear this high threshold with "field preemption" and/or "conflict preemption." Conflict preemption may occur either where (a) compliance with state and federal law is impossible, or (b) where state law stands as an obstacle to the purposes of federal law, so-called "obstacle preemption." Further, the Ninth Circuit explained that the regulation of air pollution falls within the historic police powers of the states, and that the CAA maintains a cooperative federalism approach.

In applying the CAA to the immediate case, the Ninth Circuit first explored whether the CAA's express preemption provision preempts the Counties' anti-tampering rules. Volkswagen argued that the express preemption provision under Section 209(a)[5] preempts Counties' imposition of antitampering rules on pre-sale vehicles. Counties argued that their anti-tampering rules are not "emission standards" under Section 209(a) because they do not attempt to enforce the limitations on emissions of pollutants from new motor vehicles set forth in Section 202 (emission standards for new motor vehicles). Similarly, Counties argued

[5] Section 209(a) of the CAA provides that the federal government has authority to establish "standards applicable to the emission of any air pollutant from . . . new motor vehicles" and expressly preempts certain state and local laws regulating emissions from "new motor vehicles," also known as pre-sale vehicles. *Id.* §§ 7521(a)(1), (a)(4)(A).

that the anti-tampering rules are not emissions standards because they merely prohibit tampering with emission control systems. The Ninth Circuit concluded that Section 209(a) expressly precludes state or local governments from imposing any restriction that has the purpose of enforcing emission characteristics for pre-sale vehicles. The court then turned to Volkswagen's alternative argument that Section 209(a) also expressly preempts the Counties' anti-tampering law as applied to post-sale vehicles. The Ninth Circuit quickly struck down this argument because the plain language of Section 209(a) preempts state and local regulations "relating to the control of emissions from new motor vehicles."[6] The court concluded that the express language of this provision only applies to pre-sale, and not post-sale, vehicles.

Next, the Ninth Circuit considered whether the CAA impliedly preempts the Counties' anti-tampering rules as applied to post-sale vehicles. Based on the obstacle preemption theory, Volkswagen argued that the Counties' anti-tampering laws obstruct accomplishment and execution of the full purposes and objectives of the CAA and are therefore impliedly preempted. The court noted that the CAA's text and structure, particularly given the presumption that Congress does not impliedly preempt states' historic police powers, weigh against the conclusion that Congress intended to preempt local anti-tampering laws. The Ninth Circuit found no other factors supporting obstacle preemption. The court accordingly concluded that in enacting the CAA, Congress intended states to retain the power to enforce anti-tampering laws related to post-sale vehicles and that such laws are therefore not impliedly preempted.

The Ninth Circuit then addressed Volkswagen's argument that the CAA preempts Counties' anti-tampering laws under ordinary preemption principles. Volkswagen first argued that Congress intended to give the EPA exclusive oversight over post-sale compliance with emission standards on a model-wide basis and that Counties' anti-tampering rules impede this goal. The court dismissed the first of these arguments on two grounds. The court found nothing in the CAA that raises the inference that Congress intended to (1) place manufacturers beyond the reach of state and local governments, or (2) shield a person from state enforcement actions if that person tampered with a large number of vehicles or engaged in systematic rather than sporadic tampering. The Ninth Circuit then turned to Volkswagen's second argument: that the CAA's penalty provision evidences Congress's careful balancing of interests regarding the imposition of penalties, and that states would disturb this balance if able to impose their own penalties. The court disagreed with Volkswagen's reading of the CAA because of the statute's (1) cooperative federalism scheme, (2) express preservation of state and local police powers post sale, and (3) absent congressional intent to grant EPA the exclusive authority to regulate every incident of post-sale tampering. The Ninth Circuit accordingly concluded that Volkswagen's penalty-provision

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[6] *Id.* § 7543(a).

arguments were not sufficient to pass the high bar to prove federal preemption of state law.

In sum, the Ninth Circuit concluded that the CAA expressly preempts Counties from enforcing their anti-tampering laws regarding *pre-sale* vehicles but does not expressly or impliedly preempt such enforcement regarding *post-sale* vehicle tampering. The court made special note of the "staggering liability"[7] that this ruling may create for Volkswagen. But the court observed that this result does not warrant infidelity to the Supreme Court's preemption doctrine nor to the language of the CAA. The Ninth Circuit therefore affirmed the district court's dismissal of Counties' complaints to the extent they sought to apply anti-tampering laws to new vehicles, reversed the district court's dismissal of Counties' complaints regarding post-sale vehicle tampering, and remanded for further proceedings.

B. Comprehensive Environmental Response, Compensation, and Liability Act

1. Arconic, Inc. v. APC Investment Co., 969 F.3d 945 (9th Cir. 2020)

Omega Chemical Potentially Responsible Parties Organized Group (OPOG)[8] brought an action against APC Investment Company and other entities (collectively, APC defendants)[9] in 2017 seeking to recover contribution costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[10] The District Court for the Central District of California granted summary judgment for the APC defendants, finding that a 2007 settlement between OPOG and other parties triggered the three-year statutory limitations period, thus barring OPOG's contribution claims filed against APC defendants in 2017.[11] The district court also noted that the 2007 settlement likely judicially estopped OPOG from seeking contribution claims from APC defendants. OPOG appealed the district court's decision. The Ninth Circuit reversed the district court's ruling, holding that OPOG timely appealed and was not judicially estopped from doing so, and remanded for further proceedings.

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[7] *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., Env't Prot. Comm'n of Hillsborough Cnty. v. Volkswagen Grp. of Am., 959 F.3d 1201, 1225 (9th Cir. 2020).

[8] For a full list of Potentially Responsible Parties (PRP), *see* Arconic, Inc. v. APC Investment Co., 969 F.3d 945, 945 (9th Cir. 2020); *see also id.* at 949 (explaining that OPOG is composed of a group of Omega Chemical Corporation's customers).

[9] For a full list of PRPs, *see Arconic, Inc.,* 969 F.3d at 945.

[10] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2018).

[11] Arconic, Inc. v. APC Inv. Co., No. CV 14-6456-GW(Ex), 2019 WL 398001 (C.D. Cal. 2019), *overruled by Arconic Inc.,* 969 F.3d at 945 (2020).

Omega Chemical Corporation operated a recycled solvents and refrigerants facility (Facility) in Whittier, California until 1991. In 1999, the United States Environmental Protection Agency (EPA) designated the Facility as one of the most contaminated in the nation and placed it on the National Priorities List (NPL). Following the Facility's NPL designation, EPA entered negotiations with OPOG. The OPOG and EPA negotiations culminated in EPA's development of a long-term remedial action plan for the Facility, which was divided into phases, or "operable units." At issue here are operable units one (OU-1) and two (OU-2). Following EPA's designation of the remedial action plan for OU-1 in 2001, which required OPOG to remediate the soil and groundwater adjacent to the Facility, the United States entered a consent decree with OPOG. The 2001 OU-1 consent decree triggered CERCLA's three-year statutory limitations period for OPOG's ability to seek contribution costs associated with OU-1.[12] In 2004, OPOG timely filed contribution claims against other potentially responsible entities who sent relatively small amounts of toxic waste to the Facility (*de minimis* parties). OPOG and *de minimis* parties reached a settlement in 2007. Turning to the second operable unit, EPA's selected remedial action plan for OU-2 concerned clean-up of a toxic plume that extended four miles downgradient of OU-1. The district court approved a consent decree issued by the United States in 2017 finalizing an agreement between OPOG and EPA for the OU-2 remedial action plan. Prior to the issuance of the 2017 OU-2 consent decree, OPOG began remediation work on OU-2. In 2014, OPOG sued the APC defendants for cost-recovery, arguing they had contributed to the OU-2 toxic plume but had not assisted with the clean-up. Upon the finalization of OPOG's OU-2 liabilities in 2017, OPOG amended its complaint against APC defendants, dropping the cost-recovery action and asserting a contribution claim.

The Ninth Circuit reviewed the interpretation of CERCLA and the grant of summary judgment *de novo;* the CERCLA settlements *de novo*, with the district court's factual findings receiving deference unless clearly erroneous; and the district court's application of judicial estoppel for abuse of discretion.

The Ninth Circuit first considered whether the 2007 OU-1 settlement triggered the CERCLA three-year statutory limitations period for OU-2 contributions claims by OPOG. The APC defendants argued that the 2007 OU-1 settlement generally related to the contribution costs OPOG sought from APC defendants in 2017, and thus triggered the statute of limitations period in 2007, rendering OPOG's present claims untimely. The Ninth Circuit did not find APC defendants' argument compelling. The Ninth Circuit reasoned that the APC defendants' overly broad interpretation of CERCLA's statute of limitations language would prohibit entities such as OPOG from seeking contribution three years

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12 42 U.S.C. § 9613(g)(3)(B) ("[E]ntry of a judicially approved settlement with respect to such costs" triggers CERCLA's three-year limitations period for contribution claims).

after the settlement of any suit vaguely relating to or mentioning future costs of a remediation project. The Ninth Circuit found APC defendants' interpretation unreasonable and defeating the purpose of CERCLA's contribution provision. While the OU-1 settlement briefly alluded to the OU-2 toxic plume, it established no OU-2 liabilities or duties for OPOG. Specifically, the OU-1 settlement did not establish any liabilities relating to APC defendants' OU-2 contributory actions. The district court's finalization of the OU-2 consent decree in 2017 was therefore the first judicially approved settlement capable of triggering the CERCLA limitations period for APC defendants' OU-2 contribution costs. The Ninth Circuit accordingly held that OPOG's amended complaint in 2017, seeking contribution from APC defendants for OU-2, was timely filed.

The Ninth Circuit next considered whether OPOG was judicially estopped from seeking contributions for its OU-2 costs. APC defendants argue that because OPOG pursued OU-2 contribution costs from *de minimis* parties in the OU-1 settlement, OPOG could not contend that such claims newly arose in 2017. The Ninth Circuit found APC defendants' point unrelated to their contested 2017 contribution claim. Even if OPOG had sought costs for OU-2 from *de minimis* parties in the OU-1 settlement, that would not have triggered the statute of limitations regarding the *APC defendants* because the OU-1 settlement did not establish the APC defendants' share of liability for the OU-2 toxic plume. More simply, the *de minimis* claims resolved in the OU-1 settlement were completely unrelated to activities where the APC defendants were a contributorily responsible party.

In sum, the Ninth Circuit held that the district court erred in granting summary judgment to APC defendants because the statutory period for contribution claims under CERCLA was not triggered until the OU-2 consent decree was finalized in 2017. Additionally, because the 2007 OU-1 settlement addressed issues distinct from those in OU-2, the 2007 OU-1 settlement did not judicially estop OPOG from contribution claims against APC defendants. Accordingly, the Ninth Circuit reversed the grant of summary judgment and remanded the case for further proceedings.

2. Asarco LLC v. Atlantic Richfield Co., 975 F.3d 859 (9th Cir. 2020)

Atlantic Richfield Co. (ARCO)[13] appealed a judgment for a contribution action under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[14] by the United States District Court for the District of Montana after the district judge found ARCO responsible for twenty-five percent of Asarco LLC's (Asarco) $111.4 million incurred cleanup costs for

[13] The defendants of the contribution action included British Petroleum, PLC and American Chemet Corporation. No other party appealed the judgment.

[14] 42 U.S.C. §§ 9601–75.

a Superfund Site in East Helena, Montana (Site).[15] On appeal, ARCO argued that the district court erred in (1) assessing $111.4 million as incurred costs because the amount was improperly based on the settlement agreement instead of cleanup costs incurred and necessary to protect human health and the environment, and (2) assigning twenty-five percent liability in relation to the actual environmental impact and evidence presented. The Ninth Circuit vacated and remanded the district court's $111.4 million cost assessment and affirmed the assignment of twenty-five percent liability to ARCO.

From 1888 to 2001, Asarco and its predecessors released high concentrations of arsenic at the Site. Anaconda, ARCO's predecessor, leased a portion of Site from 1927 to 1972 and released arsenic in lower concentrations in its products and byproducts. ARCO assumed its predecessor Anaconda's CERCLA liability. After Anaconda's lease ended, Asarco continued to operate Anaconda's facility until 1982 and continued to release arsenic. In 1984, the United States Environmental Protection Agency (EPA) listed the Site to the CERCLA National Priorities List and began remediation with Asarco. Prior to the resolution of Asarco's outstanding CERCLA cleanup liability, Asarco filed for Chapter 11 bankruptcy. In response, the United States, the State of Montana, and the State of Montana's Department of Environmental Quality filed proofs of claims for Asarco's projected liability under CERCLA. The parties resolved Asarco's outstanding environmental liabilities at the Site through settlement agreements and consent decrees in February and June of 2009, which estimated groundwater cleanup costs based on a pump-and-treat remediation system.

The June 2009 consent decree established a custodial trust (Trust), appointed a custodial trustee (Trustee), and designated and empowered EPA as the lead agency to authorize all work and funds for the cleanup. Pursuant to the consent decree, Asarco paid $111.4 million for groundwater cleanup, administration of the Trust, restoration and oversight costs, and compensatory damages. Of that amount, $99.294 million was specifically allocated for groundwater cleanup, which was the estimated cost of a pump-and-treat remediation system. Per the settlement agreement, unused funds would be redirected to remediate other sites Asarco was liable for cleaning up. After the Trustee fully implemented three interim cleanup measures, approximately $50 million remained in the Trust for further remediation. Based on the amount already incurred, the Trustee's estimation of $3.7 million for a future cleanup project, and ARCO's expert's estimation of $9.2 million for operations and maintenance costs, the total cleanup cost for the Site would be approximately $61.4 million. The Trustee considered but had no plans to implement the pump-and-treat remediation system.

In 2012, Asarco brought a contribution action under CERCLA against ARCO to recover its cleanup costs. The district court found the

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[15] Asarco LLC v. Atlantic Richfield Co., 353 F. Supp. 3d 916 (D. Mont. 2018).

action barred by the statute of limitations and granted summary judgment for ARCO. Upon Asarco's appeal, the Ninth Circuit found the claim timely, vacated the district court's order, and remanded for further proceedings. After an expert-testimony heavy, eight-day bench trial, the district court determined that Asarco incurred $111.4 million in necessary cleanup costs, allocated twenty-five percent liability to ARCO, and awarded Asarco $1 million for ARCO's misrepresentations and failure to cooperate. Although ARCO moved to alter or amend the judgment, the district court denied the motion and ARCO appealed the final order.

The Ninth Circuit applied several standards of review: for the incurred cleanup costs, the Ninth Circuit reviewed the district court's findings of fact for clear error and its conclusions of law de novo; for the allocation of liability, the Ninth Circuit reviewed the district court's consideration of equitable factors for abuse of discretion and the allocation in accordance with the selected factors for clear error.

First, ARCO argued that the district court erred in finding that Asarco incurred $111.4 million in cleanup costs because the Trustee had yet to spend or designate the funds for specific work and the costs were not necessary to protect human health and the environment. Instead, ARCO asserted that the incurred cost was $61.4 million, because the Trustee opted for cheaper remedial actions. In addition, ARCO argued that unused funds would be directed to sites ARCO was not liable for, per Asarco's settlement agreement. In response, Asarco argued that the entire settlement sum, irrevocable and paid in full, was incurred according to the meaning and language of the statute. Asarco also argued that a firm monetary commitment exists here, and a holding to the contrary would undermine CERCLA's objectives to encourage settlement and cleanup. Finally, Asarco asserted that the expert testimony sufficiently indicated that the Site required further remediation, beyond the Trustee's proposed cleanup and therefore would incur additional costs.

The Ninth Circuit agreed with ARCO, finding that the district court erred by including the full settlement amount of $111.4 million in the contribution claim, given that approximately $50 million had not and might not be spent for Site cleanup. Ninth Circuit precedent holds that the full settlement amount is not automatically subject to contribution. Here, Asarco failed to meet the required showing that the entire settlement amount was both necessary and actually incurred. While the court acknowledged that "incurred" could be defined broadly, it found that Asarco attempted to stretch the definition by including future remedial measures and expenses that the Trustee did not commit to because such amounts are merely speculative. The Ninth Circuit also found that the district court erred in relying on Asarco's expert testimony, holding that testimony which only indicates the necessity of additional measures and expenses is insufficient to concretely show that the entire settlement amount would, in fact, be spent on cleanup.

The Ninth Circuit next analyzed whether the district court erred in allocating twenty-five percent liability of the response costs to ARCO. ARCO argued that the district court failed to account for the volume and toxicity of each party's waste, failed to explain its consideration factors, and issued an unreasonable allocation in light of the evidence. The Ninth Circuit held that the district court did not abuse its discretion in allocating liability through equitable considerations rather than mathematical certainty, use of the Gore factors,[16] and examination of the parties' historical responsibility. Instead, the district court maintained the power to determine appropriate equitable factors to allocate liability.[17] The court also found that the district court's assessment and extensive findings adequately supported its allocation decision. While the Ninth Circuit stated that the district court could have been clearer in its Gore factor analysis, the court found that (1) the detailed record of each party's operations, releases, prevention efforts, and cooperation with officials, and (2) the expert testimony were sufficient to support the district court's allocation. Specifically, the Ninth Circuit found that the district court assessed the expert testimony and underlying inequities with sufficient rigor and care by considering the proposed allocations and selecting the conservative allocation estimation of twenty-five percent.

In sum, the Ninth Circuit held that the district court erred in its assessment of $111.4 million in incurred costs to be included in the contribution action and did not err in finding ARCO twenty-five percent liable for Site remediation costs. The Ninth Circuit vacated the $111.4 million contribution finding and remanded for further consideration.

3. United States v. Sterling Centrecorp Inc., 977 F.3d 750 (9th Cir. 2020)

The United States and the California Department of Toxic Substances Control ("DTSC," collectively, "Plaintiffs") sued Sterling Centrecorp, Inc. (Sterling) in the United States District Court for the Eastern District of California.[18] Plaintiffs brought suit against Sterling under the Comprehensive Environmental Response, Compensation, and

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16 "The Gore factors are: (i) the ability of the parties to demonstrate that their contribution to a discharge, release, or
disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with federal, state, or local officials to prevent any harm to public health or the environment." Asarco v. ARCO, 975 F.3d 859, 868 n.7 (9th Cir. 2020).

17 42 U.S.C. § 9613(f)(1) (2018).

18 United States v. Sterling Centrecorp Inc., 208 F. Supp. 3d 1126 (E.D. Cal. Sept. 22, 2016; 209 F. Supp. 3d 1151 (E.D. Cal. Sept. 20, 2016); 960 F. Supp. 2d 1025 (E.D. Cal. June 24, 2013); 208 F. Supp. 3d 1126 (E.D. Cal. Sept. 22, 2016; 2013 WL 3166585 (E.D. Cal. June 20, 2013).

Liability Act (CERCLA)[19] to recover response costs incurred from cleaning up a mining site. Sterling filed a contribution counterclaim against United States, alleging that United States was itself liable for response costs as a prior operator of the mine during World War II. After bifurcating the case between liability and damages, the district court found Sterling liable for response costs. Sterling appealed the final judgment and the Ninth Circuit affirmed each of the district court's rulings.

Between 1934 and 1943, the Lava Cap Mine (Mine) operated as one of the largest gold and silver mines in California. The Mine produced waste rock and mill tailings, the latter of which contained high concentrations of arsenic. Two log dams held the tailings in place. The United States entered World War II in 1941 and soon realized an acute need for metals and mining equipment. Thus, President Roosevelt created the War Production Board, which issued Limitation Order L–208 in 1942, in part classifying gold mines as nonessential to the war effort and requiring the gold mining industry to close down operations. By 1943, the Mine was explicitly subject to L–208. The Mine closed and never resumed mining operations. In 1952, Sterling acquired the Mine through its wholly owned subsidiary. Sterling left the Mine inactive for decades. In 1979, one of the tailings dams partially collapsed, releasing arsenic-laden waste into the local water system. Sterling and its subsidiary failed to respond to the collapse appropriately and Sterling eventually sold the Mine to a purchaser in 1989. In 1997, flooding blew out the remaining dam and washed an estimated 10,000 cubic yards of tailings into the local water system. United States Environmental Protection Agency (EPA) and DTSC then conducted an extensive response action under CERCLA. EPA officially designated the contaminated area as a Superfund Site (Site) in 1999. EPA constructed a pipeline to connect nearby residences to an uncontaminated water supply as an interim remedy costing nearly $4 million. To date, total response costs at the Site amount to more than $32 million.

United States and DTSC sued Sterling and the Mine purchaser under CERCLA seeking contribution for response costs incurred at the Site. In addition to asserting multiple defenses, Sterling filed a contribution counterclaim against United States, alleging Order L–208 made United States liable as a prior operator. The district court bifurcated the litigation into a jurisdiction and liability phase, followed by a damages phase. After a bench trial for phase one, the court maintained personal jurisdiction over Sterling and ruled that Sterling was liable under CERCLA for response costs. In phase two, proceeding on cross-motions for summary judgment, the district court decided Order L–208 did not subject United States to CERCLA liability as an "operator" of the Mine. The court found that beyond closing the Mine, United States had no involvement with the Mine's operations or the disposal of tailings.

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[19] 42 U.S.C. § 9601.

The court also held, again on separate cross-motions, that Plaintiffs were entitled to recover all response costs. The district court accordingly issued a judgment of $32 million against Sterling and the Mine purchaser. Sterling appealed the district court's rulings on (1) Sterling's own liability, (2) the liability of the United States, and (3) response costs related to the EPA's interim remedy. The Ninth Circuit reviewed the district court's legal conclusions de novo and factual findings for clear error.

The Ninth Circuit first considered Sterling's disputed liability. The court noted that Sterling contested only one element of CERCLA liability on appeal: whether Sterling was an "operator" of the Site when hazardous substances were disposed there. The court observed that this question turns on the relationship between the potentially responsible party and the waste-producing facility at issue. The Ninth Circuit found that the record, replete with factual determinations about Sterling's involvement at the Site, supports the district court's finding that Sterling was an operator of the Site.

Second, the Ninth Circuit addressed Sterling's assertion that United States acted as an "operator" of the Site by issuing Order L–208 and is therefore liable for response costs. The court rejected this argument because under CERCLA case law, operator liability stems from actual or active participation in decisions related to the facility *and* pollution at issue. Thus, the Ninth Circuit concluded that operator liability requires something more than general control over an industry or facility, and instead demands some level of direction, management, or control over the facility's polluting activities. The court referenced the record's indication that while United States instructed the Mine to shut down via Order L–208, this was the extent of the United States' involvement. The Ninth Circuit thus held that by issuing Order L–208, the United States did not manage, direct, or conduct operations specifically related to pollution at the Site, and therefore was not a prior operator subject to CERCLA liability.

Finally, the Ninth Circuit turned to Sterling's challenge to the district court's ruling allowing EPA to recover costs for its interim remedy. Sterling argued EPA's decision to construct a drinking water pipeline was arbitrary and capricious because (1) the pipeline failed to achieve its primary objective, (2) a cheaper alternative existed, namely, point-of-use treatment which would have saved nearly $3 million in response costs, and (3) the EPA improperly weighed certain criteria under 40 C.F.R. § 300.430. The court disagreed, first noting that EPA's interim remedy did achieve its objective—to provide clean drinking water to the impacted residents in line with the National Contingency Plan (NCP), which guided the CERCLA cleanup. The Ninth Circuit recognized that under CERCLA, Sterling had the burden of proof to demonstrate that EPA's solutions were inconsistent with the NCP. The court ultimately found that EPA carefully considered the required criteria, sufficiently justified its choice to construct the pipeline, and met its obligation to

consider the cost-effectiveness of each alternative and select a cost-effective remedy. The court therefore concluded that the EPA did not improperly weigh the statutory criteria under 40 C.F.R. § 300.430. Also finding a rational connection between the record and EPA's selection of the interim remedy, the Ninth Circuit rejected Sterling's final challenge.

