2023 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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I. ANIMALS & AGRICULTURE

A. Endangered Species Act

1. San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District, 49 F.4th 1242 (9th Cir. 2022).

San Luis Obispo Coastkeeper and Los Padres ForestWatch (Petitioners) petitioned the United States Court of Appeals for the Ninth Circuit for review of a decision from the United States District Court for the Central District of California granting summary judgment[1] in favor of the Bureau of Reclamation and the Santa Maria Water District (collectively, the Agencies).[2] The district court found that the Agencies did not have discretion to release water from the Twitchell Dam under Public Law 774 (PL 774),[3] and thus the Agencies could not be liable for any resulting take of Southern California Steelhead, an endangered species listed under the Endangered Species Act (ESA).[4] The Ninth Circuit granted the petition for review, holding that PL 774 did provide the agencies with enough discretion to operate the dam for the purpose of preventing steelhead takes, given that 1) PL 774 explicitly authorized the Agencies to operate the dam for "other purposes" not enumerated in the statute;[5] 2) operation of the dam in this manner was not in noncompliance with the recommendations of the Secretary of the Interior; and 3) there was no Congressional intent to preclude the dam from being operated to prevent steelhead takes. Accordingly, the Court vacated the grant of summary judgment in favor of the Agencies and remanded to the district court for further proceedings.

Under the ESA, agencies are required to give priority to halting and reversing "the trend toward species extinction," including by limiting "takes" of endangered species under section 9 of the Act.[6] Southern California Steelhead are a Distinct Population Segment under the ESA because of their substantial reproductive isolation and contribution to the genetic diversity of their species.[7] The steelhead historically spawned in the Santa Maria River, which would, pre-damming, run directly to the ocean during rainy periods. The steelhead are anadromous, meaning that they spawn in freshwater and migrate to the ocean to grow, and before the construction of the Twitchell Dam, Southern California Steelhead

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[1] San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation Dist., No. 19-8696, 2021 WL 1918789 (C.D. Cal. April 15, 2021).

[2] Defendants include the Santa Maria Valley Water Conservation District; Santa Maria Valley Water Conservation District Board of Directors; U.S. Department of the Interior; Bureau of Reclamation; and Brenda Burman, Commissioner of the Bureau of Reclamation. Intervenor Defendants include Golden State Water Company and the City of Santa Maria.

[3] Act of Sept. 3, 1954, Pub. L. No. 83-774, 68 Stat. 1190 (1954).

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

[5] 68 Stat. at 1190.

[6] *Id.* § 1532(19) (defining "take"); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

[7] 62 Fed. Reg. 43937-01 (Aug. 18, 1997); 61 Fed. Reg. 4722-01 (Feb. 7, 1996).

would migrate to the ocean during breeding seasons. Public Law 774 authorized the construction of the Twitchell Dam, and in doing so, provided that the dam would be operated "for irrigation and the conservation of water, flood control, and for other purposes."[8] Alongside the passage of PL 774, the Secretary of the Interior promulgated a report with detailed information about the dam, including recommendations about flow rate and water releases.[9]

The Ninth Circuit reviewed the district court's determination that the Agencies had no discretion *de novo*. First, the Court noted, as a threshold matter, that the current operation of the Twitchell Dam could constitute a potential "take" under the ESA, given that it impairs the steelheads' abilities to migrate and reproduce. In order for a takings claim under section 9 of the ESA to succeed, the agency's conduct must be a proximate cause of the take. In this case, proximate cause depended on the Agencies' discretion to make decisions about the release of water from the dam, since if the Agencies had no discretion, they could not be a cause of the unlawful take.

The Court first concluded that the statutory language was clear in its delegation of discretion to the Agencies. Under the plain meaning of PL 774, the Court found that the Agencies were authorized to operate the Twitchell Dam for "other purposes" besides the conservation of water.[10] The Court agreed with Petitioners that, had Congress wanted to limit the dam's operations solely to water conservation purposes, it would have used more limiting language.

The Court next addressed Petitioners' argument that the Agencies' discretion was not foreclosed by the requirement that the dam be operated in "substantial compliance" with the report from the Secretary of the Interior.[11] The Secretary's Report included recommendations for flow rates of water releases from the dam, which were not protective of the steelhead. The Agencies argued that the requirement of "substantial compliance" with these recommendations left them no discretion to adjust flow rates in a way that would prevent more takes of the steelhead.[12] The Court found, however, that this requirement did not limit the Agencies' discretion with regard to flow rates for steelhead protection; some deviation from the Secretary's Report was consistent with the statutory command given that the statute called only for "substantial" compliance and not strict compliance.[13]

Lastly, the Ninth Circuit noted that these conclusions, despite the objections of the dissent, were entirely consistent with principles of statutory construction. The Court relied on the principle that, when confronted with seemingly conflicting Acts of Congress, the Court should

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[8] 68 Stat. at 1190.
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.*

strive to give effect to both where possible, especially where there is not a clearly expressed congressional intention to preclude. The Court found that despite the Agencies' objections, there was no implied conflict between PL 774 and the ESA because the dam could be readily operated to provide "modest releases" at certain times of the year while still maintaining the dam's primary purpose to conserve water.[14]

The dissent contended that PL 774 did limit the Agencies' discretion to adjust the flow rates of the dam to prevent steelhead takes because the Secretary's Report considered and rejected the conservation of steelhead as a permissible purpose. The Court, however, disagreed with this interpretation because the discussion surrounding the steelhead conservation at the time of the law's passage focused on their use in recreational fisheries and not their survival as a species, as they were not endangered. As a result, the issue of operating the dam to protect the steelhead from extinction was not properly considered and cannot be said to be an impermissible use.

In sum, the Court found that the Agencies did have discretion to alter flow rates for the dam to prevent the unlawful take of Southern California Steelhead under PL 774 and the ESA. As a result of this determination, the Court reversed the grant of summary judgment in favor of the Agencies and remanded to the district court for further consideration.

2. Save the Bull Trout v. Williams, 51 F.4th 1101 (9th Cir. 2022).

In 2015, the U.S. Fish and Wildlife Service (FWS) issued a Bull Trout Recovery Plan (the Plan) under the Endangered Species Act (ESA)[15] in order to promote the recovery of the species by addressing its primary threats in six designated recovery units. In 2020, three environmental groups (collectively, Petitioners)[16] filed a citizen suit against FWS[17] under the ESA challenging the validity of the plan in the United States District Court for the District of Montana.[18] The district court dismissed Petitioners' present claim for claim preclusion because two of the three parties had previously challenged the same recovery plan in the United States District Court for the District of Oregon.[19] On review, the Ninth Circuit affirmed the dismissal, finding that Petitioners' were in-fact party to the first case and that there was a final judgment on the merits.

The ESA requires the FWS to develop recovery plans for listed species that identify management actions that promote species conservation, set measurable, objective criteria to support delisting, and

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14 *San Luis Obispo Waterkeeper*, 49 F.4th at 1247.

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

16 Plaintiffs include three environmental groups: Save the Bull Trout, Friends of the Wild Swan, and Alliance for the Wild Rockies.

17 Defendants include Martha Williams, in her official capacity as Principal Deputy Director of the U.S. Fish and Wildlife Service and Deb Haaland, in her official capacity as Secretary of the Department of Interior.

18 Save the Bull Trout v. Williams, 544 F. Supp. 3d 1047 (D. Mont. 2021).

19 Friends of the Wild Swan, Inc. v. Thorson, 260 F. Supp. 3d 1338, 1343 (D. Or. 2017).

establish time estimates for carrying out the plan.[20] The bull trout (*Salvelinus confluentus*) has been listed under the ESA since 1999, and the 2015 Bull Trout Recovery Plan was issued after a previous lawsuit challenged the FWS's failure to finalize a plan. In 2017, two conservation groups party to the present case[21] sued under the ESA's citizen suit provision challenging the sufficiency of the recovery plan in the District of Oregon.[22] That suit was dismissed with leave to amend for failure to state a claim for violation of non-discretionary duty, but the parties declined to amend their complaint.[23]

After the District of Oregon entered the judgment, the conservation groups appealed to the Ninth Circuit, raising for the first time that the FWS violated their nondiscretionary duty to consider five delisting factors.[24] The Ninth Circuit refused to address these new claims, noting that the conservation groups had an opportunity to raise this argument at the district court, but declined and opted to appeal. The conservation groups then returned to the District of Oregon with a Federal Rules of Civil Procedure 60(b) and 15 motion to set aside the judgment and amend the complaint, but the district court denied the motion while acknowledging that the finding "made no predetermination of [the conservation groups'] ability to be heard on the merits."[25]

Instead of appealing the denial of their motion to amend, the conservation groups added Plaintiff Save the Bull Trout and filed suit in the District of Montana arguing that the Plan does not comply with the ESA. The FWS submitted a motion to dismiss for claim preclusion, but the Montana district court denied FWS's motion to dismiss, finding the conservation groups' Oregon litigation was not a "final judgment on the merits."[26] The court later granted the FWS motion for summary judgment, finding that the Plan included "objective, measurable criteria" and rejecting Petitioners' statutory interpretation arguments.[27] Petitioners then appealed to the Ninth Circuit.

On appeal, the Ninth Circuit reviewed the district court's findings of standing and claim preclusion *de novo*. As an initial matter, the FWS argued that Petitioners did not have standing to sue. Under standing doctrine, a Plaintiff must suffer an injury-in-fact that is both concrete and particularized and actual or imminent, that is fairly traceable to the

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20 16 U.S.C. § 1533(f)(1)(B)(i)–(iii).

21 The two conservation groups involved in the first suit were Friends of the Wild Swan and Alliance for the Wild Rockies. *See Friends of the Wild Swan*, 260 F. Supp. 3d 1338.

22 *Id.* at 1343.

23 *See id.*

24 Friends of the Wild Swan, Inc. v. Dir. of U.S. Fish & Wildlife Serv., 745 F. App'x 718 (9th Cir. 2018).

25 *See Save the Bull Trout*, 51 F.4th at 1105 (quoting the district court's adoption of the magistrate judge's findings on remand, declining to adopt the magistrate judge's comments regarding the effect of the decision on a future suit regarding the conservation groups' motion to amend the complaint to assert addition claims, Fed. R. Civ. P. 60(b), 15).

26 *See Save the Bull Trout*, 51 F.4th at 1104 (quoting the district court opinion, *Save the Bull Trout*, 544 F. Supp. 3d 1047).

27 *Id.* (quoting the district court opinion, *Save the Bull Trout*, 544 F. Supp. 3d 1047).

Defendant, and that is redressable by a court.[28] Here, the FWS challenged whether Petitioners had been injured. However, the Ninth Circuit found that Petitioners' members have aesthetic, recreational, and conservation interests in the protection of the bull trout, and where there is a procedural injury, organizations have standing to sue.[29] Because the procedures created by the ESA are intended to protect their asserted interests and the Plan may influence the conservation efforts for the bull trout, the Plaintiffs cleared the standing hurdle.

On the claim preclusion issue, claims are barred where a prior suit 1) involved the same "claim" or cause of action as the later suit; 2) reached a final judgment on the merits; and 3) involved identical parties or privities.[30] The Ninth Circuit approached this issue in two parts. First, the Ninth Circuit found that the first two elements, claim identity and party privity, were met. The claims in the Oregon and Montana suits both challenged the same Plan under the same provision of the ESA.[31] Additionally, even though Save the Bull Trout was not a party to the Oregon case, they were in privity with the conservation groups.

Turning to the issue of whether there was a final judgment on the merits, the Ninth Circuit applied a strict standard of claim preclusion.[32] Because Petitioners declined the opportunity to amend their complaint and chose to appeal the decision while reserving other arguments, the Court held that they must bear the consequences of their strategic choices. Additionally, the Ninth Circuit found that the original dismissal in Oregon was a judgment on the merits because the ESA citizen suit provision only affords jurisdiction to claims where the agency has violated a nondiscretionary duty.[33] In the first case, the District of Oregon considered the merits of the claim during the jurisdiction analysis and found that the claim was insufficient, thus the court did not have jurisdiction. When the conservation groups did not amend their complaint, that finding became final and preclusive.

In sum, the Ninth Circuit affirmed the District of Montana's dismissal on the basis of claim preclusion due to Petitioners' prior involvement in a case concerning the same challenge to the Bull Trout Recovery Plan under the ESA. Because the Plaintiffs did not amend the original complaint in the first case, they were precluded as it was a final judgment on the merits by the same parties.

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[28] Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 180–81 (2000).

[29] *See id.* at 181 (discussing organizational standing); Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008) (discussing procedural injury).

[30] Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005) (quoting Sidhu v. Flecto Co., 279 F.3d 896, 900 (9th Cir. 2002)).

[31] ESA, 16 U.S.C. § 1533(f) (2018).

[32] *See Mpoyo*, 430 F.3d at 989.

[33] *See* ESA, 16 U.S.C. § 1540(g)(1)(C) (citizen-suit provision).

B. Animal Agriculture

1. Martínez-Rodríguez v. Giles, 31 F.4th 1139 (9th Cir. 2022).

Plaintiffs were six citizens of Mexico[34] who were recruited to work at Defendant Funk Dairy in Idaho as "Animal Scientists" under the "TN visa" program for professional employees. However, when Plaintiffs arrived at the dairy farm, they were required to work mainly as general laborers. Upon leaving Funk Dairy, Plaintiffs brought this suit in the United States District Court of Idaho against Defendants[35] alleging various violations under both federal and Idaho state law.[36] They alleged that Defendants' bait-and-switch tactics violated federal statutory prohibitions on forced labor by exploiting the TN visa program to coerce Plaintiffs into providing menial labor.[37]

Defendants expressly conceded, for the purposes of their summary judgment motion, that all six Plaintiffs believed the only way to remain lawfully in the United States was their continued employment at Funk Dairy. The Ninth Circuit concluded, based on Defendant's concession and its obligation to construe the evidence in the light most favorable to Plaintiffs, that a reasonable jury could find that Funk Dairy knowingly exploited Plaintiffs' labor by abusing the TN visa process to put pressure on Plaintiffs to provide labor that was considerably different from what had been represented to them and federal consular officials. As a result, the panel held that Defendants' conduct violated provisions of Chapter 77 of Title 18 of the U.S. Code, specifically those sections that prohibit forced labor and trafficking of persons into forced labor.[38] The panel went on to hold that the district court erred in dismissing Plaintiffs' federal claims, because they asserted triable causes of action under the civil suit provision of Chapter 77.[39] Because the district court erred in dismissing Plaintiffs' federal claims, the panel also reversed the district court's decision to decline supplemental jurisdiction over Plaintiffs' Idaho state law claims.[40] Accordingly, the Ninth Circuit reversed the district court's judgment and remanded the case.

Since the Ninth Circuit reviewed the grant of summary judgment to the Defendants, they recounted the facts in the light most favorable to Plaintiffs. In the fall of 2014, Defendant Curtis Giles, the operations manager at Funk Dairy, traveled to Mexico to recruit workers who

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34 Plaintiffs include the following six named Plaintiffs: Cesar Martínez-Rodríguez; Dalia Padilla-López; Mayra Múñoz-Lara; Brenda Gastélum-Sierra; Leslie Ortiz- García; Ricardo Neri-Camacho.

35 Defendants include Curtis Giles, an individual, David Funk, an individual, Funk Dairy, Inc., an Idaho Corporation, Shoesale Farms, Inc., an Idaho corporation, and Does 1–10.

36 Martínez-Rodríguez v. Giles, 391 F. Supp. 3d 985 (2019); *see also, e.g.*, 18 U.S.C. §§ 1589(a)(3), 1590(a) (2018).

37 18 U.S.C. §§ 1589(a)(3), 1590(a).

38 *Id.* §§ 1589, 1590 (2018).

39 *Id.* § 1595(a) (2018).

40 28 U.S.C. § 1367(c)(3).

qualified for TN visas to work for Funk Dairy. Giles gave presentations at several different Mexican universities, where he described employment opportunities at Funk Dairy. While the presentations were open to anyone, Giles made clear he was only looking for applicants who had already graduated and been licensed in either veterinary medicine or animal science. Through these presentations Giles recruited the six Plaintiffs, all of whom were citizens of Mexico who had completed a four-year college degree and were licensed to work in Mexico as veterinarians or animal scientists.

After attending one of the presentations, Giles interviewed each Plaintiff. During these interviews, Giles evaded providing specific details of the type of work each Plaintiff would perform if hired, but Plaintiffs developed a general sense of what they thought the job would entail over the course of the hiring process. For example, Plaintiff Dalia Padilla-López understood the job to involve supervising the quality of milk and milking at the dairy, not to be a milker. While Giles informed Plaintiffs that they would get some hands-on experience with the dairy animals, he did not suggest this would be physically demanding. Plaintiffs also left the presentations and interviews with a general understanding of the amount of work, compensation, and other benefits that would come with the jobs. Each Plaintiff received a job offer, and each accepted. Giles then arranged for legal counsel to assist them in obtaining TN visas.

The TN visa program for professional employees, established under the North American Free Trade Agreement (NAFTA),[41] allows citizens of Mexico or Canada to be admitted to the United States for the purpose of engaging in professional level business activities.[42] A person may be admitted to the United States on a TN visa for a period of three years, subject to additional extensions, educational qualifications, and eligible employment in the United States.[43] Once acquiring a TN visa and entering the United States, a TN visa holder may seek to change employers if they can find a new employer eligible to sponsor them.[44]

The Funk Dairy legal counsel prepared the applications for Plaintiffs and provided supporting letters to the U.S. Embassy in Mexico. The letters described their employment as a "professional-level position of animal scientist,"[45] described specific tasks they expected Plaintiffs to perform, and stated that "due to the sophisticated, professional nature of the above duties, the person filling this position must hold at minimum a degree in Agricultural Science, Dairy Science, Veterinary Medicine, or a closely related field."[46] During interviews with the U.S. consular officials, Funk Dairy's legal counsel prepared Plaintiffs, specifically instructing at least one Plaintiff (Padilla-López) to tell the officials she would not be

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41 North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 605.

42 *See* 8 U.S.C. § 1184(e)(2) (2018).

43 *See id.* § 214.6(e), (h)(1) (describing admission period and extensions).

44 *Id.* § 214.6(i).

45 *Martínez-Rodríguez*, 31 F.4th at 1146 (quoting support letters to the U.S. Embassy in Mexico).

46 *Id.* (same).

milking cows at Funk Dairy. Each Plaintiff ultimately obtained a TN visa that authorized entry into the United States for professional employment with Funk Dairy as an animal scientist. Plaintiffs understood their employment was "at will" and Defendants stipulated, for the purposes of summary judgment, that Plaintiffs understood that if their employment with Funk Dairy ended, their visa would expire and they could be subject to removal back to Mexico.

Once arriving at Funk Dairy, Plaintiffs realized that the activities listed in Funk Dairy's supporting letters represented only a minute portion of their duties. Plaintiffs were often required to perform menial, non-professional labor. In fact, Funk Dairy's employment records listed Plaintiffs' positions as "milker," "outside help," and even "general dairy worker."[47] Additionally, while Plaintiffs received some compensation that resembled what Giles had described, in many respects the terms were not as expected. Giles, who oversaw Plaintiffs at the dairy, was often unwilling to accommodate Plaintiffs' health needs or provide appropriate medical care for injuries and made numerous references to deportation during Plaintiffs' employment.

After about a year of employment, all Plaintiffs left Funk Dairy; some were 'released' for not meeting expectations, while others quit for various reasons. Plaintiffs complained to Immigration and Customs Enforcement (ICE) about their employment at Funk Dairy, and ICE undertook an investigation to determine whether Funk Dairy had abused the TN visa program. ICE took no further action following the investigation. In 2017, the six Plaintiffs filed their original complaint, asserting two claims under 18 U.S.C. § 1595(a), which creates a civil action for victims of violations of the various prohibitions on forced labor in Chapter 77 of Title 18 of the U.S. Code. First, Plaintiffs alleged that Defendants obtained their labor in violation of 18 U.S.C. § 1589, the prohibition on forced labor. Second, Plaintiffs alleged that Defendants violated 18 U.S.C. § 1590 by trafficking them into the United States for forced labor. Plaintiffs additionally asserted six claims under Idaho state law, including intentional fraud, concealment, false promise, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing.

Defendant's sole argument in support of summary judgment in their favor was that Plaintiffs failed to adequately establish a violation of § 1589(a)'s prohibition on forced labor.[48] For Plaintiffs to demonstrate viable federal causes of action to defeat summary judgment, they must present sufficient evidence to establish all of the elements of a violation of § 1589(a), which include demonstrating Defendant's actions satisfied the *actus reus* and *mens rea* requirements of 18 U.S.C. § 1589(a)(3).[49] The district court held that Plaintiffs failed to present sufficient evidence to

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[47] *Id.* at 1147 (quoting employment records).

[48] 18 U.S.C. § 1589(a)(3).

[49] *See also* United States v. Dann, 652 F.3d 1160, 1169–70 (9th Cir. 2011) (analyzing the elements of a charge under § 1589(a)(4)).

raise a genuine issue of material fact as to both *actus reus* or *mens rea* requirements of § 1589(a) and thus dismissed the claims for a lack of federal cause of action.[50] The Ninth Circuit reviewed *de novo* and disagreed as to both requirements.

The panel concluded that the evidence in the record would permit a reasonable jury to find that Defendants Funk Dairy and Giles knowingly acquired labor through means enumerated in 18 U.S.C. § 1589(a)(3), namely abuse of law or legal process. In context of the claims alleged, the language of § 1589(a)(3), and the phrase "abuse or threatened abuse of law or legal process,"[51] Plaintiffs were required to prove three elements to satisfy the *actus reus* requirement under 18 U.S.C. § 1589(a)(3): 1) that Funk Dairy used a legal process or law in an undesignated way; 2) that Funk Dairy did so "to exert pressure on the Plaintiff" to cause them to provide labor;[52] and 3) that "Funk Dairy obtained the Plaintiff's labor by means of the pressure created by that abuse."[53] The Ninth Circuit held that each Plaintiff presented sufficient evidence to permit a reasonable jury to find all three elements.

In addressing the first issue, the Court considered whether Funk Dairy used the TN visa program in a manner and for a purpose for which it was not designed when obtaining Plaintiff's employment through that program. The TN visa program requires an applicant to provide documentation that affirms five specified manners, most notably 1) the qualifying profession of the applicant from the list in the relevant Appendix; 2) a description of the professional activities that the applicant would be performing; and 3) the applicant's professional status, demonstrated through their educational or other qualifications.[54] Plaintiffs' testimony supported the conclusion that, during the recruitment process, Funk Dairy represented that the jobs being offered would qualify for the TN visa program of professionals. Further, Plaintiffs presented sufficient evidence to permit a rational jury to find that the job Plaintiffs were actually asked to perform upon arrival to the dairy could not be fairly described as that of an "Animal Scientist." The panel held that the evidence of a sharp disparity between the professional tasks that Funk Dairy described during the TN visa process compared to the general menial labor Defendants ultimately required of Plaintiffs is enough for a

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[50] *See* Frudden v. Pilling, 877 F.3d 821, 828 (9th Cir. 2017) ("Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-movant, there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law.").

