2024 NINTH CIRCUIT ENVIRONMENTAL REVIEW

I. ENERGY

1. California Restaurant Association v. City of Berkeley, 65 F.4th 1045 (9th Cir. 2023), as amended, 89 F.4th 1094 (9th Cir. 2024).

The California Restaurant Association (Association) sued the City of Berkeley, California (Berkeley) in the United States District Court for the Northern District of California. The Association claimed that Berkeley's Ordinance No. 7,672–N.S. (Ordinance) banning natural gas infrastructure in newly constructed buildings violated the preemption clause of the Energy Policy and Conservation Act (EPCA) as well as state law. The district court granted Berkeley's motion to dismiss the EPCA suit for failure to state a claim and declined to exercise supplemental jurisdiction over the state law claim. Under *de novo* review, the Ninth Circuit reversed and remanded, holding that the EPCA preempted the Ordinance.

In July 2019, Berkeley enacted a building code prohibiting the installation of natural gas piping in newly constructed buildings. By targeting natural gas infrastructure, the Ordinance ultimately sought, in its own words, to "reduc[e] the environmental and health hazards produced by the consumption and transportation of natural gas." The Association, representing restaurateurs and chefs, challenged the Ordinance in November 2019 claiming associational standing. One or more of its members, it alleged, wanted to open or relocate a restaurant in a new building in Berkeley after the Ordinance took effect on January 1, 2020, but could not because of the Ordinance. In claiming preemption, the Association relied on the EPCA, the federal statute that sets energy conservation standards for certain "covered products" including kitchen appliances. In relevant part, the EPCA states that, absent some exceptions not relevant in this case, "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product."[1] The Ninth Circuit first analyzed standing and then proceeded to analyze the merits of the claim.

To demonstrate injury in fact, the Association asserted (1) that restaurants rely on natural gas to prepare certain foods and (2) that many chefs are trained only with natural gas appliances. Berkeley countered that the Association lacked standing because it did not allege "how soon" the injury might occur. The Ninth Circuit rejected the City's argument because the Association did not need to offer a precise date. Rather, the Association need only establish a "credible threat" of "probabilistic harm," which the Association did in its pleading.

Moving to the merits, the Ninth Circuit identified that the overriding issue was the scope of the EPCA's preemption clause. Berkeley, the federal government (as amicus), and the trial court each advanced different interpretations of the EPCA's preemption clause. To resolve the

[1] 42 U.S.C. § 6297(c).

dispute, the Ninth Circuit looked to the plain meaning of the text to discern Congress's intent in drafting the EPCA. After establishing how the EPCA defines key terms, the Ninth Circuit narrowed its interpretive focus to one question: under the EPCA what constitutes a "regulation concerning the . . . energy use" of a covered product?

Berkeley first argued that the Ordinance did not regulate either "energy use" or "energy efficiency" and therefore fell outside the scope of the EPCA's preemption clause. First, Berkeley contended that the Ordinance did not regulate "energy use" because it did not set limits on quantity of use but rather banned infrastructure. The Ninth Circuit reasoned that such a ban reduces the quantity of energy use to zero and, since zero is still a "quantity," the Ordinance did indeed function as a "regulation concerning . . . energy use" as defined by the EPCA. Second, Berkeley argued that since the EPCA defines "energy efficiency" as a ratio of output to input, the Ordinance, by reducing input to zero, would result in an impermissible zero denominator. The Ninth Circuit pointed out that the output—the numerator—would also equal zero, thus making the result indeterminate rather than impermissible. Moreover, Congress would not, the Ninth Circuit demurred, hide an exemption in a mathematical equation. Dismissing Berkeley's first argument, the Ninth Circuit concluded that a regulation that takes the form of a prohibition is still a regulation.

Second, Berkeley argued that the scope was limited to the design and manufacture of appliances and therefore did not apply to energy sources. The Ninth Circuit pointed out however that the EPCA defines "energy use" not at the design or manufacturing stage, but rather at the point where consumers use the products. The scope therefore includes both the energy and the on-site infrastructure delivering it, without which consumers could not actually use the products. In short, the Ninth Circuit concluded that States and localities cannot "hide" energy use regulations in building codes.

The federal government argued that the scope of the preemption clause was narrow, applying only to "energy conservation standards" of the covered appliances themselves rather than on the energy they use. The government advanced two arguments in support. First, it highlighted the language of the preemption clause: "no State regulation . . . shall be effective *with respect to such product*" (emphasis added). The Ninth Circuit, however, interpreted this phrasing to limit preemption to a regulation's *effect* on the product rather than regulation on the product itself. Second, the government pointed to the title of the preemption section: "General rule of preemption for energy conservation standards . . ." The Ninth Circuit rejected this argument because it would make parts of the EPCA redundant and would require the court to elide the Act's careful distinctions between "energy use," "energy efficiency," and "energy conservation standards."

Advancing a third interpretation, the trial court read the EPCA's preemptive scope narrowly, limiting its application to ordinances that

facially or directly regulate covered appliances. Because the Ordinance did not facially regulate or mandate any particular type of appliance, the district court concluded that the Ordinance only indirectly affected consumer products. The Ninth Circuit rejected that interpretation on the grounds that nothing in the text of the Act supported such an interpretation.

Most saliently, the Ninth Circuit rejected Berkeley and the federal government's arguments because, according to the Ninth Circuit, it must heed the lessons that the Supreme Court has handed down in overturning similar arguments. In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*,[2] the Ninth Circuit below had interpreted a preemption clause in the Clean Air Act narrowly, as applying only to manufacturers of new motor vehicles rather than to purchasers. The Supreme Court, however, rejected that interpretation, reasoning that a right to sell is meaningless without a corresponding right to buy. Citing a series of similar cases, the Ninth Circuit distilled a collective lesson that speaks to this case: "States and localities can't skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can't do *directly*." The Ninth Circuit concluded that Berkeley attempted to circumvent the preemption provisions and that the Ordinance brought about the same result as a direct ban on natural gas appliances. Because the EPCA preempts a direct ban, a circuitous ban that comes to the same result is also preempted.

In sum, the Ninth Circuit held that Berkeley's Ordinance banning natural gas infrastructure in new buildings violated the EPCA's preemption clause because the Ordinance sought to do indirectly what Congress through the EPCA had said States and localities cannot do directly. The Ninth Circuit therefore reversed and remanded to the district court.

Subsequent to the panel's decision, the Ninth Circuit Court of Appeals denied the City of Berkeley's petition for rehearing *en banc*. Eight judges dissented, with Judge Friedland writing the dissenting opinion. Three judges concurred, writing separately to express respect for the dissenting opinion. Of the twenty-nine active judges, seventeen voted to deny the rehearing, including all three judges who decided the first hearing.

The dissent, recognizing climate change as "one of the most pressing problems facing society today," contended that the Court "should not stifle local government attempts at solutions based on a clear misinterpretation of an applicable statute." They explained that they felt "compelled" to dissent "to urge any future court that interprets the [EPCA] not to repeat the panel opinion's mistakes." The panel opinion erred, according to the dissenting judges, by misinterpreting key terms of the EPCA, giving them a colloquial meaning where established canons of statutory construction required recognizing their technical meaning. To support this argument,

[2] 541 U.S. 246 (2004).

the dissent analyzed the legislative history of the EPCA, the EPCA text itself, and its structure.

The legislative history of the EPCA, the dissent argued, shows that the terms at issue were "technical provisions with a narrow scope of preemption." The dissent highlights that Congress amended the EPCA in 1987 to include uniform national appliance standards. These standards had two overarching goals: one, to promote energy conservation; and two, to ease the burden on manufacturers faced with the then-existing "patchwork" of differing state regulations. Congress added the preemption provision at issue to "counteract the systems of separate state appliance standards."[3]

Turning to the language of the preemption provision, the dissent argued that it must be interpreted according to the technical meaning of key terms, not according to their colloquial use. The dissent began by reaffirming two canons of statutory construction. First, dissent reiterated that a statute must be read as a whole and its words interpreted within the context of that whole. Second, the dissent underscored that words are to be understood in their ordinary, everyday meaning—*unless* the context indicates that they carry a technical meaning, in which case the ordinary must cede to the technical. Applying those two canons to the EPCA, specifically to the term "energy use," the dissent concluded that "Berkeley's ordinance affects the *use* of natural gas products in a colloquial sense, but it does not affect the 'energy use . . . of [a] covered product' within the meaning of the preemption provision." The dissent noted that "energy use," just like "energy efficiency," in the EPCA refers to performance standards. Those standards, the dissent argued, do not depend on any *actual* use. To highlight this distinction between typical and actual, the dissent noted that the "energy use" of a product under the EPCA would not change even if a consumer simply left the appliance uninstalled, sitting idly in a garage.

Further countering the panel opinion, the dissent argued that the EPCA's definition of "energy use" as a quantity of energy consumed at the "point of use" in no way changes the dissent's analysis. That is because, the dissent maintained, "point of use" must also be understood in its technical sense. According to the dissent, "point of use" energy refers to the energy the appliance consumes from the pipe or outlet. This technical definition contrasts "point of use" with "source energy," which includes both the energy that the appliance consumes at the point of use and the energy required to produce and delivery the energy to that point. For example, the "point of use" energy of a gas stove refers to the natural gas needed to operate the stove, whereas its "source energy" would also include the energy consumed in extracting, purifying, and delivering the natural gas to the location of the stove. To demonstrate how well-established this technical meaning of "point of use" is, the dissent

[3] Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 499 (9th Cir. 2005).

cataloged five examples from regulatory agencies and industry. These sources and the textualist principles guiding the court, the dissent concluded, demonstrate that "point of use" cannot be understood in the colloquial sense of referring to the place where an appliance is used.

Finally, the dissent contended that the modifier "concerning" in the EPCA preemption provision does not broaden its scope to the extent that the panel opinion had found. The dissent conceded that the modifier does expand the provision beyond direct attempts to set efficiency or energy use standards. Nonetheless, the dissent maintained that the statute as a whole makes clear that the indirect regulations targeted by the preemption provision are those that would require manufacturers to change their product design in order to meet those higher state standards. The dissent reiterated that the intent of the ordinance was to slow climate change and reduce public safety hazards and health risks, not to require consumers to use appliances with higher efficiency standards. Indeed, the dissent emphasized that transitioning away from fossil fuels does not necessarily mean moving to appliances with higher energy efficiency. For example, some electric stoves are less efficient than natural gas stoves. Because the Ordinance does not require manufacturers to alter the design of covered products, the dissent concluded that the EPCA does not preempt it.

2. Federal Energy Regulatory Commission v. Vitol, Inc. 79 F.4th 1059 (9th Cir. 2023).

The Federal Energy Regulatory Commission (FERC) brought an action in the United States District Court for the Eastern District of California to affirm a civil penalty against energy trading company Vitol, Inc. and one of its traders, Federico Corteggiano (collectively, Vitol), for violating the Federal Power Act (FPA). FERC alleged that Vitol engaged in manipulative trading in the California energy market. The agency therefore issued an order to show cause and eventually an order assessing a penalty. When Vitol did not pay the penalty within sixty days, FERC filed an order in federal court to affirm the penalty. Vitol in turn challenged the complaint, arguing that the statute of limitations had run and moving the district court to dismiss. The district court denied the motion and certified the statute of limitations issue for interlocutory appeal. The question, under *de novo* review, was whether the statute of limitations runs from the date of alleged wrongdoing or from the date when FERC assessed the penalty. The Ninth Circuit found that FERC's claim did not accrue until it assessed a penalty and therefore the statute of limitations began only after that assessment. It thus affirmed the district court's denial of Vitol's motion to dismiss.

The FPA makes it unlawful "for any entity . . . to use or employ, in connection with the purchase or sale of electric energy . . . any manipulative or deceptive device or contrivance."[4] If FERC suspects a violation, it may order the entity to show cause and issue a notice of proposed penalty. At that point, the respondent has a choice of two proceedings: (1) an on-the-record hearing before an administrative law judge (ALJ) or (2) an adversarial proceeding in which respondent files a response and, if they choose, affidavits and other evidence. In the second option, after the adversarial proceeding, FERC may assess a penalty. If the party in violation does not pay that penalty within sixty days, FERC then seeks an order in a federal district court to affirm the penalty. Under *de novo* review, the district court then has jurisdiction "to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment."[5] In this case, following a three-year investigation, FERC issued a preliminary finding that in October 2013 Vitol sold power at a loss in order to inflate the value of derivatives that it held so as to avoid the larger loss on its derivatives positions. In a previous action, Deutsche Bank agreed to pay a substantial civil penalty after Corteggiano—then employed by Deutsche Bank—carried out a similar scheme.[6] Here, Vitol chose the second option and responded to FERC's order to show cause. After the parties agreed to a one-year extension of the statute of limitations, FERC issued an

[4] 16 U.S.C. § 824v(a).
[5] 16 U.S.C. § 823b(d)(3)(B).
[6] Deutsche Bank Energy Trading, LLC, 142 FERC ¶ 61,056 (2013).

assessment. Vitol did not pay in sixty days. FERC then sought an order in federal district court.

In moving to dismiss, Vitol argued that FERC's claim accrued as soon as the allegedly unlawful trading occurred. Because the FPA does not contain its own statute of limitations, the general statute of limitations in 28 U.S.C. § 2462 is controlling. The Ninth Circuit therefore began its analysis with the text of that section, which reads in relevant part: "an action . . . shall not be entertained unless commenced within five years from the date when the claim first accrued." Turning to Black's Law Dictionary and Supreme Court precedent, the Ninth Circuit concluded that an action accrues when "the plaintiff can file suit and obtain relief."[7] Here, FERC's cause of action was for the federal district court to affirm the assessment of the civil penalty. That cause of action, the Ninth Circuit continued, did not exist prior to FERC's assessment of the penalty.

Vitol in turn countered that the cause of action was not enforcement but the alleged violation of the FPA. It argued that the statute of limitation for that cause of action therefore started to run at the date of alleged wrongdoing. To support this argument, Vitol pointed out that the district court reviews *de novo* rather than reviewing only the record created by FERC. The Ninth Circuit rejected this argument again pointing to the language of the statute, which identifies the cause of action as seeking an affirmation of the civil penalty. The Ninth Circuit pointed out that all the court's actions in the statute—"enforcing," "modifying," and "setting aside"—take as their direct object the agency's assessment.

The Ninth Circuit further distinguished this case from *Gabelli v. SEC*,[8] which Vitol cited in support of its argument. There, the Supreme Court ruled that the statute of limitations on a civil action brought by the SEC against an investment adviser accused of fraud began when the alleged wrongdoing occurred. However, the statute in *Gabelli* permitted the SEC to bring suit as soon as the fraud occurred. The statute did not require any administrative action beforehand. In contrast, under the FPA FERC could only go to federal court after it issued an assessment following an agency proceeding. Congressional intent in the FPA, the Ninth Circuit concluded, thus differs significantly from congressional intent in the statute at issue in *Gabelli*.

Vitol then argued that the Ninth Circuit's interpretation of the statute of limitations would be "anomalous" because it creates two separate clocks for the statute of limitations, one for the administrative proceeding and another for the district court action. The Ninth Circuit countered that its interpretation was not anomalous, but rather consistent with Supreme Court precedent and other Circuit Court decisions. It noted that only the Fifth Circuit has taken a contrary view.[9] The Ninth Circuit also cited approvingly the First Circuit's criticism of

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[7] Wallace v. Kato, 549 U.S. 384, 388 (2007).

[8] 568 U.S. 442 (2013).

[9] United States v. Core Laboratories, Inc., 759 F.2d 480, 482 (5th Cir. 1985).

the Fifth Circuit opinion.[10] The Ninth Circuit further noted that the Fifth Circuit decision was limited to the particular statute in question and therefore had little bearing on the present case. Lastly, the Ninth Circuit cited the Fourth Circuit, which when presented with precisely the question in this case came to the same conclusion as the Ninth Circuit.

Finally, Vitol attacked the district court's conclusion that the administrative proceeding had its own five-year statute of limitations, independent of the five-year statute of limitations in the district court. It argued that such a conclusion would lead to "absurd and unfair" consequences. The Ninth Circuit rejected that argument as ultimately a disagreement over policy. Again, it relied on the language of the statute, which identifies the cause of action in district court as one seeking to affirm the agency assessment. The Ninth Circuit concluded that the agency "proceeding" is separate from the district court "proceeding." Furthermore, Congress intended to give FERC ample time to investigate and assess a penalty before bringing a separate cause of action before the district court.

In conclusion, the Ninth Circuit affirmed the district court's denial of Vitol's motion to dismiss, finding that the statute of limitations begins to accrue only after the agency files its order to affirm the assessment in district court.

