2021 NINTH CIRCUIT ENVIRONMENTAL REVIEW

***

2021 NINTH CIRCUIT ENVIRONMENTAL REVIEW

Editor
DARA ILLOWSKY

Members
GREGORY A. ALLEN
JESSICA HOLMES
ALEXANDRA JANSKY
BILL O'BRIEN
KENDRA SUMMERS

***

2021 NINTH CIRCUIT ENVIRONMENTAL REVIEW

***

NINTH CIRCUIT ENVIRONMENTAL REVIEW EDITOR'S NOTE

The 2021–2022 Ninth Circuit Environmental Review summarizes thirty-one decisions by the United States Court of Appeals for the Ninth Circuit issued between January and December 2021. All of the summarized opinions concern cases and questions of law impacting natural resources, energy, and the environment. Several of the summarized opinions do not strictly concern "environmental law," but rather were included for their importance in informing an intersectional understanding of environmental law and how that discipline interacts with others, particularly labor rights, Federal Indian Law, and corporate accountability. Additionally, the Ninth Circuit Environmental Review features two Chapters authored by Ninth Circuit Review members that discuss important topics stemming from recent cases out of the Ninth Circuit.

In the first Chapter, Jessica Holmes explores the use of aggregate litigation devices to pursue environmental enforcement, protection, and justice. The Chapter begins by providing an overview of aggregation devices and their uses generally, followed by an exploration of examples of aggregate litigation that have contributed to the goals of the environmental movement, including the recent Ninth Circuit ruling in *In re Volkswagen "Clean Diesel" Marketing, Sales Pratices, & Products Liability Litigation*, 2 F.4th 1199 (9th Cir. 2021). Finally, the Chapter identifies obstacles any practitioner interested in pursuing environmental aggregate litigation is likely to encounter, and offers solutions. In so doing, this Chapter responds to the need for innovation and exploration of potential new avenues for addressing our current climate, biodiversity, and environmental justice crises, and helps to guide practitioners in an area of law unfamiliar to many.

In the second Chapter, Gregory Allen explores the development of the clear statement rule, which requires that if a statute is to waive sovereign immunity, the statutory text must unequivocally express Congress's intent that immunity be waived. The chapter then attempts to predict how each Supreme Court Justice[1] would rule if the issue of waiver of sovereign immunity for punitive fines under the Clean Air Act were to come before the Court. The Chapter concludes that the current conservative-leaning Court would most likely apply the clear statement rule strictly, just as the Ninth Circuit applied the rule to the Clean Water Act in *Deschutes River Alliance v. Portland General Electric Co.*, 1 F.4th 1153 (9th Cir. 2021). The Chapter then argues that such a strict application of the clear statement rule does not adequately protect natural resources, allowing government operators of polluting facilities to escape accountability. Its thorough exploration of the history of the

[1] At the time this Chapter was written, Justice Breyer had announced his retirement, and his successor had not yet been confirmed by the Senate. This Chapter therefore analyzed only the perspectives of the eight then-sitting justices, excluding Justice Breyer.

clear statement rule and the ideologies of current Supreme Court justices can provide practitioners with a helpful roadmap for potential litigation strategies in the realm of pollution control statutes.

The Ninth Circuit Review is made possible through the hard work of its five members who are selected from the *Environmental Law* member base each year. The case summaries that appear here are the result of their commitment, even in the face of a continuing 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.

Thank you for reading!

Dara Illowsky
2021–2022 NINTH CIRCUIT
ENVIRONMENTAL REVIEW EDITOR

I. ENVIRONMENTAL QUALITY

A. Clean Air Act (CAA)

1. Sandra Bahr v. Michael S. Regan, 6 F.4th 1059 (9th Cir. 2021)

City of Phoenix residents Sandra L. Bahr, Jeanne Lunn, and David Matusow (collectively, Bahr) filed a petition for judicial review of the Environmental Protection Agency's (EPA)[2] determination that the Phoenix nonattainment area (NAA) had attained the national ambient air quality standard (NAAQS) for ozone by its 2018 deadline in compliance with the Clean Air Act (CAA).[3] The Ninth Circuit heard Bahr's claims directly,[4] reviewed them under an arbitrary and capricious standard of review, and ultimately denied the petition, holding that EPA did not act arbitrarily and capriciously when it concluded certain ozone emissions were caused by a wildfire and could thus be excluded from the NAAQS ozone calculations.

Under the CAA, a NAA is an area where certain pollutants are above NAAQS. NAAs are subject to stringent regulations and attainment deadlines, as outlined in a State Implementation Plan (SIP). A SIP is an EPA approved blueprint for how a state will achieve attainment that identifies contingency measures in the event of nonattainment. When the Phoenix NAA failed to achieve ozone attainment by its 2015 deadline, EPA imposed more stringent requirements upon it as well as a new attainment date of July 20, 2018. On June 17, 2015, a wildfire approximately 300 miles away in California began burning, and three days later, six ozone monitors in the Phoenix NAA recorded abnormally high levels of ozone in excess of the NAAQS. Without those exceedances, Arizona would have achieved its 2018 attainment deadline.

Pursuant to EPA's Exceptional Events Rule that was in place at the time, (2007 Rule), if a state could show that an uncontrollable, exceptional event was the "but for" cause of the exceedance, as well as show that the exceedance was in excess of normal historical fluctuations, then that monitoring data was to be excluded from its NAAQS calculations. Accordingly, on September 27, 2016, Arizona Department of Environmental Quality (ADEQ) submitted to EPA a demonstration of clear causal connection between the wildfire emissions and the exceedances to exclude the exceedances from its NAAQS calculations.

---

[2] Respondents were Michael Regan, Administrator, EPA; Deborah Jordan, Acting Regional Administrator, EPA Region 9, and EPA.

[3] 42 U.S.C §§ 7401–671q (2018).

[4] Pursuant to § 307(b)(1) of the CAA, the Ninth Circuit has proper jurisdiction to hear a petition for review of a "locally or regionally applicable" "final action of the [EPA] Administrator."

Three days later, EPA reissued its Exceptional Events Rule, (2016 Rule), removing the provisions about exceedances being in excess of normal historical fluctuations and the event being the "but for" cause of the exceedance, but keeping a requirement to show clear, causal connection. ADEQ followed EPA guidance for demonstration of casual connection with wildfires, resubmitted its demonstration (twice), and EPA formally concurred with the exclusions in May 2019. In its concurrence, EPA applied the 2016 Rule even though the exceedances occurred while the 2007 Rule was in effect. A rule has an impermissible retroactive effect when it impacts any vested rights, creates any new obligations, or otherwise impacts any regulated party's interest in fair notice, reasonable reliance, or settled expectations.[5] With the exceedances thus excluded, EPA proposed to issue an Attainment Determination[6] for the Phoenix NAA's July 20, 2018 deadline, as well as to suspend the State Implementation Plan (SIP) nonattainment contingency measures. Bahr commented on the proposed Attainment Determination, and shortly thereafter, EPA finalized and issued it.

Bahr first argued that EPA's application of the 2016 Exceptional Events Rule had an impermissibly retroactive effect because the exceedances occurred in 2015 while the 2007 Rule was still in effect. The Ninth Circuit began by observing that Bahr failed to exhaust administrative remedies by not raising the argument in her comment before the agency. The Ninth Circuit noted that the CAA states that objections must be raised in the public comment to be raised during judicial review,[7] but that the Ninth Circuit also considers issues raised with sufficient clarity. Here, the Ninth Circuit found that Bahr's comment neither expressly nor impliedly contested EPA's use of the 2016 Rule. The Ninth Circuit found that Bahr's failure to clearly mention the two prongs of the 2007 Rule[8] showed that she did not adequately present the issue to the agency, and thus failed to exhaust the issue.

The Ninth Circuit also held on the merits that EPA did not violate the presumption against retroactivity because EPA's application of the 2016 Rule did not impact any vested rights, create any new obligations, or otherwise impact any regulated party's interest in fair notice, reasonable reliance, or settled expectations. The Ninth Circuit reasoned that the mere fact that the events occurred while the old rule was in effect did not make the application of the new rule impermissibly retroactive. Rather, the test is whether application of the new rule impacts a vested right. Here, Bahr's only right was the right to clean air, not to the enforcement of a particular rule. The Ninth Circuit determined that EPA changed its rule in accordance with a more refined

---

5 Landgraf v. USI Film Prod., 511 U.S. 244, 265, 270 (1994).

6 42 U.S.C. § 7511(b)(2).

7 *Id.* § 7607(d)(7)(B).

8 Under the 2007 Rule, clear causation of exceedances by exceptional events was shown by (1) exceedances being in excess of normal historical fluctuations and (2) being the "but for" cause of the event. Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13,560 (Mar. 22, 2007).

or matured scientific understanding, and that Bahr offered neither evidence of reliance from regulated parties nor of impact on her right to clean air. Thus, the Ninth Circuit ruled that EPA's application of the 2016 Rule was not impermissibly retroactive.

Bahr next argued that EPA's finding of a clear causal relationship between the wildfire and the exceedances was arbitrary and capricious, even under the 2016 Rule. The Ninth Circuit rejected Bahr's argument and deferred to EPA's expertise because the determination involved scientific issues of fact. Under EPA's Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations, ADEQ needed to meet three elements to show causal connection between the emissions and the exceedances: (1) the emissions were transported to the monitors; (2) the emissions affected the monitors; and (3) the emissions caused the exceedances. Bahr argued that the data was inadequate to show dispositively that the wildfire caused the exceedances, but the Ninth Circuit held that absent any alternative technical data from Bahr showing absolutely no rational connection between the evidence and the exceedances, EPA was entitled to deference and thus its determination was not arbitrary and capricious.

Lastly, Bahr argued that EPA violated the CAA when it suspended the SIP's contingency measures after making the Attainment Determination. Bahr argued that under EPA's Clean Data Policy,[9] SIP contingency measures must be in effect regardless of an Attainment Determination, because an area could always slip back into nonattainment. EPA, however, explicitly stated in its Attainment Determination that its choice to suspend the contingency measures was not based on the Clean Data Policy but rather on its interpretation of a different CAA provision.[10] The Ninth Circuit began its analysis by noting that Bahr forfeited this argument by not raising it in her comment before the agency and further denied her an exceptional circumstance exception for the public health-related issue.

The Ninth Circuit went on to address the merits of the claim in any case and gave EPA *Chevron* deference to reasonably interpret the ambiguous CAA provision. The Ninth Circuit determined that the provision EPA was interpreting was silent on the issue of whether SIP requirements may be excused for NAAs that receive an Attainment Determination. Even though Phoenix had slid back into nonattainment by the time of the opinion, thus giving rise to Bahr's concerns, the Ninth Circuit observed that Congress accounted for such situations with a provision in the CAA[11] that requires EPA to determine whether permanent and enforceable emission reductions are causing the air quality improvements before designating a NAA as in attainment.

---

9 40 C.F.R. § 51.1118 (2021).

10 CAA, 42 U.S.C. § 7502(c)(9) (2018).

11 42 U.S.C. § 7407(d)(3)(E)(iii).

In sum, the court denied the petition because (1) Bahr failed to exhaust administrative remedies by not raising objections to EPA's application of the 2016 Rule in her comment before the agency; (2) that EPA's application of the 2016 Rule was not impermissibly retroactive because it did not impact any vested rights; (3) that EPA did not act arbitrarily or capriciously when it determined that there was a clear causal relationship between the wildfire and the exceedances absent any evidence to the contrary; (4) that Bahr failed to exhaust administrative remedies by not raising objections to the suspension of the SIP contingency measures in her comment before the agency; and (5) that EPA's suspension of the contingency measures in any case was entitled to *Chevron* deference.

2. Association of Irritated Residents v. EPA, 10 F.4th 937 (9th Cir. 2021)

The Association of Irritated Residents (AIR), a California nonprofit with members in the San Joaquin Valley (Valley), sought review of the United States Environmental Protection Agency's (EPA) approval of California's plan for meeting the air quality standard for ozone in the Valley.[12] The San Joaquin Valley Air Pollution Control District and the South Coast Air Quality Management District (collectively, Districts) intervened in defense of the approval. AIR alleged that a contingency measure contained in the plan, which would be activated if other provisions did not achieve reasonable further progress toward meeting the standard, was inadequate. The Ninth Circuit agreed and granted AIR's petition in part, holding that EPA's approval of the plan was arbitrary and capricious.

Under the Clean Air Act (CAA), EPA issues standards for pollutants and States establish plans to meet those standards and submit them to EPA for approval.[13] An area that fails to meet the standard is designated a "nonattainment" area. State plans covering these areas must include contingency measures to be undertaken if the area fails to make reasonable further progress toward the relevant air quality standard.[14]

In late 2018, the State proposed updates to its plan for the Valley.[15] The State explained that previous plans for the Valley had contingency measures that relied upon reductions from the continued implementation of programs already adopted, which provided excess emission reductions beyond what was required for attainment or reasonable further progress. The plan provided for a different contingency measure: the repeal of an exemption for the sale of small

---

[12] Respondents included EPA Administrator, Michael Regan, and Acting EPA Region 9 Administrator, Deborah Jordan.

[13] 42 U.S.C. §§ 7407(a), 7408(a), 7409(a), 7410(a).

[14] 42 U.S.C. §§ 7407(d)(1)(A), 7501(2), 7502(c)(9).

[15] The San Joaquin Valley Air Pollution Control District and the California Air Resources Board (collectively, the State) are responsible for developing and submitting the plan to the EPA for approval.

containers of paint. The plan also prescribed a menu of options to reduce emissions if the State was unable to achieve attainment. The Valley is a large inland area with some of the worst air quality in the nation and it has repeatedly failed to meet air quality standards. Thus, the Ninth Circuit concluded that the likelihood that the Valley will continue to fail to meet the ozone standard—and therefore activate the newly approved contingency measure—was a reasonable inference.

First, the Ninth Circuit evaluated if AIR established standing and if AIR's petition was ripe for review. The Ninth Circuit held that AIR's members established injury by submitting declarations containing credible allegations of respiratory distress as well as harm to their recreational and aesthetic interests due to ozone pollution in the Valley. The Ninth Circuit rejected the Districts' argument that AIR's injuries were not caused by EPA's approval of the contingency measures, and thus setting aside the approval would not redress AIR's injuries. Rather, the Ninth Circuit concluded, AIR's members' injuries were caused by EPA's approval of the new contingency measure that drastically impacted the ozone concentrations in the area, and AIR sufficiently showed that the member's injuries were redressable. The Ninth Circuit also held that the issue was fit for review because it was a purely legal question presented in the concrete setting of EPA's approval of the specific plan adopted by the State. Delaying review would cause hardship to AIR because then the allegedly inadequate measure could not be reviewed until it was already implemented, at which point any review would be too late.

Next, the Ninth Circuit reviewed whether EPA's interpretation of the CAA, resulting in its approval of the plan, was arbitrary and capricious. AIR relied on step two of the *Chevron* doctrine, arguing that EPA's approval of the contingency measure was arbitrary and capricious because the measure provided only a nominal emissions reduction of one ton per day. AIR observed that EPA had long taken the position that contingency measures should be approximately equal to the emissions reductions necessary to demonstrate reasonable further progress for one year. Thus, AIR claimed that EPA's new, contrary interpretation of the CAA was unreasonable. EPA responded that the CAA did not specify the quantity of emission reductions that a contingency measure must provide and argued that there is no binding requirement under the CAA for emission reductions that EPA must require in a contingency measure. The Ninth Circuit agreed with AIR, holding that even when assuming EPA's interpretation of the CAA was permissible, its plan approval did not survive review. The Ninth Circuit reasoned that when an administrative agency changes its policy, it must provide a reasoned explanation of the change and show that there were good reasons for the new policy. The Ninth Circuit held that EPA did not satisfy this standard for the following reasons: (1) in approving a contingency measure that provided a far lower emissions reduction, EPA did not say that it had changed its understanding of what reasonable further

progress towards applicable standards means; (2) EPA relied on surplus emissions reductions from existing measures to make up for an inadequate contingency measure without a sufficient explanation of why the new—and far more modest—contingency measure was reasonable; and (3) EPA's argument that its prior statements did not have the force of law was irrelevant because EPA still had to give a reasoned explanation for departing from its original policy. Thus, the Ninth Circuit granted AIR's petition in part holding that EPA's approval was arbitrary and capricious.

Lastly, the Ninth Circuit denied in part AIR's challenge regarding the approval of the State's Enhanced Enforcement Activities Program. The Ninth Circuit reasoned that because EPA only recognized the program as a plan strengthening measure, the dispute concerned merely whether such a measure was permissible under the CAA. Because the Ninth Circuit found that the program did not create any emission limitation that was less stringent than one in effect in the state plan, it concluded that nothing in the CAA prohibited the State from pursuing it. Therefore, the Ninth Circuit held in favor of EPA's approval of the program.

In sum, after determining that AIR established Article III standing and its challenge was ripe for review, the Ninth Circuit granted AIR's petition in part and remanded the matter back to EPA insofar as the petition related to EPA's unreasonable interpretation of the CAA in its approval of the State's plan and inadequate contingency measure. The Ninth Circuit disposed of AIR's petition in part regarding the State's Enhanced Enforcement Activities Program as the court supported EPA's determination that the program was not a standalone contingency measure, but instead a valid plan strengthening measure.

B. Toxic Substances Control Act (TSCA)

1. America Unites for Kids v. Rousseau, 985 F.3d 1075 (9th Cir. 2021)

Two environmental non-profit organizations, Public Employees for Environmental Responsibility (PEER) and America Unites for Kids (AU) (collectively, Plaintiffs), brought suit against administrators and board members of the Santa Monica Malibu Unified School District (School District) in the United States District Court for the Central District of California (District Court).[16] Plaintiffs sued the School under the Toxic Substances Control Act (TSCA)[17] to remediate illegal levels of polychlorinated biphenyls (PCBs)[18] in the School's buildings. The district court held in favor of the Plaintiffs and issued, but later modified, a permanent injunction against the school district that

---

[16] Am. Unites for Kids v. Lyon, No. CV 15-2124 PA (AJWx), 2015 WL 9412099 (C.D. Cal. Dec. 21, 2015).

[17] 15 U.S.C. §§ 2601–29 (2018).

[18] PCBs are dangerous to human health, especially children, and can be present in the air and ground.

required removal of all PCB-ridden caulking in the School's buildings. In addition, the district court dismissed PEER for lack of associational standing and imposed six sanctions on Plaintiffs for discovery order violations. On appeal, the Ninth Circuit affirmed the modified permanent injunction, reversed PEER's dismissal, and vacated and remanded the sanctions imposed on Plaintiffs for reconsideration by the district court in light of the United States Supreme Court's decision in *Goodyear Tire & Rubber Co. v. Haeger* (*Goodyear*).[19]

The school district operates Juan Cabrillo Elementary School and Malibu Middle and High School (collectively, Campus), which were found to contain illegal levels of PCBs in their caulking. In 2015, Plaintiffs filed a TSCA citizen suit with a supporting declaration from a teacher, an application for accelerated discovery to test caulk for PCBs on campus, and a motion to enjoin the school district to remedy all of the campus TSCA violations. The district court permitted the Plaintiffs to perform an invasive test for PCBs on campus, but only if air and wipe testing first indicated invasive testing was necessary. Despite these conditions, Jennifer DeNicola and Brenton Brown, two parents of students in the school district and members of AU's leadership, performed invasive tests on multiple occasions without first air or wipe testing. Upon learning of DeNicola's and Brown's actions, the school district sought and the district court imposed sanctions, under its inherent power, against the Plaintiffs. One of the sanctions denied AU attorney's fees and costs if they prevailed.[20]

More than two years later, after California voters passed "Measure M" to pay for demolition and reconstruction of the campus, the school district moved to modify the district court's permanent injunction that required millions of dollars' worth of caulk removal. Additionally, the United States Supreme Court decided *Goodyear*, which clarified the requirements and limitations for federal courts imposing sanctions under its inherent power.[21] The Ninth Circuit reviewed the district court's sanctions and modification of the permanent injunction for abuse of discretion, reviewed the district court's standing judgement and legal analysis *de novo*, and reviewed the district court's factual findings for clear error.

First, the Ninth Circuit vacated and remanded all of the sanctions for the district court to reconsider in light of *Goodyear*. The school district attempted to argue that *Goodyear* was inapplicable to the fourth

---

[19] 137 S. Ct. 1178 (2017).

[20] 15 U.S.C. § 2619(c)(2) allows TSCA claimants to be awarded attorney's fees and costs when the court deems such fees and costs appropriate.

[21] The *Goodyear* framework distinguishes between punitive and compensatory sanctions, imposing different procedural requirements and substantive limitations on both. If the sanction is compensatory, civil procedures apply and the sanction must satisfy a "but-for" standard, wherein the harm that warranted the compensatory sanction must be linked to and remedy only the sanctioned misconduct. If the sanction is punitive, criminal procedures apply, wherein the "beyond a reasonable doubt" standard is used (among other criminal procedures). *Goodyear*, 137 S. Ct. at 1182, 1186.

sanction (denying AU's attorney's fees and costs if they prevailed) because *Goodyear* dealt with a payment of attorney's fees and costs by the losing party to the prevailing party, not a denial of attorney's fees and costs to the prevailing party. The court rejected the school district's argument as a "distinction without a difference"[22] because in both cases the purpose of the order was to punish one of the parties. Furthermore, the court held that awarding attorney's fees to Plaintiffs is consistent with the purpose of TSCA to reduce environmental risk and allowed by a TSCA fee-shifting provision.[23]

Next, the Ninth Circuit reversed the district court's dismissal of PEER for lack of standing and held that PEER had associational standing through a teacher supporter of the organization. The court agreed with PEER's argument for associational standing because of PEER's non-membership organizational structure, and the close connection between PEER's environmental mission and the teacher supporter's environmental interests.

Finally, the Ninth Circuit rejected Plaintiffs' argument that the permanent injunction modification: (1) conflicted with the TSCA's broad PCB prohibition; (2) was unsupported by the record; and (3) was less protective than removing the campus's caulking. The court agreed with the school district's position that the TSCA does not require all violations to be immediately enjoined, and that such a requirement would be infeasible. The court therefore held that the modification was not an abuse of discretion or based on clearly erroneous facts because the modification reflected a more reasonable and protective strategy than preserving the campus and removing all of its caulk.

Judge O'Scannlain concurred in affirming the permanent injunction modification but dissented on the portions of the opinion vacating the sanctions and reversing PEER's dismissal. Judge O'Scannlain found no need for the district court to reanalyze the sanctions in light of *Goodyear*, and additionally, found the relationship between PEER and its teacher supporter too tenuous to grant PEER associational standing.

In sum, the court held the district court's sanctions must be vacated and remanded for the district court to apply the *Goodyear* framework. In addition, the court held PEER had associational standing because PEER's environmental mission sufficiently coincided with PEER's teacher supporter's concerns about environmental risks. Finally, the court held the district court's permanent injunction modification was not an abuse of discretion or based on clearly erroneous facts because a comprehensive long-term plan resulting in the demolition of PCB-impacted buildings on campus would better protect public health than remediation without demolition.

---

[22] *Am. Unites for Kids*, 985 F.3d 1075, 1093 (9th Cir. 2021).

[23] TSCA, 15 U.S.C. § 2619(c)(2).

C. Clean Water Act (CWA)

1. Inland Empire Waterkeeper v. Corona Clay Co., 17 F.4th 825 (9th Cir. 2021)

The Inland Empire Waterkeeper and the Orange County Coastkeeper, two environmental organizations (collectively, Coastkeeper) sued the Corona Clay Company (Corona) in the United States District Court for the Central District of California.[24] Coastkeeper brought suit under the Clean Water Act (CWA),[25] alleging that Corona violated its permit by illegally discharging pollutants into navigable waters of the United States and by failing to comply with certain permit conditions related to monitoring and reporting. The district court granted partial summary judgment for Coastkeeper and, after a jury trial, entered judgment in favor of Corona on the remaining claims.[26] On appeal, the Ninth Circuit vacated and remanded the decision, and held that an ongoing discharge violation is not a prerequisite to a CWA citizen suit asserting ongoing monitoring and reporting violations.

Corona processes clay products in Corona, California on property adjacent to the Temescal Creek. Corona's production generates storm water discharge, which Corona releases pursuant to a General Permit from the California State Water Resources Board (Board), which issues permits under the National Pollutant Discharge Elimination System (NPDES). The permit requires Corona to create a pollution prevention plan and implement monitoring programs that document the facility's storm water discharge, analyze runoff samples, and report results to the Board.

In 2018, Coastkeeper alleged that Corona violated the conditions of its General Permit by improperly discharging polluted storm water into Temescal Creek, which flowed first into the Santa Ana River and then to the Pacific Ocean. Coastkeeper alleged three permit violations directly related to discharge of pollutants and four violations related to monitoring and reporting. The district court granted partial summary judgment to Coastkeeper on two monitoring and reporting claims, and Coastkeeper voluntarily dismissed two discharge claims.