[51] 18 U.S.C. § 1589(c)(1) (defining "abuse or threatened abuse of law or legal process" as "the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action").

[52] *Id.*

[53] *See, e.g.*, Headley v. Church of Scientology Int'l, 687 F.3d 1173, 1179–80 (9th Cir. 2012).

[54] 8 C.F.R. § 214.6(d)(3)(ii)(A)–(E) (2023).

reasonable jury to find that Funk Dairy improperly used the TN visa program.

In addressing the second issue, the Ninth Circuit held that Plaintiffs presented sufficient evidence to allow a reasonable jury to conclude that Funk Dairy abused the TN visa program to exert pressure on Plaintiffs, causing them to perform different labor than they had agreed to provide. Three categories of evidence in the record support this finding. First, Funk Dairy abused the TN visa program by placing Plaintiffs in a bait-and-switch situation, where they traveled to Idaho from Mexico with expectations of work, only to be required upon arrival to perform substantial menial labor. Given the evidence that Giles fostered beliefs that the work would be professional in nature, a reasonable jury could find that the coercive pressure of Defendant's bait-and-switch was intentional, as opposed to incidental. Second, Giles's statements to Plaintiffs fostered the beliefs that failure to comply with Funk Dairy's demands would result in removal from the United States. Third, Giles made inaccurate statements about deportation that were inconsistent with the law and the TN visa program. By fostering false beliefs about the immigration consequences of failing to comply with Funk Dairy's demands, Defendant Giles put pressure on Plaintiffs to abide by the Defendants' abuse of the TN visa program. Together, this evidence supported a reasonable inference that Funk Dairy acted to exert pressure on Plaintiffs, causing them to acquiesce in supplying the menial labor that Funk Dairy demanded upon their arrival to Idaho.

In addressing the third element, the Ninth Circuit concluded that the record supported a reasonable inference that Funk Dairy obtained Plaintiffs' non-professional labor by means of abuse of the TN visa program. The causation question in this case was whether Funk Dairy's abuse of the TN visa program to exert pressure on Plaintiffs to provide menial labor different from what Plaintiffs had voluntarily agreed to perform could reasonably be found to have caused Plaintiffs to provide that labor.[55] The Court concluded that a reasonable jury could find the substantial coercive pressures created by Funk Dairy's bait-and-switch abuse of the TN Visa program proximately caused Plaintiffs to provide different, menial labor as opposed to the professional work they agreed to.

In addition to satisfying the three elements of the *actus reus* requirement under § 1589(a)(3), the panel concluded that Plaintiffs also provided sufficient evidence to permit a reasonable jury to find that Funk Dairy acted with the requisite *mens rea*. Demonstrating evidence of *mens rea* requires proof that the Defendant knew 1) that the enumerated circumstance existed and 2) that the Defendant was obtaining the labor in question as a result. The Ninth Circuit had little difficulty concluding that Plaintiffs presented sufficient evidence of *mens rea* under these standards.

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[55] *See* 18 U.S.C. § 1589(c)(1), (a)(3).

Accordingly, the Ninth Circuit held that Plaintiffs presented sufficient evidence to establish a forced labor claim under § 1598(a)(3), therefore the district court erred in granting summary judgment to Defendants and erred in declining to retain supplemental jurisdiction of the state claims. The Court reversed the district court's judgment and remanded the case.

C. Pesticides

1. Natural Resources Defense Council v. United States Environmental Protection Agency, 38 F.4th 34 (9th Cir. 2022).

The Natural Resources Defense Council (NRDC), the Rural Coalition (RC), and additional environmental organizations (collectively, Petitioners)[56] petitioned the United States Court of Appeals for the Ninth Circuit for review of the United States Environmental Protection Agency's (EPA)[57] Interim Decision that glyphosate, the active ingredient in the pesticide RoundUp, did not pose any "unreasonable risk to man or the environment."[58] EPA had issued the Interim Decision as a reassessment of glyphosate's registration pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[59] which requires EPA to issue federal registrations for pesticides. The Ninth Circuit granted the petition for review, agreeing with Petitioners that the Interim Decision 1) was not supported by substantial evidence with regard to EPA's determination that glyphosate was "not likely" to cause non-Hodgkins lymphoma (NHL) and 2) was in violation of the consultation requirements of the Endangered Species Act (ESA).[60] Accordingly, the Court vacated the glyphosate determination and remanded for further analysis and explanation but determined that vacatur was not appropriate for the ESA violation and instead set a deadline for compliance with the ESA consultation.[61] The Court did not reach Petitioners' additional challenges to the ecological risk assessment within the Interim Decision, as it granted EPA's voluntary remand motion on this portion.

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56 Petitioners include the Natural Resources Defense Council; Rural Coalition; Pesticide Action Network North America; Organización en California de Líderes Campesinas; Farmworker Association of Florida; Beyond Pesticides; and the Center for Food Safety.

57 Respondents include EPA and Michael Regan, in his official capacity as Administrator. Intervenors include Monsanto Company, National Association of Wheat Growers, National Cotton Council of America, American Farm Bureau Federation, National Corn Growers Association, American Soybean Association, National Sorghum Producers, Agricultural Retailers Association, National Association of Landscape Professionals, Golf Course Superintendents Association of America, and American Sugarbeet Growers Association.

58 *See* 40 C.F.R. § 155.56 (2023).

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

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

61 *See* Cal. Cmtys. Against Toxics v. U.S. Env't Prot. Agency, 688 F.3d 989, 992 (9th Cir. 2012) (discussing remand).

FIFRA requires that the EPA issue registrations for pesticides, including herbicides, setting forth conditions under which pesticides may be sold, distributed, and used in the United States.[62] Pursuant to FIFRA, EPA may not issue a registration for a pesticide that causes "unreasonable adverse effects on the environment,"[63] including risks to humans, non-humans, and the environment.[64] Under a 2007 congressional amendment, EPA is required to review pesticide registrations every fifteen years.[65] For pesticides approved for use before 2007, including glyphosate, EPA was required to complete a registration review by October 1, 2022.[66] In the course of completing these registration reviews, the EPA is allowed to issue preliminary registration reviews, including risk mitigation measures and requests for data needed to complete the final review.[67]

In 2015, EPA did a preliminary risk assessment for glyphosate and concluded it may pose risks to mammals and birds and may adversely affect plants via spray drift. EPA also concluded that glyphosate was "not likely" to be carcinogenic to humans. EPA maintained this conclusion despite pushback from EPA's Office of Research and Development (ORD), who expressed concerns that EPA's approach to reviewing epidemiological studies for causation contravened the framework set out in EPA's 2005 Guidelines for Carcinogen Risk Assessment (Cancer Guidelines). In January of 2020, EPA issued the Interim Decision at issue, announcing that 1) the draft assessment was final; 2) the benefits of glyphosate outweighed any ecological risks; and 3) EPA would be instituting various mitigation measures for glyphosate, including labeling changes. After the issuance of this Interim Decision, Petitioners petitioned the Ninth Circuit for review of three major issues. First, RC challenged EPA's conclusion on human health, arguing that EPA did not have appropriate support for the assertion that glyphosate was "not likely" to cause cancer. Second, RC argued that the Interim Decision as a whole was issued in violation of the ESA's consultation requirement. Last, NRDC challenged the ecological risk assessment, glyphosate cost determination, cost-benefit analysis, and mitigation requirements ("ecological portion") of the decision.

The Court first addressed RC's challenge to the human health determination, reviewing it under the substantial evidence standard required by FIFRA.[68] The Court stated that EPA's Cancer Guidelines require EPA first to do a "hazard identification" to determine whether a

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62 FIFRA, 7 U.S.C. § 136a.

63 *Id.* § 136a(c)(5)(C).

64 *Id.* § 136(bb).

65 *Id.* § 136a(g)(1)(A).

66 *Id.*

67 40 C.F.R. § 155.56 (2023).

68 Nat'l Res. Def. Council v. U.S. Env't Prot. Agency, 857 F.3d 1030, 1035–36 (9th Cir. 2017) (reviewing EPA's Interim Decision for "substantial evidence" quoting 7 U.S.C. § 136n(b)).

chemical presents a carcinogenic hazard to humans.[69] The Cancer Guidelines contain explicit guidance about finding epidemiological studies and considering factors in causality in order to produce a narrative that summarizes carcinogenic potential. EPA argued that its determination on glyphosate was rooted in the Cancer Guidelines, while RC argued that EPA's conclusion did not follow from its review of the evidence. The Court agreed with RC. The hazard descriptor categories in the Cancer Guidelines make clear that it is only appropriate to state a carcinogenic effect is "not likely" if there is affirmative, robust evidence that there is no link between the chemical and cancer.[70] EPA itself stated that the association between glyphosate and NHL "cannot be determined" from the available evidence,[71] not that there was an affirmative lack of association. Accordingly, on the basis of EPA's own evidence, the human health conclusion was not supported by substantial evidence.[72]

EPA argued further that it was appropriate to utilize the "not likely" hazard category because it had found the results of the epidemiological studies on NHL and glyphosate to be suspect. With regard to animal studies, EPA used historical data on overall cancer rates in certain animals to conclude that animal tumors in these studies could not be proven to be treatment-related. In addition, EPA argued, these studies were not confirmed using "pairwise statistical significance," or comparison to a control group.[73] The Court found both of these interpretations of the Cancer Guidelines to be incorrect; EPA's use of historical control data only to undermine study results did not comport with the Guidelines' suggestion that this data was to provide insight both to bolster and undermine studies, and proof via pairwise statistical significance was not required by the Guidelines. Lastly, EPA argued that the "concerning" results from these cancer studies only occurred at high dosages and that these results could thus be disregarded. The Court found that this approach also had no support in the Cancer Guidelines, which indicated only that high dosages could produce excessive toxicity and alter study results. These additional arguments did not provide any more support for EPA's conclusion, and therefore the Court found for Petitioners. Considering the seriousness of the agency's errors and the extent that vacating the rule would produce environmental harm, the Court vacated this portion of the Interim Decision and remanded for further analysis and explanation.

The Ninth Circuit next turned to RC's second argument that the issuance of the Interim Decision without ESA consultation was in violation of the ESA. Under section 7(a)(2) of the ESA, an agency must

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69 *Nat'l Res. Def. Council*, 38 F.4th at 45.

70 *Id.* at 46–47.

71 *Id.* at 46.

72 *See* Nat'l Res. Def. Council v. U.S. Env't Prot. Agency, 31 F.4th 1203, 1210 (9th Cir. 2022) (considering internal "inconsistencies" and "EPA's decision to abandon its own guidance without a discernable rationale" in holding that a decision was not supported by substantial evidence).

73 *Nat'l Res. Def. Council*, 38 F.4th at 47.

engage in consultation with the Fish and Wildlife Service and the National Marine Fisheries Service to determine whether its actions may have an effect on endangered or threatened species.[74] The ESA requires this action to be completed "at the earliest possible time."[75] At the time of the filing of the lawsuit, EPA had not begun the consultation process. First, the Court addressed whether Petitioners had standing to bring the ESA claim. The Court found that RC's members showed a concrete and particularized injury through proof that they were traveling to view endangered species, causation with the fact that a violation of the consultation requirement is a "procedural injury" for standing purposes,[76] and redressability in relation to the fact that the requested ESA procedure had not begun at the time of filing.[77]

Next, the Court addressed intervenor Monsanto's argument that the issue was moot because EPA had begun the consultation process after the case was filed.[78] The Court disagreed with Monsanto's view that the issue was remedied when the EPA began consultation, instead finding that the unlawful behavior at issue was the *completion* of the consultation for which the Court could feasibly provide a remedy.

Finding the threshold issues in favor of RC, the Court moved to the merits of the claim, determining that the FIFRA registration requirement triggered the ESA consultation requirement.[79] EPA and Monsanto argued that the Interim Decision was not an affirmative agency action within the meaning of the statute, ostensibly due to the idea that RC's grievance was actually EPA's failure to take mitigation measures, which would amount to agency inaction. The Court disagreed: The agency was not letting usual regulations take their course, but rather engaging in a statutorily required registration reassessment, constituting an agency action. As a result, EPA was required to make the ESA effects determination before issuing a decision under FIFRA, so it was in violation of the ESA.

While the Court agreed with Petitioners that EPA violated the ESA consultation provision, it declined to grant RC's requested remedy. Because the FIFRA deadline of October 1, 2022 was quickly approaching when the decision was issued,[80] the Court found that shortening EPA's period to complete the ESA consult would be a large burden and provide little benefit to RC. Accordingly, the Court reiterated that the

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74 16 U.S.C. § 1536(a)(2) (2018).

75 50 C.F.R. § 402.14(a) (2023).

76 *See* Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 971 (9th Cir. 2003).

77 *See* Hall v. Norton, 266 F.3d 969, 977 (9th Cir 2001); *see also* Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency, 966 F.3d 893, 911 (2020) (explaining that the redressability requirement is satisfied when relief "may influence the agency's ultimate decision of whether to take or refrain from taking a certain action" (quoting Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1226–27 (9th Cir. 2003)).

78 *See* Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997) ("If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed.").

79 *See* 50 C.F.R. § 402.14 (describing when consultation procedures begin).

80 7 U.S.C. § 136a(g)(1)(A).

consultation would need to be complete by October and declined to vacate the rest of the Interim Decision.

Lastly, the Ninth Circuit addressed the final issue, which was NRDC's challenge to the "ecological portion" of the Interim Decision. In response to this challenge, EPA made a responsive motion for a voluntary remand. NRDC argued that EPA failed to consider major environmental and economic costs of glyphosate use, failed to provide an adequate explanation of its cost-benefit analysis, and provided no evidence that EPA's proposed mitigation would be effective. The Court, however, declined to reach these claims, instead granting the agency's request for a voluntary remand. RC argued that this request was made in bad faith, as it would protect the agency from judicial review. NRDC agreed with the remand but asked the Court to impose a ninety-day deadline for completing reconsideration. The Court did not find either of these arguments persuasive, primarily for practical reasons; if the motion was denied, the Court would have to wait for substantive briefs from the Defendants, after which the October 1, 2022 deadline would have passed. Thus, the Court simply stated that the reconsideration would need to be complete before the October deadline.

In sum, the Ninth Circuit granted in part the petition for review with respect to the human health determinations, vacating and remanding to EPA for further consideration; denied in part the petition with respect to the ESA violation; and granted the Defendants' motion for voluntary remand on the ecological portion of the Interim Decision.

2. Center for Biological Diversity v. Haaland, 40 F.4th 967 (9th Cir. 2022).

The Center for Biological Diversity (CBD) and the Western Watersheds Project (WWP)[81] (collectively, Plaintiffs) petitioned the United States Court of Appeals for the Ninth Circuit for review of a decision from the District Court for the District of Oregon granting summary judgment to the U.S. Fish and Wildlife Service (FWS or the Service).[82] Plaintiffs had challenged three discrete aspects of the Comprehensive Conservation Plan (hereinafter, the Plan) for three of the five National Wildlife Refuges in the Klamath Basin put forward by the Service. CBD challenged the Plan's pest management strategy for two refuges, arguing that 1) FWS failed to consider reduced-pesticide alternatives under the National Environmental Policy Act (NEPA),[83] 2)

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[81] Plaintiffs include the Audubon Society of Portland; Oregon Wild; Waterwatch of Oregon; and Western Watersheds Project.

[82] Defendants include Deb Haaland, in her official capacity as Secretary of the United States Department of the Interior, and Aurelia Skipwith, in her official capacity as Director of the United States Fish and Wildlife Service. Intervenors include the Tulelake Irrigation District; Klamath Water Users Association; Tulelake Growers Association; Tally Ho Farms Partnership, DBA Walker Brothers; Four H Organics, LLC; Woodhouse Farming and Seed Company; and Michael Byrne.

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

FWS failed to take a sufficiently "hard look" at the environmental effects of pesticides under NEPA, and 3) FWS violated the National Wildlife Refuge System Administration Act (Refuge Act)[84] and the Kuchel Act.[85] WWP additionally argued that FWS 1) failed to properly consider reduced-grazing alternatives, 2) did not take a "hard look" under NEPA, and 3) violated the Refuge Act when approving managed livestock grazing on one refuge. The district court concluded that FWS had not acted arbitrarily or capriciously in approving the pesticide plan or the grazing plan, rejecting all of Plaintiffs' arguments. On appeal, the Ninth Circuit affirmed the grant of summary judgment to FWS.

The Court reviewed the district court's grant of summary judgment *de novo* and evaluated all statutory claims using an arbitrary and capricious standard under the Administrative Procedure Act (APA).[86] The Court first addressed CBD's argument that FWS had not adequately considered reduced-pesticide alternatives for the Refuges as part of the "reasonable range of alternatives" required under NEPA. FWS argued that the reduced-pesticide alternatives would not have been reasonable given the uses and purposes of the Refuge, thus, the agency did not need to do a formal consideration of reduced-pesticide scenarios. The Court agreed, highlighting the benefits of pesticide use for the Refuge's crop production and waterfowl population.

The Ninth Circuit next addressed CBD's argument that FWS had not taken a "hard look" at the environmental effects of pesticide use on the Refuges. CBD argued that FWS had not sufficiently reevaluated its Pesticide Use Proposal (PUP) process. FWS contended that it reasonably declined to reevaluate the PUP, given that there was no indication that the process was inadequate. Employing a rule of reason, the Court agreed with FWS, highlighting evidence that FWS had considered the direct, indirect, and cumulative effects of pesticide use in the Refuges through the PUP. Additionally, the Court did not believe a hard look analysis obligated FWS to evaluate the effects of specific pesticides.

Third, the Court addressed CBD's final argument that FWS violated the Refuge Act and the Kuchel Act by allowing continued pesticide use on the Refuges. The panel disagreed with CBD, stating that FWS's actions did not violate the Refuge Act and Kuchel Act for the same reasons they did not violate NEPA—namely, that the PUP reflected a reasonable consideration of the effects of pesticide use and its alternatives.

Next, the Court moved to WWP's arguments that FWS should not have allowed managed grazing within the Clear Lake Refuge. First, it addressed WWP's contention that FWS had an obligation to consider a reduced-grazing alternative. FWS maintained that reduced-grazing and no-grazing alternatives were impractical. The Court agreed, noting the

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[84] National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (2018).

[85] Kuchel Act of 1964, 16 U.S.C. §§ 695k–695r (1964).

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

benefits of managed grazing for protecting critical habitat and the fact that FWS was only required to "briefly discuss" a no-grazing alternative.

The Court then considered WWP's argument that FWS had not adequately considered the effects of continued grazing on the greater sage-grouse and endangered suckerfish. In response, FWS highlighted the myriad ways the Plan considered fowl and fish. The Court found for FWS, emphasizing that the Plan was particularly thorough for the greater sage-grouse and sufficiently thorough for the suckerfish.

Lastly, the Court addressed WWP's contention that grazing was an impermissible use of the Refuge. Much like in CBD's challenge, the Court found that FWS's actions did not violate the Refuge Act for the same reasons it did not violate NEPA. The panel stated that FWS reasonably decided to continue managed grazing, to the benefit of the sage-grouse and without detriment to the purposes of the Refuge.

In sum, the Ninth Circuit found that the Service had put forward a well-considered plan for the Refuges. As a result, all challenges were rejected and the Court upheld the grant of summary judgment to FWS.

II. CLIMATE CHANGE

A. Climate Change Tort Suits

1. County of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022).

The County of San Mateo, the County of Marin, and the City of Imperial Beach (collectively, the Counties) sued more than thirty energy companies[87] in California state court. The energy companies removed the complaints to the United States District Court for the Northern District of California, and the district court ultimately remanded the complaints to state court due to lack of subject matter jurisdiction. The Ninth Circuit affirmed the district court's ruling and held that the district court did not err when it determined it lacked subject matter jurisdiction under any of the grounds asserted by the energy companies.

The Counties each filed three materially similar complaints in California state court alleging that the energy companies' general involvement with and promotion of the fossil fuel industry were substantial factors in the increase of global average temperatures and

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[87] This group included Chevron Corporation; Chevron U.S.A. Inc.; ExxonMobil Corporation; BP PLC; BP America, Inc.; Shell PLC; Shell Oil Products Company LLC; CITGO Petroleum Corporation; ConocoPhillips; ConocoPhillips Company; Phillips 66 Company; Peabody Energy Corporation; Total E&P USA, Inc.; Total Specialties USA, Inc.; Arch Coal Inc.; Eni Oil & Gas, Inc.; Rio Tinto Energy America, Inc.; Rio Tinto Minerals, Inc.; Rio Tinto Services, Inc.; Anadarko Petroleum Corporation; Occidental Petroleum Corporation; Occidental Chemical Corporation; Repsol Energy North America Corp.; Repsol Trading USA Corp.; Marathon Oil Company; Marathon Oil Corporation; Marathon Petroleum Corp.; Hess Corp.; Devon Energy Corp.; Devon Energy Production Company, LP; Encana Corporation; and Apache Corp.

resulting increases in sea level. The Counties alleged they have suffered, and will continue to suffer, injuries and damages due to the rising sea level caused by the energy companies' business practices. These injuries include flooding, which damages and prevents access to real property. The complaints included causes of action for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass.

The energy companies removed the complaints to federal court, asserting various bases for subject matter jurisdiction: 1) the Counties' claims raised federal issues; 2) the Counties' claims are preempted by federal law; 3) the Counties' claims arose on federal enclaves; 4) the Counties' claims arose out of operations on the outer Continental Shelf; 5) the Counties' claims arose from actions taken by the energy companies pursuant to a federal officer's directions; and 6) the Counties' claims are related to bankruptcy cases. Shortly after the filing of the complaints, the County of Santa Cruz, the City of Santa Cruz, and the City of Richmond filed materially similar complaints which were also removed to federal court. Additionally, Marathon Petroleum Corporation individually asserted an additional ground for removal on the basis that the complaint concerned maritime activities and thus gave rise to admiralty jurisdiction.

The Counties moved to remand the cases back to state court on the basis that none of the proffered theories of subject matter jurisdiction were valid. The district court rejected each of the energy companies' theories of subject matter jurisdiction but stayed its remand order to allow the energy companies to appeal. On appeal, the Ninth Circuit affirmed the district court's conclusion that no subject matter jurisdiction existed under the federal-officer removal statute. The Ninth Circuit dismissed the rest of the appeal for lack of subject matter jurisdiction because, under the Ninth Circuit's understanding of 28 U.S.C. § 1447(d) and relevant precedent, remand orders from district courts are not reviewable by appellate courts.

The energy companies requested that the Supreme Court review the Ninth Circuit's ruling. While the petition for certiorari was pending, the Supreme Court decided *BP P.L.C. v. Mayor and City Council of Baltimore*[88] which reinterpreted § 1447(d) to allow appellate review of all Defendants' grounds for removal under that section. The Supreme Court then granted writ and remanded the case so that each of the energy companies' bases for subject matter jurisdiction could be reviewed by the Ninth Circuit. The Ninth Circuit reviewed these claims *de novo*.