[10]United States v. Meyer, 808 F.2d 912 (1st Cir. 1987).

3. Idaho Conservation League v. Bonneville Power Administration, 83 F.4th 1182 (9th Cir. 2023).

Environmental groups, including Idaho Conservation League, petitioned for review of the 2022-2023 rates (BP-22 ratemaking) set by Bonneville Power Administration (BPA), arguing that BPA failed to comply with a pair of statutory duties relating to fish and wildlife.

The Pacific Northwest Electric Power Planning and Conservation Act of 1980, otherwise known as the Northwest Power Act (NWPA),[11] is the key source of BPA's environmental obligations. The NWPA created the Pacific Northwest Electric Power and Conservation Planning Council (Council), a policymaking body consisting of state government members from Idaho, Montana, Oregon, and Washington. The Council is responsible for developing a policy document, called the "Program," that details measures to protect, mitigate, and enhance the fish and wildlife that are affected by dam and reservoir projects within the Columbia River Basin. Under the NWPA, BPA must "provide[ ] equitable treatment for . . . fish and wildlife" and "tak[e] into account" the Council's Program "to the fullest extent practicable."[12] At issue in this case was whether these two duties apply to the BP-22 ratemaking.

At the start of the formal BP-22 ratemaking process, BPA released its initial proposal for power and transmission rates. BPA's proposal projected an increase in surplus power revenues of over $100 million, which BPA saw as an opportunity to hold rates flat and invest surplus revenue in BPA's ongoing financial health. A thorough ratemaking process ensued, involving 34 parties including Petitioner environmental advocacy groups, who participated extensively in the agency process. Through this process BPA settled on a ratemaking that both reduced power rates by 2.5% and took measures to improve BPA's financial security. Most of the parties to the ratemaking did not object to the proposed settlement. However, Petitioners objected that BPA was required to abide by NWPA § 4(h)(11)(A) when projecting its spending and setting its rates and that the settlement violated this mandate by not assigning more funds to fish and wildlife mitigation. Essentially, Petitioners wanted BPA to use some of its surplus in favor of greater fish and wildlife mitigation measures.

The Court first addressed Petitioner's Article III standing and found adequate basis for standing. BPA objected that Petitioners had challenged the wrong agency action because the ratemaking process does not determine which projects to fund, but is rather about collecting funds, and thus there was no causal link between its rate decisions and the alleged harm to fish and wildlife. Relying on *Northwest Environmental Defense Center v. Bonneville Power Administration*,[13] which affirmed

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[11] Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839–839(h) (2018).

[12] 16 U.S.C. § 839b(h)(11)(A)(i)–(ii).

[13] 117 F.3d 1520, 1528–29 (9th Cir. 1997).

standing for environmental plaintiffs regarding the very same regulations and Columbia Basin salmon populations, the Court rejected this argument and found there to be sufficient historical evidence that the BP-22 ratemaking would cause BPA to spend less on wildlife mitigation and thus harm Petitioners.

On the merits, Petitioners contended that BPA's BP-22 ratemaking failed to comply with its alleged duties under § 4(h)(11)(A), which requires BPA to provide equitable treatment for fish and wildlife and take into account the Council's Program discussed *supra*. Specifically, Petitioners argued that § 4(h)(11)(A) required BPA to assign additional funds for fish and wildlife when projecting its spending and, by extension, when setting its rates. BPA argued that § 4(h)(11)(A) did not extend to ratemaking because the statutory text explicitly refers to BPA "managing" and "operating" hydroelectric facilities and thus is limited in application to the management and operation of those facilities, not off-site mitigation projects. The court declined to consider the merits of this argument and instead determined that the text and structure of the NWPA as a whole invalidated Petitioner's claim that § 4(h)(11)(A) applied to ratemaking.

Citing *Davis v. Michigan Department of Treasury*,[14] which held that statutory provisions must be interpreted within the context of the broader statutory scheme, the Court found that the "extensive provisions governing ratemaking" in § 7 of the NWPA precluded applying the obligations found in § 4(h)(11)(A) to ratemaking. The Court thought it was unlikely that Congress would intend for major environmental mitigation obligations to be located in a separate section of the statute with no mention of ratemaking to supplement the substantial regulatory framework regarding ratemaking found in § 7. Petitioners failed to offer the Court a reasonable explanation for this incongruity. The Court further noted other provisions of § 7 which mandate "equitable" requirements specifically applicable to ratemaking, reasoning that there was no indication that Congress intended the duty to provide "equitable treatment for such fish and wildlife" found in § 4 to apply to ratemaking.

Ultimately, the court denied Petitioners' appeal, holding that if Congress wanted the significant requirements of § 4(h)(11)(A) to apply to ratemaking it would have drafted the statute to say so explicitly.

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[14] 489 U.S. 803 (1989).

4. Solar Energy Industries Association v. FERC, 80 F.4th 956 (9th Cir. 2023).

The Solar Energy Industries Association, joined by environmental organizations, petitioned for review of the Federal Energy Regulatory Commission (FERC)'s Order 872, a 2020 rule that made several significant changes to regulations promulgated under the Public Utility Regulatory Policies Act of 1978 (PURPA).[15] Petitioners initially argued that Order 872 was inconsistent with PURPA as a whole, but ultimately challenged four of the changes: the Site Rule, the Fixed-Rate Rule, the Locational Marginal Price provision, and the adjustments to the market-access presumption. FERC opposed the petitions for review and was joined by a group of electric utilities.

PURPA directs FERC to promulgate rules encouraging the development of Qualifying Facilities (QFs), which are either (1) small alternative energy plants or (2) fossil fuel cogeneration plants.[16] Petitioners alleged that Order 872 "rescinded longstanding policies that had enabled the development of QFs," and instituted "new policies that were not designed to encourage the development of QFs." Because the new policies under Order 872 are less favorable for QFs than those previously in place, Petitioners contended that Order 872 violated PURPA's directive.

Applying *Chevron*, the Ninth Circuit disagreed and explicitly refuted the idea of a ratchet which only allows the promulgation of new regulations under PURPA if they are more favorable to QFs than the regulations being replaced. Rather, the Court held that PURPA's requirement that FERC prescribe "such rules as *it determines* necessary to encourage" QFs gives FERC broad discretion to determine what rules are necessary to accomplish that directive. Under step two of *Chevron*, the Ninth Circuit further found that FERC's interpretation of the encouragement provision was reasonable, agreeing that it satisfied PURPA as long as FERC regulations as a whole encourage QFs. PURPA does not require FERC to encourage QFs to the maximum extent possible.

Moving to provision-specific challenges, Petitioners first argued that Order 872's new Site Rule defied the plain meaning of PURPA, along with being arbitrary and capricious under the Administrative Procedure Act (APA).[17] Under PURPA, for a small alternative energy plant to qualify as a QF, a single energy production site cannot have a production capacity greater than 80 megawatts. Under the original Site Rule, energy production facilities within one mile of each other, using the same energy resource and owned by the same person, would have their production capacity summed up as a single site to measure against this 80 MW limit. Under the new 2020 Site Rule, there is now a rebuttable presumption

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[15] Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601–2645 (2018).

[16] 16 U.S.C. §§ 796 (17)(a)(ii), (18).

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

that affiliated facilities using the same energy resource located between one and ten miles apart should have their production capacities treated as a single site, making it more likely that they will exceed the 80 MW limit and thus be ineligible for QF advantages under PURPA.

Petitioners argued that this definition of site defied the plain meaning of the text, but the Ninth Circuit disagreed, noting that Congress explicitly delegated this authority to FERC by requiring aggregation of power production capacity for facilities "located at the same site (*as determined by the Commission*)."[18] The court further found under *Chevron* step two that FERC's interpretation of the word "site" was manifestly reasonable and that the 2020 Site Rule merely relies on the same non-locational factors like common characteristics and ownership used in the original Rule.

Petitioners also argued that FERC failed to articulate a satisfactory explanation for its redefinition of "site" in order to survive arbitrary and capricious review under the APA. Order 872, however, explicitly described FERC's finding "that some large facilities were disaggregating into smaller facilities and strategically spacing themselves slightly more than one mile apart in order to be able to qualify as separate small power production facilities." The Ninth Circuit therefore found that FERC's revision of the Site Rule to address this problem was "reasonable and reasonably explained."

Petitioners nevertheless further argued that the 2020 Site Rule was arbitrary and capricious in three different ways: 1) that the ten mile threshold was arbitrary, 2) that the inclusion of a rebuttable presumption represented an unjustifiable departure from FERC's historic practice, and 3) that FERC failed to consider the reliance interests created by the prior rule. The Ninth Circuit efficiently dispensed with these allegations, holding: 1) that any number so chosen is essentially arbitrary, but the 10 mile threshold is still reasonable despite the potential workability of a three, or five mile rule; 2) that under the APA, regulatory agencies may change their positions for any number of good reasons; 3) that FERC acknowledged the reliance interests, but reliance does not outweigh good reasons for policy change.

Finally, Petitioners contended that the 2020 Site Rule was unlawfully retroactive. The Ninth Circuit disagreed, finding that even if a facility were to lose its PURPA eligibility in the future under the new Site Rule, the Rule would not impair rights a party possessed when FERC acted. Rather, the new Site Rule potentially creates new legal consequences—the loss of qualifying status—only for events that occur in the future: recertifications that take place after the rule's effective date, and only if the facility undergoes a substantive change. A rule is not retroactive merely because it upsets expectations based on prior law.

Second, Petitioners challenged Order 872's revision of the Fixed-Rate Rule. This rule states that QFs shall not be discriminated against, but

[18] 16 U.S.C. § 796(17)(A)(ii).

they may not be paid more than avoided cost rates. Avoided costs rates are the price that an electrical utility saves by purchasing energy rather than building its own generation capacity. Order 872 modifies the Fixed-Rate Rule by allowing (but not requiring) States to eliminate fixed-contract energy rates, while requiring States maintain the right of QFs to elect fixed-contract capacity rates, with the goal of preventing QFs from violating PURPA by receiving more in payment than the costs avoided.

Petitioners argued that the new rule violated PURPA's non-discrimination provision and that it was arbitrary and capricious. The Ninth Circuit found neither theory persuasive. It held under *Chevron* that FERC has broad discretion to decide how avoided costs should be calculated and that giving States the option to require measurement of avoided costs at the time of delivery is a reasonable interpretation of the statute. While Petitioners argued that under the new Rule QFs face financial risks that other utilities do not, under PURPA the compensation regime for QFs is fundamentally different from that used for utilities because it requires that energy rates shall not discriminate against QFs, not that those rates be set in a way that offsets any other disadvantages that QFs might face in the market. The Ninth Circuit further held that FERC expressly and unambiguously acknowledged its change in policy. FERC explained the new policy with its finding that "long-term fixed price QF contracts likely exceeded the avoided energy costs at the time of delivery for extended periods of time," and that FERC reasonably exercised its broad discretion under PURPA in determining that the benefits of the new approach would exceed the harms it may inflict on QFs. Ultimately, the new Fixed-Rate Rule was not arbitrary or capricious.

Third, Petitioners contended that the Locational Marginal Price (LMP) provision of Order 872, which permits States to adopt a rebuttable presumption that LMP represents a utility's avoided costs, was arbitrary and capricious. Relying on the two-part test articulated by the D.C. Circuit in *Cablevision Systems Corp. v. FCC*,[19] Petitioners argued that the APA permits an agency to adopt an evidentiary presumption only if the presumption (1) is "rational," and (2) "shift[s] the burden of production and not the burden of persuasion." Both Petitioners and FERC agreed that *Cablevision* applied. Thus, the Ninth Circuit held 1) that FERC's studies showing that LMP is a reasonable proxy for avoided costs is a rational basis for the agency's adoption of an evidentiary presumption despite Petitioners' arguments regarding the potential downsides of this approach; and 2) that FERC did not impermissibly shift the burden of persuasion because a QF which challenges an avoided-cost rate always bears the burden of persuasion, and Order 872 only shifts the burden of production. Therefore, the Ninth Circuit held that the LMP provision was not arbitrary and capricious.

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[19] 649 F.3d 695 (D.C. Cir. 2011).

Fourth, Petitioners argued that Order 872's adjustment of the market-access presumption from 20 megawatts (MW) to 5 MW was arbitrary and capricious. The market-access presumption is a rebuttable presumption that small QFs lack non-discriminatory market access under PURPA. In Order 872, FERC explained that small QF access to regional markets has improved since the original rule was published, and thus the 20 MW threshold was no longer appropriate. The Ninth Circuit found this explanation reasonable, and thus the agency's choice of a five megawatt limit was not arbitrary and capricious.

Finally, Petitioner environmental organizations alleged that FERC violated NEPA by promulgating Order 872 without preparing an environmental assessment (EA) or environmental impact statement (EIS). FERC claimed that Order 872 fell within a categorical exclusion to NEPA, and that any downstream environmental effects are too uncertain and unforeseeable to trigger NEPA review. The Ninth Circuit reviewed these findings under the arbitrary and capricious standard and rejected them, finding that FERC was required to prepare an EA before issuing Order 872. Because of the "extraordinary disruptive consequences of vacating the rules" however, the court declined to order vacatur.

The Ninth Circuit began by holding that the Petitioner environmental organizations had Article III standing, noting that the organizations had adequately documented the concrete harms from Order 872. Many of organizations own QFs, and they all could be injured by an increase in air pollution if the new rule discourages reliance on QFs. Besides Article III standing, the Court also held that Petitioner environmental organizations had prudential standing, reasoning that the harms Petitioners fear, namely pollution and emissions, fall directly within NEPA's zone of interest to protect.

Addressing FERC's conclusion that Order 872 fell into NEPA's categorical exclusion for "clarifying, corrective, or procedural rules" from the EA requirement, the Ninth Circuit rejected this claim. FERC argued that, per *Department of Transportation v. Public Citizen*,[20] it had no discretion to keep prior rules in effect once it determined that they were in conflict with PURPA, and thus Order 872 was corrective. The Ninth Circuit disagreed, holding that FERC retained its discretion in the manner by which it carried out PURPA's statutory mandate, and thus the agency's reliance on the categorical exclusion was unreasonable.

Addressing FERC's conclusion that any potential environmental impacts from Order 872 were not reasonably foreseeable because it is "impossible to know what the states may choose to do in response to the final rule," the Ninth Circuit held that FERC misunderstood NEPA's requirements. Both applicable regulations and case law require that an agency shall prepare an EA for a major agency action unless it falls within a categorical exclusion. Furthermore, FERC's own regulations require that an EA be prepared for regulations not covered by a categorical

[20] 541 U.S. 752 (2004).

exclusion. FERC claimed that Order 872 merely provided States with new policy options and thus did not have a foreseeable impact. The Court strongly rejected this argument, saying that it was eminently foreseeable that a regulatory change as significant as Order 872 could produce significant environmental effects, most notably regarding greenhouse gas emissions. FERC further claimed that it had no meaningful way to predict the impact of Order 872. The Court rejected this argument as well, holding that if an agency is uncertain about the possible environmental effects of a proposed action, the proper course is to prepare an EA to the best of the agency's ability, not to avoid environmental analysis altogether. The Ninth Circuit also noted that the public had raised substantial concerns regarding the environmental impacts of Order 872, and that if such effects are reasonably foreseeable to the public, certainly the agency ought to take them into account when deciding not to prepare an EA. The Ninth Circuit concluded that while the lack of reasonably foreseeable environmental impacts may justify an agency's decision not to complete an EIS, it cannot relieve an agency of its obligation to produce an EA.

Having found that FERC violated NEPA by not preparing an EA and inquiring whether to vacate Order 872, the Ninth Circuit applied the two-factor balancing test found in *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*,[21] which weighs the seriousness of an agency's errors against "the disruptive consequences of an interim change that may itself be changed." While emphasizing the seriousness of FERC's failure to produce an EA, the Ninth Circuit found, per *Pollinator Stewardship Council v. EPA*,[22] that Order 872 suffers from no fundamental flaw which would make it unlikely that FERC could adopt the same rule on remand. The Court pointed out that if FERC were to conduct an EA, its judgment regarding its own modeling capability would be entitled to deference, making a different result highly unlikely. Regarding the disruptive consequences of vacatur, the Court found them to be substantial as FERC, various States, and regulated parties had already begun to implement Order 872 in due reliance. While the Ninth Circuit reaffirmed that in most cases an agency's failure to prepare an EA will require vacatur, especially because NEPA is a purely procedural statute which loses all force if an agency's failures to comply are routinely excused, in this case the court ultimately remanded to FERC without vacating the Order because "the egg has been scrambled and there is no apparent way to restore the status quo ante."

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[21] 988 F.2d 146 (D.C. Cir. 1993).