The district court instructed the jury that *Gwaltney of Smithfield Ltd.. v. Chesapeake Bay Foundation*[27] controlled as to the remaining

---

[24] Inland Empire Waterkeeper v. Corona Clay Co., No. SA CV 18-0333-DOC-DFM, 2019 WL 8011683 (C.D. Cal. Dec. 20, 2019).

[25] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2018).

[26] The district court initially granted partial summary judgment for Coastkeeper on two claims relating to Corona's failure to develop and implement best practices. Corona voluntarily dismissed two discharge claims. After the jury trial, Corona prevailed on the two remaining reporting claims.

[27] 484 U.S. 49 (1987) (holding that the CWA bars citizen suits for strictly past violations of permits and requiring that the ongoing violation forming the basis of suit be related to discharge, rather than monitoring or reporting).

three claims and required that citizen suits under the CWA be predicated on discharge violations. Coastkeeper's claims that Corona violated monitoring and reporting requirements were therefore insufficient bases for suit. Based on a jury instruction that Coastkeeper was required to prove either a prohibited discharge after the complaint was filed or a reasonable likelihood that another discharge violation would occur, the jury found for Corona on the remaining three claims. Both parties appealed, and the Ninth Circuit reviewed the district court's decision.

On appeal, Corona first argued that Coastkeeper lacked Article III standing as to both the discharge violations and recording and monitoring violations, claiming that Coastkeeper's members were not concretely injured by nominal pollution and insufficient reporting practices. Citing *Friends of the Earth v. Laidlaw Environmental Services*,[28] the Ninth Circuit disagreed, pointing to testimony from members who lived by the creek and used it for recreation that pollution from the discharged storm water impacted their enjoyment of the waterway. The Ninth Circuit also found standing for the reporting claims, noting that it had repeatedly recognized that a defendant's failure to provide statutorily required information is a sufficient injury to give citizen plaintiffs Article III standing.

Next, the Ninth Circuit addressed Corona's contention that, under *Gwaltney*, reporting and monitoring violations cannot alone form the basis of a citizen suit under the CWA. Citing the text and structure of the CWA, the Ninth Circuit determined that the district court erred in its interpretation of *Gwaltney*. It then held that *Gwaltney* does permit a citizen suit based on ongoing or imminent procedural violations, such as those alleged by Coastkeeper.

The court then addressed the evolution of jurisdictional requirements for CWA suits involving NPDES permits. The Ninth Circuit stated that at the time of trial, it required a showing that pollutants in navigable waters were "fairly traceable from the point source."[29] Shortly after, the Supreme Court rejected the Ninth Circuit's interpretation, and held instead that a permit is required when discharge from a point source flows directly into navigable waters, or when there is a "functional equivalent of a direct discharge."[30] Operating under the now-defunct precedent, Corona had previously admitted to the district court that its storm water discharge flowed "indirectly to Temescal Wash."[31] Coastkeeper claimed that this admission in addition to other evidence was sufficient to prove a jurisdictional discharge. The Ninth Circuit disagreed, vacated the

---

[28] 528 U.S. 167 (2000) (holding plaintiffs must have a concrete and particularized injury fairly traceable to the challenged conduct that can be redressed by a favorable judicial decision to satisfy Article III standing requirements).

[29] *Inland Empire Waterkeeper*, 17 F.4th 825, 836 (2021) (quoting Haw. Wildlife Fund v. Cnty. of Maui, 886 F.3d 737, 749 (9th Cir. 2018)).

[30] Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1468 (2020).

[31] *Inland Empire Waterkeeper*, 17 F.4th at 831.

judgment, and remanded to the district court for further proceedings adhering to the Supreme Court's intervening opinion.

Last, the Ninth Circuit addressed a minor point regarding Federal Rule of Civil Procedure 36.[32] It noted that Coastkeeper did not bring Corona's admission that its storm water flows indirectly to Temescal Wash to the jury. Instead, Coastkeeper asked the district court to deem the statement a binding judicial admission and to instruct the jury that the facts were admitted. The district court denied this request, characterizing it as an attempt to admit evidence post hoc. The Ninth Circuit held that this was error, and that Coastkeeper's request that the jury be so instructed in the final instructions sufficed under FRCP 36.

Ultimately, the Ninth Circuit held that the plaintiffs had standing, but that the district court erred in its interpretation of *Gwaltney*. Due to that error of interpretation, and the Supreme Court's holding in *County of Maui*, the Ninth Circuit vacated the judgment and remanded for further proceedings.

2. Food & Water Watch v. EPA, 20 F.4th 506 (9th Cir. 2021)

Two environmental organizations, Food & Water Watch and Snake River Waterkeeper (collectively, Petitioners) petitioned the United States Court of Appeals for the Ninth Circuit for direct review of a United States Environmental Protection Agency (EPA) order issuing a general National Pollutant Discharges Elimination System Permit (Permit) to Idaho-based Concentrated Animal Feeding Operations (CAFOs).[33] Petitioners challenged the Permit alleging the Permit's monitoring requirements failed to ensure compliance with its discharge limitations. The Ninth Circuit granted the petition for review upon rehearing and remanded the Permit to EPA for further proceedings consistent with the opinion.

Production and land-application areas[34] of Idaho CAFOs are known to discharge animal waste pollutants, like *E. coli* bacteria, into navigable waters of local watersheds.[35] Such CAFO discharges are illegal under the Clean Water Act (CWA)[36] unless a CAFO first obtains a Permit from EPA that limits discharges and "assure[s] compliance with"[37] the Permit's discharge limits.[38] Moreover, Ninth Circuit

---

[32] FED. R. CIV. P. 36 sets out rules for requests for admissions.

[33] Food & Water Watch v. U.S. Env't Prot. Agency (*Food & Water Watch I*), 13 F.4th 896 (9th Cir. 2021). This opinion was later withdrawn and superseded on rehearing by the opinion discussed herein.

[34] Production areas include manure lagoons and land-application areas include fields that are fertilized with manure.

[35] Food & Water Watch v. U.S. Env't Prot. Agency (*Food & Water Watch II*), 20 F.4th 506, 512 (9th Cir. 2021) (explaining "[s]everal Idaho waterways in CAFO-dominated areas show levels of *E. coli* that far exceed the Water Quality Criterion geometric mean").

[36] 33 U.S.C. §§ 1251–1388 (2018).

[37] *Id.* § 1342(a)(1)–(2).

[38] *Id.* §§ 1311(a), 1342.

precedent and current EPA regulations,[39] first revised in 2003 (2003 Rule) and then again in 2008, require a permit to have monitoring provisions sufficient to ensure compliance with its discharge limitations. In 2020, EPA issued a permit to Idaho CAFOs that prohibited pollutant discharges with few exceptions and required "mandated inspections"[40] of above-ground discharges from production areas. The Ninth Circuit reviewed the Permit pursuant to Section 509 of the CWA[41] and the Administrative Procedure Act's (APA)[42] arbitrary and capricious standard of review.[43]

Petitioners argued the Permit lacked monitoring requirements necessary to guard against violations of the Permit's discharge limitations. EPA responded that the Petitioners' challenge was untimely because the Permit largely relied on EPA's 2003 Rule. The Ninth Circuit disagreed with EPA and held the Petitioner's challenge was timely. The Ninth Circuit reasoned the Permit did not rely on the 2003 Rule because that rule did not require discharge monitoring by CAFOs.

EPA next argued that the Ninth Circuit must defer to EPA's expert judgement that the Permit contained monitoring requirements sufficient to ensure compliance with its discharge limitations. The Ninth Circuit ultimately disagreed because the Permit listed no monitoring requirements for underground discharges from production areas and dry-weather discharges from land-application areas. The Ninth Circuit reasoned that because both of these areas were known to cause discharges, the Permit could not ensure compliance with its discharge limitations without monitoring requirements for those areas.

In sum, the Ninth Circuit held EPA's issuance of the Permit was arbitrary, capricious, and in violation of the law because the Permit lacked monitoring requirements sufficient to ensure compliance with its discharge limitations. Thus, the Ninth Circuit granted the Petitioners' petition for review and remanded the Permit to EPA for further proceedings consistent with the opinion.

3. Sackett v. EPA, 8 F.4th 1075 (9th Cir. 2021)

Two landowners, Chantell and Michael Sackett (Sacketts), filed suit under the Administrative Procedure Act (APA)[44] against the U.S. Environmental Protection Agency (EPA) in the United States District Court for the District of Idaho.[45] The Sacketts alleged that EPA acted

---

[39] 40 C.F.R. §§ 122.48(b), 122.44(i)(1)(i)–(iii) (2021).

[40] *Food & Water Watch II*, 20 F.4th at 516.

[41] This provision allows "any interested person" to petition a federal Circuit Court of Appeals (in the federal judicial district where the person resides or has a directly affected business) to review the issuance of a NPDES permit within 120 days of its issuance. *See* CWA, 33 U.S.C. § 1369(b)(1)(F) (2018).

[42] 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

[43] *Id.* § 706(2)(A).

[44] 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521.

[45] Sackett v. U.S. Env't Prot. Agency, No. 08-CV-00185, 2019 WL 13026870 (D. Idaho Mar. 31, 2019).

arbitrarily and capriciously by issuing the Sacketts a compliance order (Order) without jurisdiction under the Clean Water Act (CWA).[46] The district court held that EPA's Order did not violate the APA and therefore granted EPA's motion for summary judgement. The Ninth Circuit affirmed the district court's grant of summary judgment in favor of EPA.

The Sacketts purchased and filled an Idaho property near a wetland complex, tributary, and creek—all of which drain into Priest Lake. EPA surveyed the Sackett's property after the fill and concluded, in a jurisdictional determination (JD) and a memorandum (Memo), that the Sackett's property contained wetlands regulable under the CWA. The CWA requires anyone who discharges fill material into navigable waters to obtain a Section 404 permit.[47] The Sacketts did not obtain the required permit for their fill activities. EPA therefore issued an Order against the Sacketts—which was subsequently amended and withdrawn—requiring the Sacketts to halt their fill unless and until they obtained a Section 404 permit. The court reviewed the district court's grant of summary judgment *de novo* and reviewed the district court's decision not to strike the Memo from the administrative record for abuse of discretion. The court also reviewed whether the issue was rendered moot by the amendment and withdrawal of the Order *de novo*.

First, EPA argued its JD was not a final agency action that the Sacketts could challenge under the APA. The Ninth Circuit did not accept this argument and declared it a "red herring"[48] for the mootness issue. The court reasoned the APA's final agency action requirement was already satisfied by EPA's Order, and moreover, that EPA's JD refuted mootness because it showed that EPA and the Sacketts still had an unsettled CWA jurisdiction dispute.

Second, EPA argued the case was moot because the Sacketts already obtained relief when EPA withdrew its Order. The Ninth Circuit disagreed and held the Sacketts would still be stuck in a "regulatory quagmire"[49] if the case were dismissed as moot. The court reasoned that the Sacketts had not obtained any meaningful relief because EPA could reinstate its Order at any time and whether the Sackett's property was subject to CWA jurisdiction remained unresolved.

Third, EPA argued the case was moot because of a presumption that its withdrawal of the Order was done in good faith. The Ninth Circuit did not accept this argument and held such a presumption is "by no means dispositive."[50] The court reasoned that the presumption could not moot the case because of EPA's unacceptable litigation strategy and unclear motives regarding whether it would reinstate its Order.

---

46 33 U.S.C. §§ 1251–1388 (2018).

47 *Id.* § 1344.

48 Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1084 (9th Cir. 2021).

49 *Id.*

50 *Id.* at 1085.

Finally, EPA argued new EPA CWA regulations[51] would make any judicial decision about the prior EPA CWA regulations at issue in this case "purely advisory."[52] The court disagreed and held its decision would not be purely advisory because the court is asked to interpret the CWA, not EPA regulations.

The Ninth Circuit then rejected the Sacketts' argument that the Memo was improperly included in the administrative record because it postdated EPA's Order. The court held the district court did not abuse its discretion by including the Memo in the administrative record because the Memo contained the same information as EPA's Order and did not contain any impermissible "'post hoc' rationalizations."[53]

Finally, the Sacketts argued that the governing CWA jurisdiction test was the test from Justice Scalia's concurrence in *Rapanos v. United States*.[54] The Ninth Circuit disagreed and held the test from Justice Kennedy's concurrence in *Rapanos* governed. Under this test, CWA jurisdiction over wetlands depends on a "significant nexus between the wetlands in question and navigable waters in the traditional sense."[55] The Ninth Circuit, relying on its decision in *Northern California River Watch v. City of Healdsburg*[56] and other precedent,[57] reasoned that Justice Kennedy's test was the governing test for CWA jurisdiction in the Ninth Circuit.

The Ninth Circuit rejected the Sacketts' argument that *Healdsburg* was no longer good law in the Ninth Circuit because it did not apply the "reasoning-based"[58] framework of *United States v. Davis*.[59] The court explained that even though *Healdsburg's* reasoning-based analysis was not flawless, *Healdsburg* was still good law because it was not "clearly irreconcilable"[60] with any Ninth Circuit precedent. The court further rejected the Sacketts' argument that *Healdsburg* was clearly

---

[51] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,273 (Apr. 21, 2020).

[52] *Sackett*, 8 F.4th at 1086.

[53] *Id.* at 1086–87 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971)).

[54] 547 U.S. 715 (2006). Under Justice Scalia's CWA jurisdiction test, jurisdiction only extends to "relatively permanent, standing or flowing bodies of water" and to wetlands with a "continuous surface connection" to such permanent waters. *Id.* at 739, 742.

[55] *Id.* at 779. A "significant nexus" exists only if a wetland, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

[56] 496 F.3d 993 (9th Cir. 2007) (concluding Justice Kennedy's concurrence provided the controlling rule of law from *Rapanos*).

[57] Marks v. United States, 430 U.S. 188 (1977) (explaining the controlling holding from a fractured decision is the narrowest ground that a majority of justices would assent to); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) (per curiam) (applying *Marks* to conclude Justice Kennedy's test in *Rapanos* was the controlling test).

[58] *Sackett*, 8 F.4th at 1084.

[59] 825 F.3d 1014 (9th Cir. 2016) (en banc) (clarifying how the Ninth Circuit performs a *Marks* analysis to a fractured decision).

[60] *Sackett*, 8 F.4th at 1090.

irreconcilable with *Cardenas v. United States*[61] because *Healdsburg's* reasoning-based analysis improperly relied on a dissent in *Rapanos*. The court explained reliance on a dissent is not fatal to a court's reasoning-based inquiry, as this issue has not been decided by the Ninth Circuit. And, in any event, *Healdsburg* neither directly nor indirectly relied on the dissent in *Rapanos*.

In sum, the court held that EPA's Order issued against the Sacketts was not arbitrary and capricious because EPA had CWA jurisdiction over the Sacketts' property. Additionally, the court held that the case was not moot, the district court did not abuse its discretion by including the Memo in the administrative record, and that the Ninth Circuit's governing standard for CWA jurisdiction is Justice Kennedy's test in *Rapanos*. The court thus affirmed the district court's grant of summary judgment in favor of EPA.

4. Trout Unlimited v. Pirzadeh, 1 F.4th 738 (9th Cir. 2021)

Trout Unlimited, a large sportsman's conservation organization, along with several industry, tribal, and environmental groups (collectively, Trout Unlimited),[62] brought action against the United States Environmental Protection Agency (EPA)[63] in the United States District Court for the District of Alaska. Trout Unlimited challenged EPA's withdrawal of its decision to prohibit the Army Corps of Engineers (Corps) from issuing a dredge-and-fill permit for a mine within the Bristol Bay watershed (the watershed) under the CWA.[64] Trout Unlimited alleged the withdrawal was a violation of the CWA and EPA's implementing regulations (EPA's Regulations). The district court granted EPA's motion to dismiss. The Ninth Circuit reversed in part and remanded for further proceedings to determine whether EPA's withdrawal was arbitrary, capricious, an abuse of discretion, or contrary to law under the APA.[65]

---

[61] 826 F.3d 1164 (9th Cir. 2016) (explaining the narrowest ground must be a position implicitly approved by at least five Justices "who support the judgement" (quoting *Davis*, 825 F.3d at 1020)).

[62] Plaintiff-Appellants also included Bristol Bay Economic Development Corporation; Bristol Bay Native Association, Inc.; United Tribes of Bristol Bay; Bristol Bay Regional Seafood Development Association, Inc.; Bristol Bay Reserve Association; SalmonState; Alaska Center; Alaska Community Action on Toxics; Alaska Wilderness League; Cook Inletkeeper; Defenders of Wildlife; Earthworks; Friends of McNeil River; National Parks Conservation Association; National Wildlife Federation; Natural Resources Defense Council; Sierra Club; Wild Salmon Center, and McNeil River Alliance.

[63] Defendant-Appellees also included Michelle Pirzadeh, in her official capacity as Acting Regional Administrator of EPA, Region 10; Melissa Hoffer, in her official capacity as Acting General Counsel for EPA and delegated authority of the Administrator; and Michael S. Regan, in his official capacity as Administrator. The State of Alaska was an Intervenor-Defendant-Appellee.

[64] CWA, 33 U.S.C. §§ 1251–1388 (2018).

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

Under CWA Section 404(a), the Corps has authority to issue permits for the discharge of dredged or fill material into the navigable waters of the United States at specified disposal sites.[66] But this authority is subject to CWA Section 404(c), which authorizes the EPA Regional Administrator (Regional Administrator) to determine if the discharge "will have an unacceptable adverse effect" on environmental resources, and may issue a proposed determination.[67] Issuance of a proposed determination prohibits the Corps from issuing a permit until the Section 404(c) process concludes.[68] The Regional Administrator, after publishing the proposed determination with a comment period,[69] can withdraw its determination.[70] If the Regional Administrator decides to withdraw, the Administrator of the EPA (Administrator) then reviews the decision and makes a final determination.[71] The Administrator may accept the withdrawal if they do not notify the Regional Administrator of intent to review, which is what happened here. If not notified, the Regional Administrator then publishes notice of the withdrawal of the proposed determination in the Federal Register, constituting final agency action.[72]

During the 2000s, Pebble Limited Partnership and their subsidiaries (collectively, PLP) started the process to obtain permits to mine within the watershed. In 2010, tribal communities began requesting for EPA to invoke its Section 404(c) authority to protect the watershed. The EPA then conducted a Watershed Assessment that studied the potential effects of PLP's plan to extract up to 12 million tons and concluded that large-scale mining would have unacceptable environmental effects. Consequently, EPA's Region 10 Regional Administrator issued a proposed determination under Section 404(c). The proposed determination sought to prohibit mines in the watershed that would induce unacceptable environmental impacts.

In 2017, PLP applied for a Section 404 permit and EPA subsequently withdrew its proposed determination. Trout Unlimited then brought this action alleging that EPA's withdrawal was in violation of the CWA, the EPA's regulations, and the APA. The district court granted EPA's motion to dismiss, concluding that the withdrawal was unreviewable because: (1) it was a decision not to take an enforcement action; and (2) no manageable legal standard was provided in either the CWA or EPA's regulations. Trout Unlimited timely appealed. The Ninth Circuit reviewed the dismissal *de novo*.

The Ninth Circuit addressed the reviewability of EPA's withdrawal decision within the scope of Trout Unlimited's complaint. Relying on the

---

66 33 U.S.C. § 1344(c).

67 *See* 40 C.F.R. § 231.2(e) (2021) (defining "unacceptable adverse effect" to encompass "significant degradation of municipal water supplies . . . or significant loss of or damage to" other resources).

68 *Id.* § 231.3(a)(2).

69 *Id.* § 231.4(a).

70 *Id.* § 231.5(a).

71 *Id.* § 231.5(c).

72 *Id.*

Supreme Court opinion *Heckler v. Cheney*,[73] the Ninth Circuit rejected EPA's argument that the withdrawal fell within the scope of APA Section 701(a)(2)'s exception for when agency action is committed to agency discretion by law. The Ninth Circuit ruled that the exception only applicable if no judicially manageable standards are available in the governing statute or regulation to judge an agency's exercise of its discretion.[74] The Ninth Circuit concluded that EPA's regulations contained a meaningful legal standard governing the Regional Administrator's withdrawal of a proposed determination, and the CWA did not.

To start, the Ninth Circuit analyzed the CWA and affirmed the district court's dismissal insofar as the Trout Unlimited complaint rests directly on the CWA, holding that it only had jurisdiction for challenges referencing EPA's regulations. The Ninth Circuit reached this conclusion after determining that: (1) the CWA did not contain a legal standard for the broad discretion awarded to EPA; and (2) one cannot bring statutory challenges to an Administrator's decision not to invoke Section 404(c).

Next, the Ninth Circuit held that EPA's regulation, 40 C.F.R. § 231.5(a), contains a legal standard in requiring EPA to withdraw a proposed determination only if the discharge is not likely to have an unacceptable adverse effect. The Ninth Circuit reached this conclusion after identifying three non-dispositive factors: (1) the text of Section 231.5(a) implies the Regional Administrator will withdraw a proposed determination only if an unacceptable adverse effect is unlikely; (2) the structure of EPA's regulations indicates that EPA chose to constrain its broad discretion following a decision to publish a proposed determination; and (3) EPA's only previous withdrawal was due to the Regional Administrator's reassessment of environmental effects, indicating that the authority to withdraw is contingent on assessing environmental effects. For these reasons, the Ninth Circuit concluded that Section 231.5(a) allowed the Regional Administrator to withdraw a proposed determination *only if* the discharge would be unlikely to have an unacceptable adverse effect. Thus, the Ninth Circuit held that EPA's regulations contained a meaningful legal standard for the Regional Administrator's withdrawal of a proposed determination, thus the withdrawal decision was subject to judicial review under the APA.

Lastly, the Ninth Circuit rejected EPA's argument that the withdrawal decision was unreviewable because it was a decision to not take enforcement action. The Ninth Circuit, abiding by *Heckler*, ruled that an agency's decision not to take enforcement action is presumptively unreviewable, but that presumption may be overcome if a

---

[73] 470 U.S. 821 (1985).

[74] *Cf. id.* at 830 (1985) ("[E]ven in circumstances where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's discretion.").

meaningful legal standard constrains the agency's discretion.[75] Because the Ninth Circuit concluded that 40 C.F.R. § 231.5(a) contained a meaningful legal standard, the ruling did not turn on proper characterization of EPA's withdrawal. Nevertheless, the Ninth Circuit held that the EPA's withdrawal was not a decision to take enforcement action, but instead was a product of reasoned public decision-making and had a real-world legal effect.

In sum, the Ninth Circuit held that while the CWA grants agencies discretion absent a judicially manageable legal standard, EPA's regulations did contain such a standard governing the Regional Administrator's withdrawal of a proposed determination. In addition, the Ninth Circuit concluded that the characterization of EPA's publicly guided withdrawal did not prevent judicial review. Accordingly, the Ninth Circuit held that EPA's withdrawal was a final agency action subject to judicial review under the APA and remanded the case to the district court for further proceedings to determine whether EPA's withdrawal was arbitrary, capricious, an abuse of discretion, or contrary to law.

In his dissent, Judge Bess disagreed with the majority's holding that courts can review an EPA decision to withdraw a proposed determination. Judge Bess applied a strict interpretation of 5 U.S.C. § 701(a)(2) and argued that within administrative law, there is no role for the courts when agency action is committed to agency discretion by law.[76] Thus, Judge Bess found it improper for the majority to initially concede that a CWA scheme gave EPA broad discretion while subsequently purporting to discover a judicially enforceable standard for reviewing EPA's decision. Additionally, Judge Bess argued that the majority invented a legal standard that does not exist in the statute or regulations when it interpreted 40 C.F.R. § 231.5(a) to provide a judicially manageable standard to review the action at issue, which was effectively a refusal to act.

5. Deschutes River Alliance v. Portland General Eleclctric Co., 1 F.4th 1153 (9th Cir. 2021)

Deschutes River Alliance (DRA), a nonprofit advocacy organization, sued Portland General Electric (PGE), a utility company, in the United States District Court for the District of Oregon.[77] DRA alleged PGE's operation of a hydroelectric facility, which PGE co-operated with the Confederated Tribes of Warm Springs (Tribe), violated the Clean Water Act.[78] The district court denied PGE's motion to dismiss for failure to join the Tribe as a required party, holding that the Tribe was feasible to join because the CWA abrogated the Tribe's sovereign immunity. DRA

---

[75] *Id.* at 829–837.

[76] 5 U.S.C. § 701(a)(2).

[77] Deschutes River All. v. Portland Gen. Elec. Co., 331 F. Supp.3d 1187 (D. Or. 2018).