The energy companies argued first that the district court had subject matter jurisdiction under 28 U.S.C. § 1331 because this section grants original jurisdiction to claims presenting federal questions. The Counties' complaints presented only state-law claims, and, under the well-pleaded complaint rule, Plaintiffs can avoid federal jurisdiction so long as a federal question does not present itself on the face of the complaint. The

[88] 141 S. Ct. 1532 (2021).

energy companies argued that the claims presented federal questions and were removable under the *Grable*[89] exception to the well-pleaded complaint rule, which grants federal jurisdiction over a state law claim where federal law is a necessary element of the claim for relief. The Ninth Circuit disagreed and held that the *Grable* exception to the well-pleaded complaint rule did not apply because the claims did not require resolution of a question of federal law, did not raise a question of federal law for determining jurisdiction under § 1331, and did require a fact-intensive and situation-specific analysis.

Looking to a second exception to the well-pleaded complaint rule, the energy companies next argued that the district court had subject matter jurisdiction under the artful-pleading doctrine, which applies where a federal statute is sufficiently preemptive to transform a common-law complaint into a federal claim. Here, the energy companies argued that the Clean Air Act[90] entirely preempted the Counties' claims and thus granted an exception to the well-pleaded complaint rule. The Ninth Circuit rejected this argument and held that the Clean Air Act was not sufficiently preemptive to grant federal jurisdiction. The Ninth Circuit had previously rejected this very argument[91] when it stated that the Clean Air Act was not one of the three preemptive statutes identified by the Supreme Court and that the Act failed to meet both requirements for complete preemption.

Third, the energy companies argued that the complaints arose out of federal law for the purposes of § 1331 because the claims arose on a federal enclave. The Counties contended that their claims were not based on torts that occurred on a federal enclave, but rather that their claims arose out of injuries to real property and infrastructure within their jurisdiction. The Ninth Circuit agreed with the Counties and held that the tort claims were not removable under the federal enclave doctrine. The Court reasoned that the connection between the alleged conduct that occurred on federal enclaves and the Counties' alleged injuries is too attenuated and remote to conclude that the cause of action was governed by federal law applicable to any federal enclave.

Fourth, The energy companies argued that the claims could be removed under the Outer Continental Shelf Lands Act (OCSLA)[92] which grants jurisdiction over actions arising out of particular conduct on the Outer Continental Shelf. The energy companies reasoned that the Counties' claims arose out of operations on the Outer Continental Shelf because the Counties' alleged injuries were partially caused by fossil-fuel extraction which occurred there. The Ninth Circuit disagreed and held that the claims did not arise out of or in connection with activities that occurred on the Outer Continental Shelf for purposes of establishing federal subject matter jurisdiction. The Court reasoned that, again, the

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89 *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

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

91 City of Oakland v. BP PLC, 969 F.3d 895, 907 (9th Cir. 2020).

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

connection between the energy companies activities on the Outer Continental Shelf and the Counties' alleged injuries were too attenuated because the injuries in the complaint occurred exclusively within the jurisdiction of the Counties. Additionally, the claims focused on the production and promotion of the energy companies' fossil fuel products generally rather than any specific conduct which occurred on the Outer Continental Shelf.

Fifth, the energy companies argued that the district court had jurisdiction due to federal-officer removal under 28 U.S.C. § 1442(a)(1) which allows removal of certain cases brought against federal officers. Among other requirements, a party must show that they were acting under a federal officer's direction in order to prove the causal nexus between the federal officer's directions and the Plaintiff's claims necessary to invoke § 1442(a)(1). The energy companies asserted that, based on three separate government contracts, they were government contractors acting under the direction of federal officers sufficient to satisfy § 1442(a)(1) and allow for removal. The Ninth Circuit disagreed, ruling that the energy companies were not acting under the direction of federal officers as it related to § 1442(a)(1). The Court reasoned that each of the contracts described by the energy companies failed because they pertained to arms-length business contracts which were mutually beneficial and allowed for the energy companies to exercise some degree of discretion rather than acting purely at the behest of the government.

Sixth, the energy companies argued that the district court had subject matter jurisdiction because, under 28 U.S.C. § 1452(a), the claims were related to bankruptcy cases which involved Peabody Energy Corp., Arch Coal, and Texaco, Inc. The Ninth Circuit rejected this argument. It reasoned that the energy companies failed to show that the Counties' claims were sufficiently related to the active bankruptcy claims because the district court would not have needed to interpret the confirmed plans from the bankruptcy cases to determine whether the Counties' complaints were barred in district court. Additionally, the Ninth Circuit determined that the relationship between the Counties and the companies involved in the bankruptcy claims was too attenuated to support a finding of subject matter jurisdiction under this premise.

Finally, the energy companies argued that the district court had admiralty jurisdiction over the claims brought against Marathon Petroleum Corporation only because the Counties' claims were based on fossil fuel extraction which occurs on vessels engaged in maritime actions and thus fall within the Constitution's grant of original jurisdiction.[93] The Ninth Circuit rejected this argument because, under the "saving to suitors" clause of 28 U.S.C. § 1333(1), maritime claims brought in state court are not removable unless there is another independent basis for jurisdiction. Even if the Counties' claims were proper maritime claims, they were filed in state court and the energy companies showed no other independent theory of jurisdiction.

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[93] U.S. Const. art. III, § 2, cl.1; *see also* 28 U.S.C. § 1333(1).

In sum, the Ninth Circuit held that none of the bases for removal asserted by the energy companies were valid and that the district court had no grounds for proving federal subject matter jurisdiction. The Ninth Circuit affirmed the holding of the district court, thus remanding the complaints to state court.

2. City & County of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022).

The City and County of Honolulu and the County of Maui (collectively, Honolulu)[94] brought suit against various oil and gas companies (collectively, oil companies)[95] in the District Court of Hawaii,[96] alleging numerous state law claims caused by the oil companies' alleged deception related to the harms of climate change and oil extraction. The oil companies removed the case to the United States District Court for the District of Hawaii, claiming federal jurisdiction.[97] The district court granted Honolulu's motion to remand back to state court and the oil companies subsequently appealed. The Ninth Circuit affirmed the district court's remand decision, finding that the oil companies failed to show federal jurisdiction.

Honolulu asserted state-law public and private nuisance, failure to warn, and trespass claims in alleging that oil companies conducted deceptive practices in concealing the harms of climate change and energy exploration on the environment. Honolulu asserted that oil companies' deceptions around the harms of climate change and oil extraction caused various climate change-related harms, including local property damage and land encroachment from extreme weather and rising sea levels. The

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94 The City and County of Honolulu jointly sued various oil and gas companies and the County of Maui separately sued various oil and gas companies. In both cases, the oil companies removed to federal court, and in both cases the District Court Judge remanded to state court. The oil companies separately appealed the district court's decision to remand, and the two cases were consolidated upon appeal.

95 Defendants in *City & County of Honolulu v. Sunoco* include the following: Sunoco LP; Aloha Petroleum, Ltd.; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Shell PLC; Shell USA, Inc.; Shell Oil Products Company LLC; Chevron Corporation; Chevron USA Inc.; BHP Group Limited; BHP PLC; BHP Hawaii Inc.; BP PLC; BP America, Inc.; Marathon Petroleum Corp.; ConocoPhillips; ConocoPhillips Company; Phillips 66 Company; Aloha Petroleum LLC. Defendants in *County of Maui v. Chevron* include the following: Chevron USA Inc.; Chevron Corporation; Sunoco LP; Aloha Petroleum, Ltd.; Aloha Petroleum LLC; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Shell PLC; Shell USA, Inc.; Shell Oil Products Company LLC; BHP Group Limited; BHP Group PLC; BHP Hawaii Inc.; BP PLC; BP America, Inc.; Marathon Petroleum Corp.; ConocoPhillips; ConocoPhillips Company; Phillips 66 Company.

96 The City and County of Honolulu brought suit in the Circuit Court of the First Circuit of the State of Hawaii. *See* Haw. Dist. Ct., No. 1CCV-20-0000380. The County of Maui brought suit in the Circuit Court of the Second Circuit of the State of Hawaii. *See* Haw. Dist. Ct., No. 2CCV-20-0000283.

97 The oil companies claimed eight jurisdictional grounds for removal under the federal officer removal statute, federal enclave jurisdiction, and the Outer Continental Shelf Land Act. 28 U.S.C. § 1442(a)(1) (2018); County of San Mateo v. Chevron Corp., 32 F.4th 733, 748–49 (9th Cir. 2022) (citing U.S. Const. Art I § 8, cl. 17) [hereinafter *San Mateo II*].

oil companies removed the case to federal court, claiming federal jurisdiction under 1) federal officer jurisdiction,[98] 2) federal enclave jurisdiction,[99] and 3) the Outer Continental Shelf Land Act (OCSLA).[100] The district court found the oil companies failed to show grounds for federal jurisdiction under these claims and remanded to state court pursuant to Honolulu's motion. The Ninth Circuit reviewed the district court's findings *de novo*.[101]

The oil companies' removal rested on three removal claims. First, the federal officer removal statute provides for removal in cases where a Defendant acted under the direction of a federal officer.[102] Second, federal enclave jurisdiction allows for federal jurisdiction over injuries occurring on or arising out of conduct on federal enclaves.[103] Finally, the federal government offers private parties leases for offshore fossil fuel exploration, development, and extraction under the OCSLA.[104] OCSLA permits federal jurisdiction over cases "arising out of, or in connection with" operations on the outer Continental Shelf.[105] The Ninth Circuit noted that removal statutes should be strictly construed against removal jurisdiction.[106]

As an initial argument, the oil companies cited six grounds for federal officer jurisdiction, including federal government contracts and directives.[107] The Ninth Circuit used a three-prong test to determine if the oil companies' claims provide federal officer jurisdiction: that 1) Defendants "acted under" federal officers; 2) Defendants assert "colorable federal defenses;" and 3) the lawsuits are "for or relating to Defendants' actions."[108] First, the Ninth Circuit addressed whether the oil companies were "acting under" federal officers, applying a four-factor test for "acting

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98 28 U.S.C. § 1442(a)(1). The oil companies asserted six grounds for federal officer jurisdiction.

99 *San Mateo II*, 32 F.4th 748–49 (citing U.S. Const. Art I § 8, cl. 17). The oil companies asserted one ground for removal under federal enclave jurisdiction.

100 43 U.S.C. § 1349(b)(1) (2018). Oil Companies asserted one ground for removal under OCSLA.

101 Canela v. Costco Wholesale Corp., 971 F.3d 845, 849 (9th Cir. 2020). The Ninth Circuit also found it had jurisdiction to review the district court's order under 28 U.S.C. §§ 1291, 1447(d).

102 28 U.S.C. § 1442(a)(1) (2018).

103 *San Mateo II*, 32 F.4th 748–49 (citing U.S. Const. Art I § 8, cl. 17). A federal enclave refers to federal property within a state's borders. U.S. Cont. Art I § 8, cl. 17.

104 43 U.S.C. §§ 1331–1356b. Such leases are on the Outer Continental Shelf. *Id.*

105 43 U.S.C. § 1349(b)(1).

106 *See* Hansen v. Grp. Health Coop., 902 F.3d 1051, 1056–57 (9th Cir. 2018).

107 28 U.S.C. § 1442(a)(1) (2018).

108 *Id.* As parties agreed that the oil companies were persons under the law, the Court broke the second two statutory requirements, that Defendants 1) assert a "colorable federal defense" and 2) show a "causal nexus between its actions, taken pursuant to a federal officer's direction, and Plaintiff's claims," into these three prongs which the removing party must satisfy. *San Mateo II*, 32 F.4th at 755. The Ninth Circuit did not address the final prong because the oil companies' claims failed on the first two.

under" from *San Mateo II*.[109] None of the oil companies' four claims which the Ninth Circuit addressed satisfied this test.[110] Next, the Court found that the oil companies failed to raise any "colorable federal defenses" to satisfy the second prong.[111] Thus, the Ninth Circuit rejected all six of oil companies' federal officer jurisdiction claims.

Second, the oil companies claimed that federal enclave jurisdiction was proper because some conduct relating to Honolulu's injuries, like oil extraction, occurred on federal enclaves.[112] The Ninth Circuit rejected any connection between the oil companies' activities on federal enclaves to Plaintiff's injuries as too attenuated and overly broad to provide federal enclave jurisdiction on two grounds. [113] First, Honolulu's claims did not implicate the oil companies' actions on federal enclaves. Rather, Honolulu's claims centered around the oil companies' deceptive practices rather than oil and gas activities on federal enclaves. Second, the oil companies failed to tie conduct on federal enclaves directly to Honolulu's claimed injuries. As a result, the Court rejected the oil companies' federal enclave claims.

Third, the oil companies claimed that their outer Continental Shelf activities provided federal jurisdiction under the OCSLA.[114] The Ninth Circuit rejected the Oil Companies' claim because their activities on the outer Continental Shelf were too attenuated and remote from Honolulu's alleged injuries.[115] The Court found that OCSLA provides federal jurisdiction for tort claims only when those claims arise from injuries or actions which occurred on the outer Continental Shelf.[116] The Ninth Circuit accepted the District Court's findings that Honolulu's claimed

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109 A person acted under a federal officer if that person: 1) worked under an officer "in a manner akin to an agency relationship"; 2) were "subject to the officer's close direction," or had an "unusually close" relationship; 3) helped fulfill "basic governmental tasks"; and 4) conducted activities "closely related to the government's" to face risk of state-court prejudice. *San Mateo II*, 32 F.4th at 756–57.

110 Two claims—producing oil under the Defense Production Act and operating the Strategic Petroleum Reserves—amounted to no more than normal commercial and regulatory relationships and so failed the test. Under two additional claims, related to offshore operations under OCSLA and operating the Elk Hills oil reserve, the oil companies failed to provide sufficient new evidence to distinguish these claims from the nearly identical claims of "acting under" raised and rejected in *San Mateo II*. *San Mateo II*, 32 F.4th at 759.

111 Five of the oil companies' asserted defenses—First Amendment, Due Process, Interstate and Foreign Commerce Clauses, foreign affairs doctrine, and preemption—failed the test as these defenses did not arise from official duties under government orders. The Court also rejected the government contractor defense as colorable because the oil companies only cited cases dealing with design defect claims as opposed to failure to warn claims as Honolulu alleged. The oil companies also failed to show a colorable defense through their immunity claims.

112 U.S. Const. Art I § 8, cl. 17.

113 In reaching this conclusion, the Court found that federal enclave jurisdiction should be invoked narrowly. *San Mateo II*, 32 F.4th at 749.

114 43 U.S.C. § 1349(b)(1) (2018).

115 *Id.*

116 *San Mateo II*, 32 F.4th at 753. The Court accepted as true the oil companies' assertion that 30% of domestic oil production occurred on the outer Continental Shelf but still found this insufficient. *Id.* at 754.

injuries arose from the oil companies' deceptive practices. OCSLA jurisdiction was therefore not proper because Honolulu's injuries did not arise from the oil companies' conduct on the outer Continental Shelf.

In sum, the Ninth Circuit declined to extend federal jurisdiction to the oil companies and affirmed the district court's decision to remand the case to state court. The Court did not find that federal officer jurisdiction existed. It also dispensed with the oil companies' claims of federal enclave jurisdiction and federal jurisdiction under OCSLA, finding insufficient connection between their actions on federal enclaves and on the outer Continental Shelf and Honolulu's claims.

B. Climate Change & Criminal Law

1. United States v. Reiche, 54 F.4th 1093 (9th Cir. 2023).

In November 2020, Ellen Reiche was arrested for attempting to place a "shunt" on railroad tracks to interfere with a train carrying crude oil. She was convicted of Violence Against Railroad Carriers[117] and sentenced to twelve months and one day of imprisonment by the United States District Court for the Western District of Washington.[118] The district court judge imposed an additional enhancement for reckless endangerment of a mass transportation vehicle. On appeal at the Ninth Circuit, Reiche sought review of the sentencing enhancement for reckless endangerment and her rejected motion for sentence reduction.

In the middle of the night, Reiche and an accomplice snuck onto a railroad track owned by BNSF Railway (BNSF) near Bellingham, Washington and attached a device to the rail. The device, known as a shunt, interferes with the rail signaling system and was intended to halt an incoming crude oil train. Reiche learned how to construct the shunt from various internet resources. However, a motion-sensor camera detected Reiche and the accomplice and dispatched law enforcement officers who found the two women and discovered the shunt attached to the track. After a jury trial, Reiche was convicted of Violence Against Railroad Carriers.

At sentencing, the parties discussed two major issues: first, whether Reiche had "recklessly endangered" the mass transportation vehicle garnering a nine-point sentencing enhancement,[119] and second, whether her acceptance of responsibility merited a downward sentencing adjustment. Reiche argued that she did not know about the dangers of shunting and stated that she thought it was an "entirely safe and peaceful form of protest." Despite the evidence offered by the Reiche, the judge imposed the sentencing enhancement and found that her acceptance of responsibility was insufficient to reduce the sentence. Reiche appealed those findings.

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117 16 U.S.C. § 1992(a)(5) (2018).

118 United States v. Reiche, No. 20-215 (W.D. Wash. Jan. 3, 2022).

119 U.S. SENT'G GUIDELINES MANUAL § 2A5.2(a)(2) (U.S. SENT'G COM'N 2021).

The Ninth Circuit reviewed the U.S. Sentencing Guidelines *de novo*, factual findings for clear error, and application of facts for abuse of discretion.[120]

Under the U.S. Sentencing Guidelines, sentence recommendations are determined by point accumulation based on the crime's severity, aggravating factors, and mitigation measures.[121] In this case, the Violence Against Railroad Carriers has a base level of nine points,[122] but "recklessly endangering a mass transportation vehicle" ratchets the base level up to eighteen points.[123] To find reckless endangerment, the Court must find that the Defendant was aware of the danger of their conduct and that the conduct was of the nature and degree that it was a gross deviation from a reasonable duty of care. Here, Reiche argued that she did not know that placing the shunt could result in a train derailment and thus did not know about the danger her conduct posed. However, the Ninth Circuit disagreed and found that interfering with rail signals is objectively and obviously a severe danger. Additionally, the Court emphasized that Reiche's research into the construction of the shunt was evidence that she was likely to know about the dangers of causing the abrupt braking of a freight train that amounted to a breach of reasonable care rising to the level of reckless endangerment. As a result, the Court affirmed the use of the sentencing enhancement.

On the second issue, the Sentencing Guidelines provide an opportunity for a downward sentencing adjustment for a Defendant's acceptance of responsibility.[124] To be eligible for this adjustment, the Defendant must show that they have genuine remorse for their actions, and this is generally done before going to trial. While this adjustment is available to Defendants who go to trial to preserve issues not related to factual guilt, a nonbinding comment to the Sentencing Guidelines states that the downward adjustment is not intended to apply to Defendants that put the government to its burden of proof at trial and then admit guilt after conviction.[125] Reiche argued that the district court erred in relying on this comment. However, the Court disagreed with Reiche, saying that the district court did not rely on the comment, but merely refused to exercise its authority to apply the adjustment. The Court found that the district court did not punish Reiche for going to trial, but rather appropriately used its discretion to determine that this case was not entitled to the reduction and affirmed the rejected motion.

Ultimately, the Ninth Circuit affirmed the sentence given to Reiche, first because she engaged in obviously dangerous conduct that amounted to reckless endangerment when attempting to place a shunt on a railroad

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120 United States v. George, 949 F.3d 1181, 1184 (9th Cir. 2020).
121 U.S. SENT'G GUIDELINES MANUAL § 2A5.2(a)(2).
122 *Id.* § 2A5.2(a)(4).
123 *Id.* § 2A5.2(a)(2)
124 *Id.* § 3E1.1(a).
125 *Id.* § 3E1.1(a) cmt. 2.

track and second because she was not entitled to a sentence reduction for accepting responsibility.

III. ENERGY LAW & UTILITY REGULATION

1. Ellis v. Salt River Project Agricultural Improvement & Power District, 24 F.4th 1262 (9th Cir. 2022).

A Plaintiff class[126] of Salt River Project Agricultural Project Improvement and Power District (SRP)[127] customers who own solar electricity generation systems filed suit against the electric and water service provider in the United States District Court for the District of Arizona,[128] alleging that SRP violated various state consumer protection statutes and federal antitrust laws[129] by attempting to stifle competition in the energy generation market. The Ninth Circuit affirmed dismissal of the state law claims for lack of timeliness but reversed the dismissal of federal Sherman Antitrust claims, remanding for further proceedings.

SRP is responsible for setting prices for the sale and distribution of electricity for over a million customers in the Phoenix metropolitan area. In 2015, SRP adopted a new rate scheme increasing electricity prices for customers with distributed solar systems[130] installed after December 2014, charging up to sixty-five percent more than customers without solar systems.

Plaintiffs filed a class action seeking declaratory and injunctive relief, alleging that the disproportionate pricing scheme discriminated against solar customers and disincentivized purchase and use of solar systems, leading to sole dependence on SRP for all power needs, violating state consumer protection laws, federal equal protections,[131] and the Sherman Act.[132] The district court dismissed Plaintiffs' complaint in its entirety, holding that the state claims were barred under Arizona's notice-of-claim statute,[133] that the equal protection claim was untimely, and the antitrust claim failed to sufficiently allege an injury. Additionally, the district court concluded that the Local Government

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126 Plaintiffs include: William Ellis, Robert Dill, Edward Rupprecht, and Robert Gustavis, individually and representing a class of similarly situated people. Plaintiffs are SRP solar customers subject to the increased rate.

127 SRP is an electric and water servicer for metropolitan Phoenix, Arizona and is a political subdivision of the state that controls the electrical grid and sets prices for sale and distribution of electricity.

128 Ellis v. Salt River Project Agric. Improvement & Power Dist., 432 F. Supp. 3d 1070 (9th Cir. 2022).

129 Sherman Antitrust Act, 15 U.S.C. § 2 (2018).

130 Distributed solar systems are installed by property owners who seek to generate their own electricity. Net metering laws allow owners to sell excess power back to the commercial grid. Properties with solar systems within SRP's service area remain connected to the larger grid and buy energy from SRP when they cannot generate it themselves.

131 Civil Rights Act of 1871, 42 U.S.C. § 1983 (2018).

132 Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2018).

133 ARIZ. REV. STAT. ANN. § 12-821.01(A).

Antitrust Act (LGAA)[134] shielded SRP from federal antitrust damages. Plaintiffs timely appealed the dismissal of the complaint. On appeal, the Ninth Circuit reviewed all three issues for errors of law.