[22] 806 F.3d 520, 532 (9th Cir. 2015).

II. FORESTRY AND AGRICULTURE

1. Alliance for the Wild Rockies v. Petrick, 68 F.4th 475, (9th Cir. 2023).

The Alliance for the Wild Rockies (Alliance), an environmental non-profit, sued the United States Forest Service, the United States Fish and Wildlife Service and Carl Petrick, the Forest Supervisor for the Idaho Panhandle National Forest (collectively USFS) in the United States District Court for the District of Idaho. Alliance alleged the Hanna Flats Logging Project (Project) did not qualify for the categorical exclusion[23] under the Healthy Forests Restoration Act (HFRA) because it was not within the wildland-urban interface (WUI).[24] The parties cross-moved for summary judgment. The district court first ruled that Alliance sufficiently exhausted its administrative remedies, then granted summary judgment for Alliance and ordered USFS to conduct further analysis on its use of the categorical exclusion.[25] After conducting its analysis, USFS issued a Supplement to the Decision Memo (Supplement) again approving the project under HFRA's categorical exclusion. Alliance sued again in the district court seeking a preliminary injunction against USFS's use of the categorical exclusion (*Hanna Flats II*). The district court noted a serious question existed about the valid application of the HFRA categorical exclusion to the Project. and granted a preliminary injunction in *Hanna Flatts II*. USFS appealed the rulings of *Hanna Flats I* and *Hanna Flats II*. The grant of summary judgment was reviewed *de novo* by the Ninth Circuit and the grant of a preliminary injunction was reviewed for an abuse of discretion. The Ninth Circuit vacated both opinions and remanded them to the district court.

In 2017, USFS issued a Scoping Notice and designated thousands of acres of National Forest for various treatments to reduce the risk of wildfires and disease. USFS stated that the project was "likely" exempt from the National Environmental Policy Act (NEPA) under a categorical exclusion provided in HFRA. However, HFRA's categorical exclusion only applies if the project is in the WUI, the space where human developments meet forest and wilderness areas. USFS used the definition of WUI as defined in the Bonner County Community Wildfire Protection Plan (Protection Plan) when determining the project fell within the categorical exclusion. Alliance provided extensive comments on the project[26] and USFS subsequently issued a decision memo authorizing the project.

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[23] 16 U.S.C. §6591b(c)(2)(A).

[24] 16 U.S.C. §6511(16)(A),

[25] This district court case hereinafter referred to as *Hanna Flats I*.

[26] Alliance provided over one hundred pages of comments. The comment relevant to this appeal is: "The forest plan Glossary definition of [wildland-urban interface] under (A) has allowed entities other than the general public to set [wildland-urban interface] boundaries outside of NEPA . . . processes, and under (B) defines it so vaguely as to expand the delineation of the [wildland-urban interface] greatly — again outside . . . NEPA processes."

Following the district court's grant of summary judgment to Alliance in *Hanna Flats I*, USFS issued the Supplement.

Alliance claimed that the Ninth Circuit lacked jurisdiction because the doctrines of mootness and standing applied to the *Hanna Flats I* appeal. Alliance first argued that the appeal of *Hanna Flats I* is moot because USFS had fully complied with the district court's order. The Ninth Circuit concluded USFS's compliance and issuance of a new regulation did not moot an appeal[27] reasoning that because USFS wished to rescind the Supplement and proceed under the Decision Memo, a favorable ruling could provide relief. Further, because the parties did not intend to settle, there was a present controversy for which the Ninth Circuit could provide relief. Alliance then argued USFS lacked standing because it had complied with the remand order and therefore even a favorable decision could not provide remedy. The Ninth Circuit determined that because the district court's order prevented USFS from rescinding the Supplement as it wished, there was a judicially redressable injury.

Before addressing USFS's argument that Alliance's comments did not provide notice of the issue, the Ninth Circuit addressed the "confusion" surrounding USFS's "precise argument." Below, USFS framed the issue as one of administrative exhaustion. However, on appeal, USFS framed the issue as one of administrative waiver. The Ninth Circuit stated that, to preserve USFS's notice argument, the matter must have been sufficiently raised for the trial court to rule on it. Examining the "essence" of USFS's argument below, the Ninth Circuit concluded it was whether Alliance's comments "sufficiently alerted" USFS to their concerns about WUI delineation. Whether the agency was sufficiently alerted is an element of both waiver and exhaustion but is "best characterized as waiver."[28] Because the district court ruled on the issue and created a sufficient record, USFS preserved its notice argument. The Ninth Circuit then turned to the merits of the appeal.

Alliance argued that even if the comment cited by the district court was insufficient to provide notice of their claim, other parts provided the requisite specificity. Alliance pointed to comments requesting maps of human density within 1.5 miles of the project boundaries and insect and disease area. Alliance argued that those requests put USFS on notice that it lacked a basis to categorically exempt the project from NEPA as USFS desired. The Court found that the single comment relied on by the district court did not resemble Alliance's arguments in court, reasoning that Alliance's comments were too vague and generalized to effectuate notice of their eventual claim. The Court held the district court's grant of summary judgment was based on an incorrect conclusion that USFS was on notice of Alliance's current claims.

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[27] Schweiker v. Gray Panthers, 453 U.S. 34, 42 n.12 (1981).

[28] Portland Gen. Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1023 (9th Cir. 2007).

Turning to the appeal of *Hanna Flats II*, the Ninth Circuit began by discussing which standard of review to apply. Alliance argued review of USFS's decision to rely on a categorical exclusion should be conducted under the "reasonableness" standard of deference, while USFS argued for an arbitrary or capricious standard. The Ninth Circuit held that the arbitrary and capricious standard applied, because, in the absence of a statutory right of action the arbitrary and capricious standard applies. The court pointed out that no authority established a reasonableness standard applied in this context and that Alliance did not cite any supporting authorities. The Ninth Circuit found that it had consistently reviewed agency reliance on categorical exclusions under the arbitrary and capricious standard.

Turning to the merits of the appeal and USFS's multiple grounds for challenging the district court's decision, USFS first challenged the district court's preliminary injunction as a violation of the prohibition on imposing procedural requirements not written in the statute. The Ninth Circuit concluded that the district court did not create any new procedural duties or add duties from other statutory schemes, but rather only required that USFS "adequately demonstrate" that the project fell within the Protection Plan's definition of WUI. The Ninth Circuit found this requirement by the district court to be squarely within the Administrative Procedure Act's required duties.

USFS next contended that its Decision Memo and Supplement had a sufficient explanation for its use of the categorical exclusion, arguing it could rely on the project being within the Protection Plan's WUI definition to invoke HFRA's categorical exclusion. The Ninth Circuit reasoned that the use of the Protection Plan's WUI definition was improper because it lacked the metrics for determining at-risk communities under HFRA and held that reliance on the Protection Plan's definition of WUI was not enough to justify use of the HFRA's categorical exclusion.

Finally, USFS challenged the district court's reading of HFRA, substituting "the project area" for the statute's text "Federal land" when defining an at-risk community. USFS argued that the district court's interpretation improperly required a community to border or abut the project area to be an "at-risk community." The Ninth Circuit held that the district court erred in its interpretation because its interpretation merged two provisions and created a rule requiring the project itself to border the at-risk community.[29] Accordingly, the proper reading allows for a project to be categorically excluded if it falls within the WUI that is within or adjacent to an at-risk community. The court acknowledged HFRA's different treatment of communities with a plan and communities without a plan. The Ninth Circuit concluded that the statutory scheme creates a

[29] "A project under this section shall be limited to areas . . . in the wildland-urban interface . . . ." 16 U.S.C. § 6591b(c)(2)(A). An "area" is WUI if it is "within or adjacent to an at-risk community." 16 U.S.C. § 6511 (16)(A). And a community is "at risk" if it is "within or adjacent to Federal land." 16 U.S.C. § 6511(1)(A)(ii).

"baseline protection" of at least 0.5 or 1.5 miles around at-risk communities and the baseline can be altered through a community plan.

Alliance argued that, even if the district court erred in issuing the preliminary injunction, the injunction should remain while the district court reconsiders on remand. The Ninth Circuit determined that retaining the preliminary injunction was an exercise of discretion and declined to exercise their discretion here. The Court examined the district court's analysis and determined that in issuing the injunction the district court applied the wrong standard. The district court had applied a "serious questions" standard instead of "likelihood of success on the merits" inquiry typical for preliminary injunctions. Because a legal error infected the threshold inquiry, the Ninth Circuit did not consider the other factors governing injunctive relief. The Ninth Circuit then looked at when it has retained preliminary injunctions granted on improper legal bases. When such injunctions were retained, "serious questions" existed about the validity of the statute in relation to the commerce clause and foreign affairs powers. Further, the defendant had even acknowledged the instability of the statute. The Ninth Circuit also stated that a showing of irreparable harm might be grounds to retain the injunction, but ultimately held that the injunction should not remain.

In short, the Court dispensed of Alliance's arguments that it lacked jurisdiction by relying on Circuit and Supreme Court precedent that appeal was not moot due to USFS compliance. The Ninth Circuit also held that there was a redressable injury because USFS could rescind the supplement after a favorable ruling. Next, it held that Alliance's comments were insufficient to provide USFS with notice of its eventual claims. Additionally, the Court held that the district court had not imposed any additional duties on USFS, that the Decision Memos did not contain sufficient information to justify use of the categorical exclusion, and that the district court erred in interpreting HFRA and issuing the injunction. Finally, the Ninth Circuit held that the injunction should not remain despite its improper legal foundation because there was not a "serious question" regarding the validity of statute at issue.

2. Schurg v. United States of America, 63 F.4th 826 (9th Cir. 2023).

A group of homeowners, collectively known as "the landowners," sued the Forest Service (the Service) in the United States District Court for the District of Montana.[30] The landowners sued the Service under the Federal Tort Claims Act's (FTCA),[31] claiming the Service failed to warn homeowners of property-damage risk from their efforts to suppress wildfire. The district court dismissed the claim for lack of subject matter jurisdiction under the FTCA on the grounds that the Service's decisions fell within the discretionary-function exception to FTCA's waiver of sovereign immunity. The Ninth Circuit, reviewing the dismissal *de novo*, affirmed the district court's granting of summary judgment in favor of the Forest Service.

The case centered on the Service's public communication strategy employed to inform the public of the risks posed by a Montana wildfire (Lolo Peak Fire). Burning for nearly three months, the fire was a "Type 1 Incident," and a fire team stepped in to manage the fire management activities. Based on significant spreading and strong wind conditions, the team decided to conduct "firing operations." The procedure involves burning fuels to stop the fire's growth and limit impacts to fire severity to vegetation. Type 1 Incidents pose a danger to neighboring populations and therefore demand a high level of public communication. The team developed a communication strategy to notify the public that included local in-person meetings, print materials, radio presence, and multiple online platforms. They also set up an in-person trailer and an email account to answer specific questions.

Upon learning the fire was spreading to the first landowner's undeveloped plot of land, the team posted on their online platform, InciWeb. The landowner saw the posting and learned that the fire team was in the process of executing "firing operations." Shortly thereafter, the team posted again to explain that more fire suppression efforts would be taking place near the other individual landowners, residents of the Macintosh Manor subdivision. The team also held a public meeting, staffed the information trailer, and used other technology-based communication methods to disseminate information. By the evening, the fire destroyed two homes and several accessory structures.

The landowners brought negligence and intentional tort claims against the Service and the DOA, arguing that the government had a duty to consult with the property owners personally, but failed to do so. The FTCA waives sovereign immunity for the United States, allowing parties to sue for certain tort claims.[32] If the employee's action occurred within

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[30] The landowners brought the claim against the Forest Service and the Department of Agriculture (DOA), but to stay consistent with the Ninth Circuit's opinion, the summary refers to the Forest Service.

[31] 28 U.S.C. §§ 1291, 1346, 1402, 1346, 1402, 2401, 2402, 2411, 2412, 2671–2680.

[32] 28 U.S.C. §1346 (b)(1). As the Ninth Circuit explained in *Schurg*, "[u]nder the FTCA, district courts have jurisdiction over claims against the United States for money damages

the scope of their employment, they can be held liable unless the challenged action falls within the discretionary function exception. The exception preserves sovereign immunity as to claims regarding a government employee's action based on either: (1) the exercise or performance of their official duties or (2) the failure to exercise or perform a discretionary function or duty on the part of a federal agency.

The Ninth Circuit applied a two-step test to determine whether the discretionary function exception applied. Under the test, courts must first determine whether the challenged actions involve an element of judgment or choice. This step takes into account whether a federal statute, regulation, or policy mandated a specific course of action. The second step is whether the judgment is of the kind that the discretionary function exception was designed to shield. If the court does find an element of choice, it next focuses on whether the government's action was based on considerations of public policy. Applying the first step, the Ninth Circuit found that the Lolo Peak Fire communication strategy stemmed from a published incident decision that was not a regulation, statute, or policy. The Court considered the decision's objectives to consult with private landowners and a letter from team leadership that specified that the team could not deviate from the decision.

Citing precedent in *Miller v. U.S.*, where the Ninth Circuit held that a directive to apply "aggressive suppression action to wildfires that threaten assets" did not eliminate discretion because it did not prescribe how to fight the fire.[33] The Court concluded that the instruction involved an adequate element of choice because the objectives did not dictate when or how the Service was to consult with the private landowner, rather only that they must. Further, the Ninth Circuit found that the Service's communication went above and beyond the level of consulting with private landowners, referring to numerous communications via the web, in-person, or through press releases.

Next, the Ninth Circuit applied the second step to establish if the judgment is the kind the exception was designed to shield. The question is essentially whether the decisions were based on social, economic, and political policy. Here, the landowners argued that the Service's communication was not susceptible to a policy analysis. The Ninth Circuit's decision was based mainly on its previous holding in *Green v. U.S.* wherein the Court held that the discretionary function exception did not apply when the Service did not take any action to protect private property or inform the public.[34]

'for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission' of any government employee 'acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' The United States has waived its sovereign immunity for certain tort claims under the FTCA, and parties can sue the government only where sovereign immunity is waived."

[33] 163 F.3d 591, 594–95 (9th Cir. 1998).

[34] Green v. United States, 630 F.3d 1245, 1249 (9th Cir. 2011).

Comparing the present facts to those in *Green,* the Ninth Circuit considered whether there was sufficient evidence that the Service had to make a policy based on resource allocation. Here, the Service made policy and resource choices based on the "sophisticated nature" of the community and the need to focus on fire management. The Service balanced public communication based on technology, the team's safety, and the time-intensive nature of reaching members of the public on a personalized basis. In assessing these factors, the Court found sufficient evidence of considerations that reflected balancing of economic, social, and political concerns referred to in *Green*. Because those elements were missing in *Green*, but present here, the Ninth Circuit found that the landowners' effort to invoke *Green* in that the communication decisions were not susceptible to a policy analysis fell short.

In sum, the Ninth Circuit held that the district court properly granted summary judgment for the Forest Service on all the landowners' claims. The Forest Service's communication with landowners about fire-suppression activity on or near their land satisfied both steps of the exception's test. The discretionary function exception was designed to shield decisions such as determining how to consult with landowners while managing a raging fire of the magnitude of the Lolo Peak fire, thus the landowners' claims were barred.

3. Murphy Company v. Biden, 65 F.4th 1122 (9th Cir. 2023).

Murphy Timber Company and Murphy Timber Investments, LLC (collectively, Murphy) sued the President, the Secretary of the Department of the Interior (Secretary), and the Bureau of Land Management (BLM) in the United States District Court for the District of Oregon seeking to enjoin the expansion of a National Monument.

In 2017, President Obama issued Proclamation 9564 (Proclamation) under the Antiquities Act,[35] which expanded the Cascade-Siskiyou National Monument (Monument) by 101,000 acres. This expansion extended over timberlands regulated by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O&C Act).[36] The O&C Act prescribes that timberlands under the jurisdiction of the Department of the Interior (DOI),

> [S]hall be managed . . . for permanent forest production and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties [*sic*].[37]

As logging is prohibited within the Monument, Murphy alleged that the expansion of the Monument onto O&C Act Lands violated the Act's mandate that those lands be managed for permanent forest production. The district court held that it had jurisdiction to review the President's action, and rejected Murphy's claims that the Proclamation 1) exceeded the President's Antiquities Act authority and 2) conflicted with the O&C Act's land-management directives. On appeal the Ninth Circuit affirmed the decision of the district court.

Initially at issue was the Government's argument that Proclamation 9564 is immune from judicial review. Generally sovereign immunity bars suits against the United States and its officials unless Congress has expressly waived immunity by statute. In the absence of a statutory waiver, the Supreme Court has permitted judicial review of presidential actions in two circumstances. First, the Court has recognized constitutional challenges to presidential acts as reviewable. Second, the Court held in *Larson v. Domestic & Foreign Commerce Corp.*[38] that actions by subordinate Executive Branch officials that extend beyond delegated statutory authority ("*ultra vires*" actions) are reviewable.

