2012 NINTH CIRCUIT ENVIRONMENTAL REVIEW

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NINTH CIRCUIT REVIEW EDITOR'S NOTE

I am very proud to present the 2012–2013 Ninth Circuit Environmental Review. This review contains twenty-nine summaries of Ninth Circuit Court of Appeals' decisions on environmental and natural resources topics, issued between March 2012 and March 2013. The review also includes two chapters authored by Ninth Circuit Review members. Both chapters closely examine issues raised by two summarized opinions.

In the first chapter, Jess Kincaid examines electricity generation and transmission regulation. She provides in-depth context to the *City of Redding California v. FERC* Ninth Circuit decision. Her chapter discusses how electricity regulation in the United States has resulted in oversupply in the Northwest and caused rolling blackouts and market manipulation in California. Ms. Kincaid provides an overview of the current system of electricity regulation, discusses current transmission upgrades to the U.S. electric system, and recommends an improved regulatory system that minimizes cost increases for consumers while addressing a piecemeal and problematic regulatory regime.

In the second chapter, JJ England explores preemption doctrine in the context of the Clean Air Act. He addresses whether state common law nuisance claims based on climate change and localized pollution are preempted by the Clean Air Act, and uses *Native Village of Kivalina v. Exxon Mobil Corp.*, among other recent cases outside the Ninth Circuit, to show the precedential danger of finding preemption where it might not exist.

The Ninth Circuit Environmental Review consists of five *Environmental Law* members. Each member is responsible for writing and editing complex summaries in addition to regular source-checking duties. This year's members displayed outstanding attention to detail and zeal for writing and editing. Moving forward, the format and scope of these summaries may change. However, this journal remains fervently commited to chronicling how the Ninth Cicuit addresses the dynamic and ever-important environmental and natural resource issues in the West.

JENNA BRUCE
2012–2013 NINTH CIRCUIT REVIEW EDITOR

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CASE SUMMARIES

1. Turtle Island Restoration Network v. U.S. Department of State, 673 F.3d 914 (9th Cir. 2012).

Turtle Island filed suit against the United States Department of State (DOS), alleging that it failed to meet obligations under the National Environmental Policy Act (NEPA)[1] and the Endangered Species Act (ESA).[2] Turtle Island alleged that the DOS's annual certifications of countries exempted from the general ban on shrimp imports failed to comply with NEPA because the DOS failed to prepare an environmental impact statement and failed to provide public notice. Turtle Island alleged that the DOS also violated the ESA because it failed to consult with other agencies in confirming that the certifications would not jeopardize threatened and endangered species or their habitats. Turtle Island Restoration Network (Turtle Island) appealed the United States District Court for the Northern District of California's decision to dismiss on res judicata grounds. The Ninth Circuit affirmed the district court's decision.

Commercial fishing trawl nets are a primary threat to sea turtles because turtles often become trapped in these nets and drown. Recognizing the insufficiency of domestic efforts alone, Congress enacted a law,[3] that prohibits shrimp imports harvested in ways that may adversely affect sea turtles. Section 609 certifies countries that employ turtle protection programs, which then enables those countries to export shrimp to the United States.

Pursuant to section 609(b), the President promulgated guidelines for the certification process through the DOS.[4] In the early 1990s, Earth Island Institute (EII), of which Turtle Island was formally a part, sued the DOS. The suit claimed that the promulgated guidelines conflicted with section 609(b)(2) because they restricted the geographical scope of the ban and

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

2 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2011).

3 Act of Nov. 21, 1989, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037–38 (1989).

4 Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines, 56 Fed. Reg. 1,051 (Jan. 10, 1991). Certification is carried out through various guidelines, which were revised in 1993, 1996, 1998, and 1999. *See* 58 Fed. Reg. 9,015 (Feb. 18, 1993); 61 Fed. Reg. 17,342 (Apr. 19, 1996); 63 Fed. Reg. 46,094 (Aug. 28, 1998); 64 Fed. Reg. 36,946 (July 8, 1999).

failed to evaluate the actual take of sea turtles in certified countries.[5] The Court of International Trade (CIT) found that the DOS had inappropriately restricted the geographical area to which the ban applied. The DOS then amended section 609(b)(2) to permit shipment-by-shipment importation from uncertified countries. EII and Turtle Island sued again,[6] claiming that the new provision violated the amended section. The CIT sided with Turtle Island, but the federal circuit reversed, allowing the 1999 guidelines' interpretation of the statute.[7]

In this case, Turtle Island alleged that the DOS had not complied with its NEPA and ESA obligations. The DOS asserted that Turtle Island was barred by res judicata[8] because of the two previous suits. The Ninth Circuit considered whether there was an identity of claims based on four factors.[9] Here, the court focused on the final factor—whether the suits arose out of the "same transactional nucleus of facts" because the claims involved technically different legal claims than Turtle Island's previous suits. The court examined if the suits were related by the same nucleus of facts and if the suits could be tried together conveniently.[10]

The Ninth Circuit first analyzed whether the claim could have been brought in the previous actions. While a plaintiff need not bring every possible claim, all claims arising from the same factual circumstances must be brought at once, or be barred later. Turtle Island conceded that it could have brought the NEPA and ESA claims in the earlier suits. However, it had chosen to work with the DOS to alternatively resolve the dispute. The court dismissed alternative resolution as a valid defense to res judicata.

Turtle Island attempted to distinguish this suit from previous suits by arguing that it was challenging the 2009 certification decisions, which Turtle Island could not have known about in previous litigation. The Ninth Circuit noted that Turtle Island mentioned the 2009 certifications only to provide an example of DOS non-compliance with NEPA and ESA. The court ultimately concluded that Turtle Island's claims were so vague that it could bring a new claim every year against DOS.

The Ninth Circuit opined that while this litigation was about the certification process and not the guidelines, the guidelines do not operate

5 *See* Earth Island Inst. v. Christopher, 913 F. Supp. 559, 562 (Ct. Int'l Trade 1995).

6 *See* Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064, 1068 (Ct. Int'l Trade 1999).

7 Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1290–97 (Fed. Cir. 2002).

8 Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003) (stating that res judicata applies when "there is an identity of claims, a final judgment on the merits, and privity between parties" (citation omitted) (internal quotation marks omitted)).

9 The four factors in determining the identity of claims are: "whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action, whether substantially the same evidence is presented in the two actions, whether the two suits involve infringement of the same right, and whether the two suits arise out of the same transactional nucleus of facts." Turtle Island Restoration Network v. U.S. Dep't of State, 673 F.3d 914, 917–18 (9th Cir. 2012).

10 *Id.* at 918 (citing ProShipLine, Inc. v. Aspen Infrastructures Ltd., 609 F.3d 960, 968 (9th Cir. 2010)).

independently. Turtle Island viewed the guidelines as noncompliant with section 609(b)(2) because of the potential harm to sea turtles. The court found that the suit's purpose was to prompt NEPA and ESA compliance in the certification process so as to protect sea turtles. The court noted that Turtle Island has standing because it was pursuing more than just procedural harm.

Turtle Island also argued that the claims could not be precluded because the new claims involved different conduct. Turtle Island attempted to separate the actions of promulgating guidelines from the certification process.[11] The Ninth Circuit opined that while the two actions were procedurally different, they both arose from the government's regulation of shrimp imports to encourage turtle-safe shrimp harvesting, and were not sufficiently different to defeat res judicata.

The Ninth Circuit affirmed the decision of the district court, but noted that because the legal question of NEPA and ESA compliance to section 609(b)(2) had not been litigated on the merits, another plaintiff not in privity with Turtle Island could still bring suit.

[11] *See* Fund for Animals v. Lujan, 962 F.2d 1391, 1399 (9th Cir. 1992) (holding that res judicata does not apply when earlier litigation involves the same harms, but different governmental conduct).

2. Turtle Island Restoration Network v. U.S. Department of Commerce, 672 F.3d 1160 (9th Cir. 2012).

The Hawaii Longline Association (Longliners) challenged the United States District Court for the District of Hawaii's vacatur of a regulation that increased the annual allowable incidental takes of loggerhead turtles by shallow-set longline fishers. The district court's decision allowed more incidental takes than previously allowed.[12] The vacatur was consistent with the terms of a consent decree between Plaintiff-Appellants (Turtle Island)[13] and Defendant-Appellees (Federal Agencies).[14] The United States Court of Appeals for the Ninth Circuit held that the Consent Decree made no substantive changes to regulations and therefore was not subject to the Magnuson-Stevens Fishery Conservation Act (Magnuson Act)[15] or the Administrative Procedure Act (APA)[16] procedural requirements. It also held that the district court did not clearly err in finding that the new regulations were more protective of turtles.

Over the last decade, considerable litigation has accompanied Federal Agencies' efforts to regulate the shallow-set longliner fishery in the Western Pacific Region. In this case, Turtle Island challenged a regulation concerning the annual number of allowable loggerhead and leatherback sea turtle incidental takes by Longliners.[17] To resolve this challenge, Turtle Island and Federal Agencies agreed to a Joint Motion to Enter Stipulated Injunction as an Order of the Court that dismissed all claims with prejudice. The district court approved the motion as a consent decree despite the objection of Longliners. The Consent Decree reduced the incidental take limit for loggerhead turtles from forty-six back to seventeen, the 2004 limit.[18]

The Ninth Circuit first established jurisdiction under 28 U.S.C. § 1292(a)(1) because the Consent Decree effectively functioned as an injunction.[19] The court reviewed the district court's decision for abuse of discretion.

12 Turtle Island Restoration Network (*Turtle Island*) v. U.S. Dep't. of Commerce, 672 F.3d 1160, 1164 (9th Cir. 2012).

13 Plaintiff-Appellants included Turtle Island Restoration Network, Center for Biological Diversity, and KAHEA: The Hawaiian–Environmental Alliance. *Id.* at 1160.

14 Defendant-Appellees included United States Department of Commerce, National Marine Fisheries Service (NMFS), and Gary Locke, in his official capacity as Secretary of the Department of Commerce. The district court granted Longliners' intervention. *Id.*

15 16 U.S.C. § 1854(b)(1)(A)–(B) (2006).

16 5 U.S.C. § 553 (b)–(c) (2006)

17 *See* 74 Fed. Reg. 65,460, 65,471 (Dec. 10, 2009) (increasing the incidental take number from seventeen to forty-six).

18 76 Fed. Reg. 13,297 (March 11, 2011) (codified at 50 C.F.R. § 665.813(b) (2011)).

19 *See* Gates v. Shinn, 98 F.3d 463, 468 (9th Cir. 1996) (determining that a consent decree is an injunction).

Longliners first argued that the Consent Decree violated the Magnuson Act's procedural requirements for adopting new regulations.[20] The Ninth Circuit determined it did not need to reach the question of how statutory procedural requirements attach to judicial acts like the Consent Decree because the Consent Decree did not promulgate a new substantive regulation, was temporary and merely restored pre-existing limits which were created subject to the Magnuson Act's procedural requirements in 2004.[21] Instead, the Ninth Circuit focused its inquiry on whether the Magnuson Act halted Turtle Island and Federal Agencies' capacity to settle litigation. The Ninth Circuit found no preclusion of consent decrees in the Magnuson Act or its legislative history.[22] Noting the value of consent decrees as settlement tools for federal agencies, the Ninth Circuit allowed the Consent Decree to stand.

Longliners also argued that the Consent Decree violated procedural requirements of the APA. First, the court found that there was no "undoing" of a rule without meaningful comment because Turtle Island's repeal was motivated by the same concerns as in initial rulemaking.[23] Second, the court dismissed the argument that the Consent Decree impermissibly modified substantive regulatory rules. It restated that because federal agencies did not create a new substantive rule, the APA did not apply. Third, it found that the APA does not prohibit voluntary reconsideration of regulations without reinitiation of the consultation process.[24] The Ninth Circuit upheld the district court findings that neither the Magnuson Act nor the APA procedural requirements barred implementation of the Consent Decree in this case.

Finally, Longliners challenged the district court's finding that pre-existing incidental take limits were more protective of loggerhead turtles.[25] Longliners argued that the evidence showed increased takings were statistically and biologically insignificant to the total population of turtles and could actually benefit turtle populations because of "market transfer effects."[26] The Ninth Circuit found no clear error regarding the district

20 *Turtle Island*, 672 F.3d 1160, 1166 (9th Cir. 2012) (citing Magnuson-Stevens Fishery and Conservation Management Re-authorization Act of 2006, 16 U.S.C. § 1854(b)(1)(A)–(B) (2006)). These options include approving the proposed regulations and publishing them as final rules after public comment, or rejecting the regulations and resubmitting them to the Regional Council for further action. *Id.*

21 *Id.* at 1167.

22 *See* Local No. 93 Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1981) (holding that consent decrees are not precluded where statutory and legislative history are silent as to government's ability to settle litigation).

23 *See* Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n, 673 F.2d 425, 445–446 (D.C. Cir. 1982) (requiring federal agencies to provide notice and comment pursuant to APA before repealing extant rule so as to not "undo" rulemaking).

24 *Turtle Island*, 672 F.3d at 1168–69.

25 *Id.* at 1165–66.

26 *Id.* at 1169. A market transfer effect is when buyers fill orders from unregulated fisheries instead of Longliners, who are more regulated. Longliners argue such transfer by purchase increases takes of turtles. *Id.* at n.10.

court's findings and found a logical basis for the conclusion that a reduced take would increase protections for turtles.

In sum, after the Ninth Circuit asserted jurisdiction under 28 U.S.C. § 1292(a)(1), it held that the rulemaking provisions of the Magnuson Act and procedural requirements of the APA do not apply to the Consent Decree because the Consent Decree does not make substantive changes to fishery regulations. It also held that there was no clear error in the district court's more protective finding. The Ninth Circuit thus affirmed the findings of the district court.

3. Otay Land Co. v. United Enterprises Ltd., 672 F.3d 1152 (9th Cir. 2012).

Plaintiff-Appellants, Otay Land Company (Otay Land)[27] appealed a United States District Court for the Southern District of California decision that awarded costs to Defendant-Appellees, United Enterprises Ltd. (United Enterprises)[28] under 28 U.S.C. § 1919 following partial summary judgment in favor of United Enterprises Ltd. and dismissal of the remaining causes of action for lack of jurisdiction.[29] The United States Court of Appeals for the Ninth Circuit held that the district court erred in implying a presumption of award of costs and abused its discretion by equating incurred costs with just costs.[30] The Ninth Circuit reversed the district court's ruling and remanded for further review of just costs consistent with the considerations outlined in the opinion.

Otay Land filed suit against United Enterprises in district court under section 107(a) of the Comprehensive Environmental Response, Conservation and Liability Act (CERCLA)[31] and section 7002 of the Resource Conservation and Recovery Act (RCRA)[32] for costs related to removing lead and other pollutants allegedly on its property due to prior operation of United Enterprises' shooting range. Following discovery, United Enterprises moved for summary judgment and partial summary judgment. The district court granted summary judgment on the merits for the two federal environmental claims and declined to exercise ancillary jurisdiction over the state law claims.

Apart from the federal claims that were dismissed on summary judgment, Otay Land filed a practically identical action in California state court. Meanwhile, United Enterprises submitted its costs to the district court as the prevailing party in federal court. The district court originally awarded costs under Federal Rule of Civil Procedure 54(d)[33] and 28 U.S.C. § 1920. On a prior appeal in this case, the Ninth Circuit vacated the award of costs and directed the district court to determine whether award of costs was instead appropriate pursuant to 28 U.S.C. § 1919. On remand, the district court reasoned that it could look to § 1920 for assistance in determining what

27 In addition to Otay Land Company, Plaintiff-Appellants included Flat Rock Land Company.

28 In addition to United Enterprises Ltd., Defendant-Appellees included United Enterprises, Inc., The Otay Ranch L.P., Baldwin Builders, Sky Communities, Inc., Olin Corporation, Phil G. Scott, Ray Enniss, Patrick J. Patek, and Sky Vista, Inc.

29 Federal Courts Administration Act of 1992, 28 U.S.C. § 1919 (2006) (allowing a district court to order payment of just costs when suit is dismissed for lack of jurisdiction).

30 *Id.*

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

32 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

33 FED. R. CIV. P. 54(d).

costs are just under § 1919, and upon following the necessary and reasonable standard of § 1920, awarded costs under § 1919.

Otay Land again sought review with the Ninth Circuit, and the court granted review to determine what constitutes "just costs" under 28 U.S.C. § 1919. Under § 1919, a court *may* order the payment of just costs when an action is dismissed for want of jurisdiction.[34] Ultimately, the Ninth Circuit explained that because § 1919 is distinct from 28 U.S.C. § 1447(c), the standard for each need not be exactly the same.

When determining "just costs" under 28 U.S.C. § 1919, the Ninth Circuit explained that a district court exercises broad discretion and that determination of costs should rest on fairness and equity under a totality of the circumstances analysis. The determination of just costs involves two distinct questions: 1) whether an award of costs is just, and 2) whether the appropriate amount has been awarded.

The Ninth Circuit offered four factors[35] in determining an award of just costs pursuant to 28 U.S.C. § 1919. First, the court explained that costs under § 1919 stand in "stark contrast" to the prevailing party standard under Federal Rule of Civil Procedure 54(d). Although the authority exists to grant an award of costs, costs are not mandated. Rather, such an award is permissive under § 1919. Second, the court noted that while "exigent circumstances" may play a role in the district court's determination, a showing of exigency is not required to award just costs. Third, the reasonableness of a plaintiff's basis for jurisdiction is a factor that may be considered because § 1919's predecessor, the Act of March 3, 1875, was intended to allow for the legitimate need for removal while preventing removal for vexatious purposes. However, the court recognized § 1919 does not turn solely on this factor, even though both § 1919 and 28 U.S.C. § 1447(c) share this common root. The two statutes are distinct and arise under different procedural circumstances.[36] Finally, the court offered that pending litigation in state court is a factor to consider, but there is not a "blanket rule" that just costs be awarded based upon this factor alone.

The Ninth Circuit again vacated the district court's cost award under 28 U.S.C. § 1919 and remanded to the district court to reconsider costs consistent with the considerations outlined in the opinion.

34 The court based this determination on § 1919's common history with 28 U.S.C. § 1447(c), explaining that in light of Congress's lack of explanation as to the meaning of "just costs" in § 1919, the Supreme Court's interpretation of 28 U.S.C. § 1447(c) is helpful. The Ninth Circuit focused on the Supreme Court's language that attorney's fees should be awarded "only where the removing party lacked an objectively reasonable basis for seeking removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).

35 The court cautioned that these factors are not the only appropriate considerations when determining whether to award costs.

36 § 1447(c) traditionally involves attorney's fees, where attorney fees are not typically awarded under § 1919.

4. Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012).

Alliance for the Wild Rockies (Wild Rockies) sought to enjoin Ken Salazar, United States Secretary of the Interior,[37] from removing portions of a distinct population segment (DPS) of gray wolf (*Canis lupis*) from Endangered Species Act (ESA)[38] protection in Montana, Idaho, and eastern Washington and Oregon.[39] The removal was ordered by section 1713 of the Department of Defense and Full Year Continuing Appropriations Act of 2011 (Act).[40] Wild Rockies argued that the order violated the doctrine of separation of powers. The United States Court of Appeals for the Ninth Circuit rejected Wild Rockies' argument and affirmed the United States District Court for the District of Montana's grant of summary judgment for Salazar,[41] which required section 1713 enforcement.[42]

In 2009, the United States Fish and Wildlife Service designated a DPS of gray wolves in the northern Rocky Mountains and delisted portions of these gray wolf populations by issuing the 2009 rule.[43] In *Defenders of Wildlife v. Salazar*,[44] the district court found that this partial delisting of a DPS was not permitted under the ESA, thus striking down the 2009 rule.[45] The federal government, Idaho, and Montana appealed the ruling. While the results of that appeal were pending, Congress passed section 1713 of the Act.[46] Section 1713 ordered the Secretary of the Interior to reissue the 2009 rule, which in turn successfully delisted the gray wolf in the northern Rocky Mountains region.

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37 Defendants also included Rowan Gould, Acting Director of the United States Fish and Wildlife Service, and the United States Fish and Wildlife Service. Intervenors included Idaho Farm Bureau Federation, Montana Farm Bureau Federation, Mountain States Legal Foundation, National Rifle Association of America, Safari Club International, and Wildlife Conservation Groups.

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

39 *See* Final Rule to Identify Rocky Mountain Gray Wolf As Distinct Population and to Revise the List of Endangered Species and Threatened Wildlife, 74 Fed. Reg. 15,123, 15,129 (Apr. 2, 2009) (authorizing removal of a portion of the gray wolf population within specific boundaries of the Northern Rocky Mountains from the list of endangered and threatened wildlife, pursuant to the ESA).

40 *See* Dep't of Def. and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, §1713, 124 Stat. 38 (ordering the Secretary of the Interior to reissue the final rule authorizing the removal of the wolves within sixty days of the enactment of the Act).

41 Alliance for the Wild Rockies v. Salazar (*Wild Rockies I*), 800 F. Supp. 2d 1123 (D. Mont. 2011).

42 Alliance for the Wild Rockies v. Salazar (*Wild Rockies II*), 672 F.3d 1170, 1175 (9th Cir. 2012).

43 74 Fed. Reg. at 15,129 (Apr. 2, 2009).

44 729 F. Supp. 2d. 1207 (D. Mont. 2010).

45 *Id.* at 1212 (stating that the plain language of the statute does not allow for partial delisting).

46 Dep't of Def. and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38, 150 (2011).

The issue presented to the Ninth Circuit was whether section 1713's order to the Secretary of the Interior to reissue the 2009 rule was constitutional under the separation of powers analysis from *United States v. Klein*.[47] The court reviewed this legal issue de novo and found that it did not violate the separation of powers doctrine.[48]

Wild Rockies argued that section 1713 violated the separation of powers doctrine under *Klein* because it directed the courts to reach a specific outcome, a finding of fact, or application of law to fact.[49] The court declined this reasoning, and applied *Robertson v. Seattle Audubon Society*,[50] where the Supreme Court held that when Congress directs an agency to take a particular action, it has amended the law. Applying *Robertson* and Ninth Circuit precedent,[51] the court determined that section 1713 did not demand particular findings of fact or application of law to fact, and instead merely amended or changed applicable law. The court concluded that Congress specifically directed the agency to act "without delay" and "notwithstanding other provisions of law," which was evidence of clear congressional intent to amend the law so as to avoid the standard administrative proceedings that include judicial review.[52]As such, the Ninth Circuit concluded that Congress had amended the law.

In sum, the court held that section 1713 had amended underlying law applicable to the 2009 rule, and therefore *Robertson*, not *Klein*, controlled. Closing its analysis, the court suggested that the 2009 rule appeared reviewable for issues concerning evaluation standards issued pursuant to the 2009 rule or issues of agency compliance with such standards, which opens the door for new litigation.

47 United States v. Klein, 80 U.S. 128, 146–47 (1871) (holding that Congress cannot enact legislation that prescribes rules dictating the outcome of cases). The Ninth Circuit characterized the lasting impact of *Klein* as an "isolated . . . application of the separation of powers doctrine to strike down a statute that dictated the result in pending litigation." *Wild Rockies II*, 672 F.3d at 1173.

48 *Wild Rockies II*, 672 F.3d at 1172.

49 *Id.* at 1174.

50 503 U.S. 429, 431 (1992) (holding that intervening congressional action amended the law).

51 *See* Consejo de Desarrollo Economico, Mexicali v. United States, 482 F.3d 1157, 1168–69 (9th Cir. 2007).

52 *Wild Rockies II*, 672 F.3d at 1175.

5. Karuk Tribe of California v. U.S. Forest Service, 681 F.3d 1006 (9th Cir. 2012) (en banc).

The Karuk Tribe of California (the Tribe) filed a claim under the Administrative Procedure Act (APA)[53] against the United States Forest Service (USFS).[54] The Tribe alleged that USFS's approval of four Notices of Intent (NOIs) to conduct mining without first consulting with the Fish and Wildlife Service (FWS) to determine impacts of the mining on coho salmon (*Oncorhynchus kisutch*) violated section 7 consultation requirement of the Endangered Species Act (ESA).[55] Underlying this dispute were three main issues: 1) whether the Tribe's claim failed for mootness, 2) whether allowing mining activity to proceed under the four NOIs constituted an agency "action," and 3) whether the approved mining activities "may affect" coho salmon, which triggers ESA consultation. The United States District Court for the Northern District of California entered judgment for the government. Sitting en banc, the United States Court of Appeals for the Ninth Circuit held that the Tribe's claim was not moot; that USFS's approval of mining under the NOIs was an "action"; and that the mining activities "may affect" coho salmon, triggering the requirement of consultation with FWS.[56]

The Karuk Tribe inhabits a portion of Northern California and depends on threatened coho salmon in the Klamath River system. The Klamath River system and adjacent riparian zones were designated as critical habitat for coho salmon in 1999. This critical habitat rests on publicly owned land operated by USFS. Further, the Klamath River and its tributaries contain gold. Although commercial mining for this gold is banned, recreational mining, including the commonly employed practices of "panning," "motorized sluicing," and "suction dredging," are allowed[57] so long as they comply with USFS rules and regulations.[58]

One such regulation classifies three categories of mining activities based on the likelihood that a given mining activity will cause surface impacts. The regulation establishes different procedural requirements depending on the classification.[59] Miners who "will not cause" significant surface impacts need not notify USFS of their mining plans.[60] Miners who

53 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

54 In addition to USFS, defendants included the New 49'ers, Inc. (a recreational mining company) and Raymond Koons (an individual owner of mining claims).

55 *See* 16 U.S.C. § 1536(a)(2) (2006).