The Ninth Circuit first analyzed whether the state claims were barred by Arizona's notice-of-claim statute, which requires persons filing against a public entity to file a claim that includes a specific amount of damages sought, posing a barrier to class actions against public entities.[135] Arguing that the notice-of-claim statute should not apply, Plaintiffs contended that the state law conflicts with Federal Rule of Civil Procedure (FRCP) 23 because it inhibits class certification.[136] The Ninth Circuit disagreed and affirmed dismissal of the state claims finding that FRCP 23 does not conflict with the notice-of-claim statute because the claim does not become "live" under state law until the notice of claim is delivered to the public entity.[137] As such, the Ninth Circuit concluded that Plaintiffs had neither the duty to represent the class's interests nor their own interests in certifying the class until SRP was notified of this claim. Further, since the class action suit process begins when the claim is filed with the public entity, FRCP 23 does not apply until after the notice-of-claim statute is satisfied, thus allowing the two procedures to exist without conflicting.

Plaintiffs also argued that Arizona's notice-of-claim statute is a procedural rule and therefore should not apply in federal court under the Erie Doctrine.[138] The Ninth Circuit adhered to the United States Supreme Court's holding in *Felder v. Casey*[139] which established that notice-of-claim statutes are substantive conditions on the right to sue government entities and thus apply to the adjudication of state law claims.[140] The Ninth Circuit affirmed the district court's finding that the state claims against SRP were deficient because the claims did not meet the statute's requirements, given that there was no conflict between state and federal laws governing class actions and the state procedural law is outcome-determinative.

The Ninth Circuit next analyzed the federal equal protection claim[141] that the district court, assuming that the statute of limitations started when SRP adopted the new rate structure for solar customers in February 2015, held to be untimely because it fell outside the two-year statute of limitations. The Ninth Circuit reversed this finding, holding that the

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134 Local Government Antitrust Act, 15 U.S.C. §§ 34–36 (2018).

135 ARIZ. REV. STAT. ANN. § 12-821.01(A).

136 FED. R. CIV. P. (23).

137 Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 165 (2016); ARIZ. REV. STAT. ANN. § 12-821.01(A).

138 When ruling on state laws in federal court on diversity jurisdiction, the Erie Doctrine dictates that state procedural rules only apply if they are outcome-determinative, ensuring equivalent outcomes between state and federal. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

139 487 U.S. 131 (1988).

140 *Id.* at 151–52.

141 Civil Rights Act of 1871, 42 U.S.C. § 1983 (2018).

statute of limitations began, instead, when the Plaintiffs received the bills, given that the cause of action did not arise when SRP adopted the pricing scheme because the Plaintiffs were not likely to know that the injury had occurred. On remand, the Ninth Circuit instructed the district court to consider claims timely if the charges at the discriminatory rate occurred during the statute of limitations period. The Ninth Circuit declined SRP's invitation to affirm the dismissal based on a rational basis because the district court did not rule on that theory.

Lastly, the Ninth Circuit analyzed the claims brought under the Sherman Antitrust Act[142] that the district court dismissed for failure to allege an antitrust injury, reasoning that the claims were not barred under filed-rate doctrine and state-action immunity and that SRP was shielded from antitrust damages under LGAA.[143] The Ninth Circuit evaluated the relevant antitrust issues in three parts.

First, the Ninth Circuit reversed the district court's finding that Plaintiffs failed to allege an antitrust injury.[144] The district court held that the SRP pricing structure was not the cause of Plaintiffs' injury because solar installation was uneconomical beyond the actions of SRP. The Ninth Circuit disagreed, stating that Plaintiffs merely must show that their injury was caused by SRP's scheme to artificially increase solar prices through its exclusionary conduct. As a result, the Ninth Circuit reversed and remanded for further proceedings.

Second, the Ninth Circuit affirmed the district court's determination that the filed-rate doctrine[145] and state-action immunity[146] defenses claimed by SRP were not applicable. SRP argued that the filed-rate defense applied because the state granted SRP unilateral ratemaking authority, thus it was entitled to set rates so long as they are "just and reasonable,"[147] despite having no independent oversight over their rates. The Ninth Circuit declined to extend the filed-rate doctrine to SRP on the grounds that there is no external oversight, which is essential to the doctrine. The state-action immunity defense only applies in situations where the anti-competitive conduct is undertaken by a substate governmental entity where the state has articulated a policy to displace competition. The Ninth Circuit found that the state-action immunity

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142 Sherman Antitrust Act, 15 U.S.C. § 2 (2018).

143 Local Government Antitrust Act, 15 U.S.C. §§ 34–36 (2018).

144 Under prior Ninth Circuit rulings, antitrust injury has four elements: "(1) unlawful conduct, (2) causing an injury to the Plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." American Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999).

145 Filed-rate doctrine is a judicially created rule that prohibits individuals from asserting civil antitrust claims for rates based on rates approved by state agencies. Wortman v. All Nippon Airways, 854 F.3d 606, 610 (9th Cir. 2017).

146 State-action immunity recognizes that Congress did not intend to constrain States from controlling their economies by making policy choices on what regulations to adopt. Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 224 (2013).

147 *See* ARIZ. REV. STAT. ANN. § 40-202(D) (declaring "that the most effective manner of establishing just and reasonable rates for electricity is to permit electric generation service prices to be established in a competitive market").

defense could not apply because SRP acted in contravention to Arizona's policy of preventing anti-competitive conduct by utilities and SRP lacked state authorization to act anti-competitively.[148]

Finally, the Court evaluated if the LGAA precluded antitrust damages against a local government or official. The relevant parts of the LGAA protect local governments (inclusive of "school district, sanitation district, [and] any other special function governmental unit")[149] from antitrust damages. The Ninth Circuit held that SRP should be immune from antitrust damages because SRP is designated as a water district by the state.

In sum, the Ninth Circuit affirmed in part, reversed in part, and remanded to the district court. The Ninth Circuit affirmed the dismissal of the state law claims based on the substantive nature of the state's procedural rules that do not conflict with FRCP 23 governing class actions and reversed the dismissal of Plaintiffs' equal protection claim for untimeliness, holding that discriminatory pricing claims are timely from the time of charging rather from the time of adoption by the ratemaking entity. The Ninth Circuit also reversed the dismissal of the antitrust claims, finding that Plaintiffs adequately alleged antitrust injury by showing that SRP's discriminatory pricing caused its injury but also affirmed the district court's ruling that the LGAA immunizes SRP from damages, leaving only the injunctive relief available on remand.

2. California Public Utilities Commission v. Federal Energy Regulatory Commission, 29 F.4th 454 (9th Cir. 2022).

The California Public Utilities Commission (CPUC) and other California State Agencies[150] (collectively, California) sought review of a Federal Energy Regulatory Commission (FERC) order awarding "incentive adders" to three California utilities.[151] California challenged FERC's orders on two grounds: first, that FERC failed to follow the mandate from the Ninth Circuit's remand order from this case in 2019,[152] and second, that FERC's orders granted on remand were arbitrary and capricious because FERC improperly applied California law. The Ninth Circuit reviewed FERC's responsive actions on remand *de novo*,[153] FERC's overall orders on remand under the arbitrary and capricious standard of review,[154] and FERC's interpretation of California law *de*

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148 *See id.*

149 LGAA, 15 U.S.C. §§ 35(a), 34(1)(B).

150 Transmission Agency of Northern California; Sacramento Municipal Utility District, California Department of Water Resources; Northern California Power Agency; Sacramento Municipal Utility District; Transmission Agency of Northern California.

151 Three utilities, Pacific Gas and Electric Company; San Diego Gas & Electric Company; Southern California Edison Company, also intervened in this case.

152 Cal. Pub. Utils. Comm'n v. Fed. Energy Reg. Comm'n *(CPUC I)*, 879 F.3d 966, 980 (9th Cir. 2018).

153 *See* Olivas-Motta v. Whitaker, 910 F.3d 1271, 1275, 1280 (9th Cir. 2018).

154 *CPUC I*, 879 F.3d at 973 (quoting 5 U.S.C. § 706).

novo.[155] The Court upheld FERC's orders, finding that FERC properly followed the Ninth Circuit's mandate from *CPUC I* and had not acted arbitrarily and capriciously in its orders upon remand.

FERC's Order 679[156] established "incentive adders,"[157] which FERC awards to utilities that have already joined and remain members of non-profit transmission organizations.[158] These transmission organizations provide benefits,[159] and FERC's Order 679 was established to encourage utility participation in voluntary transmission organizations. The CPUC challenged FERC's orders granting Pacific Gas & Electric Company (PG&E) incentive adders under Order 679 in 2016 and 2017 on the grounds that PG&E's membership in the California Independent System Operator (CAISO) was mandatory under California law, and thus FERC should not award the adder because such an award would not induce PG&E's membership in a voluntary transmission organization.[160]

The Ninth Circuit in 2018 found FERC's summary judgment order granting the incentive adders to PG&E to be arbitrary and capricious and remanded the case to FERC to consider whether California state law mandated PG&E's participation in CAISO.[161] This case stems out of that remand order. On remand, FERC determined that membership in CAISO was not mandatory and therefore granted the three utilities' requests for incentive adders in new remand orders. As a result, California challenged the validity of these FERC remand orders.

First, California argued that FERC disregarded the Ninth Circuit's orders on remand. Specifically, California argued that *CPUC I* held that California law does mandate participation and so FERC's orders on remand disregarded this mandate. The Court disagreed with California's reading of its decision in *CPUC I*. Instead, the Court concluded that its mandate in *CPUC I* only required FERC to consider whether participation in CAISO was mandatory under California state law. Upon this clarification of its 2018 mandate, the Court found that FERC had followed this mandate when it decided that California law did allow

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155 "We find no justification for deferring to FERC's interpretation of California law, and we apply *de novo* review." *Cal. Pub. Utilities Comm'n*, 29 F.4th at 466.

156 Promoting Transmission Investment Through Pricing Reform, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g,* Order No. 679-B, 119 FERC ¶ 61,062 (2007); 16 U.S.C. § 824s(c).

157 Incentive adders are described as upward adjustments to the rate of return for utilities that participate in transmission organizations.

158 Promoting Transmission Investment Through Pricing Reform, Order No. 679, 116 FERC 61,057. The court also referred to Regional Transmission Organizations (RTOs) and Independent System Operators (RTOs), the two types of nonprofit transmission organizations in operation in the United States.

159 The court primarily cited the benefits of combating economic harms stemming from vertically integrated utility monopolies.

160 *See CPUC I*, 879 F.3d at 970–72.

161 *Id.*

PG&E to voluntarily leave CAISO.[162] Thus, the Court found no error in FERC's actions under the Court's mandate.

Second, California argued that FERC failed to properly analyze PG&E's circumstances as directed by *CPUC I*. California's argument was further broken into two elements: first, that FERC erred by failing to apply the *Erie* doctrine[163] to California's interpretation California law, and second, that FERC's interpretation of California law was erroneous. FERC argued that it conducted the appropriate inquiry on remand. The Court found that FERC had conducted the appropriate analysis and had not acted arbitrarily and capriciously.

As an initial matter, the Ninth Circuit found that the *Erie* doctrine did not apply in this case because the right at issue was federal law and not a state law. The legal right sued upon was related to the incentive adder's and FERC's Order 679, which are both federal law. As such, FERC's decision to not apply the *Erie* doctrine and its tests for analyzing state law to the case was proper and not arbitrary and capricious.

Finally, the Court reviewed FERC's conclusion that utility participation in CAISO is voluntary. Deference to the agency's interpretation was unwarranted because FERC was not interpreting its own statute, nor does FERC have expertise in California law, and Congress has not assigned FERC to interpret statutes. Because the Court did not afford FERC deference in its interpretation of California's law, the Court proceeded to interpret the statute and law in dispute.

California's argument that participation in CAISO was mandatory was built on a 1998 CPUC decision[164] which found membership in CAISO mandatory. California further argued that this CPUC finding was binding on California state court. In *CPUC I*, the court had found that FERC Order 679 created a rebuttable presumption that membership in CAISO is voluntary.[165] California therefore bore the burden to show that membership was not voluntary. The Ninth Circuit found that California failed to meet this burden because the CPUC decision which California relied on to show that membership is mandatory is not binding on California courts. The CPUC decision was not binding because the statutory interpretation was not at the core of the PUC's decision in that case and because the CPUC's interpretation in the 1998 case is

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162 The Ninth Circuit cited to California law. *See* CAL. PUB. UTIL. CODE § 330(m) ("[E]lectric utilities should commit control of their transmission facilities to the [ISO]"); *id.* § 365(a) ("[CPUC] shall . . . encourage all publicly owned utilities in California to become full participants [in the ISO]").

163 *See* Erie RR. v. Thompkins, 304 U.S. 64 (1938); Int'l Ord. of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 915 (9th Cir. 1980).

164 California also cited a 1995 CPUC decision which the court declined to focus on; the court found that this decision was not relevant because it focused on transfers of control to CAISO (joining) as opposed to from CAISO (leaving). Order Instituting Rulemaking on Commission's Proposed Policies Governing Restructuring California's Electric Service Industry and Reforming Regulation, Decision 95-12-063, 1995 WL 792086, at *15 (Dec. 20, 1995); Joint App. of Pac. Gas & Elec. Co., Decision 98-01-053, 1998 WL 242747, at *7 (Jan. 21, 1998).

165 *CPUC I*, 879 F.3d at 977 (citing Order 679 ¶ 327).

inconsistent with California state law.[166] Because CPUC's interpretation was not binding on California courts, it was also not binding on FERC. California failed to point to anything in California's state code to support its conclusion. Rather, the provisions California cited were found to merely encourage participation in CAISO.[167] Thus, the Court found no error in FERC's interpretation of state law.

The Court ultimately found FERC's decision granting incentive adders to the utilities proper because FERC had followed the Court's remand orders properly and FERC's interpretation of California's state law was proper. Therefore, FERC's finding that the voluntariness requirement of Order 679 was met and its decision to award incentive adders under these findings was not arbitrary and capricious. Thus, the Court affirmed FERC's orders.

IV. RESOURCE EXTRACTION

1. Center for Biological Diversity v. United States Fish & Wildlife Service, 33 F.4th 1202 (9th Cir. 2022).

The Center for Biological Diversity (CBD), along with other environmental groups and several tribal nations,[168] sued the United States Forest Service (Forest Service)[169] in the United States District Court for the District of Arizona,[170] alleging violations of the Mining Law of 1872,[171] the Organic Act of 1897,[172] the National Environmental Policy Act (NEPA),[173] and the Administrative Procedure Act (APA).[174]

In 2007, Rosemont Copper Company (Rosemont), a subsidiary of Canadian firm Hudbay Minerals Inc., submitted a mining plan of operations (MPO) for an open-pit copper mine located partly in the

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166 CAL. PUB. UTIL. CODE § 851 ("A public utility . . . shall not sell, lease, assign, mortgage, or otherwise dispose of . . . any part of its [property] . . . without [CPUC approval].").

167 *See* CAL. PUB. UTIL. CODE § 330(m) ("[E]lectric utilities should commit control of their transmission facilities to the [ISO]"); *id.* § 365(a) ("[CPUC] shall . . . encourage all publicly owned utilities in California to become full participants [in the ISO]").

168 Plaintiffs include: the Center for Biological Diversity; Save the Scenic Santa Ritas; Arizona Mining Reform Coalition; Grand Canyon Chapter of the Sierra Club; Tohono O'odham Nation; Hopi Tribe; and Pascua Yaqui Tribe of Arizona.

169 Defendants include: United States Fish and Wildlife Service; United States Forest Service; United States of America; Kurt Davis, Acting Supervisor of the Coronado National Forest; Calvin Joyner, Regional Forester; Randy Moore, Chief of the U.S. Forest Service; Thomas J. Vilsack, U.S. Secretary of Agriculture. Intervenors include Rosemont Copper Company.

170 Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 409 F. Supp. 3d 738 (D. Ariz. 2019).

171 General Mining Act of 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. (2018)).

172 Organic Administration Act of 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–475, 477–482, 551 (2018)).

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

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

Coronado National Forest. Most notably, the MPO proposed dumping an estimated 1.9 billion tons of waste rock on 2,447 acres of the National Forest, where Rosemont also holds mining claims, burying the land in 700 feet of waste rock. In June 2017, the Forest Service issued a Record of Decision (ROD) adopting a final environmental impact statement (FEIS) and approving Rosemont's MPO, prompting the instant litigation. The district court granted summary judgment to CBD,[175] vacating the FEIS and ROD on the grounds that the Forest Service's decision was inconsistent with the Mining Law and other federal mining statutes, with NEPA, and with the APA. The Forest Service appealed.

The Ninth Circuit reviewed the district court's grant of summary judgment *de novo*. The Forest Service first argued, per *Skidmore v. Swift & Co.*,[176] that the Court should defer to the opinion of the Solicitor of the Department of the Interior supporting the validity of the Forest Service's actions.[177] Under *Skidmore*, the Court considered the persuasive power of the Solicitor's opinion, along with whether the agency had been consistent in its interpretation of the law. The Ninth Circuit found that the Solicitor had taken inconsistent positions regarding determinations of the validity of mining claims and thus gave "limited" weight to the Solicitor's opinion, rejecting the deference argument before turning to the statutory arguments.

The Forest Service supported its approval of Rosemont's plan to dump 1.9 billion tons of waste rock on national forest land on multiple grounds. First in the ROD, and subsequently in district court, the Forest Service argued that section 612 of the Multiple Use Sustained Yield Act (MUSYA) authorized Rosemont to dump its waste rock on its mining claims,[178] whether or not the claims were valid, because the dumping would be a "use[ ] reasonably incident" to its mining operations.[179] The Ninth Circuit clarified that the MUSYA does not authorize uses of mining claims beyond those authorized by the Mining Law,[180] and that Rosemont's mining claims are invalid under the Mining Law.

On appeal, the Forest Service abandoned the section 612 argument and instead proposed a new rationale based on section 22 of the Mining Law, despite not citing section 22 in district court or when approving Rosemont's MPO. The Ninth Circuit rejected this argument. Under *Michigan v. EPA*,[181] a court can sustain an agency decision based only on "the grounds that the agency invoked when it took the action."[182] Yet, to prevent the litigation of the section 22 argument on remand, the Ninth Circuit chose to address it.

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175 *Ctr. for Biological Diversity*, 409 F. Supp. 3d 738.
176 323 U.S. 134 (1944).
177 *Id.* at 140.
178 *See* 30 U.S.C. § 612(a).
179 *Ctr. for Biological Diversity*, 33 F.4th at 1212 (quoting the ROD).
180 *See* 30 U.S.C. § 612(a), (b).
181 576 U.S. 743 (2015).
182 *Id.* at 758.

The Forest Service argued that section 22 of the Mining Law gave Rosemont the right to occupy Forest Service land with its waste rock, whether or not it has valid mining claims on that land. In relevant part section 22 reads:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . . under regulations prescribed by law . . . .[183]

The Forest Service contended that the second clause, "the lands in which [valuable mineral deposits] are found [are free and open] to occupation and purchase,"[184] gave Rosemont a right to occupy national forest land with its deposit of 1.9 billion tons of waste rock, even if valuable minerals have not been found on that land. The Ninth Circuit rejected this reading, holding that the text itself and a century of precedential decisions foreclosed the Forest Service's interpretation. The Forest Service countered that section 22 permits Rosemont to occupy national forest lands with waste rock because that occupancy would not be permanent, claiming that the waste rock area will be revegetated and support uses like grazing and recreation. The Ninth Circuit further rejected this rationale on two grounds: first, that the discovery of valuable minerals is essential under section 22 to the right of any occupancy, temporary or permanent, beyond a limited occupancy necessary for exploration, and, second, that characterizing covering 2,447 acres of National Forest under a 700-foot-deep layer of waste rock as a temporary occupancy is plainly nonsense.

Accepting for the sake of argument that Rosemont may occupy its mining claims with its waste rock only if those claims are valid, the Forest Service next argued that the Service has no obligation to assess the validity of the claims. Rather, the Forest Service claimed that the agency may assume the validity of Rosemont's mining claims, even when that assumption is contradicted by the evidence, because the statute authorizes only the Bureau of Land Management (BLM) to make adjudicatory determinations of the validity of mining claims. The Solicitor of the Interior, as mentioned *supra*, argued that the agency is not required to determine the validity of mining claims before allowing the use of national forest lands for purposes reasonably incident to mining uses. The Ninth Circuit disagreed, finding a validity determination by BLM to be irrelevant given the clear invalidity of Rosemont's mining claims. Because there was undisputed evidence on the ROD showing that no valuable minerals had been found on the claims, the Ninth Circuit held that the claims were clearly invalid and thus the Forest Service had no basis to approve Rosemont's MPO.

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183 30 U.S.C. § 22 (2018).

184 *Id.*

Finally, the Forest Service and Rosemont argued that Part 228A of the Forest Service's mining regulations authorized Rosemont to occupy national forest land with its waste rock, whether or not the land is covered by valid mining claims, because of the broad definition of "operations" in those regulations.[185] Based on its valid mining rights on the land where its copper pit mine would be located, Rosemont argued that section 228.3(a) allows it to deposit its waste rock—as a "use[ ] reasonably incident" to mining in the pit—on national forest land "off" its mining claims.[186] The Ninth Circuit found this argument to be irrelevant, again because an agency's action may only be upheld on the grounds relied upon by the agency. The Forest Service did cite Part 228A regulations in its FEIS and ROD, but did so based on the previously discredited reliance on section 612 of MUSYA and the untested assumption that Rosemont's mining claims were valid. Therefore, the Forest Service had no valid basis for applying the Part 228A regulations.

In total, the Ninth Circuit affirmed the judgment of the district court granting summary judgment, finding that the Forest Service acted arbitrarily and capriciously in approving Rosemont's MPO based on its misunderstanding of section 612 of MUSYA and on its incorrect assumption that Rosemont's mining claims are valid under the Mining Law.

2. Grand Canyon Trust v. Provencio, 26 F.4th 815 (9th Cir. 2022).

Grand Canyon Trust, Center for Biological Diversity, and Sierra Club (collectively, the Trust) sought review of a ruling by the United States District Court for the District of Arizona upholding[187] the United States Forest Service's[188] determination that Energy Fuels Resources (USA), Inc. and EFR Arizona Strip LLC (collectively, Energy Fuels)[189] held a valid existing right to operate Canyon Mine, a uranium mine. The Ninth Circuit affirmed the district court's ruling and held that it was not arbitrary and capricious for the Forest Service to ignore sunk costs in its determination that Energy Fuels had a claim to valuable mineral deposits on federal land.

The General Mining Act of 1872 (Mining Law)[190] allows United States citizens to gain rights to "valuable mineral deposits" on federal land.[191] To gain these rights, claimants must first "locate" a mining claim

185 36 C.F.R. pt. 228 subpt. A; *id.* at § 228.3(a) (defining "operations").

186 *Ctr. for Biological Diversity*, 33 F.4th at 1212 (quoting the ROD); 36 C.F.R. § 228.3(a).

187 Grand Canyon Trust v. Provencio, 467 F. Supp. 3d 797 (D. Ariz. 2020).

188 Named Defendants in the case include: Heather Provencio, Forest Supervisor, Kaibab National Forest, and United States Forest Service, an agency in the U.S. Department of Agriculture.