[78] 33 U.S.C. §§ 1251–1388 (2018).

then filed a supplemental complaint adding the Tribe as an additional defendant. The district court went on to find no violation of the CWA and granted summary judgment for PGE and the Tribe. Both parties appealed and the Ninth Circuit reviewed the claims *de novo*. The Ninth Circuit reversed the lower court and held that while the Tribe was a required party, the CWA did not abrogate its immunity. Therefore, joinder was not feasible. The Ninth Circuit remanded the case to be dismissed without reaching the alleged CWA violations.

In 2001, PGE and the Tribe jointly applied for a license to co-operate a hydroelectric facility on the Deschutes River, located partly on the Tribe's reservation. DRA, a nonprofit advocacy organization whose purpose is to protect the Lower Deschutes River, was concerned with the facility's effect on water quality in the river and sued to enjoin PGE from continuing its operation unless it complied with water quality requirements. The citizen suit provision of the CWA authorizes citizens to bring suits "against any person, including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution."[79] A separate provision of the CWA defines "person" to include "municipality,"[80] which in turn is defined to include "an Indian tribe or an authorized Indian tribal organization."[81] The district court interpreted these provisions as abrogating the Tribe's sovereign immunity and allowed DRA to join the Tribe as an additional defendant because the Tribe had a legally protected interest that might be impaired by the lawsuit.

The Ninth Circuit first rejected PGE and the Tribe's argument that DRA lacked Article III stranding because DRA's claims were not redressable. The Ninth Circuit held that DRA met its modest burden to show redressability because the possible grant of an injunction against PGE's operation of the facility could improve water quality in the river.

The Ninth Circuit then addressed whether the CWA abrogated the Tribe's sovereign immunity. In the Ninth Circuit, tribes have sovereign immunity unless Congress clearly and unequivocally abrogated such immunity with "perfect confidence."[82] The Ninth Circuit here found no such confidence in the CWA provisions. DRA argued that the CWA abrogated the Tribe's sovereign immunity because the CWA includes "an Indian tribe" in the definition of "person."[83] The Ninth Circuit, however, did not find that language to be sufficiently clear and unequivocal, because Congress conspicuously did not mention tribes in

---

[79] *Id.* § 1365(a).

[80] *Id.* § 1362(5).

[81] *Id.* § 1362(4).

[82] Daniel v. Nat'l Park Serv., 891 F.3d 762, 774 (9th Cir. 2018); Dellmuth v. Muth, 491 U.S. 223, 231 (1989).

[83] CWA, 33 U.S.C § 1362(4).

the provision expressly about sovereign immunity of certain government entities.[84]

The Ninth Circuit also rejected DRA's argument that the court should follow two cases from outside the Ninth Circuit[85] where courts found other statutes to abrogate tribal sovereign immunity. The Ninth Circuit declined to adopt the Eighth Circuit's reasoning, finding that it ignored the absence of tribes from the explicit mention of sovereign immunity in the parallel provision of the Resource Conservation and Recovery Act (RCRA).[86] The Ninth Circuit then noted that the CWA's legislative history demonstrates tribes were included in the definition of municipalities solely to make them eligible for grants, not to be subject to citizen suits. The Ninth Circuit also distinguished the Tenth Circuit case that DRA cited, noting the Safe Drinking Water Act (SDWA)[87] did not mention the sovereign immunity of the United States or the Eleventh Amendment.

Lastly, the Ninth Circuit reviewed the district court's denial of PGE's motion to dismiss for failure to join the Tribe as a required party. Federal Rule of Civil Procedure 19 requires joinder of a party whose presence is necessary to ensure "complete relief among the existing parties,"[88] or to protect a party whose interests would be impaired or impeded were the action to proceed without that party.[89] If joinder is not feasible, Rule 19 requires dismissal when the action cannot proceed "in equity and good conscience" absent the participation of the party.[90] Here, joinder was not feasible because the Ninth Circuit had determined the CWA did not abrogate the Tribe's sovereign immunity. The Ninth Circuit rejected DRA's argument that PGE could adequately represent the Tribe's interests, noting significant precedent indicating that tribal sovereign immunity weighs heavily towards dismissal. Here, the Tribe and PGE had divergent interests because unlike PGE, the Tribe had a unique interest in preserving its fishing rights. The Ninth Circuit therefore held that the action could not proceed in equity and good conscience because the Tribe's interests would be impaired.

Circuit Judge Bea dissented in part and concurred in the judgment because he found the court's reliance on legislative history to be "superfluous and irrelevant." Judge Bea would have simply determined that the CWA did not abrogate the Tribe's sovereign immunity from the citizen suit provision's failure to mention tribes.

---

84 *Id*. § 1365(a) (explicitly abrogating the sovereign immunity of "the United States, and any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution").

85 Blue Legs v. U.S. Bureau of Indian Affs., 867 F.2d 1094 (8th Cir. 1989); Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Lab., 187 F.3d 1174 (10th Cir. 1999).

86 42 U.S.C. §§ 6901–6992k (2018) (amending Solid Waste Disposal Act, Pub. L. No. 89–272, 79 Stat. 992 (1965)).

87 42 U.S.C. §§ 300f–300j-27 (2018).

88 FED. R. CIV. P. 19(a)(1)(A).

89 *Id*. at 19(a)(1)(B)(i).

90 *Id*. at 19(b).

In sum, the Ninth Circuit held that (1) DRA had standing because an injunction would provide redress, and (2) the CWA did not clearly or explicitly abrogate the Tribe's sovereign immunity. The Ninth Circuit thus remanded the case back to the lower court to be dismissed for failure to join a required party without reaching the question of the CWA violations.

6. Southern California Alliance of Publicly Owned Treatment Works v. EPA, 8 F.4th 831 (9th Cir. 2021)

The Southern California Alliance of Publicly Owned Treatment Works (California Municipal Agencies),[91] a trade association whose members are California municipal agencies that operate wastewater treatment plants, brought action against the United States Environmental Protection Agency (EPA)[92] in the United States District Court for the Eastern District of California.[93] California Municipal Agencies claimed that EPA's 2010 Guidance (2010 Guidance), which recommended a test procedure for assessing water toxicity, violated the Administrative Procedure Act (APA)[94] and the Clean Water Act (CWA)[95] because the 2010 Guidance was issued without following notice-and-comment rulemaking procedures and because requiring and using a specific alternative test procedure in discharge permits violated EPA regulations. The Ninth Circuit affirmed district court's dismissals[96] of California Municipal Agencies' claims.

The APA allows a plaintiff to challenge only final agency action.[97] The CWA prohibits the discharge of any pollutant into the waters of the United States without a permit.[98] EPA has implemented several measures to ensure that any discharge into public waters is nontoxic, including the requirement for certain permitholders to pass a whole effluent toxicity (WET) test. In 2002, EPA updated its manuals on WET testing with the recommended tests to use in determining toxicity from WET tests. EPA stated in its 2002 update that these methods were not the only possible methods of statistical analysis, but it did not specify any alternative tests.

---

91 Petitioners include Southern California Alliance of Publicly Owned Treatment Works, Central Valley Clean Water Associations, and Bay Area Clean Water Agencies.

92 Respondents include EPA and Deborah Jordan (Acting Regional Administrator, U.S. EPA Region 9).

93 S. Cal. All. of Publicly Owned Treatment Works v. U.S. Env't Prot. Agency, 297 F. Supp. 3d 1060, 1064 (E.D. Cal. 2018); S. Cal. All. of Publicly Owned Treatment Works v. U.S. Env't Prot. Agency, No. 16-CV-02960-MCE-DB, 2019 WL 688157, at *1 (E.D. Cal. Feb. 19, 2019).

94 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

95 33 U.S.C. §§ 1251–1388 (2018).

96 The first dismissal occurred in October 2016. The second dismissal occurred in December 2016. S. Cal. All. Of Publicly Owned Treatment Works v. U.S. Env't Prot. Agency, 8 F.4th 831, 834–36 (9th Cir. 2021).

97 5 U.S.C. § 704.

98 33 U.S.C. § 1311(a).

In June 2010, EPA issued the guidance at issue here, 2010 Guidance, which explained how to use a new alternative test called the Test of Significant Toxicity (TST). TST assumes that a sample is toxic absent statistically significant evidence to the contrary. EPA has never promulgated the use of TST as a formal rule, despite amending the regulations governing WET tests since issuing the 2010 Guidance.[99]

In 2014, California Municipal Agencies filed a complaint in district court alleging that EPA violated the APA and the CWA when it approved California's application to use the TST as an alternative test for permits. After the complaint was filed, EPA withdrew its approval of California's use of TST as an alternative test. As a result, the district court dismissed the case as moot. California Municipal Agencies unsuccessfully sought reconsideration of the dismissal. Subsequently, California Municipal Agencies sought to reopen the case to amend their complaint by expanding on the allegations related directly to EPA's use of the TST and its issuance of the 2010 Guidance. The district court denied the motion (First Dismissal Order), refusing to allow the California Municipal Agencies to tack a new claim to the original challenge via a motion for reconsideration of a prior motion for reconsideration.

In 2016, California Municipal Agencies brought the instant action, alleging that EPA had violated the APA by issuing the TST guidance without following notice-and-comment rulemaking procedures, and that EPA had violated its own regulations by requiring and using the TST in discharge permits. The district court again dismissed the complaint, this time because it was barred by the APA's six-year statute of limitations.[100] The district court did not address whether the 2010 Guidance was a final agency action, which is required for a valid APA claim. California Municipal Agencies attempted to amend their complaint, but the district court dismissed with prejudice and provided an order that incorporated its First Dismissal Order in its entirety. California Municipal Agencies timely appealed from that order to the Ninth Circuit for consideration of its arguments relating to both dismissal orders. The Ninth Circuit reviewed the district court's dismissals *de novo*.

The Ninth Circuit's first inquiry was whether both dismissal orders were reviewable on appeal. EPA argued that the challenge to the First Dismissal Order should be ignored because California Municipal Agencies named only the second dismissal order in their notice of appeal. The Ninth Circuit disagreed with EPA and held that it would consider California Municipal Agencies' arguments relating to both orders. The Ninth Circuit's reasoning was due to the district court expressly stating that its second dismissal order incorporated its First

---

[99] *See* 77 Fed. Reg. 29,758 (May 18, 2012) (making changes to effluent guideline regulations); 80 Fed. Reg. 8,956 (Feb. 19, 2015); 82 Fed. Reg. 40,836 (Aug. 28, 2017) (modifying the testing procedures approved for analysis and sampling under the CWA).

[100] *See* 28 U.S.C. § 2401(a) (2018) (barring civil action against the U.S. if filed six or more years after the right of action first accrues).

Dismissal Order in its entirety and because Ninth Circuit case law provides that an appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment.

The Ninth Circuit next addressed whether EPA's 2010 Guidance was a final agency action. California Municipal Agencies claimed that the 2010 Guidance was *ultra vires* and exceeded EPA's statutory authority because the guidance document was not promulgated as a formal rule under the APA. EPA acknowledged that the guidance was an agency action, but the parties disagreed as to whether it was a "final" agency action. In its analysis, the Ninth Circuit utilized the two-prong *Bennett* test: to be deemed final, an agency action must: (1) mark the consummation of the agency's decision-making process; and (2) be one by which rights or obligations have been determined or from which concrete legal consequences will flow. EPA conceded that the 2010 Guidance met the first prong of the *Bennett* test but argued that it imposed no legal consequences. California Municipal Agencies attempted to demonstrate the requisite concrete legal consequences through two assertions: (1) EPA's 2010 Guidance changed the legal regime by allowing permitting authorities to use TST as another statistical option to analyze valid WET test data for permit compliance determinations; and (2) permit holders may be subject to criminal penalties or civil enforcement actions for failing the TST if a state or federal permit requires it. The Ninth Circuit held the 2010 Guidance created no concrete consequences on its own for two main reasons. First, the Ninth Circuit held that it is permits, not guidance documents, that create consequences for regulated entities like California Municipal Agencies. Second, CWA authorizes permit holders to be subjected to concrete consequences only if a state or federal permit incorporates the TST. Thus, the Ninth Circuit disagreed with California Municipal Agencies' assertion because an agency action is not final when subsequent agency decision-making is necessary to create any practical consequences.[101]

Additionally, the Ninth Circuit addressed California Municipal Agencies' claim that even if the 2010 Guidance itself was not final, EPA's later actions crystallized it into final agency action. To support this claim, California Municipal Agencies' cited EPA emails assuring state permitting authorities that they could still use the TST despite EPA's withdrawal of the alternative test procedure. The Ninth Circuit held that the emails reflect the same thing as the 2010 Guidance: EPA considered the TST as merely one option for interpreting the WET test data necessary to obtain a discharge permit. Thus, EPA's actions did not crystallize the use of TST as a final agency rule.

Finally, the Ninth Circuit addressed its ability to review permitting actions. Federally issued permits may not be challenged in an APA

---

[101] *See* City of San Diego v. Whitman, 242 F.3d 1097, 1102 (9th Cir. 2001) (concluding that a letter sent by EPA did not constitute a final agency action).

action in district court, and State-issued permits are subject to review only in state court. California Municipal Agencies complained that if they were unable to challenge TST in district court, then their challenge cannot be heard in any other forum. The Ninth Circuit rejected this assertion and held that California Municipal Agencies' challenge to EPA's decision to allow use of the TST in individual permits is appropriately adjudicated in the context of individual permit decisions.

In sum, the Ninth Circuit held that EPA's 2010 Guidance was not a final agency action and as a result affirmed the district court's dismissals. The Ninth Circuit disposed of the APA statute of limitations issue as it held that it was unnecessary to consider the timeliness of the complaint because it affirmed the dismissal on the alternative final agency action issue.

7. Upper Missouri Waterkeeper v. EPA, 15 F.4th 966 (9th Cir. 2021)

Upper Missouri Waterkeeper (Waterkeeper), an environmental organization, brought action against the United States Environmental Protection Agency (EPA),[102] challenging its approval of the Montana Department of Environmental Quality's variance request from water quality standards under the Clean Water Act (CWA)[103] for a term of up to 17 years. Waterkeeper contended that EPA's approval was not in accordance with the law because it violated the Administrative Procedure Act (APA).[104] The United States District Court for the District of Montana rejected Waterkeeper's challenge but granted partial vacatur of the approval, holding that EPA's approval of a variance for 17 years was arbitrary and capricious. EPA and intervenor-defendants appealed and Waterkeeper cross-appealed. The Ninth Circuit granted summary judgment in favor of EPA.

Under regulations issued by the EPA, States may obtain a variance from approved water quality standards.[105] To obtain an EPA-approved variance a State must: (1) demonstrate that compliance with such water quality standards is infeasible for reasons such as that compliance would result in substantial and widespread economic and social impact,[106] and (2) that the variance proposed sets interim limits that represent the highest attainable condition of the water body throughout the term of the variance.[107]

In 2017, Montana sought EPA approval of a variance for a term of up to 17 years which would allow 36 municipal wastewater treatment facilities to discharge more nitrogen and phosphorus into wadeable

---

[102] Defendants also include Michael Regan, EPA Administrator. Intervenor-defendants include the Treasure State Resources Association of Montana, State of Montana Department of Environmental Quality, National Association of Clean Water Agencies, and Montana League of Cities and Towns.

[103] 33 U.S.C. §§ 1251–1388 (2018).

[104] 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

[105] 40 C.F.R. § 131.14 (2021).

[106] *Id.* §§ 131.14(b)(2)(i)(A), 131.10(g).

[107] *Id.* § 131.14(b)(1)(ii).

streams than permitted under the established water quality standards. EPA approved the variance as it agreed with Montana's assessment that (1) implementing reverse osmosis technology would be necessary to attain compliance with the water quality standards, and (2) the cost of implementing such technology would result in substantial and widespread economic and social impact on the communities served by the 36 municipal wastewater treatment facilities. EPA also determined that the interim limits imposed by the variance represented the highest attainable condition for all 36 facilities, and that the variance's term of up to 17 years would last only as long as necessary to achieve the highest attainable condition.

The Ninth Circuit first analyzed Waterkeeper's cross-appeal contending that Section 1313(c)(2)(A) of CWA precluded EPA from taking compliance costs into account when approving variance requests. Applying the two-step *Chevron* analysis, the Ninth Circuit determined that the CWA provision was silent on the precise question at issue and subsequently concluded that EPA's interpretation was reasonable for two reasons. First, the provision states that water quality standards shall protect the "public . . . welfare," and that term can reasonably be understood to encompass consideration of whether compliance costs would cause substantial and widespread economic and social impact. Second, EPA reasonably construed the provision's requirement that water quality standards "serve the purposes of this chapter" to include the purposes in Section 1251(a)(2) such as to support aquatic life and recreational uses wherever "attainable."[108] The CWA does not define what to evaluate when deciding whether a particular use is attainable, so it fell to the EPA to determine the meaning of the term. The Ninth Circuit concluded that Congress likely used the term to reflect EPA's regulation that requires an evaluation of whether achieving the necessary water quality was economically feasible given the costs that would be imposed on the affected communities.[109] Thus, the Ninth Circuit held that EPA's regulations reasonably interpret the CWA as allowing consideration of compliance costs when approving variance requests.

Next, the Ninth Circuit evaluated EPA's appeal of the district court's partial vacatur of EPA's approval of Montana's variance request. The district court held that EPA's approval of the variance's term of up to 17 years was arbitrary and capricious and not in accordance with EPA's own variance regulations because (1) it did not require compliance with the highest attainable condition at the beginning of the variance term and (2) did not require compliance with Montana's water quality standards by the end of the term. In defense of the district court's ruling, Waterkeeper pointed to the regulatory provision which provides that the interim limits imposed by the variance represent the

---

[108] 33 U.S.C. § 1251(a)(2).

[109] 40 C.F.R. § 131.14(b)(2)(i)(A), 131.10(g).

highest attainable condition of the water body applicable throughout the term of the variance. Waterkeeper contended that the phrase "throughout" had the same meaning as "during" and that both require compliance with the highest attainable condition at the very outset of the term. The Ninth Circuit disagreed, concluding that EPA's variance regulation unambiguously provided that compliance with the highest attainable condition was not required at the outset, reasoning that the regulation provided that a variance may remain in effect only "as long as necessary to achieve the highest attainable condition."[110] Thus, the Ninth Circuit held that the clear purpose of a variance was to provide the time needed to achieve the attainable interim standard and that compliance with the highest attainable condition was required by the end of the variance's term, not at the outset.

In addition, Waterkeeper contended that unless a variance requires compliance with the base water quality standards by the end of the term, States are free to postpone compliance with base standards indefinitely simply by securing one variance after another, thus in conflict with the goals of CWA. The Ninth Circuit rejected this argument as a misinterpretation of the purpose and nature of a variance. The Ninth Circuit concluded that the variance at issue was in accordance with EPA's regulations as it included features that ensured that the dischargers and waterbodies subject to variances continued to improve water quality. The Ninth Circuit held that the variance at issue was compliant with EPA's regulations and was fully consistent with CWA's goals, which EPA reasonably construed to include supporting aquatic life and recreational uses "wherever attainable."[111]

In sum, the Ninth Circuit held that EPA's approval of Montana's variance request from water quality standards was valid because (1) EPA reasonably interpretated the CWA to permit it to accept compliance costs as a reason for compliance with water quality standards to be infeasible, and (2) EPA's regulation governing variances supported its finding that Montana's variance set interim limits that represented the highest condition of the water body at the outset of the variance's term. The Ninth Circuit remanded the case to the district court with instructions to deny Waterkeeper's motion for summary judgment and to grant EPA's and intervenor-defendants' motions for summary judgment in full.

D. Resource Conservation and Recovery Act (RCRA)

1. California River Watch v. City of Vacaville, 14 F.4th 1076 (9th Cir. 2021)

California River Watch (River Watch), an environmental nonprofit organization, filed a Resource Conservation and Recovery Act (RCRA)[112]

---

110 Upper Missouri Waterkeeper v. EPA, 15 F.4th 966, 975 (9th Cir. 2021).

111 33 U.S.C. § 1251(a)(2).

112 42 U.S.C. §§ 6901–6992k (2018).

citizen suit[113] against the City of Vacaville, California (City) in the United States District Court for the Eastern District of California.[114] River Watch alleged the City violated RCRA because the City's water-distribution system transported a solid waste—namely, hexavalent chromium (Compound)[115]—to the City's residents. The district court granted summary judgment for the City because River Watch failed to show the Compound qualified as a solid waste. The Ninth Circuit reviewed *de novo* the district court's grant of summary judgement for the City and reviewed the evidence in the light most favorable to River Watch. The Ninth Circuit vacated the district court's grant of summary judgement for the City and remanded for further proceedings.

RCRA prohibits, among other things, past or present "transportation"[116] of "solid waste"[117] that could be an "imminent . . . health or environmental danger."[118] A "solid waste"[119] can be, among other things, "discarded material."[120] The issue here arose from the discharge of the Compound into groundwater by wood treatment facilities in Elma, California (Site). The Compound migrated into the City's water wells through the groundwater and was subsequently transported to City residents by the City's water-distribution system.

The City argued River Watch forfeited their appellate argument that the Compound was a "discarded material" from the Site because that argument was not raised in the district court. The court disagreed and held River Watch raised the essence of their appellate argument in the district court. The court reasoned that River Watch had always maintained that the Compound originated from human activity and the Site was the Compound's likely source.

On the merits, River Watch argued that the Compound was a "solid waste" under RCRA because the Compound was "discarded material" from wood treatment operations on the Site. Relying on River Watch's expert testimony, the court held River Watch created a triable issue as to whether the Compound was a "discarded material." The court reasoned the Compound could be a "discarded material" under RCRA because the Compound was discharged into the Site's groundwater after it served its intended use in the wood treatment process.

The City argued it could not be a transporter under RCRA because RCRA does not regulate transportation of groundwater contaminated by solid waste. Relying on River Watch's expert testimony, the court held River Watch created a triable issue as to whether the City was a transporter of solid waste. The court reasoned the plain language of

---

113 *Id.* § 6972(a).

114 Cal. River Watch v. City of Vacaville, 473 F. Supp. 3d 1081 (E.D. Cal. 2020).

115 Hexavalent chromium is a human carcinogen that is known to cause significant health risks. Cal. River Watch v. City of Vacaville, 14 F.4th 1076, 1078 (9th Cir. 2021).

116 42 U.S.C. § 6772(a)(1)(B).

117 *Id.*

118 *Id.*

119 *Id.* § 6903(27).

120 *Id.*

RCRA broadly regulates transportation of "any"[121] solid waste, even groundwater contaminated by solid waste not produced by the City.

The City argued the court's plain meaning interpretation of RCRA would lead to RCRA liability for absurd transportation scenarios. The court disagreed and held its plain reading of RCRA would not lead to absurd results. The court reasoned Article III standing requirements and RCRA's imminent danger requirement for liability safeguard against the potential for absurd RCRA transportation liability scenarios.

In dissent, Judge Tashima disagreed that River Watch should be allowed to argue on appeal about "discarded material" from the Site because that legal theory was "entirely new"[122] on appeal. Additionally, Judge Tashima, relying on precedent,[123] disagreed with the City's liability under RCRA because the City had no involvement or control over the waste disposal process at the Site.

In sum, the court held River Watch (1) did not forfeit its argument on appeal, and (2) created triable issues as to whether the Compound was a "solid waste" and whether the City was a "transporter" under RCRA. Thus, the court vacated the district courts grant of summary judgment for the City and remanded for further proceedings consistent with the opinion.

II. NATURAL RESOURCES

A. National Forest Management Act (NFMA)

1. 2-Bar Ranch Limited Partnership v. United States Forest Service, 996 F.3d 984 (9th Cir. 2021)

2-Bar Ranch and other Montana ranchers (collectively, 2-Bar Ranch)[124] brought suit against the United States Forest Service (Forest Service)[125] in the United States District Court of Montana.[126] After the Forest Service suspended 2-Bar Ranch's grazing privileges for noncompliance with certain mitigation requirements of its grazing permits, 2-Bar Ranch challenged the Forest Service's application of said requirements under the National Forest Management Act (NFMA)[127]

---

121 *Id.* § 6972(a)(1)(B).

122 *Cal. River Watch*, 14 F.4th 1076, 1087 (9th Cir. 2021) (Tashima, J., dissenting).

123 Hinds Invs., Ltd. P'ship v. Angioli, 654 F.3d 846 (9th Cir. 2011).

124 Plaintiffs were 2-Bar Ranch Limited Partnership, Broken Circle Ranch Company, Inc., and R Bar N Ranch, LLC.

125 Defendants were the United States Forest Service, Thomas J. Vilsack in his official capacity as Secretary of the United States Department of Agriculture, Victoria Christiansen in her official capacity as Chief of the United States Forest Service, Leanne Marten, Cheri Ford in her official capacity as Forest Supervisor for the Beaverhead-Deerlodge National Forest, and Cameron Rasor in his official capacity as District Ranger for the Pintler Ranger District in the Beaverhead-Deerlodge National Forest.