56 Karuk Tribe of Cal. v. U.S. Forest Serv. (*Karuk Tribe*), 681 F.3d 1006, 1029 (9th Cir. 2012) (en banc).

57 This broad authorization exists under the General Mining Act of 1872, which permits private citizens to enter public lands for prospecting and mining purposes. 30 U.S.C. § 22 (2006).

58 Act of June 4, 1897 (Organic Administration Act of 1897), ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2006)) (extending the General Mining Law to national forest land and enabling USFS regulations that protect national forests from destruction and depredation).

59 36 C.F.R. § 228.1 (2004).

60 *Id.* § 228.4(a)(1)(iii), (2)(ii).

"will likely cause" significant surface impacts may only proceed under a USFS approved Plan of Operations.[61] If miners are unsure if their activities "might cause" significant surface impacts, they must submit an NOI to the USFS.[62] The District Ranger must notify the miner within fifteen days whether a Plan of Operations is required for the activity.[63]

This case concerned four NOIs for suction dredge mining and motorized sluicing in the Klamath River System submitted by the New 49'ers and three separate individuals. Following meetings with the Karuk Tribe, which had expressed concern about effects of suction dredge mining on the Klamath River system, the District Ranger for the Happy Camp District of the Klamath National Forest crafted certain practices to mitigate harm associated with these activities.[64] Each of the four NOIs adopted these proposals, and the New 49'ers NOI adopted these practices in response to a separate meeting with the District Ranger. While the District Ranger consulted with two biologists within the USFS in developing these mitigation practices, he did not consult with the FWS.

Alleging that these mining activities harm coho salmon throughout the Klamath River system and that the USFS was required to consult with the FWS, the Tribe brought this case against the USFS for declaratory and injunctive relief. After the New 49'ers and an individual mining claim owner intervened, the district court granted summary judgment in favor of the defendants. A divided panel of the Ninth Circuit affirmed.[65] The Ninth Circuit then agreed to rehear the case en banc. Because this case was decided on summary judgment, the Ninth Circuit panel applied a de novo standard of review.[66]

Due to two supervening events, mootness was a threshold issue. After the initial case was filed, all four NOIs at issue expired one year after approval, on December 31, 2004. Additionally, California passed a temporary moratorium on suction dredge mining that will not expire until June 30, 2016, at the latest.[67]The defendants also had a heavy burden to prove mootness.

On mootness, the court first held that "the Tribe's claims [we]re justiciable under the 'capable of repetition, yet evading review' exception to the mootness doctrine."[68] The one-year duration of the NOIs was too brief to allow for full litigation and, because the USFS continued to approve similar

61 *Id.* § 228.4(a), (c).

62 *Id.* § 228.4(a).

63 *Id.* § 228.4(a)(2)(iii).

64 The District Ranger required the New 49'ers to follow three "primary" practices: 1) maintain cold water habitat within 500 feet of the mouths of certain Klamath tributaries, 2) rake tailing piles "back into dredge holes in critical spawning areas," and 3) limit the amount of dredges on the Klamath River and Klamath tributaries. *Karuk Tribe*, 681 F.3d 1006, 1014 (9th Cir. 2012) (en banc) (internal quotations omitted).

65 Karuk Tribe v. U.S. Forest Serv., 640 F.3d 979 (9th Cir. 2011).

66 Russell Country Sportsmen v. U.S. Forest Serv., 668 F.3d 1037, 1041 (9th Cir. 2011).

67 CAL. FISH & GAME CODE § 5653.1 (West 2011).

68 *Karuk Tribe*, 681 F.3d at 1018.

NOIs repeatedly and as recently as December 2011, there was a "reasonable expectation that the [USFS] will engage in the challenged conduct again."[69] Second, the court held that the temporary state ban[70] did not render the case moot because the ban was not permanent. Moreover, the suction-dredge ban was a red herring because it did not prohibit all activities challenged by the Tribe, including motorized sluicing, which the USFS continued to approve. Thus, the court proceeded to the merits of the case.

The court first addressed the question of whether the USFS was required to consult with the FWS pursuant to ESA section 7 regarding effects of the mining proposed in the four NOIs. Regulations require consultation when there is "agency action" that "may affect" a listed species or adversely modify designated critical habitat.[71] Regarding the "agency action" prong, the court undertook a two-part inquiry, and addressed whether the agency "affirmatively authorized, funded, or carried out the underlying activity and whether the "agency had some discretion to influence or change the activity for the benefit of a protected species."[72] Whether approval of these four NOIs was an agency action marks the central dispute between the majority and dissent in this case.

The court first used USFS's "affirmative authorization" of NOIs to determine whether there was an agency action. The majority held that approval of each NOI was an "authorization" because USFS had to decide whether to authorize mining and notify the miner of its ultimate decision.[73] Each of the NOIs in the record had received an affirmative response of approval or denial. The court reasoned that USFS's response to an NOI also carried more weight than mere advice, which prior Ninth Circuit precedent held insufficient to be an agency action.[74] The majority emphasized that the USFS had the power to enforce conditions in an NOI and that the miners themselves sought authorization intentionally.[75] This, the majority reasoned, showed "that the [USFS] authorizes, rather than advises."[76]

Even though the General Mining Law authorizes recreational mining, the majority disagreed with USFS and miners' argument that this authorization negates the presumption that the NOI process is also requisite for mining authorization. Although the Mining Law provides a statutory right, the court reiterated that "Congress has subjected that right to environmental regulation."[77] Finally, the court dismissed the argument that it

69 *Id.* (quoting Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 857 (9th Cir. 1999)).

70 CAL. FISH & GAME CODE § 5653.1 (West 2011).

71 50 C.F.R. § 402.14(a) (2009).

72 50 C.F.R. §§ 402.02, 402.03 (2009).

73 *Karuk Tribe*, 681 F.3d at 1022. The District Ranger will notify the miner if a plan of operations is required within 15 days. 36 C.F.R. § 228.4(a)(2) (2011).

74 *See* Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1074–75 (9th Cir. 1996) (holding that providing mere advice does not amount to agency action).

75 *Karuk Tribe*, 681 F.3d at 1022.

76 *Id.* at 1023.

77 *Id.* (citing 16 U.S.C. § 478 (2006)).

was bound by Ninth Circuit precedent[78] holding that the Bureau of Land Management's review of a notice of mining was not a major federal action for purposes of the National Environmental Policy Act (NEPA).[79] The court explained that, while similar, a major federal action under NEPA is not the same as "agency action" under section 7 of the ESA.

Under the second part of its inquiry, the court held that there was "discretionary Federal involvement or control"[80] when USFS reviewed the four NOIs. Specifically, the court addressed the question of whether "the agency *could* influence a private activity to benefit a listed species, not whether it *must* do so."[81] The court examined whether USFS had a competing statutory mandate that prevented it from undertaking the ESA's consultation requirement and whether the discretion retained by USFS gave it the "capacity to inure to the benefit of a protected species."[82] The court found that USFS's statutory mandate and its own regulations granted it broad discretion to regulate mining activities, noting that "the overriding purpose of the regulations is 'to minimize [the] adverse environmental impacts' of mining activities on federal forest lands."[83] The District Ranger's creation of mitigation practices as preconditions for the mining at issue in this case, approval of these four NOIs, and different treatment of similar NOIs by a different USFS district served as three discrete examples[84] that USFS retained significant discretionary authority in approving or denying NOIs.

Turning to the third and final issue of the case, the court held that the proposed mining activities in the NOIs "may affect" protected coho salmon and its critical habitat in Klamath National Forest, thus triggering a duty to consult with FWS.[85] Because, "by definition, mining activities that require a NOI 'might cause' disturbance of surface resources," it is practically a matter of pure textual interpretation that mining activities proposed in an NOI automatically "may affect" coho salmon and its critical habitat.[86] The USFS nevertheless asserted that the record did not contain evidence that these

78 *See* Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988) (holding that BLM's review of "notice" mining operations was not a major federal action).

79 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006) (requiring impact statements for major federal actions that significantly affect the quality of the human environment).

80 50 C.F.R. § 402.03 (2009).

81 *Karuk Tribe*, 681 F.3d at 1025 (citing Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 975 (9th Cir. 2003)).

82 *Id.* at 1024 (citing Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 974–75 (9th Cir. 2003)).

83 *Id.* at 1025 (quoting 36 C.F.R. § 228.1 (2010)).

84 The court found that USFS exercised discretion by formulating criteria for the protection of coho salmon habitat, by refusing to approve a detailed NOI submitted by the New 49'ers, and by applying different criteria for the protection of fishery habitat in different districts of the Klamath National Forest.

85 The legal standard of "may affect" is relatively low because any possible effect triggers the requirement.

86 *Karuk Tribe*, 681 F.3d at 1027 (internal citations omitted).

proposed mining activities would affect protected species. Casting this argument slightly differently, the miners argued that there was no evidence in the record that any protected species would be "taken" by these activities. In response, the court held that the Tribe was not required to prove actual injury to the listed species because the Tribe alleged a section 7 violation of the ESA rather than a substantive violation under section 9. The court further found that there was ample evidence in the record to indicate that these mining activities may affect coho salmon. The court also noted that Congress intended for federal agencies to consult with expert wildlife agencies, not just biologists within their own agencies, to meet the regulatory requirement of consultation. Based on these findings, the majority held that the USFS's review and response to the four NOIs at issue constituted an agency action and that, because this action "may affect" listed coho salmon, consultation with the FWS was required.

In his dissent, joined by Chief Judge Kozinski and Judges Ikuta and Murguia, Judge Smith voiced a strong objection to the majority's holding that the USFS engaged in an "agency action" when it reviewed the four NOIs at issue. The dissent asserted that review of NOIs without requiring a Plan of Operations is inaction and not an action.[87] First, USFS regulations state "that prospectors and miners have a *statutory right, not mere privilege*, under the 1872 mining law and the Act of June 4, 1897," to use public National Forest lands for mineral exploration.[88] Second, the dissent credited the USFS's explanation that the NOI process is "an information gathering tool, not an application for a mining permit."[89] The process "gives the [USFS] the opportunity to determine whether the agency agrees with that assessment such that the USFS will not exercise its discretion to regulate those operations."[90] Recognizing that not every USFS decision is exempt from the ESA, the dissent concluded that an NOI is exactly what its name implies: a notice, not a permit or a license.

Judge Smith, joined only by Chief Judge Kozinski, also reasoned that the majority improperly relied on the subjective understanding of various District Rangers as to whether an NOI requires an ESA consultation. Judge Smith argued that a District Ranger's opinion is irrelevant because District Rangers have no authority to interpret legal questions relating to what constitutes an "agency action" under the ESA. The dissent closed by warning the public about the impact of the majority's decision, suggesting that the

87 *See* W. Watersheds Project v. Matejko, 468 F.3d 1099, 1108 (9th Cir. 2006) (holding that "inaction is not action for section 7(a)(2) purposes" (internal quotation marks omitted)).

88 National Forests Surface Use Under U.S. Mining Laws, 39 Fed.Reg. 31,317 (Aug. 28, 1974) (emphasis added).

89 *Karuk Tribe*, 681 F.3d at 1034 (M. Smith, J., dissenting).

90 *Id.* (quoting Clarification as to When a Notice of Intent To Operate and/or Plan of Operation Is Needed for Locatable Mineral Operations on National Forest System Lands, 70 Fed. Reg. 32,713, 32,720 (June 6, 2005)) (emphasis removed). The date of the Federal Register document is after the date this case was first filed but did not materially change the operative provisions. *Id.* at 1034 n.4.

decision would render the USFS impotent to address low impact mining and effectively shut down the entire suction dredge mining industry.

6. United States v. 32.42 Acres, More or Less, Located in San Diego County, California, 683 F.3d 1030 (9th Cir. 2012).

The California State Lands Commission (Lands Commission),[91] a unit of California's state government that maintains tidelands and submerged lands granted in trust, appealed a final judgment of the United States District Court for the Southern District of California. The district court held that the federal government's condemnation of 32.42 acres of land (the Property) on behalf of the U.S. Navy extinguished California's public trust rights in the Property. On appeal, the Lands Commission challenged the district court's judgment validating the federal use of eminent domain. The United States Court of Appeals for the Ninth Circuit affirmed.

California initially acquired the Property in 1850 upon its admission to the Union. In 1911, the California Legislature granted the Property to the City of San Diego under California's common law public trust doctrine. In 1949, San Diego leased the Property to the Navy for fifty years. The Navy sought to renew its lease in 1996, but the Lands Commission and the San Diego Port District opposed the extension. In response, the United States brought a condemnation action, which it later dropped when San Diego agreed to a settlement granting the Navy a lease of the Property through August 2049.

In 2005, the Navy resolved to own the Property outright, in fee simple. The same year, the United States filed a condemnation complaint that "explicitly list[ed] 'any tidelands trust rights of the State of California' as part of the estate to be taken."[92] The Lands Commission moved for summary judgment, unsuccessfully contending that the United States could not extinguish California's public trust rights. At trial, the court determined that just compensation for the Property was $2,910,000. The Ninth Circuit reviewed the district court's denial of the Lands Commission's summary judgment motion de novo.

The Ninth Circuit began by noting that the United States took a full fee simple interest in the Property using its constitutional power of eminent domain.[93] All parties agreed that the United States could take the Property. However, the Lands Commission disagreed about whether the federal government could completely extinguish California's public trust rights in the Property and, without rekindling those rights, later transfer ownership to a private party.

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91 California State Lands Commission also appeared as Defendant-Appellant, while 32.42 Acres of Land, More or Less, Located in San Diego County, the State of California; and the San Diego Unified Port District were Defendants.

92 United States v. 32.42 Acres, More or Less, Located in San Diego Cnty., Cal. (*32.42 Acres*), 683 F.3d 1030, 1033 (9th Cir. 2012).

93 *See* U.S. CONST. art. I, § 8, cl. 1, 13, 18. The United States is entitled to take the Property because of its powers to "provide for the common Defense," "provide and maintain a Navy," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." *Id.*

The Lands Commission first contended that the equal-footing doctrine[94] prevents the United States from extinguishing California's public trust rights in the Property, arguing that California's interest in its public trust rights was as important as the government's power of eminent domain. It further argued that the equal-footing doctrine required a compelling reason to grant land to the government. Noting that the Lands Commission misinterpreted the equal-footing doctrine, the court explained that the Property Clause[95] of the U.S. Constitution gives the federal government power to divest a state of its title to submerged land by making its intention to do so plain and by conveying the land for a public benefit. The Lands Commission used two cases to support its equal-footing argument, but the Ninth Circuit dismissed the quotations used from those cases "as out of context." Unlike the cases cited by the Lands Commission, the government had no property rights in post-statehood grants of land.[96] Thus, the court could find "no precedent nor any good reason" to limit the federal constitutional power to take land for public use if the federal government pays just compensation. In the court's words, "the scope of the federal navigational servitude[97] does not limit the United States' power of eminent domain."

The Lands Commission next argued that public trust rights are not extinguishable because they are an aspect of California's sovereignty. To wit, the Supreme Court had held in *Illinois Central Railroad Co. v. Illinois*[98] that the State of Illinois could not permanently transfer authority over the navigable waters, harbor, and lands underlying Lake Michigan because those lands carried with them the inviolable interest of the public.[99] However, the Ninth Circuit found that the Lands Commission failed to provide a reason why this state right limits the federal power of eminent domain. Moreover, even if there were a conflict between state and federal law, federal law would be supreme.[100]

94 The equal-footing doctrine provides that when a new state is admitted into the Union it gains "the same rights, sovereignty and jurisdiction" as the original States possess. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 474 (1988).

95 U.S. CONST. art. IV, § 3, cl. 2.

96 *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1997); Pollards Lessee v. Hagan, 44 U.S. 212, 230 (1845) (holding that the federal government did not have any title in a state's submerged lands after entry into the Union).

97 Federal navigation servitude ensures that "[a]ll navigable waters are under the control of the United States . . . , and although the title to the shore and submerged soil is in the various States . . . , it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Oregon ex rel. State Land Bd.*, 429 U.S. at 375–76 (quoting Gibson v. United States, 166 U.S. 269, 271–72 (1896)).

98 146 U.S. 387 (1892).

99 Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453, 455–56 (1892) (the Court did craft two narrow exceptions to this restraint on alienation—allowing alienation of lands "used in the improvement" of, or disposed of "without detriment to," the public interest).

100 U.S. CONST. art. VI, cl. 2.

The Lands Commission finally argued that the United States' use of eminent domain created a sort of "quiescent trust"[101]—rendering California's public trust rights inert but able to "re-emerge" if the land was later sold to a private party. This type of trust would be ideal, the Commission argued, because it would serve the Navy's purpose well while preserving the California public trust. The Ninth Circuit rejected this proposal and noted that it did not have jurisdiction to review "the wisdom" of the Navy's land-use determination. The United States had already delegated authority to the agency to take the lands for public use.

In conclusion, the court noted that neither the equal-footing doctrine nor the public trust doctrine prevent the federal government from exercising its power of eminent domain when it paid $2,910,000 in just compensation. Thus, the Ninth Circuit affirmed the district court's judgment.

101 A public trust is "quiescent" when "the public trust has no effect while the [federal government owns a property], but can 're-emerge' if the land is later sold to a private party." *32.42 Acres*, 683 F.3d at 1030, 1034.

7. Pacific Rivers Council v. U.S. Forest Service, 689 F.3d 1012 (9th Cir. 2012).

Pacific Rivers Council (Pacific Rivers) appealed the United States District Court for the Eastern District of California's decision granting summary judgment to the United States Forest Service (USFS). In January 2001, USFS issued a Final Environmental Impact Statement (2001 EIS) selecting a framework of amendments (2001 Framework) to forest plans in the Sierra Nevada Mountains (the Sierras).[102] In November 2001, the Chief of the USFS asked for a review of the 2001 Framework. As a result of the review, in January 2004, USFS issued a Final Supplemental Environmental Impact Statement (2004 EIS) and a subsequent 2004 Framework. Pacific Rivers brought suit to challenge the 2004 Framework's compliance with the National Environmental Policy Act (NEPA)[103] and the Administrative Procedure Act (APA).[104] Specifically, Pacific Rivers challenged the sufficiency of the 2004 EIS's analysis of the impacts of 2004 framework on fish and amphibians. The Ninth Circuit reversed and remanded to the district court because USFS failed NEPA's "hard look" requirement for fish. It affirmed the sufficiency of the amphibian analysis.

Iconic and expansive, the Sierra mountain range supports significant ecosystems as well as logging, grazing, and recreation activities. In November 1998, USFS published a Notice of Intent to prepare an environmental impact statement (EIS).[105] The EIS identified five broad problems to address through changes to the Forest Plans:[106] "1) conservation of old-forest ecosystems, 2) conservation of aquatic, riparian, and meadow ecosystems, 3) increased risk of fire and fuels buildup, 4) introduction of noxious weeds, and 5) sustaining hardwood forests."[107] The 2001 EIS identified eight alternatives for implementing the objective outlined in the Notice of Intent. USFS settled on Alternative 8, which is known as the 2001 Framework. There were over two hundred administrative appeals to the 2001 Framework.

After a change in the agency's administration, the newly appointed Chief of USFS decided to reevaluate the 2001 Framework instead of responding directly to appeals. The Chief directed the Regional Forester to

102 Each amended forest plan is a Land and Resource Management Plan (LRMP) promulgated pursuant to the National Forest Management Act, 16 U.S.C. § 1604 (2006). Each plan governs one of eleven national forests within the Sierras.

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

104 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

105 An EIS in this context analyzes the impact of the Forest Plan on the Sierras' ecosystems, flora, and fauna.

106 A forest plan is a document that outlines how the USFS will manage federal forest land. Forest plans outline USFS objectives and implementation of programs to reach those objectives. Forest plans also contain guidelines and rules concerning management of federal forest land.

107 Pac. Rivers Council v. U.S. Forest Serv. (Pac. Rivers Council), 689 F.3d. 1012, 1016 (9th Cir. 2012).

review fire-related issues and to identify opportunities to reduce the "unintended and adverse impacts" on grazing permit holders, recreational users and permit holders, and local communities.[108] As a result, USFS issued the 2004 EIS, which received over 6,000 administrative appeals. The Chief approved the plan as the 2004 Framework. The changes in authorized logging, logging-related activities, and grazing standards for both commercial and recreational livestock are relevant to this appeal.

The 2004 Framework allows the harvesting of an additional 4.9 billion board feet of timber over twenty years—1.2 billion of salvage timber and 3.7 billion of green timber. Additionally, the 2004 Framework allows the harvesting of larger trees and substantially increases the total logging acreage.[109] Finally, it allows for a significant increase in new road construction and reconstruction of current roads.[110] Regarding grazing restrictions, the standards contained in the 2001 Framework were largely reduced in the 2004 Framework.[111]

Before turning to the merits of the 2004 Framework, the Ninth Circuit first analyzed Pacific Rivers' standing de novo as a matter of Article III justiciability. The court then reviewed NEPA compliance using the APA's arbitrary and capricious standard.

USFS argued that Pacific Rivers had no standing to bring the case because it lacked an "injury in fact."[112] Because Pacific Rivers challenged amendments to the Land Resource Management Plans (LRMPs), USFS contended, it had failed to allege a "concrete and particularized" injury that was "actual or imminent."[113] The Ninth Circuit rejected these arguments and concluded that the 2004 Framework will impact Pacific Rivers members' use and enjoyment of the Sierras. Pacific Rivers introduced evidence that its Chairman, Bob Anderson, frequently hiked and climbed along the Sierra Range and there was a likelihood that the increased timber harvesting would be visible from great distances because it was largely in the upper two-thirds of slopes. The injury was concrete and particularized and actual or imminent, the court concluded, because of the demonstrated frequency of

108 *Id.*

109 The 2004 Framework reduces the area for prescribed burns, but increases the amount of area for permissive logging, including more logging close to streams. The 2001 Framework limited soil compaction close to streams to 5% of the stream-adjacent area, but the 2004 Framework contains no limit.

110 In total, the 2004 Framework authorizes 115 miles of new roads, and 1,520 miles of reconstruction in the first decade. The 2004 Framework allows for slightly more decommissioned roads (about 200 miles), but authorizes 215 miles of temporary roads and provides for an additional 3,200 miles of road maintenance.

111 The 2004 Framework allows for commercial livestock to graze in locations where surveys to determine the presence of certain threatened species of amphibians have not yet been performed. It also eliminates the exclusion of recreational livestock from meadows during breeding and rearing seasons.

112 The court pointed out that Article III standing was raised for the first time on appeal. Because the plaintiffs had no opportunity to supplement their complaint with member declarations as to harm, the court used a slightly less-stringent standard to review standing.

113 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000).

use and the likelihood of aesthetic injuries to Pacific Rivers members in their enjoyment of the affected forest.

USFS also argued that Pacific Rivers lacked standing because it did not challenge a specific project. Relying on precedent, the Ninth Circuit dismissed this argument, stating that plaintiffs did not have to "wait to challenge a specific project when their grievance is with an overall plan."[114] The Ninth Circuit pointed out that if a plaintiff had to wait to challenge a site-specific action, the overall programmatic authorization would escape review. Recent precedent accorded with this view: harm caused by a failure to comply with NEPA in formulating the 2004 Framework at programmatic scale could be sufficient to bring a facial NEPA challenge to the Framework.[115]

The Ninth Circuit next addressed Pacific Rivers' NEPA claims. Pacific Rivers alleged that the 2004 EIS did not take a hard look at impacts to both fish and amphibians.[116] The Ninth Circuit compared the 2004 EIS to the 2001 EIS and analyzed the sufficiency of the 2004 EIS.

The court first addressed fish. The 2001 EIS included a detailed sixty-four-page analysis of consequences to individual species of fish. The 2004 EIS, in contrast, lacked any analysis as to the consequences to individual species of fish. Instead, it incorporated by reference the analysis contained in the 2001 EIS, but failed to analyze the different environmental consequences of the 2004 Framework. This failure was particularly crucial in light of the substantial harvest of green and salvage timber planned during the first two decades of the 2004 Framework. USFS argued that the 2004 Framework was an amendment to each of the Forest Plans in the Sierras, so it was not reasonably possible to provide analysis of environmental consequences on individual species. USFS also argued that the 2004 EIS's incorporation by reference of the Biological Assessments (BAs) concerning the 2001 and 2004 Frameworks satisfied the hard look requirement.

The Ninth Circuit determined that the 2004 Framework was an amendment to the LRMPs of the Sierras, rather than an LRMP itself. Although some amendments to LRMPs may not require preparation of an EIS, the 2004 Framework was not one of them. The court concluded that the Framework was a fundamental revision to the existing LRMP that required USFS to follow the same procedures for development and approval of a

114 Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355 (9th Cir. 1994) ("[I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.").

115 *See* Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1169 (9th Cir. 2011) (holding that plaintiffs had standing to assert a facial NEPA challenge to a Forest Plan prior to site-specific implementation).

116 "Hard look," in the context of major federal actions with environmental consequences, includes "considering all foreseeable direct and indirect impacts," minimizing negative side effects, and discussing adverse impacts. *Pac. Rivers Council,* 689 F.3d 1012, 1024 (9th Cir. 2012) (quoting N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006)).

Forest Plan.[117] Even so, the USFS argued, because of the EIS's programmatic nature, analysis of individual species was not required. The Ninth Circuit agreed that NEPA's tiered structure allowed for different levels of analysis for programmatic and site-specific EISs. For a programmatic plan, there must be "sufficient detail to foster 'informed decision-making.'"[118] For a site-specific plan, a full analysis must take place once a critical decision for on-site development has been made.