189 Energy Fuels intervened for Defendants.

190 General Mining Act of 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. (2018)).

191 *See* 30 U.S.C. § 22.

by adhering to statutory and regulatory requirements.[192] One of these requirements is that the claimant must have made a "discovery" of a "valuable mineral deposit."[193] The Mining Law does not define what a valuable mineral deposit is, so the Secretary of the Interior has applied a "prudent person" test to determine whether a claimant has discovered a valuable mineral deposit.[194] An element of the "prudent person" test is the "marketability" test, which requires that the mining of the mineral be profitable for it to be "valuable" under the Mining Law.[195] In 1980, the Department of the Interior (DOI) announced that sunk costs—costs that have been unrecoverably incurred—would not be considered when determining whether a mine is profitable and it has consistently applied that rule since.[196] While the DOI has primary jurisdiction over mining claims under the Mining Law, the Forest Service has been authorized to conduct mineral exams on National Forest System lands and recommend invalid mining claims to the DOI for contest.

In 1984, Energy Fuels submitted a plan to mine uranium located in Kaibab National Forest near Grand Canyon National Park, later known as the Canyon Mine. The Forest Service approved the plan in 1986, and Energy Fuels built surface facilities near the mine and sank the first fifty feet of a planned 1,400-foot shaft before suspending operations in 1992. Following renewed interest in uranium mining near the Grand Canyon, in 2009, the Secretary of Interior published a Notice of Intent to withdraw roughly one million acres of public and national forest land, which included Canyon Mine, from new uranium mining claims. Consistent with the procedures laid out in the Federal Land Policy and Management Act of 1976,[197] the withdrawal was subject to valid existing rights. Two years after the Notice of Intent, the land was withdrawn.[198]

Energy Fuels notified the Forest Service that it intended to resume uranium mining at Canyon Mine, and it voluntarily agreed, at the Forest Service's request, to delay sinking the mineshaft until the Forest Service could issue a Valid Existing Rights (VER) Determination of Energy Fuel's claim of existing rights. The Forest Service issued the VER Determination affirming Energy Fuels' claim of existing rights in April 2012. The VER Determination stated that a valuable mineral deposit existed at the time of the Secretary's withdrawal and that, based on the

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192 United States v. Shumway, 199 F.3d 1093, 1099 (9th Cir. 1999).

193 *See* 30 U.S.C. §§ 22–23.

194 The prudent person test states:

> "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing the valuable mine, the requirements of the statute have been met."

Castle v. Womble, 19 Pub. Lands Dec. 455, 457 (D.O.I. 1894).

195 *See* United States v. Coleman, 390 U.S. 599, 600 (1968).

196 *See* United States v. Mannix, 50 IBLA 110 (1980).

197 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2018).

198 The withdrawal of these lands was upheld by the Ninth Circuit in *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845 (9th Cir. 2017).

economic conditions at the time of the mineral exam, the mine could be operated at a profit. The economic analysis treated all costs incurred by Energy Fuels prior to the cessation of activities at Canyon Mine in 1992 as sunk costs, meaning that they were not incorporated into the VER Determination calculations for the mine's profitability.

In 2013, the Trust brought four claims under the Administrative Procedure Act (APA)[199] to challenge the Forest Service's determination that Energy Fuels had a valid existing right to operate Canyon Mine.[200] The district court granted summary judgment in favor of the Defendant for three of the claimed violations of the National Environmental Policy Act (NEPA),[201] National Historic Preservation Act (NHPA),[202] and the Mining Act, and the Ninth Circuit affirmed the district court's rulings.[203] As for the fourth claim under FLPMA, which asserted that the Forest Service violated federal law when it failed to consider various costs when determining whether Canyon Mine could be operated at a profit, the district court held that the Trust lacked prudential standing to present the claim.[204] The Ninth Circuit reversed, holding that the Trust had prudential standing to present the fourth claim, and it remanded to the district court for consideration on the merits. On remand, both parties moved for summary judgment, and the district court granted summary judgment for the Defendants. The Trust appealed, arguing the district court incorrectly held that the Forest Service did not need to consider sunk costs in VER Determinations. The Ninth Circuit reviewed the district court's grant of summary judgment *de novo* and the Forest Service's VER Determination for being arbitrary or capricious.[205]

First, Energy Fuels argued that the Trust lacked the Article III standing to present its claim because the VER Determination issued was not required for Energy Fuels to resume its mining operation. As a result, setting aside the VER Determination would fail to redress the Trust's alleged injury. The Trust disputed this, arguing that the Forest Service's approval was required for mining to resume. The Ninth Circuit held that the Trust had Article III standing to present its claim. The Court reasoned that, under the law of the case doctrine, its previous finding of Article III standing on a prior appeal required that the issue not be reconsidered, and the Court found that none of the three exceptions to the doctrine applied.[206]

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

200 Grand Canyon Trust v. Williams, 98 F.Supp.3d 1044 (D. Ariz. 2015).

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

202 54 U.S.C. §§ 300101–307108 (2018).

203 Havasupai Tribe v. Provencio, 906 F.3d 1155 (9th Cir. 2018).

204 *Id.* at 1163–65.

205 APA, 5 U.S.C. § 706(2)(A).

206 *See* Minidoka Irrigation Dist. v. Dep't of Interior, 406 F.3d 567, 573 (9th Cir. 2005) ("[T]he law of the case doctrine is subject to three exceptions that may arise when '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.'") (quoting Old Person v. Brown, 312 F.3d

The parties disagreed over the appropriate standard of review for the Forest Service's decision not to consider sunk costs in its VER Determination. The Trust argued that sunk costs should be considered when evaluating whether "valuable mineral deposits" were discovered under the Mining Act because the DOI's interpretation of the Act, which ignored sunk costs, can be reviewed *de novo*. Energy Fuels argued that instead of *de novo* review, the question should be whether the Forest Service's reliance on the DOI's construction of the act was arbitrary and capricious. The Ninth Circuit affirmed the district court's determination that the proper standard of review for Forest Service's VER Determinations was arbitrary and capricious and that the Forest Service's choice to ignore sunk costs was not arbitrary and capricious. The Ninth Circuit reasoned that, because the VER Determination directly cited and applied the DOI's interpretation of the Mining Act, the Court can only review the DOI's proposed construction of the Act to the extent that the Forest Service's reliance on that interpretation was arbitrary and capricious. Additionally, the Court held that DOI's interpretation of the Mining Act was entitled to *Chevron*[207] deference because the terms of the statute are sufficiently vague and DOI's proposed interpretation was not arbitrary and capricious.

In sum, the Ninth Circuit held that the Forest Service's reliance on DOI's interpretation of the Mining Act and exclusion of sunk costs in its VER Determination was not arbitrary and capricious. It therefore affirmed the judgment of the district court.

3. 350 Montana v. Haaaland, 29 F.4th 1158 (9th Cir. 2022), amended and superseded on denial of rehearing en banc, 50 F.4th 1254 (2022).

Various environmental groups (collectively, environmental Plaintiffs)[208] sought review of the Department of the Interior's Office of Surface Mining Reclamation and Enforcement's (Interior)[209] approval of a proposed expansion of a coal mine operated by Intervenor Signal Peak Energy (Signal Peak). Environmental Plaintiffs appealed a partial summary judgment from the United States District Court for the District of Montana,[210] challenging Interior's 2018 Environmental Assessment (EA), Finding of No Significant Impact (FONSI), and approval of the mine expansion under the National Environmental Policy Act (NEPA)[211] and

1036, 1039 (9th Cir. 2002)), *amended on denial of reh'g* No. 03-35697, 2005 WL 1560395 (9th Cir. July 6, 2005).

207 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

208 Petitioners include: environmental groups 350 Montana; Montana Environmental Information Center; Sierra Club; and WildEarth Guardians.

209 Secretary of the Interior Debra Haaland is the named Defendant. Plaintiffs initially filed suit against then-Secretary of the Interior, Bernhardt, in 2020. *See* 350 Montana v. Bernhardt, 443 F.3d 1185 (D. Mont. 2020). Secretary Haaland became the named Plaintiff before this case was decided by the Ninth Circuit.

210 *350 Montana*, 443 F.3d 1185 (D. Mont. 2020).

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

the Administrative Procedure Act (APA).[212] The Ninth Circuit held that Interior acted arbitrarily and capriciously and violated NEPA in its FONSI and decision to approve the mine expansion. However, the Court held that NEPA did not require Interior to use the social cost of carbon to quantify environmental impacts for the project.

This case arose out of environmental Plaintiffs' continuing challenges, under NEPA and the APA, to Interior's reliance on a FONSI in an EA to approve Signal Peak's mine expansion without first completing an EIS, first in 2015 (2015 EA) and then again in 2018 (2018 EA).[213] In 2017, the district court partially granted environmental Plaintiffs' motion for summary judgment challenging the 2015 EA, enjoining Interior's approval of the mine expansion, and vacating Interior's 2015 EA.[214] The district court ordered Interior to prepare a new EA. Pursuant to the court's order, Interior completed the 2018 EA, again issuing a FONSI and approving the mine expansion based on the FONSI. Environmental Plaintiffs' again challenged Interior's approval of the mine expansion based on the FONSI in the 2018 EA.[215] In 2020, the district court vacated Interior's 2018 EA and remanded the EA to Interior to remedy the deficiencies therein.[216] But the district court declined to vacate Interior's approval of the mine expansion. Pursuant to the court's order, Interior prepared another EA (2020 EA), which incorporated the 2018 EA, including the 2018 EA's FONSI, but considered the deficient element identified by the district court's 2020 opinion and order to be the risk of train derailments.

Environmental Plaintiffs appealed the district court's 2020 partial summary judgment for Interior that found Interior's 2018 EA essentially supported the FONSI. Plaintiffs' appeal challenged the agency's decision to approve the mine expansion without first completing an EIS based on the FONSI in the 2018 EA as incorporated into the 2020 EA.

The Ninth Circuit reviewed the district court's partial summary judgment *de novo*.[217] It reviewed the agency's decision to not prepare an EIS under the arbitrary and capricious standard of the APA.[218] This standard requires that agencies take a "hard look" at the impacts of its decision, based the decision on a consideration of the relevant factors, and

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212 APA, 5 U.S.C. § 706(2)(A) (2018).

213 *See* Mont. Env't Info. Ctr. v. U.S. Off. Surface Mining, 274 F. Supp. 3d 1074, 1105 (D. Mont. 2017) (vacating the 2015 EA and remanding the case to Interior to take a hard look at certain elements of the Mine Expansion); *350 Mont.*, 443 F. Supp. 3d 1185, 1196, 1202 (D. Mont. 2020) (remanding to Interior to consider the risk of train derailments but finding Interior's rationale for refusing to employ the social cost of carbon satisfied NEPA). The 2015 EA was issued, as required by NEPA, based on Signal Peak's 2013 application to Interior for a mine expansion for its federal coal lease. *See Mont. Env't Info. Ctr.*, 274 F. Supp. 3d at 1085. Signal Peak had already, in 2012, applied and was approved for this mine expansion from the Montana Department of Environmental Quality. *Id.* at 1084.

214 *See Mont. Env't Info. Ctr.*, 274 F. Supp. 3d at 1094–99.

215 *350 Mont.*, 443 F.3d at 1185.

216 *Id.*

217 Bark v. U.S. Forest Serv., 958 F.3d 865, 869 (9th Cir. 2020).

218 APA, 5 U.S.C. § 706(2)(A).

provide a convincing statement supporting its finding that the impacts were insignificant.[219]

Signal Peak first claimed environmental Plaintiffs' appeal of the 2018 EA moot because the 2018 EA was superseded by the 2020 EA. The Ninth Circuit rejected Signal Peak's mootness claim because the 2018 EA was mostly "expressly incorporated" into the 2020 EA issued on remand from the district court's prior decision.[220] The 2020 EA fully incorporated the 2018 EA's analysis of the mine expansion's greenhouse gas emissions and impacts on climate change, the key findings which environmental Plaintiffs challenged on appeal.

Environmental Plaintiffs argued that Interior acted arbitrarily and capriciously and that it violated NEPA in issuing its FONSI by both failing to take a hard look at the evidence and by failing to provide a convincing statement supporting its decision. Environmental Plaintiffs first challenged Interior's finding that emissions from the mine expansion would be "minor," based on certain emission comparisons, and Interior's reliance on that finding to issue its FONSI. First, the EA found the mine expansion would have "minor" global emissions because it compared the emissions to all annual global emissions; the project's emissions would constitute 0.44% of global emissions annually. Second, the EA found the mine expansion would have "minor" domestic emissions as over ninety-three percent of the mine expansion's emissions are expected to occur from combustion overseas, and Interior omitted these emissions from its analysis of domestic emissions in Montana, where the mine expansion is located, and the United States as a whole. Environmental Plaintiffs argued that Interior's reliance on these comparisons failed to satisfy NEPA's hard look and convincing statement of the reasons requirements and that Interior failed to articulate a science-based standard for issuing its FONSI.

Interior argued that it did not act arbitrarily and capriciously because its EA reflected the scientific community's consensus around greenhouse gas emission effects on climate change and the profound consequences of climate change. Interior further insisted that the decision to find the mine expansion impacts to be only minor when compared to global emissions was supported by the Ninth Circuit's decision in *Barnes v. Deptartment of Transportation*, where it upheld a FONSI determination which relied, in part, on an agency's comparison of the project's emissions to global emissions.[221]

The Court did not directly address environmental Plaintiffs' hard look concern related to the emissions comparison. Instead, the Court found Interior failed to provide a convincing statement of the reasons in

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219 Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1132 (9th Cir. 2011).

220 *350 Montana*, 50 F.4th 1254, 1264 (9th Cir. 2022).

221 *See 350 Mont.*, 443 F.3d at. at 1140 (finding agency's FONSI determination, among other things, relied on a comparison of project emissions to global and domestic emissions, finding that total emissions at the airport would "represent less than 0.03% of U.S.-based" emissions).

support of the FONSI based on Interior's assessment of both global and domestic emissions. The Court agreed with environmental Plaintiffs that Interior failed to identify a scientific backing for its conclusion that emissions would be minor as compared to global emissions.[222] The Court found that Interior could not, on one hand, claim that climate change is a global problem in its EA and, on the other hand, decline to include emissions from combustion merely because that combustion occurs overseas.[223] Interior therefore failed to properly contextualize the mine expansion's significance under NEPA.[224] By failing to provide sufficient evidence backing its findings that the impacts would be minor, Interior failed to provide the requisite convincing statement of reasons explaining why the mine expansion's impacts were insignificant. The Court further found that Interior failed NEPA's requirement to make environmental information accessible to the public by failing to account for emissions from combustion in its domestic emissions comparisons.[225]

Next, environmental Plaintiffs argued that Interior's decision to not include the social cost of carbon in its analysis was arbitrary and capricious because Interior is required to rely on the best science, which the social cost of carbon represents.[226] The Court declined to require Interior to use the social cost of carbon, finding NEPA does not require specific metrics and it is not the Court's role to require metrics not mandated by the statute. Rather, the Court ordered Interior to, on remand, provide "some methodology that satisfies NEPA and the APA."[227]

Finally, environmental Plaintiffs argued that vacatur of Interior's FONSI is the presumptive remedy under the APA and is appropriate in this case to direct Interior to prepare an EIS. The Court found that vacatur would not be appropriate because further fact finding is needed to determine the full extent of the impacts. Instead, the Ninth Circuit remanded the case to the district court to conduct further fact finding.

In sum, the Ninth Circuit held that Interior must provide a convincing statement of reasons supporting its FONSI and support those

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222 The Court was particularly concerned because Interior admitted that under this analysis, "virtually *every* domestic source" of emissions would be deemed to have no significant impact. *350 Montana*, 50 F.4th at 1267 (9th Cir. 2022). The Court also found that Interior's domestic comparisons failed to provide a convincing rationale supporting the FONSI because the domestic comparisons omitted emissions from combustion of the project's fuel, which make up 97% of projected emissions, even if occurring abroad. Notably, parties did not dispute that greenhouse gas emissions contribute to climate change.

223 The Court also found it powerful that Interior's 2015 EA did include overseas combustion emissions in its domestic comparisons. The district court's summary judgment concerning the 2015 EA asked Interior to provide more context, not less, which the Court found Interior failed with its 2018 EA.

224 40 C.F.R. § 1508.27 (2018).

225 *Id.* § 1500.1(b).

226 Environmental Plaintiffs cited many reasons why the social cost of carbon is sound science which Interior should be required to use, including that it is a method for quantifying the harms of greenhouse gasses and was developed by the Interagency Working Group on the Social Cost of Carbon, which included experts from Interior, and that it relies on peer-reviewed and widely accepted science.

227 *350 Montana*, 50 F.4th at 1272.

reasons with science, and that Interior had failed to do so. The Ninth Circuit declined to require an agency to employ the social cost of carbon in an EA; rather, an agency must use metrics consistent with NEPA and the APA. Finally, it remanded for further fact finding, finding vacatur inappropriate without further fact finding.

In response to a petition for rehearing *en banc*, the Court issued an amended opinion, with small modifications to the opinion's language. With those amendments, the panel denied the petition for rehearing *en banc*.

4. Environmental Defense Center v. Bureau of Ocean Energy Management, 36 F.4th 850 (9th Cir. 2022).

Various environmental groups,[228] the State of California, and the California Coastal Commission (Plaintiffs) brought actions in the United States District Court for the Central District of California[229] against various federal agencies,[230] alleging multiple environmental law violations when they authorized unconventional oil drilling methods on offshore platforms in the Pacific Outer Continental Shelf off the California coast.[231] Plaintiffs alleged that these federal agencies violated the National Environmental Protection Act (NEPA),[232] the Endangered Species Act (ESA),[233] and the Coastal Zoning Management Act (CZMA)[234] when they authorized these drilling methods without following the proper procedures required in each act. Exxon Mobil Corporation, American Petroleum Institute, and DCOR Energy (petroleum intervenors) intervened to advocate for their oil well stimulation interests.

Through Freedom of Information Act (FOIA)[235] requests, the environmental groups learned that agencies within the U.S. Department of the Interior had authorized permits for offshore well stimulation without conducting the normally-required environmental review. Pursuant to settlements between the environmental groups and the Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE) (the agencies), BOEM and BSEE issued an Environmental Assessment (EA)[236] evaluating the use of offshore well stimulation treatments. The agencies concluded that these treatments would pose no significant environmental impact and issued a

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228 Environmental Groups include: Environmental Defense Center, Santa Barbara Channelkeeper, Center for Biological Diversity, and Wishtoyo Foundation.

229 Env't Def. Ctr. v. Bureau of Ocean Mgmt., No. 16-8418, 2018 WL 5919096 (C.D. Cal. Nov. 9, 2018).

230 Agencies include Bureau of Ocean Energy Management (BOEM), Bureau of Safety and Environmental Enforcement (BSEE), the Department of the Interior. The suit also names various officers of these agencies acting in their official capacities.

231 This case includes seven consolidated cases.

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

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

234 Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2018).

235 5 U.S.C. § 552.

236 40 C.F.R. § 1508.9(a)(1).

Finding of No Significant Impact (FONSI). Accordingly, they did not prepare a full Environmental Impact Statement (EIS) for the treatment projects.[237] Plaintiffs further alleged that the agencies did not execute proper consultation as required in section 7 of the ESA,[238] and that the agencies additionally failed to conduct a consistency review with California's coastal program as required by the CZMA.

The district court granted summary judgment to the agencies on the NEPA claims, and to the environmental groups on the ESA and the CZMA claims.[239] All parties timely appealed. On appeal, the Ninth Circuit addressed the following issues: 1) whether the programmatic environmental review was final agency action under the Administrative Procedure Act (APA);[240] 2) whether the claims were ripe for review; 3) whether the agencies' EA and FONSI violated NEPA; 4) whether the agencies violated the ESA by not conducting required consultation with other relevant federal agencies; and 5) whether the agencies violated the CZMA by not conducting a consistency review with California's coastal program.

The Ninth Circuit first determined that the district court had subject matter jurisdiction to hear Plaintiffs' NEPA and CZMA claims. Since neither NEPA nor the CZMA explicitly provide for judicial review, judicial review is governed by the APA. The APA limits review to "final agency actions";[241] agency action is considered final and reviewable under the APA when two conditions are met: the action 1) marks the "consummation of the agency's decision-making process"; and (2) determines "rights or obligations" or be one "from which legal consequences will flow."[242] The agencies contended that the programmatic EA and FONSI were not "final agency actions" because the private entities were still required to get agency approval for permits before using well stimulation treatments in the region. Accordingly, the agencies would have to approve site-specific permits before Plaintiffs could challenge under the APA. The Court disagreed and held that the programmatic EA and FONSI meet both prongs of the *Bennett* test for final agency action and thus are reviewable by the panel.

The agencies also contested the ripeness of Plaintiffs' NEPA and CZMA claims. The agencies contended that, because the agencies had not yet issued a formal plan for well stimulation treatments or acted on site-specific permits, Plaintiffs' claims were not ripe. The Ninth Circuit reviewed the questions of ripeness *de novo*[243] and held that the agencies' action satisfies the test for prudential ripeness, established in *Ohio*

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237 NEPA, 42 U.S.C. § 4332(C).

238 ESA, 16 U.S.C. § 1536(a)(2).

239 *Env't Def. Ctr.*, 2018 WL 5919096.

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

241 APA, 5 U.S.C. § 704.

242 *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997). These factors are referred to as the *Bennett* test. *See id.*

243 Laub v. U.S. Dept. of Interior, 342 F.3d 1080, 1084 (9th Cir. 2003).

Forestry Ass'n v. Sierra Club.[244] This prudential test requires consideration of: 1) whether delayed review would cause hardship to the Plaintiffs; 2) whether judicial intervention would inappropriately interfere with further administrative actions; and 3) whether the courts would benefit from further factual development of the issues presented.[245] The Court found that Plaintiffs' procedural challenges under NEPA and the CZMA of the agencies' proposed action, as adopted in the final EA and FONSI, satisfied the prudential ripeness test, and thus were immediately ripe for review.

Once the Ninth Circuit determined it had subject matter jurisdiction over Plaintiffs' claims and that they were ripe for review, the Court first assessed the merits of Plaintiffs' NEPA claims,[246] reviewing the district court's decision to grant summary judgment to the Defendants *de novo*.[247] Because the APA governs judicial review of agency decisions under NEPA, the Court used the APA's arbitrary and capricious standard to determine whether the agencies complied with NEPA requirements.