126 2-Bar Ranch Ltd. P'ship v. U.S. Forest Serv., 377 F. Supp. 3d 1172 (D. Mont. 2019).

127 16 U.S.C. §§ 1600–1614 (2018).

and the Administrative Procedure Act (APA).[128] 2-Bar Ranch also sought attorney's fees for its administrative appeal under the Equal Access to Justice Act (EAJA).[129] The Ninth Circuit reversed the lower court's partial grant of summary judgment for 2-Bar Ranch and held that (1) the Forest Service did not act arbitrarily or capriciously when it included mitigation requirements in 2-Bar Ranch's grazing permits, and (2) 2-Bar Ranch was not entitled to attorney's fees because its administrative appeal was not an adversarial adjudication as required by EAJA.[130]

The Forest Service issued 2-Bar Ranch a ten-year grazing permit for the Dry Cottonwood Allotment of the Beaverhead-Deerlodge National Forest in 1996. At that time, the Forest Service managed the forest under the 1987 Deerlodge Forest Plan (1987 Plan) as amended in 1995[131] and issued grazing permits for individual allotments in accordance with the 1995 Riparian Mitigation Measures (1995 Measures).[132] The Forest Service never incorporated the 1995 Measures into the 1987 Plan, but rather applied them to individual allotments on a case-by-case basis, as a means of implementing the 1995 grazing standards. Following an Environmental Assessment pursuant to the National Environmental Policy Act (NEPA),[133] the Forest Service issued 2-Bar Ranch a permit for the Dry-Cottonwood Allotment on the condition that 2-Bar Ranch comply with the 1995 Measures.

In 2009 the Forest Service issued a new forest plan, the Beaverhead-Deerlodge Forest Plan (2009 Plan), and proscribed new grazing allowable use levels for allotments "unless or until specific . . . allowable use levels have been designed through . . . site-specific NEPA decisions."[134] The new standards, in some respects less protective than the 1995 Measures,[135] applied to any allotment lacking "riparian management objectives . . . designed specifically for that allotment."[136] Because the Forest Service determined use levels for the Dry Cottonwood Allotment from the 1996 site-specific NEPA decision, it continued to apply the 1995 Measures and not the 2009 Plan's allowable use levels to 2-Bar Ranch's annual operating instructions and permit renewals. 2-Bar Ranch, however, followed the 2009 Plan's less-protective measures. The Forest Service inspected the allotment, issued

---

128 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

129 5 U.S.C. § 504 (2018).

130 *Id.* § 504(b)(1)(C).

131 The 1995 amendment established a new grazing standard to protect inland native fish but did not change the 1987 Plan's allowable use levels.

132 The 1995 Riparian Mitigation Measures were a matrix of standards to determine the appropriate level of livestock grazing in riparian areas.

133 42 U.S.C. §§ 4332–4347 (2018).

134 *Beaverhead-Deerlodge National Forest Land and Resource Management Plan*, U.S.D.A (2009) at 25, https://perma.cc/97E3-TB4H [hereinafter *Plan*].

135 The 1995 Measures limited the use of woody and herbaceous forage, but the 2009 Plan did not.

136 *Plan*, *supra* note 134, at 25.

2-Bar Ranch notices of non-compliance for exceeding its allowable use levels, and eventually suspended twenty percent of 2-Bar Ranch's grazing privileges.

Upon an administrative appeal by 2-Bar Ranch, the Forest Supervisor confirmed that the 2009 Plan did not apply to the Dry Cottonwood Allotment. She also denied 2-Bar Ranch's request for attorney's fees because the administrative appeal was not an adversarial adjudication under Section 554 of the APA[137] and was thus not eligible for attorney's fees under EAJA. 2-Bar Ranch sued in the district court. The district court agreed with 2-Bar Ranch that the Forest Service violated NFMA and the APA by not applying the 2009 Plan because the 1995 Measures were not "designed specifically for"[138] the Dry Cottonwood Allotment. The district court did not address whether the administrative appeal was an adjudication for purposes of attorney's fees and instead remanded the issue back to the Forest Service to determine whether its position was "substantially justified."[139] The Ninth Circuit reviewed the grant of partial summary judgment *de novo*.

The Ninth Circuit first found that the plain language of the 2009 Plan supported the Forest Service's application of the 1995 Measures to the Dry Cottonwood Allotment. According to the Ninth Circuit, the district court interpreted "designed specifically for" too narrowly. The Ninth Circuit reasoned that allotments with allowable use levels designed through site-specific NEPA decisions were within the meaning of the 2009 Plan's "designed specifically for" criteria because the 2009 Plan expressly excluded such allotments from its standards. Here, although the 1995 Measures themselves were not designed specifically for the Dry Cottonwood Allotment, the site-specific NEPA decision to apply them to the Dry Cottonwood Allotment was. The Forest Service's application of the 1995 Measures was also further justified because the purpose of the 2009 Plan was to protect existing water quality and riparian areas and the 1995 Measures were in some regards more protective than the 2009 Plan.

On the issue of attorney's fees, the Ninth Circuit rejected the district court's finding that whether 2-Bar Ranch's administrative appeal was an adversarial adjudication could not be reviewed until the Forest Supervisor determined whether the Forest Service's position was "substantially justified." According to the Ninth Circuit, the "substantially justified" standard would not even apply if no fees were available, so the court reviewed whether 2-Bar Ranch's administrative appeal was an adversarial adjudication. EAJA only applies to formal

---

137 APA, 5 U.S.C. § 554(a).

138 *Plan*, *supra* note 134, at 25.

139 EAJA provides in pertinent part, "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was *substantially justified* or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1) (emphasis added).

adjudications, determined on the record after an opportunity for an agency hearing,[140] and the Forest Service's grazing allotment statutes did not expressly require formal adjudication. 2-Bar Ranch argued in the alternative that it had a due process right to an administrative hearing. The Ninth Circuit, however, found that the Service did not deprive 2-Bar Ranch of due process because it gave 2-Bar Ranch an adequate right to be heard by allowing presentation of written and oral arguments, even though they were not subject to formal procedures like evidentiary hearings and cross examination. Therefore, the Ninth Circuit held that 2-Bar Ranch's administrative appeal was not an adversarial adjudication for purposes of EAJA and the Forest Service properly denied the request for attorney's fees.

In sum, the Ninth Circuit concluded that the Forest Service properly applied the 1995 Riparian Mitigation Measures to 2-Bar Ranch's Dry Cottonwood Allotment grazing permits because the 2009 Forest Plan expressly allowed for allowable use levels for individual allotments to be determined by site-specific NEPA decisions. Additionally, the Ninth Circuit held that 2-Bar Ranch's administrative appeal was not an adversarial adjudication for purposes of EAJA and thus 2-Bar Ranch was not entitled to an award of attorney's fees.

B. Endangered Species Act (ESA)

1. Center for Biological Diversity v. Haaland, 998 F.3d 1061 (9th Cir. 2021)

The Center for Biological Diversity (Center) sued Deb Haaland in her official capacity as the Secretary of the Interior, as well as the U.S. Fish and Wildlife Service (Service) and its Acting Director, Martha Williams, in the U.S. District Court for the District of Alaska.[141] The Center argued that the Service violated the Administrative Procedure Act (APA)[142] and the Endangered Species Act (ESA)[143] when it failed to sufficiently explain its reasoning for reversing its prior decision that the Pacific walrus qualified for listing as a threatened species under the ESA. The Ninth Circuit reversed the district court's grant of summary judgment in favor of the Service and remanded the case for the Service to provide a sufficient explanation for its change in position regarding the walrus's status.

The ESA directs the Secretary of the Interior to determine whether any species is threatened or endangered,[144] thus qualifying for certain protections under the statute. An "endangered species" is one that is "in

---

140 5 U.S.C. §§ 504(b)(1)(C)(i), 554(a).

141 Ctr. for Biological Diversity v. Bernhardt, No. 18-CV-00064, 2019 WL 4725124 (D. Alaska Sept. 26, 2019).

142 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

143 16 U.S.C. §§ 1531–1544 (2018).

144 *Id.* § 1533(a).

danger of extinction throughout all or a significant portion of its range,"[145] and a "threatened species" is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[146] The Service interprets "foreseeable future" to mean the period through which it can reliably determine the threats to a species and the likely consequences.

In 2008, the Center petitioned the Service to list the Pacific walrus as threatened or endangered. In February 2011, the Service issued a 45-page decision (2011 Decision) finding that listing of the Pacific walrus was warranted. It cited loss of sea ice habitat, subsistence hunting, and excessive greenhouse gas levels as primary threats. The Service added the Pacific walrus to a list of candidate species following its conclusion that other species' needs were more urgent, thus precluding the immediate listing of the walrus.

The Service, however, never listed the walrus, and the walrus remained on the list of candidate species until 2017, at which point the Service completed a final species status assessment (Assessment) for the walrus. The Assessment concluded that the walrus was "adapted to living in a dynamic environment" and that the stressors impacting the population were too unpredictable to make a clear determination about the severity of the impact on the population in the foreseeable future. Following the Assessment, the Service issued a 3-page decision (2017 Decision) without listing each statutory factor and citing only a few supporting studies. The 2017 Decision officially stated that the Pacific walrus no longer qualified for listing as a threatened species. Following the release of the 2017 Decision, the Center brought suit to challenge the Service's failure to adequately explain its reasoning behind the conclusions it reached in the 2017 Decision and its change in position from the 2011 Decision. The Ninth Circuit reviewed these claims *de novo* to determine whether the Service's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[147]

The Center argued that the Service violated the APA by failing to sufficiently explain its decision not to list the Pacific walrus. When an agency changes its position, it must: (1) display awareness that it is changing position; (2) show that the new policy is permissible under the statute; (3) believe that the new policy is better; and (4) provide good reasons for the new policy. If a new policy disregards facts and circumstances that led to the initial decision, the agency must provide an explanation. The Center contended that the Service did not meet these requirements, arguing that the court should confine its review to the 2017 Decision.

The Ninth Circuit rejected the Center's argument regarding the scope of its review and reviewed the entire record. The Ninth Circuit nevertheless agreed with the Center that the Assessment and the 2017

---

145 *Id.* § 1532(6).

146 *Id.* § 1532(20).

147 5 U.S.C. § 706(2)(A).

Decision failed to provide a rational explanation for the agency's change in policy from the 2011 Decision. The Ninth Circuit found that the 2017 Decision was a mere "cursory explanation" that contained only a general summary of the threats facing the Pacific walrus and the agency's uncertainty of these threats, and that it failed to adequately explain the rejection of the findings underlying the 2011 Decision. The Ninth Circuit also found the Assessment inadequate because, in addition to not being a decision document,[148] it also failed to explain why the Service's reasons for concluding that the threats it identified in the 2011 Decision were no longer problematic. The Assessment instead merely cited studies in the appendix, failing to explain why the impacts, while reduced, were still not problematic.

Additionally, the court found that the Service changed its position on the scope of the foreseeable future without giving an explanation. The 2011 Decision projected environmental factors affecting the Pacific walrus through 2100. Yet, the 2017 Decision found the effects of climate change on the Pacific walrus beyond 2060 to be speculative without explaining how it reached that conclusion.

Finally, the Ninth Circuit held that the Service's expression of uncertainty in the Assessment and 2017 Decision was arbitrary and capricious. The Service's statement about the effects of climate change on the Pacific walrus being too speculative was a reiteration of a generic uncertainty that was also known at the time of the 2011 Decision, and thus did not meet the agency's burden to explain why it changed its policy. While the Service's briefing before the court suggested reasons as to why this uncertainty explained its decision to remove the Pacific walrus from the candidate list, because the detailed explanation was in neither the Assessment nor the 2017 Decision, the Ninth Circuit found in favor of the Center.

In sum, the Ninth Circuit reversed the district court's grant of summary judgment for the Service and remanded the case to the Service to provide a reasoned explanation as to why it changed its policy from the 2011 Decision.

2. Friends of Animals v. Haaland, 997 F.3d 1010 (9th Cir. 2021)

Environmental non-profit Friends of Animals (Friends) sued the United States Secretary of Interior, Deb Haaland,[149] in the United States District Court for the District of Montana.[150] Friends alleged the United States Fish and Wildlife Service's (Service) pre-file notice rule

---

148 The Assessment was not an official listing decision but was rather intended "only to inform the Service's listing decision and form the scientific basis from which the [Service would] draw conclusions and make a decision." Ctr. For Biological Diversity v. Haaland, 998 F.3d 1061, 1065 (9th Cir. 2021) (internal quotations omitted).

149 Defendants also include the United States Principal Deputy Director of the Fish and Wildlife Service, Martha Williams, and the United States Fish and Wildlife Service.

150 Friends of Animals v. Bernhardt, No. CV 18-64-BLG-SPW-TJC, 2020 WL 375884 (D. Mont. Jan. 21, 2020).

(Rule)[151] for species listing petitions violated the Endangered Species Act (ESA)[152] and the Administrative Procedure Act (APA).[153] Friends asked the court to vacate the Rule and to compel the Service to make a finding on its ESA listing petition for the Pryor Mountain wild horse. The district court granted summary judgment for the Service because it found the Rule reasonable under the ESA. On appeal, the Ninth Circuit reversed and remanded to the district court to enter judgment in favor of Friends.

Under the ESA, any person can petition the Service or the National Marine Fisheries Service (NMFS) to list a species as either "threatened" or "endangered."[154] The Rule required listing petitioners to notify any state agency in charge of managing the petitioned species 30 days prior to filing a listing petition with the Service. According to the Service, the purpose of the Rule was to "encourage"[155] states to contribute information that would help the Service make a finding on a listing petition. In 2017, Friends submitted a listing petition for the Pryor Mountain wild horse without complying with the Rule. The Service denied Friend's listing petition because of this noncompliance.

The Ninth Circuit reviewed the district court's grant of summary judgment *de novo*, analyzed the Service's Rule under the *Chevron* two-step framework,[156] and examined the Service's listing petition denial under APA's arbitrary and capricious standard.[157]

Friends argued the Rule failed *Chevron's* first step because the Rule was contrary to the unambiguous language in section 4 of the ESA.[158] The Ninth Circuit rejected this argument, instead agreeing with the Service, that the ESA was silent as to pre-filing procedures and state notice requirements for listing petitions. The Ninth Circuit therefore held that the Rule survived *Chevron*'s first step because the ESA "does not directly address"[159] pre-filing procedures for a listing petition and "does not prohibit"[160] the Service from requiring a listing petition to be noticed to state agencies.

Next, the Service argued the Rule passed *Chevron's* second step because the Rule was a reasonable interpretation of the ESA, imposed only a small burden on listing petitioners, and did not require the Service to use information from noticed state agencies when making a

---

151 50 C.F.R. § 424.14(b) (2021).

152 16 U.S.C. §§ 1531–1544 (2018).

153 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

154 16 U.S.C. § 1533(b)(3)(A).

155 Friends of Animals v. Haaland, 997 F.3d 1010, 1016 (9th Cir. 2021).

156 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Under the *Chevron* two-step framework, the court first determines whether the statute unambiguously speaks to the issue at hand. *Id.* If so, the court gives effect to the clear intent of Congress, and the *Chevron* inquiry ends. *Id.* But if the statute at issue is silent or ambiguous as to the issue at hand, the court moves on to the second step and determines if the agency's interpretation of the statute was reasonable. *Id.*

157 5 U.S.C. § 706(2).

158 16 U.S.C. § 1533.

159 *Friends of Animals*, 997 F.3d at 1016.

160 *Id.*

finding on a listing petition. The Ninth Circuit disagreed and held the Rule failed *Chevron's* second step because it was contrary to the ESA's mandate that the Service only consider information in a listing petition itself when making a finding. The court reasoned the Rule impermissibly provided the Service an avenue to consider "outside information"[161] from noticed states when making a finding on a listing petition and impeded listing petition filings.

In sum, the Ninth Circuit held that the Rule was contrary to the ESA and thus could not survive the second step of the *Chevron* framework. As such, the Service's denial of Friend's listing petition for the Pryor Mountain wild horse was arbitrary and capricious because the denial was based on the Rule. Thus, the Ninth Circuit reversed and remanded to the district court to enter summary judgment in favor of Friends.

C. Federal Power Act (FPA)

1. National Parks Conservation Association v. FERC, 6 F.4th 1044 (9th Cir. 2021)

The National Parks Conservation Association (Association) moved to intervene in post-licensing proceedings[162] between the Federal Energy Regulatory Commission (Commission) and Eagle Crest Energy Company (Eagle Crest). The Commission denied the Association's motion.[163] The Association petitioned the Ninth Circuit for review of the Commission's order, claiming that it acted arbitrarily and capriciously, or abused its discretion, in denying the Association's motion. Additionally, the Association claimed the Commission violated the Federal Power Act (FPA)[164] by not providing public notice of the post-licensing proceedings. The Ninth Circuit denied the Association's petition, holding that the Commission's decisions were appropriate under the applicable guidelines.

In June of 2014, the Commission granted Eagle Crest a license to construct, operate, and maintain the Eagle Mountain Pumped Storage Hydroelectric Project[165] in California. The license required Eagle Crest to begin the project by June 2016, and complete it before June 2021. In February 2016, Eagle Crest requested an extension of the deadline to begin construction. Under the FPA rules at the time, Eagle Crest was allowed a single extension of two years,[166] which the Commission

---

161 *Id.*

162 Eagle Crest Energy Co., 167 FERC ¶ 61,117, 61,629 (2019).

163 *Id.*

164 16 U.S.C. §§ 791a–793, 796–828c (2018).

165 The Project is a closed-loop pumped storage facility set on 2,500 acres of private and Bureau of Land Management land. It will provide system peaking capacity and transmission regulating benefits to electric utilities in southern California.

166 16 U.S.C. § 806.

granted. Eagle Crest failed to meet the new deadline of June 2018, and the Association immediately requested that the Commission issue a notice of probable termination of the license. The Commission did not respond to this request.

In October 2018, FPA rules changed to allow any number of extensions totaling no more than eight years.[167] Less than a month after this rule change and more than four months past the license's expiration, Eagle Crest requested another extension.[168] Even though the Commission did not issue a public notice of the deadline extension proceedings, the Association moved to intervene. The Commission denied the Association's motion and granted Eagle Crest its extension (Extension Order).[169] The Commission also granted a request from Eagle Crest to extend the project's completion date.[170]

After its initial motion to intervene was denied, the Association requested both a rehearing and a stay of the Extension Order. The Commission denied these requests[171] and the Association petitioned the Ninth Circuit for review. The court reviewed the Commission's orders to determine if the Commission's denial of the Association's motion was arbitrary and capricious or an abuse of its discretion. The issue of the Commission's duty for public notice of the extension proceedings was reviewed *de novo*.

First, the Ninth Circuit reviewed the Commission's denial of the Association's motion to intervene. Interventions are governed by Commission Rule 214.[172] The Association argued that its motion to intervene should have been granted automatically because it was unopposed, timely, and followed the content requirements. The Commission argued that the rule does not apply to intervention in post-licensing deadline extension proceedings. According to the Commission, intervention is allowed in only two circumstances: (1) filings that make "material" changes to the project or to the terms and conditions of the license, and (2) when the requested modifications could have environmental impacts not previously considered. The court found the text of the rule unclear regarding its application to deadline extensions. But it also found that past applications of the rule supported the Commission's position. The Ninth Circuit deferred to the Commission's interpretation of their own rule and found denial of the motion to intervene was appropriate.

---

167 America's Water Infrastructure Act, Pub. L. No. 115-270, § 3001(b), 132 Stat. 3765, 3862 (2018).

168 Under 18 C.F.R. § 4.202(b) (2021), an entity has three months after a deadline to apply for an extension or request a stay. Eagle Crest did neither. The Association did not challenge the Commission's decisions under this regulation.

169 Eagle Crest Energy Co., 167 FERC ¶ 61,117, 61,631 (2019).

170 The Commission has since granted Eagle Crest a third extension on the project's commencement and completion. The deadlines are now June 2022 and June 2025, respectively. *Eagle Crest Energy Co.*, Project No. 13123-002 (March 30, 2020) (delegated order).

171 Eagle Crest Energy Co., 168 FERC ¶ 61,186, 62,106 (2019).

172 18 C.F.R. § 385.214.

The Ninth Circuit then considered whether the Commission's failure to issue public notice regarding the post-licensing proceedings was against FPA guidelines, which say licenses can only be altered after thirty days' public notice.[173] The Association argued that a change in deadline constitutes an alteration of the license, and its intervention was appropriate. Alternatively, it argued that since the extension was granted after expiration of the license it was akin to revival of a project—not merely an extension—and therefore material. The Commission interpreted the statute to apply only to "significant" alterations and argued that a deadline extension is not significant. Specifically, because the extension was not inconsistent with the terms of Eagle Crest's license, it was not significant and not subject to Section 6 notice requirements. The Commission relied on a 1923 opinion in asserting that only "substantial modification or departure from the plan of development" warranted public notification.[174]

The court noted that the statute does not define "altered" and examined the Commission's interpretation. First, it looked to the legislative history of the statute and found that while Congress acknowledged that not all amendments trigger notice under Section 6, it was silent beyond that. The court then analyzed whether the Commission's interpretation was "reasonable." In assessing reasonability, the court examined the Commission's history and found no instances of a comparable extension request where notice was required. It also noted the purpose behind Section 6 of promoting stability for investors and commented that requiring notice for every deadline extension would result in unnecessary delays that could undermine investors' expectations. This public policy interest coupled with demonstrated precedent led the court to defer again to the Commission's interpretation, and it upheld the decision that notice was not required.

After analyzing this interpretation's reasonableness through several lenses including legislative intent and historical application, the Ninth Circuit upheld the Commission's decision that notice was not required.

In sum, the Ninth Circuit found the Commission's decision to deny the Association's motion to intervene was not an abuse of its discretion nor arbitrary and capricious. The court also found that the need for public notice under the FPA did not apply to post-licensing deadline extension proceedings. The Association's petition for review was denied.

---

173 FPA, 16 U.S.C. § 799.

174 3 FED. POWER COMM'N ANN. REP. 224–25 (1923).

D. Coastal Zone Management Act (CZMA)

1. San Francisco Bay Conservation and Development Commission v. United States Army Corps of Engineers, 8 F.4th 839 (9th Cir. 2021)

The San Francisco Bay Conservation and Development Commission (Commission) brought suit against the United States Army Corps of Engineers and related parties (collectively, Corps)[175] in the United States District Court for the Northern District of California.[176] The Commission alleged that the Corps' refusal to comply with the Commission's dredging conditions violated the Coastal Zone Management Act (CZMA)[177] and was arbitrary and capricious in violation of the Administrative Procedure Act (APA).[178] San Francisco Baykeeper (Baykeeper), a regional nonprofit environmental organization, intervened as a Plaintiff-Appellant and further alleged that the Corps's failure to comply with the Commission's dredging conditions violated the Clean Water Act (CWA).[179] The district court granted the Corps' motion for summary judgment, and the Ninth Circuit affirmed.

The Corps is tasked with maintenance dredging of the San Francisco Bay's eleven channels, including the Pinole and Richmond channels. In 2015, the Corps submitted a Consistency Determination (CD)[180] for dredging during and after 2017 to the Commission and the San Francisco Regional Water Control Board (the Water Board), as required by CZMA.[181] Federal laws require review of such plans by both agencies.[182]

The CD stated where and how the Corps planned to dispose of the dredged material and the dredging methods it was to use. It proposed dumping up to 48 percent of the dredged material back into the Bay as opposed to either beneficial refuse sites or ocean disposal sites. Dumping at beneficial refuse sites is the environmentally preferred option but is also the most expensive. The CD also proposed the use of hydraulic dredging which, although less expensive than the alternative method, is more likely to kill imperiled fish.

---

175 The other defendants were Todd T. Semonite, in his official capacity; John D. Cunningham, in his official capacity; and Rickey Dale James, Assistant Secretary of the Army for Civil Works, in his official capacity.

176 S.F. Bay Conservation and Dev. Comm'n v. U.S. Army Corps of Eng'rs, No. 16-CV-05420, 2019 WL 5699076 (N.D. Cal. Nov. 4, 2019).

177 16 U.S.C. §§ 1451–1466 (2018).

178 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

179 33 U.S.C. §§ 1251–1388 (2018).

180 CZMA requires any federal agency carrying out an activity "within or outside the coastal zone that affects land or water use or natural resource of the coastal zone" to provide a consistency determination to the relevant state agency, establishing that the federal agency activity will be consistent with State management programs. 16 U.S.C. § 1456(c)(1)(A), (C).

181 16 U.S.C. § 1456(c).

182 *Id.* § 1456(c)(2); CWA, 33 U.S.C. § 1323 (2018).