The Ninth Circuit avoided in-depth analysis of this point, noting that NEPA requires that environmental consequences of a proposed plan be analyzed as soon as it is "reasonably possible" to do so, regardless of the kind of plan.[119] To begin, the court distinguished this case from earlier cases that might have supported an argument for a site-specific EIS.[120] An agency cannot avoid its obligation to perform analysis, the court concluded, merely by stating that a later Environmental Assessment will be performed. The Ninth Circuit reasoned that because the 2001 Framework contained a detailed, sixty-four-page analysis of environmental consequences for individual species of fish, the Ninth Circuit found it was reasonably possible to do the same for the 2004 EIS. USFS's failure to include any explanation for the absence of analysis was also significant.

In 2002, the Council on Environmental Quality (CEQ) established a task force to protect against what it called the "shell game" of deferring NEPA analysis to a later time.[121] The Ninth Circuit recognized that the appropriate level of environmental analysis is often debatable, but found that USFS had resolved the debate in this case by providing the detailed analysis for fish species in the 2001 EIS. Therefore, it was reasonably possible for USFS to include an analysis on individual fish species in the 2004 EIS, and thus failed the NEPA hard look requirement.

USFS next argued that the hard look requirement was satisfied by the two BAs that were incorporated by reference in the 2004 EIS. The Ninth Circuit disposed of this argument for three independently sufficient reasons. First, the BAs should have been in the text or appendix of the EIS since they

117 *See* 36 C.F.R. § 219.10(f) (1983) (significantly changing a plan requires USFS to "follow the same procedure as that required for development and approval of a forest plan"); *id.* § 219.5(a)(2)(i) (2012) ("A new plan or revision requires preparation of an environmental impact statement.").

118 N. Alaska Envtl. Ctr. v. Lujan, 961 F.2d 886, 890 (9th Cir. 1992) (quoting California v. Block, 690 F.2d 753, 761 (9th Cir. 1982)).

119 *Pac. Rivers Council*, 689 F.3d at 1026.

120 *See* Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002) (holding that NEPA requires an EIS to analyze environmental consequences of a proposed plan as soon as it is "reasonably possible"); *see also* Lands Council v. McNair, 537 F.3d 981, 991 (9th Cir. 2008) (en banc), *overruled on other grounds by* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) (holding that the "site-specific EIS at issue was sufficiently supported by studies and on-the-ground analysis").

121 NEPA TASK FORCE, MODERNIZING NEPA IMPLEMENTATION 39 (2003), *available at* http://ceq.hss.doe.gov/ntf/report/frontmats.pdf. Shell game refers to agency practice of deferring when and where issues will be addressed. Agency compliance with *Kern*'s "reasonably possible" timing constraints ensures that the agency avoids a shell game approach.

were intended to serve as the analysis of the environmental consequences. Incorporation by reference was inadequate in this case. Second, even if the BAs were included, they would not have satisfied the hard look requirement because they merely listed the fish species without providing analysis. Finally, even if the BAs could have satisfied the requirement, they only applied to one group of fish species; the 2001 EIS had identified and analyzed three separate groups.

With regard to amphibians, Pacific Rivers argued that the 2004 EIS failed to comply with NEPA requirements because the 2004 Framework delegated significant decision making to local managers of amphibian habitats. The Ninth Circuit disagreed. The 2004 EIS identified new and different dangers to specific amphibian species with the new Framework. The 2004 EIS identified different logging, prescribed burning, and grazing changes that would negatively impact frog species and then discussed mitigation strategies for attendant environmental consequences. Because of the substantial analysis for individual amphibians, the Ninth Circuit found that the 2004 EIS complied with NEPA requirements. That the USFS repeatedly committed itself to complying with NEPA for site-specific projects strengthened the court's conclusion. The 2004 EIS explicitly stated that additional NEPA compliance efforts would be required before USFS took site-specific actions. The Ninth Circuit's implicit conclusion was that the 2004 Framework complied with NEPA's tiered structure for programmatic plans.

In sum, the court found USFS failed to take a hard look at consequences as to fish but did take a hard look as to amphibians in the 2004 EIS. Since the 2004 EIS contained no analysis of the environmental consequences of the 2004 Framework on individual fish species, the court found USFS had violated NEPA.

In dissent, Judge N.R. Smith contended that the Ninth Circuit reinvented the arbitrary and capricious standard of review for agency decisions. The majority had ignored the tiering[122] framework of NEPA, Judge Smith argued, which differentiates between a programmatic and a site-specific EIS. The majority's decision in effect interprets NEPA's "reasonably possible" analysis to be "as soon as it can reasonably be done."[123] Established case law, however, uses a different standard. The dissent contended that site-specific impacts require a full evaluation of site-specific impacts only when a critical decision has been made. Only when NEPA documents are prepared after an irreversible and irretrievable commitment of resources can the agency violate NEPA. Because there was no irreversible and irretrievable

122 "Tiering" encompasses "'the coverage of general matters in broader environmental impact statements (such as national program or policy statements)' subsequently followed by 'narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the isuses specific to the statement subsequently prepared.'" *Pac. Rivers Council*, 689 F.3d at 1039 (quoting 40 C.F.R. § 1508.28 (2011)).

123 *Id.* at 1036 (quoting *Kern*, 284 F.3d at 1072).

commitment of resources, there was no NEPA violation. Since the threshold point had not been reached in this case, Judge Smith assumed that the court must defer to the methodological choices made by the agency, which determines when a site-specific analysis can reasonably be done. Additionally, Judge Smith noted, the court must assume that the agency will perform the required later analysis before committing resources.

The dissent next claimed that NEPA does not require that a subsequent EIS be prepared with the same amount of analysis as a previous EIS. In particular, requiring the same amount of analysis was inappropriate because the 2001 Framework contained more broad-based rules that made it easier to identify specific issues, whereas the 2004 Framework by design called for a flexible approach. The dissent also understood the intent behind the CEQ regulations was to balance the public's need for analysis with actual ripeness issues. As a result, agencies should receive wide latitude in choosing the scope under NEPA's tiered analysis structure. Finally, the dissent would have found that USFS did clearly explain why it had deferred analysis into specific fish and that USFS had the required discretionary power to do so. Finally, Judge Smith argued that the analysis was adequate because it provided enough "programmatic, high-level" deliberation to make sound policy that might affect multiple species, including fish.

8. Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers, 683 F.3d 1155 (9th Cir. 2012).

The Snoqualmie Valley Preservation Alliance (the Alliance) filed claims under the Clean Water Act (CWA),[124] the National Environmental Policy Act (NEPA),[125] and the Administrative Procedure Act (APA)[126] against the U.S. Army Corps of Engineers (the Corps). Puget Sound Energy, Inc. (PSE) intervened in the suit as a defendant. The Alliance alleged that the Corps' written verification that PSE could discharge fill at a hydroelectric power plant under several general nationwide permits (NWPs) was arbitrary and capricious and that an individual permit was required. The Alliance appealed the United States District Court for the Western District of Washington's grant of summary judgment to the defendants. The United States Court of Appeals for the Ninth Circuit held that this action was not barred due to improper collateral attack, the Corps' written verification was consistent with its historic practice, the Corps properly determined that the proposed discharge of fill material fell under the scope of several NWPs, and the Corps articulated sufficient rationale to support its verification.

PSE operates a dam and hydroelectric plant at Snoqualmie Falls in the State of Washington. The City of Snoqualmie, which is upriver from the Snoqualmie Falls dam, is prone to frequent flooding. In addition to other minor changes at the facility, PSE proposed to lower the height of the dam by a small amount while lengthening its width to alleviate flooding upstream of the dam. Property owners who live below the dam were concerned that this action would subject them to increased flood risk and formed the Alliance to collectively act on their concerns.

For PSE to be able to proceed with the facility modifications, several regulatory permits were required.[127] In 2004, the Federal Energy Regulatory Commission (FERC) approved a license for the upgrade. Because the modifications to the dam would lead to discharge of fill material,[128] PSE sought written verification from the Corps that it could discharge this fill material under several existing NWPs.[129] The Corps provided written

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

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

126 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

127 The project involved excavation and fill of wetlands that required permitting under section 404 of the Clean Water Act. Section 404 has two types of permits: individual and general (including nationwide permits). Individual permits allow specific activities on a case-by-case basis. General permits, in contrast, authorize all activities that meet the description provided in the permit. *See* 33 U.S.C. § 1344(a), (e) (2006).

128 *See id.* § 1344(e)(1) (allowing the Secretary to issue general permits for the discharge of dredged or fill material).

129 PSE sought authorization under Nation Wide Permit (NWP) 3(a) for removal of the old dam and construction of the new dam, NWP 33 for temporary discharges for necessary construction activities, and NWP 39 for discharges related to expansion for features necessary for the use of commercial and institutional buildings. *See* Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,181, 11,187–88 (Mar. 12, 2007).

verification that this proposed activity complied with the conditions of the NWPs.

In response to the Corps' written verification, the Alliance filed suit alleging that PSE's activity required an individual permit under the CWA, that PSE failed to undertake necessary analysis under NEPA for such an individual permit, and that the Corps' determination that these activities were permitted under the NWPs was arbitrary and capricious. The district court granted summary judgment to the defendants. Because this case was decided on summary judgment, the Ninth Circuit applied a de novo standard of review.

PSE first argued that the Alliance's claims were an improper collateral attack because they could have been brought during the review of the FERC license. The Ninth Circuit concluded that this case was not an improper collateral attack because the Corps had yet to verify that the modifications were permitted under existing NWPs. Thus, the Alliance could not have raised its current claims during the FERC licensing process. The court further explained that the result of an injunction against the Corps would not present an improper collateral attack on the FERC license because the NEPA analysis required by such an injunction would have no effect on the validity of the FERC license.

The Alliance's primary argument rested on NWP 17, which related specifically to hydropower projects.[130] This NWP affirmatively licensed hydropower projects of less than 5,000 kilowatts (kW) in size. The Alliance argued this affirmative license implied that all plants larger than this capacity required a NEPA analysis. The Alliance further asserted that the existence of this specific NWP prevented the Corps from allowing PSE's activities to proceed under any other NWP.

The court disagreed for two reasons. First, the NWP 17 was silent on the licensing of projects greater than 5,000 kW. Second, there was no language in NWP 17 that precluded the use of any other NWP by the Corps. The Corps interpreted its permitting scheme such that, so long as a hydropower project meets limiting conditions in a NWP, an individual permit is not necessary solely based on the generating capacity of the facility.[131] Because the interpretation was also articulated in the Corps' guidance, the action in this case was not merely consistent with its regulation, but was "consistent with the agency's longstanding practice."[132]

The court then turned to the Alliance's argument that the proposed modifications did not fall under the NWPs in question. Regarding NWP 3(a), the court explained that the Corps' application was consistent with the regulation because the modified dam will serve the same essential purpose

130 *Id.* at 11,184.

131 The court noted this interpretation does not provide the Corps a shortcut method to authorize power projects over 5,000 kW because NWPs have their own general terms and conditions.

132 Snoqualmie Valley Pres. Alliance v. U.S. Army Corps of Eng'rs, 683 F.3d 1155, 1161 (9th Cir. 2012) (internal quotations omitted).

as the old dam, and because minor modifications were supported by a desire to protect the public safety.[133] The court further found that application of the NWP was appropriate because hydropower projects plainly fall under the meaning of "industrial facility,"[134] as allowed for in the NWP, and because the agency's interpretation and application of its own regulations is accorded deference.

Finally, the court addressed whether the Corps' verification letter articulated a rational basis for its determination. The Alliance asserted that the Corps' letter, which verified that PSE's activities fell within the scope of the nationwide permit system, did not contain a sufficient articulation of the basis for its decision. The court concluded that a rational basis was present because the letter explained that it complied with all necessary permit conditions and would have minimal impact. Requiring more, the court explained, would abrogate the purpose of a nationwide permit system, which is rooted in efficient permitting for projects pre-determined to have little impact. The court found no CWA violation, so the Alliance's NEPA claim, which relied upon a CWA violation failed as well.

In summary, the Corps appropriately determined that PSE's activities could proceed under several NWPs. It deferred to the agency's interpretation of its own regulations. The Ninth Circuit affirmed the grant of summary judgment to the defendants.

133 *See* Final Rule for Nationwide Permit Program Regulation and Issue, Reissue, and Modify Nationwide Permits, 56 Fed. Reg. 59,110, 59,120 (Nov. 22, 1991) (codified at C.F.R. pt. 330) (noting that concerns for public safety warrant minor deviations in structural configurations for repair and replacement activities).

134 Reissuance of Nationwide Permits, 72 Fed. Reg. at 11,188–89.

9. California Communities Against Toxics v. United States, 688 F.3d 989 (9th Cir. 2012).

California Communities Against Toxics and Communities for a Better Environment (Communities) sought review of a final rule by the Environmental Protection Agency (EPA).[135] Communities challenged EPA's approval of a revision to the South Coast Portion of the California State Implementation Plan pursuant to the standards for air quality and air pollutants under the Clean Air Act (CAA).[136] Because the rule violated the CAA, Communities and EPA agreed that the case should be remanded. The United States Court of Appeals for the Ninth Circuit approved this remand. The remaining issue was whether the final rule should be vacated while EPA created a new and valid rule. Although it found the original rule invalid, the court did not vacate it for fear of severe consequences.

The South Coast Air Quality Management District (District) regulates the air quality in the South Coast Air Basin in Southern California. In 2009, the California assembly passed a bill[137] to transfer excess reduction offset credits[138] to a soon-to-be completed power plant. EPA approved the revision to the state plan in a final rule,[139] and Communities sued alleging procedural and substantive errors in the new plan.

Courts refuse voluntary remand only when the agency acts frivolously or makes a decision in bad faith. The Ninth Circuit had initially held that because EPA recognized the merits of the challenge to its rule and was forthcoming in these proceedings that the remand should be granted. The court conceded error in its voluntary remand and reviewed the agency action on issues of vacatur using an arbitrary and capricious standard.

The Ninth Circuit examined the procedural and substantive errors alleged in the final rule. EPA had failed to disclose a portion of documents in the electronic docket or docket index.[140] Yet, the Ninth Circuit found no injury to Communities because they already had possession of the documents and would eventually have an opportunity to comment after the remand. Substantively, EPA conceded that there were flaws in its reasoning

135 Respondents included Lisa Jackson, Administrator, U.S. Environmental Protection Agency and Jared Blumenfeld. Respondents-Intervenors included CPV Sentinel LLC and the South Coast Air Quality Management District.

136 42 U.S.C. §§ 7401–7671q (2006).

137 Assemb. B. 1318 (Cal. 2009).

138 *Id.* § 3. The credits come from an excess emissions trading system based on "credits," which entitles trade to offset requirements pursuant to air quality compliance under the CAA. The District maintains a stock of "credits" for excess emission reductions that it distributes to entities such as schools and hospitals. *Id.*

139 Revision to the South Coast Portion of the California State Implementation Plan, CPV Sentinel Energy Project, 76 Fed. Reg. 22,038, 22,038 (Apr. 20, 2011).

140 *See* 5 U.S.C. § 553(c) (2006) (requiring an agency to give interested persons an opportunity submit "written data, views, or arguments" that it will consider in the final rule). The court stated that the agency must make available to public the technical studies and data it used in reaching proposed rules.

for its final rule but presented new reasoning to support the final rule. The court found the final rule was nonetheless invalid because review of the agency's decision "begins and ends with the reasoning that the agency relied upon in making that decision."[141]

Finally, the court considered whether to vacate the invalid rule. In deciding vacatur, the Ninth Circuit sat in equity and balanced the errors in the rulemaking against the consequences of vacating the rule.[142] The court found that vacatur would cause significant harm because it would delay the construction of a much needed power plant. This delay could lead to blackouts, necessitating the use of diesel generators that further pollute the air. Stopping construction would also lead to economic disaster because of the scale of the project.[143]

In sum, the court reasoned that because of the consequences of vacatur it would remand without vacating the rule. It made it clear, however, that it did not authorize commencement of Sentinel's operation without a new rule in place. Therefore, it remanded for further rulemaking.

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

142 Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures.").

143 This is a billion-dollar project and will employ 350 workers.

10. Alcoa, Inc. v. Bonneville Power Administration, 698 F.3d 774 (9th Cir. 2012).

Numerous entities and organizations throughout the Pacific Northwest filed petitions for judicial review of a direct power contract between Bonneville Power Administration (BPA) and Alcoa, Inc. These petitions were consolidated for direct review[144] by the United States Court of Appeals for the Ninth Circuit. Petitioners were primarily power companies, power suppliers, and major power purchasers within the Pacific Northwest. Additionally, Alcoa sought review of a BPA interpretation of a prior Ninth Circuit holding from which BPA concluded that financial benefits of its transactions must outweigh costs to comply with its statutory mandate. After making an initial determination that the case was not moot, the Ninth Circuit affirmed the validity of all BPA contracts and actions at issue in this case as not arbitrary and capricious. It further held that BPA's contract fell within a categorical exclusion to the National Environmental Policy Act (NEPA).[145]

BPA is a federal agency charged with marketing wholesale electrical power generated by federal facilities in the Pacific Northwest. It sells electricity to public bodies and cooperatives (preference customers), private, investor-owned utilities, and, at BPA's choosing, to direct service industrial customers (DSIs). Preference customers receive a priority firm rate (PF rate).[146] DSI customers, on the other hand, pay a cost-based rate (IP rate) that must be "equitable in relation to the retail rates charged" by BPA's preference customers to industrial customers.[147] Further, BPA must set rates in accordance with sound business principles.[148]

Prior to this case, the Ninth Circuit reviewed two other contracts between BPA and Alcoa. In the first case, *Pacific Northwest Generating Cooperative v. Department of Energy* (*PNGC I*),[149] the court held that offering power to a DSI at the PF rate was inconsistent with BPA's statutory authority. In the second case, *Pacific Northwest Generating Cooperative v.*

144 Direct review was appropriate in this case under 16 U.S.C. § 839f(e)(5) (2006) (providing that challenges to BPA final agency actions or constitutionality of BPA actions "shall be filed in the United States court of appeals for the region").

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

146 Alcoa, Inc. v. Bonneville Power Admin. (*Alcoa*), 698 F.3d 774, 780 (9th Cir. 2012) ("BPA is required to 'give preference and priority' to 'public bodies and cooperatives' that purchase power from BPA for resale to their consumers. . . .[T]he priority firm or 'PF rate,' [is the rate] that allows BPA to recover the costs of generating or obtaining the power required to meet the preference customers' needs").

147 16 U.S.C. § 839e(c)(1)(B) (2006).

148 *Id.* § 838g ("[R]ate schedules . . . shall be fixed . . . consistent with sound business principles"); *id.* § 839e(a)(1) ("[R]ates shall . . . recover, in accordance with sound business principles . . . costs and expenses incurred"); *id.* § 839f(b) ("[BPA] shall . . . assure the timely implementation of [16 U.S.C. §§ 839–839h] in a sound and businesslike manner").

149 580 F.3d 792 (9th Cir. 2009).

Bonneville Power Administration (*PNGC II*),[150] the court held that the obligation to set rates was consistent with sound business principles applied to sales of power at the IP rate. The court determined that BPA must offer the IP rate if BPA elected to sell Alcoa power. In turn, BPA understood *PNGC II* to mean that in order to sell power to a DSI, BPA had to first "conclude based on evidence in the record that the proposed transaction will result in benefits that equal or exceed the costs to BPA of the transaction."[151] BPA referred to this interpretation as the "equivalent benefits standard."

Alcoa's current contract was divided into four stages: 1) an "Initial Period," 2) an "Extended Initial Period," 3) a "Transition Period," and 4) a "Second Period." The Initial Period lasted from December 22, 2009 to May 26, 2011. BPA determined that it could supply 320 average megawatts of electricity to Alcoa during the Initial Period at the IP rate and satisfy its equivalent benefits standard. In turn, it would earn a net profit of $10,000. The Extended Initial Period[152] was not at issue in this case. Following the Initial Period and any Extended Initial Period, the contract stated that the Transition Period would occur only if "the Ninth Circuit issues an opinion or other ruling holding, or that BPA determines can reasonably be interpreted to mean, that the equivalent benefits standard does *not* apply to sales under [the Alcoa Contract]."[153] If this contingency were met, BPA would have one year to study whether it could provide service to Alcoa for a five year term in the Second Period, again for 320 average megawatts of electricity at the IP rate. Following the Extended Initial Period, the parties made three rapid short-term contract amendments that extended the Initial Period to facilitate negotiations in 2012.

Two other relevant occurrences took place prior to this case. First, BPA released a draft of its Alcoa contract for public comment in 2009 and explained that it did not need to prepare an environmental impact statement (EIS) under NEPA because the contract fell under a Department of Energy categorical exclusion of contracts involving physical changes to property. Second, the Ninth Circuit amended its *PNCG II* opinion to distinguish BPA's voluntary act of providing $32 million to Alcoa—effectively providing it with the IP rate—from the act of actually providing power at the IP rate. The court noted that the latter would warrant considerably more deference because providing power is explicitly within BPA's agency expertise and its sale of power to DSIs at the IP rate is expressly statutorily authorized. Thus, providing power at the IP rate at a loss might warrant judicial deference.

As a threshold issue, the Ninth Circuit addressed whether this case was moot as to claims regarding the Initial Period because that portion of the contract had already passed. The court concluded that these claims were not moot because they fell within the "special category of disputes that are

150 596 F.3d 1065 (9th Cir. 2010).

151 *Alcoa*, 698 F.3d at 782.

152 The Extended Period allowed Alcoa to extend the contract for a period of three to twelve months at its discretion following the Initial Period. *Id.* at 783.

153 *Id.* (quoting contract).

capable of repetition while evading review."[154] The "evading review"[155] prong of that exception was met because the seventeen-month Initial Period was too short of a time to fully litigate claims involving that portion of the contract. The court noted that it had applied this mootness exception to actions lasting as long as two years. The second prong, that the conduct is "capable of repetition,"[156] was met because power contracts are by their nature short in length since they are responsive to market conditions. This finding was evinced by BPA's several short-term contract extensions in 2012. Thus, the court proceeded to the merits of the petitioners' and Alcoa's claims.

Petitioners made two separate arguments regarding BPA's alleged failure to maximize profits. First, they claimed that BPA's sale of power to Alcoa at the IP rate caused BPA to forego readily available profits and therefore, BPA did not operate in accordance with sound business principles. Moreover, petitioners reasoned that this failure to maximize profits led to increased rates paid by other customers. Second, they claimed that BPA's conclusion that it would receive $10,000 in profit was flawed.

In response, the court first held that BPA is not required to *maximize* profits, recognizing that it had previously reached the same conclusion in *California Energy Commission v. Bonneville Power Administration*.[157] In short, BPA has multiple mandates, only one of which is to charge low rates. For example, its public mission also includes ensuring "diversified use of electric power."[158] Here, BPA physically sold power at the IP rate to Alcoa, which *PNCGC II*'s amended opinion explained would likely warrant deference. And further, BPA earned a profit. In light of these facts, the court deferred to BPA, finding BPA's contract with Alcoa was neither arbitrary nor capricious.

The court also explained that BPA's conclusion that it would earn a $10,000 profit from this contract was not arbitrary or capricious based on several rationales. First, BPA backed this forecast with significant findings of fact.[159] Second, this type of determination is explicitly within BPA's realm

154 *Id.* at 786 (internal quotation marks omitted). Actions falling into this category are those where: "1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and 2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." Turner v. Rogers, 131 S. Ct. 2507, 2515 (2011).

155 The Ninth Circuit has "recognized that evading review means that the underlying action is almost certain to run its course before either this court or the Supreme Court can give the case full consideration." *Alcoa*, 698 F.3d at 787 (internal quotation marks omitted).

156 "[C]hallenged conduct is capable of repetition where there is evidence that it has occurred in the past, or there is a reasonable expectation that the petitioner would again face the same alleged invasion of rights." *Id.* (internal quotation marks omitted).

157 909 F.2d 1298, 1307–08 (9th Cir. 1990).

158 16 U.S.C. § 838g(1) (2006).

159 The Court found that under BPA's forecast, "it would be able to supply Alcoa's needs from its existing inventory (which otherwise would constitute surplus power), in all weather and flow conditions except 'critical' situations," and BPA gave adequate consideration to the matter. *Alcoa*, 698 F.3d at 790.

of expertise, such that BPA is warranted in receiving substantial deference from the court. Third, even though petitioners presented additional evidence such as updated meteorological data, this evidence was available only after the administrative record had been closed.

In addition to these arguments, petitioners also challenged the waiver-of-damages provision in the contract, which stated that BPA and Alcoa may waive any right to seek damages or restitution when a court finds a part of the contract void or unenforceable. The court concluded that the BPA Administrator has "broad powers to enter and modify contracts, including the power to compromise or settle claims" and that it is not the court's proper place to second-guess BPA's judgment.[160]

The Ninth Circuit then discussed Alcoa's argument that BPA's use of the "equivalent benefits standard" was arbitrary and capricious. The court explained that Alcoa premised its argument on incorrect facts and law, first because the record did not support the contention that BPA refused to sell power at the IP rate unless the equivalent benefits standard was met, and second because BPA has no obligation to sell any power to Alcoa. The court explained its reluctance to fashion categorical rules regarding matters within BPA's discretion. Rather, the court explained that such evaluations must be made on a case-by-case basis, and BPA was within its statutory authority regarding the Initial Period of the contract.

Petitioners also argued that the Second Period of the contract violated BPA's mandate to act in accordance with sound business principles because the contract could yield a $300 million net loss to BPA. The majority disposed of this argument on the ground that the petitioners' potential injury was too speculative to meet either ripeness[161] or standing.[162] The court provided three reasons for this determination. The first two focused squarely on the fact that neither of the two contingencies for the Second Period to come to fruition had yet been met.[163] Third, and most importantly, the parties had expressly removed all references to the Second Period from the contract in their May 2012 amendment, meaning that they would have to rewrite the provision to once again include the Second Period for the *threat* to petitioners to be realized. The contingencies required to create the injury were not concrete and particularized enough to establish standing, which

160 *Id.* at 792.