First, Plaintiffs claimed that the agencies violated NEPA because the agencies' EA was inadequate, they failed to provide a reasonable range of alternatives,[248] and the EA's statement of purpose and need was too narrow.[249] In a separate NEPA violation, Plaintiffs also challenged the agencies' decision not to prepare an EIS.[250] The Ninth Circuit agreed with Plaintiffs and concluded that the agencies did not take a "hard look" mandated by NEPA as they relied on flawed assumptions in the EA, which rendered the FONSI irrational. Next, the Court found that the agencies did not give full and meaningful consideration to a reasonable range of alternatives, which rendered the EA inadequate under NEPA. Additionally, the Court held that the agencies should have prepared a full EIS in light of the unknown risks posed by well stimulation treatments and the significant gaps in the data recognized by the agencies. The Ninth Circuit held that the agencies violated NEPA both because their EA was inadequate and because they failed to prepare an EIS. The Court remanded to the district court with instructions to amend its injunction to prohibit the agencies from approving permits for well stimulation treatments until the agencies issued an EIS and fully evaluated all reasonable alternatives.

Next, the Ninth Circuit evaluated the environmental groups' claims under the ESA, alleging violations of the section 7 consultation

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244 523 U.S. 726, 733 (1998).

245 *Id.*

246 NEPA requires agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." NEPA, 42 U.S.C. § 4332(C). Agencies may prepare an EA to determine whether to prepare an EIA. 40 C.F.R. § 1508.9(a)(1).

247 Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 778 (9th Cir. 2006).

248 NEPA, 42 U.S.C. § 4332(C).

249 *See* Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853, 865 (9th Cir. 2004).

250 *See* Ocean Advocs. v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005) (requiring a "convincing statement of reason" when deciding not to prepare an EIS (citation omitted)).

requirement.[251] The district court granted summary judgment to Plaintiffs on the issue and the agencies appealed, arguing that there is no "agency action" requiring consultation, and therefore the ESA claim is not ripe. The Ninth Circuit reviewed the issue *de novo* and affirmed the district court.

The Ninth Circuit used the two-step *Karuk Tribe* test[252] to determine whether an action qualifies as a sufficient "agency action" under the ESA. First, it determined whether the agency "affirmatively authorized, funded, or carried out the underlying activity."[253] The Court affirmed the district court's holding that, in issuing the EA and FONSI for the proposed action, the agencies "affirmatively authorized" private companies to proceed with the well stimulation treatment. The second question was whether the agency had discretion to influence or change the activity for the benefit of a protected species.[254] The Court concluded that the programmatic analysis and approval of offshore well stimulation treatments without restriction in the EA or FONSI met the definition of "agency action." Accordingly, the Court affirmed the district court's grant of summary judgment to the environmental groups on the ESA claims.

The State of California also alleged that the federal agencies violated the CZMA because they failed to conduct a consistency review to determine whether the use of offshore well stimulation treatments is consistent with California's coastal management program, as required by the Act.[255] The CZMA requires review of any "federal agency activity" that may affect a state's coastal zone to confirm it is consistent with the state's coastal management program.[256] The agencies contended that the proposed action in the EA and FONSI is not a "federal agency activity" and therefore does not require CZMA consistency review because private companies would still have to obtain permit approval before conducting well stimulation treatments. The Ninth Circuit reviewed this question of statutory interpretation *de novo* and agreed with the district court that the agencies' proposed action to allow well stimulation treatments in the Pacific Outer Continental Shelf qualifies as a "federal agency activity" under the CZMA. Accordingly, the Court held that the agencies violated the CZMA by failing to conduct the required consistency review with California's coastal management program and found that summary judgment was properly granted to California.

Finally, the Ninth Circuit reviewed the district court's decision to issue injunctive relief. The district court awarded injunctive relief to remedy the ESA and CZMA violations, which enjoined the agencies from approving permits allowing well stimulation treatments offshore California until the agencies had completed consultation with the Fish

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251 ESA, 16 U.S.C. § 1536(a)(2).
252 *See* Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1021 (9th Cir. 2012).
253 *Id.*
254 *Id.*
255 CZMA, 16 U.S.C. § 1456(c)(1)(A) (2018).
256 *Id.* § 1456.

and Wildlife Service as required in the ESA and a consistency review with California as required in the CZMA. Intervenors Exxon and DCOR challenged the injunction, claiming the district court presumed irreparable harm to Plaintiffs from procedural violations of the ESA and CZMA, and the panel reviewed the decision to issue injunctive relief for an abuse of discretion.[257] It first determined, upon *de novo* review, that the district court applied the correct four-factor test for injunctive relief.

To issue a permanent injunction, a district court must first find that a Plaintiff demonstrated that: 1) it suffered an irreparable injury; 2) remedies available at law are inadequate compensation; 3) considering the balance of hardships between Plaintiffs and Defendants, a remedy in equity is warranted; and 4) the public interest would not be disserved by a permanent injunction.[258] Because the district court applied the proper legal test, the Ninth Circuit would only reverse the district court's decision if the application was 1) illogical, 2) implausible, or 3) without support in inferences that may be drawn from facts in the record. The Court could not conclude that the district court's application of the test was illogical, implausible, or without support. Additionally, the Court acknowledged that the district court pointed to tangible examples that demonstrated the risk of irreparable harm, such as the failure to consult wildlife agencies and failure to conduct a consistency review with California that can no longer be cured once drilling permits are issued. Accordingly, the Ninth Circuit held that the district court's issuance of injunctive relief was not an abuse of discretion.

In conclusion, the Ninth Circuit concluded that it had jurisdiction to review the challenges to the agencies' EA and FONSI and that Plaintiffs' claims were ripe for review. After reviewing both the agencies' EA and FONSI, the Court held that the agencies failed to take the hard look required in NEPA when issuing the EA, and that they should have prepared an EIS for their proposed action. The Court reversed the district court's grant of summary judgment to Defendants on the NEPA claims and instead granted summary judgment to Plaintiffs on these claims. In addition, the Ninth Circuit held that the agencies violated both the ESA by failing to conduct the consultation required by the Act and the CZMA by failing to conduct a consistency review between the proposed offshore well stimulation treatment and California's coastal program. Accordingly, the Court affirmed the district court's grant of summary judgment to Plaintiffs on the ESA and the CZMA claims. Finally, the Ninth Circuit held that the district court's issuance of injunctive relief was not an abuse of discretion and remanded with instructions that the district court amend its injunction to enjoin the agencies from approving well stimulation treatments until agencies issued a complete EIS as required by NEPA, instead of relying on the inadequate EA.

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257 California v. Azar, 911 F.3d 558, 568 (9th Cir. 2018).

258 Monsanto v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010) (citation omitted).

V. FORESTRY AND LAND USE

A. Forestry

1. Los Padres ForestWatch v. United States Forest Service, 25 F.4th 649 (9th Cir. 2022).

In April 2019, the United States Forest Service issued a Decision Memo approving the Tecuya Ridge Shaded Fuelbreak Project (the Project) in the Los Padres National Forest to mitigate future risk from wildfires. Local environmentalist groups[259] (collectively, Plaintiffs) sued the United States Forest Service and its officers (collectively, Forest Service)[260] alleging that the project's approval violated the National Environmental Policy Act (NEPA)[261] and the project's required logging violated the Roadless Area Conservation Rule.[262] Both parties filed motions for summary judgment. The United States District Court for the Central District of California granted the Forest Service's motion and denied Plaintiffs' motion.[263] On appeal, the Ninth Circuit vacated and remanded, finding that the Forest Service failed to explain how the Project complied with the Roadless Area Conservation Rule.

The Forest Service proposed the Tecuya Ridge Project in 2018 following findings that the dense forest posed a significant threat for future wildfires. The proposed Project aimed to cut down on both "surface" and "ladder" fuels by creating a logged area without vegetation that could serve as a staging area for future fire suppression efforts. The proposal included "thinning" of 1,626 acres of commercially viable timber, including 1,100 acres within the protected Antimony Inventoried Roadless Area (IRA). The Forest Service issued the proposal with a period for public comment and Plaintiffs and other interested parties expressed its concerns over the NEPA review and the Roadless Area Conservation Rule. The Project was approved in April 2019; Plaintiffs subsequently

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259 Plaintiffs include Los Padres ForestWatch; Earth Island Institute; and the Center for Biological Diversity.

260 Defendants are the United States Forest Service; Los Padres National Forest Supervisor, Kevin Elliott; and the United States Fish and Wildlife Service. Industry intervenors include the American Forest Resource Council; California Forestry Association; and the Associated California Loggers.

261 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (West 2023).

262 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (2001 Roadless Conservation Rule); *see also* 36 C.F.R. § 294.11. The 2001 Roadless Conservation Rule was originally enjoined before it went into effect and the Forest Service promulgated a new rule, Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25654 (May 13, 2005) (codified at 36 C.F.R. § 294), but these new rules were set aside in 2009. See California *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F. 3d 999, 1021 (9th Cir. 2009), reinstating the original 2001 rules, 66 Fed. Reg. 3244, 3245, which are at issue in this case.

263 Los Padres ForestWatch v. U.S. Forest Serv., No. 19-5925, 2020 WL 4931892 (C.D. Cal. Aug. 20, 2020).

filed suit and the district court granted the USFS summary judgment in August of 2020.

The Ninth Circuit reviewed the district court's grant of summary judgment *de novo*. The Court reviewed the agency decisions under the Administrative Procedure Act,[264] using a standard of review assessing whether the decision is arbitrary, capricious, anabuse of discretion, or otherwise not in accordance with the law.[265]

The Court began its analysis by determining whether the Forest Service violated the Roadless Area Conservation Rule. The Conservation Rule generally prohibits commercial timber cutting, sale, or removal because they "have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics."[266]

The Conservation Rule includes exceptions, which the Ninth Circuit assessed as a three-part inquiry: the timber harvest must 1) harvest trees "generally smaller in diameter"; 2) be necessary for either improving threatened or endangered species habitat, or to restore or maintain ecosystem characteristics (such as mitigating wildfire effects);[267] and 3) improve or maintain one of the roadless characteristics.[268] At issue here, Plaintiffs asserted that the agency's determination that the Project would qualify for this exception was arbitrary and capricious because the Forest Service failed to substantiate its decision for the first and third parts of the test.

Defending its determination that trees less than twenty-one inches in diameter are "generally smaller in diameter," the Forest Service articulated that it aimed to prevent uncharacteristic wildfire effects like the "laddering" of fire into more vulnerable crowns of other trees. The Ninth Circuit agreed with Plaintiffs, holding that an agency must offer more than generic statements to satisfactorily explain its decisions. Crucially, the Ninth Circuit found the lack of evidence about the average or median tree diameter within the Tecuya Ridge area dispositive because there was no way to weigh whether twenty-one inches was an arbitrary benchmark. Additionally, a Briefing Paper that accompanied the agency decision stated that a "large tree" was greater than twenty-four inches, supporting the assertion that the decision was arbitrary because it only leaves three inches of difference between the "small" and "large" categories. The Ninth Circuit also rejected the agency's requested deference based on expertise stating that it would be imperative to the objective of maintaining the forest health. Concluding their consideration of that element, the Court refrained from dictating procedures for

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

265 *Id.* § 706(2)(A).

266 Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3244.

267 *See* 33 C.F.R. § 294.13.

268 *Id.* § 294.11. Unique characteristics include high quality undisturbed soil, air, and water, drinking water, biological diversity, habitat for threatened or endangered species, traditional cultural sites, and other factors. *Id.*

determining what is an appropriate threshold for "small" trees, instead stating that the determination in this case was unsupported by the administrative record.

On the third part of this inquiry, the Court upheld the Forest Service's determination that the Project would improve or maintain the roadless characteristics of the Tecuya Ridge area. The Court found that the evidence provided by the Forest Service was sufficient to show that the project would improve the habitat for threatened species and would benefit at least two botanical species by reducing the risk of harm from wildfires.

On the second issue, Plaintiffs contended that the Forest Service violated NEPA by categorically excluding the Tecuya Ridge Project from an environmental assessment (EA) or an environmental impact statement (EIS). Under NEPA, agencies can circumvent the documentation typically required under an EIS or an EA if the agency determines the project qualifies for a Categorical Exclusion where they have determined that the project will not have a significant effect on the human environment.[269] If the Categorical Exclusion does apply, the Forest Service must demonstrate that "no extraordinary circumstances" exist that would require an EA or EIS.[270]

For the Tecuya Ridge Project, the Forest Service invoked Categorical Exclusion 6 (CE-6), which applies to timber stand and habitat improvements covering non-herbicidal forest management.[271] Plaintiffs argued that CE-6 only applies to precommercial thinning, not the Project's authorized commercial thinning, while the Forest Service argued that the Project was a timber stand improvement in line with the factors of CE-6. The Ninth Circuit deferred to the companion case, *Mountain Communities for Fire Safety v. Elliott*,[272] agreeing that the Forest Service's interpretation of CE-6 was reasonable, thus it was not arbitrary or capricious.

Plaintiffs also challenged the agency's determination that "no extraordinary circumstances" merited conducting an EA or EIS. They contended that significant resource conditions established extraordinary circumstances,[273] namely how the Project applies to an inventoried roadless area and federally listed threatened species. Additionally, Plaintiffs argued that the Project's potential impacts on public safety are extraordinary circumstances demanding environmental review that prevents the Forest Service from authorizing the project because it does not align with the Mt. Pinos Community Wildfire Plan. Because the Forest Service sought to construct the fuelbreak further from the wildland urban interface, Plaintiffs asserted that the Project did not serve a public safety interest and thus was arbitrary and capricious. However,

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269 40 C.F.R. § 1508.4 (2023); NEPA, 42 U.S.C. § 4332(C) (2018).
270 40 C.F.R. § 1508.4; 36 C.F.R. § 220.6 (2023).
271 36 C.F.R. § 220.6(e)(6).
272 25 F.4th 667 (9th Cir. 2022).
273 36 C.F.R. § 220.6(b)

the Ninth Circuit ruled in favor of the Forest Service, finding that it had adequately considered the resource conditions and that public safety considerations were not required. The Ninth Circuit concluded that the rationale behind the Project's location was reasonable because the agency provided evidence that it would aid in future wildfire suppression efforts and was not too remote to be effective.

In sum, the Ninth Circuit vacated the grant of summary judgment in favor of the Forest Service and remanded the case to the Forest Service to substantiate its determination that trees less than twenty-one inches in diameter are "generally small trees" in the Tecuya Ridge area.

2. Mountain Communities for Fire Safety v. Elliott, 25 F.4th 667 (9th Cir. 2022).

In November 2018, the United States Forest Service Supervisor, Kevin Elliott, issued a Decision Memorandum approving the Cuddy Valley Project (the Project) in the Los Padres National Forest to mitigate future risk from wildfires by reducing overstocking, surface and ladder fuels, and improving resiliency. Local environmentalist groups[274] (collectively, Plaintiffs) sued the United States Forest Service and its officers (Forest Service)[275] in the United States District Court for the Central District of California, alleging that the project's approval violated the National Environmental Policy Act (NEPA)[276] and the National Forest Management Act (NFMA).[277] Both parties filed for summary judgment and the district court granted the Forest Service's motion and denied Plaintiffs' motion. Plaintiffs filed for an appeal with the Ninth Circuit.

The Forest Service proposed the Cuddy Valley Project in 2018 after finding that wildfire suppression techniques had led to overgrowth and ladder fuel accumulation throughout the project area. The proposed Project authorized two main components: first, thinning and pruning of smaller trees and shrubs, and second, cutting commercially viable trees and harvesting them for sale on 601 acres of forest. The Project proposal's objective was to reduce the forest from 480 trees per acre to its historic density of 93 trees per acre. Additionally, the proposal would retain Jeffrey pine trees not infected with dwarf mistletoe and black oaks that did not pose an individual hazard. The Forest Service issued the proposal with a period for public comment and Plaintiffs (and other interested parties) expressed concerns for the impacts on sensitive species of plants

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274 Plaintiffs include Mountain Communities for Fire Safety; Los Padres ForestWatch; and Earth Island Institute.

275 Defendants are the United States Forest Service and Los Padres National Forest Supervisor, Kevin Elliott.

276 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (West 2023).

277 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2018) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93- 378, 88 Stat. 476 (1974)); Mountain Cmtys. for Fire Safety v. Elliott, No. 19-CV-6539, 2020 WL 2733807 (C.D. Cal. May 26, 2020).

and animals, as well as increased fire risk and invasive plant species. Despite these concerns, the Project was approved in November 2019. Plaintiffs subsequently filed suit, and the district court granted summary judgment for the Forest Service in May 2020.

The Ninth Circuit reviewed the district court's grant of summary judgment *de novo*. With respect to agency decisions under the Administrative Procedure Act (APA),[278] the Ninth Circuit reviewed the decision to determine whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[279]

Under NEPA, federal agencies must prepare an environmental impact statement (EIS) for proposed actions that may "significantly affect the quality of the environment" that is subject to public notice, comment, and revision.[280] The EIS process often begins with an environmental assessment (EA) to determine whether an action warrants a full EIS, but both the EA and EIS can be avoided if the action falls under a relevant Categorical Exclusion (CE). These exclusions are adopted by the agency through APA notice and comment procedures and have been found to not significantly affect the environment. Here, the Forest Service found the Project was categorically excluded from the need for an EIS pursuant to CE-6, an exclusion that applies to "timber stand improvement activities" including "thinning or brush control to improve growth or to reduce fire hazard."[281] Plaintiffs challenged the use of CE-6, arguing that it only applies to thin, precommercial saplings and does not permit the logging of larger commercially viable trees.

In deciding whether CE-6 limits commercial thinning of timber stands, the Court assessed what level of deference to give the Forest Service's interpretation of CE-6. Where a regulation is genuinely ambiguous, courts have given agency interpretations of their own regulations *Auer* deference.[282] However, the Court found that the statutory language of CE-6 was not ambiguous and that timber stand improvements are not limited to precommercial trees. Finding that the Forest Service is not bound by the 2014 Forest Service Manual definition of "stand improvement" that would limit thinning to saplings, the Court stated that the Manual definition is not incorporated into either the NEPA regulations or the Los Padres Forest Plan to be binding on the agency.

Plaintiffs next argued that the Forest Service decision to use CE-6 to avoid an EIS was arbitrary and capricious under the APA.[283] Courts will only find the use of categorical exclusions arbitrary where the action is not reasonably encompassed within the scope of the exclusion. However, agencies may be required to conduct an EIS if there are "extraordinary

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278 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).
279 *Id.* § 706(2)(A).
280 42 U.S.C. § 4332(C).
281 36 C.F.R. § 220.6(e)(6) (2023).
282 *See* Auer v. Robbins, 519 U.S. 452, 453 (1997).
283 APA, 5 U.S.C. § 706(2)(A).

factors" that would cause a normally excluded action to have a significant effect. Plaintiffs argued that the Forest Service was required to use NEPA's intensity factors[284] before using CE-6, especially the factors about effects on public safety and highly controversial decisions. The Court found that the Forest Service was not required to separately consider the intensity factors because it had already done so when it assessed resource conditions specific to the site. As such, the Court affirmed that the Project approval did not violate NEPA.

Plaintiffs then argued that the approval violated NFMA's regulations for maintaining aesthetic management standards. Under NFMA, each national forest is required to develop a Land and Resource Management Plan (also known as a "forest plan") designating allowed uses on every unit of forest land and other standards for appropriate management of the forest.[285] Any project within the forest is required to conform to the standards set out in the forest plan.[286] At issue here are the aesthetic management standards of the Los Padres Forest Plan that require the forest to remain at a level of "High Scenic Integrity," meaning that human disturbance is not visually apparent.[287]

Plaintiffs argued both that the Decision Memorandum should have included its explanation of how the plan would comply with the aesthetic standards and that the proposal itself substantively violated the aesthetic standards requirements, making the approval arbitrary and capricious. The Ninth Circuit disagreed with Plaintiffs on both points, noting that the lack of explanation was not a material procedural error and finding that the Forest Service was not required to issue a document detailing its compliance with the forest plan at the time of decision. In addition, the Court found that the approval was not substantively arbitrary, because the record reflected that there would be no road construction and the proposal preserved larger trees; thus, it was reasonable for the Forest Service to conclude that reduction in scenic quality would be minimal or within approved ranges provided by the Los Padres Forest Plan.

In sum, the Ninth Circuit affirmed the grant of summary judgment in favor of the Forest Service, finding that the use of NEPA CE-6 can apply to thinning commercially viable timber and that the Forest Service's approval of the Cuddy Valley Project did not violate the Los Padres Forest Plan's aesthetic management provisions.

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284 40 C.F.R. § 1508.27 (2023).

285 NFMA, 16 U.S.C. § 1604(a).

286 *Id.* § 1064(i).

287 *Mtn. Cmtys. for Fire Safety*, 25 F.4th at 681 (citing 36 C.F.R. § 219 (Plan Standards)).

B. Land Use

1. Friends of Alaska National Wildlife Refuges v. Haaland, 29 F.4th 432 (9th Cir. 2022), vacated, 54 F.4th 608 (granting rehearing en banc), appeal dismissed 2023 WL 4066653 (9th Cir. June 15, 2023).

Various environmental organizations[288] challenged a land exchange agreement in Alaska between the Secretary of the Interior[289] and King Cove Corporation, an Alaska Native village corporation.[290] Through the land exchange, King Cove Corporation sought to use the land it would acquire to build a road to allow its residents access to the city of Cold Bay, in part to provide access to medical facilities. The proposed road would run through the Izembek National Wildlife Refuge. The United States District Court for the District of Alaska granted summary judgment to the environmental organizations and set aside the exchange agreement.[291] Defendants appealed to the Ninth Circuit, which ultimately reversed the district court's judgment and remanded the case for further proceedings.

The case centers around a land exchange agreement, ultimately approved by Secretary David Bernhardt in 2019, between King Cove Corporation and the U.S. Department of the Interior. King Cove Corporation hoped to use the land it would receive through the agreement to build a road allowing access to the city of Cold Bay. For decades, residents of King Cove, one-third of whom are Alaska Natives, have advocated for the construction of a road, primarily to access Cold Bay's larger all-weather airport to facilitate medical evacuations. King Cove has limited medical facilities and residents who require hospitalization must go all the way to Anchorage or Seattle. A road to Cold Bay would provide King Cove residents a more expedient and efficient transportation system to access medical facilities closer by. The proposed road would run through the Izembek National Wildlife Refuge, consisting of tundra, wetlands, and lagoons. This includes the Izembek Lagoon, which contains one of the world's largest eelgrass beds. Additionally, the refuge is an important habitat for birds: it supports almost all of the global population of Pacific black brant and the Steller's eiders, a threatened species in the United States, among others. Because much of the refuge is designated as wilderness, no road may be built through it as long as it retains its designation as a refuge.[292]

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288 Petitioners include: the Wilderness Society; Defenders of Wildlife; National Audubon Society; Wilderness Watch; Center for Biological Diversity; National Wildlife Refuge Association; Alaska Wilderness League; and the Sierra Club.

289 The Secretary of the Interior was Debra Haaland at the time of the challenge; accordingly, she is now being sued in her official capacity.

290 King Cove Corporation intervened for Defendants alongside the state of Alaska and a Native village and tribe: Agdaagux Tribe of King Cove and Native Village of Belkofski.

291 Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 463 F. Supp. 3d 1011 (D. Alaska 2020).

292 16 U.S.C. § 1133(c) (2018).