In June 2015, the Commission responded to the Corps with a proposed Letter of Agreement (LOA) approving the Corps' CD pursuant to "Special Conditions." Under the Commission's Special Condition II.B (20/40 Disposal Condition) the Corps would reduce disposal volume to a maximum of twenty percent in-Bay and commit to a minimum of forty percent beneficial reuse. Under the Commission's Special Condition II.J.2.a (Hydraulic Dredge Condition) the Corps would use a maximum of one hydraulic dredge in either the Richmond or Pinole channels annually.

In February 2015, the Corps wrote a letter to the Water Board requesting a Water Quality Certification (WQC) for its dredging proposal. The Board issued a conditional WQC to the Corps in May 2015. Provision 10 of the WQC called for hydraulic dredging to be used in, at most, one of either the Richmond or Pinole channels in any given year.

In November 2015, the Corps rescinded its earlier acceptance of the Commission's LOA and the conditions set forth in it, claiming funding limitations. The Corps cited the federal standard that makes cost an important criterion in dredging decisions.[183] The Corps sent a similar letter to the Water Board. After lengthy considerations and drafting of four alternate plans, the Corps adopted Course of Action #2 (COA #2). Under COA #2, the Corps reduced hydraulic dredging by dredging only one of the Richmond and Pinole channels each year in alternating fashion and made no commitments with respect to in-Bay disposal or beneficial reuse.

The Commission filed suit in September 2016, seeking a declaration that the Corps was required to conduct dredging as outlined in the Commission's LOA. After the Corps adopted COA #2 several months into the litigation, Baykeeper intervened. Plaintiffs jointly filed an amended complaint in June 2017 alleging the Corps violated the CZMA, the CWA, and the APA when it improperly refused to comply with Commission's dredging conditions and instead adopted COA #2. The district court granted the Corps' motion for summary judgement.

Plaintiffs first argued that the Corps must comply with the Commission's 20/40 disposal condition because the Corps' refusal to comply was based solely on cost. Plaintiffs cited federal regulations that prohibit federal agencies from citing a general lack of funds in order to avoid compliance with an enforceable policy of an approved coastal zone management program.[184] Plaintiffs' argument failed, however, because the statute and implementing regulations require compliance only with the "enforceable policies" of management programs approved by the National Ocean and Atmospheric Administration (NOAA).[185] The Commission's specific numerical targets set forth in the LOA were not drawn from any provision of a NOAA-approved program. Plaintiffs

---

183 33 C.F.R. §§ 335.7, 336.1.

184 15 C.F.R. § 930.32(a)(3).

185 *Id.* § 930.11(h), (l).

responded that the 20/40 disposal condition was based on Policies 1, 3, and 5 of the Bay Plan, a comprehensive coastal conservation and development plan. But the Ninth Circuit observed that these policies express overall goals as they relate to dredged material in extremely general terms. Plaintiffs did not show any textual or practical connection between its conditions and the Bay Plan Policies that they purportedly relied upon. Thus, the Ninth Circuit rejected plaintiffs' claim under the APA that the Corps must comply with the Commission's 20/40 disposal condition.

Plaintiff next argued that the Corps violated the CWA by violating Provision 10 of the Water Board's WQC. Provision 10 stated that the Corps would limit hydraulic dredge use to a maximum of one in-Bay federal channel annually. Plaintiffs argued that this meant the Corps was to transition from hydraulic dredging to mechanical dredging in at least one of the Richmond and Pinole channels while still dredging both channels annually. The Corps, on the other hand, argued that COA #2 complied with the plain language of Provision 10 and therefore with the CWA. Under COA #2, the Corps proposed to dredge only one of the Richmond or Pinole channels each year in alternating fashion. The Ninth Circuit reasoned that based on past practice, the Commission and Board likely expected the Corps to switch from hydraulic dredging to mechanical dredging, not reduce the frequency of the Corps' dredging. Provision 10, however, only directs the Corps to limit its use of hydraulic dredging to once annually. Therefore, the Ninth Circuit also rejected Plaintiffs' CWA claim because the Corps' plan technically complied with Provision 10 of the WQC.

Finally, Plaintiffs argued that the Corps' decision was arbitrary and capricious in violation of the APA, both because COA #2 was a generally unreasonable means of complying with Provision 10 and because the Corps did not adequately explain and justify its decision to depart from past practices. The Ninth Circuit concluded that the decision was not arbitrary and capricious because the Corps engaged in a lengthy, cooperative process of negotiations. The court also rejected Plaintiffs' argument that the Corps' failure to comply with various procedural regulations warranted setting aside the agency decision. Plaintiffs did not explain what relief would be warranted by such violations or how such violations might affect the validity of COA #2. Although the court recognized Plaintiffs' concerns that the COA #2 represented a departure from the parties' prior understandings, it held that the adoption of COA #2 was not arbitrary or capricious or in violation of any material reporting requirements.

Ultimately, the Ninth Circuit held that Plaintiffs' CWA claim failed because the Corps' plan complied with Provision 10 of the WQC. Additionally, the court held that Plaintiffs' claim under the APA that the Corps must comply with the Commission's 20/40 Disposal Condition failed because the condition is not supported by any enforceable policy. Therefore, the Ninth Circuit affirmed the district court's grant of summary judgement to the Corps.

E. Public Trust Doctrine

1. United States v. Walker River Irrigation District, 986 F.3d 1197 (9th Cir. 2021)

Mineral County, Nevada (County) intervened in litigation[186] concerning the 1936 Walker River Decree (Decree) entered by the United States District Court for the District of Nevada.[187] County, invoking the public trust doctrine (Trust), sought to modify and reopen the Decree to recognize a new water right to the maintenance of a minimum water level in Walker Lake (Lake) to preserve and support wildlife, recreation, and the County's economy. The district court dismissed the County's intervention because the County (1) lacked standing, and (2) the Trust could not remedy the Lake because that would require reallocation of previously adjudicated water rights.[188] On appeal, the Ninth Circuit affirmed in part and vacated, then remanded the case to the district court to determine whether the Trust could provide a remedy for the Lake that did not require the reallocation of adjudicated and settled water rights.

County's economy and income rely heavily on the Lake's water levels being able to support public uses and values such as wildlife and recreation. The Lake once supported suitable habitat for fish and migratory birds, as well as a lively recreational scene for locals and non-locals alike. But decreased precipitation, lake recession, and upstream appropriations from water rights holders under the Decree led to a significant reduction in the Lake's surface area, volume, and wildlife, as well as a much of its recreation and economically productive value. The Nevada Supreme Court, in response to the Ninth Circuit's certified questions about the Trust's applicability to adjudicated and settled water rights, addressed the import of the Trust and its possible remedies for the water right the County sought. Assuming the only effective remedy for the County required reallocation of adjudicated and settled water rights, the Nevada Supreme Court held the Trust could

---

186 The County moved to intervene in litigation from 1991 concerning water rights under the Decree for the United States (Plaintiff), the Walker River Paiute Tribe (Plaintiff-Intervenor), and the Walker River Irrigation District (Defendant). In 2013, the County's motion was granted. Mineral Cnty. v. Walker River Irrigation Dist., 900 F.3d 1027, 1029–31 (9th Cir. 2018) (explaining the Decree and subsequent water rights litigation under the Decree).

187 The entry of the Decree by the district court was the result of litigation between the Plaintiff, Plaintiff-Intervenor, and the Defendant, and adjudicated and settled water rights for hundreds of claimants. *Id*. The Decree, governed by a comprehensive set of Nevada water rights statutes, gave the district court continuing jurisdiction to adjudicate and settle—under the doctrine of prior appropriation—water rights for any claimant in the Walker River Basin. *Id.*; NEV. REV. STAT. §§ 532–544 (2021).

188 The district court invoked the political question doctrine to conclude it lacked the authority to use the Trust to reallocate adjudicated and settled water rights for the purposes of the Lake. *Mineral Cnty.*, 900 F.3d at 1027.

not provide such a remedy.[189] Additionally, the Nevada Supreme Court noted any challenge to judicial decrees adjudicating water rights must be brought within three years.[190] The Ninth Circuit then found the County had standing and reviewed the district court's dismissal of the case *de novo*.

On appeal, the County argued the case should be remanded to determine whether the Decree itself violated the Trust. The Ninth Circuit held that in light of the Nevada Supreme Court's answers to the certified questions, the County's challenge to the Decree was untimely because the County identified no legal authority that allowed it to challenge a judicial decree that adjudicated water rights more than three years, let alone 80 years, after it was entered.

The County also argued the case should be remanded to determine if their Trust claim could provide a remedy other than reallocating previously adjudicated water rights. This would require the district court to determine if the Trust had been violated since the entry of the Decree, and if so, what minimum water flows and remedies are sufficient and proper. The County argued this was a factual issue for the district court to address. Defendant argued a remand was not warranted because the Nevada Supreme Court held the Trust could not be used as a remedial tool, and alternatively, the County's Trust argument was impermissibly being raised for the first time on appeal. The Ninth Circuit agreed with County and held that remedies, other than reallocation of adjudicated and settled water rights, may be provided by the Trust because the Nevada Supreme Court only foreclosed a Trust remedy that required reallocation of such rights. In addition, the Ninth Circuit held County's complaint was broad enough, the litigation early enough, and the Federal Rules of Civil Procedure (FRCP) liberal enough, to accommodate the remedies County sought in their complaint. The court stated even if the complaint were not broad enough to encompass the remedies, FRCP 15(a) and 15(b) could be used to amend the complaint before or during trial. Further, FRCP 54(c) allows the district court to grant any relief not requested by a party, so long as evidence shows the party is so entitled.

In sum, the Ninth Circuit held the County's Trust claim, insofar as it sought a remedy that required reallocation of adjudicated and settled water rights, could not be sustained because the Nevada Supreme Court expressly foreclosed using the Trust for that purpose. But insofar as the Trust claim sought any other remedy, the claim could proceed on remand because the Nevada Supreme Court did not expressly foreclose using the Trust for that purpose. Thus, the Ninth Circuit affirmed the

---

189 The Nevada Supreme Court noted that while the Trust applied to adjudicated and settled water rights, using the Trust to reallocate adjudicated and settled water rights would contravene Nevada's water rights statutes that do not permit reallocation of water rights and value finality in water rights. Mineral Cnty. v. Lyon Cnty., 473 P.3d 418, 421–22 (Nev. 2020).

190 The Nevada Supreme Court acknowledged this limited time period appreciated the value of finality in Nevada's water rights statutes. *Id.* at 429–30.

District Court's dismissal in part, vacated its dismissal in part, and remanded for further proceedings consistent with its opinion.

F. California Environmental Quality Act (CEQA)

1. United States v. State Water Resources Control Board, 988 F.3d 1194 (9th Cir. 2021)

The United States sued the California State Water Control Board (Board) in the United States District Court for the Eastern District of California[191] and simultaneously in California state court[192] seeking declaratory and injunctive relief. In both courts, the United States alleged three state law claims for violations of the California Environmental Quality Act (CEQA)[193] regarding the Board's water quality control plan. It later added a federal discrimination claim in federal court, alleging a violation of intergovernmental immunity because the plan required more stringent salinity standards for the federal Bureau of Reclamation (Bureau).[194] The district court granted the Board's motion for a partial stay as to the state law claims under *Colorado River Water Conservation District v. United States*,[195] and the U.S. appealed. On appeal, the Ninth Circuit reversed the district court's decision, holding that the district court abused its discretion in granting the stay. The Ninth Circuit also held that it had jurisdiction over the appeal pursuant to the *Cohen v. Beneficial Industrial Loan Corporation*[196] finality rule exception, and that affirmance based on a *Railroad Commission of Texas v. Pullman*[197] abstention would have been improper.

The Board is a California state agency that administers water rights and water quality laws. It manages a California estuary that contains the New Melones Dam, operated by the Bureau. The Bureau's operation of the dam must comply with California law. The Board first adopted a water quality control plan for the estuary in 1978. In December 2018, the Board approved an Amended Plan. The Amended Plan instituted changes to the management of the estuary, including altering flow objectives and salinity levels. The U.S. claims that these changes adversely affect operation of the New Melones Dam.

In March of 2019, the U.S. simultaneously filed separate suits against the Board in California superior court and federal district

---

191 United States v. State Water Res. Control Bd. (*State Water Res. Control Bd. I*), 418 F. Supp. 3d 496 (E.D. Cal. 2019).

192 United States v. State Water Res. Control Bd. (*State Water Res. Control Bd. II*), 988 F.3d 1194, 1199 (9th Cir. 2021).

193 *Id.*; CAL. PUB. RES. CODE §§ 21000–21189 (2021).

194 *State Water Res. Control Bd. II*, 988 F.3d at 1199.

195 *State Water Res. Control Bd. I*, 418 F. Supp. 3d at 524; Colo. River Water Conservation Dist. v. United States (*Colorado River*), 424 U.S. 800 (1976).

196 337 U.S. 541 (1949).

197 312 U.S. 496 (1941).

court. In federal court, the U.S. asserted jurisdiction pursuant to 28 U.S.C § 1345[198] and initially alleged the same three causes of action as it pleaded in the state court action, all of which were violations of various CEQA provisions. When the Board moved to dismiss the federal suit, the U.S. amended its complaint to add a claim that the Board also discriminated against the U.S. in violation of the intergovernmental immunity doctrine. The U.S. informed the state court that the federal court was its preferred venue.[199]

The Board asked the district court to abstain from hearing the case or stay the case pursuant to *Colorado River*. The district denied abstention[200] before considering whether it could issue a *Colorado River* stay. Noting that other district courts in the Ninth Circuit had found partial stays permissible "where some, but not all, of a federal plaintiff's claims are pending in a parallel state action,"[201] the court weighed the two claims separately. Finding that the *Colorado River* factors weighed against staying the intergovernmental immunity claim, but weighed in favor of staying the CEQA claims, the court granted a partial stay. The U.S. appealed, and the Ninth Circuit reviewed the district court's decision for abuse of discretion in granting the stay.[202]

The Ninth Circuit ordinarily has jurisdiction to review a *Colorado River* stay order pursuant to 28 U.S.C. § 1291, but the decision of whether to grant a *partial* stay posed a distinct question. The court reasoned that because the federal district court would still have to adjudicate the non-stayed claims, the normal finality rules of Section 1291 did not necessarily apply. In deciding the question, the court relied on the *Cohen v. Beneficial Loan Corporation* exception to the finality rule: if the district court's order determines the disputed question conclusively, resolves an important issue separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment, then it is exempted from the finality rule as written in 28 U.S.C. § 1291. The Ninth Circuit determined that the district court order in this case met these three criteria, and thus that it had jurisdiction.

---

198 Judiciary and Judicial Procedure, 28 U.S.C § 1345 (2018).

199 Meanwhile, parties other than the U.S. filed eleven additional suits in California state court asserting CEQA violations based on the Amended Plan. A California state judge coordinated these cases, but not the U.S.'s case, as the U.S. had moved for a stay in its state court cases. As of the date of the district court's decision, that state court motion was still pending.

200 *See State Water Res. Control Bd. I*, 418 F. Supp. 3d at 504–15 (discussing its denial of abstention under the Brillhart, Burford, and Pullman doctrines).

201 *Id*. at 516 (quoting Krieger v. Atheros Commc'ns, Inc., 776 F. Supp. 2d 1053, 1060–61 (N.D. Cal. 2011), *abrogated by State Water Res. Control Bd. II*, 988 F.3d 1194 (9th Cir. 2021)).

202 The Ninth Circuit noted that "[T]his standard is stricter than the flexible abuse of discretion standard used in other areas of law because discretion must be exercised within the narrow and specific limits prescribed by the [*Colorado River*] doctrine." R.R. St. & Co. Inc. v. Transp. Ins. Co., 656 F.3d 966, 973 (9th Cir. 2011).

Building on Supreme Court precedent, the Ninth Circuit employs eight factors to be applied flexibly and pragmatically in determining whether a *Colorado River* stay is appropriate.[203] The Ninth Circuit noted that the eighth factor, whether the state court proceedings will resolve all issues before the federal court, controlled the outcome in this case, because a *Colorado River* stay is per se inappropriate when the state court proceedings will not resolve the entire case before the federal court. According to the court, there is a strong presumption that the presence of an additional claim in the federal suit renders *Colorado River* inapplicable. Here, there is an additional claim in the federal suit. This would otherwise be dispositive, but the Ninth Circuit stated that a district court could properly issue a partial *Colorado River* stay in order to preclude a party from engaging in egregious forum shopping. Accordingly, the Ninth Circuit noted critically that the United States did not include its intergovernmental immunity claim in its initial federal complaint. Nevertheless, the Ninth Circuit held that the United States' actions did not constitute the type of forum shopping necessary to justify a partial *Colorado River* stay.

Finally, the Board argued that an abstention under *Pullman* would provide an alternative ground to uphold the district court's stay. The *Pullman* doctrine dictates that federal courts should abstain from hearing cases in which the resolution of a federal constitutional question could be rendered unnecessary if the state courts were given the opportunity to interpret ambiguous state law. As long as the Board did not seek to "enlarge"[204] the rights it obtained under the district court judgment, the district court's decision in its favor could be affirmed based on any evidence in the record. Here, the district court denied abstention and did not stay the federal constitutional claim. Therefore, the Ninth Circuit found that the Board could not request affirmance on *Pullman* grounds because it would require staying the federal claim, which would "enlarge the rights [the Board] obtained under the district court judgment."

Ultimately, the Ninth Circuit held that the district court abused its discretion in granting the stay. It reversed the ruling of the district court and remanded the case for further proceedings. The Ninth Circuit also held that it had jurisdiction over the appeal of a partial *Colorado River* stay, pursuant to an exception to the finality rule under *Cohen*, and that affirmance based on a *Pullman* abstention would have

---

[203] The eight factors are: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. United States v. State Water Res. Control Bd., 988 F.3d 1194, 12023 (2021).

[204] *Id.* at 1208 (citing Rivero v. City & Cnty. of San Francisco, 316 F.3d 857, 862 (9th Cir. 2002)).

impermissibly enlarged the rights obtained under the district court's judgement.

G. Wildfire Management & Federal Tort Claims Act (FTCA)

1. Esquivel v. United States, 21 F.4th 565 (9th Cir. 2021)

Alfredo Esquivel and Donald Willard (Appellants) appealed the United States District Court for the Eastern District of Washington's dismissal of claims brought against the United States[205] under the Federal Tort Claims Act (FTCA).[206] Appellants sought damages for 15 acres of property burned in the effort to subdue the 2015 North Star Fire (Fire) in Washington. The district court dismissed the claims for lack of subject matter jurisdiction and denied Appellants' request for additional jurisdictional discovery. The Ninth Circuit affirmed all holdings.

In August 2015, the Fire started in northeastern Washington.[207] The United States Forest Service (USFS) led firefighting operations, assigning a Type 2 Incident Management Team (IMT) to coordinate the efforts. The IMT included a Structure Group headed by Thomas McKibbin, who was an employee of the Bureau of Land Management (BLM).

Near the end of August 2015, the Structure Group went to protect the ranch property of Alfredo Esquivel and Donald Willard. Once there, McKibbin determined that the Fire posed a serious threat to the buildings and structures on the land. McKibbin directed the firefighters to create a fire break along a dirt road bordering the property and to widen the break using a burnout fire.[208] Prior to carrying out his plan, McKibbin contacted Willard. McKibbin and Willard had different memories of their conversations. McKibbin recalled Willard expressing concern that the IMT was going to sacrifice his land to save the federal land nearby. McKibbin says he assured Willard that their purpose was protecting his land, and Willard consented to McKibbin's plan.[209]

---

[205] Defendants-Appellees were: United States of America, acting through its agent Bureau of Land Management; Armando Forseca, an individual, in both his personal and representative capacities; Tom Doe, a Bureau of Land Management employee or contractor, in both his personal and representative capacities.

[206] 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671–2680. (2018). The FTCA waives the United States' sovereign immunity for certain torts. Jurisdiction is provided to district courts only under specific circumstances. There are two exceptions to the waiver: a discretionary function exception and a misrepresentation exception. Both are at issue in this case. *Id.* § 1346(b).

[207] The fire started on the Colville Indian Reservation due to human error. After combining with several nearby fires, it became the state's largest wildfire in history, burning more than 300,000 acres.

[208] Burnout fires are controlled using flammable fuel sources near the fire line. Once the fuel is consumed, the fire is finished. The space created by the burn serves as a barrier to stop the wildfire from advancing beyond the break.

[209] Willard reported that McKibbin told him the crew was going to spray foam to keep the burnout fire from spreading, and he believed his property would be protected. McKibbin did not recall a conversation about using foam and said it would be unusual to

McKibbin and his crew supervised the burnout fire until well after dark. When Willard left his property that evening, he observed that the closest fire was small and about a quarter mile away. The next morning, Willard found his backyard burning with no one attending the fire. He fought the blaze alone for five hours until McKibbin and his crew returned. Willard and McKibbin recounted their subsequent interactions differently, but ultimately McKibbin and his crew left the property as instructed by the IMT Operations Chief. Willard maintained that the fire started by the crew burned 15 acres of his property, and if he had known McKibbin was going to leave an unsupervised fire burning his property, he would not have left, and the damage would not have occurred.

Appellants unsuccessfully pursued administrative remedies with the BLM, eventually filing suit in May 2018 under the FTCA. The government motioned to dismiss the suit for lack of subject matter jurisdiction. The district court granted the motion to dismiss in February 2020 and the court denied Appellants' subsequent request for jurisdictional discovery, with final judgment entered in September 2020. The Ninth Circuit reviewed *de novo* the district court's finding that it lacked subject matter jurisdiction under the FTCA. It reviewed the lower court's denial of jurisdictional discovery for abuse of discretion.

Under the FTCA, a claim is barred if it is based on a government official's discretionary actions.[210] Appellants agreed that the decision to execute the burnout fire was discretionary. But they argued that McKibbin's statements to Willard promising precautionary actions were not discretionary and fell outside the exception. Because McKibbin spoke with Willard while exercising judgment grounded in policy, the court concluded as a matter of law that McKibbin's conversation with Willard fell within the discretionary function exception and was barred.

The court then examined whether the misrepresentation exception[211] barred Appellants' claims. Willard's assertion that he would not have left his property without relying on McKibbin's promise to spray foam and protect his land fell squarely into the scope of the misrepresentation exception. Willard's reliance to his detriment on the statement of a government employee is precisely the scenario to which this exception applies, and the court upheld the district court's finding as such.

Lastly, the court considered the denial of Appellants' request for additional jurisdictional discovery. Appellants claimed the district court erred in its resolution of Appellants' claims that McKibbin intentionally

---

use during a burnout. If Willard did not want a burnout, McKibbin says, they would not have started one.

[210] A discretionary action is one that requires the official to exercise personal judgment or choice. 28 U.S.C. § 2680(a). If the official's discretion is reasonably exercised, the government cannot be liable for their actions.

[211] When, as here, claims under the FTCA are based on an allegation of misrepresentation or misinformation on the part of a government official, they are explicitly barred. *Id.* § 2680(h).

or negligently lied to Willard about the use of foam, and that it abused its discretion when it refused to allow further discovery. The Ninth Circuit found the district court appropriately considered the facts in a light most favorable to the Appellants and did not err in deciding it lacked subject matter jurisdiction over the case. Further, it found Appellants made no showing of prejudice or abuse of discretion by the district court.

Ultimately, the Ninth Circuit affirmed the district court's findings. They held that Appellants' claims fell within the scope of both the misrepresentation exception and the discretionary function exception of the FTCA, and that the lower court did not err when it denied their request for jurisdictional discovery.

H. Natural Scenic Areas

1. BNSF Railway Co. v. Clark County, 11 F.4th 961 (9th Cir. 2021)

The BNSF Railway Company (BNSF) sued Clark County, Washington and three individual county employees[212] (collectively, Defendants) in the United States District Court for the Western District of Washington.[213] BNSF alleged that Clark County's mandatory permit system for railroad construction in the Columbia River Gorge Natural Scenic Area (Scenic Area) was preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA).[214] The Columbia River Gorge Commission and Friends of the Columbia River Gorge (collectively, Defendant-Intervenors) intervened on the side of the Defendants. The district court held that Clark County's permitting process was preempted and granted summary judgment for BNSF. On appeal, the Ninth Circuit affirmed the summary judgement decision.

In 1986, Congress passed the Columbia River Gorge Natural Scenic Area Act (Gorge Act)[215], consenting to the creation of the Columbia River Gorge Compact between Washington and Oregon. The Gorge Act required Oregon and Washington to establish the Columbia River Gorge Commission (Commission). The Commission is comprised of voting members from both states who operate under a management plan. The management plan must be approved by the Secretary of Agriculture, must generally protect agricultural and forest lands, and must prohibit major development that may adversely affect the area's scenic, cultural, recreation, or natural resources. In accordance with the management

---

[212] Mitch Nickolds, in his official capacity as Director of Community Development of Clark County; Kevin A. Pridemore, in his official capacity as Code Enforcement Coordinator of Clark County; Richard Daviau, in his official capacity as County Planner of Clark County.