The Government argued that because no statute waives sovereign immunity, there was no basis for judicial review. It also contended that because the O&C Act regulates only the Secretary's discretion, the

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[35] Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303 (2018).

[36] Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act, 43 U.S.C. §§ 2601–2634 (2018).

[37] *Id.* at § 2601.

[38] 337 U.S. 682 (1949).

President's action under the Antiquities Act could not be subject to *ultra vires* review. In response, Murphy claimed that *Larson* creates an exception to sovereign immunity on the basis that the O&C Act places a "reviewable limit" on the President's authority to designate monuments under the Antiquities Act.

Neither the Supreme Court nor the Ninth Circuit had previously found that the *Larson* exception is applicable to actions by the President. However, because Murphy's claims against the Secretary and the President were thoroughly interwoven, and the claims against the Secretary on O&C Act grounds were clearly within *Larson*'s purview, the Ninth Circuit held that Murphy's claims against the President regarding the Proclamation were justiciable. The Ninth Circuit further noted that Murphy's challenge implicated separation of powers concerns, namely the conflict between the executive authority derived from the Antiquities Act and the legislative mandate found in the O&C Act. Regardless of whether it characterized the challenge as constitutional or *ultra vires*, the Ninth Circuit found jurisdiction over Murphy's allegation that the O&C Act restricts the President's designation powers under the Antiquities Act.

Murphy contended that the provision of the Antiquities Act allowing the President to designate protected national monuments is irreconcilable with the O&C Act's mandate that O&C Lands be managed for permanent forest production. The Ninth Circuit disagreed. The Supreme Court held in *Morton v. Mancari* that when two statutes are capable of coexistence, it is the duty of the courts to regard both as effective.[39] Here, the Ninth Circuit found the Antiquities Act and the O&C Act easily reconcilable. While Murphy argued that the O&C Act implicitly repealed the power of the President to extend Antiquities Act protections to O&C Lands, the Ninth Circuit noted that Murphy faced a heavy burden of showing Congress intended such a result. Looking to the legislative history of both Acts, and the history of congressional regulation of executive action under the Antiquities Act, the Ninth Circuit found that the designation of O&C Lands as part of the Monument did not conflict with the Secretary discretion in administering those lands under the O&C Act's directives.

The Ninth Circuit's holding relied on an analysis of the text, purpose, and history of the O&C Act. First, the court emphasized that the Act directs the DOI to determine which portions of the land should be set aside for logging and which should be reserved. Murphy conceded, and the court emphasized, that not all O&C Lands are subject to the statute's sustained-yield timber production mandates. Rather, the O&C Act's language that the lands be "managed . . . for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties [*sic*]," provides substantial support for the idea that the DOI has considerable

[39] Morton v. Mancari, 417 U.S. 535, 551 (1974).

discretion in deciding which O&C Lands are to be logged. By mandating that the Secretary exercise their discretion to prohibit logging on the O&C Lands within the new borders of the Monument, the Proclamation fits within the O&C Act's framework.

Second, the Ninth Circuit confirmed its textual analysis by considering the legislative goals and history of the O&C Act. Relying on Committee Reports from the House and Senate, speeches by President Roosevelt, and historical works regarding the evolution of logging policies on federal lands in the American West, the Court explained how the O&C Act was a reactionary course correction from the previous policy of "outright liquidation" of forests.[40] Based on this historical context, the Ninth Circuit found clear evidence that conservation and preservation of natural resources were the primary purposes behind the passage of the O&C Act. Therefore, Murphy's contention that the Act prohibits the President from preserving O&C Lands as a monument is in contradiction with the Act's congressional intent.

Finally, the Ninth Circuit considered the judicial precedent regarding both the Antiquities Act and the O&C Act. It noted that the Supreme Court has never overturned an Antiquities Act proclamation, and that when Congress has intended to limit the President's authority to designate national monuments it has done so explicitly. Both Alaska and Wyoming, for example, are subject to federal laws which constrain the President's power to designate monuments.[41] Similarly, there is substantial precedent for the DOI's statutory discretion in managing O&C Lands. *Seattle Audubon Society v. Moseley*, *Portland Audubon Society v. Babbitt*, and *Headwaters Inc. v. BLM, Medford District* all considered whether the O&C Act requires timber production to be the exclusive use of O&C Land, and found that it did not.[42] Rather, those cases confirmed the power of the DOI to reserve O&C Lands from logging.

Therefore, the Ninth Circuit found that the reservation of a small fraction of O&C Lands as part of the Cascade-Siskiyou National Monument did not violate congressional intent or the Secretary's broad authority to regulate the O&C Lands as a whole, and thus affirmed the decision of the district court.

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[40] H.R. Rep. 75-1119, 2 (1937).

[41] 54 U.S.C. § 320301 (d) (2018), 16 U.S.C. § 3213 (a) (2018).

[42] 80 F.3d 1401 (9th Cir. 1996); 998 F.2d 705 (9th Cir. 1993); 914 F.2d 1174 (9th Cir. 1990).

4. Migrant Clinicians Network v. U.S. Environmental Protection Agency, 88 F.4th 830 (9th Cir. 2023).

Environmental and farmworkers organizations (Organizations) filed a petition for review of Environmental Protection Agency's (EPA) pesticide registrations of streptomycin sulfate (streptomycin) for use in combating Huanglongbing (HLB) disease and citrus canker in oranges and other citrus crops. Additionally, the Organizations alleged that EPA violated sections of the Endangered Species Act (ESA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In response to the Organization's petition for review, EPA filed a motion to remand to the agency without vacatur of the pesticide registrations. Following EPA's motion to remand without vacatur, the Organizations cross-moved for remand with vacatur. The Ninth Circuit granted the Organizations' petition in part and denied it in part, and EPA's pesticide registrations were vacated and remanded back to the agency.

Before a pesticide can be distributed and sold in the United States, the EPA must satisfy the requirements of FIFRA and the ESA. FIFRA is a comprehensive regulatory scheme that governs the use, sale, and labeling of pesticides. Under FIFRA, the EPA may not register a pesticide (or amend an existing pesticide registration) unless it can prove that when the pesticide is used in accordance with widespread and commonly recognized practice, the pesticide will perform its intended function without causing unreasonable adverse effects on the environment. FIFRA defines "unreasonable adverse effects on the environment" as any unreasonable risk to people or the environment. When the EPA grants an unconditional registration, as was the case here, it must review all relevant data in its possession and determine that no additional data is necessary to make the determinations required by FIFRA. In addition to FIFRA's requirements, the EPA's pesticide registration decisions must comply with the ESA. Broadly, the ESA requires federal agencies to ensure that any action authorized, funded, or carried out by such agency will not likely jeopardize the continued existence of any endangered or threatened species or damage its habitat. Thus, at the earliest time possible, the EPA must determine whether its proposed pesticide registration decisions may affect a listed species or its critical habitat ("effects determination").

Streptomycin is an antibiotic that has been used in agriculture, animal husbandry, and human medicine for several decades. It has also been used commercially to control bacterial plant diseases in the U.S. since the 1950s. Streptomycin has been approved for use on other fruit-bearing plants such as apple and pear trees, and for several decades, it has been used as a human antibiotic drug without significant incidents or concerns for human health. In 2015, pesticide manufacturers proposed and submitted applications to the EPA to amend pesticide registrations of streptomycin for use in certain citrus crops to manage HLB disease and citrus canker in oranges and other citrus crops. HLB is an incurable and often fatal plant disease spread by invasive insects. Citrus canker is

caused by a subspecies of bacteria called *Xanthomonus citri* and is spread by wind, rain, irrigation, and human contact. In Florida, which contains most of the citrus crop in the U.S., HLB has reduced 42% of citrus acreage, while citrus canker has reduced 30% of citrus acreage.

EPA issued a Final Registration Decision in January 2021. In amending the streptomycin registration, the EPA attempted to comply with FIFRA, but it admitted it did not comply with the ESA due to the high volume of pesticide applications, the unusual complexity of ESA pesticide reviews, and the proliferation of lawsuits challenging pesticide products. In March 2021, the Organizations filed a petition for review asking the Ninth Circuit to set aside EPA's amended registrations for streptomycin for use on citrus. In February 2022, the EPA filed a motion to remand to the agency without vacatur of the pesticide registrations. Although the EPA acknowledged that it had violated the ESA by failing to make an ESA effects determination before approving the new uses of streptomycin, it argued that the equities weighed against vacatur. The Organizations cross-moved for remand with vacatur. The motions panel of the Ninth Circuit denied both motions without prejudice. Hearing this case for the first time, the Ninth Circuit reviewed EPA's compliance with FIFRA for substantial evidence and reviewed ESA compliance under the Administrative Procedure Act's arbitrary and capricious standard. Ultimately, the Ninth Circuit granted the Organizations' petition in part and denied in part, and vacated and remanded the EPA's pesticide registrations back to the agency.

The Ninth Circuit first held that since the EPA conceded that it failed to comply with the ESA, the Court would only address the ESA in the context of determining the appropriate remedy, after considering the Organizations' FIFRA claim.

Second, the Ninth Circuit held that under FIFRA, the EPA adequately accounted for the various pathways by which antibiotic resistance might spread following streptomycin's application to citrus groves. The Organizations argued that EPA's analysis was defective in failing to account fully for all potential vectors by which antibiotic resistance could spread. However, the Ninth Circuit found that substantial evidence supported the EPA's assessment of the risk of antibiotic resistance, and the EPA sufficiently explained why the risk of increased resistance was not unreasonable based on defined mitigation measures. The Ninth Circuit also explained that the EPA could reasonably rely on the fact that after many decades of streptomycin in agricultural applications, there is no indication it has led to antibiotic resistance that poses a concern to human health.

Third, the Ninth Circuit agreed with the Organizations' argument that the EPA failed to evaluate the risk that streptomycin would pose to pollinators such as bees. Under FIFRA, the EPA may approve a pesticide registration only if it has reviewed all relevant data in its possession and has determined that no additional data are necessary to assess whether the pesticide will perform its intended function without unreasonable

adverse effects on the environment. In this case, the EPA was required to analyze whether the amended registration of streptomycin would have an unreasonable adverse effect on pollinators, but the EPA's statements indicated that it lacked sufficient data to evaluate the environmental risks of streptomycin registration for use on citrus groves. Additionally, the Ninth Circuit reasoned that the EPA cannot unconditionally approve or amend a pesticide registration until it has reviewed all relevant data and determined that no additional data is necessary.

Finally, the Ninth Circuit partly agreed with the Organizations' argument that the EPA lacked substantial evidence for its assessment of streptomycin's benefits. FIFRA requires the EPA to determine whether registration of a pesticide would pose any unreasonable adverse effects on the environment, taking into account the economic, social, and environmental costs *and benefits* of the use of any pesticide. The Organizations argued that the EPA's benefits assessment was not supported by substantial evidence because the studies were flawed, the EPA ignored scientific evidence in the record suggesting that streptomycin was ineffective at treating HLB disease, and the EPA lacked sufficient support for its findings that streptomycin prevents infection. The Ninth Circuit agreed with the Organizations' third point and granted the Organizations' petition for review so the EPA could provide a more coherent and detailed explanation of whether it understands disease prevention to be a benefit of streptomycin.

As for remedy, the Court considered whether to vacate the registration amendments or remand to the EPA to address its errors without vacatur. To determine whether an agency's action should remain in effect on remand, the Ninth Circuit uses a two-factor balancing test that weighs the seriousness of the agency's errors against "the disruptive consequences of an interim change that may itself be changed."[43] Due to the EPA's utter failure to comply with the ESA, as well as its failure to fully comply with FIFRA, the Ninth Circuit reasoned that any remand without vacatur would at least require a mandatory timetable for compliance. In *Center for Food Safety v. Regan*, the Court imposed a 180-day deadline for similar violations; the Ninth Circuit found no reason to believe the equities in the present case would justify a more lenient deadline. At oral argument, however, counsel for EPA explained that the agency would prefer an outright vacatur of the amended pesticide regulation since EPA could not complete an ESA effects determination until at lest the fall of 2026. Consequently, the Ninth Circuit vacated the EPA's amended registration.

In sum, the Ninth Circuit vacated the EPA's amended registrations of streptomycin for use on certain citrus groups and remanded to the agency so that it could address any noted defects in its FIFRA analysis and conduct an ESA effects determination.

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[43] Ctr. for Food Safety v. Regan, 56 F.4th 648, 663 (9th Cir. 2022).

III. WATER

1. *Idaho Conservation League v. Poe, 86 F.4th 1243 (9th Cir. 2023).*

Plaintiff Idaho Conservation League (ICL) brought a citizen suit against Shannon Poe for conducting suction dredge mining in Idaho's South Fork Clearwater River (the South Fork) without a Section 402 National Pollutant Discharge Elimination System (NPDES) permit, in violation of the Clean Water Act (CWA). Poe argued that the mining activities did not require an NPDES permit and that even if they did, any alleged discharge of "dredged' or "fill" material into the South Fork required a permit under Section 404, not Section 402 of the CWA. The district court granted summary judgment to ICL and the Ninth Circuit affirmed, holding that Poe's suction dredge mining qualified as the "addition" of a "pollutant" under the CWA and required a Section 402 permit.

The CWA prohibits the discharge of a pollutant from a point source without a permit. [44] The CWA defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source."[45] "Point source" is defined to include "any discernible, confined and discrete conveyance."[46] "Pollutant" includes "dredged spoil," "solid waste," "rock," "sand," and "industrial . . . waste discharged into water."[47] Navigable waters are defined as "the waters of the United States."[48] The CWA does not define "addition" of a pollutant. Dischargers of pollutants must obtain an NPDES permit (also known as Section 402 permit) from the EPA, or a Section 404 permit from the Army Corps of Engineers (the Corps). Under Section 402, the EPA may issue NPDES permits for the discharge of any "pollutant," on the condition that the discharge comply with the CWA. Under Section 404 of the CWA, the Corps may issue permits "for the discharge of dredged or fill material."[49] When a discharge requires a Section 404 permit, it does not require a Section 402 permit.

Suction dredge mining uses a floating pump to suck water, sand, and minerals through a "sluice box," separate out heavy metals, and discharge water, sediment, and other pollutants back into the river. In 2014, 2015 and 2018, Poe suction dredge mined for forty-two days on the South Fork, a navigable water in north-central Idaho, without an NPDES permit. ICL sued Poe, alleging that he was violating the CWA by failing to obtain an NPDES permit while dredging and discharging pollutants into the South Fork. The district court granted summary judgment to ICL, concluding that Poe's suction dredge mining added pollutants—not dredged or fill

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[44] Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993).

[45] 33 U.S.C. § 1362(14).

[46] *Id.*

[47] 33 U.S.C. § 1362(6).

[48] 33 U.S.C. § 1362(7).

[49] 33 U.S.C. § 1344(a).

materials—to the South Fork and required an NPDES permit under Section 402 of the CWA. The district court enjoined Poe from suction dredge mining in the South Fork without an NPDES permit and imposed a $150,000 civil penalty. Poe appealed the judgment as to liability. The Ninth Circuit reviewed the decision *de novo*.

First, the Ninth Circuit determined that Poe's dumping of suction dredge mining waste into the South Fork was an "addition" of a pollutant under the CWA. The Court explained that since 1970, the EPA has interpreted the CWA to prohibit discharges from mining sluice boxes unless done in compliance with an NPDES permit. In 1988, the EPA adopted industry-wide regulations setting effluent limitations for NPDES permits for gold mining from floating dredges. The Ninth Circuit rejected challenges to these regulations and determined that the resuspension of streambed materials may constitute the "addition" of a pollutant, ultimately deferring to EPA's interpretation.[50] Poe argued that his mining activities did not constitute an "addition" of a pollutant, because they merely transferred water within a single waterbody. The Ninth Circuit disagreed, explaining that Poe excavated and then processed rocks, sand and silt, ran them through the sluice box, and then discarded the waste material into the water. These activities added a plume of wastewater to the South Fork, suspending materials that were previously deposited into the riverbed. Therefore, the Court held that Poe's mining activities constituted an "addition" into the South Fork under the CWA.