In sum, the Ninth Circuit affirmed the district court's orders finding (1) Sterling liable for response costs, (2) United States not liable for response costs, and (3) EPA's interim remedy not arbitrary and capricious or inconsistent with the NCP. The Ninth Circuit thus upheld the judgment against Sterling and the Mine purchaser.

Judge Smith filed a separate opinion, concurring with the majority's conclusions that Sterling is liable for response costs and that EPA's interim remedy selection was not arbitrary and capricious, but dissenting in regard to United States' liability as an operator of the Site. Judge Smith reasoned that by issuing Order L–208, which required the Mine to shut down and cease removal of any waste from the mine, United States was necessarily involved in the direction of polluting activities. Judge Smith disagreed with the majority's distinction between instructing the Mine to shut down and exercising some level of direction management, or control over the facility's polluting activities.

C. Pesticides and Herbicides

1. National Family Farm Coalition v. U.S. Environmental Protection Agency, 960 F.3d 1120 (9th Cir. 2020)

National Family Farm Coalition, Center for Food Safety, Center for Biological Diversity, and Pesticide Action Network North America (collectively, "National Family Farm") filed suit in the Ninth Circuit against the United States Environmental Protection Agency (EPA). National Family Farm alleged EPA's approval of conditional use registrations for three dicamba-based herbicides (2018 Order) violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[20] and the Endangered Species Act (ESA).[21] Although EPA's 2018 Order affected three companies,[22] only Bayer CropScience (Monsanto) intervened. Monsanto argued the Ninth Circuit lacked jurisdiction to hear the claims. Both Monsanto and EPA disputed National Family Farm's requested scope of review. The Ninth Circuit held it had jurisdiction to hear the case, National Family Farm's challenge appropriately covered the entirety of EPA's 2018 Order, and EPA violated FIFRA by substantially understating acknowledged risks and by completely failing to acknowledge other risks. The court did not address National Family

[20] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2018).

[21] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

[22] Corveta (formerly DuPont) and BASF were the additional parties affected by EPA's registration approval.

Farm's ESA claim. FIFRA requires the Ninth Circuit to uphold EPA's registration approvals so long as EPA's decisions are "supported by substantial evidence when considered on the record as a whole."[23]

In the 1990's, Monsanto's "Roundup Ready" crop system—which paired a glyphosate-based herbicide with genetically modified, glyphosate-tolerant seed varietals—quickly achieved widespread use in the agricultural industry. One consequence of the Roundup Ready system was the creation of "superweeds," or weeds which developed an impressive tolerance to the glyphosate-based herbicide. In search of a solution to the superweeds, Monsanto and other agrochemical companies turned to dicamba. Dicamba, which EPA first approved for limited use in 1967, is a highly toxic herbicide that effectively kills many types of plants, bushes, trees, and, notably, superweeds. However, dicamba has a problematic feature—its volatility. During dicamba's application to crops, wind speeds, temperature inversions, precipitation events, and slight human or technical error all can easily create conditions where dicamba can drift up to one mile away from the application site and cause significant, unintended damage. To address dicamba's volatility issue, Monsanto, Corveta, and BASF produced three lower-volatility dicamba-based herbicides[24] designed for application to dicamba-tolerant (DT) soybean and cotton plants, similar to the Roundup Ready system.

In 2016, Monsanto, Corveta, and BASF submitted applications to EPA to register the lower-volatility dicamba-based herbicides. After "weighing all the risks,"[25] EPA conditioned approval of the registrations on a list of mandatory restrictions designed to minimize drift. In a separate action, National Family Farm challenged the 2016 Order, but EPA issued the 2018 Order before the court published a decision on the 2016 Order, rendering National Family Farm's 2016 claim moot.

National Family Farm filed the present challenge against the 2018 Order on January 11, 2019, in the Ninth Circuit. FIFRA grants federal courts of appeals original jurisdiction to review challenges of orders issued by EPA's Administrator if an adversely affected party files a challenge within sixty days of an order entering into force.[26]

First, Monsanto argued the Ninth Circuit lacked jurisdiction to hear the case because National Family Farm filed their claims outside the allotted sixty-day response period, given the 2018 Order entered into force on October 31, 2018 and National Family Farm filed this suit on January 11th. The Ninth Circuit disagreed. Although an adversely affected party has sixty days to file a petition from the date an order enters into force, if the Administrator does not state the date an order will enter into force, the order becomes effective two weeks after the

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[23] 7 U.S.C. § 136n(b).

[24] Monsanto created "XtendiMax with VaporGrip Technology"; Corveta created "DuPont FeXapan Herbicide;" and BASF created "Engenia Herbicide."

[25] Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency, 960 F.3d 1120, 1126 (9th Cir. 2020).

[26] 7 U.S.C. § 136n(b).

Administrator signs the order.[27] Here, because the Administrator did not specify a date on which the order entered into force, the regulatory default of two weeks after signature applied. National Family Farm filed this action within sixty days and two weeks of the 2018 Order's signing. Accordingly, the Ninth Circuit held that National Family Farm timely filed their challenge, and the court had jurisdiction.

Next, EPA and Monsanto argued National Family Farm's requested scope of review was too broad. National Family Farm's claim encompassed the entirety of the 2018 Order, therefore including the herbicides of all three agrochemical companies. Only Monsanto, but not Corveta or BASF, intervened. The Ninth Circuit held review of the entire order was proper because EPA treated the three companies uniformly during the registration and comment and review process, and National Family Farm did not distinguish between the three companies in their petition.

Turning to the principal issue, National Family Farm argued EPA's 2018 Order violated FIFRA because EPA did not adequately consider the risks associated with the dicamba-based herbicides. The Ninth Circuit agreed. Under FIFRA, approval of a conditional amendment of an existing registration requires EPA to demonstrate "(i) the applicant has submitted 'satisfactory data,' *and* (ii) the amendment will not significantly increase the risk of any unreasonable adverse effect on the environment."[28] After coming to a cursory conclusion that EPA failed to meet the first element, the court focused its analysis on the second element. In evaluating whether EPA demonstrated approval of the registrations would not significantly increase risk of harm, the court considered risks EPA acknowledged but understated and risks EPA completely failed to acknowledge.

EPA acknowledged but understated three risks in the 2018 Order. First, EPA unreasonably relied on *estimates* prepared by Monsanto regarding how many acres of DT seeds farmers would plant in 2018, as opposed to *actual* data that was available to the agency at the time. Second, EPA was "agnostic" about whether reports of dicamba-based harm represented under- or over-reporting when the evidence weighed heavily in favor of under-reporting. Third, despite internally recognizing the widespread harm dicamba had caused,[29] EPA did not quantify or estimate dicamba-related harm and instead stated the herbicides only created *a potential* to harm non-DT crops.

EPA completely failed to acknowledge three additional risks dicamba poses. First, EPA failed to acknowledge the difficulty users face when trying to comply with the 2018 Order's application restrictions, evidence of which was widely available. One Texas farmer, expressing a commonly

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[27] 40 C.F.R. § 23.6 (2020).

[28] 7 U.S.C. § 136a(c)(7)(B) (emphasis added).

[29] *Nat'l Fam. Farm Coal.*, 960 F.3d at 1127, 1138 (explaining that Rueben Baris, Acting Chief of EPA's herbicide branch of the Office of Pesticide Programs, knew "in 2017 'more than 3.6 million' acres of non-DT soybeans were damaged by dicamba herbicides.").

shared sentiment, said achieving perfect conditions for application of dicamba "is basically a fairy tale."[30] Second, FIFRA explicitly requires EPA to consider the economic, social, and environmental costs and benefits related to an herbicide's use, but EPA only addressed environmental costs. Third, because EPA did not properly review the risks and costs associated with the herbicides, substantial evidence did not support EPA's decision to approve the 2018 registrations.

In sum, the Ninth Circuit held that it had jurisdiction, National Family Farm's requested scope of review appropriately covered the entire order, and EPA's 2018 Order violated FIFRA because EPA understated the acknowledged risks and completely failed to acknowledge other risks. Accordingly, the Ninth Circuit vacated the registrations, prohibiting use of the herbicides under the 2018 Order.

2. National Family Farm Coalition v. U.S. Environmental Protection Agency, 966 F.3d 893 (9th Cir. 2020)

The National Family Farm Coalition and various environmental organizations[31] (collectively, "National Family Farm") filed petitions for review against the U.S. Environmental Protection Agency (EPA), EPA's administrator Andrew Wheeler, and Dow Agrosciences LLC (collectively, "EPA"), challenging three EPA decisions to register a pesticide product—Enlist Duo—under the Federal Insecticide Fungicide and Rodenticide Act (FIRFA).[32] National Family Farm contend that EPA's decision violated both FIFRA and the Endangered Species Act (ESA).[33] The Ninth Circuit reviewed National Family Farm's FIFRA claim for "substantial evidence when considered on the record as a whole,"[34] which is a relatively deferential standard, and reviewed National Family Farm's ESA claim under an arbitrary and capricious standard. The Ninth Circuit held that National Family Farm established associational standing under both FIFRA and the ESA, and that EPA's proceedings fully complied with the ESA and substantially complied with FIFRA—with the exception of considering Enlist Duo's effect on monarch butterflies. The court remanded to the agency without vacatur.

Pesticide-resistant weeds and decreasing crop yields across America led the EPA to register Dow Agrosciences LLC's "Enlist Duo" as a regulated pesticide under FIRFA. Enlist Duo combines two already-registered pesticides: 2,4-dichlorophenoxyacetic acid choline salt ("2,4-D") and glyphosate dimetyhlammonium salt ("glyphosate"). After conducting a full risk assessment for 2,4-D under FIFRA and assessments under the ESA, EPA concluded that Enlist Duo's registration would "not generally

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[30] *Id.* at 1141.

[31] Petitioners were Natural Resources Defense Council, Beyond Pesticides, Center for Biological Diversity, Center for Food Safety, and Pesticide Action Network North America.

[32] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2018).

[33] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

[34] Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency, 966 F.3d 893, 914 (9th Cir. 2020).

cause unreasonable adverse effects on the environment"[35] under FIFRA and would comply with the ESA, subject to certain use restrictions. EPA issued a final order registering Enlist Duo under the FIFRA in 2014 and amended the registration in 2015 and 2017 to include more states. National Family Farm challenged all three registrations, which the Ninth Circuit consolidated into one proceeding.

Under FIFRA, EPA must register all pesticides and pesticide products, establishing the terms and conditions of its sale and use. EPA may "unconditionally register" the pesticide only if doing so will not cause "unreasonable adverse effects" on the environment.[36] A more lenient method is "conditional registration," which allows EPA to amend existing pesticides with less data than unconditional registration requires. EPA may conditionally register a pesticide only if the pesticide would not "significantly increase the risk of any unreasonable adverse effects" on the environment.[37] EPA must also comply with the ESA's consultation requirement, under which agencies must assess the impacts of a proposed action on listed species and their habitats. However, if a listed species is outside the action area, it will not be affected and EPA need not consult with expert agencies. Similarly, if EPA finds "no effect" on listed species or critical habitat within the action area, it need not consult with expert agencies.

First, the Ninth Circuit addressed EPA's argument that National Family Farm lacked associational standing to seek review of EPA's decision to register Enlist Duo. National Family Farm asserted that their members suffered procedural injuries due to EPA's misapplication of FIFRA's procedural requirements and EPA's lack of evidence to support its decisions. The Ninth Circuit agreed with National Family Farm, holding that National Family Farm established associational standing under both FIFRA and ESA because at least one organization from each petition for review demonstrated that (1) its members would otherwise have standing to sue in their own right under both FIRFA and ESA, (2) the interests it seeks to protect are germane to the organization's purposes, and (3) neither the claim asserted nor the relief requested required the participation of individual members in the lawsuit.

National Family Farm then argued that EPA incorrectly applied FIFRA's "conditional registration" standard (CRS) to Enlist Duo in 2014, rather than the stricter "unconditional registration" standard (URS). The Ninth Circuit disagreed, noting that EPA's sole citation to the CRS in the 2014 Final Registration Decision was a typographical error and that EPA applied URS after explicitly relying on the URS in at least four registration documents. National Family Farm similarly argued that EPA incorrectly applied the URS to Enlist Duo in 2017, after citing to the CRS in a registration document. The Ninth Circuit again disagreed,

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[35] *Id*. at 905.
[36] 40 C.F.R. § 152.112(e) (2020).
[37] *Id.* § 152.113.

characterizing EPA's citation error as "harmless" to National Family Farm, given that EPA explicitly applied URS in 2017, and URS is the more petitioner-friendly, burdensome standard.

Next, National Family Farm contended that EPA lacked substantial evidence for its 2014, 2015 and 2017 registration decisions under FIFRA because EPA failed to: (1) properly assess harm to monarch butterflies from increased use of Enlist Duo in target fields; (2) consider that Enlist Duo would increase the use of glyphosate over time; (3) correctly consider the volatility of 2,4-D;[38] and (4) consider the synergistic effects of mixing Enlist Duo with a different chemical called glufosinate.[39]

First, the Ninth Circuit agreed that while EPA properly assessed the risk to butterflies outside of target fields, EPA's decision lacked substantial evidence because the agency failed to consider how the destruction of milkweed on target fields would affect butterflies.[40] Second, the court held that EPA reasonably concluded that Enlist Duo's registration would not increase the overall use of glyphosate, but rather, would only impact the *type* of glyphosate product used. Third, the Ninth Circuit held that after considering eight different studies and performing two types of modeling, EPA reasonably concluded that 2,4-D exhibited low volatility and would not cause "unreasonable adverse effects" on the environment. Fourth, the Ninth Circuit held that National Family Farm's concerns about mixing Enlist Duo with glufosinate were speculative, given that such mixing has yet to occur in the five-year period since Enlist Duo was first registered, and that EPA regulations currently prohibit mixing Enlist Duo with glufosinate.

National Family Farm then challenged EPA's registration of Enlist Duo under the ESA on three grounds: (1) EPA's "no effect" finding for plants and animals was legally erroneous; (2) EPA's rationale for limiting the action area to the treated fields was not sound; and (3) EPA violated its duty to ensure no "adverse modification of critical habitat."[41] The Ninth Circuit rejected all three arguments. First, the court held that EPA's "no effect" finding was not arbitrary and capricious based on EPA's sound reliance on a risk quotient/level of concern methodology to discern effects on biodiversity, the agency's species-specific assessment, and agency's adoption of mitigation measures. Next, the court accorded deference to EPA in the way it chose to define the action area because EPA put forth plausible and science-based reasoning to justify its decision. Finally, the court held that EPA adequately considered whether Enlist Duo would affect eight species with critical habitat designations on or nearby corn, cotton, and soybean fields, as well as those species'

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[38] Volatilization is the evaporation of chemicals into a gas, which then drift away from target fields and impact nearby plants and animals.

[39] Synergism is two or more chemicals working together to produce a greater combined effect than they would separately.

[40] Milkweed is the sole food source for caterpillars and monarch butterflies need milkweed to lay their eggs.

[41] Nat'l Fam. Farm Coal., 966 F.3d at 923–28.

primary constituent elements ("PCEs"). The Court further held that EPA need not consider species outside of the action area.

In sum, the Ninth Circuit rejected all but one of National Family Farm's arguments under FIFRA and the ESA: that EPA failed to consider how the destruction of milkweed on target fields would affect monarch butterflies. Nonetheless, the court remanded the case without vacatur after characterizing that error as minor, in light of the agency's full compliance with the ESA and the agency's substantial compliance with FIFRA.

Judge Nelson concurred, addressing how the interplay of Article Three standing and FIFRA's venue provision could make a difference in future cases. Judge Watford dissented, arguing that EPA also violated the ESA by failing to use the "best scientific data available" to assess whether Enlist Duo will adversely affect threatened and endangered species.

3. Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 956 F.3d 1134 (9th Cir. 2020)

Natural Resources Defense Council, Inc. (NRDC) petitioned for writ of mandamus of the United States Environmental Protection Agency and Administrator Andrew Wheeler's (collectively, EPA) response to NRDC's petition requesting to cancel the registration[42] of the pesticide tetrachlorvinphos (TCVP) used in household pet products (Products).[43] NRDC asserted that because the Administrative Procedure Act (APA)[44] requires EPA to resolve NRDC's petition "within a reasonable time," EPA violated the APA by delaying response to NRDC's petition for over ten years despite EPA's assurances of timely action and knowledge of TCVP's serious risks to children. The Ninth Circuit concluded it had original jurisdiction because it would have jurisdiction to review EPA's final decision. Accordingly, the Ninth Circuit granted the petition for a writ of mandamus and ordered EPA to respond to NRDC's petition within ninety days of the decision.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[45] directs EPA to protect human health and the environment. FIFRA tasks EPA with determining which pesticides may be registered for distribution and sale in the United States, periodically reviewing and sometimes canceling registrations; however, interested parties may also petition EPA to cancel a registered pesticide.[46] EPA may not approve of pesticide

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[42] Pesticides must be registered to be distributed and sold in the United States. 7 U.S.C. § 136a(a) (2018).

[43] Letter from U.S. Env't Prot. Agency to Miriam Rotkin, et. al., Nat. Res. Def. Council (Nov. 6, 2014), https://perma.cc/2VRW-4BTC.

[44] Administrative Procedure Act §6, 5 U.S.C. § 555(b) (2018).

[45] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 (2018).

[46] 40 C.F.R. § 154.10 (2019).

registration that would cause "unreasonable adverse effects" to the environment or human health.[47]

TCVP is a subset of organophosphate pesticides, developed from nerve agents in World War II, which endangers the neurodevelopment of children. Following a 2008 peer-reviewed study finding that TCVP could be absorbed through contact with Products containing the pesticide, NRDC filed an administrative petition to cancel the registration of TCVP for Products in April 2009.

In February 2014, NRDC sought a writ of mandamus based on EPA's failure to respond to the petition for five years in the D.C. Circuit. The case was dismissed after EPA issued a final response denying NRDC's petition in accordance with a newly completed risk assessment. NRDC then sued EPA for unlawful denial of the petition in the Ninth Circuit. EPA sought voluntary remand on the grounds that EPA's pending risk assessment would change its response to NRDC. The Ninth Circuit granted EPA's motion and remanded the case after EPA assured the court that it would comply within a reasonable time frame and issue a revised response within ninety days of the finalized risk assessment.

EPA issued the finalized risk assessment in December 2016, which found that children could indeed be exposed to TCVP via Products and could suffer from neurodevelopmental delays. But EPA did not respond to NRDC's petition within ninety days. Instead, in March 2017, EPA sent NRDC a letter stating that the agency would conduct further review of the Products and issue a proposed decision between July and September 2017. EPA continued to revise the schedule of registration review over the course of two years, stating that the risk assessment needed to be refined with the data of one remaining registrant. After two years without response or action by EPA, NRDC filed the instant petition for a writ of mandamus in May 2019. Five days after NRDC's filing, for the first time in two years EPA took action to compel the remaining registrant for its data to complete the risk assessment. The Ninth Circuit acknowledged that the issuance of a writ of mandamus is an extraordinary remedy, justified only in exceptional circumstances, and reviewed EPA's actions for "egregious" delay.[48]

The Ninth Circuit found that EPA egregiously delayed its response to NRDC's petition based on precedent from the Ninth and D.C. Circuits, and because the six "*TRAC*"[49] factors weighed in favor of NRDC. Of the

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[47] 7 U.S.C. §§ 136(bb), 136a(a), 136a(c)(5)(C).

[48] Nat. Res. Def. Council v. U.S. Env't Prot. Agency, 956 F.3d 1134, 1138 (9th Cir. 2020).

[49] The factors are "(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably

TRAC factors, the most important is the first factor, the rule of reason, which courts use to determine a reasonable time for an agency's response. EPA argued that the rule of reason weighed in the agency's favor because it took action and made progress in advancing the risk assessment by compelling the remaining registrant for its data. The Ninth Circuit rejected EPA's argument, noting that EPA only compelled the remaining registrant after NRDC filed its petition and the risk assessment EPA sought to conduct with the remaining data would not affect EPA's conclusions because the mere presence of TCVP posed concerns. The Ninth Circuit analogized its decision here to *In re Pesticide Action Network North America*,[50] where the court held that the rule of reason weighed sharply in favor of petitioners for three reasons: (1) EPA's failure to issue a final response for eight years, (2) EPA's failure to meet its self-imposed "concrete timeline," and (3) EPA's desire to conduct excessive analysis to delay a response for an organophosphate pesticide.[51] Here, the rule of reason similarly tipped in NRDC's favor because EPA effectively postponed a response for more than ten years when it took action only after prompted by NRDC or a court.

Of the remaining five *TRAC* factors, the Ninth Circuit found two did not apply because Congress did not provide a specific timetable for EPA to follow, and there was no dispute that a finding of impropriety was necessary. The Ninth Circuit next analyzed the final three *TRAC* factors. EPA argued that while TCVP poses serious risk to human health, EPA regulates almost entirely for human health and any delays here are due to actions with higher priorities to meet statutory deadlines. The Ninth Circuit found EPA's arguments unconvincing for three reasons: (1) EPA already found and recognized the need to protect children from TCVP's neurodevelopmental effects; (2) EPA's claim of competing priorities was conflated with and based on old practices; and (3) EPA's contention that the level of uncertainty in the agency's risk assessment did not justify prioritizing statutory deadlines, favoring administrative efficiency, and delaying action where it knew of TCVP's risks to human health because the possibility of future contradictions is always inherent. Above all, the Ninth Circuit found that the clear threat to human welfare superseded EPA's competing priorities.

In sum, the Ninth Circuit held that EPA egregiously delayed response to NRDC's petition to cancel the registration of TCVP used in Products because EPA was effectively delaying a response for more than ten years without justification given the strong human health interests. The Ninth Circuit thus granted NRDC's petition for writ of mandamus and ordered EPA to issue a final response within ninety days of the finalization of the decision with specific procedures for EPA to follow.

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delayed." Telecomms. Res. & Action Ctr. (TRAC) v. Fed Commc'ns Comm'n (FCC), 750 F.2d 70, 80–81 (D.C. Cir. 1984).

[50] Nat. Res. Def. Council v. U.S. Env't Prot. Agency (*In re Pesticide Action Network North Am.*), 798 F.3d 809, 813–14 (9th Cir. 2015).

[51] *Id.* at 814.

D. Nuclear Waste Storage and Disposal

1. United States v. Washington, 971 F.3d 856 (9th Cir. 2020)

The United States brought suit against the State of Washington and several state actors[52] (collectively, "Washington") in the United States District Court for the Eastern District of Washington.[53] The United States claimed that state law HB 1723 violated the doctrine of intergovernmental immunity because it directly regulated[54] and discriminated against the federal government. HB 1723 creates a presumption specifically for workers at the Hanford site, a decommissioned federal nuclear production site, that certain diseases or conditions are "occupational diseases." Under the doctrine of intergovernmental immunity, state laws may not "regulate the United States directly or discriminate against the Federal Government or those with whom it deals" unless Congress clearly and unambiguously states otherwise.[55] The district court found that the federal waiver of intergovernmental immunity from state workers' compensation laws in 40 U.S.C. § 3172[56] applies to HB 1723. The court therefore held that HB 1723 does not violate the doctrine of intergovernmental immunity. The Ninth Circuit affirmed.

The Hanford site is a decommissioned federal nuclear production site in southeastern Washington. The United States Department of Energy (DOE) began overseeing cleanup of the site in 1989 and cleanup is expected to continue for at least sixty more years. Private contractors and subcontractors perform most of the cleanup work.