[213] BNSF Ry. Co. v. Clark Cnty., 438 F. Supp.3d 1199 (W.D. Wash. 2020).

[214] Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 893 (codified as amended in scattered sections of 5a, 7, 11, 15, 16, 18, 20, 23, 26, 29, 31, 33, 39, 42, 45, 46, 46a 49, 52 U.S.C.).

[215] 16 U.S.C. §§ 544–544p (2018).

plan, Clark County enacted various land use ordinances for the portions of the Scenic Area within the county.

In June 2018, BNSF began upgrading an existing railroad track and constructing a second track in southwest Washington in a portion of the Scenic Area within Clark County. In August 2018, Clark County officials requested that BNSF obtain a permit pursuant to the Clark County Code. BNSF refused, claiming that the permitting process was preempted by the ICCTA. The ICCTA is a comprehensive federal regulatory scheme that standardizes policy relating directly to railroad transportation and construction. It explicitly preempts state law in these areas.[216]

BNSF sued Defendants seeking a declaration that the ICCTA preempted Clark County's railroad permitting process. All parties, including Defendant-Intervenors, filed cross-motions for summary judgment. The district court agreed with BNSF that the ICCTA preempted Clark County's permitting process and granted summary judgment for BNSF. On appeal, the Ninth Circuit reviewed the district court's decision *de novo*.

Neither party disputed that BNSF's actions came within the ICCTA's preemption provision. Appellants, however, argued that an exception to the provision applied. The Ninth Circuit had previously held that "if an apparent conflict exists between the ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible."[217] The Ninth Circuit identified this exception in part to preserve the ability of state and local agencies to implement federal environmental regulations, such as the Clean Water Act (CWA).[218]

Defendants first argued that the Gorge Act is effectively a federal environmental statute that must be harmonized with the ICCTA. The Ninth Circuit disagreed, concluding that the Gorge Act is fundamentally dissimilar to other, nationwide environmental statutes, such as the CWA, Clean Air Act (CAA),[219] and Safe Drinking Water Act (SDWA),[220] because it is limited to a small portion of the country. Additionally, unlike the CWA, CAA, and SDWA, the Gorge Act's management plan need not undergo final federal approval. The Ninth Circuit reasoned

---

216 49 U.S.C. § 10501(b) (2018). Under the ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over all aspects of railway regulation that fall within the statute. *Id.* § 10501(a). Such exclusive jurisdiction precludes, or "preempts," states or counties from regulating in a way that interferes with federal regulations.

217 Ass'n of Am. RRs. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097 (9th Cir 2010).

218 *See id.* at 1098 (stating that "to the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental laws (such as 'statewide implementation plans' under the Clean Air Act), ICCTA generally does not preempt those regulations because it is possible to harmonize ICCTA with those federally recognized regulations"); 33 U.S.C. §§ 1251–1388 (2018).

219 42 U.S.C. §§ 7401–7671q (2018).

220 42 U.S.C. §§ 300f–j-27 (2018).

that these other statutes have the power to imbue county ordinances with the force of federal law; the Gorge Act, by contrast, does not.[221] Finally, the Ninth Circuit noted that, unlike other national environmental statutes, the Gorge Act lacks any provision providing a federal forum for enforcement.

Defendants next asserted that, even if the Gorge Act is not itself a federal environmental law, it *authorizes* the permitting process which, therefore, must be reconciled with the ICCTA. Defendants relied on *BNSF Railway Co. v. California Department of Tax and Fee Administration*,[222] in which the Ninth Circuit found that a California state law enacted after the ICCTA that required railroads to collect and remit fees for shipments of hazardous materials could be "harmonized" with the ICCTA.[223] But the Ninth Circuit here distinguished its prior holding because California's law had conformed to the federal Hazardous Materials Transport Act which *explicitly* authorizes states to regulate railway transport, while the Clark County statutes have no such anchor in the Gorge Act. The Ninth Circuit also discounted an argument based on legislative history as impermissibly vague, and an argument based on *Swinomish Indian Tribal Community v. BNSF Railway Co*.[224] on grounds that the statute at issue in that case (the Indian Right of Way Act), though also enacted after ICTAA, explicitly stated that it applied to railroads. Ultimately, the Ninth Circuit affirmed the lower court's grant of summary judgment to BNSF, finding that Clark County's permitting process was preempted by the ICTAA.

I. Land Rights

1. Confederated Tribes and Bands of the Yakama Nation v. Klickitat County, 1 F.4th 673 (9th Cir. 2021)

Klickitat County appealed the United States District Court for the Eastern District of Washington's holding that the Confederated Tribes and Bands of the Yakama Nation's (Yakamas) Reservation (Reservation) includes the disputed territory "Tract D."[225] The case arose under an 1855 Treaty that defined the boundaries of the Yakama Reservation with some ambiguity. The Ninth Circuit affirmed the district court's ruling, holding that Tract D was within the Reservation's borders.

The instant dispute began when an enrolled member of the Yakama Nation was indicted by Klickitat County for acts that occurred on Tract

---

221 *See* BNSF Ry. Co. v. Clark Cnty., 11 F.4th 961, 969 (9th Cir 2021) (noting "[t]he Gorge Act provided for how Oregon and Washington would cooperatively manage the area they shared, but Congress did not confer on them substantive powers they could not previously exercise on their respective sides of the Columbia Gorge.").

222 904 F.3d 755 (9th Cir. 2018).

223 *Id.*

224 951 F.3d 1142 (9th Cir. 2020).

225 Confederated Tribes & Bands of Yakama Nation v. Klickitat Cnty., No. 17-CV-3192, 2019 WL 12378995 (E.D. Wash. Aug. 28, 2019).

D. Because the Yakamas and the federal government share exclusive jurisdiction over specific offenses occurring on Reservation land,[226] they sought declaratory relief to bar the County from prosecuting their citizen. The County maintained that Tract D was not part of the Yakama Reservation, and its jurisdiction was appropriate.

During negotiations of the Treaty in 1855, the Yakamas did not speak English or understand European cartography, including the concepts of latitude and longitude. Accordingly, it was important for the Treaty to define the Reservation using natural features and landmarks. Shortly after the Treaty was signed, its accompanying map was lost. Three surveyors between 1890 and 1926 each proposed different solutions, all discovering during their explorations that the Treaty's descriptions could not be reconciled with existing land features. Of particular frustration was a "spur whence flows the water of the Klickitat and Pisco rivers."[227] No such spur was found, complicating interpretation of the Treaty's language and identification of Reservation borders.

In 1930, the original map was found mistakenly filed under "M" for Montana. Another survey was ordered, and Tract D was officially included in the Reservation's boundaries for the first time.

In 1939, the Secretary of the Interior declared to Congress that the Yakamas' claim to Tract D was meritorious.[228] However, not all federal agencies followed this position. In 1949, the Yakamas petitioned the Indian Claims Commission (ICC) for a final decision. Eventually, the ICC determined that Tract D was indeed within the Reservation's boundaries.[229] The federal government has treated Tract D as the Yakamas' territory since that decision. A survey in 1982—considered definitive by the federal government—included Tract D within the Reservation.

The district court in this case found that Tract D is within the boundaries of the Reservation and therefore not subject to County jurisdiction. The County appealed. The Ninth Circuit reviewed two of the lower court's findings of fact for clear error: first, that no spur exists; and second, that the Yakamas would have understood the Treaty to include Tract D within the Reservation at the time the Treaty was made. The court then reviewed *de novo* whether the district court's interpretation of the Treaty was proper based on those findings of fact. Finally, the court considered *de novo* the County's argument that a 1904

---

226 In 2014, Washington Governor Jay Inslee issued a proclamation that the Yakamas and the federal government share exclusive jurisdiction over certain criminal and civil offenses that occur on Reservation lands. Wash. Proclamation 14-01 (Jan. 17, 2014), https://perma.cc/EY5E-75MQ.

227 Treaty with the Yakamas, U.S.-Yakama Nation, arts. I & II, June 9, 1855, 12 Stat. 951, 952.

228 *Yakima Indians Jurisdictional Act: Hearing on H.R. 2390 Before the Spec. Subcomm. Of the H. Comm. On Indian Affs.*, 76th Cong. 3 (1939).

229 Yakima Tribe v. United States, 16 Ind. Cl. Comm. 536, 560–64 (1966).

statute passed by Congress altered the southwestern border and omitted Tract D from the Reservation's boundaries.

The panel found no error in the lower court's finding that no spur exists as identified in the 1855 Treaty. The County proffered an expert with no experience in geography or topography to testify to the existence of a spur, but the court sustained an objection from the Tribe as to his testimony. The Ninth Circuit held that even with this expert's testimony they would find no clear error in the district court's ruling. The County's suggested spur conflicted with both the surveyors' findings and the ICC's conclusion that no spur existed.

The Ninth Circuit also found no error in the lower court's conclusion that the Yakamas' understanding of the Treaty at the time it was signed would have included Tract D within the Reservation. Pointing to the historical record, the County insisted that there was no evidence prior to the 1930s that the Yakamas had expressed a belief that Tract D was within the Reservation. The court noted that while post-treaty actions can bear on the interpretation of a Treaty's meaning, they were not informative in this case. The ill-informed surveys that happened between 1890 and the 1930s so broadly excluded land the Yakamas understood to be theirs that the Tribe had concerns beyond just Tract D. Their neglect to assert this specific allotment as part of their Reservation was understandable when compared to the larger swaths of land they were fighting for. The Ninth Circuit agreed with the lower court that materials from the Treaty negotiations supported the conclusion that the Yakamas understood their Reservation to include Tract D at the time of the Treaty's signing.

The court then reviewed *de novo* the district court's conclusion that the Treaty included Tract D within the Reservation. Under the Indian canons of construction, treaty terms must be interpreted "in the sense in which they would naturally be understood by the Indians."[230] Because no spur exists, the Treaty's description of the Reservation's southwestern border is ambiguous. The County agreed that ambiguities must be settled in favor of the Tribe but argued that unambiguous text called for exclusion of Tract D from the Reservation. They referred to the word "divide" in the Treaty's language, saying that if no spur exists the "divide" referred to is clear and unambiguous, excluding Tract D. The court held that this theory merely replaced one ambiguity with another because it would frustrate additional directions that put the Reservation's boundary south of Mt. Adams. Ultimately, they decided that under the Indian canon of construction, the district court's ruling was correct, and Tract D was within Reservation boundaries.

Finally, the court considered the County's argument that Congress's 1904 statute altered the Reservation borders and excluded Tract D. For a Congressional statute to alter the meaning of a Treaty,

---

[230] Yakama Nation v. Klickitat Cnty., 1 F.4th 673, 680 (9th Cir. 2021) (quoting Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019)).

Congress must "clearly express its intent to do so."[231] The requisite intent to abrogate the Treaty was not apparent, so the court rejected this argument.

Ultimately, the Ninth Circuit affirmed the district court and held that Tract D is within the Yakama Reservation's borders; the County therefore has no jurisdiction over the actions of Yakamas citizens on that land.

2. Snoqualmie Indian Tribe v. Washington, 8 F.4th 853 (9th Cir. 2021)

The Snoqualmie Indian Tribe (Snoqualmie) sued the State of Washington[232] in the United States District Court for the Western District of Washington.[233] The Snoqualmie sought a declaration that they are a signatory to the Treaty of Point Elliot (Treaty)[234] and that their reserved off-reservation hunting and gathering rights under the Treaty continue. The Samish Indian Nation (Samish) sought and were granted leave to intervene for purposes of appeal. The Ninth Circuit affirmed the district court's dismissal on grounds of issue preclusion because the Ninth Circuit had ruled in a prior case that the Snoqualmie have no fishing rights under the Treaty, and that the issue of the reservation of hunting and gathering rights is not materially different from that of fishing rights because they depend on the same factual issue of treaty-tribe status.

The Treaty reserved off-reservation fishing, hunting, and gathering rights for several tribes in 1859. In 1975, fourteen tribes successfully established treaty-tribe status and off-reservation fishing rights, but in 1981 the Snoqualmie along with the Samish unsuccessfully intervened to establish their treaty-tribe status and fishing rights.[235] In that case, the Ninth Circuit held that for treaty-tribe status, a group "must have maintained an organized tribal structure"[236] from the time of the Treaty. The Snoqualmie and Samish failed to meet this criterion because they had not lived as a "continuous separate, distinct and cohesive Indian cultural or political community."[237] Following that case, the Snoqualmie and Samish both petitioned for and gained federal recognition.

---

[231] *Id.* (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999)).

[232] Defendants were the State of Washington, Jay Robert Inslee in his capacity as Governor, and Kelly Susewind in her capacity as Director of the Washington Department of Fish and Wildlife.

[233] Snoqualmie Indian Tribe v. Washington, No. 19-CV-06227, 2020 WL 1286010 (W.D. Wash. Mar. 18, 2020).

[234] Treaty between the United States & the Dwamish, Suquamish, & Other Allied & Subordinate Tribes of Indians in Washington Territory, 12 Stat. 927 (U.S. Treaty Apr. 11, 1859).

[235] *See* United States v. Washington (*Washington I*), 520 F.2d 676 (9th Cir. 1975); United States v. Washington (*Washington II*), 641 F.2d 1368 (9th Cir. 1981).

[236] Snoqualmie Indian Tribe v. Washington, 8 F.4th 853, 858 (9th Cir. 2021) (quoting *Washington II*, 641 F.2d at 1372).

[237] *Id.* (quoting at *Washington II*, 641 F.2d 1374).

In 1995, the Ninth Circuit held that the "recognition of the tribe . . . is a question wholly independent of treaty fishing rights."[238] In 2001, however, when the Samish again sought to establish fishing rights under the Treaty as a recognized tribe, the court held that "federal recognition *is* a sufficient condition for the exercise of treaty rights."[239] On remand, the district court still denied the Samish fishing rights, and the Samish appealed again. The Ninth Circuit reheard the case en banc, clarified the conflicting authorities, and stated unequivocally that federal recognition has no effect on the establishment of treaty rights.[240]

The Snoqualmie brought this action to establish treaty-tribe status for the exercise of hunting and gathering rights. The district court dismissed the complaint on grounds of issue preclusion because the Snoqualmie had previously been denied treaty-tribe status to exercise fishing rights and the factual issue of whether the group maintained an organized tribal structure from the time of the Treaty remained unchanged. The Ninth Circuit reviewed the district court's dismissal before establishing subject matter jurisdiction on grounds of issue preclusion for an abuse of discretion and reviewed the issue preclusion *de novo*.

The Ninth Circuit first addressed whether the district court erred by dismissing the case without establishing subject matter jurisdiction. In the Ninth Circuit, the court has discretion to dismiss an action before establishing subject matter jurisdiction only if it is a non-merits dismissal and if dismissal is less burdensome than determining jurisdiction. As a matter of first impression, the Ninth Circuit held that issue preclusion is a permissible non-merits dismissal, because the merits of the issue have already been adjudicated. The court further determined that dismissal was less burdensome than establishing jurisdiction because to establish jurisdiction, the district court would have needed to examine an amended complaint and any motions to follow, all to inevitably be dismissed without reaching the merits. The Ninth Circuit therefore held that the district court did not abuse its discretion when it dismissed the case before establishing subject matter jurisdiction.

The Ninth Circuit went on to address the district court's dismissal based on issue preclusion. In the Ninth Circuit, the court can bar relitigation of an issue if the issue at stake is identical to a previously litigated issue that was "actually litigated and decided."[241] The Snoqualmie argued that their hunting and gathering rights were not "actually litigated" in the previous case that determined their lack of fishing rights. The Ninth Circuit rejected this argument, reasoning that the issues the Snoqualmie had previously litigated and were seeking to

---

238 *Id.* at 859 (quoting Greene v. Babbit, 64 F.3d 1266, 1269 (9th Cir. 1995)).

239 *Id.* (emphasis added) (quoting United States v. Washington (*Washington III*), 394 F.3d 1152, 1158 (9th Cir. 2005)).

240 *Id.* (quoting United States v. Washington (*Washington IV*), 593 F.3d 790, 798 (9th Cir. 2010) (en banc)).

241 *Id.* at 864 (quoting Janjua v. Neufeld, 933 F.3d 1061, 1065 (9th Cir. 2019)).

litigate were the same—that is, the issue of treaty-tribe status. The Ninth Circuit held that the difference between fishing rights and hunting and gathering rights was immaterial to the case because the predicate issue "actually litigated" was treaty-tribe status, which was likewise determinative of Snoqualmie hunting and gathering rights under the Treaty.

The Snoqualmie and Samish (collectively, Tribes) argued that the previous en banc decision allowed an exception to issue preclusion for newly recognized tribes to present a claim for treaty rights not yet adjudicated. The Ninth Circuit rejected their argument because the case the Tribes relied on clearly established that federal recognition has no effect on the establishment of treaty rights. The court reiterated that the crucial finding of fact is that the Tribes had not functioned as "continuous separate, distinct and cohesive cultural or political communities"[242] and thus lacked treaty-tribe status.

The Snoqualmie also argued for an exception to issue preclusion under the Restatement (Second) of Judgments, which states that issues are not precluded where the issue is either one of law or a new determination of the issue is warranted. The Ninth Circuit rejected this argument because the issue of treaty-tribe status was a factual issue and not a legal one, and because the Samish (and the Snoqualmie by extension) had no reason to hold back any evidence at the previous hearings. The Ninth Circuit concluded that the procedures in the previous case were of sufficient quality and extensiveness, so no new determinations of the issue were warranted.

In sum, the Ninth Circuit affirmed the district court's dismissal on grounds of issue preclusion because issue preclusion was a non-merits dismissal that was less burdensome than establishing subject matter jurisdiction, the issue of treaty-tribe status under the Treaty of Point Elliot had been previously litigated, and no exceptions applied.

III. FOOD SAFETY

1. Friends of the Earth v. Sanderson Farms, Inc., 992 F.3d 939 (9th Cir. 2021)

Public interest groups Friends of the Earth and Center for Food Safety (collectively, Advocacy Groups) sued a major poultry producer, Sanderson Farms, Inc. (Sanderson) in the United States District Court for the Northern District of California. The case was brought under California's Unfair Competition Law (UCL)[243] and False Advertising Law,[244] claiming that Sanderson's advertising and marketing materials were designed to mislead consumers about the use of antibiotics in

---

242 *Id.* at 866 (quoting *Washington II*, 641 F.2d 1368, 1374 (9th Cir. 1981)).

243 CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2022).

244 *Id.* §§ 17500–17606.

Sanderson's chicken products and farming practices. Sanderson moved to dismiss the case, arguing that the Advocacy Groups did not have organizational standing because they did not divert resources to combat the allegedly misleading representations. The district court agreed and dismissed Advocacy Groups' claims for lack of organizational standing. Advocacy Groups timely appealed, and the Ninth Circuit affirmed the district court's dismissal.

To establish organizational standing, Advocacy Groups were required to show that they diverted resources to combat the representations at issue because it frustrated their organizational missions. Only the diversion of resources component was at issue on appeal. Organizations divert resources when they alter their resource allocation to combat the challenged practices, but not when they go about their business as usual.

In August 2016, Advocacy Groups became aware that Sanderson marketed and advertised its chicken products as "100% Natural" and that it ran advertisements stating that there were "[n]o antibiotics to worry about here."[245] The next year, Advocacy Groups filed the instant suit against Sanderson. Sanderson then moved to dismiss, challenging Advocacy Groups' organizational standing. The district court denied the motion because Advocacy Groups claimed that they had devoted additional time and diverted resources to counteract Sanderson's alleged misrepresentations.

Following significant discovery, Sanderson moved to dismiss for the second time, raising a factual challenge to Advocacy Groups' organizational standing. Because the existence of jurisdiction turned on disputed factual issues, it fell to the district court to resolve those factual disputes itself. After review of the record, the district court dismissed the case finding that Advocacy Groups had not diverted resources to combat the advertisements; rather, the activities were continuations of their ongoing work to discourage routine antibiotic use. The Ninth Circuit reviewed the district court's factual findings for clear error.

First, the Ninth Circuit determined that the relevant period for analysis was between the date Advocacy Groups learned of Sanderson's alleged misrepresentations, August 2016, and the date they filed this lawsuit, June 2017.

Next, the Ninth Circuit focused on whether Advocacy Groups' activities within the relevant time were in continuation of existing advocacy, or whether they were an affirmative diversion of resources to combat Sanderson's representations. Advocacy Groups attempted to distinguish Sanderson-related expenditures from ongoing activities by pointing to post-discovery information offered by their staff members. For example, Advocacy Groups provided a staff member's declaration that after the advertisements at issue were published, an employee spent 25 percent more time educating the public about why Sanderson's antibiotic advertisements were misleading. The district court,

---

[245] Friends of the Earth v. Sanderson, 992 F.3d 939, 941 (9th Cir. 2021).

referencing the sham affidavit rule,[246] held that the referenced representative declarations presented by Advocacy Groups were inconsistent and conflicted with earlier depositions. Advocacy Groups stated in earlier depositions, for example, they would have continued to pressure restaurants to switch from Sanderson as a poultry supplier even without knowledge of the specific advertisement at issue.

Advocacy Groups disputed the district court's approach to resolving the conflicting evidence, arguing that the court erred in not applying the stringent requirements of the sham affidavit rule and in not holding an evidentiary hearing. The Ninth Circuit held that the district court's perspective was consistent with the rules governing a factual challenge to standing and that once Sanderson contested the truth behind the factual allegations, Advocacy Groups had the burden to support their allegations with competent proof. The Ninth Circuit concluded that the district court's reference to the sham affidavit rule did not change its determination, because the district court was not required to follow the strictures of the sham affidavit rule when resolving factual disputes going to jurisdiction. Thus, the Ninth Circuit agreed with the district court in concluding that once Sanderson's misleading advertisements were brought to the attention of Advocacy Groups, they simply continued doing what they were already doing—publishing reports on and informing the public of various companies' antibiotic practices.

Lastly, Advocacy Groups argued that their UCL claim should move forward because they challenged Sanderson's husbandry practices—not just its advertising. The Ninth Circuit rejected this argument because throughout the litigation, and as Advocacy Groups acknowledged at oral argument, all parts of the UCL claim were related to Sanderson's representations of its chicken products as "100% Natural." Thus, the Ninth Circuit held that the UCL claim was entirely tethered to the representations and that none of Advocacy Groups' claims survived the dismissal.

In sum, the Ninth Circuit found no error in the district court's conclusion that Advocacy Groups did not have standing because they failed to produce evidence demonstrating they expended additional resources to address Sanderson's advertisements. Additionally, the Ninth Circuit disposed of Advocacy Groups' attempt to further the claims related to Sanderson's husbandry practices because it found that all parts of the UCL claims related to the same alleged misrepresentations. Therefore, the Ninth Circuit affirmed the district court's dismissal for lack of organizational standing.

---

[246] The sham affidavit rule prevents a party who has been examined at length on deposition from raising an issue of fact simply by submitting an affidavit contradicting their own prior testimony, which would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. FED. R. CIV. P. 56. Here, the Ninth Circuit concluded that on a summary judgment motion, the sham affidavit rule permits courts to set aside contradictory testimony, provided certain conditions are met. *See* Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012) (summarizing the sham affidavit rule in the Ninth Circuit).

2. National Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021)

The National Pork Producers Council and the American Farm Bureau Federation (collectively, "the Council") appealed a United States District Court for the Southern District of California decision[247] granting California Defendants'[248] motion to dismiss for failure to state a claim. The Council claimed that California's Proposition 12 violated the Commerce Clause. The Ninth Circuit affirmed the district court's dismissal, holding that the Council's complaint failed to show that Proposition 12 violated the clause.

Proposition 12 bans the sale in California of whole pork meat—no matter where produced—from animals confined inconsistently with California health and safety standards.[249] In December 2019, the Council filed a complaint challenging Proposition 12 and seeking declaratory judgment holding it unconstitutional. The complaint alleged the proposition violated the dormant Commerce Clause[250] by regulating conduct outside of California and imposing burdens on the industry without serving any legitimate local interests. Additionally, the Council sought to permanently enjoin the proposition's implementation and enforcement. In April 2020, the district court granted Defendants' motion to dismiss. The court gave the Council leave to amend its complaint and it instead moved for entry of judgment, resulting in the complaint's dismissal with prejudice. The Council appealed to the Ninth Circuit, which reviewed *de novo* the court's judgment on the motion to dismiss.

The Council first argued that the proposition imposed an undue burden on interstate commerce by having impermissible extraterritorial effect, presenting four theories in support. Its first theory was that Proposition 12 regulates prices in other states. The Council introduced a series of Supreme Court cases finding regulations impermissible due to their effect on interstate pricing. The Ninth Circuit found that because Proposition 12 neither controlled nor affirmed prices of pork products, the argument was not compelling.