Next, the Court held that the discharged material from suction dredge mining is a pollutant and requires an NPDES permit. Poe argued that the waste discharged from his mining operation constituted "dredged" or "fill material" under Section 404, over which the Corps has exclusive permitting authority. The Court first looked to the plain language of the CWA but found the language ambiguous. Turning to the agencies' implementing regulations, the Court highlighted a 1986 memorandum of agreement between EPA and the Corps that described "placer mining wastes" as the type of "pollutant" subject to Section 402, not Section 404.[51] In addition, a 1990 Regulatory Guidance Letter issued by the Corps stated that "dredged materials," processed to remove desired elements, are no longer "dredged materials" under Section 404 but are instead "pollutants" under Section 402.[52] The Court therefore deferred to the agencies' interpretation of the CWA and their implementing regulations and held that the processed material discharged from Poe's mining operation was a "pollutant" regulated by Section 402, not Section 404, of the CWA.

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment to ICL, holding that Poe's suction dredge mining

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[50] Rybachek v. EPA, 904 F.2d 1276 (9th Cir. 1990).

[51] Memorandum of Agreement Concerning Regulation of Discharge of Solid Waste Under the Clean Water Act, 51 Fed. Reg. 8871, 8872 (March 14, 1986).

[52] U.S. Army Corps of Engineers, *Regulation of Waste Disposal from In-Stream Place Mining*, Regulatory Guidance Letter 88-10 (July 28, 1990).

activities constituted the "addition of a pollutant" and were therefore regulated under Section 402 of the CWA.

2. City & County of San Francisco v. U.S. Environmental Protection Agency, 75 F.4th 1074 (9th Cir. 2023).

The City and County of San Francisco (San Francisco) petitioned the Ninth Circuit for review of a U.S. Environmental Protection Agency (EPA) order denying review of its National Pollutant Discharge Elimination System[53] (NPDES) permit for its Oceanside combined sewer system and wastewater treatment facility. San Francisco challenged two general narrative prohibitions and a long-term pollution control plan (LTCP) update requirement in the permit as inconsistent with EPA's authority under the Clean Water Act (CWA). EPA's Environmental Appeals Board (EAB) denied San Francisco's petition for review. The Ninth Circuit affirmed, holding that the CWA and its implementing regulations authorized the EPA to impose the narrative prohibitions and LTCP update requirements, and that EPA's decision was rationally connected to evidence in the administrative record.

Combined sewer systems convey both sewage and storm water to a treatment plant through a single set of pipes. Combined sewer overflows (CSOs) occur during heavy precipitation when water in the system exceeds the capacity of the pipes or the treatment plant, leading to the discharge of pollutants into surface waters.[54] Under the CWA, discharges of pollutants from "point sources" into the navigable waters of the United States require NPDES permits. Before such a permit can be issued, federal and state authorities must establish that the discharge will satisfy both water quality standards (WQS) and effluent limitations. WQS specify a body of water's designated uses and water quality criteria (benchmarks to protect such uses). Effluent limitations are typically expressed numerically, as the maximum mass of pollutants which any point source may discharge. Water quality-based effluent limitations (WQBELs) establish more stringent discharge requirements when necessary to meet applicable WQS. NPDES permits base their specific effluent limitations on state-defined WQS, and EPA is authorized under the CWA to review state-defined WQS and approve or disapprove them. If numeric limitations are not feasible, agencies may impose operational requirements or prohibitions in their place.

In 1994, EPA issued the CSO Control Policy (Policy), which prohibited all dry-weather CSOs and which required municipalities with combined sewer systems to implement "Nine Minimum Controls" and develop and implement an LTCP.[55] The Policy creates a two-phase permitting process for municipalities with combined sewer systems. In Phase I, the municipality must develop and implement the Nine Minimum Controls and develop an LTCP. Phase II permits apply to

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[53] 33 U.S.C. §§ 1251–1387.

[54] Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18688, 18689 (Apr. 19, 1994) [hereinafter *CSO Control Policy*].

[55] *CSO Control Policy*, 59 Fed. Reg. 18688–89 (Apr. 19, 1994) (codified at 33 U.S.C. § 1342(q)(1)).

implementing CSO controls, LTCPs and post-construction monitoring. Phase II permits require the municipality to engage in ongoing reassessment of CSOs to sensitive areas based on new and improved techniques "to eliminate or relocate overflows," or changing economic circumstances. Phase II permits also require a "reopener clause authorizing the NPDES authority to reopen and modify the permit upon determination that the CSO controls fail to meet WQS or protect designated uses." In the event of such a determination, permittees may be required to submit a revised LTCP containing "additional controls" that will meet WQS. Cities such as San Francisco, which had CSO controls prior to the 1994 adoption of the Policy, are exempt from the Policy's initial "planning and construction provisions" but not from the operational "post-construction monitoring" provisions.

In 1972, the California State Water Board adopted the *Water Quality Control Plan for Ocean Waters of California* (Ocean Plan) which established the WQS and effluent limitations within San Francisco's jurisdiction to protect "beneficial uses" of the Pacific Ocean. In 1979, San Francisco was granted a limited exception from compliance with the Ocean Plan during wet weather on the condition that the Regional Water Board be permitted to modify the exception upon finding that "beneficial uses" have been affected. In 1997, San Francisco was issued its first NPDES permit for Oceanside, which exempted it from the Policy's "planning and construction requirements" because of the "substantially complete" nature of its construction projects to control CSOs.

After receiving reports that San Francisco had failed to notify the Regional Water Board about several incidents involving "raw sewage mixed with stormwater [] overflowing . . . into streets, sidewalks, residences and businesses," EPA requested more information from San Francisco regarding its CSOs. In September 2018, the Regional Water Board found that San Francisco's LTCP did not satisfy the minimum required elements under its permit or the Policy. In October 2018, EPA and the Board shared a draft permit with San Francisco that contained the narrative prohibitions and an "LTCP Update" provision. In April 2019, EPA issued a memorandum detailing the legal and factual bases for requiring San Francisco to update its LTCP. The EPA stated that the LTCP Update was necessary due to numerous changes to San Francisco's combined sewer system, including the city's capital upgrades and operational problems. San Francisco submitted comments disputing the EPA's authority to impose these requirements in their Oceanside permit. EPA and the Board responded that the narrative prohibitions were lawful under the CWA and that most "individual NPDES permits since at least 1993" included a nearly identical provision. The agencies included factual findings to support the inclusion of the LTCP Update requirement.

In December 2019, EPA and the Regional Water Board reissued the Oceanside NPDES permit. The final permit included numeric effluent limitations for dry-and wet-weather discharges and two general narrative prohibitions forbidding discharges that "cause or contribute to a violation

of any applicable water quality standard," or "create pollution, contamination or nuisance." The final permit also included a requirement that San Francisco update its LTCP, outlining five major tasks that the city must undertake to control CSOs. After EPA approved the final permit, San Francisco filed a petition for review with the EAB, challenging the narrative prohibitions and the LTCP Update requirement as contrary to the CWA, its implementing regulations, and the evidentiary record. The EAB denied San Francisco's petition in December 2020, and EPA issued its Notice of Final Permit Decision later that month. The Ninth Circuit reviewed the EAB decision under the Administrative Procedure Act (APA) to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

First, the Court held that the inclusion of the general narrative prohibitions in the Oceanside NPDES permit was consistent with EPA's authority under the CWA. San Francisco argued that the provisions were contrary to EPA's obligation under the CWA to clearly specify pollutant limits or operational requirements to achieve compliance with any applicable WQS. The Court explained how under the CWA and CSO Control Policy, permitting agencies are *required* to include narrative limitations on discharges when necessary to satisfy applicable state WQS. Here, the Court held that the two narrative prohibitions included in the Oceanside NPDES permit were consistent with the CWA and the Policy because they simply required that San Francisco's discharges comply with applicable state WQS. It explained that these narrative provisions "operate as a backstop" to the numeric and narrative WQBEL provisions in the event that the technological and water-quality based effluent limitations fail to achieve compliance.

The Ninth Circuit also held that EPA did not abuse its discretion or act contrary to law in issuing the general narrative prohibitions. The Court addressed San Francisco's argument that the EPA failed to conform to procedures for setting WQBELs and that EPA was required to "conduct a reasonable potential analysis" prior to setting any general narrative prohibitions. It found that the governing statutory provision requires permitting authorities to impose limitations "necessary" to meet WQS but does not restrict the agency to a pollutant-by-pollutant analysis. The Court concluded by holding that EPA's decision to include the narrative prohibitions in the Oceanside permit was rationally supported by evidence in the record. EPA responded to San Francisco's comments on the permit draft with detailed factual findings describing the negative impacts of CSOs on San Francisco's water quality. Therefore, the Ninth Circuit held that EPA did not act arbitrarily or capriciously by including the two narrative prohibitions in the final Oceanside permit.

Next, the Ninth Circuit addressed San Francisco's argument that the LTCP requirement was unlawful because EPA did not make a finding of noncompliance. The Court disagreed, holding that the text of the standard Phase II provisions did not condition San Francisco's

reassessment of their CSO control program on a finding of noncompliance by permitting authorities. It explained that the Policy provides EPA with broad authority to reassess, modify and revise NPDES permitting requirements for programs that were initially exempt from Phase I planning and construction requirements. The Court also held that EPA's determination that the Oceanside system needed an updated LTCP was rationally supported by evidence on the record. The age of the LTCP alone supported EPA's conclusions, as did the Board's finding that San Francisco's current LTCP was inadequate under the CWA. The Court also noted that the 1979 Ocean Plan Exception was conditioned on active efforts by San Francisco to protect water quality while considering CSOs changing affects to beneficial uses and demonstrated adverse impacts.

Finally, the Court addressed San Francisco's challenge to an LTCP Update Task requiring it to reevaluate alternatives for certain CSO discharge points within close proximity of "sensitive areas." The Court held that the Policy provides NPDES permitting authorities with discretion to order municipalities that were initially exempted from planning and construction requirements to periodically reassess CSOs to sensitive areas. San Francisco argued that this provision is unlawful because the EPA can only require it to assess alternatives intended to "eliminate or relocate" CSOs, rather than "reduc[e] the[ir] magnitude and frequency." The Court acknowledged that the Policy allows EPA to require a less expensive and potentially more effective measure and noted that efforts to reduce the "magnitude and frequency" of CSOs are likely to be less costly than alternatives aimed at relocating or eliminating them. Therefore, the Ninth Circuit upheld EPA's inclusion of the LTCP Update requirement in the 2019 Oceanside NPDES permit as lawful and rationally supported by evidence in the record.

In sum, the Ninth Circuit denied San Francisco's petition for review, affirming EPA's authority under the CWA to include the challenged provisions, and holding that EPA's decisions were rationally connected to evidence on the record.

IV. ENDANGERED SPECIES ACT AND ANIMAL LAW

1. Center for Biological Diversity v. United States Fish & Wildlife Service, 67 F.4th 1027 (9th Cir. 2023).

An environmental non-profit organization, the Center for Biological Diversity (the Center), brought an action alleging that the United States Fish and Wildlife Service (FWS) violated the Administrative Procedure Act (APA) in approving a proposed mining project (the Project). The mining company, Rosemont Copper Company (Rosemont) intervened and filed crossclaims against the FWS, arguing that their critical-habitat designations violated the APA and the Endangered Species Act (ESA). The United States District Court for the District of Arizona granted FWS's and the Center's motions for summary judgment, and Rosemont appealed.

The Ninth Circuit reviewed the claims *de novo* to determine whether the FWS's challenged actions were arbitrary and capricious. The Court affirmed the district court's vacatur of the FWS's designation of the challenged area as occupied critical habitat and reversed the court's granting of summary judgment to the FWS regarding its designation of that same area as unoccupied critical habitat. The Ninth Circuit held that FWS's decision to designate the land in question as occupied was arbitrary and capricious because it went against Congress's intent; it held that the designation of the same land as unoccupied critical habitat was arbitrary and capricious because the FWS failed to provide a "reasoned evaluation of the relevant factors," and its designation was "without substantial basis in fact."

The primary issue in this case is the ESA's critical habitat designations for jaguar populations in the United States. Protections for threatened and endangered species are governed by the ESA. The ESA directs the Secretary of the Interior (the Secretary) to determine whether any species meets the criteria to be federally listed as "endangered" or "threatened." Those species are then listed in the Federal Register under the determined status. Jaguar populations in the United States have dwindled significantly, leading to debate over which protections are appropriate for both the species and their habitat.

At the time a species is listed, the Secretary must designate any habitat of the species considered to be "critical." The standard for designating critical habitat is whether it is "essential" to the "conservation of the species." There are two categories of designated critical habitat: occupied and unoccupied. Occupied habitat requires that the species be present in the area at the time the species is listed and must have the "physical or biological features essential to the conservation of the species and which may require special management considerations or protection." Unoccupied habitat does not require that the species be present at the time of listing, but only is designated if the Secretary determines "that such areas are essential for the conservation

of the species."[56] When designating habitat, the FWS establishes "core areas" with "persistent verified records" of species occurrence over time and recent evidence of reproduction. Additionally, the FWS establishes "secondary areas" that contain species habitat with historical and/or recent records of presence, but with little to no recent records of reproduction. Sometimes secondary areas occur between core areas and serve as vital transit areas where individuals can move and eventually breed.

There are over 700,000 acres of designated critical habitat in Arizona and New Mexico for jaguar; the habitat is divided into six units, four located in Arizona (Units 1–4), one on the Arizona/New Mexico border (Unit 5), and one located in New Mexico (Unit 6). There are also several subunits within those units. The challenged units, Unit 3 (an "occupied" area) and Subunit 4b ("unoccupied"), are in a designated secondary area that extends into Arizona and New Mexico but does not connect to core areas. Rosemont's proposed copper mine is in the northern Santa Rita Mountains in Pima County, Arizona. When Rosemont consulted with the FWS regarding permits in compliance with the statute, the agency issued Biological Opinions in 2013 and 2016 concluding the Project was not likely to destroy or adversely modify the jaguar's critical habitat.

In September 2017, the Center sued the FWS, alleging that its 2016 Biological Opinion violated the APA by approving the Project. Rosemont intervened as a defendant and cross-claimed that the FWS violated the ESA and the APA by designating Unit 3 and Subunit 4b as designated critical jaguar habitat. The parties cross-moved for summary judgment. Rosemont argued that the FWS erred in determining Unit 3 as *occupied*, to which the district court agreed. However, the district court found that the FWS properly designated both areas as *unoccupied* habitat and granted FWS and the Center's motions for summary judgment and denied Rosemont's motion. Additionally, it granted summary judgment to the Center on its claim that FWS's 2016 Biological Opinion improperly used a heightened standard in their determination of the impact of the Project. FWS then denied a petition brought by Rosemont to exclude their mine proposal from its critical-habitat designations, finding that the petition lacked substantial scientific or commercial information to support the claim that the units are not "essential for the conservation of the species." The Ninth Circuit reviewed the district court's summary judgment rulings *de novo* to determine whether the FWS's challenged actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The ESA does not define "essential," so the Ninth Circuit began by reviewing the plain meaning and how the term is bolstered by surrounding statutory text. The Court determined that ESA unambiguously establishes "essential" to mean more than merely beneficial but rather that without the designation, the species cannot be

[56] 16 U.S.C. §1532(5)(A)(ii).

brought to a point where the measures are no longer necessary. Next, it considered relevant case law, citing *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, where the Supreme Court construed the definition of critical habitat to mean only areas that are "indispensable" to the conservation of the endangered species.[57] The FWS and the Center argued that both Units are essential for jaguar conservation because "protecting these areas through the ESA's consultation process will promote jaguar recovery." The parties also argued that "essential" is a broad standard used in reference to a broad concept of conservation, while Rosemont argued that the conservation interpretation is "watered-down" and that it contravenes the plain meaning of the ESA. The Ninth Circuit was not persuaded by the FWS and the Center's arguments, finding that the argument focuses on limiting words "critical," "essential," and "necessary," and does not give effect to all terms of the statute.

Next, the Ninth Circuit reviewed the district court's holding that FWS's designation of Unit 3 as "occupied" status. The district court held that the designation was arbitrary and capricious because the FWS relied on evidence of occupancy outside the timeframe of listing.[58] The species was listed in 1972 and has a ten-year lifespan, and the FWS designated Unit 3 as "occupied" based on a sighting in 1965 of a single male jaguar in the Patagonia mountains, as well as photographs from 2012 and 2013. The Ninth Circuit found it reasonable to base the designation on the 1965 sighting because it occurred within the ten-year timeframe of the species listing; however, they found it unreasonable to consider the 2012 and 2013 photographs because they fall well outside of the timeframe in which the species was listed and were taken in a different mountain range than that of the proposed mine. The Ninth Circuit found that even if the 1965 sighting was sufficient evidence to classify the land as occupied habitat, it would not support the finding that the jaguar used the challenged area "with sufficient regularity" such that it "is likely to be present during any reasonable span of time." FWS attempted to justify its decision by 1) noting the difficulty of detecting jaguars in the 1970s, and 2) the presence of "primary constituent elements" for jaguars in Unit 3,[59] but the Court found this evidence to be insufficient, noting that without further compelling evidence from the relevant period, most of the decision rested on speculation. As such, the Ninth Circuit affirmed the district court's conclusion that the FWS's challenged designation was arbitrary and capricious.