Under 40 U.S.C. § 3172, employees of private contractors working on federal land, such as those working at the Hanford site, can bring workers' compensation claims under state law "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State" where the federal land is located.[57] In 2018, Washington enacted HB 1723, which amended the Washington Industrial Insurance Act (WIIA), the State's workers' compensation scheme, to specifically cover Hanford site employees working either directly or indirectly for the United States. The amendment established a presumption for these

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[52] Defendants were the State of Washington, Washington Governor Jay Inslee, the Washington State Department of Labor and Industries (DLI), and DLI Director Joel Sacks.

[53] Order Granting Defendants' Motion for Summary Judgment, United States v. Washington, No. 4:18-cv-05189-SAB (E.D. Wash. June 13, 2019), ECF No. 43.

[54] In a footnote, the court noted that the United States did not explain how HB 1723 directly regulates the federal government, but the court assumed that the amendment was "sufficiently akin to direct regulation" to trigger the doctrine of intergovernmental immunity. Wash., 971 F.3d 856, 862 n.5 (9th Cir. 2020) (quoting Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 182 (1988)).

[55] *Id.* at 861 (quoting Boeing Co. v. Movassaghi, 768 F.3d 832, 839 (9th Cir. 2014)).

[56] Extension of State Workers' Compensation Laws to Buildings, Works, and Property of the Federal Government, 40 U.S.C. § 3172 (2002).

[57] 40 U.S.C. § 3172(a).

workers that certain diseases or conditions are "occupational diseases" under the WIIA. The United States then brought suit against Washington, claiming that HB 1723 regulated and discriminated against the federal government in violation of the intergovernmental immunity doctrine. The Ninth Circuit interpreted the statutes and reviewed the district court's decision granting Washington's cross motion for summary judgment de novo.

The Ninth Circuit first addressed the United States' claim that the wording of § 3172 limits the federal government's waiver of immunity to generally applicable state laws. Specifically, the United States pointed to the phrase "in the same way and to the same extent" to support its assertion that the waiver does not apply to workers' compensation laws, such as HB 1723, which attach only to federal employees and contractors. The court disagreed, finding that the plain text of § 3172 includes no such limit on its waiver of immunity.

Next, the court rejected the United States' argument that HB 1723 violates the doctrine of intergovernmental immunity because it discriminatorily applies only to the federal government. The court reasoned that the state is entitled to distinguish between federal and state or private entities when creating workers compensation laws because nothing in the text of § 3172 requires restricting the State's ability to do so.

Finally, the Ninth Circuit observed that the United States disregarded the phrase "as if the premises were under the exclusive jurisdiction of the State" in its interpretation of § 3172. The court held that when read in conjunction with "in the same way and to the same extent," the language of § 3172 clearly "removed federal jurisdiction as a barrier to a state's authority over workers' compensation laws for all who are located in the state."[58] The court therefore concluded that the statute authorizes Washington to assert exclusive authority over workers' compensation laws applicable to employees working on federal land within the state.

The court also briefly addressed two issues it declined to resolve. First, the court refrained from ruling on the United States' contention that its previous use of a federal statute to compensate Hanford workers addresses the same concerns Washington seeks to address with HB 1723 and therefore preempts the state law. The court noted that the United States had waived such an argument by failing to raise it clearly and distinctly in the district court. The court also declined to address Washington's argument defending the constitutionality of HB 1723 because the United States had not raised constitutional claims of the sort against which Washington attempted to defend.

In sum, the Ninth Circuit held that HB 1723 does not violate the doctrine of intergovernmental immunity because it falls within § 3172's waiver of federal immunity from state workers' compensation laws. The

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[58] Wash., 971 F.3d at 865.

court therefore affirmed the district court's grant of summary judgment for Washington.

2. Public Watchdogs v. Southern California Edison Co., 984 F.3d 744 (9th Cir. 2020)

Public Watchdogs[59] appealed a decision by the United States District Court for the Southern District of California which (1) found that the district court lacked subject matter jurisdiction over claims against the United States Nuclear Regulatory Commission (NRC) and claims against the regulated entities[60] (Private Defendants) under the Administrative Orders Review Act (Hobbs Act),[61] (2) granted Private Defendants' motion to dismiss for failure to state a claim, and (3) denied Public Watchdogs' motion for preliminary injunction. Public Watchdogs alleged NRC's decisions and Private Defendants' actions did not adequately ensure proper decommissioning of nuclear facilities. The Ninth Circuit affirmed the district court's decision and found that the district court lacked subject matter jurisdiction under the Hobbs Act against NRC and Private Defendants because Public Watchdogs' claims directly challenged or were ancillary or incidental to NRC's final licensing orders and were thus subject to initial review at the court of appeals.

Under the Hobbs Act, courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of" the NRC.[62] In addition, any person may file a request with the NRC to institute a proceeding "to modify, suspend, or revoke a license, or for any other action as may be proper."[63]

Starting in the 1960s, NRC issued Facility Operating Licenses for three nuclear electric generating units at the San Onofre Nuclear Generating Station (Station) to Utility Defendants, which allowed them to possess and store spent nuclear fuel (SNF)[64] at the Station. In 2015, Utility Defendants ceased operations of two units and created a decommissioning plan. The decommissioning plan included proposed amendments to the Facility Operating Licenses ("License Amendments") and the use of Holtec's canister storage system (Holtec System). The Holtec System was previously deemed safe and approved of by NRC in a

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59 Plaintiff-Appellant Public Watchdogs is a California non-profit corporation that advocates for public safety.

60 Defendants-Appellees were NRC, Southern California Edison (Edison), San Diego Gas & Electric Company (SDG&E), and Sempra Energy, SDG&E's parent company, (collectively, "Utility Defendants"), and Holtec International (Holtec). Utility Defendants owned the nuclear facilities subject to decommissioning. Holtec was selected by the utilities and approved by NRC to store spent nuclear fuel (SNF).

61 Administrative Orders Review Act, 28 U.S.C. §§ 2341–2351 (2018).

62 *Id.* § 2342.

63 10 C.F.R. § 2.206 (year).

64 SNF is a radioactive byproduct that results from the consumption of nuclear fuel. Pub. Watchdogs, 984 F.3d at 749.

Certificate of Compliance (Certificate) after notice-and-comment rulemaking.[65]

NRC opened the License Amendments to public comment and intervention, but received no comments. NRC approved the License Amendments and required Utility Defendants to take actions necessary to decommission the plant and maintain the facility, including storage and maintenance of SNF in a safe condition.

In July and August 2018, Utility Defendants mishandled SNF canisters during their transfer to storage and failed to report the incidents to NRC. In response to the August incident, NRC conducted an inspection of the Utility Defendants' loading procedures, corrective actions, and reporting procedures. Utility Defendants also voluntarily halted its SNF transfers until NRC completed its inspections. Ultimately, NRC issued two notices of safety violations against Utility Defendants and imposed a fine on Edison. The Utility Defendants resumed SNF transportation operations in July 2019.

In 2019, Public Watchdogs brought suit at the district court, alleging: (1) NRC negligently decommissioned the Station by recklessly selecting Holtec as the supplier of the SNF storage and by arbitrarily granting the License Amendments; (2) NRC improperly approved the Certificate for Holtec System, despite not meeting required minimum safety thresholds, and failed to bar Holtec's post-Certificate canisters design changes; (3) Utility Defendants negligently decommissioned the Station by damaging canisters during burial and transportation and by failing to report two mishandling incidents in July and August 2018; and (4) NRC exempted Holtec from pre-approval for SNF canister design changes and Certificate requirements, exempted Utility Defendants from reporting the July incident, and approved of Holtec's resumption of SNF transfer in 2019 despite the July and August safety violations.

Public Watchdogs asserted: (1) NRC violated the Administrative Procedure Act (APA);[66] (2) Private Defendants violated the Price-Anderson Act[67] and California's public nuisance laws;[68] and (3) Holtec was liable under a strict products liability theory. In addition, Public Watchdogs also filed a motion for preliminary injunction and a temporary restraining order to restrain Utility Defendants from transferring SNF. Private Defendants responded by filing a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim.

After filing at the district court, Public Watchdogs also filed a petition with the NRC to institute a proceeding at NRC with claims and requests for remedies substantively similar to the claims it brought at the

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[65] In that rulemaking, NRC responded to public comments and stated that the design of Holtec System was in compliance with requirements and tested the Holtec System for corrosion and stress, ultimately concluding the Holtec System was safe. 10 C.F.R. pt. 72.

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

[67] Price-Anderson Act, 42 U.S.C. § 2210(n)(2) (2018).

[68] Cal. Civ. Code §§ 3479–80.

district court. The NRC denied Public Watchdogs' petition after the district court decision.[69]

Ultimately, the district court dismissed Public Watchdogs' complaint with prejudice; held that the district court did not have subject matter jurisdiction of the claims against NRC or Private Defendants because the district court applied the Hobbs Act broadly to final orders and actions preliminary, ancillary, or incidental to final orders; and held that the Hobbs Act applied to Public Watchdogs' claims against NRC and Private Defendants because the defendants' actions were final orders or actions preliminary, ancillary, or incidental to the final orders. The Ninth Circuit reviewed the district court's subject matter jurisdiction finding de novo.

First, the Ninth Circuit analyzed whether NRC's final orders and actions preliminary, ancillary, or incidental to the final orders fell within the scope of the Hobbs Act. Public Watchdogs argued for a narrow, facial interpretation of the Hobbs Act to apply only to actions granting, suspending, revoking, or amending a license. The Ninth Circuit held that the Hobbs Act should be construed broadly and also encompass actions preliminary or incidental to final orders because the language of Section 2239 was ambiguous;[70] the legislative history showed that Congress intended for the Hobbs Act to apply to all final agency responses for licenses, including denials and inaction; the precedent showed actions directly involved with determining the final order fell within the Hobbs Act; and the bifurcation of the final order and the preliminary or incidental issues for initial review would be irrational absent clear Congressional intent because the issues arose from the same proceeding.

The Ninth Circuit next analyzed if Public Watchdogs' individual claims fell within the scope of the Hobbs Act. First, the Ninth Circuit determined that the Public Watchdogs' APA claim against NRC fell within the scope of the Hobbs Act because the APA claim was a challenge to the issuance or was preliminary, ancillary, or incidental to the issuance of the License Amendment and Certificate disguised as an APA claim. The Ninth Circuit rejected Public Watchdogs' argument that its challenge to NRC's failure to enjoin Private Defendant's dangerous transfer of SNF was outside the scope of the Hobbs Act because Public Watchdogs challenged NRC's procedural and substantive review—a part of the issuance process. Public Watchdogs also argued that its additional claims fell outside of the Hobbs Act because NRC granted exemptions[71] and NRC's actions occurred after the issuance of the final orders. The Ninth Circuit found that NRC's decision to not exercise its authority to impose

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[69] While the district court case and NRC petition were pending, Public Watchdogs filed an emergency petition at the Ninth Circuit for writ of mandamus to immediately suspend decommissioning at the Station until the NRC petition was resolved. The Ninth Circuit denied the writ because NRC did not improperly delay its response.

[70] Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 734–35 (1985); Gen. Atomics v. U.S. Nuclear Regul. Comm'n, 75 F.3d 536, 539 (9th Cir. 1996) (explaining that Section 2239 should be "read liberally").

[71] Brodsky v. U.S. Nuclear Regul. Comm'n, 578 F.3d 175, 182 (2d Cir. 2009).

fines, inspect, or enforce for alleged violations were not grants of exemptions for the Certificate, reporting, or SNF transfer safety requirements. The Ninth Circuit stated that the relevant inquiry was whether Public Watchdogs' claims were incidental or ancillary to NRC's final orders—not whether NRC's actions occurred after the final order—and held that Public Watchdogs' claims were incident or ancillary to the final orders.

Next, the Ninth Circuit analyzed whether Public Watchdogs' APA challenge of NRC's actions fell within the scope of the Hobbs Act, independent of the challenge to the License Amendment or Certificate. The Ninth Circuit held that NRC's actions fell within the scope of the Hobbs Act because the claims challenged NRC's enforcement decisions, which must first be challenged through a petition to NRC by citizens.[72] NRC's decision on that petition would then be subject to the Hobbs Act. The Ninth Circuit also noted that Public Watchdogs' decision to file the NRC petition after it filed a similar claim at the district court pointed directly to the irrational bifurcation of the procedural and the substantive issues of a final order, would lead to wasted resources with some issues receiving two layers of judicial review, and did not conform with administrative law principles that encourage subject matter expertise.

Lastly, the Ninth Circuit analyzed whether Public Watchdogs' claims against Private Defendants fell within the scope of the Hobbs Act. Public Watchdogs asserted that the public liability, public nuisance, and strict product liability claim against Private Defendants fell outside the narrow scope of the Hobbs Act because the Hobbs Act only applied to actions against the NRC. The Ninth Circuit nevertheless found that the claims fell within the scope of the Hobbs Act because the underlying arguments regarding the safety requirements, reckless handling, failure to investigate, and products liability were disguised challenges to the issuance of the License Amendment and Certificate, despite artful pleading. In addition, the Ninth Circuit found that Private Defendants' conduct was related to NRC's enforcement decisions—which were "inextricably intertwined" with the License Amendment and Certificate—and thus preliminary, ancillary, or incidental to the final orders.

In sum, the Ninth Circuit held that the Hobbs Act applied broadly to NRC's final orders and actions preliminary, ancillary, or incidental to NRC's final orders and Public Watchdogs' claims against NRC and Private Defendants fell within the scope of the Hobbs Act.

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[72] 10 C.F.R. § 2.206.

E. Land Use

1 Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 960 F.3d 603 (9th Cir. 2020)

Shipping terminal developer Oakland Bulk & Oversized Terminal, LLC (OBOT) sued the City of Oakland ("City" or "Oakland") in the United States District Court for the Northern District of California.[73] OBOT alleged that Oakland breached a contract regarding the development of a bulk shipping terminal (the "terminal") by applying an ordinance to the terminal that prohibited bulk shipping facilities in the City from handling coal. OBOT further alleged that Oakland's ordinance and application thereof violated the Commerce Clause and were preempted by federal law. Environmental organizations intervened (Intervenors).[74] Following a bench trial, the district court entered judgment in OBOT's favor. The City and Intervenors appealed. On appeal, the Ninth Circuit affirmed the district court's ruling.

In 2012, Oakland entered into a Lease Disposition and Development Agreement with OBOT's predecessor-in-interest regarding the development of a bulk shipping terminal. In 2013, Oakland and OBOT entered into a subsequent Development Agreement (the "Agreement"). The Agreement gave OBOT the right to develop the Project in accordance with city approvals and existing city regulations. In essence, California law freezes regulations to protect private parties' reliance interest in project development by providing that the rules, regulations, and official policies in force at the time agreements are executed continue to apply to the corresponding project under a later development agreement. In this regulatory environment, the Agreement here froze existing regulations as to OBOT's proposed terminal, with the exception that under Section 3.4.2 of the Agreement, the City "shall have the right" to apply new lawful regulations if the City "determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, [or] adjacent neighbors . . . in a condition substantially dangerous to their health or safety."[75] The Agreement itself did not limit the types of bulk goods that could be shipped through the terminal. Prior to the Agreement's execution, Oakland had "some indication" that coal was one of the commodities that might be handled at the terminal. In 2014, OBOT agreed to sublease the terminal to the subsidiary of a Utah coal company. In 2015, responding to public and political pushback against coal operations, Oakland held a public hearing and conducted a year-long public process to assess the potential health and safety effects of OBOT's proposed coal operations. Over 500 people

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73 Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 321 F. Supp. 3d 986 (N.D. Cal. 2018)

74 Intervenor-Defendants-Appellants were Sierra Club and San Francisco Baykeeper.

75 Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 960 F.3d 603, 608 (9th Cir. 2020).

requested to speak at the initial public hearing in which health and air pollution experts testified that a coal terminal could endanger nearby residents of West Oakland. Following the hearing, City staff collected further comments from interested parties and solicited input from environmental consultants and health experts. On June 24, 2016, City staff published a report that summarized the findings of the information-gathering process and recommended a prohibition on the storage and handling of coal at bulk material facilities and shipping terminals in Oakland.

On July 27, 2016, after a final public hearing, the Oakland City Council unanimously enacted Ordinance No. 13385 (the "Ordinance"), which forbade the handling of coal at bulk material facilities. The Council also unanimously approved Resolution No. 86234, which applied the Ordinance to OBOT. The City Council found that based on "substantial evidence in the record," that without applying the Ordinance to OBOT the development of the terminal would result in a "condition substantially dangerous" to the "health and/or safety" of nearby community members.[76] The passage of the Ordinance and Resolution thus barred coal at the OBOT terminal.

OBOT sued Oakland in December 2016. After Oakland filed a motion to dismiss, Sierra Club and San Francisco Baykeeper moved to intervene. The district court denied intervention of right but granted permissive intervention. The court denied both Oakland's and Intervenors' motions to dismiss and the parties' cross-motions for summary judgment on the breach of contract claim. The court conducted a bench trial and took the constitutional and federal preemption claims under submission, pending resolution of the breach of contract claim. The district court ultimately found that Oakland lacked substantial evidence that OBOT's proposed coal operations posed a substantial danger to health or safety. Therefore the court determined that Oakland breached the Agreement and declared the Resolution invalid.

On appeal, the Ninth Circuit considered standard of review "pivotal" to the outcome of the appeal. If the court reviewed this case as a breach of contract dispute, it would give deference to the trial court's factual findings. Alternatively, if the court reviewed the case as an administrative law proceeding, the court would owe deference to the City's health and safety findings. Oakland and Intervenors argued that the latter approach was mandated by the terms of the Agreement. Specifically, they argued that the parties to the Agreement, by using the phrase "substantial evidence," incorporated into the Agreement a judicial standard of review used in administrative law proceedings. The Ninth Circuit rejected this argument, finding: (1) the plain language of the Agreement does not support such a position; (2) where the parties intended to delineate parameters on litigation, they did so expressly; and

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[76] *Id.*

(3) contracting parties cannot dictate to a federal court the standard of review governing a case.

Next, the Ninth Circuit considered whether "substantial evidence" judicial review applies here as a matter of law. Because the court could not identify any California Supreme Court case that spoke to whether administrative law review principles apply to a breach of contract action challenging an administrative decision, the court attempted to predict how the California Supreme Court would decide this issue. In addition to considering relevant state case law, the court reasoned that deferring to the government in this sort of breach of contract dispute would "unfairly tilt the scales towards the government" and create an "escape hatch" for the government to abandon contractual obligations.[77] Thus, the Ninth Circuit concluded that the district court owed no deference to the City's factual findings and did not err in considering extra-record evidence beyond what appeared at the City's public hearings.

Because the district court decided this case by bench trial, the Ninth Circuit reviewed the district court's factual findings for clear error and its conclusions of law de novo. The only issue presented by OBOT's breach of contract claim was whether Oakland invoked Section 3.4.2 of the Agreement based on "substantial evidence" of a condition "substantially dangerous" to the health or safety of OBOT's terminal users or adjacent neighbors. Oakland and Intervenors argued that the process and findings leading to the enactment of the Ordinance sufficiently proved that coal handled at the OBOT terminal would pose substantial danger to West Oakland residents. OBOT presented conflicting expert testimony. Ultimately, the court found inadequacies in the methodologies relied upon and conclusions drawn by Oakland and Intervenors. The court ruled against Oakland, finding its health and safety determination about coal at the OBOT terminal inadequate.

The Ninth Circuit then considered two alternative arguments posed by Intervenors. First, Intervenors asserted that Section 3.4.2 of the Agreement provides Oakland the right to apply "City Regulations" adopted after execution of the contract, and the Ordinance constitutes a City Regulation. Intervenors argued that because California Government Code Section 65866 allows development agreements to freeze only land use regulations, the court must read "City Regulations" in the Agreement as pertaining *only* to land use regulations, otherwise the Agreement violates California Government Code. The Ninth Circuit rejected this argument on the basis that the Agreement expressly defines "City Regulations" broadly without distinguishing between land use and non-land use regulations. Further, the court noted that the plain language of the Agreement manifests the parties' intent to freeze all existing regulations, not just land use regulations. Second, Intervenors argued that to the extent Section 3.4.2 applies to non-land use regulations, it is invalid because it conflicts with Government Code Section 65866. The

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[77] *Id.* at 611–12.

district court declined to consider this argument, determining the argument to be outside the scope of Intervenors' permissive intervention, which was limited to defending against OBOT's claims and did not include the right to bring counter-claims or cross-claims. The Ninth Circuit reviews limitations imposed on permissive intervention for abuse of discretion. Because Federal Rule of Civil Procedure 24(b) grants "wide latitude" for dictating the terms of permissive intervention, the Ninth Circuit found that the district court did not abuse its discretion here.

Finally, Intervenors argued that the district court erred in failing to grant intervention of right in this action. The Ninth Circuit reviewed the district court's denial of intervention of right de novo. Here, adequacy of representation was the sole element of Federal Rule of Civil Procedure 24(a)(2) at issue. Ultimately, the court concluded that Intervenors did not make the "very compelling showing" necessary to overcome the "presumption of adequacy" afforded to Oakland because (1) a governmental entity was already acting on behalf of the Intervenors' interest in this action, and (2) Intervenors and Oakland shared the same ultimate objective of upholding the Ordinance and Resolution.

In sum, the Ninth Circuit identified the key legal issue in this case as whether to defer to the district court's factual findings or the City's health and safety findings. Because this is a breach of contract dispute and not an administrative law proceeding, the court deferred to the district court's factual findings upon concluding that those findings were not clearly erroneous. The Ninth Circuit thus affirmed the district court's ruling.

Judge Piersol dissented, opining that the trial court erred in admitting and considering evidence pertaining to the health and safety effects of coal handling and storage that was not submitted to the City's public process soliciting such information leading up to the enactment of the Ordinance.

2. California v. U.S. Environmental Protection Agency, 978 F.3d 708 (9th Cir. 2020)

Several states and one intervenor (collectively, "Plaintiffs")[78] sued U.S. Environmental Protection Agency (EPA) in the U.S. District Court for the Northern District of California.[79] Plaintiffs sought an injunction to compel EPA to promulgate its federal landfill emissions plan under the Clean Air Act (CAA).[80] After the district court entered an injunction requiring the EPA to promulgate the plan within six months, the EPA

[78] Plaintiff-Appellees were: State of California, by and through Attorney General Xavier BECERRA and the California Air Resources Board; State of Illinois; State of Maryland; State of New Mexico; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; and State of Vermont. The Intervenor-Appellee was Environmental Defense Fund, an environmental nonprofit organization.

[79] California v. U.S. Env't Prot. Agency, 385 F. Supp. 3d 903, 906 (N.D. Cal. 2019).

[80] Clean Air Act, 42 U.S.C. §§ 7401–7671q (2018).

finalized a rulemaking process which extended the regulatory deadline by two years and asked the Court to modify the injunction. The district court denied EPA's motion but temporarily stayed its injunction. EPA appealed, and the Ninth Circuit reversed the district court's decision and remanded the case to modify the injunction.

In 2016, EPA promulgated new emissions guidelines under the CAA for municipal solid-waste landfills. This action triggered a series of mandates for states and EPA. Under this process, (1) each state had to submit a plan for how it would implement the new guidelines, (2) EPA was to approve or disapprove each state plan it received, and (3) for states that failed to submit a plan at all, EPA was to promulgate a federal plan that would govern implementation in those states. The deadline for EPA to comply with this third requirement was set by regulation for November 30, 2017. When EPA failed to meet this deadline, several states sued in May 2018 to force EPA to promulgate its federal plan. EPA responded to that suit, but also initiated a rulemaking process in October 2018 to extend its regulatory deadline for issuing a federal plan. EPA moved for a stay of the litigation pending resolution of the rulemaking process but the district court refused. EPA then made an additional attempt to continue the case, but its motion was again unsuccessful. While the new rulemaking was underway, the district court entered an order requiring EPA to issue a federal plan by November 6, 2019. A few months later, EPA finalized the new rulemaking process and regulatory amendment, thereby extending the regulatory deadline by two years. Thus, when the case reached the Ninth Circuit, EPA faced two conflicting deadlines: November 6, 2019 under the court's order and August 30, 2021 under the amended regulations.