161 "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580–81 (1985)).

162 A party has standing to press its claim in federal court only when it can demonstrate the existence of an injury in fact, that is "an invasion of a legally protected interest which is a) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 455 U.S. 149, 155 (1990)) (internal quotation marks omitted).

163 These contingencies included: 1) a ruling by the Ninth Circuit that the equivalent benefits standard need not be adhered to, and 2) a BPA determination that it could "provide service to Alcoa in a manner 'consistent with any alternative standard established' by such a ruling." *Alcoa*, 698 F.3d at 793 (citation omitted).

also prevented petitioners from seeking protection under the "capable yet evading review" doctrine.

Finally, the court addressed the petitioners' NEPA argument that BPA was required to prepare an EIS prior to moving forward with this contract. The court first noted that BPA expressly relied upon a Department of Energy regulation categorically excluding this type of action from the requirement to prepare an EIS.[164] The majority panel explained that because this determination "implicated substantial agency expertise," it was entitled to deference. BPA adequately considered the factors and did not make a "clear error of judgment." Thus, its conclusion was not arbitrary or capricious.

In summary, the issues in this case were not moot because they were capable of repetition while evading review. The court determined that BPA's actions were not arbitrary and capricious, deferring to BPA's policy judgment. The court denied the petitions relating to the Initial Period, dismissed the portions of the petitions to invalidate the contract's Second Period, and denied the NEPA claim.

Additionally, Judge Tashima wrote separately to concur with Judge Bea's argument that only "well-reasoned dicta," not dicta based on hypothetical situations, should bind the court, contrary to the precedent set by *Miranda B. v. Kitzhaber*.[165] The two judges shared the view in an attempt to correct precedent that was mistakenly adopted by the Ninth Circuit due to a technical error.[166]

In dissent, on the merits of the case, Judge Bea explained that he believed petitioners had standing to bring their claims regarding the Second Period. He explained that BPA has a relatively strict statutory mandate and that the portion of the contract pertaining to the Second Period clearly took them outside these statutory bounds. Judge Bea criticized the majority's opinion for not providing guidelines to the parties and failing to give consideration to evidence of past conduct.

BPA is statutorily prohibited from selling power to customers below cost. The second period would have set a cost cap, which is contrary to BPA's mandate to recover all costs. This cost cap could have resulted in up to a $330 million loss, in excess of BPA's statutory authority. A $330 million loss would result in rate increases for other customers.

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164 "Establishment and implementation of contracts, marketing plans, policies, allocation plans, or acquisition of excess electric power that does not involve: 1) the integration of a new generation resource, 2) physical changes in the transmission system beyond the previously developed facility area, unless the changes are themselves categorically excluded, or 3) changes in the normal operating limits of generation resources. 10 C.F.R. pt. 1021, subpt. D, app. B4.1 (2011).

165 "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (quoting United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (en banc)).

166 *Alcoa*, 698 F.3d at 796 (Tashima, J., concurring); *id.* at 804 n.4 (Bea, J., concurring in part and dissenting in part).

BPA may not explicitly or implicitly subsidize any one customer because sound business principles dictate that BPA should focus on maximizing profits. Though no panel has given a comprehensive definition to the term "sound business principles," there are four relevant statutory references to the term in BPA's governing statutes.[167] The dissent interpreted these authorities to require that BPA not sell power at a rate below cost. Therefore the Second Period, during which BPA would have sold power below cost, was not in accordance with sound business principles.

If forced to wait until the Second Period to challenge BPA, petitioners would be forced to bear the brunt of these increased fees because it will be too late for effective judicial review. Judge Bea noted that this case marked the third time BPA had entered into a contract with Alcoa at less than the IP rate and encouraged BPA and Alcoa to adopt principles for inclusion in future contracts.

167 16 U.S.C. §§ 825s, 838g, 839e(a)(1), 839f(b) (2006).

11. Pacific Coast Federation of Fishermen's Associations v. Blank, 693 F.3d 1084 (9th Cir. 2012).

Pacific Coast Federation of Fishermen's Associations (Association)[168] challenged the National Marine Fisheries Service (NMFS)[169] amendments to the fishery management plan for the trawl sector of the Pacific Coast Groundfish Fishery. NMFS designed the changes to promote economic efficiency, decrease environmental impacts, and simplify future decision making, which may shrink the plaintiffs' participation in the fishery. The United States Court of Appeals for the Ninth Circuit upheld the United States District Court for the Northern District of California's grant of summary judgment to the defendants and held that NMFS complied with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act)[170] and the National Environmental Policy Act (NEPA).[171]

Fishery Management Councils submit their fishery management plans to the public and to NMFS for review. The plans must allocate harvests fairly and equitably among commercial and recreational sectors, comply with national standards that include measures to prevent overfishing, and specify optimum yield at each fishery.[172] The Fishery Management Councils began regulating fisheries by limiting those who could enter and participate in the fisheries in 1990. Under this regulation, participants receive privileges to harvest a portion of a species within the fishery. The structure of the privilege program was the basis of the Association's claims.

In 2003 the Pacific Council began to develop a program to better manage the Pacific Groundfish Fishery, which extends along the California, Oregon, and Washington coasts. The Pacific Council divided its goals into two proposals: rationalization of the trawl sector and allocations, and Pacific halibut bycatch. In August 2010, NMFS prepared different environmental impact statements (EISs) for each proposal, which resulted in Amendments 20 and 21. Amendment 20 assigns fishing privileges within three separate sectors of the trawl fishery and includes measures to minimize adverse impacts to fishing communities.[173] Amendment 21 supports Amendment 20 by fixing allocations of groundfish among various trawl and non-trawl sectors.[174]

168 Plaintiff-Appellants included Pacific Coast Federation of Fishermen's Associations, Port Orford Ocean Resource Team, and San Francisco Crab Boat Owners Association.

169 Defendant-Appellees included Rebecca M. Blank in her official capacity as Acting Secretary of the United States Department of Commerce, National Marine Fisheries Service, and National Oceanic and Atmospheric Administration.

170 Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C § 1853a(c) (2006).

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

172 16 U.S.C. § 1853(a)(13), (14) (2006).

173 Pacific Coast Groundfish Fishery Management Plan, Amendments 20 and 21, Trawl Rationalization Program, 75 Fed. Reg. 78,344 (Dec. 15, 2010).

174 *Id.*

The court reviewed NMFS's decision under the arbitrary and capricious standard of the Administrative Procedure Act (APA),[175] and analyzed whether NMFS "had considered the relevant factors and articulated a rational connection between the facts found and the choice made."[176] The court reviewed NMFS's interpretation of the Magnuson Act under the two-step framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[177]

On the merits, the Association argued that § 1853a of the Magnuson Act requires NMFS to develop criteria for distributing quota shares to fishing communities and adopt policies to ensure participation of fishing communities. The Ninth Circuit, however, agreed with NMFS that the Magnuson Act only required NMFS to consider participation of fishing communities and weigh participation against other objectives. The court found that the provisions that require consideration of the framework of the fishery do not require that fishing communities receive an allocation of quota shares.[178] While § 1853a requires NMFS to take fishing communities into account, it does not require guaranteed access or any particular role in the program. In the alternative, the Association argued that Amendments 20 and 21 defied National Standard 8 policy, which encouraged community participation in the fishery.[179] The court disagreed, holding that this standard does not require a particular outcome and merely provides a framework for the Pacific Council's analysis.

The court then turned to whether NMFS met its obligations to consider fishing communities in the creation of Amendments 20 and 21. The court determined NMFS adequately met its obligations to include descriptions of the effects of quota programs on communities and explain how communities participated in the Pacific Council's decision. In addition, the court found that NMFS implemented measures to provide an equitable allocation of quota shares, assist entry level participants and fishing communities, and prevent a single shareholder from acquiring excessive shares in accordance with 16 U.S.C. § 1853a(c)(5)(A), (C)–(D). Although the court recognized Amendments 20 and 21 may impact the fishing communities, the court found NMFS adequately balanced and considered those concerns against conservation goals and needs of other users. The court highlighted that its role is to review agency action, and not substitute its own judgment, so it deferred to the agency's expertise.

175 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

176 Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 88 (1983).

177 467 U.S. 837 (1984). The two-step test requires the court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, the court will follow Congress's intent. If the statute is ambiguous, the court will determine if the agency's interpretation is "based on permissible construction of the statute." *Id.* at 843.

178 Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1853a (2006). The Association attempted to rely on legislative history to support its claim. The court found that § 1853a only required NMFS to consider fishing communities in developing the program.

179 16 U.S.C. § 1851(a)(8) (2006).

The Association next argued that 16 U.S.C. § 1853a(c)(5) and (c)(7) required NMFS to restrict the ability to receive and hold quota shares to those who "substantially participate" in the Pacific Coast Groundfish Fishery. NMFS countered that § 1853a(c)(1)(D) is the only provision that determines who is excluded from acquiring quota shares. The court agreed with NMFS for three reasons: 1) reading sections a(c)(5) and (c)(7) as the Association does requires adding the word "only" to subsection (c)(5); 2) though the Magnuson Act refers to "persons who substantially participate in the fishery," that phrase is not found in provisions specifying who may not acquire quota shares; and 3) "limiting quota shares to those who substantially participate in the fishery would conflict with other parts of § 1853a(c)."[180] The court further found that § 1853a(c)(1)(D) contemplates, but does not require, that participation requirements may be established, and there is no mandate that participation be limited to those who substantially participate in the fishery.

Turning to the NEPA claims, the Ninth Circuit noted that NEPA requires agencies to disclose the environmental impacts of their proposed actions. The Association argued that NMFS violated NEPA by performing separate EISs for Amendments 20 and 21 because § 1502.4(a) states that proposals which are related closely enough to be a single course of action shall be evaluated in a single EIS.[181]

The Ninth Circuit first noted that § 1508.25 rather than § 1502.4 determines whether an agency must prepare a single EIS.[182] Following application of § 1508.25, the court found that Amendments 20 and 21 have independent utility and are not connected actions because they do not have co-extensive goals. Amendment 20 is applicable only to trawling, while Amendment 21 allocates catch limits between trawl and non-trawl sectors. Further, the court noted the true purpose behind § 1508.25 is to prevent agencies from evading a full impact analysis by dividing the project into multiple actions. The Ninth Circuit did not find a violation in this "divide and conquer" approach in this case because NMFS adequately studied the direct, indirect, and cumulative effects of Amendments 20 and 21, separately and jointly, and properly considered and addressed the public comments.

Turning to the alternatives analysis under NEPA, the court found that NMFS considered a reasonable range of varied alternatives. The Ninth Circuit determined that NMFS appropriately narrowed the range of alternatives and was not required to consider every possible alternative. As such, the court found NMFS's choice to limit alternatives to quota programs in Amendment 20 and to similar allocation methodology in Amendment 21 was adequate.

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180 Pac. Coast Fed'n of Fishermen's Ass'n v. Blank, 693 F.3d 1084, 1095 (9th Cir. 2012).

181 40 C.F.R. § 1502.4(a) (2012).

182 While § 1502.4(a) mentions that related proposals should be contained in a single EIS, it lacks any type of independent test to determine when this is necessary. *Id.* Section 1508.25(a)(1), however, expressly provides criteria to determine which proposals to include in an EIS. 40 C.F.R. § 1508.25(a)(1) (2012).

Finally, the Association argued that the EISs were inadequate because they focused on socioeconomic impacts instead of focusing on impacts on groundfish habitat specifically. The Association argued this analysis basically ensured the long term domination of trawling. The Ninth Circuit disagreed, determining that Amendment 20 and 21 did not necessarily favor trawling, and may actually decrease the dominance of trawling by consolidating the fleet. The court noted that both amendments discussed potential effects on non-trawl communities. Additionally, the court noted that NMFS adequately considered mitigation in both Amendments since NEPA only requires mitigation measures to be reasonably detailed.

In summary, the court found that NMFS satisfied the requirements of the Magnuson Act national standards and satisfied the requirements of NEPA by appropriately studying Amendments 20 and 21 in separate EISs, considering adequate alternatives, and adopting appropriate mitigation measures.

12. League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Service, 689 F.3d 1060 (9th Cir. 2012).

League of Wilderness Defenders–Blue Mountains Biodiversity Project (the League) challenged the environmental impact statement (EIS) prepared by the United States Forest Service (USFS)[183] for a forest thinning, fuels reduction, and research project in the Pringle Falls Experimental Forest. The League alleged that USFS's EIS for the Pringle Falls Experimental Forest Thinning, Fuels Reduction, and Research Project (Project) in the Deschutes National Forest in Central Oregon failed to comply with National Environmental Policy Act (NEPA).[184] The United States Court of Appeals for the Ninth Circuit held that the statement of purpose and EIS were reasonable under the arbitrary and capricious and abuse of discretion standards. Furthermore, the Ninth Circuit determined that the EIS took a hard look at impacts on snag-dependent wildlife and species that depend on standing dead trees. Thus, the Ninth Circuit affirmed the United States District Court for the District of Oregon's grant of summary judgment to USFS.

USFS manages the experimental forest under the Forest and Rangeland Renewable Resources Research Act of 1978.[185] The Project authorized logging and controlled burning on approximately 2,500 acres of the experimental forest in Deschutes National Forest to reduce the risk of wildfire and beetle infestation and to conduct forest management research. USFS observed in 2005 that the density of trees in the forest placed the Project area at risk of beetle infestation and wildfire.

USFS uses calculations of upper management zone (UMZ) and prescribed stand density index (SDI) to calculate a forest's health. A forest with "[a]n SDI higher than the UMZ level means that trees are at imminent risk of beetle infestation."[186] The forests within the Project area had an SDI between 132 and 224% of UMZ. Because of the high ratio, USFS determined that without thinning, wildfire or beetle infestation could destroy the area and jeopardize ongoing and future research projects.

In 2007, USFS designed a research project (Study Plan) that simultaneously addressed scientific objectives and aimed to reduce wildfire and pest risk in the "ProjectArea". The Study Plan identified six research questions and divided the study area into four blocks, which were subdivided into five areas with which to test different levels of logging and controlled burning. USFS believed that some of the research questions

183 Other defendants included John Allen in his official capacity as Forest Supervisor, Deschutes National Forest, and Bov Eav in his official capacity as Director of the Pacific Northwest Research Station.

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

185 Forest and Rangeland Renewable Resources Research Act of 1978, 16 U.S.C. §§ 1641, 1650 (2006).

186 League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv. (*Wilderness Defenders*), 689 F.3d 1060, 1066 (9th Cir. 2012).

would be answered by the Project within a few years and others would take decades. After a series of internal and external peer reviewers, USFS approved the Study Plan.

USFS performed an environmental review of the Project at the same time it developed the Study Plan. It circulated a draft EIS to the public in 2009 and consulted the United States Environmental Protection Agency (EPA) and United States Fish and Wildlife Service (FWS). EPA voiced its support of the Project, and FWS concluded that the Project was not likely to jeopardize the threatened northern spotted owl. In March 2010, USFS issued a final EIS for the Project that outlined two action alternatives and a no-action alternative. The no-action alternative left the forest in the existing state. Alternative 2, the selected alternative, required logging of 70% of the trees larger than six inches in diameter. Alternative 3 was similar to Alternative 2, but involved logging approximately 15% fewer trees, leaving a larger amount of spotted owl habitat untouched. USFS selected Alternative 2 the same day that it issued the final EIS.

The League appealed the district court's grant of summary judgment to USFS. It argued that the EIS was deficient for three reasons: 1) the EIS limited the purpose and need for the Project and only considered Project alternatives that followed the Study Plan, 2) the Project lacked scientific integrity, and 3) the Project failed to take a hard look at impacts to the forest habitat. The court reviewed the district court's grant of summary judgment de novo[187] and the agency's compliance with NEPA under an arbitrary and capricious standard.[188]

First, the Ninth Circuit considered the purpose and need of the Project through the EIS. In assessing the purpose and need, the court found that the EIS was backed by statutory frameworks.[189] The League argued that the EIS was too narrow and required rigid implementation of the Study Plan. While the Ninth Circuit recognized that the EIS may appear narrow when read in isolation, the court found that when read in context, the Study Plan was reasonable because it expressly incorporated broad objectives.

The Ninth Circuit dismissed the League's challenge because it found that the EIS adequately informed decisions by USFS and the public. USFS involved interested parties in the NEPA process almost a year prior to the final approval of the Study Plan. The Ninth Circuit dismissed the League's assertion that USFS failed to closely consider retaining trees of greater than twenty-one inches. The court also determined that the EIS did not have to consider an alternative in detail that would not provide beneficial research data for USFS. Furthermore, the EIS only needed to consider alternatives that reduced the risk of beetle infestation and wildfires while answering the

187 Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1109 (9th Cir. 2010).

188 Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008).

189 *See* Wildfire Disaster Recovery Act of 1989, 16 U.S.C. § 551 (2006) (provides USFS authority to protect against destruction by fire); Forest and Rangeland Renewable Resources Research Act of 1978, 16 U.S.C. § 1642 (2006) (providing USFS authority to conduct research experiments that it deems necessary in experimental forests).

six research questions, which may have resulted in very similar alternatives.[190] Ultimately, the court emphasized that this case is unique because of the research purpose of the Project and its location in an experimental forest. Other NEPA cases may have found these alternatives inadequate.

On the League's claim that the EIS lacked scientific integrity, the Ninth Circuit commented that the court is deferential in reviewing the agency's area of expertise. The League first argued that the EIS exaggerated the potential risk to fire and beetles by using the terms imminent and catastrophic. The Ninth Circuit stated that USFS should have defined the terms "imminent" and "catastrophic" in its glossary, but that the use of these terms was not arbitrary and capricious or an abuse of discretion. In addition, there was no abuse of discretion because the League overlooked the EIS prediction that half the Project area could be susceptible to moderate or high fire behavior in twenty years.

In its second argument against scientific integrity, the League disagreed with USFS's assertion that trees in the Project faced a high risk of wildfire and a possible stand-replacing event.[191] The Ninth Circuit held that USFS provided adequate information to support the assertion of a high risk of wildfire and stand-replacing event, and the League failed to offer scientific evidence to support the assertion that the presumed risk was inaccurate. Finally, the Ninth Circuit held that the risk-reduction goal in the EIS made clear that the goal of the Project was to protect trees for ongoing and future research, overcoming the League's assertion that logging 70% of the trees in the area was inconsistent with the goal of reducing the risk of catastrophic tree mortality. Furthermore, the court noted that the EIS's statement of purpose indicated impacts to and options for future research opportunities. As a result, the Ninth Circuit found that the EIS thoroughly explains its fire risk reduction goals.

Finally, the Ninth Circuit found that USFS took a hard look[192] at the Project's impacts on tree mortality, wildlife species dependent on standing dead trees, and wildlife species dependent on snags.[193] The Ninth Circuit found that the League mischaracterized the purpose of the project with reference to tree mortality and wildlife species dependent on standing dead trees. The court accepted the qualitative, rather than quantitative, analysis of tree mortality due to the unique nature of the area. Furthermore, the court found that USFS's analysis of impacts of snag-dependent species was

190 NEPA only requires an agency to consider reasonable or feasible alternatives, and does not require the agency to consider an infinite amount of alternatives when preparing an EIS. Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 868 (9th Cir. 2004).

191 A stand is a group of trees of similar size, species, and structure growing together.

192 The court defined a hard look analysis to include all foreseeable impacts, whether direct or indirect, and applied a rule of reason standard to determine if the EIS contained a reasonable discussion of probable environmental consequences. *Wilderness Defenders,* 689 F.3d 1060, 1075–76 (9th Cir. 2012).

193 Snags are dead trees that stand greater than 10 feet tall and are larger than 10 inches in diameter. *Id.* at 1076.

sufficient because precise quantification was unreasonable, and USFS adequately explained the impacts in qualitative terms.

In summary, the Ninth Circuit found that the EIS considered a reasonable range of project alternatives that met the project's multiple goals, and that the EIS was adequately supported by scientific data.

13. Center for Biological Diversity v. Salazar, 695 F.3d 893 (9th Cir. 2012).

The Center for Biological Diversity and Pacific Environment (CBD) challenged Kenneth Salazar, Secretary of Interior, and United States Fish and Wildlife Service (FWS)[194] regulations that allow incidental taking of polar bears (*Ursus maritimus*) and Pacific walruses (*Odobenus rosmarus*) in the Chukchi Sea and on the adjacent coastal region of Alaska. The Federal District Court for the District of Alaska granted summary judgment against the Center. The CBD appealed to the United States Court of Appeals for the Ninth Circuit. CBD claimed that FWS's decision to grant incidental take permits violated the Marine Mammal Protection Act (MMPA),[195] Endangered Species Act (ESA),[196] and National Environmental Policy Act (NEPA).[197] The Ninth Circuit affirmed the district court's decision, finding that the MMPA analysis for "small numbers" of incidental takes and "negligible impact" on species stock were correctly determined by the agency, and that the accompanying biological opinion (BiOp) and environmental assessment (EA) complied with ESA and NEPA requirements.

Both polar bear and the Pacific walrus are protected under the statutes under which CBD made its claims. [198] Both the polar bear and the Pacific walrus, located off the coast of northern Alaska in the Chukchi Sea region, are protected under the MMPA.[199] Additionally, the polar bear was recently listed as a threatened species under the ESA and is therefore protected under both ESA and the MMPA.[200] Both species live on the waxing and waning ice flows in the Chukchi Sea region, which has seen significant oil and gas exploration and development over the last twenty years.

In June 2008, FWS issued incidental take regulations as part of further regional oil and gas exploration and development.[201] The final rule issued by FWS contemplated on- and offshore activities.[202] The court noted there were mitigating actions in the rule, including seasonal variations in drilling and exploration, as well as requirements for activity-specific letters of authorization (LOAs) for each discrete exploration. FWS also stated that the

194 The Alaska Oil and Gas Association (Association) intervened as defendants.

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

196 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2011).

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

198 NOAA FISHERIES SERVICE, MMPA FACT SHEET, *available at* http://www.nmfs.noaa.gov/pr/pdfs/mmpa_factsheet.pdf.

199 The MMPA's principal purpose is to prohibit the take of marine mammals in United States waters by United States citizens and to maintain the health of the marine ecosystem.

200 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008).

201 Marine Mammals; Incidental Take During Specified Activities, 73 Fed. Reg. 33, 212 (June 11, 2008) (to be codified at 50 C.F.R. pt. 18).

202 Ctr. for Biological Diversity v. Salazar (*Center*), 695 F.3d 893, 900 (9th Cir. 2012). Offshore activities included four seismic survey vessels and attendant ships, vessels, and drilling activities. Onshore activities included six wells, up to 100 miles of roads, and four airfield runways.

rules would have a "negligible impact" on polar bears and walruses and only "small numbers" of either species would be incidentally taken.[203]

In July 2008, FWS started to issue LOAs for exploration activities. As it had done in FWS's 2006 Beaufort Sea regulations,[204] the CBD filed suit, alleging failure to comply with MMPA, ESA, and NEPA. The Ninth Circuit reviewed the case de novo, as the case came before it on appeal from summary judgment. The Ninth Circuit also applied *Chevron U.S.A., Inc v. Natural Resources Defense Council*[205] analysis for each of FWS's findings.[206]

The Ninth Circuit first analyzed the CBD's three main arguments supporting the MMPA claims. The CBD first argued that FWS used an impermissible regulatory definition that conflated findings of incidental takes of "small numbers" of mammals with the separate question of whether the incidental takes will result in a "negligible impact" on each species.[207] The court agreed with the CBD's premise that it is impermissible to use the negligible amount standard to fulfill the small numbers finding, adopting the reasoning in *Natural Resources Defense Council v. Evans*.[208] Conflation can lead to incidental takings that are more than "small numbers." While the Ninth Circuit agreed with CBD's argument, the court found that a facial challenge to the regulatory definition was time-barred. As such, the CBD could only challenge FWS's application of the definition. Distinguishing *Evans,* the Ninth Circuit found that because FWS had analyzed small numbers and negligible amount separately in the rulemaking, it had not conflated the distinct analyses.

Second, the CBD argued that even though small numbers and negligible impact were analyzed separately, they were still arbitrary and capricious because the small numbers must be interpreted without reference to a relative population. Instead, the CBD argued, FWS must state in absolute terms the number of animals that would be incidentally taken by activities. The court rejected this argument, stating that "small numbers" has no plain meaning that requires an "absolutist" requirement or any requirement for actual numbers to be investigated or published. Additionally, the legislative history provided no guidance. Since the court found the statute is silent or

203 *Center*, 695 F.3d at 899.

204 *See* Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701, 706 (9th Cir. 2009) (upholding FWS's 2006 Beaufort Sea regulations under MMPA and NEPA that an authorized incidental take would result in a "negligible impact").

205 467 U.S. 837 (1984).

206 The court first determines whether Congress has directly spoken to the exact issue in question, and where there is unambiguous expressed intent of Congress, the agency must follow that intent. But, if the statute is silent or ambiguous, the court decides whether or not the agency has used a permissible interpretation. *Id.* at 842–43.

207 Section 101(a)(5)(A) of the MMPA provides that citizens may request authorization for incidental takes of "small numbers" of sea mammals when they carry out specified activities within a region. Marine Mammal Protection Act of 1972,, 16 U.S.C. § 1371(a)(5)(A)(i) (2006). Additionally, FWS must allow such incidental takes if it finds that the total incidental take during a five-year permit period will have a "negligible impact." *Id.* § 1371(a)(5)(A)(i)(I) (2006).