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[57] 139 S. Ct. 361, 368–69 (2018).

[58] Agency action is arbitrary and capricious when the agency "relies on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, [or] offer[s] an explanation for its decision that runs counter to the evidence before the agency."

[59] PCEs are "those specific elements of the physical or biological features that provide for a species' life history processes and are essential to the conservation of the species" *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Jaguar*, 79 Fed. 12587.

Next, the Ninth Circuit turned to the FWS's designation of Unit 3 and Subunit 4b as *unoccupied* critical habitat. Rosemont argued that the FWS failed to follow its regulation, 50 C.F.R. § 424.12, which provides that the Secretary shall designate critical habitat outside the geographical area occupied by a species *only* when a designation limited to its present range would be inadequate to ensure the conservation of the species.[60] Rosemont argued the regulation imposes a sequenced two-step analysis: 1) the FWS must first determine that any *occupied* critical habitat is inadequate to conserve the jaguar, and 2) the FWS must determine that designation of *unoccupied* critical habitat is essential for conservation of the species. The Court looked at the history of the regulation, specifically focusing on amendments made in 2016 which removed the original language: unoccupied critical habitat designations were allowed *only* when occupied critical habitat "would be inadequate" The language was restored in 2019 because the FWS wanted to retain the sequenced approach to considering the "inadequacy" of occupied habitat before turning to the designation of "essential" unoccupied designations.

Ultimately, the Ninth Circuit interpreted the regulation to mean that if occupied critical habitat is *adequate* to conserve a protected species, then unoccupied areas necessarily are not *essential* to conservation. However, if occupied critical habitat is inadequate for conservation, then designation of unoccupied critical habitat may be essential. When the FWS made their designation of Unit 3 and Subunit 4b, it did not first address whether designated *occupied* critical habitat was adequate to address conservation goals, so its designation of *unoccupied* habitat as essential was insufficient. For these reasons, the Ninth Circuit determined that the agency's designation of unoccupied habitat was arbitrary and capricious.

In sum, the Ninth Circuit found that FWS's designation of the challenged areas must be vacated. The Court held that the designation of Unit 3 as *occupied* habitat was not supported by sufficient evidence of occupancy and affirmed the district court's finding that the FWS's decision was arbitrary and capricious. Further, the Court held that the FWS's designation of Unit 3 and Subunit 4b as *unoccupied* critical habitat was arbitrary and capricious because the FWS failed to provide a "reasoned evaluation of the relevant factors," and its designation "is without substantial basis in fact." Because the Service did not follow the sequenced approach outlined in their own regulation, they failed to provide a "rational connection between the facts found and the choice made" or to "articulate[] a satisfactory explanation" to justify its designations of Unit 3 and Subunit 4b as unoccupied critical habitat.

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[60] 50 C.F.R. §424.12(e); "(e) The Secretary may designate critical habitat for those species listed as threatened or endangered but for which no critical habitat has been previously designated. For species listed prior to November 10, 1978, the designation of critical habitat is at the discretion of the Secretary." (2012)

2. Center for Biological Diversity v. Haaland, 58 F.4th 412 (9th Cir. 2023).

An environmental non-profit organization, the Center for Biological Diversity (the Center), brought an action under the Endangered Species Act (ESA) and the Administrative Procedure Act (APA) for judicial review of the decision of the United States Fish and Wildlife Service (the Service). The Center challenged the Service's decision to deny a petition to amend the grizzly bear's recovery plan due to its status as a threatened species under the ESA.[61] The district court entered summary judgment against the Center, finding that the Plan was not a "rule" under the APA and was not subject to a petition for amendment.[62] The Center appealed. The Ninth Circuit, reviewing under the arbitrary and capricious standard, affirmed the district court's grant of summary judgment in favor of the Service.

The Grizzly Bear Recovery Plan (the Plan) was issued by the Service to identify actions necessary for the conservation and recovery of the species, which has been listed as threatened since 1975.[63] The Plan identified "recovery zones" and issued several plan "supplements" that provided habitat-based recovery criteria for these zones. The Plan and the Supplements contain criteria that the Service believed would ultimately result in the grizzly bear's removal from the list of threatened species.

The Center petitioned the Service in June 2014, asking that they "further evaluate the recovery potential of all these areas" in a revised version of its 1993 recovery plan.[64] The petition proposed areas that would support grizzly bear populations and urged the Service to further evaluate the recovery potential of these areas in a revised recovery plan. The Center's action claimed that the Plan failed to provide for the conservation and survival of the grizzly bear. It further claimed that the Service violated its affirmative duty to conserve the grizzly bear by not pursuing additional recovery areas. Lastly, the Center claimed the Service unreasonably denied the Center's petition to update the Plan.

The ESA requires the Secretary to develop and implement recovery plans for the conservation and survival of endangered and threatened species.[65] The Secretary must keep a list of endangered and threatened species and review those designations at least once every five years, but it does not require the Secretary to update recovery plans. The decision

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[61] Defendants included Debra Anne Haaland in her official capacity as Secretary of the U.S. Department of Interior; and Martha Williams in her official capacity as Director of the U.S. Fish and Wildlife Service. The State of Wyoming; the State of Idaho; Wyoming Stock Growers Association; Wyoming Farm Bureau Federation; Utah Farm Bureau Federation joined as Intervenor-Defendants.

[62] 5 U.S.C. §533(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.") The district court granted summary judgment against the Center because it found that the Plan was not a "rule" subject to a petition under section 533(e) of the APA.

[63] The plan was first established in 1982, and again revised in 1993.

[64] *Haaland*, 58 F.4th at 416.

[65] 16 U.S.C. §1533(a)(1).

for delisting is based on the best scientific and commercial data available.[66] When delisting, the agency must (1) provide notice of a proposed delisting regulation and the opportunity to comment; and (2) publish a final regulation to delist.[67]

The Ninth Circuit first addressed the issue of whether the district court had jurisdiction to review this action under the APA. The APA grants jurisdiction to review final agency actions or where statutorily allowed. The Ninth Circuit applied a two-prong test established by the Supreme Court in *Bennett v. Spear* to determine if an agency action is "final."[68] The first *Bennett* criterion is that if the action is one that is not tentative, but one that marks the consummation of the agency's decision-making process. The second is if the action is one by which rights or obligations have been determined, or from which legal consequences will flow.[69]

The Ninth Circuit applied the first *Bennett* criterion by looking first at whether the action amounted to a definitive statement of the agency's position. Under the ESA, a recovery plan should be developed using the services of appropriate public and private agencies with opportunity for public review and comment. The Ninth Circuit cited precedent that suggests that the issuance of a recovery plan is not a "tentative or interlocutory" action, but rather the agency's "arrival at a definitive position."[70] However, the Court ultimately decided that, because the Service repeatedly issued Plan Supplements, it had not treated the Plan as a last step. On this prong, the Ninth Circuit concluded that the Service's denial of the Center's petition was not final agency action because recovery plans are non-binding.

The Ninth Circuit next turned to the second *Bennett* criteria: whether rights or obligations have been determined, or if legal consequences will flow from the decision. The Court highlighted that the Service does not initiate enforcement actions based on recovery plans, nor do the plans impose any obligation on anyone. Here, the Center relied on a D.C. Circuit opinion that emphasized that the ESA requires the Secretary to implement a recovery plan that the agency is obligated to work toward.[71] However, the Ninth Circuit relied on a portion of that opinion that stated a recovery plan was not a binding document, thus it concluded that a decision not to grant a petition to modify a plan is not a reviewable final agency action.

In sum, the Ninth Circuit held that the district court properly granted summary judgment against the Center. The Service's decision not to amend the Grizzly Bear Recovery Plan, like the adoption of the Plan itself, was not an action "from which legal consequences will flow."

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[66] *Id.* §1533(b)(1)(A).
[67] *Id.* §§ 1533(b)(5)–(6).
[68] Bennett v. Spear, 520 U.S. 154 (1997).
[69] *Id.* at 177–78.
[70] S.F. Herring Ass'n v. Dep't of the Interior, 946 F.3d 564, 578–79 (9th Cir. 2019).
[71] Friends of Blackwater v. Salazar, 691 F.3d 428 (D.C. Cir. 2012).

The Center's suit did not challenge a final agency action, and the district court was not authorized to review the denial of the petition under the APA.

3. WildEarth Guardians v. United States Forest Service, 70 F.4th 1212 (9th Cir. 2023).

WildEarth Guardians (WildEarth) brought an action alleging that the United States Forest Service (USFS) violated sections of the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). WildEarth alleged that USFS violated these statutes by failing to consider modifying grazing management to mitigate recurring wolf-livestock conflicts that result in the lethal removal of wolves from the Colville National Forest. On cross-motions for summary judgment, the United States District Court for the Eastern District of Washington granted summary judgment to USFS, holding that WildEarth lacked Article III standing. WildEarth appealed. The Ninth Circuit affirmed.

The Colville National Forest covers portions of Ferry, Stevens, and Pend Oreille Counties in Eastern Washington. Although gray wolves in Eastern Washington are no longer an endangered species under federal law, the State continues to designate them as endangered. Washington law generally prohibits killing endangered species, but it permits the State's Department of Fish and Wildlife (Department) to authorize the removal or killing of wildlife that is destroying or injuring property, or when it is necessary for wildlife management or research. Thus, the Department adopted a plan to promote recovery of gray wolves, and the plan described circumstances in which the Department may kill wolves (referred to as "lethal removal") to stop repeated depredations on livestock. The Department evaluates the need for lethal removal on a case-specific basis. The USFS controls uses of forest land, including for livestock grazing, through a forest plan, and it implements the plan by issuing permits to livestock owners that authorize grazing in specified areas.

In 2019, the USFS revised its plan for the Colville National Forest. WildEarth sued USFS, alleging that USFS violated sections of both NEPA and NFMA by failing to consider modifying grazing management to mitigate recurring wolf-livestock conflicts that result in the lethal removal of wolves from the Colville National Forest. Specifically, WildEarth alleged that USFS's forest plan related to grazing decisions would lead to an increase in the number of wolf attacks on livestock, which in turn would cause the Department to kill more wolves.

On cross-motions for summary judgment, the district court granted summary judgment to USFS, holding that WildEarth lacked Article III standing. To establish Article III standing, a plaintiff must show (1) it has suffered an "injury in fact" that is concrete and particularized and actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. In this case, the district court reasoned that WildEarth had not shown that a favorable decision would redress its injury because the lethal removal of gray wolves is the prerogative of the Department, here a third party not before the Court. Hearing this case for the first time, the Ninth Circuit reviewed

de novo the grant for summary judgment due to lack of Article III standing.

The Ninth Circuit first held that WildEarth's claimed injury arises from the actions of a third party that is two steps removed from the USFS. The Court reasoned that USFS does not regulate lethal removals of gray wolves, which is the alleged direct cause of WildEarth's injury. WildEarth argued that many of its claims involve procedural rights, such as those created by NEPA, where the Ninth Circuit has held in many cases that a plaintiff alleging a procedural injury only has to meet relaxed requirements of causation and redressability. However, the Ninth Circuit clarified that the causation and redressability requirements are relaxed for procedural claims only in the sense that a plaintiff need not establish the likelihood that the agency would render a different decision after going through the proper procedural steps. Furthermore, the Ninth Circuit explained that a plaintiff must still show a likelihood that the challenged action, if ultimately taken, would threaten the plaintiff's interests.

Second, the Ninth Circuit stated that where an essential element of standing depends on the potentially harmful actions of a third party in response to a government action or inaction, it becomes the plaintiff's burden to prove that the third party will actually engage in said harmful actions based on the government's action or inaction. More specifically, if USFS had clear regulatory authority over the third party (*i.e.*, the Department) which more directly caused WildEarth's injury, or if USFS was an integral participant in the Department's allegedly harmful action, WildEarth may have a better claim for standing. However, WildEarth had not shown that the USFS exerts such control over the Department's conduct. Additionally, USFS does not participate in lethal removals of gray wolves, and the State Department defines its own lethal removal criteria without any federal government input or intervention. WildEarth cited various cases in which plaintiffs established standing to challenge government action even though the injury was inflicted by a third party, but the Ninth Circuit pointed out that in many of those cases, the government defendant actually regulated the third party's harmful conduct, which was not the case here.

In sum, the Ninth Circuit held that because USFS does not regulate or participate in lethal removal of gray wolves, the agency did not have a determinative or coercive effect on the Department's harmful conduct. Thus, because WildEarth's alleged injury depended on the unfettered choices made by an independent actor not before the court, WildEarth lacked standing to assert its claims against USFS.

V. HAZARDOUS WASTE

1. *Center for Biological Diversity v. United States Forest Service, 80 F.4th 943 (9th Cir. 2023).*

The Center for Biological Diversity (the Center), along with other environmental groups, brought an action for declaratory and injunctive relief against the United States Forest Service (USFS) for allegedly violating the Resource Conservation and Recovery Act (RCRA). The Center claims that USFS failed to regulate the use of lead ammunition used by hunters in the Kaibab National Forest, thereby endangering California condors and other scavenger animals that ingest spent ammunition from leftover carcasses. The United States District Court for the District of Arizona ultimately granted USFS's motion to dismiss for failure to state a claim and denied the Center's motion to amend their complaint to add RCRA claims against Arizona officials. The Center appealed, and the Ninth Circuit affirmed the district court's holding.

The Kaibab National Forest (Kaibab) consists of about 1.6 million acres of public land that borders the Grand Canyon. It is home to a variety of wildlife and is a popular hunting destination, particularly for big game. Several hunters in the area use lead ammunition. However, ammunition is often left behind by hunters when an animal is either (1) shot but not retrieved because the wounded animal evades the hunter and dies elsewhere or (2) when hunters field-dress a kill (*i.e.*, take only the meat and leave the internal organs and other remains behind). Lead is a potent toxic to animals, and ingestion can cause severe poisoning and even death. This risk creates an issue for several scavenger birds, such as the endangered California condor, that feed on the carcasses, which often contain lead fragments. A number of cases relating to lead poisoning in bird species caused by spent ammunition have already been documented on Forest Service land in Arizona.

The USFS is authorized by Congress to regulate activities on national forest lands. However, the agency does not require a permit for recreational hunting on National Forest System lands, and it rarely exercises its authority to preempt state laws related to hunting and fishing. Thus, in regard to the Kaibab, Arizona is the primary regulator of hunting and fishing activities and bears most of the responsibility for managing these activities. However, Arizona's permits allow hunters to use lead ammunition.

In 2012, the Center first filed this suit for declaratory and injunctive relief and alleged that USFS violated RCRA. RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste in the United States. RCRA contains a citizen-suit provision that provides a private cause of action against the U.S. or any governmental agency that has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste. Specifically, the Center claimed

that as a federal agency, USFS was required under RCRA to properly handle and dispose of any solid or hazardous waste. However, USFS failed to regulate the use of lead ammunition by hunters in the Kaibab, and thus violated RCRA because it contributed or is contributing to the past or present disposal of solid or hazardous waste. In 2013, the district court granted USFS's motion to dismiss for lack of standing, and the Ninth Circuit reversed, finding that the Center satisfied Article III standing requirements and remanded to the district court to decide USFS's motion to dismiss for failure to state a claim. The district court then dismissed the case again, claiming that the case was an impermissible request for an advisory opinion and concluded that the case did not present a real and substantial controversy. Again, the Ninth Circuit reversed and remanded. On remand for the second time, the district court granted USFS's motion to dismiss, holding that the Center failed to establish that USFS is a "contributor" under RCRA. Additionally, the district court denied Plaintiff's motion to amend its complaint by adding Arizona officials who allegedly violated RCRA. Hearing the case for the third time, the Ninth Circuit reviewed the district court's dismissal for failure to state a claim *de novo*. Additionally, the Ninth Circuit reviewed the district court's denial of the Center's motion to amend for abuse of discretion and the request for the case to be reassigned to a different district court judge.