Confronted with these two disparate deadlines, EPA filed a motion under Federal Rule of Civil Procedure 60(b)(5) requesting relief from the district court's injunction. The district court denied the motion but temporarily stayed its injunction. EPA appealed and moved for a stay of the district court's injunction pending appeal, which a motions panel granted. The Ninth Circuit was then asked to decide whether a district court abuses its discretion by refusing to modify an injunction even after its legal basis has evaporated and new law permits what was previously enjoined. The Ninth Circuit reviewed for the district court's decision to deny the Rule 60(b) motion for abuse of discretion and reviewed questions of law underlying the decision to deny the motion de novo.

The Ninth Circuit first noted that while court orders are ordinarily final, under Rule 60(b)(5) a court may modify an injunction when applying it prospectively is no longer equitable. The court went on to discuss the historically flexible nature of procedure as applied in courts sitting in equity. EPA argued that the district court abused its discretion by forcing the agency

to comply with the injunction despite emergence of new regulations which extended the time to issue a federal plan to August 2021. Plaintiffs responded that courts should look beyond the new regulations and

conduct a broad, fact-specific inquiry into whether modification would prevent inequity and pointed out that EPA had not shown it would be harmed if forced to continue to abide by the injunction. The Ninth Circuit held that the district court's refusal to modify the injunction, when a change in law dissipated the legal basis for its order, was an abuse of discretion. The court pointed to a long line of Supreme Court, Ninth Circuit, and sister circuit precedent that stands for the proposition that a change in the law underlying an order warrants modification of an injunction.

The Ninth Circuit then turned to Plaintiffs' argument that precedent required a broad, fact-intensive inquiry into whether altering an injunction is equitable, even if the legal duty underlying the injunction has disappeared. The Ninth Circuit disagreed, distinguishing the procedural posture in the immediate case from the precedent relied on by Plaintiffs. Plaintiffs then argued that equities support their view because the injunction required a discrete task, the issuance of the federal plan, rather than a continuing injunction. But the court found no legal basis to treat the injunction in this case any differently than one that might be characterized as ongoing or indefinite. The Ninth Circuit observed that it is the prospective effect, not the continuing nature, of an injunction that matters and renders the injunction amenable to modification based on a shift in law.

Finally, the Ninth Circuit considered both parties' arguments that the other's preferred resolution of the case would violate the Constitution's separation of powers. The court observed that while no branch other than the judiciary can reverse the final judgment of an Article III court, Congress and executive agencies can disturb injunctive relief because it is not a *final* judgment. The Ninth Circuit found it irrelevant that the EPA itself changed its regulations in the immediate case, noting that the EPA is obviously the competent authority to modify the law at issue. Therefore, the court saw no reason why the EPA should be prejudiced when requesting Rule 60(b)(5) relief in light of its authority to amend its own regulations and held that a change in regulations that dissolved the legal basis for the injunction did not violate the separation of powers doctrine.

In sum, the Ninth Circuit held that that when a district court reviews an injunction based solely on law that has since changed to permit what was previously forbidden, it is an abuse of discretion for that court to refuse to modify the injunction given the alteration in law. The Ninth Circuit therefore reversed the district court's decision and remanded with instructions for the district court to modify the injunction.

II. NATURAL RESOURCES

A. Alaska Oil and Gas Extraction

1. Center for Biological Diversity v. Bernhardt, 982 F.3d 723 (2020)

The Center for Biological Diversity and other conservation groups (collectively, "CBD")[81] challenged the actions of the Bureau of Ocean and Energy Management (BOEM) and the Fish and Wildlife Service (FWS)[82] under the Outer Continental Shelf Lands Act (OCSLA), [83] which provides original jurisdiction to the Ninth Circuit.[84] CBD's claims, all brought pursuant to the Administrative Procedure Act ("APA),[85] relate to BOEM and FWS's approval of a request to construct an offshore drilling facility ("Liberty project"). First, CBD made two challenges to the environmental impact statement (EIS) that BOEM completed pursuant to the National Environmental Protection Act (NEPA).[86] Second, CBD argued that FWS violated the Endangered Species Act (ESA)[87] and the Marine Mammal Protection Act (MMPA)[88] because FWS's biological opinion ("BiOp") relied on arbitrary and capricious mitigation measures. Third, CBD argued FWS violated the ESA because the FWS's incidental take statement failed to quantify nonlethal takes of polar bears. Lastly, CBD contended BOEM violated the ESA because BOEM relied on FWS's allegedly invalid BiOp when BOEM approved the Liberty Project. The Ninth Circuit upheld BOEM's decision about greenhouse gas methodologies under NEPA, upheld FWS's no-jeopardy determination under the ESA, and ruled BOEM and FWS acted arbitrarily and capriciously in all other instances.

Hilcorp Alaska LLC, an energy management company, sought approval to construct the Liberty Project in the outer continental shelf off Alaska's coast. OCSLA governed the proposed action and required the project's approval under NEPA because the project was a "major Federal action[] significantly affecting the quality of the human environment,"[89] and approval under the ESA and the MMPA because the proposed action implicated species protected under both acts. BOEM had direct authority

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81 The other conservation groups were the Defenders of Wildlife, the Friends of the Earth, Greenpeace USA, and Pacific Environment.

82 The other Respondent was David Bernhardt. Respondent-Intervenor was Hilcorp Alaska LLC.

83 Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356a (2018).

84 Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723 (2020).

85 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018); *Bernhardt,* 982 F.3d at 733 ("NEPA, the ESA, and the MMPA all lack independent judicial review provisions. Claims arising under all three are therefore reviewed under the Administrative Procedure Act.").

86 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

87 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

88 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421h (2018).

89 *Bernhardt,* 982 F.3d at 734 (quoting 42 U.S.C. § 4332(C)).

over the NEPA process and the final decision for the Liberty Project. FWS prepared and made decisions about the BiOp under the ESA and the MMPA. CBD challenged decisions made by both BOEM and FWS regarding the Liberty Project.

The Ninth Circuit reviewed the NEPA, ESA, and MMPA claims under the APA's arbitrary and capricious standard of review.[90] The court applied a "rule of reason" standard in determining whether FWS's "discussion of environmental consequences" in the EIS was "sufficiently thorough."[91]

CBD first argued that the EIS BOEM completed pursuant to NEPA was arbitrary and capricious because BOEM used different methodologies for determining the "greenhouse gas emissions produced by the no-action alternative and other project alternatives."[92] Specifically, CBD challenged the fact that BOEM, in preparing the no-action alternative, used modeling technology to account for greenhouse gases emissions "that would substitute for the oil not produced at Liberty."[93] The court agreed with CBD that BOEM's use of different methodologies for greenhouse gas calculations would have been arbitrary and capricious. However, because the court found BOEM's methodologies were consistent between action alternatives, the court held BOEM did not act arbitrarily or capriciously.

Second, CBD argued that the EIS BOEM issued was arbitrary and capricious because BOEM did not consider foreign oil consumption when calculating the greenhouse gas emissions of the EIS's no-action alternative. The court agreed with CBD because (1) BOEM did not consider foreign oil consumption in the no-action alternative, (2) "NEPA requires agencies to evaluate the direct and indirect effects of the proposed project,"[94] and (3) foreign oil consumption was a reasonably foreseeable indirect effect of the Liberty Project. Accordingly, the Ninth Circuit held BOEM's EIS was arbitrary and capricious.

Next, CBD alleged that FWS violated the ESA because FWS's no-jeopardy and no-adverse-modification findings in the BiOp arbitrarily and capriciously relied on "uncertain, insufficiently specific mitigation measures."[95] The Ninth Circuit agreed with CBD that the mitigation measures were arbitrary and capricious because they were "too vague to enforce."[96] However, a BiOp may contain unenforceable provisions "with no legal consequence" so long as the agency does not rely on those provisions in making final determinations about a project.[97] Here, the

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90 5 U.S.C. § 706(2)(A).

91 *Bernhardt*, 982 F.3d at 734 (quoting Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1071 (9th Cir. 2002)

92 *Id.* at 735.

93 *Id.* at 736.

94 *Id.* at 737; 40 C.F.R. § 1502.16 (2020).

95 *Bernhardt*, 982 F.3d at 743.

96 *Id.* at 747.

97 *Id.*

court concluded that while FWS's no-jeopardy finding did not rely on the mitigation measures, FWS's no-adverse-modification finding did rely on considerations that incorporated the mitigation measures. Therefore, the no-adverse-modification portion of FWS's BiOp was arbitrary and capricious.

The court then turned to CBD's assertion that FWS violated the ESA because FWS's BiOp arbitrarily and capriciously relied on an incidental take statement that failed to quantify the "amount and extent"[98] of nonlethal takes of polar bears for the Liberty Project. FWS argued that the incidental take statement did not need to quantify "nonlethal disturbances" because the relevant disturbances did not "rise to the level of a take."[99] The court disagreed with FWS, finding that FWS "contemplated that the harassment and disturbance polar bears will suffer could trigger re-consultation with FWS and did not quantify the nonlethal take that polar bears are expected to face."[100] Failing to quantify nonlethal takes of polar bears rendered FWS's incidental take statement arbitrary and capricious under the APA and in violation of the ESA.

Lastly, CBD argued that BOEM violated the ESA because BOEM relied on FWS's partially arbitrary and capricious BiOp in reaching its final decision about the approval of the Liberty Project. The Ninth Circuit agreed, highlighting that "[a]n agency cannot meet its Section 7 [ESA] duties by relying on a legally flawed biological opinion."[101]

In conclusion, the court held that while BOEM's use of methodologies for calculating greenhouse gas emissions did not violate NEPA, but BOEM's failure to consider foreign oil consumption for the EIS's no-action alternative did violate NEPA; FWS violated the ESA by relying on arbitrary and capricious mitigation measures in making no-adverse-modification findings; FWS again violated the ESA because FWS's incidental take statement failed to quantify nonlethal takes of polar bears; and BOEM's approval of the Liberty Project violated the ESA because BOEM's approval relied on FWS's BiOp, which was at least partially invalid. The Ninth Circuit vacated BOEM's approval of the Liberty Project and remanded the action to BOEM.

2. Northern Alaska Environmental Center v. U.S. Department of the Interior, 983 F.3d 1077 (9th Cir. 2020)

Northern Alaska Environmental Center and other environmental organizations[102] (collectively, "Plaintiffs") brought suit in the United

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98 *Id.* at 743.

99 *Id.* at 749.

100 *Id.* at 750.

101 *Id.* at 751.

102 Plaintiffs were Northern Alaska Environmental Center, Alaska Wilderness League, Defenders of Wildlife, Sierra Club, and The Wilderness Society, Inc.

States District Court for the District of Alaska[103] against the U.S. Department of the Interior ("DOI"), the Bureau of Land Management ("BLM") and other federal defendants[104] (collectively, "Defendants"). Plaintiffs claimed Defendants violated the National Environmental Policy Act ("NEPA")[105] and the Administrative Procedure Act ("APA")[106] when BLM failed to prepare a NEPA analysis for a 2017 oil and gas lease sale in the National Petroleum Reserve-Alaska ("the Reserve"). The district court held that a 2012 Environmental Impact Statement ("EIS") for the management of BLM lands within the Reserve encompassed the 2017 lease sale, and so a new NEPA analysis was not required. The Ninth Circuit denied the Plaintiffs' petition for rehearing en banc and affirmed the district court's grant of summary judgment for the Defendants.

The Reserve is a 23 million acre expanse of land on the north coast of Alaska. 22.6 million acres of the Reserve are managed by BLM pursuant to the Naval Petroleum Reserves Production Act ("NPRA").[107] BLM's actions under NPRA are subject to NEPA procedural requirements. In 2012, BLM published a combined Integrated Activity Plan ("IAP") and EIS for the management of the BLM lands in the Reserve. The EIS alternatives analysis included a set of hypothetical development scenarios based, in part, on the assumptions that BLM would hold multiple annual lease sales and that "full exploration and development of petroleum resources in the Reserve would take place over many decades."[108] The IAP/EIS also stated that BLM would prepare an administrative determination of NEPA adequacy ("DNA") for future proposed lease sales "to determine whether the then-existing NEPA documentation was adequate."[109]

In August 2017, BLM solicited nominations and comments on all unleased tracts on its Reserve lands for a lease sale. The following month, BLM issued a DNA which stated that the proposal for the 2017 lease sale "was part of the preferred alternative analyzed in the 2012 EIS, and that no new information or circumstances substantially changed the analysis."[110] The bidding process began in December 2017 and ended in January 2018. In the interim, the United States Geological Survey (USGS) released an updated Assessment of Undiscovered Oil and Gas Resources ("USGS Assessment") for the Reserve which raised the

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103 N. Alaska Env't Ctr. v. U.S. Dep't of the Interior, Case No. 3:18-cv-00030-SLG, 2018 WL 6424680 (D. Alaska Dec. 6, 2018).

104 Defendants were the U.S. Department of the Interior, the Bureau of Land Management, Secretary of the Interior Ryan Zinke (substituted on appeal with Secretary of the Interior David L. Bernhardt), and BLM Director Brian Steed. ConocoPhillips Alaska, Inc. intervened on the side of the Defendants.

105 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

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

107 Naval Petroleum Reserves Production Act of 1976, 42 U.S.C. §§ 6501–6508 (2018).

108 *N. Alaska Env't Ctr.*, 983 F.3d at 1082.

109 *Id.*

110 *Id.* at 1083.

estimate of technically recoverable oil from 896 million barrels to 8.7 billion barrels. In February 2018 BLM issued a Revised DNA that discussed the USGS Assessment and several other recent developments, finding that none were significant. According to BLM, the USGS Assessment was unusable because it did not estimate the volume of *economically* recoverable resources and included resources located adjacent to the Reserve. Furthermore, the agency found the other developments insignificant because "the 2012 EIS had already erred on the conservative side and over analyzed likely potential impacts."[111]

The Plaintiffs alleged three causes of action in the district court: (1) BLM failed to prepare a NEPA analysis for the 2017 lease sale; (2) BLM failed to take a "hard look" at the environmental impacts of the 2017 lease sale, including failing to properly analyze the USGS Assessment and other developments; and (3) BLM violated its own NPRA regulations when it issued the Revised DNA after the 2017 lease sale was completed. The district court granted the Defendants' cross-motion for summary judgment, holding that while the Plaintiffs' claims were not time-barred and a NEPA analysis was required prior to the issuance of the 2017 leases, the 2012 EIS fulfilled that purpose. Furthermore, BLM was not required to perform a parcel-specific analysis until it "was reviewing actual exploration and development proposals."[112] The Ninth Circuit reviewed the district court's grant of summary judgment for the Defendants de novo and BLM's compliance with NEPA for "reasonableness" under the APA.

The Ninth Circuit first rejected the Defendants' argument that the complaint was time barred by NPRA's statute of limitations. The statute requires that any action seeking judicial review of the adequacy of an EIS for oil and gas leasing in the Reserve must be filed within sixty days of the availability of the EIS in the Federal Register. According to the Defendants, the Plaintiffs were inherently challenging the 2012 EIS, and the sixty day window to challenge that EIS had long since passed. The Ninth Circuit found, however, that the Plaintiffs' first and third claims could be resolved without violating the statute of limitations because if the 2012 EIS served as the EIS for the 2017 lease sale, these claims would fail on the merits; if the 2017 lease sale instead required its own NEPA analysis, then these claims were not affected by the statute of limitations. Whether the statute of limitations barred the second claim, however, depended on how the first claim was resolved. If the 2012 EIS was adequate as the EIS for the 2017 lease sale, then a claim that the EIS failed to take a "hard look" at the impacts of the sale was time barred. The Ninth Circuit therefore had to inquire whether the 2012 EIS was the EIS for the 2017 lease sale.

To answer this inquiry, the Ninth Circuit first determined that despite being a programmatic-level analysis for the IAP, the court could

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111 *Id.* (internal quotations omitted).

112 *Id.* at 1084.

defer to BLM's judgment and determine that the 2012 EIS was sufficiently site-specific to serve as the EIS for the 2017 lease sale. The court noted that it would ultimately conclude that the 2012 EIS did cover future lease sales, so the court did not need to determine whether BLM's 2012 analysis reached the precise degree of required site specificity because the NPRA statute of limitations made such an inquiry unnecessary. But, whatever the appropriate degree of site-specificity, the court was not persuaded it was so much greater than that reflected in the 2012 EIS that the 2012 EIS could not have encompassed the 2017 lease sale.

Next, the Ninth Circuit looked to how the 2012 EIS defined its own scope and concluded that BLM's position that the 2012 EIS was the EIS for the 2017 was reasonable. The court noted that the expressly defined scope of the 2012 EIS was ambiguous as to what extent it may encompass future lease sales. But, in a section of the "Introduction," the

EIS stated that prior to future lease sales, BLM need only conduct "an administrative determination of NEPA adequacy,"[113] as opposed to a full NEPA analysis, if the agency determines its existing analysis is adequate for a subsequent sale. The court understood this to suggest that the intended scope of the 2012 EIS included the 2017 lease sale.

Having found that the 2012 EIS was the EIS for the 2017 lease sale, the Ninth Circuit concluded that the Plaintiffs' first and third claims failed on the merits because BLM did, in fact, prepare a NEPA analysis for the 2017 lease sale prior to the sale taking place. BLM therefore did not violate NEPA or its own NPRA regulations. Having reached that conclusion, the court determined the Plaintiffs' second claim was time barred because it was actually a challenge to the 2012 EIS, and the NPRA statute of limitations for challenges to the 2012 EIS had long since passed. The court noted that BLM may have had an obligation to supplement its NEPA analysis with new circumstances and new information surrounding the 2017 lease sale, but the Plaintiffs had disavowed a supplementation claim, so the issue was waived. The Ninth Circuit therefore affirmed the district court's grant of summary judgment in favor of the Defendants.

B. Endangered Species Act

1. Crow Indian Tribe v. United States, 965 F.3d 662 (9th Cir. 2020)

Indian tribes, various state agencies, and environmental and animal-welfare organizations (collectively, "Crow Indian Tribe")[114] filed claims

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[113] *Id.* at 1094.

[114] Other respondents include State of Montana Department of Fish, Wildlife and Parks; Crow Indian Tribe; Crow Creek Sioux Tribe; Standing Rock Sioux Tribe; Piikani Nation; The Crazy Dog Society; Hopi Nation Bear Clan; Northern Arapaho Elders Society; David Bearshield; Kenny Bowekaty; Llevando Fisher; Elise Ground; Arvol Looking House; Travis Plaited Hair; Jimmy St. Goddard; Pete Standing Alone; Nolan J. Yellow Kidney; Humane

against the United States Fish and Wildlife Service (FWS)[115] in the United States District Court for the District of Montana.[116] Crow Indian Tribe argued FWS violated the Endangered Species Act (ESA)[117] and the Administrative Procedure Act (APA)[118]by issuing a rule delisting a population of grizzly bear in the Greater Yellowstone Ecosystem (Yellowstone grizzly) from the threatened species list (2017 Rule). On appeal, Crow Indian Tribe made four jurisdictional challenges and FWS and State intervenors[119] appealed portions of the district court's remand order. The Ninth Circuit ruled jurisdiction was proper, affirmed the district court's ruling in part, and remanded the issue of FWS's scope of review regarding remnant populations.

The FWS first listed the grizzly bear as a threatened species under the ESA in 1975. In 1982, FWS promulgated a Grizzly Bear Recovery Plan (Recovery Plan), which identified six geographically isolated ecosystems, including the Greater Yellowstone Ecosystem (Yellowstone). Yellowstone is one of two ecosystems where substantial grizzly bear populations exist. FWS first attempted to delist Yellowstone grizzlies in 2007 (2007 Rule). In the 2007 Rule, FWS also declared the Yellowstone grizzly a "distinct population segment" (DPS). FWS's 2007 Rule therefore had the effect of delisting the Yellowstone grizzly while leaving all other populations of grizzly bears, or "remnant populations," listed as threatened species under the ESA. Following challenges to the 2007 Rule, the Ninth Circuit upheld the lower court's decision to vacate the 2007 Rule. FWS subsequently published the Conservation Strategy for the Grizzly Bear (2016 Conservation Strategy) and issued a rule delisting the Yellowstone grizzly (2017 Rule). The 2016 Conservation Strategy was a non-binding plan for the management and monitoring of the Yellowstone grizzly upon the species' delisting. The 2016 Conservation Strategy contributed to FWS's conclusion, in the 2017 Rule, that FWS could ensure the overall recovery of the Yellowstone grizzly upon the species' delisting and characterization as a DPS.

Crow Indian Tribe challenged the 2017 Rule. The district court granted summary judgment for Crow Indian Tribe, vacated the 2017

Society of the United States; the Fund for Animals; WildEarth Guardians; Northern Cheyenne Tribe; Sierra Club; Center for Biological Diversity; National Parks Conservation Association; Alliance for the Wild Rockies; Native Ecosystems Council; Western Watersheds Project; and Robert H. Aland.

115 In addition to FWS, the following were appellants United States of America; United States Department of the Interior; David L. Bernhardt, Secretary, United States Department of the Interior; Jim Kurth, Acting Director, FWS; Hillary Cooley, Grizzly Bear Recovery Coordinator; State of Wyoming; Safari Club International; National Rifle Association of America, Inc.; Sportsmen's Alliance Foundation; Rocky Mountain Elk Foundation.

116 Crow Indian Tribe v. United States, 343 F. Supp. 3d 999 (D. Mont. 2018).

117 Endangered Species Act of 1973, §§ 1531–1544 (2018).

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

119 State intervenors include Idaho, Montana, and Wyoming.

Rule, and remanded the case to FWS for further agency consideration. FWS and State Intervenors appealed to the Ninth Circuit. The Ninth Circuit reviewed the agency action under an arbitrary and capricious standard of review.

Crow Indian Tribe challenged the Ninth Circuit's jurisdiction on four counts. The Ninth Circuit rejected each of Crow Indian Tribe's arguments, finding jurisdiction proper. First, the court found FWS could appeal the district court's remand order because that order was final as to FWS. Second, the court held FWS had standing, and was not merely seeking an advisory opinion, because a favorable decision on appeal would alter FWS's reevaluation of the 2017 Order and would redress FWS's alleged injuries relating to the remand order. Third, the district court's order requiring FWS to commit to recalibration was a final order for State intervenors because an appeal was the only way to hear State intervenors' objections. Fourth, State intervenors suffered a concrete injury, and therefore had standing, because they "relied on the validity of the 2017 Rule in enacting legislation and state management plans."[120]

Next, the court turned to FWS's challenges to the scope of the district court's remand order. Specifically, FWS argued that the ESA does not require FWS to conduct a "comprehensive review" of the effect of the Yellowstone grizzly's delisting on remnant populations. The court agreed with FWS and reversed the district court's holding on that issue. In reaching its conclusion, the Ninth Circuit distinguished the 2017 Rule from a recent case where the court *did require* FWS to conduct a comprehensive review.[121]

Next, FWS appealed the district court's ruling that FWS had not applied the best available scientific information when FWS, in the 2017 Rule, concluded that a lack of genetic diversity was *not* a threat to the Yellowstone grizzly. FWS argued that the court could not substitute its judgment for FWS's scientific expertise. The Ninth Circuit affirmed the lower court's ruling. First, the court found FWS's overall conclusion that the Yellowstone grizzly's genetic health was not at risk erroneous because that conclusion ignored express concerns raised in scientific studies[122] about the species' *long-term* genetic health. Second, the 2017 Rule mentioned the need for regulatory measures to protect the species' long-term genetic health, but the court noted an absence of a "concrete, enforceable mechanism"[123] to protect the Yellowstone grizzly, so FWS therefore did not satisfy delisting protection requirements.