208 279 F. Supp. 2d 1129, 1150 (N.D. Cal. 2003) (holding that conflating small numbers and negligible impact in analysis makes the "small numbers" language "mere surplusage").

ambiguous to the meaning of "small numbers," *Chevron* directed the court to accept the agency's interpretation so long as it was reasonable. The Ninth Circuit found that FWS's interpretation was reasonable, if imperfect. It thus upheld the agency's interpretation that "small numbers" and "negligible impact" were distinct terms.

Last, CBD claimed that FWS's qualitative "small numbers" finding was based on a false assumption and bad science because it failed to consider on and offshore impacts. CBD conceded that the analysis by the agency focused primarily on offshore open-water activities because that is where the majority of activities took place. The court noted that this analysis cannot be deemed irrational where the majority of the activity would be offshore. The court noted that onshore activity was also explained in the final rule as part of the analysis and those impacts were still negligible. The CBD also argued that the mitigation and monitoring measures were inadequate and unproven, but the Ninth Circuit revealed that the very same mitigation regulations have proven highly successful elsewhere.[209]

The Ninth Circuit next analyzed the ESA claims made by CBD, which resembled the arguments under the MMPA. First, CBD asserted that mitigation measures were unproven and ineffective. The court disagreed, determining the agency had reasonable evidence that the measures were effective and proven to mitigate impact to the mammals in the region.

The court then focused on CBD's second set of substantive arguments that the Incidental Take Statement (ITS) included in FWS's BiOp violated the ESA because it did not provide an absolute numerical cap on permissible takes and did not provide an "adequate surrogate measure" for such a limit. In determining whether FWS's ITS and BiOp violated the ESA, the court first considered whether an ITS was required at all, then considered CBD's claim of numerical and surrogate take deficiencies.

FWS and the Association argued that an ITS was not required because the ESA take provisions did not apply. The court held otherwise. First, the court restated a rule from *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife* (*Arizona Cattle Growers*),[210] that where a take is not reasonably likely to occur no ITS statement is required. In *Arizona Cattle Growers*, the agency had no rational basis to offer an ITS because there were no endangered or threatened species in the region of proposed activity. The court distinguished *Arizona Cattle Growers* because there were threatened or endangered species in this region of proposed activity. Additionally, the Ninth Circuit applied another rule from *Evans*: the Final Rule, not the LOAs, triggers an ITS.[211]

209 *Center*, 695 F.3d 893, 912–13 (9th Cir. 2012).

210 273 F.3d 1229, 1242 (9th Cir. 2001).

211 *Center*, 695 F.3d at 910 ("Section 7(b)(4) of the ESA specifically references Section 101(a)(5) of the MMPA, rather than the MMPA implementing regulations referring to LOAs, and thus 'clearly contemplates the promulgation of a Final Rule, not letters of authorization,' as the trigger for producing an ITS") (quoting *Evans*, 279 F. Supp. 2d at 1182).

The court then fully analyzed the Association's final claim that section 9 prohibitions do not apply. The court reiterated that an ITS cannot be avoided based on section 9 inapplicability. Because the ITS serves as a check on FWS's original finding that the "incidental take of listed species resulting from proposed action will not [jeopardize the continued existence of the species]," the ITS cannot be avoided for inapplicability of section 9.[212] The court also noted exemptions from section 9 take prohibitions are related, but are not negations of the distinct requirement that the service will provide an ITS along with its BiOp.

In contrast to section 105(a)(5)(A), section 7 of the ESA's legislative history reveals that Congress "clearly declared a preference for expressing take in numerical form."[213] While the court noted its preference for a specific, absolute number,[214] it recognized that there may be times when the amount of a take cannot be given a precise numerical estimate. Accordingly, the Ninth Circuit only required a numerical value, where one can "be practically obtained."[215] Calling it a close question, the court looked at the thin explanation for the impracticability of expressing a numerical measure of take in the Chukchi region. It was satisfied with the ITS and other sections of the BiOp because the precise activities and locations were unknown and the "dynamic nature of sea ice habitats" limited how well FWS could provide numerical estimates.[216]

Surrogate measures of take by definition "must be able to perform the functions of a numerical limitation" because they have "clear standard[s] for determining when the authorized level of take" has occurred.[217] FWS used its negligible effects finding and the small numbers determination as a surrogate for articulating the numbers of the anticipated amount of take.[218] The court allowed this vague numerical surrogate for several reasons. First, the ITS is just a mechanism to trigger section 7(a)(2). The MMPA standard is more conservative than the ESA standard. Meeting the more stringent MMPA standard is all that is required to comply with the ESA. Once MMPA standards are exceeded, the ESA once again requires consultation. Because there was fairly established reasoning for no numerical limits on takes, because there was no viable alternative to the numerical or surrogate deficiencies, and because the MMPA standard is stricter than the ESA standard, the court found the ITS surrogate was sufficient. Under normal circumstances, the court noted, it would have held the same.

212 *Id.* at 911 (alterations in original) (quoting *Evans*, 279 F. Supp. 2d at 1182).

213 *Id.* (quoting Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1037 (9th Cir. 2007)).

214 *Allen*, 476 F.3d at 1037 ("Accordingly, we have recognized that the permissible level of take [in an ITS] ideally should be expressed as a specific number.").

215 *Arizona Cattle Growers*, 273 F.3d at 1250.

216 *Center*, 695 F.3d at 912. The court found solace in the controlling case law on requiring a precise number. In contrast, *Allen*'s BiOp offered no explanation as to why FWS was able to numerically quantify the level of take.

217 *Id.* (quoting *Allen*, 476 F.3d at 1038; quoting *Arizona Cattle Growers*, 273 F.3d at 1251).

218 *Id.*

Under NEPA, the CBD challenged FWS's EA for the 2008 Chukchi Sea regulations for two reasons. First, the CBD claimed that the EA failed to consider a reasonable range of alternatives by only analyzing two alternatives. An EA need only include a "brief discussion" of reasonable alternatives and the standard is lesser than under an environmental impact statement.[219]

FWS explained its no-action alternative by stating that the Association would continue exploration activities without mitigation measures.[220] The court found this action was sufficient. The CBD claimed that FWS failed to consider effects of a large oil spill. The CBD argued FWS violated NEPA because its analysis assumed that oil activities would continue despite illegal takings. The court disagreed, stating that a failure to mention that other measures would discourage incidental takes was not arbitrary and capricious. The CBD also claimed that the EA should have analyzed other alternatives, such as requiring further mitigation measures or eliminating important habitat areas from the geographic scope of the projects and attendant regulations. The Ninth Circuit noted that it had previously found no NEPA violation for EAs that only analyzed two alternatives.[221]

Finally, the Ninth Circuit considered the CBD's argument that the EA failed to analyze the significant foreseeable impacts of oil spills.[222] The EA centered on risks associated with small operational spills because FWS considered the possibility of a large spill to be very remote. The 2008 regulations covered only a five-year period, and because of the finite duration, an analysis for full-scale development and production went beyond the NEPA requirement. The probability of a large-scale spill from exploratory activities or from the period of proposed regulations was very low.[223] The court required nothing further due to the narrow scope of the activity.

In sum, because FWS reasonably interpreted section 101(a)(5)(A) of the MMPA and because their determinations for small numbers were not arbitrary and capricious, the Ninth Circuit affirmed and upheld the accompanying BiOP and EA as complying with the ESA and NEPA.

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219 Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1246 (9th Cir. 2005) (quoting 40 C.F.R. § 1508.9(b) (2000)).

220 *Center*, 695 F.3d at 915 (quoting 2008 Environmental Assessment).

221 N. Idaho Cmty. Action Network v. U.S. Dep't. of Transp., 545 F.3d 1147, 1154 (9th Cir. 2008) ("[W]e hold that the Agencies fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the 2005 EA.").

222 The Center attacked the EA on the basis that it failed to take a hard look as required by NEPA, including "all foreseeable direct and indirect impacts." *Center*, 695 F.3d at 916–17.

223 *Id.* at 917. FWS cites a Minerals Management Service (MMS) estimate that the likelihood of a large spill in the Chukchi Sea was somewhere between 33% and 51% over "the life of the development and production activity." *Id.* Because this rule was for a brief, smaller five-year period, the court allowed FWS to discard that percentage estimate.

14. City of Redding, California v. Federal Energy Regulatory Commission, 693 F.3d 828 (9th Cir. 2012).

A group of municipal and federal governmental entities (California Parties) that sell electricity to the California marketplace petitioned for review of certain Federal Energy Regulatory Commission (FERC) orders. The foundations of their claims tied back to the California energy crisis of 2000 and 2001.[224] In the aftermath of the energy crisis, the United States Court of Appeals for the Ninth Circuit held that FERC lacked authority to order refunds from entities not under its jurisdiction, including the California Parties in this case.[225] In a set of subsequent orders, citing authority from section 206 of the Federal Power Act (FPA),[226] FERC stated that it had "revised" or "reset" the market rates for the period between October 2, 2000, and June 20, 2001. The Ninth Circuit held that while FERC does not have authority to order refunds from public entities, it did not exceed its authority in retroactively revising the rates. The court thus denied California Parties' petition.

In *Bonneville Power Administration v. Federal Energy Regulatory Commission* (*Bonneville*),[227] the Ninth Circuit held that FERC lacked jurisdiction over nonpublic utilities and could not order them to pay refunds for electricity sold that did not reflect legitimate forces of supply and demand. In the present case, FERC issued new orders that did not require refunds, but instead reset the market clearing prices in an effort to establish just and reasonable prices in the market. While these orders did not require nonjurisdictional entities to pay refunds, they did create potential contract claims against rates charged over the fair market price set by FERC. FERC reasoned it may order refunds from public utilities subject to its jurisdiction and over whom it has authority to order refunds.

Before analyzing FERC's authority to issue the retroactive rate order, the court addressed FERC's arguments that California Parties lacked standing.[228] FERC argued that California Parties lacked standing because

224 California restructured its electricity markets in the 1990s in an attempt to lower market prices. As part of the restructured market, sellers of electricity received the market clearing price necessary to meet regional demand instead of a market rate in an attempt to prevent sellers from holding out until prices increased. Market prices under this model skyrocketed, resulting in rolling regional power outages and litigation.

225 *See* Bonneville Power Admin. v. Fed. Energy Regulatory Comm'n (*Bonneville*), 422 F.3d 908, 921 (9th Cir. 2005) (holding that Congress clearly intended to exclude nonpublic utilities from FERC's jurisdiction). Power producing municipal and government entities are "nonpublic" entities and are not subject to FERC's jurisdiction. Merchant power generators who are not municipal or government entities are "public" entities and are subject to FERC's jurisdiction.

226 16 U.S.C. § 824e (2006).

227 422 F.3d 908 (9th Cir. 2005).

228 *See* 16 U.S.C. § 825l(b) (2006) (limiting judicial review under the FPA to those parties that have been "aggrieved by an order of the Commission"). Additionally, parties must meet Article III standing requirements of injury in fact, redressability, and causation. *See* Exxon Mobil Corp. v. Fed. Energy Regulatory Comm'n, 571 F.3d 1208, 1210 (D.C. Cir. 2009).

they prevailed in *Bonneville*, thus lacking sufficient injury. While the general rule is that a party cannot appeal from a decree in its favor, the court nonetheless found standing for plaintiffs. The court found that they had a continued personal stake because the consequence of FERC's order to reset the market clearing prices had forced California Parties to defend themselves from substantial contract damages. Therefore, the parties suffered an injury adequate for standing under the FPA and Article III.

FERC then challenged California Parties' standing as "resting on speculation of contract actions."[229] FERC relied on *Federal Power Commission v. Hope Natural Gas Co.*,[230] where the Supreme Court held that Federal Power Commission findings were unreviewable.[231] The Ninth Circuit distinguished reasoning that, unlike *Hope*, FERC's action was not contingent on another agency, was final, and was based on a contract litigation proceeding in another court. The Ninth Circuit noted that if California Parties could not challenge FERC's orders in this court, it appeared that they could not challenge the orders anywhere.

California Parties challenged the Ninth Circuit's jurisdiction under the theory that this appeal was a collateral attack on a prior FERC order. The court admitted that its jurisdiction is limited to the review of new orders, but stated that determining whether a petition is a collateral attack turns on whether the order is a clarification or a modification of a prior order.[232] The court determined that because this petition was not a collateral attack, it could move forward. The court noted that FERC itself had difficulty keeping its own orders straight, and it thus could not expect other parties to do so.

In asserting that it had broad power to retroactively reset rates for all market participants, FERC relied on its power under section 206 of the FPA. The Ninth Circuit reviewed the agency's interpretation under the test established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council.*[233] Upon examination of the structure and language of the FPA, the court determined that FERC did not have the authority to reset rates charged by all market participants. Further, the overall structure of section 206 separates the power to set rates in section 206(a) from the power to order refunds in section 206(b). The court reasoned "this bifurcation points to the unambiguous congressional decision that these provinces remain distinct."[234]

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229 City of Redding, Cal. v. Fed. Energy Regulatory Comm'n, 693 F.3d 828, 836 (9th Cir. 2012).

230 320 U.S. 591 (1944).

231 *Id.* at 618.

232 *City of Redding, Cal.*, 693 F.3d at 837. In Pacific Gas & Electric Co. v. FERC, the court held that a modification is reviewable, but a clarification is not. 464 F.3d 861, 868–69 (9th Cir. 2006). The distinction turns on "whether a reasonable party in the petitioner's position would have perceived a substantial risk that the order meant what the Commission now says it means." *Id.*

233 467 U.S. 837 (1984).

234 *City of Redding, Cal.*, 693 F.3d at 840. While FERC's ability to refund does not extend to nonjurisdictional entities, FERC still has the ability to "determine just and reasonable rates retroactively without resetting rates for all market participants." *Id.* at 841.

It was therefore unnecessary to proceed to the second step in the *Chevron* inquiry because Congress had clearly spoken and did not grant FERC retroactive rate setting authority over nonjurisdictional sellers.

The Ninth Circuit then considered the orders in question. The court ruled in *Bonneville* that FERC could order refunds from jurisdictional entities and that recalculating just market rates for all participants was necessary to order those refunds. Read narrowly, the orders were aimed at determining the fair and reasonable clearing prices of electricity, rather than determining the kinds of affected parties. This kind of decision is within FERC's authority under section 206. Thus, the court upheld FERC's decision. The court opined that the impact of the calculation to contract claims pending in other courts was not for it to say.[235] While FERC does not have expansive authority to retroactively reset rates, it was not necessary to require the court to reject the order FERC entered.

Ultimately, the Ninth Circuit held that FERC had not exceeded its authority in issuing orders that reset all market clearing prices for all market participants over the periods in question. FERC may passively determine just prices when it orders refunds from jurisdictional entities.

In dissent, Judge McKeown highlighted that FERC only had three available permissible actions. FERC may make prospective and retroactive determinations of a fair market price, may prospectively set market rates, and may order retroactive refunds. Having interpreted the FPA this way, FERC did not have the authority to retroactively reset market rates. This interpretation draws a distinction between FERC's ability to determine what fair market rates are and the nonexistant authority to retroactively set the rates properly charged.

Judge McKeown suggested that the majority violated the court's statutory authority in two ways. First, the majority ignored principles of *SEC v. Chenery Corp.*[236] in an attempt to make up for deficiencies in FERC's reasoning that it had the authority to retroactively set rates. Second, the majority favored a position FERC did not support.[237] While Judge McKeown agreed that the petitioners had standing, she found a direct injury from the FERC orders retroactively resetting the rates. By allowing FERC to engage in retroactive rate setting, Judge McKeown accused the rest of the panel of adopting a "see no evil" approach that is at odds with both *Chenery* and common sense.

235 *Id.* at 842.

236 332 U.S. 194, 196 (1947) (prohibiting courts from making up for any deficiencies in the agency's explanation).

237 The court held that FERC is not prohibited from passively determining just prices when it orders refunds from jurisdictional injuries, while FERC argued that the issue was retroactive rate setting.

15. Earth Island Institute v. U.S. Forest Service, 697 F.3d 1010 (9th Cir. 2012).

The Earth Island Institute and the Center for Biological Diversity (Plaintiffs) filed suit against the United States Forest Service (USFS)[238] under the Administrative Procedure Act (APA).[239] The Plaintiffs claimed: 1) USFS's Angora Project did not meet the "viability requirements" of the National Forest Management Act (NMFA)[240] regarding management indicator species (MIS), such as the black-backed woodpecker; and 2) the project's environmental assessment (EA) did not meet the requirements of the National Environmental Policy Act (NEPA).[241] The United States District Court for the Eastern District of California granted summary judgment in favor of USFS,[242] and the United States Court of Appeals for the Ninth Circuit affirmed.

The Lake Tahoe Basin Management Unit (LTBMU) oversees USFS land affected by the Angora Fire.[243] In response to this fire, the LTBMU developed the Angora Project pursuant to the LTBMU Forest Plan to strike a balance in restoring the area's ecology while simultaneously protecting area residents from future fires. USFS determined that these actions were necessary because if no action was taken, surface fuels (e.g., dead and living trees) would continue to accumulate, exacerbating fire danger. USFS prepared an EA for this project under NEPA, which included an analysis of impacts on black-backed woodpeckers. This EA resulted in a finding of no significant impact (FONSI).

The Ninth Circuit reviewed this case de novo under the APA's arbitrary and capricious standard of review[244] and affirmed the district court's opinion, holding that USFS's actions were not arbitrary and capricious.

Turning to the first question on the merits, the Ninth Circuit held that the LTBMU Forest Plan did not require that the Angora Project demonstrate at the *project level* that viable populations of MIS, including the black-backed woodpecker, would be maintained. The court based this holding on three rationales. First, it explained that USFS promulgated a rule in 1982 implementing the NFMA's viability requirements. This rule required USFS to identify MIS and to manage fish and wildlife habitat so that populations of

238 Nancy Gibson was also named as a defendant in her official capacity as Forest Supervisor for the Lake Tahoe Basin Management Unit.

239 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

240 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

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

242 Earth Island Inst. v. Gibson, 834 F. Supp. 2d 979 (E.D. Cal. 2011).

243 For background information on this fire, *see* U.S. DEP'T OF AGRIC., AN ASSESSMENT OF FUEL TREATMENT EFFECTS ON FIRE BEHAVIOR, SUPPRESSION EFFECTIVENESS, AND STRUCTURE IGNITION ON THE ANGORA FIRE 1–2 (2007), *available at* http://www.cnpssd.org/fire/angorafireusfsfullreport.pdf.

244 5 U.S.C. § 706(2)(A) (2006).

existing native and desired non-native vertebrate species could exist at viable levels. This rule was superseded in 2000, and therefore the 1982 rule's viability requirements would only have been applicable to the Angora Project if those requirements were incorporated directly into the LTBMU Forest Plan. The court determined that those requirements were not incorporated into the LTBMU Forest Plan because it deemed the plan to be nearly "identical" to that in *Earth Island Institute v. Carlton,*[245] which held in part that the forest plan in question did not incorporate the 1982 rule's viability requirements.

Second, the court explained that even if the LTBMU Forest Plan did incorporate *some* portions of the 1982 rule's viability requirements, these requirements only applied at the planning level and did not include monitoring requirements to ensure MIS viability at the project level. The court agreed with USFS's argument that to fulfill agency duty with respect to MIS analysis, USFS only needed to discuss effects of alternative management on MIS habitat.[246] The court noted that this type of analysis was sufficient to fulfill the 1982 requirements based on Ninth Circuit precedent.[247]

Third, the court rejected the Plaintiffs' argument that USFS should be required to analyze the "quantity and quality of habitat necessary" for viability of the black-backed woodpecker as opposed to merely monitoring the habitat of the species.[248] The court found that because viability management is largely accomplished through monitoring of population trends, habitat monitoring is the equivalent to an analysis of "quantity and quality of habitat necessary" for viability. Additionally, the court found that the LTBMU Forest Plan "expressly disavows" monitoring at the project level and held that lack of monitoring and analysis of "quantity and quality of habitat" was not arbitrary or capricious.

Where a forest plan requires monitoring of the MIS at planning level, it does not necessarily incorporate the same viability requirement in the project area at issue in any given case. Indeed, the court found *Carlton*'s fact pattern to be so similar to this case that *Carlton*'s holding in favor of USFS could not be distinguished.[249] Ultimately, given the absence of precedent to support the Plaintiffs and the deference that is accorded to USFS's interpretation of its own Forest Plan, the Ninth Circuit explained that USFS did not exercise a clear error in judgment when it did not analyze the quantity and quality of black-backed woodpecker habitat.

Turning to the second issue on the merits, the court held that the EA was not arbitrary and capricious under NEPA for four reasons. First, USFS

245 626 F.3d 462 (9th Cir. 2010).

246 Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010, 1016 (9th Cir. 2012).

247 *See* Lands Council v. McNair, 537 F.3d 981, 995 (9th Cir. 2008) ("[N]either the NFMA nor the IPNF Forest Plan require the Forest Service to *improve* a species' habitat to prove that it is maintaining wildlife viability.").

248 *Earth Island Inst.*, 697 F.3d at 1016.

249 *Carlton*, 626 F.3d at 471 (finding first that the sole MIS requirement applicable at the project level is an assessment of habitat and second, that there are no monitoring requirements for MIS at the project level where viability requirements pertain to the planning area).

adequately ensured the scientific integrity of the EA,[250] which the court was able to verify by reference to an outside report and study to support its black-backed woodpecker population distribution determination. The court further noted that given the scientific expertise required in this analysis, USFS's determination as to scientific integrity of its EA was subject to heightened deference.

Second, the court explained that USFS did not have a duty to respond to dissenting scientific opinions because this duty only exists for final environmental impact statements, not an EA. Thus, lack of response was not arbitrary or capricious. The court continued, reasoning *arguendo* that even if USFS had a duty to respond to dissenting scientific opinion, it adequately met that duty here. Although responses were not directly leveled at each individual dissenting point, USFS nonetheless responded to both in its EA and its FONSI.

Third, the court explained that USFS's analysis of a no action alternative and its preferred alternative was sufficient.[251] USFS did not need to undertake any analysis beyond these two alternatives when other proposed alternatives did not adequately meet USFS's goal of reducing fire risk. Additionally, the court stated that as the proposed action's environmental impact lessens, the number of alternatives that are required for consideration decrease as well.[252] Given USFS's FONSI, the consideration of two alternatives was consequently appropriate.

Finally, the court flatly rejected Plaintiffs' argument that USFS failed to take a "hard look" at impacts in light of the above reasoning. Therefore, the court upheld USFS's actions, holding that neither its treatment of the viability requirements nor the EA were arbitrary or capricious.

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250 *Earth Island Inst.*, 697 F.3d at 1019. NEPA only requires that an EIS be insured for professional quality. However, USFS did not dispute that scientific integrity insurance also applied to EA. The court therefore assumed the requirement applied to the EA.

251 The court analyzed the consideration of proposed alternatives for the EA under a less stringent standard than an EIS, following *Native Ecosystems Council v. U.S. Forest Service*, which held that an agency's consideration of alternatives need not be more than the no-action and preferred action alternatives, given the nature of the proposed action. 428 F.3d. 1233, 1249 (9th Cir. 2005).

252 La. Crawfish Producers Ass'n-W. v. Rowan, 463 F.3d 352, 357 (5th Cir. 2006).

16. United States v. El Dorado County, 704 F.3d 1261 (9th Cir. 2013).

The United States District Court for the Eastern District of California suspended a consent decree between El Dorado County and City of South Lake Tahoe (collectively County) and the United States. The United States challenged the district court's decision to "suspend" the consent decree until further fact findings at an evidentiary hearing.[253] The United States Court of Appeals for the Ninth Circuit upheld the lower court's decision and dismissed the appeal, and found that the suspension was not an appealable final decision.

From 1955 to 1971, the United States permitted the County to run a landfill on United States Forest Service (USFS) land. Toxic chemicals were found in groundwater near the former landfill, and in 1996 USFS and the County entered a consent decree that required the County to implement a remedial plan to clean up the chemicals. The County alleged defects in the plan and moved to modify the consent decree. The district court held that the plan had errors that would significantly increase cost of remediation, and the United States would have to pay the additional costs. The district court "suspended" County implementation of the plan until after an evidentiary hearing to determine the extent of United States liability.

On appeal, the Ninth Circuit first analyzed its jurisdiction over the parties. The United States argued that the Ninth Circuit had jurisdiction to hear its appeal for two reasons: 1) the order from district court modified an injunction and thus fell within 28 U.S.C § 1292(a)(1); and 2) even if it did not fall under the statute, the order satisfied the requirements set out in *Carson v. American Brands, Inc.*[254] The Ninth Circuit stated that consent decrees affected by court orders do not fall directly within the language of § 1292(a)(1) because they do not grant, deny, or modify injunctions by their terms.[255] The court noted however, that sometimes these orders have the same practical power as an injunction, and in circumstances where orders act as injunctions, interlocutory appeal is appropriate if conditions enumerated in *Carson* are met. *Carson* imposed three conditions, requiring that the order: 1) has the practical effect of the grant or denial of injunction, 2) contain serious, perhaps irreparable consequences, and 3) be effectively challenged only by immediate appeal. The court found that the *Carson* requirements were not satisfied and consent decrees did not fit under § 1292(a)(1).

Next, the court considered whether irreparable harm that would occur without the interlocutory appeal. The Ninth Circuit found that United States would not suffer serious harm because the injuries alleged were insufficient to fulfill its burden when money and time could be reimbursed. Second, the court found that the order may be challenged by other appeals, especially

253 United States v. El Dorado Cnty., 704 F.3d 1261, 1263 (9th Cir. 2013).

254 450 U.S. 79 (1981).