In 2009, Congress authorized the Secretary of the Interior to conduct a land exchange with King Cove Corporation.[293] Under the exchange, King Cove Corporation would transfer its land to the United States, and in return the United States would transfer all its right, title, and interest to a section of the Izembek Refuge to allow for the construction of a gravel road.[294] This single lane road would run between the cities of King Cove and Cold Bay, to be used primarily for health and safety purposes, including access to and from the Cold Bay Airport. The statute required the Secretary to investigate the environmental impact of the road to determine whether construction would be in the public interest.[295] Authority under this statute to construct the road would expire in seven years.[296]

In 2013, Interior Secretary Sally Jewell concluded that the exchange presented controversial issues of public policy and ultimately decided not proceed with the land exchange. Jewell, weighing the concern for more reliable options of medical transportation from King Cove to Cold Bay against the threat to a globally significant landscape that supports an abundance of diverse wildlife, concluded that there were other viable methods of transport that would avoid the irreparable degradation of irreplaceable ecological resources by building a road through the refuge.

In 2018, Interior Secretary Ryan Zinke diverged from Jewell's decision and approved a land exchange agreement. Since the Secretary's authority under the 2009 Act had expired, Zinke relied on a provision of the Alaska National Interest Lands Conservation Act (ANILCA).[297] Under this agreement, King Cove Corporation would transfer certain lands within the Izembek Alaska Peninsula National Wildlife Refuges to the United States, and in exchange would receive a corridor of under 500 acres through the Izembek Refuge. Several environmental groups (also Plaintiffs in this case) filed suit in the district court of Alaska, challenging Secretary Zinke's decision.[298] The district court found that Secretary Zinke's decision was arbitrary and capricious because he ignored the prior agency determinations concerning the environmental impacts of the road on Izembek without providing reasoned decision for his shift in position.[299] Accordingly, the district court vacated the land exchange agreement, and the Secretary did not appeal.

In 2019, King Cove Corporation asked newly appointed Interior Secretary David Bernhardt to reconsider a land exchange. Secretary Bernhardt ultimately approved an agreement very similar to the

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293 Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 6402(a), 6403(a)(1)(A), 123 Stat. 991, 1178, 1180.

294 *Id.*

295 *Id.* § 6402(b)(2), (d)(1), 123 Stat. at 1178–79.

296 *Id.* § 6406(a), 123 Stat. at 1182.

297 Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101–3233 (2018).

298 Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 381 F. Supp. 3d 1127 (D. Alaska 2019).

299 *Id.* at 1143.

agreement vacated in 2018. Plaintiffs again challenged the agreement, and the district court again granted summary judgment to Plaintiffs and vacated the agreement.[300] The district court held that the exchange failed to advance the stated purposes of ANILCA and was therefore impermissible under that statute. Further, the district court held that Secretary Bernhardt's decision to enter the agreement was arbitrary and capricious because he failed to provide sufficient reasoning to defend his change in policy from the previous position. Finally, the Court argued that, because the agreement relates to transportation systems, it falls within Title XI of ANILCA,[301] which determines procedures for approving such systems, and the Secretary failed to follow ANILCA's procedural requirements. Defendants appealed and the Ninth Circuit reviewed the agency's decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[302]

First, the Ninth Circuit held that Secretary of Interior David Bernhardt properly understood ANILCA's purposes when he decided that the 2019 land exchange was appropriate under the statute. ANILCA authorizes the Secretary, "in acquiring lands for the purposes of this Act, to exchange lands" with Alaska Native village corporations.[303] Secretary Bernhardt, in his decision, specifically invoked the purposes outlined in §3101(d) of the statue, which states that ANILCA

> "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people."[304]

He concluded that the land exchange comported with the purpose of ANILCA because it strikes the proper balance between protection of scenic, natural, cultural, and environmental values and provides opportunities for the long-term social and physical well-being of the Alaska Native people. Additionally, Secretary Bernhardt noted the crucial necessity for a road connecting King Cove and Cold Bay to provide future emergency medical and other social needs, which he claimed was underestimated in the 2013 decision. According to the Ninth Circuit, in enacting ANILCA, Congress achieved the proper balance between conservation needs and economic and social needs, and giving the Secretary land exchange authority was one way Congress achieved this balance. The Court held that Secretary Bernhardt appropriately used his discretion in determining that the social and economic needs of the King Cove residents outweighed the environmental concerns in building a road through the Izembek National Wilderness Refuge.

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300 *Friends of Alaska Nat'l Wildlife Refuges*, 463 F. Supp. 3d 1011 (D. Alaska 2020).
301 *See* 16 U.S.C. §§ 3161(c), 3164(a).
302 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2018).
303 ANILCA, 16 U.S.C. § 3192(h)(1).
304 *Id.* § 3101(d).

Second, the Ninth Circuit disagreed with the district court's conclusion that Secretary Bernhardt violated the Administrative Procedure Act (APA)[305] when he departed from his predecessor's position on the land exchange without providing adequate explanation. The APA requires a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[306] For an agency's decision to survive review, the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[307] According to the Ninth Circuit, a "satisfactory" explanation need not be a perfect explanation. Additionally, as long as the agency considers the relevant factors, a court should not set aside the decision because it believes it has a better one. The Ninth Circuit concluded that Secretary Bernhardt's decision met these APA standards; he acknowledged the competing policy considerations and prior findings that building a road would likely have negative environmental impacts, but concluded that the value of the road to the city of King Cove outweighed the environmental harm. He stated: "I choose to place greater weight on the welfare and well-being of the Alaska Native people who call King Cove home."[308]

Finally, the Ninth Circuit held that the land exchange agreement was not subject to the special procedures that ANILCA requires for the approval of transportation systems, outlined in Title XI of the Act. Title XI lays out a single comprehensive statutory authority for the approval or disapproval of applications for transportation and utility systems, including roads, within conservation units or areas in Alaska.[309] It provides, in part, that "no action by any Federal agency under applicable law with respect to . . . the authorization . . . of any transportation . . . system shall have any force or effect unless the provisions of this section are complied with."[310] The Ninth Circuit agreed with the government's argument that, while the Secretary did not follow that process, he did not have to because the land exchange provision invoked is not an "applicable law" for the purposes of Title XI.[311] Title XI defines an applicable law as: "any law of general applicability . . . under which any Federal department or agency has jurisdiction to grant any authorization . . . without which a transportation or utility system cannot, in whole or in part, be established or operated."[312] The Ninth Circuit held that the land exchange agreement

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

306 *Id.* § 706(2)(A).

307 Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

308 *Friends of Alaska Nat'l Wildlife Refuges*, 29 F.4th 432, 440 (quoting Secretary Bernhardt).

309 16 U.S.C. § 3161(c).

310 *Id.* § 3164(a).

311 *See id.*

312 *Id.* § 3162(1).

does not fit this definition because it authorizes the Secretary to exchange lands; it does not give him jurisdiction to grant any authorization deemed necessary for a transportation system, as outlined above. What matters for the purpose of Title XI is whether the land exchange authorizes construction of a road within a conservation system unit, and the Ninth Circuit held that it does not. While the land exchange agreement proposes that King Cove Corporation may construct a road, it is not authorization on its own to do so; King Cove Corporation will need to obtain permits under the relevant governing laws.[313]

The Ninth Circuit ultimately held that Secretary of Interior David Bernhardt properly understood ANILCA's purposes when he decided that the 2019 land exchange was appropriate under the statute and that he provided adequate explanation for his departure from his predecessor's position on the land exchange. The Ninth Circuit also concluded that the land exchange was not subject to Title XI requirements because the agreement was not executed under an "applicable law" and did not purport to authorize a transportation system.

Subsequently, the Ninth Circuit granted a motion for rehearing *en banc*.[314] However, in March 2023, before the *en banc* rehearing, the Secretary of the Interior issued a Decision Memorandum withdrawing from the land exchange agreement. The King Cove Corporation sought to enjoin this withdrawal but was ultimately unsuccessful as the Ninth Circuit dismissed the case as moot.[315]

VI. WATER

A. Pollution and Hazardous Waste

1. California River Watch v. City of Vacaville, 39 F.4th 624 (9th Cir. 2023).

California River Watch (CRW) petitioned the Ninth Circuit for review of a decision from the U.S. District Court for the Eastern District of California concluding that the City of Vacaville (the City) could not be held liable for the "transportation" of hexavalent chromium under the Resource Conservation and Recovery Act (RCRA)[316] and granting summary judgment for the City.[317] In 2021, the Ninth Circuit issued an initial opinion agreeing with CRW that the City could be liable for

313 *See, e.g.*, Clean Water Act, 33 U.S.C. § 1344.

314 Friends of Alaska Nat'l Wildlife Refuges v. Haaland, 54 F.4th 608 (9th Cir. 2022).

315 Friends of Alaska Nat'l Wildlife Refuges v. Haaland, No. 20-35721, 2023 WL 4066653 (9th Cir. June 15, 2023).

316 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2018) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)); see id. § 6902(a)(8) (discussing the objective of RICRA of establishing "guidelines for solid waste collection, transport, . . . and disposal practices and systems").

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

contributing to the "transportation" of a solid waste under RCRA, reversing the grant of summary judgment.[318] However, in 2022, the Court reversed course, withdrawing the 2021 opinion and issuing this superseding opinion holding that 1) CRW had shown that hexavalent chromium was "solid waste" for RCRA purposes but that 2) the City did not have the necessary connection to waste disposal to be held liable for "transportation." Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment to the City.

RCRA creates a private right of action for citizens to seek relief under its "endangerment provision."[319] To be held liable under RCRA's endangerment provision, a party must be 1) "contributing to" the "transportation" of 2) "solid waste" 3) "which may present an imminent and substantial endangerment to health or the environment."[320]

CRW contended that from 1972 to 1982, several wood treatment facilities in Elvira, California dumped large amounts of hexavalent chromium after utilizing the chemical for wood treatment. The hexavalent chromium, a known human carcinogen, migrated to the City's well field via groundwater, where it was drawn up through the City's water distribution system and moved through this system into residents' homes. CRW contended that this meant that the City has been "transporting and discharging" a "solid waste" in violation of RCRA.

The Court first addressed CRW's contention that the hexavalent chromium constituted a "solid waste" under RCRA. In RCRA, a "solid waste" is defined as including "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations."[321] CRW argued that the hexavalent chromium was a "discarded material" within the meaning of the statute because it "likely" came from the waste management process of a particular industrial site in Elvira, while the City contended that the hexavalent chromium could be naturally occurring. The Court first resolved the threshold matter of whether CRW had forfeited its argument about the source of the hexavalent chromium, finding that it had not; rather, CRW had always maintained on some level that the source of the hexavalent chromium was anthropogenic. Reviewing the district court's conclusion on this issue *de novo*, the Ninth Circuit agreed with CRW that the hexavalent chromium was "discarded" within the meaning of RCRA. In this case, industrial facilities drip-drying wood, allowing hexavalent chromium to seep into the soil, was discharging into the environment, as the material was no longer serving its intended use as a wood preservative and was instead leftover waste.

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318 Cal. River Watch v. City of Vacaville, 14 F.4th 1076 (2021).

319 42 U.S.C. § 6972(a)(1)(B).

320 Ctr. for Cmty. Action & Env't Just. v. BNSF Ry. Co., 764 F.3d 1019, 1023 (9th Cir. 2014); 42 U.S.C. § 6972(a)(1)(B).

321 42 U.S.C. § 6903(27). RCRA broadly defines a solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations[.]" *Id.*

The Ninth Circuit next addressed the issue of whether the City was "contributing to the transportation" of the solid waste in violation of RCRA via the incidental uptake of hexavalent chromium into its water distribution system.[322] CRW asserted that the City was "transporting" the hexavalent chromium by physically moving the waste, while the City countered that "transportation" under RCRA required a more direct connection to the waste disposal process, rather than mere coincidental movement. The Ninth Circuit concluded that the City's interpretation was correct, looking to the meaning of "transport" in the context of the statute, RCRA's overall structure, and the targeted meaning of the endangerment provision. The Court found that RCRA uses the term frequently to describe movement in direct connection with waste disposal: in many sections of the statute the word "transport" is used to describe the responsibilities of "shippers" of waste to treatment, storage, and disposal facilities;[323] to establish permitting, recordkeeping, and inspection requirements;[324] and to create incentives for participants in the waste disposal system to protect health and the environment.[325] The Court concluded that this implied that the City's more "incidental" movement of hexavalent chromium did not fall within the Act's meaning of "transport."

A singular concurrence maintained that the issue could have been resolved under *Hinds Investments v. Angioli*.[326] In *Hinds*, the Ninth Circuit held that a city was not liable under RCRA after refusing to give a "wide breadth" to the meaning in statute with regards to what acts are sufficient to trigger liability.[327] The concurrence would have found the issue resolved by the fact that *Hinds* requires that the Defendant be "actively involved" in or have some degree of control over the disposal process, which the City here did not have.[328] The majority disagreed with this reading of *Hinds*, finding that it did not control the instant case due to the fact that the Court in *Hinds* was interpreting the meaning of "contributing" to disposal, with nothing to say about the meaning of "transport."

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the Defendant City because the City could not be said to be "transporting" solid waste in violation of RCRA.

2. Central Sierra Environmental Resource Center v. Stanislaus National Forest, 30 F.4th 929 (9th Cir. 2022).

Central Sierra Environmental Resource Center (CSERC) and Sierra Forest Legacy petitioned the Ninth Circuit for review of a decision from

322 42 U.S.C. § 6972(a)(1)(B).
323 *See* RCRA, 42 U.S.C. § 6923(a)(4).
324 *See id.* § 6923(a)(1)–(4).
325 *See id.* § 6972(a).
326 654 F.3d 846 (9th Cir. 2011).
327 *Id.* at 850.
328 *Id.* at 851.

the District Court for the Eastern District of California granting summary judgment[329] for the Stanislaus National Forest and other Defendants (collectively, SNF).[330] Under section 313 of the Clean Water Act (CWA),[331] the California State Water Resources Control Board (State Board) had entered a Management Agency Agreement (MAA)[332] with the United States Forest Service (USFS) to recognize the State Board as the agency responsible on Forest Service lands for the implementation of water management plans. The USFS granted three grazing permits within the Stanislaus National Forest, which Petitioners challenged on the basis that these permits led to fecal matter runoff that polluted streams, impairing recreational use in violation of CWA section 313 and California's Porter-Cologne Water Quality Control Act (P-C Act).[333] On appeal, the Ninth Circuit concluded that SNF did not violate section 313 or the P-C Act, because 1) the MAA clearly established that USFS would implement "Best Management Practices" in lieu of instituting water quality reporting and permitting requirements; 2) this MAA was not superseded by the State Board's adoption of the Nonpoint Source Pollution Control Program (2004 NPS Policy); and 3) water quality objectives (WQOs) did not apply directly, of its own force, to individual dischargers, and thus violations of those WQOs did not constitute automatic violations of section 313. Accordingly, the Court affirmed the grant of summary judgment in favor of SNF.

The Clean Water Act is implemented through a scheme of "cooperative federalism" which includes a delegation of authority to State and Regional Boards to develop "areawide waste treatment management plans."[334] Section 208 of the CWA requires states to designate organizations capable of developing effective waste treatment management plans which include controlling nonpoint agricultural sources.[335] Section 313 indicates that these responsibilities may be shifted to a federal agency, but the federal agency responsible for engaging with facilities that will discharge must comply with federal, state, and local requirements for the control and abatement of water pollution.[336]

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329 Cent. Sierra Env't Res. Ctr. v. Stanislaus Nat'l Forest, No. 17-441, 2019 WL 3564155 (E.D. Cal. Aug. 6, 2019).

330 Defendants include Stanislaus National Forest; United States Forest Service; and Jason Kuiken, Forest Supervisor of Stanislaus National Forest. Intervenors include Robert Brennan; Sherrine Brennan; Jesse Riedel; Jenny Reidel; Clifton Hodge; California Farm Bureau Federation; California Cattlemen's Association; Stanislaus National Forest Grazing Permittees Association.

331 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2018); *id.* § 1323(a).

332 CWA, 33 U.S.C. § 1288(c).

333 Porter-Cologne Water Quality Control Act, CAL. WATER CODE §§ 13000–16104 (West 2022).

334 CWA, 33 U.S.C. § 1288(c).

335 *Id.*; *id.* § 1288(b)(2)(F).

336 *Id.* § 1323.

Under California's P-C Act, the State Board adopts water quality control plans, which are binding on regional boards,[337] but regional boards also "formulate and adopt" water quality control plans of their own.[338] In creating water quality control plans, the regional boards establish: 1) beneficial uses of a particular waterway, 2) applicable WQOs to protect those uses, and 3) a program to implement these WQOs.[339] Under the State Board's current implementation measures, dischargers must self-report,[340] which leads to the State issuing either water discharge requirements (WDRs),[341] which function as permits,[342] or a waiver of the WDRs.[343] Generally, without a WDR or waiver, no person is allowed to "initiate any new discharge."[344]

In 1981, the State Board signed an MAA with the USFS to recognize it as the water management agency on Forest Service lands. Within the MAA, the USFS agreed to use "Best Management Practices" (BMP) in lieu of requiring dischargers to engage in California's WDR or waiver scheme. In 2004, the State Board adopted the 2004 NPS Policy, which stated that "all current and proposed NPS discharges must be regulated under WDRs or waivers," but acknowledged that some agencies have other implementation authorities through MAAs.

In 2012 and 2016, USFS issued the three grazing permits at issue. Petitioners contended USFS's allowance of grazing led to fecal matter runoff which polluted streams. CSERC's testing showed 136 violations of the applicable WQO for coliform fecal matter, which led to two streams' placement on California's "impaired waterways" list submitted to the Environmental Protection Agency. As a result of these perceived violations, CSERC filed suit against SNF.

As a threshold issue, the Ninth Circuit *sua sponte* addressed whether CSERC had standing to bring its claim. Finding that the organization met the requirements of organizational standing because its members alleged ongoing recreational harm,[345] the Court concluded that the organization had standing.

The Ninth Circuit then addressed CSERC's argument that USFS violated the P-C Act by failing to require either WDRs or waivers for the discharges from the grazing permits. The Court found that the MAA

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337 CAL. WATER CODE §§ 13140, 13141, 13146, 13240; *id.* § 13170 (noting that plans adopted by the State Board "supersede any regional water quality control plans for the same waters to the extent of any conflict.").

338 *Id.* § 13240; *see also id.* § 13245.

339 *Id.* § 13050(h), (j)(1)–(3).

340 *See id.* § 13260(a)(1) (requiring any "person discharging waste or proposing to discharge waste" to "report of the discharge, containing the information that may be required by the regional board").

341 *Dep't of Finance*, Commission on State Mandates, 378 P.3d 356, 361 (2016) (quoting CAL. WATER CODE § 13263(a)).

342 *See* CAL. WATER CODE § 13374.

343 *Id.* § 13269(a)(1).

344 *Id.* § 13264(a).

345 *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977) (recognizing the associational standing doctrine).

clearly established that, in lieu of filing reports and getting WDRs, USFS would instead implement the agreed upon Best Management Practices. The text of the MAA stated that USFS's "reasonable implementation" of the Best Management Practices would substitute for compliance with the WDR and waiver scheme and that the reporting requirement was explicitly waived. In the MAA, the Court determined that the State Board and USFS had agreed that the Best Management Practices constituted "sound water quality protection and improvement" on Forest Service lands,[346] and thus, by the MAA's plain terms, USFS and the State Board had not violated the P-C Act by failing to file discharge reports and failing to get WDRs or waivers for the grazing permits.

Next, the Ninth Circuit addressed CSERC's contention that the MAA was superseded by the State Board's adoption of the 2004 NPS Policy. CSERC argued that, because the MAA stated that nothing in it would be construed as "limiting the authority of the State Board, or the Regional Boards in carrying out its legal responsibilities for management, or regulation of water quality," the adoption of the 2004 NPS Policy should have mooted portions of the MAA, meaning that WDRs or waivers were required for any nonpoint source discharges, including runoff from the grazing permits. The Court found this argument unpersuasive. It found that the 2004 NPS Policy explicitly referenced the fact that current MAAs would remain operative, and, as such, the State Board would need to affirmatively take authority back from USFS in order for the MAA to become inoperative.

Lastly, the Ninth Circuit addressed CSERC's final argument that, regardless of the MAA, USFS violated section 313 by authorizing livestock grazing that caused violations of the regional WQOs. CSERC contended that the Court had already held in other cases that the WQOs were enforceable against specific dischargers, but the Court found this to be a misreading of prior holdings; the cases CSERC cited for this proposition did not address the issue of whether the Court could enjoin specific projects alleged to produce violations of WQOs, but rather the government had conceded this point so the Court had not reached it. The Court held that no provision of section 313 or the P-C Act made dischargers directly liable for violating WQOs; instead, the State Board was responsible for developing a "program of implementation" to enforce the WQOs, which are determined separately.[347]

In sum, the Court found that: 1) USFS was not required to institute water quality reporting and permitting requirements; 2) the MAA was not superseded by the State Board's adoption of the 2004 NPS Policy; and 3) WQOs did not apply directly to individual dischargers, and thus violations of those WQOs did not constitute automatic violations of section 313. As a result of these determinations, the Court affirmed the grant of summary judgment against CSERC.

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346 *Cent. Sierra Env't Res. Ctr.*, 30 F.4th 934, 939 (quoting the MAA).

347 CAL. WATER CODE § 13050(j)(3).

B. Tribal Water Rights

1. Klamath Irrigation District et. al. v. U.S. Bureau of Reclamation et. al., 48 F.4th 934 (9th Cir. 2022).

Shasta View Irrigation District (SVID), Klamath Irrigation District (KID), and other irrigators, farmers, and water users appealed the dismissal of their action which challenged the U.S. Bureau of Reclamation's operating procedures.[348] These procedures were adopted in consultation with other relevant federal agencies to maintain specific lake levels and instream flows to comply with the Endangered Species Act (ESA)[349] and to protect the federally reserved water and fishing rights of the Hoopa Valley and Klamath Tribes. The Districts' main contention was that compliance with the procedures violated the Administrative Procedure Act (APA)[350] and Reclamation Act[351] because distributing water to fulfill the Tribal reserved waters would deprive the Districts of what they claim were waters lawfully appropriated to the Districts in a state adjudication proceeding. The Hoopa Valley and Klamath Tribes intervened as of right, then moved to dismiss the action on the ground that they are required parties who cannot be joined due to their tribal sovereignty. The Ninth Circuit ultimately affirmed the district court's conclusion that, since finding the Reclamation's operating procedures to be unlawful would imperil the Tribes' reserved water and fishing rights, the Tribes were required parties who could not be joined because of their sovereign immunity and the actions should be dismissed.[352]

The Klamath Basin occupies about 12,000 square miles, stretching from south-central Oregon to northern California. The waters of the Klamath Basin serve as a critical habitat for various species of fish listed as endangered pursuant to the ESA. Due to changing water elevation in the Upper Klamath Basin (UKB) as well as water quality issues, the population of some endangered fish have drastically declined.