The Council's second theory was that the regulation would overwhelmingly affect pork products sold outside of California. It asserted that the regulation would force producers of pork to either

---

247 National Pork Producers Council v. Ross, 456 F. Supp. 3d 1201 (S.D. Cal. 2020).

248 Defendants were Karen Ross, Secretary of The California Department of Food & Agriculture; Tomás J. Aragón, Director of the California Department of Public Health; and Rob Bonta, Attorney General of California.

249 Proposition 12 amended sections 25990–25993 of the California Health and Safety Code to "prevent animal cruelty by phasing out extreme methods of farm animal confinement." Cal. Prop. 12, § 2 (2018). The relevant portion of Proposition 12 prevents knowingly engaging in a sale within California of "[w]hole pork meat" unless the meat was produced in compliance with specified sow confinement restrictions. Cal. Prop. 12, § 3(b) (2018); CAL. HEALTH & SAFETY CODE §§ 25990(b)(1)–(2), 25991(e)(1)–(4) (West 2022).

250 The "Commerce Clause" refers to art. I, § 8, cl. 3 of the Constitution, which grants Congress the power to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. The "dormant" Commerce Clause prohibits state legislation that discriminates against or excessively burdens interstate commerce. *Id.*

apply California's standards[251] to all their sows or to segregate them accordingly, with either outcome resulting in oppressive costs. The Ninth Circuit rejected the idea that any regulation with upstream effects violates the Commerce Clause, noting that a state law is not unconstitutional under the clause unless it regulates solely out-of-state conduct.

Third, the Council suggested the case against Proposition 12 was analogous to a series of cases in which the Ninth Circuit struck down state regulations controlling transactions conducted solely outside of the state. It claimed that Proposition 12 compelled out-of-state producers to conduct business in a manner dictated by California's law. The court held that although the regulation controls in-state sales of pork products regardless of their origin, it does not directly control any product outside the state's borders. The law did not require an out-of-state producer to comply with Proposition 12 unless they chose to sell pork in California—it was not a mandate of commercial behavior. Although Proposition 12 had upstream commercial effects, those effects did not render the regulation unconstitutional.

The Council's fourth theory was that the pork industry needed uniform national regulation and the California regulation put this need at risk. The Ninth Circuit acknowledged that laws violate the Commerce Clause when they interfere with systems of national concern. But because Proposition 12 did not affect a concern akin to taxes or interstate travel—where uniformity is crucial—it did not violate the constitution under this theory. A difference in regulation from state to state of how pork is raised was not a threat to any national interest.

The Council's second argument was that the proposition's burdens on interstate commerce were not warranted in relation to its local benefits. Arguing that a regulation must have enough local benefit to warrant the interstate burden, it urged the court to find that because no legitimate local interest existed, the regulation was a violation of the Commerce Clause. Because the Council had already failed to show that the regulation put excessive burdens on out-of-state producers, the court found weighing those concerns against local benefits was unnecessary. The Ninth Circuit rejected this argument, noting higher costs of production and costs to consumers did not automatically qualify as substantial burdens.

Ultimately, the court affirmed the district court's grant of Defendants' motion to dismiss and agreed that the Council failed to state a violation of the Commerce Clause in its complaints.

---

[251] The regulations require that producers wishing to sell products in California obtain certification of their operations. 3 Cal. Agric. §§ 1322, 1326.2 (proposed May 28, 2021), https://perma.cc/ED59-GH9R. This includes allowing access to certifying agents and maintaining recordkeeping compliance. *Id.*

In March 2022, the U.S. Supreme Court granted certiorari of the case.[252]

IV. VEHICLE EMISSIONS

1. Wochos v. Tesla, Inc., 985 F.3d 1180 (9th Cir. 2021)

Gregory Wochos, Kurt Friedman, and Uppili Srinivasan (Wochos), as named plaintiffs on behalf of a putative class of Tesla shareholders, sued Tesla Inc.,[253] (Tesla) in the United States District Court for the Northern District of California[254] for violating the Securities Exchange Act (SEA).[255] Wochos alleged that Tesla made false and misleading statements to investors about the production of the Model 3, Tesla's first mass-market electric vehicle. The district court dismissed the action without leave to amend on grounds that Tesla's misrepresentations fell within the safe harbor provision of the Private Securities Litigation Reform Act (PSLRA)[256] for forward-looking statements. The Ninth Circuit reviewed the dismissal *de novo* and affirmed the district court. The Ninth Circuit held that Tesla's statements either fell into the safe harbor for forward-looking statements or were not false and thus did not violate the SEA.

As Tesla prepared to mass-produce the Model 3 in the period of May through August of 2017, it publicly announced in forms filed with the Security and Exchange Commission, public events, and in calls with investors that it was on track to achieve its goal of producing 5,000 vehicles per week by the end of the year with no issues. Tesla specifically stated that it began installing manufacturing equipment at two of its factories and was making "great progress"[257] while also acknowledging some risk factors that could lead to delay. Tesla's CEO, Elon Musk, also referred to the vehicles as "production cars"[258] at a public event when the company was still manufacturing them by hand. Numerous former employees testified that they had, well before the public announcements, told Musk that Tesla would not be able to meet the goal of producing 5,000 vehicles per week by the end of 2017. Tesla formally admitted the reality that it would not be able meet this goal in November 2017. Wochos sued Tesla under Section 10(b) of the SEA[259] and its implementing rule, Rule 10-b5,[260] which make it unlawful for a company to make false or misleading statements "in connection with the

---

252 National Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 90 U.S.L.W. 3299 (U.S. Mar. 28, 2022) (No. 21-468).

253 Defendants were Tesla Inc., Elon Musk in his capacity as Chairman and Chief Executive Officer, and Deepak Ahuja in his capacity as Chief Financial Officer.

254 Wochos v. Tesla, Inc., No. 17-CV-05828, 2019 WL 1332395 (N.D. Cal. 2019).

255 15 U.S.C. §§ 78a–78qq (2018).

256 Pub. L. 104–67 (2018) (codified as amended in scattered sections of 15 U.S.C.).

257 Wochos v. Tesla, Inc., 985 F.3d 1180, 1196 (9th Cir. 2021).

258 *Id.* at 1187.

259 15 U.S.C. § 78j(b).

260 17 C.F.R. § 240.10b-5 (2021).

purchase or sale of any security."[261] Wochos also sued Musk and Tesla's CFO, Deepak Ahuja, as "controlling persons" under SEA Section 20.[262]

To bring a claim under Section 10(b), a plaintiff must prove, *inter alia*, a material misrepresentation or omission. Misrepresentations and omissions are failures to represent a material fact and thus do not generally include honest opinions. Section 21E of the PSLRA[263] explicitly carves out a safe harbor for forward-looking statements, designed to protect companies that fall short of "optimistic projections."[264] A company is not liable for false or misleading forward-looking statements that are accompanied by cautionary language or that are made without knowledge of their falsity.

First, the Ninth Circuit rejected Wochos' argument that Tesla's predictive statements contained embedded assertions of present facts. The Ninth Circuit reasoned that Tesla's production goal was a forward-looking plan, and its statements about being on track with no issues were likewise forward-looking because any plan reflects current circumstances, and these statements simply reaffirmed the objective.

Next, the Ninth Circuit found that while Tesla's statement about installing manufacturing equipment at two of its factories was *not* forward-looking, it was nonetheless unactionable because Wochos failed to sufficiently establish the statement was materially false or misleading. Wochos argued that Musk misleadingly implied that Tesla was automatically manufacturing vehicles when he referred to them as "production cars," but the Ninth Circuit determined that Wochos failed to show that, in using that term, Musk really meant that Tesla was automatically manufacturing vehicles.

The Ninth Circuit also rejected Wochos' argument that Tesla's statement about "great progress" was false and misleading. The Ninth Circuit reasoned that such language was an opinion and could only be false if Tesla had made no progress at all. The Ninth Circuit further reasoned that Tesla's forward-looking statements were accompanied by cautionary statements, and that former employees telling Musk that Tesla's goal was impossible did not prove Musk truly believed its goal would be impossible.

Last, the Ninth Circuit addressed whether the district court correctly dismissed the action without leave to amend because of the futility of amendment. Wochos briefed on appeal an additional statement by Tesla in August 2017 that implied its automated assembly line had begun in July 2017. The Ninth Circuit found this amendment futile because Wochos failed to demonstrate that the statement foreseeably caused Wochos' loss. In October 2017, the Wall Street Journal revealed that the automated assembly line had not begun in

---

261 *Id.* § 240.10b-5(b).

262 15 U.S.C. § 78t.

263 *Id.* § 78u-5.

264 *Wochos*, 985 F.3d 1180, 1189 (9th Cir. 2021) (quoting In re Quality Sys., Inc. Sec. Litig., 865 F.3d 1130, 1142 (9th Cir. 2017)).

July, causing Tesla's stock price to drop, but the stock price quickly rebounded by the following week. Therefore, the Ninth Circuit concluded, the August misrepresentation could not have caused any significant price fall and Wochos could not plead the additional statement had caused Tesla shareholders any loss, thus making the district court's dismissal with prejudice appropriate.

In sum, the Ninth Circuit held that Tesla's statements about being on track to achieve its goal to produce 5,000 Model 3s per week by the end of 2017 with no issues were forward-looking and thus within the safe harbor of the PSLRA. The Ninth Circuit also held that while Tesla's statement that it started installation of manufacturing equipment was not forward looking, nor was it false, and thus it could not support Wochos' securities fraud claim. Additionally, the Ninth Circuit held that Tesla's statements about "production cars" and "great progress" were not false or misleading, and lastly, that Wochos' amendment was futile because it failed to sufficiently allege loss causation. Therefore, the Ninth Circuit affirmed the district court's dismissal with prejudice.

2. In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, 2 F.4th 1199 (9th Cir. 2021)

The Puerto Rico Government Employees & Judiciary Retirement Systems Administration (System), a public pension fund that invested in bonds issued by Defendant-Appellant (Volkswagen),[265] an automobile manufacturer that was secretly installing defeat devices in its cars to conceal unlawfully high emissions, filed a putative securities-fraud class action in the United States District Court for the Northern District of California.[266] Seeking to recover for losses relating to the bonds it purchased, the System claimed Volkswagen violated various securities regulations including Rule 10b-5 of the Securities and Exchange Commission.[267] The district court denied Volkswagen's subsequent motion for summary judgment based on the *Affiliated Ute* presumption of reliance.[268] Volkswagen then brought the instant interlocutory appeal. The Ninth Circuit concluded that the *Affiliated Ute* presumption was inapplicable in this context. Accordingly, the Ninth Circuit reversed the order denying Volkswagen's motion for summary judgment and remanded for the district court to further consider whether a triable issue of material fact exists.[269]

---

[265] Defendant-Appellants include Volkswagen AG; Volkswagen Group of America, Inc.; Volkswagen Group of America Finance LLC; Michael Horn; and Martin Winterkorn.

[266] In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig., No. MDL 2672 CRB (JSC), 2019 WL 4727338, at *1 (N.D. Cal. Sept. 26, 2019), *rev'd and remanded*, 2 F.4th 1199 (9th Cir. 2021).

[267] Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2018); 17 C.F.R. §240.10b-b (2021).

[268] Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972).

[269] After this Ninth Circuit opinion was filed, the System filed a petition for rehearing and for rehearing en banc. The petition was denied on September 23, 2021. In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig., 13 F.4th 990 (9th Cir. Sept. 23, 2021).

The Securities Exchange Act of 1934,[270] Rule 10b-5, makes it unlawful to make any untrue statement of a material fact or to omit a necessary material fact.[271] There are six elements of a Rule 10b-5 claim.[272] The relevant elements at issue in this case were: (1) a material misrepresentation or omission by the defendant; (2) a connection between the misrepresentation or omission and the purchase or sale of a security; and (3) reliance upon the misrepresentation or omission. Plaintiffs bear the burden to prove all elements of a Rule 10b-5 claim, including reliance. The U.S. Supreme Court in *Affiliated Ute Citizens of Utah v. United States*,[273] however, removed the plaintiff's burden to affirmatively prove reliance as a condition of recovery under certain limited circumstances. Under *Affiliated Ute*, reliance is presumed when it would be impossible or impractical to prove given that no positive statements were made, such that the plaintiff would be forced to prove a speculative negative. The Ninth Circuit has applied the *Affiliated Ute* presumption to cases in which plaintiffs allege violations of Section 10(b) based on omissions of material fact.

From May 2014 through May 2015, Volkswagen issued and closed the bonds at issue in this case in three private placements and issued an Offering Memorandum for each bond (collectively, Offering Memoranda). The System alleged that on May 15, 2014, the same day Volkswagen issued its Offering Memorandum for the first bond offering, its investment advisor placed orders to buy approximately $4 million worth of bonds on the System's behalf.

On September 18, 2015, the United States Environmental Protection Agency (EPA) and California Air Resources Board (CARB) issued notices of violation to Volkswagen relating to the use of defeat devices in certain Volkswagen diesel vehicles. Volkswagen was secretly installing defeat devices in millions of its diesel cars worldwide to mask unlawfully high emissions from regulators and to cheat on emissions tests. Following the announcement of the Volkswagen scandal, market prices of some Volkswagen bonds, including those purchased by the System, temporarily dipped below par value.

In October 2015, one month after Volkswagen's defeat device scandal was announced to the public, the System sold the bonds it purchased from Volkswagen for a loss. The System subsequently filed the instant proposed class action against Volkswagen for violations of federal securities laws. The System alleged over nine pages of affirmative misrepresentations made by Volkswagen that it relied upon when purchasing the bonds.[274]

---

[270] 15 U.S.C. §§ 78a–78qq (2018).

[271] 17 C.F.R. § 240.10b-5.

[272] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014).

[273] 406 U.S. 128 (1972).

[274] For instance, the System identified affirmative misleading statements that implied that Volkswagen's vehicles were compliant with emissions regulations when they were not in fact, including: "Automobile manufacturers must reduce the CO2 emissions of their new

The district court denied Volkswagen's motion for summary judgment, wherein Volkswagen had argued that the System failed to meet its burden to prove reliance because the System presented no evidence that it relied on the Offering Memoranda, the *Affiliated Ute* presumption of reliance did not apply, and if did it apply, Volkswagen had invalidated the *Affiliated Ute* presumption. In denying Volkswagen's motion, the district court did not rule on the issue of direct reliance, and instead found that the *Affiliated Ute* presumption of reliance applied. Despite that the System based its claims on both affirmative statements and an omission made by Volkswagen, the district court held the claims were not mixed allegations because it was Volkswagen's failure to disclose the defeat device that ultimately drove the System's allegations.

The district court granted Volkswagen's motion to certify the decision for interlocutory appeal, and the Ninth Circuit granted Volkswagen's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).[275] The Ninth Circuit reviewed the order denying Volkswagen's motion for summary judgment *de novo*.

The Ninth Circuit's key inquiry was whether the System's allegations were primarily claims of omission, or if the allegations were mixed because the System alleged both an omission and affirmative misrepresentations. The court found that the System alleged an omission when it claimed that Volkswagen failed for years to disclose that it was secretly installing defeat devices in its clean diesel line of cars and also alleged over nine pages of affirmative misrepresentations that it relied upon when purchasing the bonds from Volkswagen. Accordingly, the Ninth Circuit held that these affirmative misrepresentations, along with the omission allegation, forced this case outside the scope of *Affiliated Ute* presumption of reliance because these were mixed allegations.

Next, the Ninth Circuit held that the System assumed the evidentiary burden to prove the elements of a Rule 10b-5 claim, including reliance, because the System explicitly plead reliance on extensive, detailed, and specific affirmative misrepresentations in its complaint. Thus, the System did not face the difficult task of proving a speculative negative because it did not allege it was forced to rely on omissions, and therefore had not invoked the narrow circumstance necessary for the *Affiliated Ute* presumption of reliance. Rather, the System alleged that Volkswagen said a great deal, and critically, that it relied on those statements when purchasing the bonds at issue. Therefore, the Ninth Circuit held that the *Affiliated Ute* presumption of reliance did not apply because the System could prove reliance through ordinary means by demonstrating a connection between the alleged misstatements and its injury.

---

passenger car fleet . . . to 130g CO2/km from 2012 onward . . . Currently, Volkswagen offers . . . models . . . with CO2 emissions below 130g CO2/km." In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig., 2 F.4th 1199, 1206 (9th Cir. 2021).

[275] 28 U.S.C. § 1292(b) (2018).

In sum, the Ninth Circuit held that this case included mixed allegations that claimed both an omission and affirmative misrepresentations against Volkswagen. The System's allegations could not be characterized primarily as claims of omission, rendering the *Affiliated Ute* presumption inapplicable. Accordingly, the Ninth Circuit reversed the order denying summary judgment to Volkswagen and remanded for the district court to further consider whether a triable issue of material fact exists.

Judge Wallace dissented, agreeing with the majority that this interlocutory appeal presents a mixed case of both omissions and affirmative misrepresentations, but disagreeing with how the majority interpreted binding precedent. Judge Wallace argued that the affirmative misrepresentations alleged in the System's complaint all relate back to Volkswagen's key omission of installing defeat devices, and therefore do not alter the primary focus of the plaintiff's claims. Therefore, according to Judge Wallace, the *Affiliated Ute* presumption should apply. Additionally, Judge Wallace argued that Volkswagen's omission regarding its deceptive practices was clearly material, and it is common sense that a bond purchaser, such as the System, would not take on the significant risk of purchasing corporate debt from a business that is deceiving government regulators worldwide. As a result, Judge Wallace believed the majority's argument that proving a speculative negative would not be difficult in this context downplayed the severity of Volkswagen's omission and added a new evidentiary hurdle for plaintiffs; a plaintiff may now only call upon the *Affiliated Ute* presumption if it is impossible to prove direct reliance.

V. ENVIRONMENTAL JUSTICE & LABOR LAW

A. National Environmental Policy Act (NEPA)

1. Navajo Nation v. U.S. Department of the Interior, 996 F.3d 623 (9th Cir. 2021)

The Navajo Nation (Nation) sued the Department of the Interior (DOI), the Secretary of the Interior (Secretary), the Bureau of Reclamation (BOR), the Bureau of Indian Affairs (BIA), and various water districts (collectively, Appellees) in the United States District Court for the District of Arizona.[276] The Nation alleged that the United States breached its trust obligation to assert and protect the Tribe's reserved water rights. The Nation also claimed that the United States violated the Administrative Procedure Act (APA)[277] and the National Environmental Policy Act (NEPA)[278] by failing to consider the tribe's

[276] Navajo Nation v. U.S. Dep't of the Interior, 34 F. Supp. 3d 1019 (D. Ariz. 2014).
[277] 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).
[278] 42 U.S.C. §§ 4332–4347 (2018).

water rights when managing the Colorado River. The district court dismissed for lack of subject matter jurisdiction. The Ninth Circuit affirmed in part and reversed in part, agreeing that the Nation lacked standing to bring its NEPA claims, but that its breach of trust claim was not barred.[279] On remand, the district court dismissed the Nation's complaint with prejudice, holding: (1) the Nation failed to identify a specific treaty, statute, or regulation that imposed an enforceable trust duty on the Appellees; and (2) the court lacked jurisdiction to decide the claim under the doctrine of *res judicata*.[280] The Nation appealed, and the Ninth Circuit reversed the district court's decision.

The Navajo Nation is party to two treaties with the United States. The first, signed in 1849, placed the Navajo people "under the exclusive jurisdiction and protection of the . . . United States."[281] The second, signed in 1868, established the Navajo Reservation (Reservation).[282] The majority of the Reservation is within the drainage basin of the Colorado River. A series of federal treaties, statutes, regulations, common law rulings, Supreme Court decrees, and interstate compacts, together called the "Law of the River," dictate Colorado River water allotment.

In 1952, Arizona sued California in the Supreme Court over access to the Colorado River.[283] The United States and other basin states intervened. The United States asserted claims to water in the Colorado River Basin on behalf of twenty-five tribes, but only asserted claims to the mainstream on behalf of five tribes, excluding the Nation; the United States limited the Nation's claim to one of the river's tributaries, the Little Colorado River. In 1964, the Supreme Court issued a decree that excluded the Little Colorado River from the adjudication, thereby excluding the Nation's claim. It also conclusively determined the *Winters* rights of the five tribes for whom the federal government asserted federally reserved rights.[284] The decree did not determine any rights for the Nation, or for the twenty other excluded tribes.

In 1968, Congress enacted the Colorado River Basin Project Act (Basin Act).[285] Under the Basin Act, the Secretary determines annually whether there will be enough water to satisfy the amount budgeted among the Lower Basin states, and whether and how much "surplus" water will be available. In 2001 and 2007, the Secretary adopted guidelines to clarify how it determines whether a specific year was a "surplus" or "shortage" year.[286] Before adopting the guidelines, the

---

279 Navajo Nation v. Dep't of the Interior, 876 F.3d 1144, 1174 (9th Cir. 2017).

280 Navajo Nation v. U.S. Dep't of the Interior, No. CV-03-00507-PCT, 2018 WL 6506957, at *2, *5 (D. Ariz. Dec. 11, 2018).

281 Treaty with the Navaho, 1849 art. I, Sep. 9, 1849, 9 Stat. 974.

282 1868 Treaty between the United States of America and the Navajo Tribe of Indians, 1868 art. XIII, June 1, 1868, 15 Stat. 667.

283 Arizona v. California (*Arizona I*), 373 U.S. 546, 550–51 (1963).

284 Under the *Winters* doctrine, when the Federal Government withdraws land for the purpose of establishing a reservation, it impliedly reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. Winters v. United States, 207 U.S. 564, 577 (1908).

285 43 U.S.C. §§ 1501–1556 (2018).

286 *See* 66 Fed. Reg. 7772 (Jan. 25, 2001); 73 Fed. Reg. 19,873 (Apr. 11, 2008).

Secretary published a draft environmental impact statement (DEIS) discussing the legal interests in assets held in trust by the federal government (Indian Trust Assets).

In 2003, the Nation filed suit against Appellees under the APA challenging the 2001 Surplus Guidelines.[287] The Nation alleged that Appellees violated NEPA and breached their trust obligations by managing the Colorado River without considering the Nation's yet-unquantified federal reserved water rights. Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities intervened. The district court dismissed the complaint, holding that the Nation lacked Article III standing to bring its NEPA claims, and that sovereign immunity barred its breach of trust claim. On appeal, the Ninth Circuit agreed that the Nation lacked standing to bring its NEPA claims but reversed and remanded the breach of trust issue.

On remand, the district court denied two motions by the Nation for leave to file an amended complaint, as the court considered amendment to be futile. The district court then dismissed the Nation's complaint with prejudice because the general trust relationship between the United States and the Nation was insufficient to create a trust obligation in the United States. Holding that it was jurisdictionally barred under the doctrine of *res judicata* from considering the issue, the court rejected the Nation's argument that the *Winters* doctrine creates a sufficiently specific trust obligation. The court reasoned that whether *Winters* rights attached to the mainstream of the Colorado River was already decided by the Supreme Court's reservation of jurisdiction in *Arizona I*.[288] The Ninth Circuit reviewed the district court's decision for abuse of discretion.

The Nation first argued that the Ninth Circuit need not decide the *res judicata* issue because it did not seek a judicial determination of its water rights, but rather sought only an injunction ordering the Appellees to: (1) investigate the Nation's needs for water; (2) develop a plan to meet those needs; and (3) manage the Colorado River according to that plan. The Ninth Circuit agreed with the Nation that it had jurisdiction. Notably, the Ninth Circuit declined to determine the scope of the Supreme Court's reserved jurisdiction under Article IX.

The Ninth Circuit rejected appellee's argument that the Nation's claim was barred by *res judicata* because the Nation essentially sought a judicial determination of its rights to the Colorado River, a claim that the federal government could have asserted in *Arizona I*. The court

---

[287] Navajo Nation v. U.S. Dep't of the Interior, 876 F.3d 1144, 1159 (9th Cir. 2017).

[288] 1964 Decree, Arizona v. California, 376 U.S. 340, 353 (1964):

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

distinguished *Nevada v. United States*,[289] where the federal government was barred from asserting tribal water rights under *res judicata* because (1) the cause of action was already asserted in previous litigation and (2) the parties in the instant proceeding were identical to or in privity with the parties in the previous litigation. The Ninth Circuit found that the Nation asserted a different claim than the federal government asserted in *Arizona I*. Thus, the Nation's breach of trust claim, was not barred by *res judicata*.