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120 Crow Indian Tribe v. United States, 965 F.3d 662, 676 (9th Cir. 2020).

121 *See* Humane Soc'y v. Zinke, 865 F.3d 585 (D.C. Cir. 2017) (holding that FWS was required to conduct a "comprehensive review" of remnant populations where the simultaneous delisting of a species and a designation of that species as a DPS resulted in FWS "discarding" the remnant population).

122 Notably, these were the scientific studies that FWS used to support its findings in the 2017 Rule.

123 *Crow Indian Tribe*, 965 F.3d at 680.

Lastly, State intervenors challenged the district court's order requiring FWS to include a commitment to recalibration.[124] State intervenors claimed they already committed to using current estimators and recalibration would be "unnecessary and speculative."[125] Because recalibration is necessary to effectively protect the Yellowstone grizzly and listing decisions must be "solely on the basis of the best scientific data,"[126] the Ninth Circuit rejected State intervenors' argument and affirmed the district court's decision requiring FWS to include a commitment to recalibration.

In sum, the Ninth Circuit found it had jurisdiction to hear the case and affirmed the lower court's decisions that FWS arbitrarily and capriciously concluded the 2017 Rule did not pose a risk to the Yellowstone grizzly's genetic health and that FWS must include a commitment to recalibration. Lastly, the court remanded the case with instructions for the district court to determine the scope of review FWS must undergo regarding remnant populations.

C. Magnuson-Stevens Fishery Conservation and Management Act

1. Pacific Choice Seafood Co. v. Ross, 976 F.3d 932 (9th Cir. 2020)

Pacific Choice Seafood Company and related entities (collectively, "Pacific Choice")[127] sued the National Marine Fisheries Service (Service)[128] in the United States District Court for the Northern District of California.[129] Pacific Choice sued the Service under the Magnuson-Stevens Act (Act)[130] and the Administrative Procedure Act (APA),[131] alleging that a fishing quota imposed by the Service exceeded the Service's authority under the Act and violated the APA. The district court granted the Service's motion for summary judgment on all claims. On appeal, the Ninth Circuit sua sponte raised the issue of jurisdiction and held the court had jurisdiction to hear the case. The Ninth Circuit affirmed the district court's ruling.

Pursuant to the Act, the Service regulates fisheries in the Pacific Ocean, including the Pacific non-whiting groundfish fishery (fishery). Pacific Choice had a share in fishing activities in the fishery. In 2010, the Service enacted a quota system, limiting the maximum allowable catch to

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124 *See id.* at 680 ("Recalibration accounts for methodological changes between population estimators in order to ensure that the FWS is able to accurately estimate the Yellowstone grizzly's population size.").

125 *Id.* at 681.

126 Endangered Species Act of 1973, 16 U.S.C. § 1533(b)(1)(A) (2018).

127 Other plaintiffs included Sea Princess LLC and Pacific Fishing LLC.

128 United States Secretary of Commerce, Wilbur Ross, was also a defendant.

129 Pac. Choice Seafood Co. v. Ross, 309 F. Supp. 3d 787 (N.D. Cal. 2018).

130 Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1891d (2012).

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

2.7 percent for any one entity. In 2015, the Service learned Pacific Choice "owned or controlled at least 3.8 percent of the quota share" and ordered Pacific Choice to "divest its excess share."[132] The Ninth Circuit reviewed the district court's decision de novo.

First, the Ninth Circuit sua sponte reviewed jurisdiction. Under the Act, plaintiffs must challenge the Service's actions within thirty days of a regulation's promulgation.[133] In 2010, the Service promulgated the catch quota Pacific Choice challenged in this case, yet Pacific Choice did not file a claim until 2015. Because Pacific Choice timely challenged the Service's order requiring divestment of excess shares, however, the court found that Pacific Choice was also able to challenge "the regulation under which the action [was] taken."[134] The court, therefore, held it had jurisdiction.

Second, Pacific Choice argued the Service violated the Act when the Service created the 2.7 percent maximum quota because that determination relied on an impermissibly broad interpretation of "excessive share." Pacific Choice argued "excessive share" restrictively means only monopoly or oligopoly conditions, and the Service's broader considerations impermissibly exceeded the scope of the statute. The Service argued its interpretation conformed with the statute because the Service considered numerous factors in addition to market power. Applying *Chevron* deference, the Ninth Circuit agreed with the Service, reasoning the Service reasonably interpreted an ambiguous statute.

Third, Pacific Choice alleged the Service's 2.7 percent rule was arbitrary and capricious because the Service, during the decision-making process for the quota, ignored market power and failed to explain the methods used to reach the 2.7 percent share as opposed to a different percentage. The court disagreed, finding the Service's rule was neither arbitrary nor capricious because the Service satisfied statutory guidelines,[135] discussed market power, and provided a reasonably discernable basis for the final rule chosen.

Fourth, Pacific Choice presented the statutory argument that the Service exceeded its authority under the Act by interpreting the statutory language of "hold, acquire, or use" as including "control."[136] The court denied Pacific Choice's argument. In doing so, the court applied *Chevron* deference, finding again that because of the Act's ambiguity, the Service's interpretation received deference because the interpretation was reasonable.

Lastly, Pacific Choice claimed the Service acted arbitrarily and capriciously by promulgating the 2.7 percent rule because that rule

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132 Pac. Choice Seafood Co. v. Ross, 976 F.3d 932, 935 (9th Cir. 2020).

133 16 U.S.C. § 1855(f)(1).

134 *Pac. Choice Seafood Co.*, 976 F.3d at 938–39 (quoting Oregon Troller's Ass'n v. Gutierrez, 454 F.3d 1104, 1113 (9th Cir. 2006)).

135 16 U.S.C. § 1854(b)(1).

136 *Pac. Choice Seafood Co.*, 976 F.3d at 944.

defined "control" so broadly as to constitute an abuse of discretion.[137] The court found Pacific Choice's argument unpersuasive. Although broad, the Service sufficiently clarified the definition of "control" to avoid crossing the high threshold the abuse of discretion standard represents.

In sum, the Ninth Circuit held it had jurisdiction and that the Service's 2010 2.7 percent maximum quota rule and 2015 order to Pacific Choice did not violate the Act or the APA. Therefore, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the Service.

D. National Forest Management Act

1. Oregon Natural Desert Association v. U.S. Forest Service, 957 F.3d 1024 (9th Cir. 2020)

Oregon Natural Desert Association and Center for Biological Diversity (collectively, "ONDA"), two conservation organizations, brought suit against the United States Forest Service and the Malheur National Forest Supervisor (collectively, "Forest Service") in the United States District Court for the District of Oregon.[138] ONDA alleged that the Forest Service violated the National Forest Management Act (NFMA)[139] when it failed to "analyze and show" that its issuance of grazing authorizations for seven allotments in the Malheur National Forest (MNF) were consistent with the MNF Land and Resource Management Plan (Forest Plan). Several ranchers whose livestock graze on these allotments intervened on the side of the Forest Service. The Ninth Circuit first determined the case was justiciable, despite the Forest Service's assertions to the contrary, then ultimately affirmed the district court's grant of summary judgment in favor of the Forest Service.

The MNF is home to a regional population of bull trout which is listed as threatened under the Endangered Species Act (ESA),[140] due in part to habitat damage resulting from livestock grazing activity. The Forest Service manages livestock grazing within the MNF under the Forest Plan and through the issuance of grazing authorizations for specified allotments. Under NFMA, "instruments for the use and occupancy of National Forest System lands" must be "consistent with" the applicable forest plan.[141] The Forest Plan for MNF includes standards for

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[137] *Id.* (explaining how the Service interpreted "hold, acquire, or use" to include "control" and then defined "control" to include "the ability through any means whatsoever to control or have a controlling influence over the entity to which [quota share] is registered").

[138] Or. Nat. Desert Ass'n v. U.S. Forest Serv., No. 3:03-cv-0213-PK, 2018 WL 1811467 (D. Or. Apr. 16, 2018).

[139] National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2018) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93- 378, 88 Stat. 476 (1974)).

[140] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

[141] 16 U.S.C. § 1604(i).

management of grazing practices, two of which ONDA alleges the Forest Service violated here: INFISH Standard GM-1 (Standard GM-1) and Forest Plan Management Area 3A Standard 5 (Standard 5). Standard GM-1 requires the Forest Service to modify or suspend grazing practices which interfere with attainment of Riparian Management Objectives (RMOs)[142] or which are likely to adversely affect inland native fish. Standard 5 requires the Forest Service to provide habitat sufficient to support or increase populations of bull trout and certain other fish species.

ONDA challenged 117 grazing authorizations on seven allotments in the MNF under NFMA and the Administrative Procedure Act (APA).[143] ONDA sought a declaratory judgment as to the legality of the authorizations and an injunction on livestock grazing in bull trout critical habitat and certain other areas. The district court granted summary judgment for the Forest Service and Intervenors and dismissed the action with prejudice. On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment *de novo*. The court also reviewed *de novo* the Forest Service's allegations that the case was moot and not ripe. The court applied an arbitrary and capricious standard of review in its assessment of the alleged NFMA violations.

The Ninth Circuit first rejected the Forest Service's argument and found the case ripe for adjudication. Though ONDA challenged a large number of grazing authorizations, the court upheld the challenges as sufficiently specific to a subset of authorizations, rather than a broad challenge to "forest-wide management practices."[144] Therefore, the case was ripe.

The court also rejected the Forest Service's argument that the case was moot. Though many of the challenged grazing authorizations had expired since this litigation began in 2003, the court could still provide effective relief because the effects of grazing continue beyond the grazing period itself. If the court were to find in favor of ONDA and conclude the grazing was unlawful, the court could remedy the damage from the authorizations by ordering a stop or a reduction in ongoing grazing, allowing the riparian habitats to recover.

The court then moved on to ONDA's challenges to the grazing authorizations. ONDA argued that the Forest Service acted arbitrarily and capriciously when issuing the grazing authorizations because it failed to satisfy NFMA's requirement that the agency "analyze and show" in a written document that the authorizations were consistent with the Forest Plan.[145] The court rejected this position, finding no basis in Ninth Circuit

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142 RMOs are established under the Inland Native Fish Strategy (INFISH), a program adopted by the Forest Service in 1995 for the management of inland fish habitats in Eastern Oregon and surrounding areas.

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

144 Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1067 (9th Cir. 2002).

145 Or. Nat. Desert Ass'n v. U.S. Forest Serv., 957 F.3d 1024, 1033 (9th Cir. 2020).

precedent to establish an obligation that the Forest Service produce such a written document.

Next, the court rejected ONDA's contention that the Forest Service failed to demonstrate the consistency of the grazing authorizations with Standard GM-1 and Standard 5. The court found that the Forest Service complied with both standards when it conducted annual monitoring, prepared Biological Assessments under the ESA, analyzed RMO compliance throughout the entire period in question, and consulted both informally and formally with the U.S. Fish and Wildlife Service (USFWS).[146] Further, the Forest Service's grazing authorizations also included stipulations for the protection of riparian habitat and the agency had, in fact, suspended or stopped grazing activity in the past in response to potential effects on bull trout. This persuaded the court that the Forest Service adequately enforced the Forest Plan standards in compliance with NFMA. Noting that the court gives "substantial deference" to the Forest Service's interpretation of its own Forest Plan, the court held that the Forest Service did not act arbitrarily and capriciously with respect to Standard GM-1 and Standard 5 when it issued the grazing authorizations.

In sum, the Ninth Circuit held that the Forest Service did not violate NFMA when it issued grazing authorizations for seven allotments in the MNF because the agency was not obligated to provide a written document demonstrating the authorizations' compliance with the Forest Plan. Furthermore, the Forest Service was substantively in compliance with both Standard GM-1 and Standard GM-5 of the Forest Plan. The Ninth Circuit therefore affirmed the district court's grant of summary judgment for the Forest Service and Intervenors.

III. MISCELLANEOUS

A. National Environmental Policy Act

1. Bark v. United States Forest Service, 958 F.3d 865 (9th Cir. 2020)

Bark, Cascadia Wildlands, and Oregon Wild (collectively, "Bark"), a group of conservation organizations, brought suit against the United States Forest Service (USFS) in the United States District Court for the District of Oregon.[147] Bark contended that USFS violated the National Environmental Policy Act (NEPA)[148] when it determined that the Crystal Clear Restoration Project (Project), a forest management initiative and timber sale, did not require an Environmental Impact Statement (EIS). Bark also claimed that USFS violated the National Forest Management

146 USFWS concluded that the Forest Service's grazing plans were not likely to adversely affect bull trout or their critical habitat.

147 Bark v. U.S. Forest Serv., 393 F. Supp. 3d 1043 (D. Or. 2019).

148 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h (2018).

Act (NFMA)[149] when it did not comply with forest plans and guidance documents applicable to the Project area. The Ninth Circuit reversed the district court's grant of summary judgment in favor of USFS and held that USFS was required to prepare an EIS for the Project. The Ninth Circuit did not reach the NFMA claim.

The Project proposed to use a forest management technique called "variable density thinning" to cut trees for forest products.[150] According to USFS, the Project would also reduce the risk and intensity of wildfires. Under NEPA, agencies are required to prepare an Environmental Assessment (EA) to determine whether a federal action will "significantly affect[] the quality of the human environment"[151] and thus require an EIS, or if the project instead warrants a finding of no significant impact (FONSI). To determine if a project will have a significant impact, NEPA requires the agency to consider both the context and intensity of the project's possible effects. Under this analysis, the agency considers a list of ten non-exhaustive factors, including how "highly controversial" or "highly uncertain" the environmental effects of the project are likely to be.[152] If the EA raises "substantial questions" about the potential impact of the project, an EIS is required.[153] A project is "highly controversial" if there is sufficient evidence to question the reasonableness of the agency's decision, creating a "substantial dispute."[154] The agency must also consider the cumulative impacts of the project in the aggregate with "other past, present, and reasonably foreseeable future" actions by any agency.[155] Here, following the completion of an EA, USFS issued a FONSI and therefore did not prepare an EIS.

Bark challenged the FONSI in district court under NEPA and NFMA. The district court granted USFS' motion for summary judgment on all claims. On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment *de novo*. The court applied an arbitrary and capricious standard of review in its analysis of USFS' decision to issue the FONSI and decline to prepare an EIS.

The Ninth Circuit first held that the Project required an EIS because Bark provided evidence which raised substantial questions about the potential impact of the Project. This classified the Project as highly controversial and warranted an EIS. In its public comments on the EA, Bark presented scientific evidence demonstrating that variable density thinning may not be effective in fire suppression and may actually worsen

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149 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2018) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

150 The Project would affect nearly 12,000 acres of land in Mt. Hood National Forest.

151 42 U.S.C. § 4332(2)(C).

152 40 C.F.R. § 1508.27(b)(4) (2012).

153 Bark v. U.S. Forest Serv., 958 F.3d 865, 868 (9th Cir. 2020) (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)).

154 *Id.* at 870 (quoting Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1240 (9th Cir. 2005)).

155 40 C.F.R. § 1508.7.

fire severity, contrary to USFS' assertions. USFS failed to meaningfully engage with this evidence in its response to Bark's comments. The Project was therefore highly controversial and highly uncertain, and an EIS was required.

Next, the Ninth Circuit held that the Project further required an EIS because USFS failed to provide any meaningful cumulative effects analysis. While the agency noted the existence of some other projects it claimed to have considered, it neither quantified nor sufficiently detailed the cumulative impacts of these projects. Instead, the agency merely made conclusory assertions that there would be "no cumulative effects."[156] Furthermore, a portion of the EA which purported to address cumulative impacts on spotted owls limited the analysis in the EA to such a small buffer zone that it was impossible to differentiate cumulative impacts from the Project's direct impacts. The inadequacy of USFS' cumulative effects analysis left the court unable to verify whether the agency considered these effects at all, creating a substantial dispute about the significance of the Project's environmental impact. USFS was therefore required to prepare an EIS.

Having already concluded that the Project required an EIS, the Ninth Circuit did not reach Bark's NFMA claims.

In sum, the Ninth Circuit held that USFS violated NEPA when it failed to prepare an EIS for the Project because Bark had demonstrated a substantial dispute about the potential impacts of the project and USFS did not provide an adequate cumulative effects analysis. The Ninth Circuit therefore reversed the district court's ruling and remanded the case for further proceedings.

Judge Graber concurred in the judgment and the portion of the court's opinion which concluded the Project required an EIS because the proposed variable density thinning is both highly controversial and highly uncertain. Judge Graber would not, however, have reached the issue of the cumulative impacts analysis.

2. American Wild Horse Campaign v. Bernhardt, 963 F.3d 1001 (9th Cir. 2020)

American Wild Horse Campaign[157] and Kimerlee Curyl (collectively, "Wild Horse"), filed suit against Bureau of Land Management (BLM) and the Secretary of the Department of the Interior (collectively, "BLM") opposing the "geld and release" component of BLM's wild horse management plan ("Gather Plan"). Wild Horse asserted that the gelding component violated the National Environmental Policy Act (NEPA),[158]

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156 *Bark*, 958 F.3d at 872.

157 American Wild Horse Campaign is a nonprofit organization that engages in litigation and policy work to protect wild horses and burros from government roundups (i.e. removal from public lands).

158 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

the Wild Free-Roaming Horses and Burros Act (WHBA),[159] and the Administrative Procedure Act (APA).[160] Wild Horse argued that BLM acted arbitrarily and capriciously because (1) five NEPA intensity factors demonstrated that gelding has significant effects on the environment, yet BLM did not prepare an environmental impact statement (EIS) as required by NEPA; and (2) BLM authorized the plan without considering all relevant evidence. The District Court for the District of Nevada granted summary judgment for BLM.[161] The Ninth Circuit reviewed the decision *de novo* and affirmed.

The WHBA authorizes BLM to manage wild horse populations, and when necessary, "remove" excess horses from public lands to avoid overpopulation and degradation of rangeland resources. BLM keeps removed horses in long-term holding facilities for the remainder of their lives. The WHBA also grants BLM authority to use other population control methods, such as gelding.[162] Because the holding facilities were overpopulated with 8,600 excess horses, BLM developed a "Gather Plan" in 1971 which included, among other things, the geld and release of some male horses back into the wild. After considering 5,000 public comments, BLM issued a final Environmental Assessment (EA) for the Gather Plan and later issued a "finding of no significant impact" (FONSI).

NEPA requires agencies to prepare an EIS for major federal actions which "significantly affect the quality of the human environment." To make this determination, agencies must consider the intensity (severity) of the proposed project's effects. NEPA also requires agencies to take a "hard look" at the consequences of the actions. In addition, the WHBA requires BLM to consult with individuals recommended by the National Academy of Sciences, and upon BLM's discretion, others with expertise in wild horse management. Furthermore, the APA requires agencies to explain any inconsistent factual findings in their EA.

First, Wild Horse argued that BLM violated NEPA by failing to prepare an EIS for the Gather Plan. In Wild Horse's view, the Gather Plan requires an EIS because the gelding component would have significant effects on the environment, as demonstrated by five of NEPA's intensity factors: the effects are highly uncertain; the effects are highly controversial; the gather area is in close proximity to "cultural resources" (i.e. wild horses); the Gather Plan establishes precedent for future actions with significant effects; and the Gather Plan threatens a violation of federal law. The Ninth Circuit analyzed each factor and found no violation of NEPA.

As to the uncertainty factor, the Ninth Circuit held that BLM conducted a thorough review of all existing research, and thus, their scientific prediction that the geld and release method would not yield

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159 Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2018).

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

161 Am. Wild Horse Campaign v. Zinke, 353 F. Supp. 3d 971 (D. Nev. 2018).

162 Gelding is a form of castration performed on male horses.

significant effects on individual wild horses, nor family structures, was reasonable. The court also pointed to Wild Horse's lack of evidence, noting that a single study which suggests a connection between gelding and aggressive behavior in domesticated horses, does not per se suffice to demonstrate "highly uncertain effects." Addressing the controversy factor, the court reasoned that mere opposition to agency action—without supporting evidence—does not, by itself, create a "controversy" within the meaning of NEPA. With regard to the proximity factor, the Ninth Circuit upheld BLM's determination that the gather area was not in "close proximity to historical or cultural resources" because wild horses are not considered a cultural resource. Next, the court rejected Wild Horse's assertion that the Gather Plan improperly established precedent, noting instead that the Gather Plan is highly specific to the project, locale, and available data, and therefore will not have wide-reaching effects. Finally, the court found no threat of violation to federal law because BLM followed the mandate of WHBA to address existing data and expert opinions during the public-comment period.

Second, Wild Horse argued that BLM violated NEPA's "hard look" standard and the WHBA's consultation requirement by failing to consider BLM's Gelding Study, expert opinions, and the National Academy of Sciences (NAS) report. The Ninth Circuit dismissed Wild Horse's attack under both NEPA and the WHBA. The court conceded that BLM did not discuss at length its Gelding Study in the EA. The court held, however, that BLM considered and addressed the only relevant factor raised by the Gelding Study and explained why additional information was not available. This, in the court's view, met NEPA's "hard look" standard. Further, the court held that the WHBA does not require BLM to discuss all expert opinions submitted during the public comment period; the WHBA merely requires BLM to consult with NAS and leaves it to the Secretary's discretion to consult "other individuals" with expertise and knowledge. Here, the court found no violation of the WHBA because (1) BLM sufficiently addressed concerns and factors raised in the NAS report; and (2) BLM justified its divergence from suggestions in expert opinions, pointing to parts of the EA that addressed common concerns.

Lastly, Wild Horse asserted that BLM violated the APA because BLM did not explain a factual inconsistency in the Gather Plan: BLM claimed in the EA that it needed the results of its Gelding Study before it could make an informed decision about gelding wild horses, and subsequently issued the Gather Plan without explaining why the Study's results were no longer necessary. The Ninth Circuit rejected this argument, noting that BLM made no such finding in its EA for the Gelding Study; rather, BLM merely acknowledged that some uncertainty remained.

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment for BLM on three grounds. First, the "intensity factors" put forth by Wild Horse do not demonstrate significant effects on the environment, therefore BLM did not violate NEPA by failing to

prepare an EIS. Second, BLM authorized the Gather Plan only after considering all relevant evidence that the agency was required to consider. As such, BLM did not violate NEPA's "hard look" standard, nor the WHBA's consultation requirement. Finally, BLM did not violate the APA because BLM did not fail to explain any factual inconsistencies.

B. Border Wall Litigation

1. Sierra Club v. Trump, 977 F.3d 853 (9th Cir. 2020)

Plaintiffs Sierra Club, Southern Border Communities Coalition (SBCC), and nine states (collectively, "Sierra Club")[163] filed suit against the Trump Administration,[164] challenging the Administration's use of emergency construction authority under 10 U.S.C. § 2808 (Section 2808) to authorize the construction of eleven border wall projects on the southern border of the United States. Sierra Club argued that the Administration misplaced reliance on Section 2808 because the border construction projects failed to satisfy two statutory requirements of Section 2808: the projects were neither "necessary to support the use of the armed forces," nor were they "military construction projects."[165] The U.S. District Court for the Northern District of California granted summary judgment and declaratory relief to Sierra Club on their Section 2808 claims and issued a permanent injunction.[166] The Ninth Circuit reviewed the district court's grant of injunctive relief for abuse of direction. The Ninth Circuit affirmed the summary judgment verdict in favor of Sierra Club and affirmed the district court's issuance of a permanent injunction blocking construction at the border.