255 *El Dorado Cnty.*, 704 F.3d at 1263.

after an evidentiary hearing. After an evidentiary hearing and final judgment, the United States could appeal the same legal issues. The court stated that, at worst, the United States must pay further site cleanup itself and then be reimbursed by the County. The court declined to discuss "incomplete" modification because the other *Carson* factors failed and mooted the discussion.

Finally, the Ninth Circuit discussed the deficiencies of the USFS's reliance on another Ninth Circuit case. The United States had also argued that the court should avoid applying the *Carson* requirements altogether, following *Hook v. Arizona*.[256] The *Hook* court had allowed appeal from a consent decree, holding that a district court order appointing a special master to oversee implementation of a previous consent decree was a modification under § 1292(a)(1), without mentioning *Carson* or applying its additional requirements. The Ninth Circuit concluded "modification of an injunctive consent decree is appealable, but only when the *Carson* requirements are satisfied."[257] The court then applied *Carson* in the case before it, implying that *Hook* should have applied to it too. Thus, the Ninth Circuit upheld the lower court, finding that suspension was not an appealable final decision.

256 Hook v. Arizona, 120 F.3d 921 (9th Cir. 1997).

257 *El Dorado Cnty.*, 704 F.3d at 1264.

17. Native Village of Kivalina v. ExxonMobile Corp., 696 F.3d 849 (9th Cir. 2012).

On appeal from the United States District Court for the Northern District of California's dismissal of claims for damages, Native Village of Kivalina and the City of Kivalina (collectively, Kivalina) sought damages from Energy Producers[258] for greenhouse gas (GHG) emissions that have resulted in global warming, thus threatening Kivalina by severely eroding its land. Kivalina appealed the dismissal to the United States Court of Appeals for the Ninth Circuit under a federal common law public nuisance claim. The Ninth Circuit found that the Clean Air Act (CAA)[259] displaced Kivalina's public nuisance claims, and upheld the district court's dismissal.

Kivalina is a town of 400 residents, located seventy miles north of the Arctic Circle. Ninety-seven percent of the residents are members of a federally recognized tribe of Inupiat Native Alaskans. Ice formations off the town's coast have traditionally protected it from fall, winter, and spring storms. However, the city has become vulnerable to winter storms in recent years because the protective winter ice barrier is thinner, has formed later in the fall, and has broken apart earlier each spring. Current erosion and sea storms threaten the town's existence.[260]

In the district court, Kivalina contended that Energy Producers' contribution to global warming through GHG emissions constituted a public nuisance. The emissions were a "substantial and unreasonable interference with public right[s]" to use and enjoy public and private property in Kivalina[261] because GHG emissions had caused the increases in temperature, the lessened capacity of the ocean to remove carbon dioxide, and the rising sea levels that have all resulted in the destruction of land in Kivalina.

The district court dismissed the suit. It first held that Kivalina created a political question in its complaint; therefore, judicial consideration of the public nuisance claim would violate the separation of powers doctrine. Second, the district court found that Kivalina lacked standing because Kivalina could not prove either a substantial likelihood that defendant's

258 Energy Producers include ExxonMobile Corporation; BP P.L.C.; BP America, Inc.; BP Products North America, Inc.; Chevron Corporation; Chevron U.S.A., Inc.; ConocoPhillips Company; Royal Dutch Shell PLC; Shell Oil Company; Peabody Energy Corporation; The AES Corporation; American Electric Power Company, Inc.; American Electric Power Services Corporation; Duke Energy Corporation; DTE Energy Company; Edison International; MidAmerican Energy Holdings Company; Pinnacle West Capital Corporation; The Southern Company; Dynegy Holdings, Inc.; Xcel Energy, Inc.; and Genon Energy, Inc.

259 42 U.S.C. §§ 7401–7671q (2006).

260 Native Vill. of Kivalina v. ExxonMobile Corp. (*Kivalina*), 686 F.3d 849, 853 (9th Cir. 2012) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-142, ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE 30, 32 (2003) *available at* http://www.gao.gov/new.items/d04142.pdf).

261 *Id.* at 854.

conduct caused loss of land or that the seed of its injury could be traced to the Energy Producers.

The Ninth Circuit reviewed the district court's dismissal for lack of subject matter jurisdiction de novo. The majority first considered whether there was a legislative action that displaced the common law action of nuisance. The court found that the CAA displaces the public nuisance claim; therefore, they did not reach the question of standing. District Court Judge Pro, sitting in designation, further analyzed displacement and standing issues in a lengthy concurrence.

As an initial matter, the majority adopted the displacement analysis of *American Electric Power Co. v. Connecticut* (*AEP*)[262] to analyze the viability of Kivalina's federal common law claim. The Ninth Circuit stated that environmental law is included in federal common law, and environmental law specifically includes the type of ambient or interstate air and water pollution at issue in Kivalina's case.[263]

For a federal common law public nuisance action, a court must find that the action is widespread and unreasonably interferes with a right common to the general public.[264] On the threshold question of federal common law, the Ninth Circuit found that Kivalina had a federal common law claim because there was a transboundary pollution issue. The right to assert a federal common law nuisance claim, however, may be displaced where federal statutes directly answer the federal question.

The majority next addressed whether displacement of one remedy extends to all remedies associated with a given transboundary pollutant problem. In *AEP*, the Court found that the CAA displaces the federal common law right to seek abatement of emissions.[265] Thus, the Ninth Circuit first stated that the Supreme Court had already spoken on the issue of displacement of GHG emissions. At issue in this case was whether injunctive relief displacement means that damage remedies were also displaced. The court concluded that current Supreme Court jurisprudence held that if a cause of action is displaced, all remedies associated with that cause of action are also displaced.[266] The Ninth Circuit concluded Kivalina's public nuisance damage action was displaced under *AEP* because a Congressional

262 131 S.Ct. 2527, 2537–38, 2540 (2011) (holding that the CAA and the Clean Water Act displaced federal common law claims for public nuisance with an abatement remedy). The Court in *AEP* reiterated that federal common law can exist where Congress directed federal courts to create it or where federal questions exist and federal courts must fill interstices of the law creating a federal common law.

263 *Id.* at 2530 (quoting State of Ill. v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 103 (1972)).

264 *Kivalina*, 696 F.3d at 856 (quoting Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 357 (2d Cir. 2009)).

265 *Id.* at 857 (citing *AEP*, 131 S. Ct. at 2537).

266 *Id.* The court cited Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (holding that severing remedies from causes of action is not allowed), and Middlesex County. Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 4 (1981) (holding that the remedy for damages is displaced where the cause of action for injunctive relief is displaced).

act occupied the entire arena of transboundary GHG emissions; therefore, any remedy for damages was also displaced by the CAA.

The court rejected claims that the damage occurred before EPA acted to establish GHG standards, finding that Congress had "directly spoken" by empowering EPA as the sole GHG emissions regulator. Congressional action, not executive, was the relevant inquiry in the displacement analysis.[267] Finally, the Ninth Circuit rejected any retroactivity issues because a Congressional statute encompassed the entire field of regulation, superseding the existing federal common law, and therefore any federal court decisions.[268]

In sum, the court found that the public nuisance claim relating to losses associated with GHGs was displaced by the CAA, EPA statutes, and EPA actions. It did not reach any other issues.

In a lengthy, explanatory concurrence, Judge Pro explored conflicting precedent to show why a claim for injunctive relief also requires displacement of damages claims, and why affirmation of the district court's lack of standing finding was correct. Judge Pro began with an explanation of displacement in *State of Illinois v. City of Milwaukee* (*Milwaukee II*)[269] in which the Court found that an "all-encompassing program of water pollution regulations," had left "no room for courts to attempt to improve on that program with federal common law."[270] Judge Pro highlighted the numerous reasons for finding an "all encompassing" regulatory scheme.[271]

With regard to displacing damage remedies in the context of displacement legislation, the concurrence examined *Middlesex County Sewerage Authority v. National Sea Clammers Association* (*Middlesex*).[272]At issue in *Middlesex* was an organization's right to bring suit against New Jersey and New York, among others, for allowing discharge of pollutants that allegedly caused harm to fisheries and related industries in the Atlantic Ocean. The Supreme Court found in that case that where Clean Water Act (CWA) specifically had barred injunctive relief against administering entities, the statute also precluded bringing damage suits.

267 Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 777 (7th Cir. 2011) ("Displacement focuses on the relation between Congress and the federal courts—it is not a doctrine that is concerned with the relation between the federal courts and the executive branch").

268 *Kivalina*, 696 F.3d at 858 (citing State of Illinois v. City of Milwaukee (*Milwaukee II)*, 451 U.S. 304 (1981)).

269 451 U.S. 304, 318–19 (1981).

270 *Id.*

271 In *Milwaukee II* the federal government set effluent limitations and the plaintiff's claims were for specific effluent limitations. The requested relief in *Milwaukee II* included construction of controls for overflows, but overflows were nothing more than point source discharges fully covered by the permit process in the Clean Water Act. Moreover, Illinois had a forum to protect its rights because it participated in the permitting process. The Court in *Milwaukee II* found that the citizen suit remedy section did not revoke other remedies, but the act as a whole might. *See Kivalina*, 696 F.3d at 861.

272 453 U.S. 1 (1981).

Judge Pro then cited the tension between *Milwaukee II* and *Middlesex* and the later *Exxon Shipping Co. v. Baker* (*Exxon Shipping*)[273] and *Silkwood v. Kerr-McGee Corp.*[274] *Exxon Shipping* and *Silkwood* support the conclusion that the rights and remedies may be severed when a claim at issue seeks injunctive versus damage relief. In *Exxon Shipping*, the Court found that punitive damages remedies under federal maritime common law were not displaced by penalties associated with CWA violations.[275] The Court differentiated *Exxon Shipping* from *Middlesex* and *Milwaukee II* because its private claims for economic damages did not frustrate the CWA scheme.[276] Under *Silkwood*, a state law injunctive relief claim can be preempted while the damages claim, which is also a state law claim, need not be required to be preempted, inapposite of *Middlesex*.

Judge Pro determined that "[r]egardless of *Exxon's* effect on the viability of federal maritime common law negligence claims,"[277] *AEP, Milwaukee II,* and *Middlesex* support the displacement of CAA nuisance claims for damages. Despite this conflict, the reasoning of the case before the Ninth Circuit was quite clear. First, Congress spoke directly to what remedies are available under the CAA. Second, the CAA is comprehensive and occupies the entire field because it has an expert agency administering the law and variety of enforcement mechanisms, including enforcement by States, EPA, and private parties. Third, and perhaps most important, displacement does not leave Kivalina without a remedy. It could still refile the nuisance claim in state court provided that the state law is not preempted by federal law, allowing it to pursue its claims elsewhere.

The concurrence reached the question of standing and found that Kivalina's allegations failed to fulfill standing requirements of causation.[278] Judge Pro noted that because Kivalina's allegations were not bound in time, and because Kivalina did not identify when its injury occurred, there not sufficient facts to show that these defendants and their activities were

273 554 U.S. 471 (2008).

274 464 U.S. 238 (1984).

275 The Supreme Court noted that the CWA had specifically preserved the right to seek punitive damages despite not listing the source of the claim for punitive damages.

276 *Kivalina*, 696 F.3d at 862. The Court found it "too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals." *Id.*

277 *Id.* at 866. According to Judge Pro, *Exxon Shipping* either did not recognize that the *Middlesex* Plaintiffs sought damages as well as injunctive relief or it ignored that the amount of damages would have effectively enjoined the defendants, in turn effectively forcing an effluent standard when Congress had spoken directly to the issue of injunctive relief. Judge Pro contended that the Court must not have viewed 33 U.S.C. § 1321 as so comprehensive as to displace federal maritime common law negligence claims for damages unlike the CWA provisions that the *Milwaukee II* court found displaced federal common law nuisances claims.

278 To establish causation the plaintiff must demonstrate that its injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Kivalina*, 696 F.3d at 867 (citing Pritikin v. Dep't of Energy, 254 F.3d 791, 797 (9th Cir. 2001)).

behind global warming. Finally, Judge Pro expressed reservations at singling out these defendants (as opposed to all GHG emitters).

18. Grand Canyon Trust v. U.S. Bureau of Reclamation, 691 F.3d 1008 (9th Cir. 2012).

The Grand Canyon Trust (Trust)[279] appealed the United States District Court for the District of Arizona's grant of summary judgment for the United States Bureau of Reclamation (BOR)[280] and the United States Fish and Wildlife Service (FWS)[281] regarding the Glen Canyon Dam (Dam).[282] The Trust alleged violations of the Endangered Species Act (ESA)[283] in regard to the endangered humpback chub (*Gila cypha*), National Environmental Policy Act (NEPA),[284] and Administrative Procedure Act (APA)[285] as a result of the Dam's operation. The United States Court of Appeals for the Ninth Circuit dismissed the Trust's claims as moot in part and affirmed in part.

The Dam is located on the Colorado River in Northern Arizona. It created Lake Powell, a reservoir that provides drinking water for twenty-five million people. Without mitigation, the Dam largely prevents the flow of sediment from Lake Powell to the Colorado River below the Dam, affecting critical habitat of the humpback chub by making certain regions of the river cooler. The core issues in this case centered on application of statutory requirements protecting the humpback chub.

Under the Grand Canyon Protection Act of 1992 (GCPA),[286] the Secretary of the Interior (Secretary) was required to complete a final environmental impact statement (EIS) under NEPA and transmit annual operating plans (AOPs) to Congress and the Governors of the Colorado River Basin States. NEPA requires the issuance of an EIS for every major federal action significantly affecting the quality of human environment. Responding to the GCPA's statutory requirements, BOR completed its final EIS in 1995. This EIS analyzed alternative operations under a modified low fluctuating flow (MLFF) regime and a seasonally adjusted steady flow regime.[287]

279 The Trust is an organization that focuses on protecting and restoring the Colorado Plateau.

280 BOR is responsible for the operation of the Glen Canyon Dam.

281 FWS is responsible for the protection of the endangered humpback chub, a fish that exists in relatively inaccessible areas of the Colorado River.

282 Defendants also included Michael L. Connor, Commissioner U.S. Bureau of Reclamation. Intervenor-defendants in the action included the State of Arizona, State of Nevada, Colorado River Commission of Nevada, State of Colorado, Southern Nevada Water Authority, Central Arizona Water Conservation District, New Mexico Interstate Stream Commission, State of Utah, State of Wyoming, State of New Mexico, State of California, Colorado River Energy Distributors Association, Southern California Metropolitan Water District, and Imperial Irrigation District.

283 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2011).

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

285 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

286 16 U.S.C. §§ 221–228 (2006). The GCPA required the Secretary to mitigate adverse impacts and to complete an EIS under NEPA.

287 Using the MLFF regime means that water releases would "tend to be higher in summer and winter, corresponding with greater electricity demand, and lower in the spring and fall,

BOR also formally consulted with FWS regarding the operation of the Dam using MLFF. Under the ESA, the action agency must formally consult with the species consulting agency—either FWS or the National Marine Fisheries Service (NMFS)—if the action agency may affect a listed species. The consulting agency then issues a biological opinion (BiOp) which states whether a critical habitat of a listed species will be jeopardized. The consulting agency may also issue an incidental take statement (ITS) if the action may incidentally take a threatened or endangered species. Through this consultation process, FWS issued a BiOp in 1994 that stated that MLFF jeopardized the humpback chub and recommended adoption of an adaptive management program (AMP).[288] This AMP process resulted in BOR's 2008 Experimental Plan (2008 Plan). Following additional formal consultation, FWS issued a new BiOp (2008 BiOp) reversing FWS's previous jeopardy position expressed in the 1994 BiOp. This reversal prompted the Trust to file suit in the District of Arizona.[289]

The district court granted summary judgment to BOR, concluding that the ESA and NEPA do not apply because AOPs are neither agency actions nor major federal actions. Although the district court recognized that part of the 2008 BiOp was valid, it invalidated FWS's reversal of its MLFF jeopardy position. The district court found FWS's reversal invalid because FWS did not include a reasoned basis explaining why MLFF would not destroy or adversely modify critical habitat for the humpback chub and because FWS's conclusion lacked a discussion on the effects of MLFF on chub recovery.

In response to the district court's ruling, FWS issued a 2009 Supplement to the 2008 BiOp that resulted in a 2009 BiOp. The Trust then filed a supplemental complaint containing the following three claims: 1) "the 2009 BiOp and the 2009 ITS violate the ESA; 2) the 2009 ITS violates NEPA; and 3) FWS's draft 2009 Recovery Goals, on which FWS relied to address humpback chub recovery in the 2009 BiOp, violate the ESA."[290] The district court granted summary judgment to FWS on all counts except for the claim regarding the 2009 ITS, on which it granted summary judgment to the Trust. Again in 2010, FWS issued a 2010 ITS to supplement its other documents. The Trust then appealed to the Ninth Circuit. Before this appeal was heard, FWS issued a 2011 BiOp and 2011 ITS.

corresponding with decreased electricity demand." Grand Canyon Trust v. U.S. Bureau of Reclamation (*Canyon*), 691 F.3d 1008, 1014–15 (9th Cir. 2012). The goal of the seasonally adjusted steady flow regime was to recreate the Colorado River's natural flow by releasing more water in the spring and less water in the summer and fall.

288 The recommended AMP called for a study of flow impacts on the humpback chub, use of experimental flow rates to provide additional data, and implementation of recommendations stemming from this study to ensure the species' survival.

289 The Trust alleged that "[BOR] violates the ESA by not consulting with FWS on the development of each of the Dam's AOPs; that [BOR] violates NEPA by not preparing an . . . EIS for each AOP; and that FWS's 2008 BiOp violates the ESA." *Canyon*, 691 F.3d. at 1014–15.

290 *Id.* at 1015.

The Ninth Circuit reviewed the district court's grant of summary judgment and decision on subject matter jurisdiction de novo.[291] The court reviewed BOR and FWS's compliance with the ESA and NEPA under the APA's arbitrary and capricious standard.[292]

As an initial matter, the Ninth Circuit held that all issues relating to the 2009 BiOp and 2010 ITS were rendered moot by FWS's issuance of the 2011 BiOp and 2011 ITS.[293] Beyond this threshold issue, the court confirmed the district court's ruling that BOR's decision not to consult with FWS under the ESA did not violate APA standards because BOR had no discretion to act for the benefit of the humpback chub under the AOP process itself. The court based this conclusion on two rationales.

First, the court explained the general rule that consultation is only required when there is "discretionary Federal involvement or control."[294] The court found that BOR does not have the discretion to select different operating criteria for the Dam simply in an AOP.[295] Rather, BOR's discretionary decision-making process lies in its establishment of operating criteria for the Dam, such as using MLFF. After concluding that the 2008 AOP's purpose was merely informational,[296] the Ninth Circuit held that BOR did not violate the ESA by issuing each AOP without formally consulting with FWS because BOR did not exercise discretion in preparing each AOP.[297]

Second, the court referred to Ninth Circuit precedent in *California Sportfishing Protection Alliance v. Federal Energy Regulatory Commission* (*California Sportfishing*)[298] as an example of nondiscretionary agency action. In *California Sportfishing*, the Ninth Circuit held that while ESA consultation was properly undertaken prior to issuance of an operating permit for a hydroelectric dam, mere continued operation of the dam did not require regular consultation regarding newly listed species. Consistent with *California Sportfishing*, the Ninth Circuit found that BOR's yearly issuance of AOP is not an agency action because BOR fully complied with ESA

291 *See* Karuk Tribe of Cal. v. U.S. Forest Serv. (*Karuk Tribe*), 681 F.3d 1006 (9th Cir. 2012); Hambleton Bros. Lumber Co. v. Balkin Enters., Inc., 397 F.3d 1217, 1226 n.8 (9th Cir. 2005).

292 *See Karuk Tribe*, 681 F.3d at 1017.

293 *See* Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1124 (9th Cir. 1997) (holding that new BiOp moots issues relating to old BiOp)

294 50 C.F.R. § 402.03 (2012); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 668 (2007) (holding that § 402.03 is reasonable and must be accorded deference and confirming that the ESA's consultation requirement is not triggered where an agency lacks statutory discretion to act for the benefit of an endangered species).

295 The plain language of the Colorado River Basin Project Act of 1968, 43 U.S.C. § 1552(b), provides that AOPs must describe the actual operation of the Dam "under the adopted criteria for the preceding compact water year and the projected operation for the current year." Thus, the court concluded that BOR does not exercise discretion signifying agency action.

296 The Ninth Circuit found BOR's 2008 AOP purpose to be a description, which supports the idea that AOP is merely a tool that describes how BOR is meeting its preexisting obligations while implementing the MLFF.

297 The Ninth Circuit considered that Congress knows how to, but chose not to, mandate consultation in the preparation of each AOP.

298 472 F.3d 593 (9th Cir. 2006).

consultation requirements prior to the Secretary choosing MLFF. The Ninth Circuit also noted it would be unduly cumbersome and unproductive to allow ESA challenges on an annual basis for each AOP.

The Ninth Circuit next addressed the Trust's contention that BOR violated NEPA by not preparing an EIS for each AOP. The Ninth Circuit concluded that AOPs are not major federal actions for which an EIS must be prepared under NEPA. The court specifically noted "where a proposed federal action would not change the status quo, an EIS is not necessary."[299] Since the fluctuations in flow were routine managerial actions, BOR did not have to comply with NEPA's requirement for an EIS. Additionally, the Ninth Circuit stated that BOR was not making material changes to the operating criteria for the Dam.

Finally, the court addressed the Trust's contention that the district court did, in fact, have jurisdiction to review the Draft 2009 Recovery Goals for the humpback chub. The Ninth Circuit affirmed the district court's ruling for two reasons. First, the draft 2009 Recovery Goals were moot because there was no jurisdiction under either the citizen suit provision of the ESA[300] or under the APA[301] for review. The court reasoned that FWS, pursuant to its discretion, used the Draft 2009 Recovery Goals as best available science. The Ninth Circuit concluded that no jurisdiction existed because FWS did not fail to carry out a nondiscretionary act prior to using the science included in the draft 2009 Recovery Goals to support its 2009 BiOp. Second, the issue of whether the APA supports review of the Draft 2009 Recovery Goals was moot because the document was no longer operative as a result of the 2011 BiOp. The Ninth Circuit ultimately vacated the judgment of the district court with regard to the 2009 BiOp and 2010 ITS.

299 Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990).
300 16 U.S.C. § 1540(g)(1)(C) (2006).
301 5 U.S.C. § 702 (2006).

19. Native Village of Kivalina IRA Council v. U.S. Environmental Protection Agency, 687 F.3d 1216 (9th Cir. 2012).

The Native Village of Kivalina IRA Council and other plaintiffs (collectively, Kivalina)[302] filed suit under the Administrative Procedure Act (APA)[303] against the United States Environmental Protection Agency (EPA).[304] Kivalina alleged that EPA's Environmental Appeals Board (EAB) improperly denied review[305] of a National Pollutant Discharge Elimination System permit (NPDES, or a section 404 permit) finalized by EPA Region 10. The United States Court of Appeals for the Ninth Circuit affirmed the EAB's decision to deny review of EPA's decision to grant the NPDES permit to Teck Alaska.

Teck Alaska, in partnership with NANA Regional Corporation, operates an open pit zinc and lead mine, known as the Red Dog Mine, in Northwestern Alaska. Mining operations at that mine caused discharge of contaminated wastewater into a river that flows into the Chukchi Sea.[306] EPA planned to reissue a NPDES permit in 2008 with conditions different than the company's previous NPDES permit. In late 2009, EPA completed a final supplemental environmental impact statement under the National Environmental Policy Act (NEPA)[307] and responded to public comments. In January 2010, EPA issued a final NPDES permit, and shortly thereafter, Kivalina challenged specific conditions of this permit by appeal to the EAB. EPA withdrew several permit conditions, thereby mooting appeal of all but one section of Kivalina's petition for appeal.

The sole issue in this case was whether EAB's denial of review for three monitoring conditions in the final NPDES permit was improper under the APA as either arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Ninth Circuit first noted that review under 40 C.F.R § 124.19(a) has several requirements. First, issues raised in a petition to the EAB generally must be raised in the public comment process. Second, the permit condition must be based either on a "clearly erroneous finding of

302 Other plaintiffs included Native Village of Point Hope IRA Council, Alaska Community Action on Toxics, and the Northern Alaska Environmental Center.

303 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

304 Other defendants included Lisa Jackson, as Administrator of the U.S. Environmental Protection Agency, and Dennis McClarren, as Regional Administrator for Region X of the U.S. Environmental Protection Agency. The permit recipient, Teck Alaska Inc., a mining company and partner NANA Regional Corporation, intervened as respondents in the case.

305 The EAB's initial decision is unpublished, but may be found at: *In re Teck Alaska, Inc. (Red Dog Mine)*, NPDES Appeal No. 10-04 (U.S. Envtl. Prot. Agency Bd. of Appeals, Nov. 18, 2010), *available at* http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/FC7957D1DEC191CA852577DF005B4722/$File/Order%20Denying%20Review%20. . .50.pdf.

306 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006). The Alaska Department of Environmental Conservation certified that the discharges would comply with the CWA and Alaska Water Quality Standards. Native Vill. of Kivalina IRA Council v. U.S. Envtl. Prot. Agency (*Kivalina*), 687 F.3d 1216, 1218 (9th Cir. 2012).

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

fact or conclusion of law or raise an important policy consideration."[308] The petitioner has the burden of proof, and petitioner's conclusory statements are insufficient. Petitioner must buttress claims by reason and explain why the challenged conditions should be reviewed by the EAB. Finally, a petition to the EAB must be responsive to EPA responses to public comments.