The Ninth Circuit first held that the USFS's failure to regulate either through direct action or permitting does not make it liable under RCRA. Plaintiff argued that USFS was a "contributor" by virtue of its general regulatory authority over the Kaibab, the control it had by permitting Special Use permits for outfitters and guides, and its status as Kaibab's landowner. However, the Ninth Circuit determined that based on the plain meaning of the word and relevant case law, to be a "contributor" subject to RCRA liability, the defendant must have played an active role in contributing to the improper disposal of hazardous materials. Additionally, the Ninth Circuit pointed out that Congress had not directed USFS to regulate hunters' use of lead ammunition on federal lands and that USFS's failure to regulate the disposal of hazardous waste does not fall under RCRA's meaning of "contributor." Although USFS had general authority to regulate and issue Special Permits, its decision to ultimately refrain from "actively" regulating the use of lead ammunition did not make it liable under RCRA. Furthermore, the Ninth Circuit determined that property ownership alone is insufficient to establish RCRA liability, and that USFS's decision to refrain from regulating lead ammunition is merely passive conduct that does not actively contribute to the deterioration of the land or wildlife that inhabit it.

Second, the Ninth Circuit held that the district court did not abuse its discretion by denying Plaintiff's motion to amend its complaint. The Center argued that, because Arizona officials control the use of lead ammunition in the Kaibab, claims that Arizona officials also violated RCRA should be added to the suit. However, the Ninth Circuit disagreed

because although there is an exception that allows private parties to bring suit against state officials, this is only allowed in instances where state officials have a fairly direct connection to an ongoing violation of federal law. Here, the Center's proposed amendment failed to allege any violation of federal law for the same reasons the Center failed to allege that USFS violated RCRA. Finally, the Ninth Circuit held because the district court did not err in dismissing the Center's complaints and its motion to amend, the request for reassignment was moot.

In sum, the Ninth Circuit affirmed the district court's decision to dismiss the Center's complaint that USFS violated RCRA because the Center failed to state a valid claim. Additionally, the Court held that the district court properly denied the Center's motion to amend the relevant complaint because it would be improper for the Center to add RCRA claims against Arizona officials if there was no ongoing violation of federal law. Finally, the Ninth Circuit rendered the Center's request for reassignment to another district court judge moot.

2. GP Vincent II v. Estate of Beard, 68 F.4th 508 (9th Cir. 2023).

The current owner of an environmentally contaminated property (the Property) brought an action against the prior owners and tenant of the Property for cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[72] contribution under the California Land Reuse and Revitalization Act (CLRRA), and declaratory relief for future response costs. The prior owners and tenant moved to dismiss for failure to state a claim. The United States District Court for the Northern District of California granted the motion on the basis of claim preclusion. The Ninth Circuit reversed and remanded the case, holding that GP Vincent's claims covered costs and obligations distinct from the CERCLA claims asserted in the prior litigation.

Norma and Edgar Beard owned the Property in the 1970s and 1980s. From 1973–1981, Etch-Tek, a company run by Edgar Beard, manufactured circuit boards on the Property. As a result of Etch-Tek's manufacturing activities, the hazardous substance tetrachloroethylene (PCE) was released into the Property's soil and groundwater. In 1992, Etch-Tek relocated its facilities and Mayhew Center, LLC (Mayhew) purchased the property. Mayhew used the property for office and storage space and did not conduct activities involving PCE. In 2007, an adjacent retirement community called Walnut Creek Manor, LLC (Walnut Creek) discovered that the soil on its property was contaminated with PCE. Walnut Creek's investigations indicated that the PCE emanated from the Property, and Walnut Creek sued Mayhew in federal court, asserting CERCLA cost recovery, nuisance, trespass and negligence claims (Walnut Creek action). Walnut Creek prevailed and was awarded $350k in past damages and $1.597 million in future damages. The district court concluded that the Property was the source of the PCE found on Walnut Creek's property and held Mayhew liable for future response costs. By that time, Edgar Beard was deceased and Etch-Tek had dissolved, so Mayhew asserted CERCLA cost recovery and contribution claims against Norma Beard, seeking to hold her liable for the Walnut Creek judgment (Mayhew/Beard action). The district court consolidated the Mayhew/Beard action with the Walnut Creek action and referred both cases to a magistrate judge for a settlement conference. The parties reached a settlement (Settlement Agreement) in October 2010.

The Settlement Agreement provided Walnut Creek with $400,000 in satisfaction of the jury's award of past damages and tasked Mayhew with all cleanup responsibilities. The parties agreed to create an escrow account—funded by Norma Beard, her insurer, and Mayhew—that Mayhew could draw from pursuant to an Escrow Agreement that was attached to the Settlement Agreement. The Escrow Agreement only allowed disbursements for costs associated with remediation of the Walnut Creek property. Following the settlement, the district court

[72] 42 U.S.C. §§ 9601–9675 (2018).

entered a stipulated order dismissing the Mayhew/Beard action with prejudice and a stipulated order and injunction in the Walnut Creek action, outlining the parties' payment obligations and Mayhew's remediation obligations. The court ordered Mayhew to fulfill its cleanup obligations in accordance with the Settlement Agreement. Mayhew failed to remediate all contamination at the Walnut Creek Remediation Area by the agreed-upon November 2012 deadline, and Walnut Creek moved for sanctions and disbursement of the remaining escrow funds. The district court found Mayhew in contempt, ordered it to complete its cleanup and abatement obligations and release all remaining escrow funds to Walnut Creek. Eventually, Mayhew defaulted on its mortgage, and the Property was placed in a state court receivership.

In 2017, GP Vincent purchased the Property after entering an agreement with the Regional Water Quality Control Board, whereby GP Vincent assumed the obligation to clean up the property pursuant to the California Land Reuse and Revitalization Act (CLRRA). In 2020, GP Vincent filed the instant suit against Mayhew, Beard Estates, Etch-Tek and others asserting claims of CERCLA cost recovery, CLRRA contribution, and declaratory relief regarding future response costs. Beard Estates and Etch-Tek moved to dismiss all claims against them on the basis of claim preclusion, and the district court granted the motion. GP Vincent appealed, and the Ninth Circuit reviewed the dismissal of the complaint on claim preclusion grounds *de novo*.

Claim preclusion bars a claim from being litigated in a subsequent action if it was raised or could have been raised in a prior action.[73] Claim preclusion applies if the earlier litigation reached a final judgment on the merits, involved the same claim or cause of action as the later lawsuit, and involved the same parties or their privies.[74]

First, the Ninth Circuit explained that the Mayhew/Beard action ended in a dismissal of all claims with prejudice, which is generally considered a final judgment on the merits with preclusive effect.[75] GP Vincent argued that Mayhew breached the terms of its lending agreement by entering into a settlement and stipulating to the dismissal of its claims without the permission of its lender. The court held that the alleged breach had no bearing on the finality of the judgment in the Mayhew/Beard action.

Next, the Court considered whether the identity of the claims asserted by GP Vincent were the same as the claims asserted in the Mayhew/Beard action. CERCLA provides two mechanisms for private parties to seek reimbursement for costs associated with the remediation of hazardous waste. A party uses a CERCLA § 107(a) cost-recovery action to get reimbursed for its own environmental cleanup costs, and uses a CERCLA § 113(f) contribution action to get reimbursed for paying more

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[73] Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001).

[74] Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005).

[75] Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005).

than its fair share of cleanup costs to a third party.[76] The Ninth Circuit explained that the Mayhew/Beard action resolved Norma Beard's liability for § 113 contribution costs towards Mayhew's remediation of Walnut Creek's property, but the judgment had not involved costs relating to the remediation of GP Vincent's Property where the PCE was discharged. An issue of material fact existed regarding whether the judgment in the Walnut Creek action resolved Beard's § 107 liability to GP Vincent for its costs associated with cleaning up its own property. The Ninth Circuit also explained that the Settlement Agreement addressed CERCLA liability for the Walnut Creek property's remediation costs but did not address costs associated with remediating the Property at issue. In addition, the Escrow Agreement attached to the Settlement Agreement only allowed money from the escrow account to be used for remediating the Walnut Creek property. The Ninth Circuit found that the district court's release of all escrow funds to Walnut Creek after holding Mayhew in contempt supported its conclusion, holding that Mayhew's CERCLA § 113 contribution claim seeking apportionment of liability from the Walnut Creek action was distinct from GP Vincent's CERCLA § 107 cost recovery claim seeking reimbursement for its own cleanup costs.

The Court provided additional support for its narrow construction of the CERCLA claims at issue. The Court recognized that it must construe the statute so as "to effectuate its two primary goals: (1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances bear the cost of remedying the conditions they created."[77] It explained that CERCLA § 107 expressly contemplates successive cost recovery actions by permitting recovery only of those costs already incurred,[78] and that Ninth Circuit precedent has recognized the viability of successive CERCLA claims concerning separate obligations.[79]

Finally, the Ninth Circuit briefly addressed the privity element of claim preclusion. It held that the district court erred in determining on the pleadings that Norma Beard was in privity with Edgar Beard and Etch-Tek, who were not parties to the Mayhew/Beard Action. The Court explained that the determination of whether the parties were in privity is a fact-intensive inquiry requiring further evidence and analysis beyond the confines of a motion to dismiss.

In sum, the Ninth Circuit reversed the district court's dismissal of the claims, holding that the claims asserted by GP Vincent were not precluded by the judgment issued in the Mayhew/Beard action and remanded the case for further proceedings.

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[76] 42 U.S.C. § 9607(a); 42 U.S.C. § 9613(f).

[77] United States v. Sterling Centrecorp Inc., 977 F.3d 750, 756 (9th Cir. 2020).

[78] 42 U.S.C. § 9613(g)(2)(B).

[79] ASARCO, LLC v. Celanese Chem. Co., 792 F.3d 1203, 1215 (9th Cir. 2015).

VI. INDIGENOUS PEOPLES

1. *Metlakatla Indian Community. v. Dunleavy, 58 F.4th 1034 (9th Cir. 2023).*

The Metlakatlan Indian Community (Community) brought an action seeking declaratory and injunctive relief against the State of Alaska (Alaska). The Community alleged that Alaska's limited entry program for commercial fishing illegally restricted Community members' right to fish outside the reservation boundaries. The United States District Court for the District of Alaska granted Alaska's motion to dismiss for failure to state a claim, and the Community appealed. The Ninth Circuit reversed and remanded the district court's judgment.

The Community members are descendants of the Tsimshian people indigenous to the Pacific Northwest. The Tsimshian heavily relied on fish for subsistence, use in cultural practices, and trade. In 1862, the Tsimshians established a coastal community at Metlakatla, Canada and began a communal commercial fishing enterprise. In 1887, the Metlakatlans were forced off their land and established a new home on Annette Islands, located in Alaskan territory, due to its easy access to waters with abundant fish. Four years later, Congress passed the 1891 Act, which recognized the Metlakatlan Indian Community and established the Annette Islands as the Community's reservation. For years after, the Community members continued to fish where they had always fished, both in the waters immediately surrounding the reservation and in the waters miles away, sometimes 50 miles off the reservation. In 1916, U.S. President Woodrow Wilson proclaimed that the waters 3,000 feet from the shoreline (exclusive zone) of the Annette Islands were exclusively reserved for the Metlakatlan Indian Community. In 1958, however, Congress granted statehood to Alaska, and in 1972, Alaska adopted a constitutional amendment that authorized the State to limit the entry of new participants into commercial fisheries in Alaskan waters. This created issues for the Community because non-Indian commercial fishing practices in State-managed fishing areas have put a substantial strain on the Community's fishing yields. For example, the Community adopted a management strategy that had increased herring biomass in the Community's exclusive zone to more than 20,000 tons—one of the largest herring stocks in Southeast Alaska. However, when the herring leave the exclusive zone, Alaska's limited entry program restricts Community members' access to the herring.

In August 2020, the Community sued Alaska in federal district court, alleging that Alaska's limited entry program illegally restricted Community members' right to fish outside the reservation boundaries. The Community's complaint sought 1) a declaration that Congress' recognition of the Annette Islands Reserve for the Metlakatla Indian Community included the non-exclusive right to fish in waters adjacent to the Reserve and that such right has not been revoked or diminished; and

2) a permanent injunction barring the State of Alaska from asserting jurisdiction over the Community and its members, where such jurisdiction is inconsistent with the Community's reserved fishing rights and unreasonably interfered with the Community's reserved fishing rights. Alaska moved to dismiss the complaint for failure to state a claim under FRCP 12(b)(6). The district court denied the Community's request for oral argument and granted the motion to dismiss on the grounds that the Community failed to state a claim for relief because the 1891 Act did not reserve off-reservation fishing rights for the Community's members. Hearing this case for the first time, the Ninth Circuit reviewed *de novo* the dismissal for failure to state a claim and any underlying legal conclusions that the district court based its decision on. Additionally, the Ninth Circuit reviewed for abuse of discretion the district court's decision to deny permanent injunctive relief.

The Ninth Circuit first held that the 1891 Act preserved for the Community and its members an implied right to non-exclusive off-reservation fishing in the traditional fishing grounds for personal consumption, ceremonial purposes, and commercial purposes. Alaska asked the Ninth Circuit to distinguish between statutes and executive orders and contended that an implied right to fish off-reservation should not be found in the statutory text of the 1891 Act because the text was utterly silent on the matter. However, the Ninth Circuit determined that the type of legal instrument that establishes a reservation made no difference to its inquiry into a tribe's attendant resource rights because according to the Indian canon of construction, statutes that touch federal Indian law are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. Furthermore, the Ninth Circuit noted that the Indian canon required the Court to infer rights that support a reservation's purpose.

Second, Alaska argued that the Community was foreclosed from claiming an implied right to off-reservation fishing because Metlakatlans had no aboriginal claims to preserve. However, the Ninth Circuit disagreed for the same reasoning applied above. Additionally, the Ninth Circuit noted that legislative history shows that when Congress passed the 1891 Act that established the Metlakatlans' reservation, it did so with the expectation that Metlakatlans would continue to support themselves by fishing in non-exclusive off-reservation waters as they had done since time immemorial.

Third, Alaska asked the Ninth Circuit to distinguish the Community from tribes that gave up their original lands in exchange for off-reservation rights because the United States gave the Annette Islands to the Metlakatlans as a gift rather than an exchange when they were forced off their original lands. Alaska argued that because the United States gave the Annette Islands as a gift, it did not intend the 1891 Act to provide implicit off-reservation rights. However, the Ninth Circuit disagreed and determined that there was nothing in the case law that indicated that implied rights were only found in instances where there had been an

exchange. Furthermore, the Ninth Circuit noted that it would be difficult to characterize the creation of many reservations as a result of any sort of genuine exchange.

Finally, Alaska argued that the legislative history of the 1891 Act demonstrated a lack of intent to convey off-reservation fishing rights because at the time, the Senate understood that the Metlakatlans had formed a "model Christian community" and the record was absent of any fishing rights. The Ninth Circuit disagreed, however, and found Alaska's reasoning to be irrelevant to the question of whether Congress expected the Metlakatlans to support themselves through off-reservation fishing.

In sum, the Ninth Circuit held that Alaska's limited entry program for commercial fisheries violated the Metlakatlans' implied off-reservation fishing rights. As fishing was and continued to be the heartbeat of the Community, Congress's intent in the 1891 Act was to grant the Metlakatlans with off-reservation fishing rights that would satisfy present and future needs of the Community.

2. State of Alaska Department of Fish and Game v. Federal Subsistence Board, 62 F.4th 1177 (9th Cir. 2023).

The State of Alaska Department of Fish and Game (Alaska) sued the Federal Subsistence Board, along with various federal employees in their official capacities[80] (collectively FSB), in the United States District Court for the District of Alaska. Shortly after Alaska filed suit, the Organized Village of Kake (Kake) intervened as defendants. The controversy arose after the FSB made two short-term changes to hunting practices on federal public lands in Alaska. First, the FSB opened an emergency hunt for Kake, allowing the harvest of five deer and two moose (emergency hunt). Second, the FSB instituted a partial, temporary closure of public lands in game management Unit 13 to non-subsistence hunters (partial Unit 13 closure).[81] Alaska alleged that through these two short-term actions, the FSB violated the Alaska National Interest Lands Conservation Act (ANILCA) and the Administrative Procedure Act (APA).

The FSB oversees the Federal Subsistence Management Program, under the authorities of ANILCA, the Alaska Native Claims Settlement Act, and the Federal Advisory Committee Act.[82] FSB members are the regional directors of the Fish and Wildlife Service, National Park Service, Bureau of Land Management, Bureau of Indian Affairs, and Forest Service. The FSB also has three public members appointed by the Secretaries of the Interior and Agriculture.