On February 15, 2019, President Trump invoked his authority under the National Emergencies Act[167] and declared the state of affairs at the U.S.-Mexico border a "national emergency"[168] requiring emergency construction authority under Section 2808.[169] Congress twice attempted to end the national emergency classification, but both efforts were blocked

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163 Sierra Club and the Southern Border Communities Coalition are nonprofit environmental organizations with an interest in protecting their members' use and enjoyment of the land near the Southern border of the United States, and the natural resources and wildlife therein. State plaintiffs were California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin.

164 Defendants were President Donald J. Trump, Mark T. Esper (Acting Secretary of Defense), Ryan D. McCarthy (Secretary of the Army), Kenneth J. Braithwaite (Secretary of the Navy), Barbara M. Barrett (Secretary of the Air Force), the United States Treasury and Acting Secretary therein, the U.S. Department of the Interior and Acting Secretary therein, and the U.S. Department of Homeland Security and Acting Secretary therein.

165 Sierra Club v. Trump, 977 F.3d 853, 879 (9th Cir. 2020).

166 California v. Trump, 407 F. Supp. 3d 869 (N.D. Cal. 2019).

167 50 U.S.C. § 1601 *et seq* (2012).

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

169 Section 2808 permits the use of emergency construction authority, but only in the event of a declaration of war or a declaration establishing a national emergency.

via presidential veto. On September 3, 2019, the Secretary of Defense unveiled the Administration's intent to divert funds from the Department of Defense's budget in order to pay for eleven border wall construction projects. In total, the Secretary of Defense diverted funds from 128 military construction projects—totaling over $500 million. Under authority of Section 2808, the Secretary of Defense authorized the military to begin border construction without consideration of environmental laws such as the National Environmental Policy Act[170] or the Endangered Species Act.[171] In response, Sierra Club filed suit.

Before turning to the merits of the case, the Ninth Circuit held that all plaintiffs established Article III standing to challenge the Administration's projects because plaintiffs demonstrated injury-in-fact, causation, and redressability. First, the court held that all nine states had Article III standing: California and New Mexico suffered environmental injuries—harm to natural resources and endangered species living near the border—and that by directing the military to proceed without considering otherwise applicable state and federal laws, the Trump Administration harmed the States' quasi-sovereign interests by interfering with their ability to enforce state code, including laws to protect public health and the environment. Next, the court held that the remaining seven states suffered economic injuries from the Trump Administration's diversion of military funds under Section 2808, which robbed the states of beneficial military construction projects that would have otherwise resulted in state and local tax revenue.

Additionally, the Ninth Circuit held that Sierra Club and SBCC adequately alleged organizational standing by showing that (1) their members would otherwise have standing to sue in their own right, (2) the interests the organizations seek to protect are germane to the organizations' purposes, and (3) both organizations suffered a diversion of its resources and a frustration of its mission.

After addressing standing, Sierra Club first argued that all plaintiffs had a cause of action to bring suit. The Ninth Circuit agreed, holding that the States fall within Section 2808's "zone of interests"[172] and that the States have a cause of action under the Administrative Procedure Act (APA)[173] because the Department of Defense violated its affirmative duty under Section 2808 to refrain from invoking the statute's emergency construction authority except in rare circumstances—none of which applied here. Next, the Ninth Circuit held that Sierra Club and SBCC met the requirements to appropriately assert a cause of action under the Appropriations Clause of the Constitution because the Trump Administration had allegedly diverted funds without meeting Section

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170 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

171 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

172 *Sierra Club*, 977 F.3d 853, 878 (9th Cir. 2020).

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

2808's requirements and such actions fall within the Appropriations Clause's zone of interests.[174]

Second, Sierra Club argued that Section 2808 did not authorize construction at the border because neither of Section 2808's requirements were met: the Administration's projects were not necessary to support the use of the armed forces and they were not military construction projects. The court agreed, reasoning that border construction benefited U.S. Border Control and the Department of Homeland Security ("DHS")—a civilian agency—and not the armed forces. Additionally, the court held that the ordinary meaning of "necessary" (indispensable; vital; essential) does not support the Trump Administration's use of Section 2808 because the projects were not done out of necessity, but rather, efficiency.

The court further held that while Section 2808 permits the Secretary of Defense to undertake military construction projects, the border wall projects at issue do not qualify as such. Section 2801 defines "military construction" as involving a "military installation"—a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department."[175] The Trump Administration emphasized the border wall projects' proximity to Fort Bliss—a military installation—and argued that that the land on which President Trump's projects would be built were subject to military jurisdiction, and therefore, the border wall projects involved "other activity under the jurisdiction of the Secretary of a military department." The Ninth Circuit rejected both arguments, reasoning that the border wall projects were located hundreds of miles away from Fort Bliss and were functionally distinct from Fort Bliss, with regard to the purpose and type of military activities conducted. Second, the court reasoned that because Congress provided specific examples of military installations such as bases, camps, posts, stations, and yards, the term "other activity" cannot be read so broadly as to encompass construction of a border wall. Doing so, in the court's view, would render the specific examples mere surplusage and contradict the text of Section 2808.

Finally, the Ninth Circuit held that the district court did not abuse its discretion in granting Sierra Club a preliminary injunction enjoining construction at the border. The Ninth Circuit found that (1) Sierra Club would suffer an irreparable injury absent injunctive relief; (2) the available remedies at law are inadequate; (3) the balance of hardships between the parties weighs in favor of enjoining the Trump Administration; and (4) the public interest is best served by granting Sierra Club an injunction because doing so will deter the misuse of executive power. Lastly, the Ninth Circuit held that the district court did not abuse its discretion in dismissing the States' request for a separate permanent injunction, deeming the request duplicative and moot.

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174 The Appropriations Clause, U.S. Constitution. Art. 1, § 9, cl. 7, states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

175 10 U.S.C. § 2801(a), (c)(4).

In sum, the Ninth Circuit held that Section 2808 did not authorize the construction of three projects along the southern border of the United States and that the Trump Administration's actions violated the APA and the Appropriations Clause. The court affirmed the district court's grant of summary judgment in favor of Sierra Club and affirmed the district court's issuance of a permanent injunction.

Judge Collins dissented, concluding that Trump Administration's invocation of Section 2808 was lawful. Judge Collins first addressed standing, agreeing with the majority that Sierra Club, California, and New Mexico had established Article III standing and had a cause of action to challenge the construction projects under the APA. Next, Judge Collins asserted that the construction activities satisfied all three statutory requirements of Section 2808.

Judge Collins concluded that (1) in accordance with the National Emergencies Act, the President declared a national emergency at the southern border requiring the use of armed forces; (2) the construction projects qualified as "military construction projects"[176] under Section 2808 because they involved military installations subject to the jurisdiction of a military Secretary; and (3) the projects were "necessary to support the use of the armed forces"[177] because by deterring illegal entry into the United States, the border wall would reduce the need for Department of Defense personnel at the projects' locations and allow for redeployment of personnel to areas of higher concern along the U.S.-Mexico border. As such, Judge Collins would have reversed the district court's grant of summary judgement for Sierra Club.

2. California v. Trump, 963 F.3d 926 (9th Cir. 2020)

Plaintiffs comprised of sixteen states (collectively, "the States")[178] filed suit against the Trump Administration and various agencies,[179] challenging the Administration's invocation of Sections 8005 and 9002 of the Department of Defense Appropriations Act of 2019,[180] in order to transfer $2.5 billion from the Department of Defense's (DoD) budget to President Trump's border construction projects. The States argued that the budgetary transfer was unlawful because the transfer did not meet the statutory requirements of Sections 9002: President Trump's border

176 *Sierra Club*, 977 F.3d at 905.

177 *Id.*

178 State plaintiffs include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Wisconsin.

179 Defendants include President Donald J. Trump, Ryan D. McCarthy (Secretary of the Army), Richard V. Spencer (Secretary of the Navy), Heather Wilson (Secretary of the Air Force), the U.S. Department of Defense and Acting Secretary therein, U.S. Department of the Treasury and Acting Secretary therein, the U.S. Department of the Interior and Acting Secretary therein, and the U.S. Department of Homeland Security and Acting Secretary therein.

180 P.L. 115-245 div. A, Sept. 28, 2018, 132 Stat. 2982.

wall was not an "unforeseen military requirement" and certain funding requests for border construction had previously been denied by Congress. The U.S. District Court for the Northern District of California granted declaratory judgment to the States on the Section 9002 claim but refused to issue a permanent injunction.[181] The Ninth Circuit reviewed the district court's conclusions regarding Article III standing and statutory interpretation *de novo* and reviewed the district court's denial of injunctive relief for abuse of direction. The Ninth Circuit affirmed the district court's grant of declaratory judgment to the States and affirmed the district court's denial of the permanent injunction sought by the States.

On January 6, 2019, the Trump Administration requested $5.7 billion to fund the construction of 234 miles of wall at the southern border of the United States. After failed negotiations, Congress passed the Consolidated Appropriations Act of 2019, setting aside only $1.375 billion for Trump's border projects. In response, President Trump invoked his authority under the National Emergencies Act (NEA)[182] and declared the state of affairs at the southern border a "national emergency"[183] requiring the reprogramming of funds from several sources—including $2.5 billion from the DoD budget—to cover the cost of immediate border wall construction.

Shortly thereafter, the Department of Homeland Security (DHS) submitted a funding request to the DoD for several border construction projects that, in theory, would block drug smuggling corridors.[184] Because the DoD budget fell short of the amount DHS requested ($2.5 billion), the Secretary of Defense authorized a budgetary transfer under Sections 8005 and 9002 of the Department of Defense Appropriations Act of 2019 (DODAA § 8005),[185] diverting $1 billion from Army personnel funds and $1.5 billion from "various excess appropriations" to border construction activities. Additionally, because the projects were undertaken for the purpose of border security, DHS invoked their authority under the Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[186] to waive all legal requirements that would otherwise apply to the projects in order to ensure expeditious construction. On February 18, 2019, the States filed suit.

DODAA § 8005 limits budgetary transfer powers by imposing several requirements: (1) the authority may not be invoked unless used for higher

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181 California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019).

182 50 U.S.C. § 1601 *et seq* (2012).

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

184 10 U.S.C. § 284 allows for the transfer of funds to provide support for counter-drug activities of other federal government agencies. There were seven border wall construction projects approved under § 284 by the Acting Secretary of Defense: "Yuma Sector Projects" 1 and 2 in Arizona, "El Paso Sector Project"1 in New Mexico, "El Centro Sector Project" 1 in California, and "Tucson Sector Projects" 1–3 in Arizona.

185 P. L. 115-245, div. A, Sept. 28, 2018, 132 Stat. 2982.

186 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, div. C, §102(a)-(c), as amended by the REAL ID Act of 2005, P.L. 109-13, div. B, §102.

priority items based on unforeseen military requirements; and (2) if Congress previously denied funding for that particular project, the DoD cannot invoke transfer authority. Additionally, while DODAA § 8005 does not *require* formal congressional approval, it is common practice for the DoD to seek informal approval before proceeding with the budgetary transfer—something the DoD failed to do in this instance.[187]

Before turning to the merits of the case, the Ninth Circuit held that the States had Article III standing to challenge the Administration's projects because the States successfully demonstrated injury in-fact, causation, and redressability. Focusing on California and New Mexico, the Ninth Circuit held that both States suffered concrete and particularized environmental injuries—harm to natural resources, endangered species and threatened species living near the border. The court further held that the Trump Administration's use of IIRIRA waiver authority to bypass California and New Mexico's environmental laws harmed the States' quasi-sovereign interests by interfering with their abilities to enforce state code. Next, the court concluded that California and New Mexico's environmental and quasi-sovereign injuries were fairly traceable to the Administration's budgetary transfers under DODAA § 8005 and that the court could redress such injuries by declaring the budgetary transfers unlawful.

The States asserted that they had a cause of action to sue under the Administrative Procedure Act (APA)[188] because the States had Article III standing and the States' interests were within the "zone of interests" to be protected by the statute at issue in this case—DODAA § 8005. The Ninth Circuit held that the States satisfied the zone of interests test because the States were "suitable challengers" to enforce the statute; that is, the States' interests in this lawsuit are congruent with the interests of Congress—the intended beneficiary of DODAA § 8005. The court noted that both the States and Congress have an interest in tightening congressional control over the executive branch's reprogramming of funds, in order to avoid separation of powers issues and enforce the Appropriations Clause of the Constitution.[189]

Next, the States argued that DODAA § 8005 did not authorize the DoD's budgetary transfers to fund border wall construction because the DoD failed to satisfy both elements of DODAA § 8005 invocation: (1) the transfer must be based on unforeseen military requirements; and (2) transfers are not allowed where Congress previously denied funding for

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[187] Invocation of DODAA § 8005 does not "require" formal congressional approval, however, Administrations commonly obtain such approval by adhering to what is known as a "gentleman's agreement." After DoD failed to seek approval of the budgetary transfers, the House Committee on Armed Services and the House Committee on Appropriations both wrote letters to DoD formally disapproving of the DoD's unauthorized reprogramming action.

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

[189] The Appropriations Clause, U.S. Constitution. Art. 1, § 9, cl. 7, states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

that particular project or activity. The Ninth Circuit agreed that the DoD's transfers were unlawful. First, the court explained that neither the general need for enhanced border security, nor President Trump's proposed solution (construction of a border wall), were "unforeseen" and that construction projects at issue were not "military requirements" because the construction projects were not essential to the armed forces, soldiers, bearing of arms, or any other war effort.[190] The court noted that the budgetary transfers primarily benefited DHS, which is a civilian agency entirely separate from the armed forces. Second, the court pointed out that Congress has denied the Trump Administration's request for border wall funding on many occasions: Congress failed to pass seven bills that sought funding for the wall and refused to grant the Administration the $5.7 billion requested, instead appropriating $1.375 billion for the construction of "primary pedestrian fencing . . . in the Rio Grande Valley Sector."[191] For these reasons, the Ninth Circuit affirmed the district court's grant of declaratory judgment in favor of the States.

Turning to the States' request for injunctive relief, the Ninth Circuit affirmed the district court's denial of the States' request without prejudice to renewal. The Ninth Circuit agreed with the district court that granting the States an injunction would be a duplicative and unnecessary effort, as the district court already granted Sierra Club a permanent injunction enjoining border wall construction in a companion case.[192]

In sum, the Ninth Circuit concluded that the States adequately alleged Article III standing and had a cause of action to sue under the Administrative Procedure Act. The court held that the Trump Administration acted beyond the scope of DODAA § 8005 when authorizing the budgetary transfers at issue and as a result, the Ninth Circuit affirmed the district court's grant of declaratory judgment in favor of the States. The court also affirmed the district court's denial of an injunction, as the court deemed the requested relief duplicative and unnecessary.

Judge Collins dissented, agreeing that California had established Article III standing but determining that the States did not have a cause of action to challenge the budgetary transfers under the APA or any other law. Judge Collins further remarked that transfers satisfied the requirements of DODAA § 8005 and thus were a lawful exercise of executive power. As such, Judge Collins would have reversed the district court's grant of declaratory judgment in favor of the States and remanded for entry of partial summary judgment in favor of the Administration.

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190 The DODAA does not define the term "military," so the Ninth Circuit employed the ordinary meaning of the term, which means "of or relating to soldiers, arms or war."

191 California v. Trump, 963 F.3d 926, 932 (9th Cir. 2020).

192 Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2020).

C. Tribal Rights and Jurisdiction

1. Stand Up for California! v. U.S. Department of the Interior, 959 F.3d 1154 (9th Cir. 2020)

Nonprofit corporation Stand Up for California!, along with several other plaintiffs (collectively, Stand Up),[193] sued the Secretary of the Department of the Interior (Secretary) in the United States District Court for the Eastern District of California.[194] Stand Up challenged the Secretary's issuance of procedures under the Indian Gaming Regulatory Act (IGRA).[195] Stand Up claimed that the Secretarial Procedures violate the Administrative Procedure Act (APA)[196] because they conflict with certain gambling prohibitions of the Johnson Act.[197] Stand Up also claimed that the Secretarial Procedures violated the National Environmental Policy Act (NEPA),[198] the Clean Air Act (CAA),[199] and the Freedom of Information Act (FOIA).[200] The district court granted summary judgment to the Secretary on all claims. Stand Up timely appealed all but the FOIA claim. On appeal, the Ninth Circuit affirmed the district court's ruling as to the Johnson Act claim and vacated and remanded as to the NEPA and CAA claims.

In 2005, the North Fork Rancheria of Mono Indians (North Fork), a federally-recognized Indian tribe, submitted a fee-to-trust application to the Department of the Interior (DOI) to take 305 acres of land in Madera, California (Madera Parcel) to develop a hotel and casino. In reviewing the application, DOI completed an Environmental Impact Statement (EIS) under NEPA and made a conformity determination under the CAA. The district court upheld both actions as valid after Stand Up challenged the fee-to-trust determination.[201] North Fork and the State of California then began negotiating a Tribal-State compact to govern the Madera Parcel development. After California voters vetoed the compact, North Fork compelled the state to negotiate in good faith under IGRA.[202] The district court ordered California and North Fork to conclude a compact within sixty days, consistent with IGRA §§ 2710(d)(7)(A) and (d)(7)(B). The

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193 Plaintiffs-Appellants were Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God – Madera, and Dennis Sylvester.

194 Stand Up for Cal! v. U.S. Dep't of the Interior, 328 F. Supp. 3d 1051 (E.D. Cal. 2018).

195 Indian Gaming Regulatory Act § 11, 25 U.S.C. § 2710(d) (2018).

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

197 15 U.S.C. § 1175(a) (2018).

198 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

199 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2018).

200 Freedom of Information Act, 5 U.S.C. § 552 (2018).

201 Stand Up for Cal.! v. U.S. Dep't of the Interior, 204 F. Supp. 3d 212, 323 (D.D.C. 2016), *aff'd*, 879 F.3d 1177, 1192 (D.C. Cir. 2018).

202 *See* N. Fork Rancheria of Mono Indians v. California, No. 1:15-cv-00419, Docket 46, at 2–3, 2016 WL 4208452 (E.D. Cal. Aug. 10, 2016).

parties did not reach an agreement. The district court appointed a mediator charged with selecting from among each party's last best offer, "the one which best comports with the terms of [IGRA,] . . . any other applicable Federal law[,] and with the findings and order of the court."[203] The mediator adopted North Fork's proposed compact. California did not consent to the proposed compact, so the mediator submitted the compact to the Secretary of the Interior to prescribe Secretarial Procedures consistent with the mediator-selected compact. Such Secretarial Procedures would authorize class III gaming (as defined in IGRA) on the Madera Parcel pursuant to IGRA. The Secretary issued the Secretarial Procedures in July 2016. Stand Up then sued DOI in November 2016, ultimately seeking to block North Fork's development of the Madera Parcel. North Fork intervened and became co-defendants with DOI.

The Ninth Circuit reviewed the district court's summary judgment determination and interpretation of statutory meaning de novo, with deference to agency actions unless found arbitrary or capricious. The court first considered whether the Secretarial Procedures conflicted with the Johnson Act and therefore violated the APA. The Johnson Act prohibits "any gambling device . . . within Indian country"[204] and IGRA expressly exempts from the Johnson Act "gaming conducted under a Tribal-State compact."[205] But IGRA contains no express exemption for gaming conducted pursuant to Secretarial Procedures in place of a compact. Stand Up argued that because IGRA does not expressly indicate whether Secretarial Procedures shall be treated as a Tribal-State compact under IGRA, IGRA does not exempt gaming activities approved under Secretarial Procedures from Johnson Act gaming prohibitions. The Secretary maintained that Indian gaming activities conducted pursuant to Secretarial Procedures are not subject to Johnson Act restrictions. The court sided with the Secretary's interpretation of IGRA because an implied exemption of gaming activities via Secretarial Procedures is more consistent with IGRA's purpose and related provisions. The court reasoned that IGRA does not authorize Secretarial Procedures while simultaneously making gaming pursuant to those Procedures illegal and thwarting the remedial function of the Procedures. Further, the Ninth Circuit noted that even if it considered IGRA's statutory language ambiguous, *Chevron* deference and the Indian canon of statutory construction would resolve such ambiguity in favor of the Secretary and North Fork.

The Ninth Circuit next considered Stand Up's claims that the Secretarial Procedures at issue did not comply with NEPA and CAA requirements to conduct an EIS and a conformity determination, respectively. Contrary to the district court, the Ninth Circuit held that under IGRA, Secretarial Procedures have no per se exemption from

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203 25 U.S.C. § 2710(d)(7)(B)(iii)–(iv) (2018).
204 15 U.S.C. § 1175(a) (2018).
205 25 U.S.C. § 2710(d)(6).

NEPA and CAA requirements. The Ninth Circuit found no such exemption because the Secretary maintains discretion to consider other applicable federal laws when prescribing Secretarial Procedures. The Ninth Circuit, however, vacated and remanded the district court's ruling on these issues because the district court did not properly determine the threshold questions of (1) whether the Secretarial Procedures were a major federal action requiring an EIS, and (2) whether the EIS or conformity determination that were prepared in the previous fee-to-trust process satisfy the NEPA and CAA procedural requirements of the present action.

Finally, the Secretary argued that Secretarial Procedures are a type of agency rulemaking and as such are exempt from CAA requirements. The Ninth Circuit disagreed and noted that Secretarial Procedures are not issued pursuant to rulemaking requirements and procedures under the APA. Accordingly, the Ninth Circuit held that Secretarial Procedures are not categorically exempt from a CAA-required conformity determination. The court remanded the issue for the district court to consider the second threshold question listed above.

In sum, the Ninth Circuit held that Indian gaming activities conducted pursuant to IGRA Secretarial Procedures are not subject to Johnson Act restrictions and that IGRA does not categorically bar application of NEPA or CAA procedural requirements to the Secretary's actions in prescribing procedures for allowing gaming in Indian country. Therefore, the Ninth Circuit affirmed in part, vacated in part, and remanded the district court's grant of summary judgment.

D. Climate Change Torts

1. City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020)

The city of Oakland, California and the city and county of San Francisco, California (Cities) each sued five of the world's largest energy companies (Energy Companies)[206] in California state court. After the cases were consolidated, the defendants removed them to the United States District Court for the Northern District of California.[207] The Cities filed public nuisance claims against Energy Companies under California law. The district court denied Cities' motion to remand and granted Energy Companies' motion to dismiss for failure to state a claim. Cities appealed. On appeal, the Ninth Circuit held that the Cities' state-law claim for public nuisance does not arise under federal law for purposes of federal question jurisdiction pursuant to 28 U.S.C. § 1331; thus, the court remanded the case to the district court with instructions to consider whether there was an alternative basis for subject-matter jurisdiction

[206] The energy companies were BP P.L.C.., Chevron Corporation, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell pld.

[207] City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

and if not, to remand the case to state court.[208] Energy Companies petitioned for a panel rehearing and/or rehearing en banc. The Ninth Circuit unanimously voted to deny the Energy Companies' petition and instead amended one footnote of its opinion appearing at 960 F.3d 570 (9th Cir. 2020). This summary encompasses both rulings.