Here, the Ninth Circuit agreed with the EAB that for each of the three challenged monitoring conditions,[309] Kivalina did not adequately explain why its challenge merited EAB review. Of central importance to the Ninth Circuit was that Kivalina reused its public comments when petitioning the EAB, without explaining to the EAB why EPA's response to these public comments were clearly erroneous as to a finding of fact or conclusion of law. Because EPA explained in each response to Kivalina's public comments why it was acting within its proper scope of authority, the court explained that Kivalina needed to delineate why EPA's assertions were incorrect in its EAB petition. Since Kivalina did not undertake additional analysis based on EPA's responses, Kivalina's challenges were inadequate.

Because Kivalina's challenges were inadequate, the Ninth Circuit's panel unanimously concluded that the EAB's decision to deny review was proper, and denied Kivalina's petition for review.

308 *Kivalina*, 687 F.3d at 1219.

309 Kivalina challenged the reduction in monitoring requirements, the removal of biomonitoring provisions, and the EPA's failure to require third-party monitoring. *Id.* at 1220.

20. Natural Resources Defense Council v. Salazar, 686 F.3d 1092 (9th Cir. 2012).

The Natural Resources Defense Council (NRDC)[310] filed suit in United States District Court for the Eastern District of California claiming that the Bureau of Reclamation (BOR)[311] violated section 7(a)(2) of the Endangered Species Act (ESA).[312] Specifically, NRDC claimed that BOR unlawfully jeopardized delta smelt (*Hypomesus transpacificus*) and did not adequately consult with United States Fish & Wildlife Service (FWS) when it renewed water supply contracts with forty-one water users in California.[313] The United States Court of Appeals for the Ninth Circuit upheld the district court's conclusions on summary judgment that NRDC lacked standing as to Delta Mendota Canal Contracts (DMC Contracts) and that the Settlement Contracts did not trigger the ESA. Therefore, the court found that BOR did not need to undertake consultation under section 7(a)(2) of the ESA.

BOR and California's State Water Project (SWP) manage the Central Valley Project (CVP). The CVP encompasses the San Joaquin and Sacramento Rivers and includes infrastructure designed to divert, pump, and convey water from the two rivers to myriad users. Delta smelt are endemic to San Joaquin and Sacramento Rivers Delta Estuary and are listed pursuant to the ESA as an endangered species.[314] In 2005, the United States Forest Service (USFS) analyzed the effects of the renewal of long-term water supply contracts between BOR and Delta Mendota Canal Contractors (DMC Contractors) and Settlement Contractors on delta smelt and its critical habitat. In its biological opinion, USFS concluded that BOR's proposed renewal of forty-year contracts would not adversely affect the delta smelt. Following these findings, BOR reissued forty-one water supply contracts. Twenty-eight contracts went to Settlement Contractors.[315] Thirteen contracts went to DMC Contractors.[316]

310 Plaintiffs included California Trout, Baykeeper & Its Deltakeeper Chapter, Friends of the River, and The Bay Institute.

311 Defendants included Kenneth L. Salazar, acting in his official capacity as Secretary of the Interior; Sam D. Hamilton, in his official capacity as Director of the U.S. Fish and Wildlife Service; Michael J. Connor, in his official capacity as Commissioner of the U.S. Bureau of Reclamation; and dozens of California city, county, and state water irrigation districts and agencies, along with affected individual users.

312 16 U.S.C. § 1536(a)(2).

313 Natural Res. Def. Council v. Salazar (*NRDC v. Salazar*), 686 F.3d 1092, 1095 (9th Cir. 2012).

314 *Id.* at 1095. Delta Smelt are currently listed as threatened. Although they warrant "endangered" status, such status is precluded. Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 76 Fed. Reg. 66,370, 66,428 (Oct. 26, 2011).

315 Settlement Contractors are those parties who hold water rights senior to those held by BOR in the initial contract in 1964. In the initial contract, Settlement Contractors received a

In response to an earlier suit regarding these contracts that struck down an initial biological opinion, BOR engaged in a new consultation with USFS. In 2008, this consultation resulted in a new biological opinion, which found that the CVP and SWP operations likely threatened the delta smelt. NRDC subsequently challenged BOR's renewal of DMC contracts and Settlement Contracts. The district court granted a summary judgment motion for BOR, finding that NRDC lacked standing to challenge DMC contract renewals, that it failed to prove the Settlement Contracts were not discretionary, and that BOR's actions therefore did not fall under section 7(a)(2). Because mootness and standing are solely questions of law, the Ninth Circuit reviewed these issues de novo.

As a threshold issue, the Ninth Circuit held that NRDC's claims were not moot. When an agency issues a biological opinion that supersedes a prior biological opinion in litigation, there is no longer a case or controversy surrounding the suit, and the plaintiffs' case is moot. In this case, the Ninth Circuit stated that the issues were not moot for two reasons: first, because recent litigation[317] held parts of the 2008 biological opinion unlawful, and second, because the court found unclear whether the 2008 opinion took into account forty-one CVP contracts.

The Ninth Circuit next considered whether NRDC had asserted a procedural violation with regard to the DMC Contracts. Standing requires a plaintiff to show an injury-in-fact, causation, and redressability.[318] While the Ninth Circuit found an injury-in-fact from the potential harm to the delta smelt by the over-commitment of water, the court held plaintiffs lacked standing under both a procedural and substantive claim analysis. Since the shortage provisions allowed BOR to elect to not deliver water to meet section 7(a)(2) requirements, the court found that injury to delta smelt was not traceable to these contracts. Further, the court explained that without a traceable injury, redressability was not possible. Therefore, the court held that the plaintiffs lacked standing because their claims failed to show causation and redressability.

The third issue the court addressed was whether renewal of the Settlement Contracts was a discretionary act. If renewal of these contracts by BOR was a nondiscretionary act (i.e., assuming certain requirements outside of BOR's control were met, BOR would have no choice but to renew the contracts), then the ESA's section 7 consultation requirement would not

guaranteed base water amount annually without any fee that could be reduced by no more than 25% in very dry years. Beyond the base water, other project water was available for a fee.

316 DMC Contractors received water delivery annually for a fee paid to BOR.

317 San Luis & Delta-Mendota Water Auth. v. Salazar, 760 F. Supp. 2d 855 (E.D. Cal 2010).

318 *NRDC v. Salazar*, 686 F.3d at 1098 (citing Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1224–1225 (9th Cir. 2008)). To establish the element of injury-in-fact in a procedural claim, a plaintiff need only show a procedural right that "if exercised, *could* protect [its] concrete interest." *Id.* (quoting *Salmon Spawning & Recovery Alliance*, 545 F.3d at 1224–1225). With an injury-in-fact, plaintiffs must also prove causation and redressability by the court, but these elements have a lower burden of proof in a procedural claim.

be triggered.[319] Here, the court explained that renewing these settlement contracts was nondiscretionary for two reasons. First, prior contracts provided for the original Settlement Contracts to preserve water supply quantities upon renewal. Second, federal and state relations dictated BOR's discretion. BOR only has authority to operate the CVP in compliance with California Water Resources Control Board decisions. This board decided through Decision 990 that BOR could operate the CVP only if it delivered base supply water for free and if the Bureau renewed contracts on request. This lack of discretion meant actions by BOR did not trigger ESA section 7(a)(2)

In sum, the majority determined the case was not moot, and NRDC lacked standing on the DMC contracts claims. The majority held that ESA section 7(a)(2) did not apply to the Settlement Contracts.

In a lengthy dissent, Circuit Judge Paez disagreed with the majority on standing and the application of section 7(a)(2) of the ESA. Judge Paez explained that the plaintiffs should have been granted standing to challenge the DMC contracts. First, he reiterated that at the standing phase of litigation, all facts must be construed in a light most favorable to the plaintiffs. Judge Paez contended a reasonable fact finder could have found that BOR had several possible options available[320] to it to comply with the ESA. Each option "would likely" improve the delta smelt's habitat and health.[321] Further, he explained that the shortage provisions in the DMC contracts were not sufficient to establish ESA compliance because they "[tell] us nothing about whether the plaintiffs are right" as to their claim about violations of the ESA based on renewal of DMC contracts.[322] Finally, Judge Paez stated that provisions that "allow" BOR to protect delta smelt do not "ensure" that BOR will do so.[323]

Turning to the second issue, the dissent also asserted that requirements of ESA section 7(a)(2) did in fact apply to the renewals of the SRS contracts and these renewals were discretionary agency actions. The decision to renew the contracts was discretionary for three reasons. First, Central Valley Project Improvement Act section 3404(c) only applies to water service contracts that use CVP water, which is defined as water diverted by the federal government.[324] SRS contracts do not use water from CVP because the contractors, not the federal government, directly divert their water from

319 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 668 (2007) (stating that "not every action authorized, funded, or carried out by a federal agency" is a result of the agency's discretion).

320 Judge Paez postulated that these options, which would arise from USFS's biological opinion, might include: providing less water to contractors, utilizing a more protective pricing structure, or altering timing of water deliveries.

321 *NRDC v. Salazar*, 686 F.3d at 1101 (Paez, J., dissenting).

322 *Id.*

323 *Id.*

324 Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3404, 106 Stat. 4708 (1992). Note, § 3406(c) also applies to long-term repayment contracts. But these are not at issue in this case.

the Sacramento River. Judge Paez also gave credence to BOR's former determination that the SRS contracts are not water service contracts. Second, Judge Paez interpreted Decision 990 by its terms to not require renewal because it does not impose a "permanent" renewal requirement.[325]

Finally, the dissent explained that language in Article 2 of the SRS contracts strongly suggests that the parties were not in full agreement on all material terms for every renewal of the contract.[326] Judge Paez rejected the majority's reading of Article 9(a) in isolation. He argued for a broader, contextual interpretation that included Article 2, which provided an end date to the contract and a process for renewals. Using the context of Article 2 and harmonizing it with Article 9(a), he concluded that Article 9(a) provisions represent a partial integration clause. Even if the contextual reading failed, Judge Paez explained that Article 9(a) does not limit pricing and timing of water deliveries, both of which would "inure to the benefit of the delta smelt," therefore triggering ESA section 7(a)(2).[327] As such, Judge Paez would reverse the district court's grant of summary judgment and remand for further consideration of the DMC and SRS contracts.

325 *NRDC v. Salazar*, 686 F.3d at 1104.
326 *Id.* at 1105.
327 *Id.* at 1104.

21. Public Lands for the People v. U.S. Department of Agriculture, 697 F.3d 1192 (9th Cir. 2012).

Public Lands for the People, Inc. (the Association)[328] filed suit against the United States Forest Service (USFS)[329] regarding USFS's decision to limit the use of motor vehicles to certain roads in the El Dorado National Forest (ENF). The United States District Court for the Eastern District of California dismissed the complaint sua sponte for lack of standing and for failing to state a claim. The Association appealed and the United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision.

In 2005, USFS published a Notice of Intent to propose restrictions on motor vehicle use in the ENF. In 2008, USFS issued a Final Environmental Impact Statement (FEIS)[330] recognizing that if prohibitions were adopted, miners and prospectors would need to obtain permission to use motor vehicles in areas where permission was not previously required. The Association alleged that the 2008 decision could now subject them to criminal and civil penalties for failure to file a Notice of Intent or Plan of Operations should they use motor vehicles without authorization.

The Ninth Circuit first addressed the issue of standing[331] "as if raised in a motion to dismiss."[332] The Circuit took this approach because the district court sua sponte dismissed the complaint on its face. The Ninth Circuit determined that the district court's approach to standing was unduly burdensome because some of the Association members would no longer be able to access their mining claims due to the new prohibitions. In reaching its conclusion that the Association had standing, the court focused on the prohibition of access mining claims rather than the details of the mining rights. The court found the prohibition of access was "fairly traceable" to the 2008 decision and could be redressed by "striking down the prohibition on vehicular access."[333]

The Ninth Circuit followed its standing analysis by addressing the Association's claim that USFS lacks authority to restrict motor vehicle use in

328 Plaintiffs also include Gerald E. Hobbs, Bryan Bunting, Hillarie Bunting, Steve Wandt, Gene E. Bailey, Richard Nuss, and Randy Burleson.

329 Defendants include the U.S. Department of Agriculture, Secretary of Agriculture Tom Vilsack, Chief Forester of the USDA Forest Service Tom Tidwell, Regional Forester USDA Forest Service Regional Office R5 Randy Moore, and Forest Supervisor of the ENF Ramiro Villalvazo.

330 The FEIS also discussed the effect of 36 C.F.R. pt. 228 (2012) that requires miners to obtain preauthorization for certain prospecting and exploration activities. U.S. DEP'T OF AGRIC. & U.S. FOREST SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: ELDORADO NATIONAL FOREST PUBLIC WHEELED MOTORIZED TRAVEL MANAGEMENT EIS 3-212 (2008), *available at* http://pr dp2fs.ess.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5357446.pdf.

331 Article III standing requires an injury-in-fact, which is fairly traceable to the challenged conduct and has some likelihood of redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

332 Bernhardt v. Cnty. of Los Angeles, 279 F.3d 862, 867 (9th Cir. 2002).

333 Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 697 F.3d 1192, 1196 (9th Cir. 2012).

the ENF. USFS's extensive statutory authority[334] doomed this argument. The court cited *Clouser v. Espy*[335] to indicate that the Secretary of the Department of Agriculture (Secretary) possesses statutory authority to regulate activities related to mining even in non-wilderness areas for the purpose of preserving national forests. Additionally, the Secretary has authority to regulate conduct reasonably incidental to mining.[336]

The court also determined that, contrary to the Association's allegations, the 2008 decision was not an indirect prohibition on mining operations, and the restrictions were reasonable because the decision balanced competing interests. Furthermore, the Association failed to identify any specific statute that stripped the Secretary of Agriculture's ability to regulate motor vehicle use. The court also dismissed the Association's argument that 16 U.S.C. § 472[337] restricted the Secretary's discretion by noting that the Secretary has long had the authority to restrict motorized access to specified areas of national forests.[338]

Lastly, the Ninth Circuit turned to USFS's interpretation of 36 C.F.R. § 228.4(a).[339] The court deferred to the agency's interpretation of its own regulatory definition of public road,[340]and found that the agency's definition of public was reasonable because it matched plain language meaning. The Ninth Circuit concluded that the Association's alternative definition did not render USFS's definition plainly erroneous or inconsistent, and instead explained that USFS's definition was reasonable.

The Ninth Circuit ultimately concluded that the Association had standing to bring the suit. The court also determined that USFS acted within its authority to prohibit motor vehicle use in ENF and affirmed the lower court's dismissal of the complaint.

334 *See* 16 U.S.C. § 551 (2006) (Secretary of Agriculture has authority to promulgate rules and regulations to protect the national forest lands); 16 U.S.C. § 478 (2006) (individuals "must comply with the rules and regulations covering such national forests").

335 42 F.3d 1522, 1529–30 (9th Cir. 1994).

336 United States v. Doremus, 888 F.2d 630, 632–33 (9th Cir. 1989).

337 Transfer Act of 1905, 16 U.S.C. § 472 (2006).

338 *See Clouser*, 42 F.3d at 1530 (discussing the Secretary of Agriculture and Forest Service's authority to regulate mining).

339 This section provides that a notice of intent is not required for "Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes." 36 C.F.R. § 228.4(a) (2012).

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

22. Resisting Environmental Destruction of Indigenous Lands (REDOIL) v. U.S. Environmental Protection Agency, 704 F.3d 743 (9th Cir. 2012).

Resisting Environmental Destruction of Indigenous Lands (REDOIL)[341] petitioned for review of two air permits upheld by the Environmental Appeals Board (EAB) of the United States Environmental Protection Agency (EPA).[342] The two permits authorize exploratory drilling operations in the Arctic Ocean with a drillship and associated fleet support vessels.[343] The petition for review challenged the determination by EAB that support vessels do not require the best available control technology (BACT) for controlling emissions.[344] The Petition also challenged the EAB's exemption of a five-hundred meter radius around the drillship from ambient air quality standards.[345] The United States Court of Appeals for the Ninth Circuit reviewed both issues and upheld the EAB's denial of the petition. The Ninth Circuit also deferred to the EAB's interpretation of EPA's statutory and regulatory interpretations.

The Ninth Circuit first considered the application of BACT to the associated fleet of support vessels. The court noted that the 1990 amendment allowed EPA for the first time to regulate Outer Continental Shelf (OCS) sources "located offshore" and that Congress directed EPA to "establish requirements" so that OCS sources would meet air quality standards for the Prevention of Significant Deterioration (PSD) program.[346]

The Ninth Circuit followed with a discussion of the statutory and regulatory definitions of OCS source, finding that an OCS source includes vessels that are "[p]ermanently or temporarily attached to the seabed" or "[p]hysically attached to an (OCS) facility, in which case only the stationary source aspects of the vessels will be regulated."[347]

The court then examined whether the Clean Air Act (CAA) is ambiguous as to BACT's application to associated vessels not attached to an

341 Other petitioners included Alaska Wilderness League, Center for Biological Diversity, Natural Resources Defense Council, Northern Alaska Environmental Center, Oceana, Pacific Environment, Sierra Club, and The Wilderness Society.

342 The respondent is the United States Environmental Protection Agency. The respondent intervenors are Shell Gulf of Mexico Inc. and Shell Offshore Inc.

343 Shell Gulf of Mexico Inc. and Shell Offshore Inc. purchased areas to conduct oil and gas exploration in the seas off the North Slope of Alaska. Shell sought to explore with a drillship and an associated fleet of support vessels.

344 The permits required the drillship to comply with BACT, but did not require BACT compliance for the associated fleet of support vessels.

345 The ambient air exemption was conditioned on the United States Coast Guard's establishment of a safety zone that prohibits the public from entering the area.

346 Clean Air Act, 42 U.S.C. § 7627 (2006).

347 Resisting Environmental Destruction on Indigenous Lands (REDOIL) v. U.S. Envtl. Prot. Agency (*REDOIL*), 704 F.3d 743, 749 (9th Cir. 2012) (citing 40 C.F.R. § 55.2 (2012)); 42 U.S.C. § 7627(a)(4)(C)(iii) (2006)).

OCS source. The court, following four other circuit courts of appeal,[348] found that the EAB's determinations are considered formal adjudications that warrant *Chevron* deference.[349] As such, the Ninth Circuit applied the *Chevron* analysis, and first examined the plain language to distill Congress's intent. Under the plain language of the statute, the court commented that Congress never expressed an intention to regulate associated vessels as OCS sources, or to apply BACT to those vessels. The court agreed with EPA that the CAA was ambiguous.

The court dismissed REDOIL's argument that Congress intended to apply the direct emissions clause[350] to all PSD requirements, including BACT. The court determined that REDOIL's argument was invalid because it did not follow unambiguously from the statutory language. The statute does not, based on its plain language, instruct that any vessel associated with an OCS source be considered an OCS source. The court recognized Congress's conflicting signals when it excluded the fleet of vessels from the "OCS source" definition, but included the fleet's emissions as a direct emission of an OCS source. The court thus found ambiguity.

REDOIL also argued that the legislative history of § 7627 should be used to resolve alleged ambiguity in the statute. The court disagreed with REDOIL's approach. The court reiterated that if a statute is clear, there is no need to use legislative history to illuminate its meaning. The court also dismissed REDOIL's argument that the use of the term "direct emissions" was unambiguously meant to subject OCS sources to PSD. The court explained that Congress's use of "direct emissions" instead of "secondary emissions" did not illuminate any congressional intent with regard to the term "direct emissions" in the OCS provisions.

The Ninth Circuit then classified EAB's characterization of the statute's ambiguity as reasonable. The court noted that EAB reconciled the ambiguity appropriately in two ways. First, EAB appropriately considered the associated fleet's emissions as a baseline for triggering PSD. Second, EAB appropriately assessed whether the drillship would cause a violation of one of the PSD requirements. In sum, the court found that EAB's decision to not apply BACT to vessels within twenty-five miles of an OCS source was a reasonable construction of an ambiguous statute, and therefore required deference.[351]

348 *See Id.*, 704 F.3d at 749–50 (including the Third, Fourth, and Eighth Circuits, and the Supreme Court).

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

350 42 U.S.C. § 7627(a)(4)(C) (2006) ("For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source.").

351 EAB's approach was consistent with Santa Barbara County Air Pollution Control District v. U.S. Environmental Protection Agency, 31 F.3d 1179, 1180–1181 (D.C. Cir. 1994) (upholding EPA regulations refusing to regulate in-transit maritime vessels as OCS sources because it was not reasonable for the EPA to do so).

Finally, the court addressed EPA's grant of the five-hundred meter ambient air exemption. The court found that the exemption was not "plainly erroneous or inconsistent with the [agency's] regulation[s]."[352] The parties agreed that EPA's interpretation of an exemption described in a 1980 letter from a former EPA administrator deserved deference. The letter stated that an exemption is available only when land is owned or controlled by a source, and a physical barrier prevents public access to that land. Because a physical barrier is impracticable on the ocean, EPA had leeway in applying the required barrier conditions to the marine context. The court concluded that EPA's grant of an ambient air exemption based on an effective safety zone excluding the public was a permissible interpretation in the marine context. Therefore, the court affirmed the district court's petition denial.

352 Auer v. Robbins, 519 U.S. 452, 461 (1997).

23. Native Ecosystems Council v. Weldon, 697 F.3d 1043 (9th Cir. 2012).

Native Ecosystems Council (NEC) brought suit against the United States Forest Service (USFS) and a regional forester[353] alleging violations of the National Environmental Policy Act of 1969 (NEPA)[354] and the National Forest Management Act of 1976 (NFMA).[355] These allegations stemmed specifically from USFS's issuance of a Finding of No Significant Impact for a fuels-reduction project (the Project) involving understory thinning and burning in the Lewis and Clark National Forest. The United States District Court for the District of Montana granted summary judgment in favor of USFS, and NEC appealed. The United States Court of Appeals for the Ninth Circuit affirmed, holding that USFS took the required "hard look" at the environmental impacts of the Project in the manner required by NEPA. In addition, the Ninth Circuit held that USFS reasonably considered relevant factors that could have affected elk (*Cervus Canadensis*) hiding cover and goshawk (*Accipiter gentilis*) populations in Montana as required by the NFMA.

This case centered on facts involving the Ettien Ridge fuels Reduction Project (the Project), which was approved by USFS in September of 2009. The Project aimed to benefit the Middle Fork Judith Wilderness Study Area by reducing the danger of stand-replacing crown fires. The Project was also intended to reduce the risk of fire danger in Sapphire Village. Following an administrative appeal initiated by NEC, the size of the Project was reduced from 1,655 acres to 832 acres and the number of temporary roads was reduced as well. This suit resulted from further issues regarding that administrative appeal.

The court applied the deferential arbitrary and capricious standard of review under the Administrative Procedure Act (APA)[356] and noted that consideration of questions reviewed for the first time on appeal is left to the discretion of the appellate court.[357] The Ninth Circuit first examined the NEPA claims and then turned to the NFMA claims.

On the NEPA claims, the Ninth Circuit determined whether USFS took a hard look at the Project's environmental consequences. NEC contended that USFS's aerial photo interpretation methodology (PI Type) was invalid and unreliable. The court found that USFS did not act arbitrarily and capriciously because USFS selected PI Type methodology based on rigorous and scientific elk logging studies. Moreover, the Ninth Circuit noted that NEC failed to present any distinguishing facts between USFS's elk logging

353 Leslie Weldon was the Regional Forester of Region One of the U.S. Forest Service.

354 42 U.S.C. §§ 4321–4347 (2006).

355 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

356 5 U.S.C. § 706 (2006). The court also noted that it must conduct a "searching and careful" inquiry in its determination of compliance. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

357 Singleton v. Wulff, 428 U.S. 106, 120–21 (1976).

studies and the facts in this case. The court highlighted that the mere fact that NEC disagrees with the use of PI Type methodology does not mean that there is a NEPA violation.

The Ninth Circuit specifically addressed three of NEC's arguments regarding elk cover hiding analysis. Because the central facts of this case involved a scientific agency determination, the standard of review was extremely deferential to the agency.[358] The court first disagreed with NEC's contention regarding logging and thinning. The court determined that USFS specifically considered the direct and indirect consequences of the Project's related activities based on no agency action and the proposed action. The court stated that because USFS supported its findings with multiple studies, the Ninth Circuit would defer to USFS's conclusion that slashing and thinning activities would not alter the PI Type of the Project area. Moreover, the court found USFS's conclusions adequate even though they were "superseded by more accurate predictions" (i.e., data presented in a 2009 silvicultural report that corrected errors in a 2007 silvicultural report upon which USFS originally relied).[359] Second, the court discussed NEC's contention that prescribed burning of the Project area would alter the PI Type. The Ninth Circuit found that NEC failed to appreciate the Project's goal to preserve the distinguishing features of the PI Types by removing invasive fauna that have caused increased fire risk. Third, the court addressed NEC's contention that hand slashing would produce stumps and render Project areas as cutover,[360] altering their PI Type. The court stated that USFS was entitled to substantial deference in its interpretation of its own rules.[361] Ultimately, the court found NEC's contention lacked evidentiary support, and USFS had showed that the technical definition of cutover would be met on these facts.[362] Thus, on all three issues, the court held that USFS did not violate NEPA.

Turning to the NFMA claims, the Ninth Circuit stated that USFS's interpretation and implementation of its own plan was entitled to substantial deference. As a result of substantial deference and USFS's use of scientific reports, the court held that USFS did not violate its own plan on logging and thinning. The court also held that USFS did not act arbitrarily or capriciously in regard to prescribed burning because burning will retain the defining

358 The court explained that here, agency determinations are arbitrary and capricious if the agency "offer[s] an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" and that the court defers to agency decisions supported by data that the "*agency deems reliable*." Native Ecosystems Council v. Weldon (*NEC*), 697 F.3d 1043, 1053 (9th Cir. 2012) (internal citations omitted).