The FSB-authorized emergency hunt was completed prior to trial in August 2022, and thus the district court found Alaska's claims for this issue moot. The district court did not find Alaska's emergency hunt claims to fit within the "capable of repetition yet evading review" exception to the mootness doctrine. The district court further found that the FSB did not violate the APA when it determined the partial Unit 13 closure was necessary for the continuation of subsistence users and public safety. Alaska timely appealed. Dismissal for mootness is reviewed *de novo*. While Alaska's appeal was pending, the partial Unit 13 closure expired, and thus the Ninth Circuit was obligated to address mootness as to the

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[80] The federal employee defendants are: David Schmid, in his official capacity as the Regional Supervisor for the United States Forest Service; Sonny Perdue, in his official capacity as the United States Secretary of Agriculture; Gene Peltola, in his official capacity as Alaska Regional Director, Bureau of Indian Affairs; Gregory Siekaniac, in his official capacity as Alaska Regional Director, United States Fish and Wildlife Service; Chad Padgett, in his official capacity as State Director for Alaska, United States Bureau of Land Management; Don Striker, in his official capacity as Alaska Regional Supervisor, National Park Service; David Bernhardt, in his official capacity as the United States Secretary of the Interior; Anthony Christianson, in his official capacity as Chair of the Federal Subsistence Board; Charlie Brower, in his official capacity as Member of the Federal Subsistence Board; Rhonda Pitka, in her official capacity as Member of the Federal Subsistence Board.

[81] 50 C.F.R. § 100.4 divides Alaska into twenty-six game management units.

[82] The FSB implements these laws through regulations found at 36 C.F.R. § 242, 50 C.F.R. § 100, and 42 C.F.R. §§ 101–6.10.

partial Unit 13 closure for the first time. The Ninth Circuit reversed the dismissal of the emergency hunt claims as moot and remanded for further proceedings. However, the Ninth Circuit vacated the district court's order regarding the partial Unit 13 closure and remanded with instructions to dismiss as moot.

Alaska challenged the district court's mootness determination only on its claim that ANILCA does not authorize the federal government to open emergency hunting seasons. Alaska argued this claim falls under the "capable of repetition yet evading review" exception to mootness. The Ninth Circuit first analyzed whether the challenged action would evade review. An issue evades review if the action "will almost certainly run its course before full litigation can be completed."[83] The emergency hunt was limited to 60 days.[84] Neither the FSB nor Kake argued that the action would not evade review. The Ninth Circuit analogized the emergency hunt to cases where it held that actions of longer duration "evade review" and found this prong satisfied.

The Ninth Circuit then turned to the other mootness exception prong of whether the action was "capable of repetition." For an action to be capable of repetition, there must be "some indication that the challenged conduct will be repeated."[85] Alaska alleged that ANILCA did not give the federal government authority to open emergency hunting seasons at all, while the FSB argued that, because the conditions of the COVID-19 pandemic had changed, there was no reasonable likelihood of another emergency hunt like the one at issue. The Ninth Circuit found the FSB's framing too narrow. The Ninth Circuit then analyzed three elements to determine whether there was a reasonable expectation of reoccurrence: 1) whether the action had happened before; 2) whether the agency had committed not to rely on the regulation at issue; 3) whether the public interest favored judicial action. The Court found that, because emergency hunts had been authorized in the past, it was plausible they would be authorized again in the future. Next, because the FSB had made no commitment not to rely on the regulation, the Court found that there was a likelihood of recurrence. Finally, the Court found the public interest weighed significantly in favor of settling the issue so the State and the FSB may effectively manage wildlife populations.

Next, the Ninth Circuit considered addressing the merits of Alaska's claim that the FSB violated ANILCA by opening the Kake hunt. When a district court does not reach the merits on a fully developed record, the Ninth Circuit, in its discretion, may address a purely legal issue. The Ninth Circuit assumed it had discretion here but declined to decide the issue because the question was one of complex statutory interpretation as well as one of first impression, thus remanding the issue back to the district court for further proceedings.

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[83] Biodiversity Legal Found. v. Badgley, 309 F.3d 116, 1173 (9th Cir. 2002).

[84] 50 C.F.R. § 100.19(a).

[85] Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 854 (9th Cir. 1999).

The Ninth Circuit then analyzed FSB's partial Unit 13 closure. Because the partial Unit 13 closure expired while this appeal was pending, the Ninth Circuit had to determine whether it had jurisdiction over the issue. Alaska argued that its claim fell under the exception from mootness under the same exception as above, "capable of repetition yet evading review." The FSB contended that if Alaska sought expedited review, the FSB's action would not have escaped review, but the Ninth Circuit stated that seeking expedited review is not a prerequisite to meeting this exception. However, the Court found that, even if Alaska sought expedited review, the partial Unit 13 closure still may have expired before full review.

Under the "capable of repetition" prong Alaska is required to show that it is likely to suffer "the same or very similar harm."[86] This prong is not met when future decisions will be based on different criteria, factors, or methods.[87] Alaska argued that the FSB will again close public lands in Unit 13 to non-subsistence users for reasons like those cited in the 2020 decision. The Ninth Circuit found this claim moot because Alaska was not likely to suffer the same or similar harm, reasoning that the required public hearing and consultation with state and regional officials would undoubtedly provide new information to consider. Further, the regulations require the FSB to analyze new factual information for each proposed closure.

In short, the Ninth Circuit held that Alaska's emergency hunt claim fits the "capable of repetition yet evading review" exception to mootness, remanding the issue to the district court. The Ninth Circuit further held that the partial Unit 13 closure was moot because the action, by force of regulation, was not capable of repetition. The Court reversed the district court's emergency hunt finding of mootness and vacated the partial Unit 13 closure finding. Both claims were remanded for further proceedings consistent with the Ninth Circuit's opinion.

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[86] Alcoa Inc. v. Bonneville Power Admin., 698 F.3d 774, 787 (9th Cir. 2012).
[87] Ramsey v. Kantor, 96 F.3d 434, 446 (9th Cir. 1996).

VII. CONSERVATION

1. *Gearing v. City of Half Moon Bay, 54 F.4th 1144 (9th Cir. 2022).*

Thomas and Daniel Gearing (collectively Gearing) sued the City of Half Moon Bay (the City) in the United States District Court for the Northern District of California. Gearing sued under 42 U.S.C. section 1983 and alleged a regulatory taking. The City filed an eminent domain action in state court. The City then filed a motion to abstain[88] in the federal case pending resolution of the eminent domain action. The district court granted the motion to abstain and Gearing appealed. Gearing argued that the abstention was precluded because abstention would force litigation of federal claims in state court, effectively requiring exhaustion of state-forum remedies.[89] In the alternative, Gearing alleged that the requirements for "*Pullman* abstention" are not met. The Ninth Circuit found that the two cases that Gearing relied on did not apply and the abstention requirements were met. The Ninth Circuit therefore affirmed.

Gearing owns undeveloped properties in the City's "West of Railroad" (WRR) area. The City's Land Use Plan (LUP) for the WWR area "severely restricts housing development."[90] LUP section 9.3.5 requires landowners in the WRR area to submit a master plan analyzing the impact of the proposed development on the area's conservation and recreation zones. Instead of a master plan, Gearing submitted a letter that, according to Plaintiffs, was an application to build housing pursuant to California Senate Bill 330 (SB 330). SB 330 prohibits local agencies from rejecting affordable-housing proposals without a written finding that the project would adversely impact public health or safety. The City rejected the letter, informing Gearing that SB 330 did not require approval of the project because a master plan had never been approved under LUP section 9.3.5. Three months later, the City informed Gearing that it intended to acquire their properties through eminent domain. Gearing rejected the offer to purchase the properties based on their appraised values.

On March 15, 2021, Gearing filed this action in the district court, alleging the City effected a regulatory taking in violation of the Fifth and Fourteenth Amendments by rejecting their proposal and enforcing LUP restrictions on their property. On March 23, the City filed an eminent domain action in state court. The City then filed, and the district court granted, a motion to abstain in Gearing's federal case, pending resolution of the City's state action. A district court's decision on a *Pullman*

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[88] This motion was filed pursuant to *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

[89] *See* Knick v. Twp. of Scott, Pennsylvania, 588 U.S. 180 (2019) and Pakdel v. City & Cnty. of San Francisco, California, 594 U.S. 474 (2021) (rejecting administrative exhaustion requirements for takings claims).

[90] Gearing v. City of Half Moon Bay, 54 F.4th 1144, 1146 (9th Cir. 2022).

abstention is reviewed under a "modified abuse of discretion standard."[91] First, the appellate court reviews *de novo* whether the *Pullman* requirements are met.[92] Then, if the *Pullman* requirements are not met, the district court has "little or no discretion" to abstain.[93] If the requirements are met, the decision to abstain is reviewed for abuse of discretion.[94]

First, Gearing argued the Supreme Court's *Knick* and *Pakdel* rulings preclude *Pullman* abstention when abstention would effectively impose exhaustion requirements on a takings plaintiff. Gearing argued that abstention in their case would force them to litigate their regulatory taking claim as part of the state-court eminent domain action, creating the equivalent of an exhaustion requirement for their federal takings claim. The Ninth Circuit held, even reading *Knick* and *Pakdel* as rejecting "effective exhaustion requirements," abstention would not be precluded here. The court explained that eminent domain can be adjudicated separately and not reach the takings issue because the suits compensate property owners for different injuries. Here, Gearing could recover in the eminent domain action for the fair market value of their properties as impacted by the LUP regulations. Gearing could then litigate the regulatory takings claim and recover damages for the economic impact on their investment-backed expectations.

In the alternative, Gearing argued that even if *Knick* and *Pakdel* do not preclude *Pullman* abstention, the requirements for such abstention were not met. There are three *Pullman* requirements. First, the complaint must touch a sensitive area of social policy which the federal courts ought not to enter unless no alternative is available.[95] The Ninth Circuit "has long held" that land use planning is a sensitive social policy.[96] Gearing's challenge to the City's denial of their proposal pursuant to LUP section 9.3.5 alone satisfied this requirement. The second factor requires that adjudication on the constitutional issue can be avoided or narrowed by a definitive ruling on the state issue.[97] The Ninth Circuit reasoned that the state eminent domain action will likely narrow the federal litigation because it will require the state court to interpret LUP section 9.3.5 and SB 330. The court determined that by allowing the state court to interpret these state-law rules, the federal action would be streamlined and simplified. Finally, there must be an unclear question of state law.[98] The Ninth Circuit generally only requires a minimal showing of uncertainty in land-use cases. Here, the interaction between SB 330 and the City's

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[91] *Id.* at 1147.
[92] Courthouse News Serv. v. Planet, 750 F.3d 776, 782 (9th Cir. 2014).
[93] *Id.*
[94] *Id.*
[95] Sinclair Oil Corp. v. Cnty. of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996).
[96] *Id.*
[97] *Id.*
[98] *Id.*

LUP section 9.3.5 was uncertain since SB 330 had not been interpreted by any courts.

In sum, the Ninth Circuit held that *Pullman* abstention was not precluded because eminent domain and takings actions can be litigated separately and compensate distinct injuries. Additionally, the Ninth Circuit found that all three *Pullman* requirements were met and thereby disposed of Plaintiffs' alternative argument. The Ninth Circuit affirmed the district court's grant of the City's motion to abstain.

VIII. PROCEDURAL

1. In re Klamath Irrigation District, 69 F.4th 934 (2023).

After the U.S. Bureau of Reclamation (Reclamation) removed Klamath Irrigation District's (KID) motion for preliminary injunction and the U.S. District Court of Oregon denied its motion to remand, KID petitioned the Ninth Circuit for writ of mandamus to compel the district court to remand the suit to Oregon state court. KID argued the district court's denial of its motion to remand was clearly erroneous because the state court had prior exclusive jurisdiction over the dispute—namely, Reclamation's authority to release water from Upper Klamath Lake in compliance with tribal rights and the Endangered Species Act (ESA). The Ninth Circuit denied KID's petition, holding that the state court did not have prior exclusive jurisdiction and that the district court did not commit clear error in declining to remand the case.

Upper Klamath Lake is a large freshwater lake in the Klamath Basin. Reclamation operates the Klamath River Basin Project (Project), a series of dams and irrigation works that provide water from Upper Klamath Lake to users in southern Oregon and northern California. The Yurok and Hoopa Valley Tribes of California (the Tribes) have depended upon the waters of the Klamath Basin and its fisheries "since time immemorial." Under the Reclamation Act of 1902,[99] Reclamation must balance various interests in accordance with state and federal law. Under the ESA, Reclamation must maintain specific water levels in Upper Klamath Lake and instream flows in the Klamath River to preserve critical sucker fish and salmon habitat. The Tribes' senior federal reserved water rights also compel Reclamation to maintain specific instream flows in the Klamath River that is at least equal to the amount of water necessary to fulfill Reclamation's ESA responsibilities. Reclamation also contracts with KID and other irrigators to supply water, "subject to [its] availability."

In 1975, Oregon began the Klamath Basin Adjudication (KBA), during which the Oregon Water Resources Department (OWRD) determined claims to water rights in the Klamath Basin. In 2014, OWRD entered an Amended and Corrected Findings of Fact and Final Order of Determination (ACFFOD) in Oregon state court which made the ACFFOD enforceable pending judicial confirmation. The Tribes did not participate in the KBA, but the Federal Circuit has concluded that their rights are protected regardless of the state adjudication.[100] Under the ACFFOD, Reclamation has the right to store water in Upper Klamath Lake, and KID's rights to use water for irrigation are subservient to the Tribes' rights and Reclamation's ESA responsibilities.

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[99] 43 U.S.C. §§ 371–390h.

[100] Baley v. United States, 942 F.3d 1312, 1340–41 (Fed. Cir. 2019).

During a prolonged drought in the Klamath Basin, Reclamation limited the release of water for irrigation but continued to release water into the Klamath River in compliance with tribal rights and the ESA. KID filed a motion for a preliminary injunction against Reclamation in Oregon state court, challenging Reclamation's authority to release water in compliance with tribal rights and the ESA. Reclamation planned to raise federal defenses and removed KID's motion for preliminary injunction to district court. KID moved to remand the case on the grounds that the state court has prior exclusive jurisdiction over the rights determined in the ACFFOD. The district court declined KID's motion to remand, holding that the state court did not have prior exclusive jurisdiction where KID sought to litigate federal issues. KID petitioned the Ninth Circuit for a writ of mandamus, seeking to compel the district court to remand its motion for preliminary injunction to state court. The Ninth Circuit considers various factors, called *Bauman* factors, to determine whether mandamus is warranted.[101] However, mandamus review is limited to "extraordinary causes," and the Court may exercise its discretion to deny the petition even when all factors are satisfied. A necessary condition for granting a writ of mandamus is a clear error as a matter of law. Clear error requires a determination that the district court misinterpreted the law or committed an abuse of discretion.

KID argued the district court's denial was clearly erroneous under the doctrine of prior exclusive jurisdiction, which provides that "when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court."[102] KID asserted that the doctrine applies to give Oregon state court exclusive jurisdiction over the ACFFOD and that KID's motion for preliminary injunction could not be adjudicated without determining the extent of the water rights in state court. Reclamation argued that federal sovereign immunity prevents the state court from possessing prior exclusive jurisdiction over the issues raised in KID's motion for preliminary injunction. In response, KID contended that Reclamation waived sovereign immunity under the McCarran Amendment,[103] which allows the United States to be joined in a suit wherein it is necessary to adjudicate the rights of various owners on a given stream.

First, the Ninth Circuit held that the doctrine of prior exclusive jurisdiction did not apply in this case. The KBA did not adjudicate Reclamation's ESA obligations or the Tribes' senior water rights, so KID's challenge to those rights extended beyond the state court's jurisdiction. While the McCarran Amendment waives the United States' sovereign immunity to allow the government to be joined as a defendant in a state

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[101] Bauman v. U.S. Dist. Ct., 557 F.2d 650 (9th Cir. 1977).

[102] State Eng'r of State of Nevada v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nevada, 339 F.3d 804, 809 (9th Cir. 2003).

[103] 43 U.S.C. § 666(a).

adjudication, it does not empower a state to adjudicate rights beyond its jurisdiction.

Next, the Ninth Circuit explained that KID and other similarly situated parties had already been unsuccessful in previous federal lawsuits, in one of which the Court rejected KID's characterization of its suit as an administration of ACFFOD-determined rights.[104] By filing its underlying motion in state court, KID sought to obtain a more favorable forum and circumvent Ninth Circuit precedent, the Tribes' rights, and the effect of the ESA. Finding the lack of clear error dispositive, the court did not consider the remaining *Bauman* factors. Finally, the Ninth Circuit emphasized that it did not reach the merits of KID's underlying motion for preliminary injunction. The court's determination that the state court lacked exclusive jurisdiction had no effect on the merits of KID's motion. KID could still seek substantive relief and would not be damaged or prejudiced by litigating the underlying motion before the district court.

In sum, the court denied KID's petition for writ of mandamus, holding that the district court did not err in declining to remand the motion for preliminary injunction to the state court.

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[104] Klamath Irrigation Dist. v. U.S. Bureau of Reclamation (KID II), 48 F.4th 934 (9th Cir. 2022).