In 2017, Cities filed complaints alleging that Energy Companies' fossil fuel production and promotion caused or contributed to global warming that increased sea level rise. Cities claimed they have been and will continue to be harmed by sea level rise via increased coastal flooding and shoreline erosion, among other injuries. Cities sought an order of abatement requiring Energy Companies to pay for a "climate change adaptation program."[209] Energy Companies then removed Cities' complaints to federal court, identifying seven different grounds for federal subject-matter jurisdiction. The district court denied Cities' motion to remand the case to state court because the Cities' claim was "necessarily governed by federal common law."[210] In response, Cities amended their complaints to include a public nuisance claim under federal common law. In June 2018, the district court dismissed the amended complaints for failure to state a claim. The district court also ruled that it lacked personal jurisdiction over Energy Companies and entered judgments in their favor. Cities then appealed (1) the denial of their motions to remand, (2) the dismissal of their complaints for failure to state a claim, and (3) the district court's personal-jurisdiction ruling. The Ninth Circuit reviewed the questions of statutory construction and subject-matter jurisdiction de novo.

The court first considered Cities' argument that the district court erred in determining it had federal-question jurisdiction under 28 U.S.C. § 1331. To determine whether federal-question jurisdiction exists, the Ninth Circuit considers the pleadings filed at the time of removal, without reference to later amendments. The court acknowledged its responsibility to adhere to the well-pleaded-complaint rule and noted two exceptions to the rule. First, the court recognized a special category of state-law claims that arise under federal law for purposes of § 1331 because federal law is a necessary element of the claim for relief. Second, the "artful-pleading doctrine" allows removal where federal law fully preempts a state-law claim. In the present case, each complaint asserted only a single cause of action for public nuisance under California law, so the district court lacked federal-question jurisdiction unless one of the two exceptions applied.

Analyzing the first exception, the Ninth Circuit applied the Supreme Court's four-factor test from *Grable & Sons Metal Production, Inc. v. Darue Engineering & Manufacturing*.[211] The court only reached the first

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208 City of Oakland v. BP P.L.C., 960 F.3d 570, 575 (9th Cir. 2020).

209 City of Oakland v. BP P.LC., 969 F.3d 895, 902 (9th Cir. 2020).

210 *Id.*

211 545 U.S. 308, 314 (2005).

of these factors, concluding that Cities' state-law claim for public nuisance failed to raise a substantial federal question because it neither required an interpretation of a federal statute nor challenged a federal statute's constitutionality. Further, the court doubted whether the Cities' claim required an application or interpretation of federal law because (1) the Supreme Court has not determined that there is a federal common law of public nuisance relating to interstate pollution, and (2) the Ninth Circuit has previously held that federal public-nuisance claims aimed at imposing liability on energy producers for climate change issues are displaced by the Clean Air Act (CAA). Instead of identifying a legal issue, the Energy Companies suggested that Cities' state-law claim implicates a variety of federal interests including energy policy, national security, and foreign policy. The Ninth Circuit rejected this argument. The court reasoned that these policy considerations do not raise a substantial question of federal law for the purpose of determining jurisdiction under § 1331.

Energy Companies also argued that Cities' state-law claim for public nuisance arises under federal law because it is completely preempted by the CAA. The Ninth Circuit rejected this argument. The court noted that the Supreme Court has not held that the CAA is a statute with extraordinary preemptive force (only three statues have such distinction), and further that the Supreme Court has not answered the question of whether the CAA preempts a state-law nuisance claim under ordinary preemption principles. The Ninth Circuit continued to explain the CAA does not meet either of the two requirements for complete preemption. The court observed (1) the statutory language of the CAA does not indicate that Congress intended to preempt every state law cause of action within the scope of the CAA, and (2) the CAA does not provide Cities with a substitute cause of action. Because neither exception to the well-pleaded-complaint rule applied to the case at hand, the Ninth Circuit concluded that the district court erred in holding that it had jurisdiction under § 1331 at the time of removal.

The Ninth Circuit continued its inquiry, however, because Cities cured the subject-matter jurisdiction defect by amending their complaints to assert a claim under federal common law after removal. Therefore, at the time the district court dismissed Cities' complaints, there was subject-matter jurisdiction pursuant to § 1331 because the operative pleadings asserted a claim "arising under" federal common law. In response, Energy Companies raised two arguments in support of the court's authority to affirm the district court's dismissals, even without subject-matter jurisdiction at the time of removal.

First, Energy Companies argued that by amending their complaints to assert a claim under federal common law, Cities waived the argument that the district court erred in refusing to remand the cases to state court. The Ninth Circuit disagreed. The court found that Cities timely moved for remand and only amended their complaint to conform with the district court's ruling, while expressly reserving all rights to raise arguments that

immediate federal jurisdiction is improper. The court concluded that this reservation was sufficient to preserve the argument that removal was improper.

Second, Energy Companies argued that any impropriety regarding removal could be excused because "considerations of finality, efficiency, and economy"[212] weighed in favor of affirming the district court's dismissal of Cities' complaints. The Ninth Circuit first acknowledged that federal removal statute 28 U.S.C § 1441(a) requires a case to be "fit for federal adjudication at the time [a] removal petition is filed."[213] The court further explained that because a party violates § 1441(a) if it removes a case not fit for federal adjudication, a district court generally must remand the case to state court even if subsequent actions created federal subject-matter jurisdiction. The Ninth Circuit then recognized a narrow exception to this rule that weighs "considerations of finality, efficiency, and economy"[214] in determining whether, after a jurisdictional defect has been cured after removal and the case has been tried in federal court, a court can excuse a § 1441(a) violation if remanding the case to state court would be inconsistent "with the fair and unprotracted administration of justice."[215] The court explained that the decision to excuse a § 1441(a) violation depends on the stage of adjudication. In the present case, when the district court entered judgments, the cases had been on its docket for under a year and no discovery occurred. The Ninth Circuit found these proceedings to be an acceptably modest use of judicial resources and concluded that "considerations of finality, efficiency, and economy" were not "overwhelming"[216] here. Thus, the court held that if there was not subject matter jurisdiction at the time of removal, the district court must remand the cases to state court.

In sum, an en banc panel of the Ninth Circuit vacated the district court's judgment and remanded the case to the district court to determine whether an alternative basis for federal jurisdiction exists. If the district court finds no such basis, the court must remand the cases to state court. Finally, the Ninth Circuit noted it retains jurisdiction over any further appeals arising from these cases.

2. County of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020)

The County of San Mateo and other cities and counties (collectively, "Counties")[217] brought six actions against more than thirty oil and gas

212 Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 (1996).
213 *Id.* at 73.
214 *Id.* at 75.
215 *Id.* at 77.
216 *Id.*
217 Plaintiffs were the County of San Mateo, the County of Marin, the City of Imperial Beach, the County of Santa Cruz, the City of Santa Cruz, and the City of Richmond.

companies (collectively, "Energy Companies")[218] in California state court. The six complaints alleged nuisance and other tort actions over the role of the Energy Companies' fossil fuel products and related operations[219] in causing the increase in global mean temperature change and sea level rise. The Energy Companies removed the cases to federal court, asserting eight grounds of subject-matter jurisdiction. The Counties moved to remand to state court. The United States District Court for the Northern District of California granted the Counties' motions[220] and the Energy Companies appealed. On appeal, the Ninth Circuit reviewed the district court's remand order de novo and affirmed in part and dismissed in part.

In 2017, the County of San Mateo, the County of Marin, and the City of Imperial Beach filed three separate complaints in California state court against the Energy Companies, alleging public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass. The County of Santa Cruz, the City of Santa Cruz, and the City of Richmond filed similar complaints in California state court soon after. The complaints alleged that the Energy Companies' fossil fuel products and related operations are a substantial factor in causing the increase in global mean temperature change and sea level rise.

The Energy Companies removed all six complaints to federal court, asserting eight bases for federal subject-matter jurisdiction, including removal under the federal-officer removal statute.[221] The Counties moved to remand to state court based on a lack of subject-matter jurisdiction. The district court granted the Counties' motions, rejecting all eight of the grounds upon which the Energy Companies relied for subject-matter jurisdiction but stayed the remand orders. The Energy Companies appealed.

The Ninth Circuit explained that under the "non-reviewability clause" of 28 U.S.C. § 1447, its authority to review a remand order is limited; only an order remanding a case to State court pursuant to the "exception" clauses, § 1442 or § 1443 are reviewable by appeal. The court

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[218] Defendants were Chevron Corporation: Chevron U.S.A, Inc., ExxonMobil Corporation, BP PLC, BP America, Inc., Royal Dutch Shell PLC, Shell Oil Products Company LLC, CITGO Petroleum Corporation, ConocoPhillips, Conoco-Phillips Company, Phillips 66 Company, Peabody Energy Corporation, Total E&P USA, Inc., Total Specialties USA, Inc., Arch Coal, Inc., Eni Oil & Gas Inc., Rio Tinto Energy America, Inc., Rio Tinto Minerals, Inc., Rio Tinto Services, Inc., Anadarko Petroleum Corporation, Occidental Petroleum Corporation, Occidental Chemical Corporation, Repsol Energy North America Corp., Marathon Oil Company, Marathon Oil Corporation, Marathon Petroleum Corp., Hess Corp., Devon Energy Corp., Devon Energy Production Company, LP, Encana Corporation, and Apache Corp.

[219] Fossil fuel-related operations include the Energy Companies' "wrongful promotion of their fossil fuel products and concealment of known hazards associated with the use of those products; and their failure to pursue less hazardous alternatives available to them." County of San Mateo v. Chevron Corp., 960 F.3d 586, 593 (9th Cir. 2020) (internal citations omitted).

[220] County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018).

[221] 28 U.S.C. § 1442(a)(1).

reviewed the district court's holding that there was no subject-matter jurisdiction under the federal-officer removal statute de novo.

The Ninth Circuit first considered the Energy Companies' claim that the district court's order remanded the complaints based not on a ground of subject-matter jurisdiction, but on a merits determination.[222] The Ninth Circuit rejected this argument. The court further explained that even if the district court erred in reaching this conclusion, review on appeal is unavailable.

The Ninth Circuit next considered the Energy Companies' claim that the "exception clause" of 28 U.S.C. § 1447(d) required plenary review of the district court's remand order. The Ninth Circuit considered its holding in *Patel v. Del Taco, Inc.*,[223] in which the panel decided the exception clause granted it the authority to review a district court's remand order "only to the extent that the order addresses the statutory sections listed in the clause."[224] The Energy Companies argued that the court should instead follow the Seventh Circuit in *Lu Juhong v. Boeing Co.*,[225] which held that when a complaint is removed to State court "pursuant to section 1442," under the statute, the entire remand order is subject to plenary review.[226] The Energy Companies urged the Ninth Circuit to follow *Lu Juhong* instead of *Patel* because they alleged *Patel* was overturned when Congress amended the statute[227] and because *Patel* was poorly-reasoned. The Ninth Circuit disagreed, first highlighting that the Energy Companies' arguments implicate the doctrine of stare decisis and there is no intervening judicial authority that would abrogate *Patel*. The court further reasoned that Congress gave no indication that it intended to change the "then-unanimous" interpretation of the exception clause when it amended § 1447(d), but rather it intended to incorporate *Patel*. Applying *Patel's* interpretation of the exception clause, the court held it could review the district court's remand order only to the extent that it addressed the federal-officer removal statute. The court dismissed the Energy Companies' appeals for lack of jurisdiction to the extent the Energy Companies sought review of the district court's rulings on bases other than subject-matter jurisdiction.

The Ninth Circuit then analyzed the Energy Companies' claim that the district court erred in holding that there was no subject-matter jurisdiction under the federal-officer removal statute. The court first provided some statutory background, explaining that despite multiple amendments in its more than fifty-year history, the statute's purpose remains the same: to protect the Federal Government from interference

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222 The "non-reviewability clause" of §1447(d) generally applies when remand is based on a ground of subject-matter jurisdiction.

223 446 F.3d 996 (9th Cir. 2006).

224 *Chevron*, 960 F.3d at 595.

225 792 F.3d 805, 808 (7th Cir. 2015).

226 *Id.* at 811. The Seventh Circuit held that because § 1447(d) authorizes review of "an order," it authorizes review of the order itself and not just reasons for the order. *Id.*

227 Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2, 125 Stat. 545, 546 (2011).

by State authorities through disallowing States to bring Federal officers or agents to trial in State courts. The court noted that when Congress first enacted the statute, the phrase "officer of the United States" referred to officers with significant authority and that subsequent amendments extended the statute's scope to those "acting under" an officer. Federal employees "acting under" an officer include employees of officers as well as "private person(s)" with specific types of close relationships with the federal government. The court highlighted the factors the Supreme Court considers in determining whether a private person falls into this category. The court applied these factors to the Energy Companies' argument that they meet the statute's criteria based on three agreements they have with the federal government.

The court first considered defendant CITGO's fuel supply agreements with the Navy Exchange Service Command (NEXCOM), in which CITGO agreed to supply fuels to NEXCOM under three sets of contractual requirements.[228] The Energy Companies claim these three contracts are sufficient to invoke federal jurisdiction. The court disagreed, reasoning that the contractual provisions in the CITGO agreement seemed typical of commercial contracts and the act of supplying fuels to the Navy for resale is "not an activity so closely related to the government's implementation of federal law" that CITGO faced a significant risk of state-court prejudice.[229] The court held that CITGO was not "acting under" a federal officer by supplying fuels to NEXCOM under federal supply contracts.

The court next considered the Energy Companies' 1944 "unit agreement" for petroleum reserves between Standard Oil Company of California ("Standard"), defendant Chevron Corporation's predecessor in interest, and the U.S. Navy. The court pointed to its holding in *United States v. Standard Oil Company of California*[230] that Standard's activities under the unit agreement did not meet the criteria for the federal-officer removal statute because the company was not acting on behalf of the federal government to help the government perform its function, but rather, the company and the government reached an agreement that was mutually beneficial and the company was acting independently within that agreement.

The court then considered the Energy Companies' standard-form lease agreements ("Oil and Gas Leases of Submerged Lands Under the Outer Continental Shelf Lands Act").[231] The Energy Companies argued that they were "acting under" a federal officer when holding the leases because the leases required lessees to drill for oil and gas pursuant to government exploration plans and sell some of their products to certain

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[228] The contractual requirements include: (1) specific fuel specifications to meet compliance standards; (2) provisions allowing the Navy to inspect delivery, site, and operations; and (2) requirements for branding and advertising.

[229] *Chevron*, 960 F.3d at 601 (internal citations omitted).

[230] 545 F.2d 624, 626–28 (9th Cir. 1976).

[231] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356a (2018).

buyers. The Ninth Circuit disagreed, reasoning that the leases do not require the lessees to act on behalf of the federal government, fulfill basic governmental duties, or engage in an activity so closely related to the government function that they would risk state-court prejudice.

The court concluded that the Energy Companies did not meet their burden of proving by a preponderance of the evidence that they were "acting under" a federal officer sufficient to invoke the federal-officer removal statute.

In sum, the Ninth Circuit held that the non-reviewability clause only provided the court with jurisdiction to review the district court's removal order to the extent that the order addressed whether removal was proper under the federal-officer removal statute. Affirming in part, the Ninth Circuit held that the Energy Companies did not meet their burden of establishing the criteria under the federal-officer removal statute. Because the court lacked jurisdiction to review the rest of the remand order, it dismissed the remainder of the Energy Companies' appeal.

E. National Historic Preservation Act

1. Center for Biological Diversity v. Esper, 958 F.3d 895 (9th Cir. 2020)

The Center for Biological Diversity, other environmental organizations, and private individuals with interests in the preservation of the Okinawa dugong (collectively, "the Center"),[232] brought suit against the Secretary of Defense and the United States Department of Defense (collectively, "the Department") in the United States District Court for the Northern District of California.[233] The Center alleged that the Department violated § 402 of the National Historic Preservation Act (NHPA)[234] when it failed to take into account the effects of the construction and operation of a new aircraft base on the Okinawa dugong ("dugong"). The dugong is a listed endangered marine mammal with cultural significance to many Okinawans. The Center further alleged that the Department's finding that the base would have no adverse effect on the dugong was arbitrary, capricious, contrary to law, and contradicted by evidence in the record. The Ninth Circuit held that the Department complied with all procedural requirements of § 402 and its finding of "no adverse effect" was not arbitrary or capricious. The Ninth Circuit affirmed the district court's grant of summary judgment for the Department.

This case centers around a Department project allowing for the construction and operation of an aircraft base in Okinawa, Japan. Section

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232 Plaintiffs included Turtle Island Restoration Network, Japan Environmental Lawyers Federation, Save the Dugong Foundation, Anna Shimabukuro, Takuma Higashionna, and Yoshikazu Makishi.

233 Okinawa Dugong (*Dugong dugon*) v. Mattis, 330 F. Supp. 3d 1167 (N.D. Cal. 2018).

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

402 of the NHPA directs federal agencies to "take into account" the effect of "any undertaking outside the United States" on "a property that is on the World Heritage List or on the applicable country's equivalent of the National Register [of Historic Places] . . . for purposes of avoiding or mitigating any adverse effect."[235] According to the district court, an agency must comply with four basic analytical components to sufficiently "take into account" the effect of the project:

(1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property, (3) a determination as to whether there will be adverse effects or no adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.[236]

The district court also noted that the agency should "engage the host nation and other relevant private organizations and individuals in a cooperative partnership" as part of the "take into account" process.[237]

In 2003, the Center filed suit under the Administrative Procedure Act (APA)[238] alleging the Department failed to take into account the adverse effects of the construction and operation of the base on the dugong in violation of § 402 of the NHPA. The Department moved to dismiss the suit on the grounds that the Japanese Law for the Protection of Cultural Properties, which protects the dugong as a natural monument, was not "equivalent" to the U.S. National Register of Historic Places for the purposes of § 402[239] and did not qualify as "property" under § 402.[240] The district court denied the motion to dismiss. The parties then filed cross-motions for summary judgment and the district court granted the Center's motion, holding that the Department failed to comply with the requirements of § 402 by failing to supply evidence that the Department adequately considered the available information on the dugong or the effects of the construction and operation of the base. The court ordered the Department to comply with the statutory requirements and held the case in abeyance until the Department completed the "take into account" process. The Department did so and concluded that the project would not pose an adverse effect on the dugong because there was

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235 *Id.* § 307101(e).

236 Ctr. for Biological Diversity v. Esper, 958 F.3d 895, 901–02 (9th Cir. 2020).

237 *Id.* at 902 (quoting Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1104 (N.D. Cal. 2008)).

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

239 Under § 402, the "take into account" process is required "[p]rior to the approval of any undertaking outside the United States that may directly and adversely affect a *property* that is on the World Heritage List or on *the applicable country's equivalent of the National Register [of Historic Places]*." 54 U.S.C. § 307101(e) (emphasis added).

240 Section 402 defines an "object" which is sufficient to qualify as "property" as a "material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." 36 C.F.R. § 60.3(j) (2020).

an "extremely low probability" of dugong presence in the area of the new base, and the construction and operation of the base would not have an adverse effect on any dugong in the area. In response, the Center filed its first supplemental complaint alleging that the Department violated the required procedures under § 402. The district court dismissed the complaint based on the standing and political question doctrines, but the Ninth Circuit reversed and remanded the case. On remand, the district court granted the Department's motion for summary judgment because the Center failed to demonstrate that the Department's process was unreasonable or violated § 402. The district court further held that the Department's "no adverse effects" finding was not arbitrary or capricious. On appeal here, the Ninth Circuit reviewed the district court's grant of summary judgment de novo, the Department's decisions under an arbitrary and capricious standard of review, and the Department's § 402 compliance procedures for reasonableness.

The Ninth Circuit began by agreeing that the "take into account" process must include the four steps and the consultation identified by the district court.

Second, the Ninth Circuit addressed the Center's allegation that the Department violated § 402 when it failed to consult with the Center and other local community members, provide an opportunity for public participation, and consult with any entity regarding the effects of the new base on the cultural characteristics of the dugong.[241] The court rejected the Center's assertion that the Department was obligated to consult with specific parties because while § 402 does require "reasonable consultation with outside entities," precisely which organizations, individuals, or entities the federal agencies choose to consult with and the manner of consultation are left to the discretion of the agencies.[242] The Department adequately considered the declarations submitted by the Center and obtained information from local community members indirectly. Therefore, the court found that the Department acted reasonably in not consulting the Center and local community members because it found no evidence that further consultation with the Center would have contributed material information. The court similarly held that § 402 does not require public participation because the provision contains no evidence of congressional intent nor guidelines to support such a requirement. In the absence of a notice and comment requirement under § 402, the Department reasonably considered only the Japanese government's public notice and comment. The Ninth Circuit also found the Department's decision not to seek consultation on the effect of the new base on the dugong's cultural significance reasonable because the

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241 The Center based this argument on regulations implementing § 106 of the NHPA, but the court rejected this approach because § 106 applies to projects within the U.S., while § 402 applies abroad. Furthermore, § 402 does not include any delegation of authority to a federal agency to promulgate implementing regulations, suggesting that Congress intended to allow federal agencies discretion in how they conduct the "take into account" process.

242 Ctr. for Biological Diversity, 958 F.3d 895, 906 (9th Cir. 2020).

Department considered a report which found no culturally important activities were being conducted in or associated with the project area.

Third, the court determined that the Department reasonably complied with the four components of the "take into account" process: 1) it clearly identified the protected property at issue: the dugong; 2) it commissioned and reviewed multiple studies, issued a final report of its findings, and included indirect consultation with Okinawans, direct engagement with the Japanese government, and incorporated the Japanese environmental impact study into its final recommendation; 3) it determined there would be no adverse effect to the dugong; and 4) there was no need to enact mitigation measures following the "no adverse effect" finding. The court therefore concluded that the process was reasonable.

Finally, the court rejected the Center's argument that the Department's conclusion that the new base would have no adverse effect on the dugong was arbitrary, capricious, and contrary to law. The court found that the Department had baseline biological data to allow a reliable determination of the effects of the new base on the dugong. The court also rejected the Center's arguments that the Department did not consider the full range of impacts of the new base on the dugong and the finding was contradicted by evidence in the record. The court acknowledged that the Department lacked robust baseline data for the dugong, but while such data is preferred, it is not required. The court therefore concluded that the monthly survey data relied upon by the Department was sufficient to support a reasonable conclusion that the dugong's presence in the project area was "sporadic and intermittent, at best," and therefore the project posed no adverse effect on the dugong.[243] The court next concluded that while the Department could have addressed certain factors more explicitly and obtained additional data, its failure to do so did not render its ultimate finding arbitrary, capricious, or contrary to law. Finally, the court found that through commissioned studies, previously conducted studies, interviews, and field work, the record rationally supported the Department's finding of "no adverse effects."

In sum, the court found that the Department complied with all procedural requirements of § 402 of the NHPA and its finding of "no adverse impact" was not arbitrary or capricious. The Ninth Circuit therefore affirmed the district court's grant of summary judgment for the Department.

F. Utilities

1. Abcarian v. Levine, 972 F.3d 1019 (9th Cir. 2020)

Utility customers (Plaintiffs) sued Los Angeles Department of Water and Power (DWP) and City of Los Angeles (City) officials (collectively,

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[243] *Id.* at 912.

"Defendants")[244] in the United States District Court for the Central District of California.[245] Plaintiffs alleged that DWP overcharged for electric power and then transferred the surplus revenue to the City, thereby allowing the City to collect an unlawful tax under California law. Plaintiffs asserted claims under the Hobbs Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), 42 U.S.C. § 1983, and various claims under California state law. The district court dismissed Plaintiffs' federal causes of action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and refused jurisdiction over the remaining state-law claims. The Ninth Circuit affirmed the district court's judgment.