The Appellees then argued that the Nation did not properly rely on any treaty provision, statute, or regulation to impose a trust obligation on the Appellees. The Ninth Circuit rejected this argument, first distinguishing several previous non-binding cases that stated requirements a tribe must meet to bring a breach of trust action for non-monetary relief. First, the Nation merely sought injunctive relief, a lesser remedy than was sought in some of the prior cases. Second, none of the prior cases concerned claims to vindicate *Winters* rights, whereas provisions of the Nation's various treaties, related statutes, and executive orders establishing the Navajo Reservation give rise to implied water rights under *Winters*. The court noted specifically that the 1868 Treaty included farming-related provisions which would be essentially meaningless unless the Nation had sufficient access to water. Therefore, the Ninth Circuit held that the farming provisions in the 1868 Treaty may serve as the "specific statute" that satisfies the standards set forth in those prior cases.

Ultimately, the Ninth Circuit held that the Nation's claim did not implicate the Supreme Court's reservation of jurisdiction, and that the district court erred when it dismissed the claim without first considering the Nation's rights under *Winters*. As a result, the Ninth Circuit reversed the district court's dismissal of the Nation's motion for leave to amend and remanded with instructions to permit amendment.

2. Native Village of Nuiqsut v. Bureau of Land Management, 9 F.4th 1201 (9th Cir. 2021)

The Native Village of Nuiqsut, Alaska and environmental organizations (collectively, Native Village)[290] sued the Bureau of Land Management (BLM)[291] in the United States District Court for the District of Alaska[292] for alleged violations of the National Environmental Policy Act (NEPA),[293] Administrative Procedure Act

---

289 463 U.S. 110 (1983).

290 Plaintiffs included the Native Village of Nuiqsut, Alaska Wilderness League, Friends of the Earth, Natural Resources Defense Council, Sierra Club, and Center for Biological Diversity.

291 Defendants were BLM, Debra Haaland in her capacity as Secretary of the Interior, Chad Padgett in his capacity as Alaska BLM State Director, Nichelle Jones in her capacity as BLM District Manager of the Arctic District Office. ConocoPhillips Alaska, Inc. intervened.

292 Native Vill. of Nuiqsut v. Bureau of Land Mgmt. (*Native Village*), 432 F. Supp. 3d 1003 (D. Alaska 2020).

293 42 U.S.C. §§ 4321–4347 (2018).

(APA),[294] and the Alaska National Interest Lands Conservation Act (ANILCA).[295] Native Village claimed that BLM improperly approved a winter drilling exploration program for ConocoPhillips, an oil and gas producer, in the National Petroleum Reserve-Alaska (Petroleum Reserve). BLM argued that the case was moot because ConocoPhillips had completed the program, but the district court found that the "capable of repetition, yet evading review"[296] exception to mootness applied and heard the case on the merits. The district court granted BLM summary judgment and Native Village appealed. The Ninth Circuit, reviewing the district court's ruling on mootness *de novo*, held that the case was moot and that the "capable of repetition, yet evading review exception" did not apply. The Ninth Circuit vacated the district court's decision and remanded the case with instructions to dismiss.

In 2012, BLM published an Environmental Impact Statement (2012 EIS) for the 23.6-million-acre Petroleum Reserve. In 2014 and 2018, BLM approved ConocoPhillips' requests to construct drill pads in the Greater Mooses Tooth (GMT) Unit within the Petroleum Reserve. In both instances, rather than performing new environmental analyses, BLM tiered the EISs (GMT EISs) to the 2012 EIS. In 2018, BLM approved ConocoPhillips' 2018–2019 winter exploratory well drilling program in the Bear Tooth Unit of the Petroleum Reserve, without an EIS but with an Environmental Assessment (2018 EA) and Finding of No New Significant Impact (FONSI). The 2018 EA tiered to, or incorporated by reference, the 2012 EIS and the two GMT EISs. Upon receiving BLM's approval, ConocoPhillips carried out and completed the program. Native Village sued BLM, claiming that the 2018 EA's NEPA analysis was inadequate. The district court held that case was not moot because the five-month exploration program was the "sort of short-term action that evades judicial review"[297] and it was likely that BLM would continue to authorize exploratory drilling with EAs that tier to the 2012 EIS and GMT EISs. But the district court granted BLM summary judgement on the merits, and Native Village appealed.

The Ninth Circuit held that the case was moot because ConocoPhillips completed the program and thus the court could not provide Native Village any relief. The court rejected Native Village's argument that the "capable of repetition, yet evading review" exception to mootness applied. For this exception to apply, the challenged action must be "too short to allow full litigation before it ceases," and there must be a "reasonable expectation that plaintiffs will be subjected to the challenged action again."[298] Here, the Ninth Circuit found that the five-month exploratory drilling program was of short enough duration to

---

294 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

295 16 U.S.C. §§ 3101–3233 (2018).

296 Native Vill. of Nuiqsut v. Bureau of Land Mgmt. (*Native Village II*), 9 F.4th 1201, 1207 (9th Cir. 2021) (quoting *Native Village*, 432 F. Supp. 3d at 1021–23).

297 *Id.* at 1207–1208 (quoting *Native Village*, 432 F. Supp. 3d at 1021–22).

298 *Id.* at 1209 (quoting Wildwest Inst. v. Kurth, 855 F.3d 995, 1002–03 (9th Cir. 2017)).

fulfill the first prong of the exception. The Ninth Circuit found dispositively, however, that circumstances had changed in the time that elapsed since the district court's ruling, and that a combination of factors, taken together, indicated that there was no reasonable expectation of repetition, and the case was thus moot.

First, the Ninth Circuit noted that the Council on Environmental Quality (CEQ) issued new regulations on the implementation of NEPA in 2020 (2020 Rule). Although the CEQ began a review of the 2020 Rule in 2021 pursuant to an Executive Order,[299] and the Secretary of the Interior directed BLM to "not apply the 2020 Rule in a manner that would change the application of . . . NEPA that would have applied to a proposed action before the 2020 Rule went into effect,"[300] the Ninth Circuit reasoned that BLM might still use the new regulations, including different methods of calculating environmental impacts in future exploration projects. Thus, the Ninth Circuit concluded there was no reasonable expectation of repetition and that the new regulations rendered the case moot.

Next, the Ninth Circuit determined that even if BLM continued to use the old regulations, the case was still moot because BLM issued a new EIS for the Petroleum Reserve in 2020 (2020 EIS). The Ninth Circuit reasoned that BLM would not likely tier any future EAs for exploratory drilling programs to the 2012 EIS and thus Native Village could not show a reasonable expectation of repetition.

The Ninth Circuit agreed with Native Village that BLM's tiering to the GMT EISs was improper because the GMT Units are separate from the Bear Tooth Unit where the winter exploration program took place. NEPA tiering is only proper where the previous document "actually discuss[es] the impacts of the project at issue."[301] The Ninth Circuit nevertheless held that the case was moot because it would be unlikely for BLM to continue conducting future NEPA analyses with such improper tiering. Thus, Native Village could not show a reasonable expectation of repetition.

Lastly, the Ninth Circuit found that ConocoPhillips' statement of voluntary cessation that it would not conduct additional winter exploration in the nearby area for the foreseeable future also decreased the likelihood of repetition. Although not sufficient by itself, the Ninth Circuit determined that the statement was yet another factor showing that Native Village had no reasonable expectation that it would be subjected to the challenged activity again.

In sum, the Ninth Circuit reasoned that the new circumstances of the 2020 Rule, the 2020 EIS, the unlikelihood of further improper tiering to the GMT EISs, and ConocoPhillips' statement of voluntary cessation, taken together, showed that the "capable of repetition, yet

---

299 Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

300 *Native Village II*, 9 F.4th at 1211 (quoting SECRETARY OF THE INTERIOR ORDER NO. 3399, 2021 WL 1584759, at *3 (Apr. 16, 2021)).

301 *Id.* at 1213 (quoting S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 588 F.3d 718, 726 (9th Cir. 2009)).

evading review" exception to mootness did not apply. Thus, the Ninth Circuit held that the case was moot, vacated the district court's grant of summary judgment for BLM, and remanded the case with instructions to dismiss.

B. Intersection of Labor and Environmental Law

1. Mauia v. Petrochem Insulation, Inc., 5 F.4th 1068 (9th Cir. 2021)

Iafeta Mauia alleged violations of the California Labor Code by his employer, Petrochem Insulation, Inc. (Petrochem).[302] The United States District Court for the Northern District of California denied Petrochem's motion to dismiss, allowing the case to move forward on three of Mauia's claims.[303] Petrochem appealed, and the Ninth Circuit reversed the lower court's decision.

Petrochem employed Mauia as an Onsite Project Manager and Superintendent on oil platforms off the coast of California. An hourly employee whose shifts were 12 hours long, Mauia alleged Petrochem failed to provide meal and rest periods as mandated by California law.[304] Mauia sought back-pay related to both claims.[305] Additionally, Mauia complained that Petrochem's practice of not providing these breaks to its workers was an unfair business practice and sought disgorgement and restitution.[306]

Because the relevant worksite was located on the Outer Continental Shelf (OCS), Petrochem countered that the federal Fair Labor Standards Act (FLSA)[307] governed its actions—not state law. The Outer Continental Shelf Lands Act (OCSLA)[308] dictates that the OCS is under federal jurisdiction, making FLSA the applicable law. Petrochem also argued that because Mauia's unfair business practices claim was derivative of his other allegations it necessarily failed if the first two claims did not survive.

The district court denied Petrochem's motion to dismiss Mauia's state-based claims[309] and certified its order for interlocutory review.

---

302 Mauia v. Petrochem Insulation, Inc., No. 18-CV-01815, 2020 WL 264669 (N.D. Cal. Jan. 16, 2020).

303 The District Court dismissed two of Mauia's five claims; only three allegations were at issue in the Ninth Circuit.

304 California Labor Code requires a 30-minute meal period for every five hours worked. CAL. LAB. CODE § 512(a) (West 2022); *see* 8 CAL. CODE REGS. § 11160(10)(A) (West 2022). The Labor Code also mandates ten minutes of rest time for every four hours worked. CAL. LAB. CODE § 512(a); *see* 8 CAL. CODE REGS. § 11160(10)(B).

305 Pursuant to CAL. LAB. CODE § 226.7.

306 *See* CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2022).

307 29 U.S.C. §§ 201–219 (2018).

308 43 U.S.C. §§ 1331–1356b (2018) (extending "[t]he Constitution and laws and civil and political jurisdiction of the United States" to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State").

309 FED. R. CIV. P. 12(b)(6).

Petrochem petitioned for and received permission to appeal.[310] The Ninth Circuit reviewed *de novo* the lower court's order denying the motion to dismiss for failure to state a claim.

State law is adopted on the OCS only when it is both applicable and not inconsistent with federal law.[311] The court relied on *Parker v. Newton*[312]—another case involving an OCS oil rig worker suing his employer for compensation issues under California law—which held that state law is only applied if the relevant federal law does not cover the issue under scrutiny. Because it was never a state, the *Parker* court reasoned that the analysis for which law applies on the OCS is different from the typical analysis for a conflict between federal and state law. The *Parker* court held that pre-emption analysis did not apply; under the OCSLA, if federal law is on point, state law has no role to play.

The question before the court in *Mauia* was whether there was a gap in the FSLA that needed to be filled by California law—as the lower court found—or if the FSLA covered Mauia's allegations on its own. The district court found a gap because federal law did not require employers to provide employees with meal and rest breaks and only addressed when those breaks must be compensated as work time.

The Ninth Circuit disagreed and found that the FLSA does address meal and rest periods for employees. While California's standards were different and provided more protection for workers, they covered an issue already included in applicable federal law. The FLSA does not mandate meal and break periods for employees, but federal laws do touch the subject and state law cannot replace it. The court followed *Parker* and refused to apply the pre-emption analysis rejected by the Supreme Court in that case.

Ultimately, the Ninth Circuit reversed the lower court's denial of Petrochem's motion to dismiss regarding the meal and rest periods claims. Mauia conceded that the claim regarding unfair competition was based on the first two allegations and therefore failed as well. The order denying the motion to dismiss this last issue was also reversed by the Ninth Circuit, and the case as a whole was dismissed.

2. Decker Coal Co. v. Pehringer, 8 F.4th 1123 (9th Cir. 2021)

An open-pit surface miner, Jerry Pehringer, employed by Decker Coal Company (Decker), filed for black lung benefits[313] with the Department of Labor (DOL). DOL issued a proposed decision awarding Pehringer benefits and Decker appealed. The claim was then transferred to DOL's Office of Administrative Law Judges (ALJ) and assigned to Judge John P. Sellers, III, who affirmed the decision. Decker appealed to the Benefits Review Board (BRB), and BRB again affirmed

---

310 Since trial courts in the circuit were split on the issue, the question was sent to the Ninth Circuit for a final ruling.

311 43 U.S.C. § 1333(a)(2)(A).

312 Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881 (2019).

313 Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901–944 (2018).

the decision. Decker then alleged constitutional defect and petitioned for the invalidation of the award and requested remand to a different ALJ. The Ninth Circuit denied Decker's petition after reviewing the decision for abuse of discretion.

Congress established a program designed to compensate coal miners who contracted Black Lung Disease.[314] Under this program, if a miner was employed for fifteen years or more and can demonstrate the existence of a totally disabling respiratory or pulmonary impairment, then there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis.[315]

Decker employed Pehringer from 1977 until he was laid off in 1999. In 2014, Pehringer filed for black lung benefits, citing his severe chronic obstructive pulmonary disease (COPD). ALJ Sellers held that the fifteen-year presumption applied because of the weight of medical evidence in favor of the presumption and Decker's failure to provide rebuttal evidence against the presumption of legal pneumoconiosis. Thus, ALJ Sellers awarded Pehringer BLBA benefits.

Decker filed motions for reconsideration and to reopen the record to admit documents related to Pehringer's employment. Decker challenged ALJ Seller's invocation of the fifteen-year presumption and requested a modification of the awarded benefits. ALJ Sellers denied the motion because—despite his granting two extension requests to submit evidence—Decker never submitted additional evidence before the record closed nor filed a post-hearing brief.

The Ninth Circuit first addressed Decker's argument that the statute permitting removal of an ALJ only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing was unconstitutional.[316] Decker claimed that the statute provided a second level of for-cause protection for ALJs, violating separation of powers and thus depriving ALJ Sellers of constitutional authority to decide Pehringer's claim.

Noting that the constitutionality of Section 7521 as applied to DOL ALJs had not been decided by the Supreme Court, the Ninth Circuit concluded that the President had sufficient control over DOL ALJs to satisfy the Constitution based on four reasons: (1) ALJ Sellers was performing a purely adjudicatory function in deciding the BLBA claim; (2) the President has broad executive power to order the Secretary of Labor to change DOL's regulatory scheme and remove ALJs from the adjudicatory process;[317] (3) the BRB's role provides the President with meaningful control over DOL ALJ as the BRB can readily overturn an ALJ's decision that is legally erroneous or unsupported by substantial evidence, and (4) tenure restrictions do not violate separation of powers, particularly in the case of inferior officers like an ALJ with sufficient

---

314 *Id.*

315 *Id.* § 921(c)(4).

316 5 U.S.C. § 7521(a) (2018).

317 30 U.S.C. § 932a (2018).

accountability. Thus, the Ninth Circuit concluded that Section 7521 is constitutional as applied to properly appointed DOL ALJs.

The Ninth Circuit next evaluated whether ALJ Sellers erred in adjudicating Pehringer's claim for benefits. Decker argued that ALJ Sellers abused his discretion in denying its motion for reconsideration and rejecting its request to reopen the record to admit evidence it asserted would show that Pehringer could not invoke the fifteen-year statutory presumption based on the length of his employment. Decker reasoned that Section 22 of the Longshore Act[318] required ALJ Sellers to modify the award of benefits. The Ninth Circuit held that Decker's arguments were unavailing.

First, the Ninth Circuit concluded that Decker's request in reliance on Section 22 for modification of the benefits award in the reconsideration motion filed was procedurally improper. Because ALJ Sellers did not have authority to consider this procedurally improper request, he did not abuse his discretion in declining to act on Decker's requested relief based on Section 22.

Second, the Ninth Circuit determined ALJ Sellers acted within his discretion in denying Decker's post-hearing motion for reconsideration on the merits. ALJ Sellers reasonably concluded that he granted Decker ample time—1,455 days—to submit evidence and argument before the record closed. Further, the Ninth Circuit found that ALJ Sellers did not abuse his discretion in refusing to reopen the record. The Ninth Circuit concluded there was no error in rejecting untimely evidentiary submissions that could have been obtained with reasonable diligence during the significant length of time the record was open. ALJ Sellers therefore acted within his discretion in denying Decker's post-hearing motion.

Decker also argued ALJ Sellers erred in finding that the criteria for legal pneumoconiosis was met, allowing for the presumption that Pehringer was entitled to benefits. Consistent with congressional intent, the Ninth Circuit held that once a claimant successfully invoked the fifteen-year presumption, the party opposing the claimant's entitlement to benefits must rebut the presumption of total disability due to pneumoconiosis. Here, the Ninth Circuit held that ALJ Sellers properly found that Pehringer was totally disabled due to pneumoconiosis and properly invoked the fifteen-year presumption for the following reasons.

First, ALJ Sellers thoroughly analyzed Pehringer's employment history and cited record evidence in finding that Pehringer's work as a coal miner exposed him to coal mine dust for more than fifteen years and that he had a totally disabling respiratory or pulmonary impairment. Second, substantial evidence supported ALJ Sellers's conclusion that Pehringer's well-reasoned and well-documented medical evidence did not aid Decker in rebutting the presumption of legal pneumoconiosis. Thus, the Ninth Circuit held that ALJ Sellers did not err in concluding that Decker failed to rebut the presumption of legal pneumoconiosis as it did not submit any evidence to rebut the

[318] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901–950 (2018).

presumption and no other record evidence supported Decker's arguments.

In sum, the Ninth Circuit affirmed ALJ Sellers' decision on the merits, holding that (1) there were no constitutional impediments to prevent ALJ Sellers from adjudicating this case; (2) Decker's failure to adequately defend against Pehringer's claim did not invalidate ALJ Sellers's award of benefits; (3) substantial evidence supported ALJ Seller's finding that Pehringer successfully invoked the presumption of legal pneumoconiosis and Decker failed to rebut that presumption when it had the burden to do so; and (4) based on the record and BLBA regulations, ALJ Sellers acted within his discretion in disposing of Decker's post-hearing motions. The Ninth Circuit therefore denied Decker's petition for review.

VI. TRIBAL SOVEREIGNTY

1. Newtok Village v. Patrick, 21 F. 4th 608 (9th Cir. 2021)

Newtok Village, a federally recognized Alaskan Native Tribe (Tribe), is governed by the New Council. The New Council sued Andy Patrick (Patrick) and other members of the Old Council,[319] a competing tribal council, in the United States District Court for the District of Alaska.[320] The New Council sought to enjoin the Old Council from misrepresenting themselves as the Tribe's legitimate leadership. Finding that it had subject matter jurisdiction, the district court entered a default judgement and granted a permanent injunction against the Old Council after the Old Council failed to defend the lawsuit. Five years later, following a finding of contempt against one of its members, the Old Council filed a motion to set aside the default judgment and vacate the permanent injunction for lack of jurisdiction. The district court denied the Old Council's motion and awarded the New Council attorney's fees. On appeal, the Ninth Circuit reversed the district court's ruling, finding that neither court had jurisdiction to hear the case.

Coastline erosion along the Ninglick River forced Newtok to begin to relocate its village inland in 2019. During this historic relocation, two competing factions of Newtok Village leaders—the Newtok Village Council (New Council) and the Newtok Traditional Council (Old Council)—emerged. In 2013, the Department of Interior Bureau of Indian Affairs (BIA) formally recognized the New Council after a majority at a Tribal meeting earlier that year voted to recognize the New Council as the governing body of Newtok Village. The BIA, however, strictly limited its recognition to contract formation under the

---

[319] Defendants also included Stanley Tom, a Tribal Administrator and employee, though not an elected Traditional Council member at times relevant to this action.

[320] Newtok Vill. v. Patrick, No. 14-CV-00009, 2021 WL 735644 (D. Alaska Feb. 25, 2021).

Indian Self-Determination and Education Assistance Act (ISDEAA).[321] The Old Council appealed the BIA's decision to the Interior Board of Indian Appeals (Board). However, in 2015, before the Board issued its final decision, the New Council sued the Old Council in the United States District Court for the District of Alaska, seeking to (1) permanently enjoin the Old Council from representing themselves as the Tribe's governing body, and (2) a court order mandating that the Old Council relinquish certain tribal records, equipment, and property. The district court granted the requested injunction, permanently enjoined the Old Council from possessing Tribal property or occupying the Tribe's council building, issued a writ of assistance, and granted the New Council attorney's fees.

In 2020, the New Council filed a motion alleging that Patrick defied the tribe's COVID-19 precautions by fraudulently giving Tribal approval to carry a Newtok resident into the village on a private airplane. The district court held Patrick in contempt without a hearing. Six months later, the Old Council challenged the initial injunction for lack of federal subject matter jurisdiction. The district court denied the motion, claiming jurisdiction under "a variety of federal statutes, particularly in light of the fact that such misrepresentation interfere[d] with federal government contracts."[322] Additionally, the court found the Old Council had acted in bad faith by bringing groundless claims and therefore granted the New Council attorney's fees. The Old Council timely appealed, arguing the district court did not have jurisdiction to hear the New Council's claims and seeking dismissal and vacatur of the attorney's fees award. The Ninth Circuit reviewed the district court's jurisdictional decision *de novo* and assessed whether the district court abused its discretion by twice granting the New Council attorney's fees.

The Old Council raised three arguments against the district court's finding of subject matter jurisdiction. First, the Old Council argued that, on its face, the complaint failed to plead a federal question. The Ninth Circuit agreed. It noted that Article III of the Constitution grants federal courts jurisdiction only for cases arising under the Constitution and federal law, and the well-pleaded complaint rule,[323] derived from 28 U.S.C. § 1331, further narrows that jurisdiction. Because the New Council's claims were rooted in common law tort and conversion, the Ninth Circuit held that its claims do not arise under federal law. The Ninth Circuit also found that 28 U.S.C. § 1362, the jurisdictional statute specifically related to Indian tribes, did not create a general federal common law for all Indian affairs. Finally, the Ninth Circuit held that, although the ISDEAA grants federal jurisdiction for cases relating to tribal self-determination contracts, the statute applies only to suits

---

321 25 U.S.C. §§ 5301–5423 (2018).

322 Newtok Vill. v. Patrick (*Newtok Village II*), 21 F.4th 608, 614 (9th Cir. 2021).

323 The well-pleaded complaint rule requires that a plaintiff necessarily raise a question of federal law, unaided by anything alleged in anticipation of potential defenses, in order for the case to arise under the laws of the United States for purposes of federal jurisdiction under 28 U.S.C. § 1331. *See* Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908).

against the United States, not intra-tribal claims such as those at issue in this action.

Second, the Old Council argued that, under the *Grable* test, the New Council failed to raise a substantial federal question. The *Grable* doctrine permits federal courts to hear claims under state law "that nonetheless turn on substantial questions of federal law."[324] When a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress," [325] it may be heard in federal court. The New Council argued that the government's decision regarding which body to recognize constituted a substantial federal question. The Ninth Circuit disagreed, holding that the state law claim must satisfy both the well-pleaded complaint rule *and* the *Grable* test to qualify as a justiciable federal question. Because the complaint did not satisfy the well-pleaded complaint rule, *Grable* was inapplicable.

Finally, the Old Council argued that because the case concerned an intratribal dispute, it was nonjusticiable. The Ninth Circuit agreed, stating simply that disputes between members of a tribe are nonjusticiable in federal courts. The court noted that the Supreme Court has cautioned against any intrusion upon tribal sovereignty that could interfere with a tribe's status as a politically and culturally sovereign body. The Ninth Circuit cited several of its prior cases in support of its conclusion. It also distinguished the instant case from *Goodface v. Grassrope,*[326] in which the Eighth Circuit held that the district court had jurisdiction to order the BIA to recognize either a new council or an old council. The Ninth Circuit noted that, unlike in *Grassrope*, the BIA's decision to recognize the New Council for limited ISDEAA contract-related purposes was not disputed.

Having concluded that the district court did not have subject matter jurisdiction, and thereby did not have the power to award the New Council attorney's fees, the Ninth Circuit vacated the award of attorney's fees.

Ultimately, the Ninth Circuit reversed the district court decision, holding that because the case did not arise under federal law, the court lacked jurisdiction. The Ninth Circuit vacated the default judgment, permanent injunction, and the order awarding attorney's fees. Finally, the Ninth Circuit remanded the case and directed the district court to enter an order of dismissal without prejudice to allow the plaintiffs the chance to establish a federal foundation for their claims.

---

[324] *Newtok Village II*, 21 F.4th at 618 (quoting Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005)).

[325] *Id.* (quoting Gunn v. Minton, 568 U.S. 251, 258 (2013)).

[326] Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983).

***