Since time immemorial, the Klamath Tribes have used water and fish resources of the Klamath Basin for cultural, ceremonial, subsistence, religious, and commercial purposes. In the 1864 treaty that established a reservation of around 800,000 acres abutting the UKB and some of its tributaries, the Klamath Tribes retained the exclusive right of taking fish in the streams and lakes included in the reservation. The Ninth Circuit panel acknowledged that one of the very purposes of establishing the Klamath Reservation was to secure a continuation of the Tribe's traditional hunting and fishing habits. Prior case law established that Tribal water rights include the right to certain conditions of water quality

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348 Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 489 F. Supp. 3d 1168 (D. Or. 2020).

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

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

351 32 Stat. 388, Pub. L. 57–161 (1902).

352 *See* FED. R. CIV. P. 19.

and flow to support life stages of fish, and that these rights carry a priority date of time immemorial.[353] In other words, these rights were not created by the 1864 treaty, rather the treaty confirmed the continued existence of these rights.

The Act of April 8, 1864 authorized the creation of the Hoopa Valley Reservation, located in northern California along the Klamath River and one of its largest tributaries, as a permanent homeland for the Hoopa Valley Tribe. The Court also acknowledged that, like the Klamath Tribe, traditional fishing was one of the central purposes for which the Hoopa Valley Reservation was established. The U.S. Bureau of Reclamation (the Bureau) is a federal agency within the U.S. Department of the Interior that oversees water resource management. As per the Reclamation Act, the Bureau is authorized to carry out water management projects in accordance with state law regarding appropriation, use, and distribution of water for irrigation purposes, except where state law is superseded by federal law.[354] In 1905, the Bureau began construction of the Klamath River Basin Reclamation Project (the Project). Today, the Bureau manages the Project in accordance with state and federal law, balancing multiple competing interests in the Klamath Basin. The Bureau is responsible for managing the Project in a manner consistent with both its obligations under the ESA and the federal reserved water and fishing rights of the Klamath and Hoopa Valley that predate the Project and resulting Project rights. [355]

In 2019, following a 2018 Biological Assessment, the Bureau adopted a Biological Opinion which analyzed how the new Amended Proposed Action for managing the Project would impact ESA-listed fish species.[356] In the Amended Proposed Action, the Bureau confirmed it would continue to use the water in Upper Klamath Lake for instream purposes, which included fulfilling its obligations under the ESA and to the Tribes. This would necessarily limit the amount of water available to other water users with junior rights to the waters of the Klamath Basin. In March of 2019, KID, SVID, and other water users, agreeing to consolidate their individual cases, sought declaratory relief that the Bureau's operation of the Project pursuant to the 2019 Amended Proposed Action was unlawful under the APA. KID and SVID also sought to enjoin the Bureau from using water from Upper Klamath Lake for instream purposes that limited the amount of water available to irrigation districts. The Hoopa Valley and Klamath Tribes successfully moved to intervene as of right, arguing that they were required parties to the suit. The Tribes then moved to dismiss the case under Federal Rule of Civil Procedure (FRCP) 12(b)(7)

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353 *See, e.g.*, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

354 43 U.S.C. § 383.

355 *See* ESA, 16 U.S.C. § 1536(a)(2) (consultation requirements under the ESA); Parravano v. Babbitt, 70 F.3d 539, 541 (9th Cir. 1995) (recognizing Tribes' "federally reserved fishing rights").

356 *See* ESA, 16 U.S.C. § 1531–1544 (listing endangered species, including species present in the Klamath River Basin).

for failure to join a required party under FRCP Rule 19,[357] arguing that tribal sovereign immunity barred their joinder. The magistrate judge recommended that the district court find in favor of the Tribes, and in September 2020, the district court adopted the magistrate's decision in full.[358] Appellants timely appealed.

The Ninth Circuit first held that the district court had jurisdiction over the action pursuant to 28 U.S.C. § 1331 and that it had jurisdiction over the district court's final judgment to dismiss Appellants' complaints pursuant to 28 U.S.C. § 1291. The Court reviewed the district court's decision to dismiss for failure to join a required party for abuse of discretion, the district court's interpretation of federal statutes, and issues of tribal sovereignty *de novo*.[359] The Court first engaged in a three-part inquiry to determine whether the Tribes' failure to join a required party under FRCP 19 provided a valid defense that could result in dismissal under FRCP 12(b)(7). First, it examined whether the absent party must be joined under Rule 19(a). Second, it determined whether joinder of the party was feasible. Finally, if the joinder was found to be infeasible, it determined whether, in equity and good conscience, the action should proceed among existing parties or be dismissed.[360]

To determine whether the absent party must be joined, the Court recognized the Tribes' federally reserved fishing rights, and that this suit, in seeking to amend, clarify, reprioritize, or otherwise alter the Bureau's ability to fulfill the ESA requirements, would necessarily affect the Tribes' long-standing reserved water rights. The panel noted that, if the Districts were successful, the Tribes' reserved water rights could be impaired, and therefore the Tribes were required parties. The Districts argued that the Bureau adequately represented the Tribes' interests, and therefore they were not required parties. The Court disagreed, pointing to *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*,[361] and concluded that the Bureau's competing interest in ESA compliance hinders its ability to adequately represent the Tribes' interests in preserving their fishing and water rights. Consequently, the Bureau could not be an appropriate substitute party in place of the Tribes, and thus the Tribes were necessary parties.

The Districts went on to argue that, even if the Tribes were required parties under Rule 19, the suit should proceed because the McCarran Amendment waives the Tribes' sovereign immunity.[362] The Ninth Circuit disagreed. The McCarran Amendment waives the United States' sovereign immunity in certain circumstances, and while it may reach

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357 FED. R. CIV. P. 12(b)(7); FED. R. CIV. P. 19.

358 *Klamath Irrigation Dist.*, 489 F. Supp. 3d 1168 (D. Or. 2020).

359 *See, e.g.*, Alto v. Black, 738 F.3d 1111, 1125 (9th Cir. 2013). *See also* U.S. v. Tan, 16 F.4th 1346, 1349 n.1 (9th Cir. 2021) (reviewing proper interpretation of federal statutes *de novo*); Jamul Action Comm. v. Simermeyer, 974 F.3d 984, 991 (9th Cir. 2020) (reviewing issues of tribal sovereign immunity *de novo*).

360 FED. R. CIV. P. 19(b).

361 932 F.3d 843 (9th Cir. 2019), *cert. denied* 141 S. Ct. 161 (2020).

362 43 U.S.C. § 666(a).

federal water rights reserved on behalf of Tribes, the Amendment only controls in cases adjudicating or administering water rights.[363] The Court ultimately concluded that the lawsuit is not an administration of previously determined rights, but instead an APA challenge to federal agency action—specifically to the Bureau's authority to release water from the UKB consistent with the ESA and downstream rights of the Hoopa Valley and Klamath Tribes. Accordingly, the Court held that the McCarran Amendment does not waive the sovereign immunity of the tribes in this case.

After determining the Tribes were required parties that could not be joined to sovereign immunity, the Ninth Circuit considered whether the case could proceed in equity and good conscience. To determine whether the suit should proceed among the existing parties when a required party cannot be joined, FRCP Rule 19(b) sets out a balancing test of equitable factors. The Court considered: 1) potential prejudice, 2) possibility to reduce prejudice, 3) adequacy of a judgment without the required party, and 4) adequacy of a remedy with dismissal. The Court pointed to a "wall of circuit authority" that requires dismissal when a Native American tribe cannot be joined due to its assertion of tribal sovereign immunity.[364] Due to this circuit authority, and the mutually exclusive nature of the Districts' claims and the Tribes' claims, the Court held that the case must be dismissed in equity and good conscience.

In conclusion, the Ninth Circuit affirmed the district court's dismissal of the Districts' actions, holding that the Tribes were required parties under FRCP Rule 19 who cannot be joined due to their sovereign immunity and that the case should not proceed in absence of the Tribes in equity and good conscience.

2. Sauk Suiattle Indian Tribe v. City of Seattle, 56 F.4th 1179 (9th Cir. 2022).

The Sauk Suiattle Indian Tribe sued the City of Seattle and Seattle City Light (Seattle)[365] in Washington Superior Court, Skagit County,[366] seeking declaratory and injunctive relief under Washington's Declaratory Judgments Act.[367] The Tribe alleged Seattle's operation of the Gorge Dam without fish passage facilities (fishways) violated various state and federal laws. Seattle removed the case to federal court. The United States District Court for the Western District of Washington denied the Tribe's motion to remand,[368] finding it had jurisdiction under 28 U.S.C.

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363 *Id.*

364 *See* Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1163 (9th Cir. 2021) (internal quotation marks and citation omitted).

365 Seattle City Light is not a separate entity from the City of Seattle.

366 Sauk Suiattle Indian Tribe v. City of Seattle, No. 21-2-00386-29 (Skagit Co. Superior Ct. July 29, 2021).

367 Uniform Declaratory Judgments Act, WASH REV. CODE §§ 7.24.010–.190 (2022).

368 Sauk Suiattle Indian Tribe v. City of Seattle, No. 21-1014, 2021 WL 5200173 (W.D. Wash. Nov. 9, 2021) (denying tribe's motion to remand); Sauk Suiattle Indian Tribe v. City

§§ 1441(a) and 1331. The district court then dismissed the case under the futility exception to 28 U.S.C. § 1447(c),[369] finding it lacked original subject matter jurisdiction over the case but that it was absolutely certain that the case would be dismissed in the state court upon remand. The Ninth Circuit reviewed the district court's findings *de novo*.[370] The Court affirmed the district court's decision.

Seattle applied for a new license from the Federal Energy Regulatory Commission (FERC)[371] to operate the Gorge Dam alongside two other dams (the Project) in 1977. The Tribe intervened and engaged in settlement negotiations regarding the Project. These settlement negotiations resulted in a Settlement Agreement, joined by the Tribe, which was incorporated into a 1995 Order (FERC Order) granting Seattle a renewed thirty-year license to operate the three dams.[372] The Tribe did not seek rehearing or appeal to the FERC Order. In July 2021, the Tribe filed a complaint seeking declaratory and injunctive relief under Washington's Declaratory Judgments Act, alleging operating the Gorge Dam without fishways violated various state and federal laws and constitutions.[373]

The Court first affirmed the district court's denial of the Tribe's motion to remand because the Tribe's case depended on resolution of substantial questions of federal law.[374] Because state law created the

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of Seattle, No. 21-1014, 2021 WL 5712163 (W.D. Wash Dec. 2, 2021) (granting City's motion to dismiss for lack of subject matter jurisdiction).

369 *See* Bell v. City of Kellogg, 922 F.2d 1418 (9th Cir. 1991) (first recognizing the futility exception, dismissing cases "[w]here the remand to state court could be futile"); 28 U.S.C. § 1447(c).

370 Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1315 (9th Cir. 1998) (finding the Ninth Circuit reviews "issues of subject matter jurisdiction and denials of motions to remand removed cases *de novo*"); Trustees of Constr. Indus. & Laborers Health & Welfare Tr. v. Desert Valley Landscape & Maint., Inc., 333 F.3d 923, 925 (9th Cir. 2003) (finding the Ninth Circuit reviews "*de novo* . . . whether the district court had supplemental jurisdiction").

371 The Ninth Circuit's opinion and this summary refer to both FERC and its predecessor the Federal Power Commission as FERC for simplicity.

372 Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding, 71 FERC 61159, 61527 n.1 (1995). The FERC Order includes a "Fish Passage" section which explains that parties agreed to in the Settlement Agreement. *Id.* at 61535. FERC reserved "authority to require fish passage in the future." *Id.* at 61535.

373 The Tribe's amended complaint maintains that numerous state and federal laws and constitutional provisions prohibit the operation of dams without fishways, such as the Gorges Dam. The complaint named the following:

> "the 1848 Act establishing the Oregon Territory, Chap. 177, 9 Stat. 323 (1948), and the 1853 Act establishing the Washington Territory, Chap. 90, 10 Stat. 172 ("Congressional Acts"); the Supremacy Clause of the United States Constitution, U.S. CONST. art.VI, cl. 2; the Washington State Constitution, which purportedly incorporates the Congressional Acts; and Washington nuisance and common law."

Sauk-Suiattle Indian Tribe, 56 F.4th at 1183 (citations added).

374 In a concurring opinion, Judge Fletcher argued that, because the district court lacked original subject matter jurisdiction over the case under section 313(b) of the FPA, 16 U.S.C. § 825l(b), the question of whether the district court had subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1441(a) was not at issue; rather the sole question before the Court should have been whether the district court properly dismissed the case.

Tribe's cause of action, a federal district court has jurisdiction if "a well-pleaded complaint establishes . . . that the Plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[375] Applying the four-part test from *Gunn v. Minton*,[376] the Court found the Tribe's case depended on substantial questions of federal law, in large part because the Tribe's complaint expressly invoked the "governing Congressional Acts" and the Supremacy Clause of the United States.[377] The Court also found that the state-law claims were "so related" to the federal questions so that the district court was proper to find supplemental jurisdiction over the remaining state law claims.[378]

Next, the Court considered whether the district court was correct to dismiss the Tribe's claims. The Court held first that section 313(b) of the Federal Power Act (FPA)[379] applied to the Tribe's claims because the Tribe's claims challenged the FERC Order granting Seattle a renewed license to operate the Project.[380] Section 313(b) vests the Court of appeals, not the district court, exclusive jurisdiction in the federal courts over objections to FERC orders by parties to FERC proceedings.[381] Therefore, the district court properly found it lacked original subject matter jurisdiction over the Tribe's claims.

The Court then found the district court properly applied the futility exception to 28 U.S.C. § 1447(c) to dismiss the case. The Tribe argued that section 1447(c) requires the district court to remand the case to state court. The Court held that because section 313(b) of the FPA vests exclusive jurisdiction over the Tribe's action in the federal Courts of appeal, there is "absolute certainty" the state court would dismiss the action following remand.[382] Given that certainty, the Court found it was compelled to apply the futility exception to section 1447(d) and affirm the district court's dismissal of the action.[383]

In sum, the Ninth Circuit affirmed the district court's decision to dismiss the tribe's claims for lack of original subject matter jurisdiction

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375 Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 27–28 (1983).

376 568 U.S. 251, 258 (2013).

377 A substantial federal question exists when the question 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." *Id.* The court found all four elements were met.

378 28 U.S.C. § 1367(a) (2018)

379 16 U.S.C. § 791–828(c) (2018).

380 FPA, 16 U.S.C. § 825*l*(b), The court noted that the Supreme Court did not distinguish between state law and federal law challenges to FERC orders when interpreting the scope of section 313(b). City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958).

381 16 U.S.C. § 825l(b).

382 Glob. Rescue Jets, LLC v. Kaiser Found. Health Plan, Inc., 30 F.4th 905, 920 n.6 (9th Cir. 2022) (quoting Polo v. Innoventions Int'l, LLC, 833 F.3d 1193, 1198 (9th Cir. 2016)).

383 In a concurring opinion, all three judges of the panel urged the Ninth Circuit to en banc reconsider the futility exception to section 1447(c). The court agreed with Petitioners that the precedent misreads an exception into section 1447(c), which states only if "the district court lacks subject matter jurisdiction, the case *shall* be remanded [to state court]." 28 U.S.C. § 1447(c) (emphasis added).

under the futility exception to 28 U.S.C. § 1447(c). The Court held that, because the Tribe's complaint challenged the underlying FERC Order permitting the Gorge Dam, section 313(b) of the FPA governs. Section 313(b), however, vests sole jurisdiction over challenges by parties to a FERC proceeding in the federal courts of appeals, so it is absolutely certain the state court would be required to dismiss the Tribe's claims upon remand. Given that certainty, the Court applied the futility exception to 28 U.S.C. § 1447(c) to dismiss the case. The Ninth Circuit, therefore, affirmed the district court's dismissal of the Tribe's claims.

VII. MISCELLANEOUS

1. Center for Community Action and Environmental Justice. v. Federal Aviation Administration, 18 F.4th 592 (9th Cir. 2021), amended by 51 F.4th 322 (9th Cir. 2022), amended by 61 F.4th 633 (9th Cir. 2023).

Environmental organizations and the State of California (collectively, Petitioners)[384] petitioned for review of a decision made by the Federal Aviation Administration (FAA), alleging violations of the National Environmental Policy Act (NEPA)[385] in its finding of no significant environmental impact (FONSI) from construction and operation of an air cargo facility at a public airport. In November 2021, the Ninth Circuit denied the petition, holding that Petitioners did not establish the FAA's findings in its environmental assessment (EA) were arbitrary and capricious.[386] In October 2022, the Ninth Circuit amended its decision, updating the portion of the opinion that discussed the cumulative impact analysis.[387] Ultimately, the Court held that Petitioners' conclusory criticisms of the EA's failure to conduct a more robust cumulative air impact analysis amounted to disagreements with the results and the producers. The Court further concluded it had no reason to find that the FAA conducted a deficient cumulative impact analysis.

A summary of the original opinion is provided to better understand the amendments to the decision. Petitioners and the State of California asked the Ninth Circuit to review the FAA's Record of Decision which found no significant environmental impact stemming from the air cargo facility project (hereinafter the Project) at the San Bernardino International Airport. To comply with its duties under NEPA, the FAA issued an EA that evaluated the environmental impacts of the Project.[388]

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384 Petitioners include Center for Community Action and Environmental Justice, Sierra Club, Teamsters Local 1932, Shana Saters, and Martha Romero.

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

386 *See* 18 F.4th 592 (9th Cir. 2021).

387 *See* 51 F.4th 322 (9th Cir. 2022).

388 *See* 40 C.F.R. § 1509.9(a) (2019). The relevant regulations were amended in 2020, *see* Update to the Regulations Implementing the Procedural Provisions of the National

Petitioners alleged errors in the EA and the FAA's FONSI finding. Judicial review of agency decisions under NEPA is governed by the Administrative Procedure Act (APA);[389] accordingly, the Court reviewed the FAA's findings to determine whether its actions were arbitrary and capricious.[390] The Court held that the Petitioners did not establish the EA findings to be arbitrary and capricious and therefore denied the petition. More specifically, the Ninth Circuit held that: 1) FAA's use of one general study area to evaluate multiple potential environmental impacts of the Project was not in violation of its responsibility under NEPA to take a "hard look"; 2) FAA's use of a reduced study area to analyze hazardous material issues when evaluating the project was not arbitrary; 3) FAA's cumulative impacts analysis was not deficient; 4) the FONSI report prepared under the California Environmental Quality Act did not require the FAA to prepare an environmental impact statement (EIS); 5) FAA's calculations regarding truck emissions generated by the project were not capricious; and 6) any failures by the FAA to explicitly discuss the project's adherence to California or federal ozone standards did not render its EA deficient.

The Court amended its November 2021 decision in a few ways. First, it replaced specific terms and phrases from the Slip opinion. Additionally, the Court held that the petitions for rehearing en banc were denied as moot and added that further petitions for rehearing may be filed within the time periods specified by the applicable rules. The amendment included Attachment A, which included a discussion on the panel's cumulative impacts analysis and decision. In the original filing, Petitioners asserted that the FAA failed to sufficiently consider the cumulative impacts of the Project. The Ninth Circuit discussed NEPA's requirements of a cumulative impacts analysis as requiring that an EA for a single project consider the cumulative impacts of that project together with "past, present and reasonably foreseeable future actions." It further defined cumulative impacts as "the impact on the environment which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions." An EA may be considered deficient if it fails to include a cumulative impact analysis or to tier to an EIS that reflects such analysis. This is partly because, absent a cumulative impact approach, agencies could easily avoid required, comprehensive environmental review by undertaking many small actions that are insignificant on its own but together have a substantial impact.

For a cumulative impact analysis to be adequate, an agency must provide some quantified or detailed information.[391] The agency must take

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Environmental Policy Act, 85 Fed. Reg. 43304 (Jul. 16, 2020), but the Ninth Circuit relied on the pre-2020 amendment regulations because those regulations were in force at the time FAA issued its EA and FONSI.

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

390 Administrative Procedure Act, 5 U.S.C. § 702(A) (2018).

391 Bark v. U.S. Forest Serv., 958 F.3d 865, 869 (9th Cir. 2020).

a "hard look" at the cumulative impacts of a project, a requirement that emphasizes whether the agency adequately explained the potential effects and risks, not whether the Petitioner disagrees with those explanations.[392] A cumulative impact analysis is insufficient if it discusses only "the direct effects of the project at issue on a small area" or "merely contemplates other projects but has no quantified assessment of their combined impacts."[393] Petitioners need only show a potential for cumulative impact when alleging a failure to adequately consider cumulative impacts.[394] Petitioners here first argued that the FAA only considered past, present, and reasonably foreseeable projects within the General Study Area and should have expanded the assessment to include more than eighty other additional projects. However, Petitioners only asserted that the FAA, by not including these additional projects, failed to consider the fact that these additional projects combined would result in a massive increase of daily trips in the first year of operations, and the record showed the FAA specifically accounted for these traffic increases generated by the additional projects for the purposes of identifying cumulative traffic volumes. Petitioners conceded this point and pivoted their argument that the FAA should have considered the more than eighty other projects' effects on unidentified "other impact areas." However, according to the Ninth Circuit, Petitioners failed to identify what other potential cumulative impacts the FAA did not consider. The Court concluded that, because Petitioners could not identify any potential cumulative impacts that the FAA failed to consider, there are none. The Court reasoned that, while the burden on Petitioners to identify potential cumulative impacts is not "onerous,"[395] they still bear the burden of persuasion, and Petitioner's statement that FAA needed to consider the effect of the eighty-plus projects on unidentified other impact areas does not meet that burden. Petitioners suggested that the FAA should have considered the more than eighty other projects' cumulative impact on air emissions but failed to provide support for that view. FAA indisputably considered more than twenty other projects, and so long as the agency provides a sufficient explanation, the Ninth Circuit will generally defer to the agency's determination of the scope of its cumulative effects review.[396]

Petitioners also argued that the EA did not disclose specific, quantifiable data about the cumulative effects of related projects and did not explain why it did not provide objective data about the projects. However, the Ninth Circuit noted that proper consideration of cumulative

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392 *See* Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).

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

394 Tinian Women Ass'n v. U.S. Dep't of the Navy, 976 F.3d 832, 838.

395 *See id.* at 838 (quoting Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 605 (9th Cir. 2010)).

396 Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1071 (9th Cir. 2002).

impacts of a project requires some quantified *or* detailed information.[397] Accordingly, despite Petitioners' argument, quantified data in cumulative effects analysis are not necessarily a requirement. Further, the Court found that the FAA did provide sufficiently detailed information about the cumulative impacts.

Ultimately, the Court stated that Petitioners' conclusory criticisms of the EA's failure to conduct a more robust cumulative air impact analysis amounted to disagreements with results, not procedures. Accordingly, the Ninth Circuit found no reason to conclude that the FAA conducted a deficient cumulative impact analysis.

[397] Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2020).