Under a charter from the City, DWP fixes rates to be charged to DWP customers for electric power, subject to approval by the Los Angeles City Council and Mayor. The charter provides that all revenues collected from DWP electric power sales are to be deposited in a "Power Revenue Fund" in the City treasury, and that if there is a surplus in the Power Revenue Fund at the end of the City's fiscal year, the City Council may transfer that surplus to the City treasury's "Reserve Fund." With the Mayor's consent, the City Council may transfer funds from the Reserve Fund to the City's "General Fund." The electricity rates applicable to Plaintiff's claims were approved by three City ordinances adopted by City Council after a series of at least three public meetings. Since 2010, the electricity rates that DWP charged its customers have exceed DWP's costs for providing that service, yielding a surplus at the end of the fiscal year. Each year over the same time period, the City Council transferred the surplus from the Power Revenue Fund to the General Fund. The transfers at issue from the Power Revenue Fund ranged from $254 million to $300 million.

Plaintiffs asserted that the annual transfers from the Power Revenue Fund to the General Fund demonstrate that DWP electricity rates have consistently exceeded the reasonable costs of providing electric power services. Plaintiffs thus alleged that the above-cost electricity rates constituted a "tax" within the meaning of the California Constitution and were therefore subject to voter-approval requirements. In September 2016, Plaintiffs filed a putative class action complaint against City and DWP officials, claiming that DWP illegally overcharged its customers and therefore the officials were liable to ratepayers on a variety of federal and state-law grounds. In light of a substantially similar state court class action challenging the legality of the City's electric rates, the district court stayed the immediate case and denied Plaintiff's request for a preliminary injunction. The district court then denied Plaintiffs' separate motion to enjoin the parallel state court action. Plaintiff appealed those

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244 Five members of the DWP Board, three officers of DWP, DWP's inhouse legal counsel, the fifteen members of the City Council, the Mayor, and the City Attorney and his chief deputy.

245 Abcarian v. Levine, No. CV167106GHKJPRX, 2016 WL 7189899 (C.D. Cal. Nov. 28, 2016), *aff'd*, 693 F. App'x 487 (9th Cir. 2017).

orders and the Ninth Circuit affirmed.[246] After the state court subsequently granted preliminary approval for a class action settlement in the parallel litigation, Plaintiffs successfully moved to lift the stay of the immediate action and filed the operative amended complaint against Defendants.

Plaintiffs asserted nine claims, three of which expressly arise under federal law. First, Plaintiffs alleged that Defendants are personally liable under 42 U.S.C. § 1983 in their individual capacities because the City's unlawful rates deprived Plaintiffs of property. Second, Plaintiffs alleged that Defendants are liable for those same due process violations under 42 U.S.C. § 1983 in their official capacities. Third, Plaintiffs asserted a claim under the civil action provision of RICO, 18 U.S.C. § 1964. Specifically, Plaintiffs alleged that by charging illegal electricity rates and threatening to terminate service for customers who failed to pay, Defendants violated RICO provisions related to fraud, wire fraud, mail fraud, extortion, and obstruction of justice. Plaintiffs alleged six additional claims, five of which (fraud, conspiracy, conversion, breach of contract, and interference with economic relations) arise solely under state law. Finally, the Plaintiffs asserted an extortion claim which was expressly charged as a state-law tort, a RICO predicate, and direct federal cause of action for a violation of the Hobbs Act. The district court dismissed the state law claims without prejudice and the four federal claims with prejudice. Plaintiffs timely appealed.

The Ninth Circuit first considered the Plaintiffs' assertion that a direct cause of action exists under the Hobbs Act. Plaintiffs argued that this criminal statute creates a private civil right of action for victims of extortion and alleged that by threatening to turn off Plaintiffs' utility services unless they paid DWP's unlawful electricity rates, Defendants extorted money from Plaintiffs. However, the Ninth Circuit found no language in the Hobbs Act that creates a civil private right of action for victims of extortion. The court thus concluded that the district court properly dismissed this claim.

Plaintiffs nonetheless argued that as alleged victims of Hobbs Act extortion, they are members of the class of the statute's intended beneficiaries and therefore the court should imply a cause of action in their favor. The Ninth Circuit disagreed because the unaccompanied fact that a federal criminal statute protects victims of the offense defined by that statute does not allow such victims to assert an implied private civil cause of action. The court reasoned that if being a victim of the offense described in a criminal statute were sufficient to assert an implied cause of action, then the victim of any crime would be a beneficiary of the criminal statute's proscription able to assert a civil claim, regardless of the statute's perhaps intentional omissions.

Plaintiffs next asserted that Congress' express inclusion of violations of the Hobbs Act within the definition of "racketeering activity" regarding

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246 Abcarian v. Levine, 693 F. App'x 487 (9th Cir. 2017).

a civil RICO claim indicates a Congressional intent to allow civil actions under the Hobbs Act. The Ninth Circuit again disagreed, reaching the opposite conclusion, and instead reading the inclusion as negating any intention to create a civil cause of action directly under the Hobbs Act. The court noted that the inclusion of Hobbs Act violations as predicates for a civil RICO Act claim confirms that when Congress intends to provide a private damages remedy, Congress does so *expressly*.

The Ninth Circuit next affirmed the dismissal of Plaintiffs' RICO claim, but relied on separate reasoning than the district court. First, the court noted that the Ninth Circuit's rule categorically exempting municipalities from civil RICO liability does not extend to personal suits against municipal officials acting in their official capacities. The Ninth Circuit then went on to indicate that Plaintiffs' RICO claim failed as a matter of law because it did not adequately allege a cognizable predicate act.

Plaintiffs' claims relied on four specific crimes that fall within the definition of "racketeering activity"—extortion under California law, extortion under the Hobbs Act, mail and wire fraud, and obstruction of justice. The court found the latter two readily dismissible. Plaintiffs' allegations of mail and wire fraud rested on the theory that Defendants caused DWP to send electric bills which falsely implied that the charges were consistent with California law. But this allegation failed largely due to the open and public process by which the electricity rates were set and the later transfers of funds that were made. The court then dismissed the obstruction of justice allegation because the Plaintiffs' provided only conclusory assertions, devoid of factual backing. The Ninth Circuit then considered the Plaintiffs' remaining theory, that DWP's collection of illegally high electricity rates amounted to extortion under the Hobbs Act or California law. The court ultimately held that this theory failed as a matter of law under Ninth Circuit precedent instructing that the type of extortion considered under the Hobbs Act does not extend protection against extortion to overzealous efforts to obtain property on behalf of the government.

Finally, the Ninth Circuit affirmed the dismissal of Plaintiffs' § 1983 claims. Without reaching the merits of the issue, the court concluded that it lacked jurisdiction over the Plaintiffs' claims under the Johnson Act.[247] The court noted that the Johnson Act purports to stop federal courts from interfering in state utility rate challenges, typically on substantive due process grounds. The Ninth Circuit indicated that because it dismissed all of Plaintiffs' federal statutory claims, immediate jurisdiction could be "based solely on . . . repugnance of the order[s] to the Federal Constitution."[248] Here, Plaintiffs' § 1983 claims rested on the assertion that Defendants deprived Plaintiffs of property without due process of law in violation of the Fourteenth Amendment. But the Ninth Circuit

247 28 U.S.C. § 1342.
248 *Id.*

refused jurisdiction to enjoin or otherwise interfere with the Defendants' electricity rates because to do so would directly contravene the Johnson Act, which the court found to be applicable.

In sum, the Ninth Circuit held that Plaintiffs' complaint failed to state a claim for which relief can be granted. The court also concluded that amending the complaint would be futile. Therefore, the Ninth Circuit affirmed the judgment of the district court and dismissed Plaintiffs' federal causes of action.

G. Constitutional Issues

1. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)

Twenty-one youth citizens,[249] the environmental nonprofit organization Earth Guardians, and a "representative of future generations"[250] (collectively, "Plaintiffs") brought suit against the President, the United States, and federal agencies[251] (collectively, "the government") in the United States District Court for the District of Oregon.[252] The original complaint alleged, among other things, a violation of the Plaintiffs' constitutional right to a "climate system capable of sustaining human life" due to the government's actions permitting, authorizing, and subsidizing the fossil fuel industry.[253] The district court

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249 The youth plaintiffs were: Kelsey Cascadia Rose Juliana; Xiuhtezcatl Tonatiuh M., through his Guardian Tamara Roske-Martinez; Alexander Loznak; Jacob Lebel; Zealand B., through his Guardian Kimberly Pash-Bell; Avery M., through her Guardian Holly McRae; Sahara V., through her Guardian Toa Aguilar; Kiran Isaac Oommen; Tia Marie Hatton; Isaac V., through his Guardian Pamela Vergun; Miko V., through her Guardian Pamel Vergun; Hazel V., through her Guardian Margo Van Ummerson; Sophie K., through her Guardian Dr. James Hansen; Jamie B., through her Guardian Jamescita Peshlakai; Journey Z., through his Guardian Erika Schneider; Victoria B., through her Guardian Daisy Calderon; Nathaniel B., through his Guardian Sharon Baring; Aji P., through his Guardian Helaina Piper; Levi D., through his Guardian Leigh-Ann Draheim; Jayden F., through her Guardian Cherri Foytlin; and Nicholas V., through his Guardian Marie Venner.

250 "Future generations" were represented by climate science expert Dr. James Hansen.

251 Defendants were United States of America; Mary B. Neumayer, in her capacity as Chairman of Council on Environmental Quality; Mick Mulvaney, in his official capacity as Director of the Office of Management and the Budget; Kelvin K. Droegmeier, in his official capacity as Director of the Office of Science and Technology Policy; Dan Brouillette, in his official capacity as Secretary of Energy; U.S. Department of the Interior; David L. Bernhardt in his official capacity as Secretary of Interior; U.S. Department of Transportation; Elaine L. Chao, in her official capacity as Secretary of Transportation; U.S. Department of Agriculture; Sonny Perdue, in his official capacity as Secretary of Agriculture; U.S. Department of Commerce; Wilbur Ross, in his official capacity as Secretary of Commerce; U.S. Department of Defense; Mark T. Esper, in his official capacity as Secretary of Defense; U.S. Department of State; Michael R. Pompeo, in his official capacity as Secretary of State; Andrew Wheeler, in his official capacity as Administrator of the EPA; Office of the President of the United States; U.S. Environmental Protection Agency; U.S. Department of Energy; and Donald J. Trump, in his official capacity as President of the United States.

252 Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).

253 *Id.* at 1250.

denied the government's motion to dismiss. The government sought a writ of mandamus and moved for a stay of proceedings which the Ninth Circuit and Supreme Court, respectively, denied. The government then moved for summary judgment and judgment on the pleadings. The district court granted summary judgment in part, dismissed in part, and dismissed the President as a defendant. In response, the government filed numerous motions requesting the district court certify various issues for interlocutory appeal,[254] which the district court initially denied. The district court ultimately took the Ninth Circuit's invitation to revisit the certification issue. The district court then "reluctantly"[255] certified various orders denying the motions for interlocutory appeal and to stay the proceedings. The government appealed the issues to the Ninth Circuit. On appeal, the Ninth Circuit reversed the district court's interlocutory orders and remanded to the district court with instructions to dismiss for lack of Article III standing.

In their complaint, Plaintiffs claimed injuries of psychological harm, impairment to recreational interests, exacerbated medical conditions, and damage to property because the government violated: (1) the Fifth Amendment Due Process Clause; (2) the Fifth Amendment Equal Protection Clause; (3) the Ninth Amendment; and (4) the public trust doctrine. To remedy these injuries, Plaintiffs sought: (1) a declaration that the government is violating the Constitution; (2) an injunction requiring the government to cease permitting, authorizing, and subsidizing fossil fuel use; and (3) an order requiring the government to prepare a plan to draw down greenhouse gas emissions.

The district court denied the government's motion to dismiss, holding that Plaintiffs had standing, raised judiciable questions, and stated multiple viable claims. First, the district court held that the Plaintiffs had stated a viable claim for violation of a Fifth Amendment due process right to a "climate system capable of sustaining human life."[256] The court defined that right as one free from catastrophic climate change that would cause death, shorten lifespans, cause widespread property damage, threaten food sources, and dramatically change ecosystems. Second, the district court held that Plaintiffs stated a viable "danger-creation due process claim"[257] arising from the government's failure to regulate fossil fuel industry emissions. Finally, the district court held that Plaintiffs had a viable public trust claim grounded in the Fifth and Ninth Amendments. The Ninth Circuit primarily addressed whether Plaintiffs satisfied the "redressability" element of Article III standing. To do so, the Ninth Circuit analyzed whether an Article III court has the authority to provide redress with an order requiring the government to develop a plan to phase out fossil fuels and draw down atmospheric carbon dioxide.

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254 28 U.S.C. § 1292(b) (2018).
255 *Juliana,* 947 F.3d at 1166.
256 *Id.* at 1165.
257 *Id.*

The Ninth Circuit first noted that Plaintiffs presented an extensive record at the district court detailing that: (1) climate change is occurring at an increasingly rapid pace; (2) the rise in atmospheric carbon dioxide stems from fossil fuel combustion and will "wreak havoc on the climate if left unchecked;"[258] (3) the federal government has understood for decades—since as early as 1965—that fossil fuel use risks significant harms to Earth's climate and ecosystems; and (4) the government acted in the affirmative in a variety of ways to promote fossil fuel use and contribute to climate change. With this background information, the Ninth Circuit then went on to analyze the issues at hand.

First, the Ninth Circuit addressed the government's argument that the Plaintiffs' claims must proceed under the Administrative Procedure Act's (APA)[259] "comprehensive remedial scheme,"[260] which imposes forum and procedural requirements at the *agency* level for challenges to the constitutionality of agency actions and bars the filing of freestanding constitutional claims directly with the courts.[261] The Ninth Circuit disagreed, explaining that rather than claiming that any individual agency action exceeded authorization or was arbitrary and capricious on its own, Plaintiffs asserted that the government's actions *cumulatively* contributed to the violation of plaintiffs' constitutional rights. Because the APA only allows for challenges to discrete agency actions, Plaintiffs were not constrained by the APA's requirements. The court further explained that even if parties must bring certain constitutional challenges to agency actions under the APA, a holding here requiring all constitutional claims to conform to the APA's procedural requirements would bar Plaintiffs from challenging any violation of constitutional rights that occurred outside of a discrete agency action. Such a holding would raise serious constitutional concerns and would contradict the purpose of the APA.

Second, the Ninth Circuit found that Plaintiffs' complaint and declarations demonstrated concrete and particularized injuries, satisfying the injury prong of the Article III standing analysis. The court also held that Plaintiffs' pleadings satisfied the causation requirement of Article III standing. The government asserted that the causal connection between the government's actions to promote fossil fuels and Plaintiffs' injuries was too attenuated. The Plaintiffs argued that their injuries stemmed from a host of federal policies that supported the fossil fuel industry, including decades of subsidies and drilling permits, and direct government actions. Because a genuine factual dispute existed as to whether the government's policies were a "substantial factor"[262] in

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258 *Juliana*, 947 F.3d at 1166.

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

260 *Juliana*, 947 F.3d at 1167.

261 5 U.S.C. § 706(2)(A), (C).

262 *Juliana*, 947 F.3d at 1169.

causing the plaintiff's injuries, the court found Plaintiffs had satisfied the causation requirement for purposes of surviving summary judgment.

Finally, the Ninth Circuit evaluated the "redressability" factor, assessing whether the court could provide meaningful redress for Plaintiffs' injuries that is more than "merely speculative."[263] In its analysis, the panel assumed that a constitutional right to a "climate system capable of sustaining human life"[264] exists, without deciding the merits of that claim. The court focused on whether the Plaintiffs showed that the relief they sought was (1) substantially likely to redress the injuries they sustained and (2) within the district court's power to award.

As to the first prong, the court explained that a declaration that the government's actions violate the Constitution would not be "substantially likely" to mitigate Plaintiffs' actual injuries and would therefore not be an acceptable remedy. The panel was also skeptical of the efficacy of an injunction on fossil fuel use and related plan to draw down emissions, neither of which the court believed would redress Plaintiffs' injuries. The court determined that redress would require a "fundamental transformation of this country's energy system"[265] and a host of other transformative systematic changes over a period of decades.

The court then determined that the second prong of the redressability analysis was also not satisfied because any meaningful redress to Plaintiffs' injuries would require actions beyond the authority of the court. Such remedies would require "a host of complex policy decisions entrusted, for better or worse . . . [to] the executive and legislative branches of government."[266] Plaintiffs argued that the district court need not make actual policy decisions for the government; the court could redress Plaintiffs' injuries by granting an order requiring the political branches to decide which policies would best phase out fossil fuel use and draw down emissions. The court disagreed, reasoning that even a general plan would require the court system to determine whether the government sufficiently responds to the order in the future, both Executive and Congressional action, and oversight by the judiciary for many decades. The panel relied on the Supreme Court's recent decision in *Rucho v. Common Cause*,[267] explaining that redressability questions implicate separation of powers issues, and federal courts are not authorized to wield political power without strict limiting standards. Because Plaintiffs' requested relief would require an Article III court to determine whether a government plan would be sufficient to remedy Plaintiffs' injuries, the court reasoned such a remedy is outside the scope of an Article III court. The Ninth Circuit "reluctantly"[268] held that the plaintiffs' must make their case to other branches of government. The

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263 *Id.* at 1170.
264 *Id.* at 1165.
265 *Id.* at 1171.
266 *Id.*
267 Rucho v. Common Cause, 139 S.Ct. 2484, 2508 (2019).
268 *Juliana*, 947 F.3d at 1165.

panel reversed the district court's certified orders and remanded to the district court with instructions to dismiss for lack of Article III standing.

Judge Staton dissented, highlighting that Plaintiffs brought suit "to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction,"[269] and noted that even partial relief would provide meaningful redress. Judge Staton reasoned that "practical redressability is not measured by [the court's] ability to stop climate change in its tracks"[270] but by its ability to curb emissions to some meaningful degree to avoid a "point of no return."[271] Since Plaintiffs' claims did not pose political questions, Judge Staton further reasoned, they should have proceeded. She ultimately disagreed with the court and would have held that Plaintiffs had standing, articulated claims under the Constitution, and presented sufficient evidence to bring those claims to trial.

2. Tinian Women Ass'n v. United States Dep't of the Navy, 976 F.3d 832 (9th Cir. 2020).

The Tinian Women Association and environmental groups (collectively, "TWA")[272] challenged the United States Department of the Navy's (USDN)[273] decision to relocate 8,000 troops from Japan to Guam and the Commonwealth of the Northern Mariana Islands (CNMI) in the District Court for the Northern Mariana Islands.[274] TWA alleged the USDN violated the National Environmental Policy Act (NEPA)[275] and the Administrative Procedure Act (APA)[276] because USDN did not follow NEPA procedure for "connected actions" or "cumulative impacts" and did not consider site alternatives to Guam and the CNMI for the relocation.[277] Additionally, TWA argued the district court erred in waiving a third NEPA claim. TWA sought injunctive and declaratory relief. The district court granted USDN's motion for summary judgment as to the first NEPA claim, dismissed TWA's second NEPA claim for lack of jurisdiction, and determined TWA waived the third NEPA claim. The Ninth Circuit

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269 *Id.* at 1175.

270 *Id.* at 1182.

271 *Id.*

272 Other plaintiffs were Guardians of Gani, Paganwatch, and Center for Biological Diversity.

273 Other defendants were Ray Mabus, Secretary of the Navy,; United States Department of Justice,; United States Department of Defense,; and Patrick Shanahan, Acting United States Secretary of Defense.

274 The Ninth Circuit consolidated the following two cases on appeal: Tinian Women Ass'n v. U.S. Dep't of the Navy, 2017 WL 4564188 (D.N. Mar. Islands 2017) and Tinian Women Ass'n v. U.S. Dep't of the Navy, 2018 WL 4189632 (D.N. Mar. Islands 2018).

275 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

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

277 Tinian Women Ass'n v. United States Dep't of the Navy, 976 F.3d 832, 837 (9th Cir. 2020) [hereinafter, "TWA"].

affirmed the district court's decisions but dismissed TWA's second claim for a lack of jurisdiction on different grounds.

In 2005, the United States and Japan signed the U.S.-Japan Alliance Agreement (Agreement). In the Agreement, the United States agreed to relocate 8,000 troops and their dependents from Okinawa, Japan to Guam and the CNMI. Because the USDN anticipated the relocation would "significantly alter the environment,"[278] the USDN began the NEPA process.[279] The USDN internally disputed whether expansion of existing training facilities in Guam was necessary but ultimately decided expansion was not necessary and "declined to plan for such training unless it would materially impact the environmental review process."[280] Relevant here are the 2010 Record of Decision (ROD) and 2015 ROD, which the USDN published "memorializing" the 2010 and 2015 EISs, respectively.[281] In the 2010 ROD, the USDN considered the development of five live-fire training facilities throughout Guam and Tinian, an island of the CNMI. Notably, in the 2010 ROD, the USDN declared its intent to proceed with the relocation and declined to decide about construction of new facilities on Guam and CNMI until a later date. That "later date" was in 2015 when the USDN, in its 2015 ROD, "approved the construction of a live-fire training range" in Guam.[282]

The Ninth Circuit reviewed the district court's grant of summary judgment and the dismissal of TWA's second claim de novo, the USDN's decisions under the arbitrary and capricious standard of review, and the district court's waiver of TWA's third claim for an abuse of discretion.

TWA brought two challenges against the USDN's decision to relocate troops to Guam and CNMI. First, TWA argued the USDN violated NEPA because the decisions to relocate troops and to construct training facilities were "connected actions" and therefore the USDN must have considered them in one EIS but instead considered them separately in the 2010 and 2015 RODs.[283] The Ninth Circuit agreed with TWA that agencies must consider "connected actions" in one EIS, but found that because the actions had "independent utility and purpose" the USDN permissibly considered the actions separately.[284] More simply, although closely related, the relocation was not dependent on the construction of new training facilities in Guam and the CNMI and vice versa.

Alternatively, TWA argued the USDN violated NEPA for its failure to consider the cumulative impacts of the 2010 and 2015 RODs together. Although TWA met the low burden for proving the potential for cumulative impacts, the Ninth Circuit affirmed the USDN's motion for summary judgment under an exception that allows agencies to "consider

278 *TWA*, 976 F.3d 832,at 835 (9th Cir. 2020).
279 *Id.* at 836.
280 *Id.*
281 *Id.*
282 *Id.*
283 40 C.F.R. § 1508.25(a)(1).
284 *TWA*, 976 F.3d at 838.

the cumulative impacts of actions in a subsequent EIS when the agency has made clear it intends to comply with those requirements and the court can ensure such compliance."[285] Because the court found the USDN's declared intent to consider the construction activities at a later date satisfied the exception, the court affirmed the USDN's motion for summary judgment.

Next, TWA asserted that the USDN violated NEPA by failing to consider locations beyond Guam and CNMI. The district court had dismissed this claim for lack of constitutional standing and pursuant to the political question doctrine. But the Ninth Circuit held that because the court lacked jurisdiction for standing reasons the court did not need to reach the issue of the political question doctrine. Although TWA demonstrated a procedural injury, that injury was not redressable because the court could not grant TWA relief without "upsetting the agreement to relocate troops from Okinawa to Guam."[286] Finding that TWA did not satisfy Article III standing, the court affirmed the district court's dismissal of TWA's second NEPA claim.

Lastly, the court summarily resolved a dispute about whether TWA waived a third NEPA claim about the USDN's Relocation Final EIS. TWA argued it raised this third claim by mentioning the Relocation Final EIS throughout its complaint. The court held TWA waived its third NEPA claim, highlighting that TWA mentioned only two claims for relief in its complaint.

In sum, the Ninth Circuit affirmed the district court's grant of the USDN's motion for summary judgment, dismissal of TWA's second NEPA claims, and decision that TWA waived a potential third NEPA claim.

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285 *Id.* at 839.

286 *Id.* at 840.

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