359 *Id.* at 1054.

360 Cutover areas are areas with clear evidence of human's cutting activities.

361 Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003).

362 The court found that the technical definition of "cutover" required cutting that is "significant and widespread." *NEC*, 697 F.3d at 1055. As such, the court deferred to the agency's interpretation of its own regulation.

characteristics of non-forest within the region. The court also held that USFS complied with NFMA for its plan on cutting and slashing.

The Ninth Circuit continued its analysis of NEC's NFMA claims by addressing alleged harm to goshawk populations[363] in the region. To prove its claim, the court explained that NEC would have to show a "specific connection between the challenged site-specific action and the alleged violation,"[364] and that, even though this bar was not high, the contested portion of the forest plan had to "play[] a causal role with respect to the [Project]."[365]

NEC claimed that USFS violated NFMA for two reasons. First, NEC claimed that USFS failed to monitor the goshawk populations in the annual monitoring reports. The court held that NEC's claim was invalid because it failed to make a site-specific challenge. Second, NEC argued that USFS failed to conduct further studies on goshawk nesting rates after seeing decreases in the goshawk population that exceeded 10%. The Ninth Circuit established that there may be a sufficient nexus between the alleged violations and the goshawk populations. However, the court disagreed with NEC's contention that USFS failed to determine how vegetation management activities were affecting the goshawk population. The court found that USFS provided a sufficient cold weather-based explanation for goshawk nesting declines. Moreover, the Ninth Circuit reiterated that USFS's own interpretation of its plan is entitled to substantial deference and that USFS must only reasonably consider the relevant factors involved with the goshawk population.

The Ninth Circuit affirmed the decision of district court, determining that USFS adequately considered the impacts on elk and goshawk populations under NEPA and NFMA.

363 Goshawks are a Management Indicator Species (MIS), meaning that they "serve[] as a barometer for species viability at the forest level" and that one of their specific functions is to help with monitoring "the effects of management activities on species via changes in population trends." JIM LE FEVRE ET AL., NORTHERN GOSHAWK (*ACCIPITER GENTILIS*): SPECIES ASSESSMENT - DRAFT 5 (2005) *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5199933.pdf.

364 *NEC*, 697 F.3d at 1057 (citing Ecology Ctr. v. Castaneda, 574 F.3d 652, 658 (9th Cir. 2009)).

365 *Id.* (quoting Hapner v. Tidwell, 621 F.3d 1239, 1250 (9th Cir. 2010)).

24. Center for Biological Diversity v. U.S. Bureau of Land Management, 698 F.3d 1101 (9th Cir. 2012).

Center for Biological Diversity (CBD), Defenders of Wildlife *et al.,* and Summit Lake Paiute Tribe challenged the approval by U.S. Bureau of Land Management (BLM) of the Ruby Pipeline Project under the Endangered Species Act (ESA). The BLM intervened. Primarily, CBD claimed the biological opinion (Ruby BiOp) issued by the Fish and Wildlife Service (FWS) was arbitrary and capricious because the Ruby BiOp's "no jeopardy" and "no adverse modification" determinations relied on protective measures outlined in a conservation action plan (CAP) that was not enforceable under the ESA. CBD also challenged the Ruby BiOp because it did not take into account the potential impact of withdrawing 337.8 million gallons of groundwater from sixty-four wells along the pipeline. CBD challenged the incidental take statement (ITS) claiming it miscalculated the number of fish to be killed and deficient for not placing a limit on the number of eggs and fry of threatened trout to be taken. The Ninth Circuit agreed that the Ruby BiOp was arbitrary and capricious for relying on the CAP and for accounting for the withdrawal of groundwater. But, the Ninth Circuit found the ITS sufficient, vacating BLM's Record of Decision and remanding to FWS.

The Ruby Pipeline Project involved the construction of a 42-inch diameter pipeline that would extend from Wyoming to Oregon, encompassing roughly 2,291 acres of federal land and crossing 209 rivers and streams that support endangered species.[366] In 2009, Ruby filed a formal application with the Federal Energy Regulatory Commission (FERC), seeking a Certificate of Public Convenience and Necessity to authorize the Project. FERC then requested consultation with FWS about the proposed license. To authorize projects on federal land it manages, the BLM must comply with section 7 consultation requirements under the ESA,[367] which implicate section 9 take prohibitions.[368] Section 7 consultation requires agencies to determine the likelihood that a critical species or habitat will be adversely affected by its action and comply with procedural requirements attendant to that determination.[369] During the consultation process, FWS must formulate a biological opinion to determine if the action itself, "taken together with other cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."[370]

366 Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1106 (9th Cir. 2012).

367 Endangered Species Act of 1973, 16 U.S.C. § 1536 (2006).

368 *Id.* § 1538.

369 50 C.F.R. § 402.12 (2012).

370 *Id.* § 402.14(g)(4).

Section 9's biological opinion and no-take provisions provide FWS with enforcement power to protect species. Violations of the section provide for stiff criminal sanctions and other penalties.[371] If the biological opinion concludes that no jeopardy or adverse modification is likely, FWS may issue an ITS to shield the private party and action agency from the incidental takings of protected species. ESA regulations also require agencies to monitor the impacts of incidental takes and comply with reporting requirements. An action agency must also reinitiate consultation if the proposed action is later modified and the effects to the listed species or its habitat change. When new consultation is required, the original biological opinion and ITS lose validity and no longer shield parties from taking penalties.[372]

FWS's Ruby BiOp identified five critical habitats and nine species throughout Nevada, Oregon, and Colorado that would be adversely affected by the Project because of its stream crossings and depletion of ground and surface water. To avoid a jeopardy determination, FWS suggested that Ruby implement certain conservation measures into the CAP to mitigate harm for sucker fish, chub fish, and cutthroat trout. It further suggested that Ruby request that FERC adopt these measures as part of its proposed authorization action.

FERC rejected these inclusions. FWS and Ruby instead entered into a Letter of Commitment in which Ruby agreed to adopt these measures. This letter outlined the nature and limits of Ruby's commitment to conservation projects.[373] It also characterized the CAP as entirely separate from the requirements of section 7 of the ESA, meaning that FWS could not consider these measures as part of the proposed action. Because the CAP could not be considered as part of FERC's proposed action, FWS instead incorporated the conservation measures into its cumulative effects[374] analysis when it formulated the Ruby BiOp. In doing so, FWS determined that these measures would positively affect background environmental factors and therefore mitigate jeopardy to the nine species.

On this basis, FWS made a "no jeopardy" determination for the Project. Notably, the CAP measures, while enforceable by both FERC and BLM, were not enforceable by FWS under the ESA.[375] CBD argued, and the Ninth Circuit

371 *See id.* § 402.

372 U.S. FISH & WILDLIFE SERV. & NAT. MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT, 4-56 (1998) [hereinafter ESA Handbook].

373 Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1110–11 (9th Cir. 2012). Attached to the letter was a list of twelve conservation measures, such as construction of fish migration barriers, road improvements to protect species, and riparian area restorations. *Id.*

374 "Cumulative effects are those effects of future State or private activities, *not involving Federal activities*, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02 (2012) (emphasis added).

375 *Ctr. for Biological Diversity*, 698 F.3d at 1109–10.

agreed, that the Ruby BiOp was arbitrary and capricious under the Administrative Procedure Act[376] because it relied on measures of the CAP that would not be binding under the ESA.

The court reached this conclusion following a two-part inquiry. First, the court explained the important distinction between effects of the proposed action and cumulative effects. While a jeopardy determination takes both kinds of effects into account, among other considerations,[377] cumulative effects are not part of the proposed action and therefore are not enforceable under the ESA. The Ninth Circuit stated that the enforceability of the CAP measures turns on integration into the proposed action plan by the agency, pointing to the analysis in *Sierra Club v. Marsh*.[378] In that case, the parties fairly relied on conservation agreements because they were included in the agency action. Therefore, the interlocking procedural requirements of section 7 and substantive enforcement mechanisms under section 9 protected the species, forcing adverse risk to "be borne by the project, not by the endangered species."[379] Here, by contrast, the CAP measures were not within section 7 requirements and thus could not be considered enforceable under the ESA. The court noted that this miscategorization affected the ESA scheme in profound ways: it "sidetracked" FWS, precluded re-opening the consultation process when necessary, and eliminated criminal penalties and exposure to citizen suit enforcement.

FWS argued *Selkirk Conservation Alliance v. Forsgren*[380] allowed it to rely on promised conservation measures as background cumulative effects for the Ruby BiOp. The court disagreed with this interpretation. In *Selkirk*, while there were joint agreements between the private actor and several agencies, the Ninth Circuit found that the measures were enforceable under the ESA because they were incorporated into the terms and conditions of the incidental take section of the biological opinion. This bound the parties to the ESA's substantive enforcement safeguards.[381]

Building on *Marsh* and *Selkirk*, the court made explicit that for conservation measures to be considered in a biological opinion, conservation measures must be enforceable under the ESA. Otherwise, Congressional intent to entrust FWS with protection of listed species would be subverted. Such measures would be enforceable only by agencies with non-ESA mandates.[382]

In the second part of the Ninth Circuit's inquiry, the court determined whether the CAP measures should properly have been categorized as

376 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

377 *See* ESA Handbook, *supra* note 372, at 4-37.

378 Sierra Club v. Marsh, 816 F.2d 1376, 1388–89 (9th Cir. 1987).

379 *Id.* at 1386.

380 Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944 (9th Cir. 2003).

381 *Id.* at 953 n.4.

382 *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1117 (9th Cir. 2012).*

cumulative effects or as effects of the proposed project. The section 7 FWS Coordinator had earlier stated that inclusion of the CAP measures in FERC's proposed action must be analyzed in FWS's Ruby BiOp. Even though FWS subsequently changed positions, the court determined that "the CAP measures and pipeline construction were unequivocally interrelated" and "were intended to 'compensate for . . . project effects on the species under review.'"[383] Moreover, Ruby's CAP measures were not fully funded, would only be implemented after FERC approval of the Project, and were not guaranteed to come to fruition. The court recognized that such measures may have been insufficient for section 7 and section 9 purposes even if they had been properly implemented through the ESA's procedural requirements. The court deemed the CAP measures interrelated to the proposed action and unenforceable under the ESA. As such, the court held that the Ruby BiOp was arbitrary and capricious.

The Ninth Circuit then examined the Ruby BiOp's failure to consider how withdrawing groundwater would affect the listed species. Although the Project sought to withdraw 333.7 million gallons of groundwater, the Ruby BiOp did not consider the withdrawal's impact. FWS deemed them irrelevant factors in jeopardizing the continued existence of fish or contributing to destruction of habitat. FWS based this determination on an assumption that groundwater withdrawals would not impact surface water. The court highlighted that the burden is on the consulting agency to show the absence of an adverse effect. The ESA requires that the FWS review all relevant and available information to ensure that there are no adverse effects.[384]

The Ninth Circuit quickly disposed of FWS's first argument that groundwater withdrawals would have no impact on fish species because "those species do not live in ground water–they live in rivers and streams."[385] The court based its conclusion on U.S. Geological Survey evidence that most surface and ground water systems are intimately linked and could affect surface water and therefore affect endangered species. Second, FWS argued that even if groundwater impacts surface water, the withdrawals would be too small to be discernible. Again, the court turned to information in the final environmental impact statement that evinced the contrary. The court found that CBD clearly met its light burden of showing that groundwater withdrawals were a relevant factor in how the project may affect listed species. Because FWS did not respond to this shifted burden by addressing groundwater withdrawals in the Ruby BiOp, the Ninth Circuit found that FWS's actions were arbitrary and capricious.

The Ninth Circuit, however, did hold that FWS's adoption of estimates of take from an earlier 2004 biological opinion was not arbitrary and capricious. The 2004 opinion calculated incidental fish take levels based on the "dry ditch" method for crossing bodies of water, which was also planned

383 *Id.* at 1118 (quoting ESA Handbook, *supra* note 372, at xii).

384 50 C.F.R § 402.14(g)(1) (2012).

385 *Ctr. for Biological Diversity*, 698 F.3d at 1122 (internal citations omitted).

for this Project.[386] The court explained that FWS's reliance on the 2004 opinion was acceptable because the Project incorporated similar precautions assumed in that prior opinion. For example, the Project comported with both Oregon Department of Fish and Wildlife and Nevada Department of Wildlife standards for water pumping speeds.

On the penultimate issue considered, the Ninth Circuit discussed the Ruby BiOp's ITS, which authorized the take of "all eggs and fry" of threatened Lahontan cutthroat trout near eighteen water crossings.[387] CBD argued that the ITS was arbitrary and capricious because it did not include a numerical value for the incidental take. The court disagreed, pointing to the self-evident impracticability of quantifying the number of minute fry and eggs. FWS is normally required to explain why providing a numerical cap is impossible, but the court found that FWS's lack of explanation regarding the use of a surrogate instead of a cap was not arbitrary and capricious because impossibility was self-evident.

Finally, the Ninth Circuit vacated and remanded the Ruby BiOp and Record of Decision, finding Ruby BiOp's reliance on unenforceable CAP measures arbitrary and capricious. The Ninth Circuit instructed FWS to either properly categorize and treat the CAP measures as interrelated actions or exclude reliance on their beneficial effects. The court further instructed FWS to formulate a revised biological opinion that addresses the impacts of groundwater withdrawal.

386 This method involves constructing two temporary dams, manually capturing fish caught between the dams and releasing them downstream, then draining this area, and temporarily diverting flow from the stream or river through a pipe. *Id.* at 1126.

387 *Id.*

25. Alaska Survival v. Surface Transportation Board, 705 F.3d 1073 (9th Cir. 2013).

Petitioner Alaska Survival (Survival)[388] sought judicial review before the United States Court of Appeals for the Ninth Circuit of a Surface Transportation Board (STB) grant of authorization to construct a thirty-five mile rail line through waters and wetlands that provide a home to wildlife between Port MacKenzie and Wasilla, Alaska. The line's purpose was to provide rail service to Port MacKenzie and connect it with existing Alaska Railroad Corporation (ARRC) lines.[389] Survival alleged that STB improperly granted an exemption from public review and failed to meet requirements of the National Environmental Policy Act (NEPA).[390] The Ninth Circuit held that STB acted within its authority in granting the exemption from full licensing procedures and there was no error under NEPA.

STB initiated an environmental impact statement (EIS) in 2008 and released a draft environmental impact statement (DEIS) in 2010 for the proposed rail line. STB initiated the final environmental impact statement (FEIS) in 2011 with the requirement that ARRC employ 100 environmental impact mitigation measures and identify a preferred alternative for the line. STB's Office of Environmental Analysis (OEA) did not request comment on the FEIS, but several agencies expressed concerns related to the purpose and need statement.

In December 2008, ARRC filed a § 10502 petition for exemption from the full licensing procedures required by the Interstate Commerce Commission Termination Act (ICCTA).[391] The section authorizes STB to grant exemptions that allow for streamlining the regulatory process, eliminating notice and comment in some cases, and removing requirements for hearings.[392] STB is authorized to grant exemptions when the board finds that the application is not necessary to carry out the transportation policy of § 10101 and either the transaction is limited in scope or is not needed to protect shippers from the abuse of market power.[393] STB issued a 2-to-1 decision to grant the exemption. STB also adopted all of the OEA environmental review including the environmentally preferred alternative and measures after concluding that the EIS took a "hard look"[394] at environmental impacts of the proposed action.

388 Alaska Survival, Sierra Club, and Cook Inletkeeper were Petitioners.

389 Alaska Railroad Corporation, the State of Alaska and the Matanuska Susitna Borough intervened as Respondents.

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

391 ICC Termination Act of 1995, 49 U.S.C. § 10502 (2006).

392 Vill. of Palestine v. Interstate Commerce Comm'n, 936 F.2d 1335, 1337 (D.C. Cir. 1991).

393 49 U.S.C. § 10502(a) (2006).

394 NEPA requires agencies to take a "hard look" at environmental consequences of major federal actions, which includes analyzing completeness of information available, soundness of analysis, thorough discussion of alternatives, and disclosure of sources. Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2003).

As a threshold question, respondents and respondent-intervenors asserted that the issue was not properly before the Ninth Circuit because Survival did not raise the agency's use of exemption during the administrative process. The Ninth Circuit stated that there is no bright line test to determine whether a party has properly exhausted an administrative claim before an agency and the determination must be made on a case-by-case basis.[395] Because neither the statute nor regulation required exhaustion of administrative remedies, the court considered whether judicially-imposed issue exhaustion was appropriate.

The Ninth Circuit found that STB failed to inform parties that in order to later challenge an STB decision, it was first necessary to submit comments during the exemption process. The record did not show that STB ever notified stakeholders when the appropriate time to raise issues with the exemption process should take place. As a result, the court found judicially imposed exhaustion inappropriate. With the issue properly before the court, the Ninth Circuit moved to the substantive claims.

Survival asserted three arguments related to the ICCTA exemption grant. The Ninth Circuit reviewed STB's statutory construction of the ICCTA with *Chevron* deference[396] and held that STB's grant of an exemption under § 10502 was not arbitrary, capricious or an abuse of discretion and that substantial evidence supported STB's findings favoring the grant of exemption.

First, Survival argued that STB should have performed a full analysis of public convenience and necessity under § 10901 before granting a § 10502 exemption, particularly when the financial viability of the project was suspect. The Ninth Circuit disagreed and did not read prior D.C. Circuit precedent[397] to require a public convenience and necessity analysis before granting an exemption from procedure. The court held that such a conclusion went against the plain language of § 10502, and commented that neither the section nor the regulations required examination of financial viability.

Second, Survival argued that STB does not have authority to grant a § 10502 exemption for such a large project. The Ninth Circuit found that the plain language of the statute did not require STB to consider both factors,[398] so STB did not have a duty to consider the size of the project.

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395 Buckingham v. Sec'y of U.S. Dep't. of Agric., 603 F.3d 1073, 1080 (9th Cir. 2010).

396 *Chevron* deference requires that the court first inquire whether Congress has directly spoken to the precise question at issue before the court, and if so, the agency "must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984). If Congress has not addressed the specific issue, then the court must determine whether the agency's construction of the statute is permissible. *Id.*

397 *See* HolRail, LLC v. Surface Transp. Bd., 515 F.3d 1313, 1314, 1315 (D.C. Cir 2008) (holding the word "cross" does not include new line construction on another's right-of-way).

398 ICC Termination Act of 1995, 49 U.S.C. § 10502(a)(2) (2012) (allowing STB to grant an exemption for projects of limited scope *or* when full statutory proceedings are not necessary to protect shippers from abuse of market power) (emphasis added). STB analysis rested on the project's impact on shippers rather than on the limited scope.

Third, Survival argued that STB did not consider the fifteen-part Rail Transportation Policy, specifically factors promoting a safe and efficient rail transportation system, encouraging honest and efficient management of railroads, and promoting energy efficiency.[399] The Ninth Circuit, however, found that STB did not have to make a finding for every possible impact of the policy. The court deferred to STB, and concluded that STB's consideration of only four factors was reasonable, and noted STB had provided sufficient findings to support its conclusion.

The Ninth Circuit disposed of Survival's three reasons for claiming that STB's EIS did not comply with NEPA. The court disagreed with Survival on all three claims. First, Survival claimed that STB erred by adopting a purpose and need statement that focused only on the needs stated by ARRC and that the statement should have included public goals.[400] While the agency must consider the statutory context of the proposed action, the agency has discretion to determine how to implement its statutory objectives.[401] STB also had discretion to determine which of the broad public needs will be considered. Survival also argued that STB considered an impermissibly narrow range of alternatives by adopting ARRC's goals. The Ninth Circuit found, however, that the twelve build alternatives and the one no-action alternative considered were sufficient to enable STB to make an informed decision. The challengers also claimed that there was no need for the project, but the court discounted this argument for failing to consider the legitimate interests in a connecting rail line.

Second, Survival argued that STB impermissibly refused to consider a rail design without a full-length access road. The Ninth Circuit held that the EIS only has to consider reasonable or feasible alternatives. The court reasoned that the rail line could never be built without an access road, was skeptical that a temporary road would be any less harmful, and questioned the feasibility of any non-access road alternative. It deferred to STB's technical expertise in determining whether the no access road option was feasible and found that STB did not act arbitrarily or capriciously in declining to consider the no access road alternative.

Finally, Survival argued that STB's rapid assessment analysis of wetland damage mitigation was too cursory to meet NEPA's hard look requirements because it did not consider bridging streams and elevating tracks to minimize damage. The Ninth Circuit commented that NEPA does not require adoption of mitigation measures, but mandates only reasonably thorough discussion.[402] STB's authorization was conditional on adoption of the one-hundred mitigation measures and therefore the Ninth Circuit found STB complied with NEPA's requirement of a reasonably thorough analysis.

399 49 U.S.C. § 10101 (2006).

400 40 C.F.R. § 1502.13 (2006) (requiring the statement of purpose to "specify the underlying purpose and need to which the agency is responding").

401 Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 866 (9th Cir. 2004).

402 City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1152 (9th Cir. 1997).

26. Jayne v. Sherman, 706 F.3d 994 (9th Cir. 2013).

Several environmental groups sued multiple federal government defendants[403] regarding adoption of the Idaho Roadless Rule (IRR)[404] in December 2006. The plaintiffs first contended that the Fish and Wildlife Service (FWS) erred in its preparation of a Biological Opinion (BiOp) and therefore violated section 7 of the Endangered Species Act (ESA).[405] The plaintiffs also claimed defendants violated National Environmental Policy Act (NEPA)[406] due to reliance on the BiOp and misinterpretation of the Wyoming Wilderness Act of 1984.[407] The plaintiffs asserted that the IRR should be enjoined. The United States Court of Appeals for the Ninth Circuit adopted the opinion of United States District court for the District of Idaho in full and affirmed the district court's grant of summary judgment to the government defendants.

The United States Forest Service (USFS) adopted the Roadless Area Conservation Rule in 2001 (2001 Roadless Rule) to protect identified areas from road construction and timber harvesting.[408] In 2005, USFS asked states to submit petitions to adjust management systems so that it could fine tune the 2001 Roadless Rule. Idaho participated in this process, and after significant public input, USFS adopted Idaho's petition. This action resulted in the IRR, which classified Idaho's 9.3 million acres of roadless areas into five themes.[409]

Various environmental groups challenged USFS's approval of the five-themed IRR, arguing IRR should be replaced with the 2001 Roadless Rule. While USFS consulted with FWS under the ESA, the petitioners challenged the final environmental impact statement and the BiOp. The plaintiffs argued that the BiOp erred in its reliance on assurances from USFS that it was committed to future protection of endangered species in nonbinding letters.

403 Plaintiffs included Gerald Jayne; Greater Yellowstone Coalition; The Lands Council; Natural Resources Defense Council; Sierra Club; and the Wilderness Society. Defendants included Harris Sherman, Under Secretary for National Resources and Environment, U.S. Department of Agriculture; Tim Tidwell, Chief U.S. Forest Service; Tom Vilsack, Acting Director, U.S. Fish and Wildlife Service; and Ken Salazar, Secretary, U.S. Department of the Interior, in their official capacities.

404 Roadless Area Conservation; National Forest System Lands in Idaho, 72 Fed. Reg. 17,816, 17,817 (Apr. 10, 2007).

405 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2011).

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

407 The Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, 98 Stat. 2807 (1984).

408 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001).

409 Jayne v. Sherman, 706 F.3d 994, 997 (9th Cir. 2013). The more protective themes were the Wild Land Recreation, Primitive, and Special Areas of Historic or Tribal Signficiance themes, each with very limited exceptions to allow road construction. The latter two categories—Backcountry/Restoration and Community Protections Zones—allowed temporary roads and logging to help reduce wildfire danger. The goal of the latter two themes was to increase management flexibility to allow community protection from the threat of wildfires. The final theme allowed for road construction that would facilitate phosphate mining.

The district court held that the BiOp, ESA challenges, and any NEPA challenges were without merit and declined to enjoin the IRR.

The Ninth Circuit first turned its attention to standing and ripeness. Citing one plaintiff's plan to return to the roadless areas twice every year, the court found the requirement for a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact" was clearly met.[410] The court rejected the defendants' argument that the programmatic nature of the rule meant that harm was not imminent because the rule had yet to be applied. Rather, the court explained that the challenge "can never get riper" because this was the only opportunity for plaintiffs to challenge the programmatic rule.[411]

The court then turned to the merits of the case, first addressing the ESA claim. The FWS's BiOp contained two relevant conclusions. First, it found that caribou habitat would likely improve as a result of the action. Therefore, caribou would not be placed in jeopardy by the IRR because of the management strategies and future commitments of the Idaho Panhandle National Forest (IPNF). [412] Second, the BiOp concluded that the IRR was unlikely to jeopardize grizzly bears. This determination was based on forthcoming IPNF standards highlighted in letters from the USFS Supervisor of IPNF to the FWS. To counter risks associated with the IRR, the Supervisor explained that USFS was going to amend its long range management plan to ensure minimization of adverse effects on grizzly bears resulting from motorized access to habitat.[413] FWS interpreted this statement to mean that no road construction would occur in grizzly bear core habitat until adoption of the Access Amendment and that the Access Amendment would go through section 7 consultation prior to adoption.

The core ESA question addressed by the court was whether FWS properly determined that road building was reasonably certain not to occur and whether FWS properly relied on USFS's promises to protect listed species made in letters from the USFS Supervisor in IPNF to FWS. The court found that FWS properly considered the letters, did not ignore evidence of Supervisor's commitments, and did not base reliance on an implausible

410 W. Watersheds Project v. Kraayenbrink, 620 F.3d 1187, 1199 (9th Cir. 2010).

411 *Jayne*, 706 F.3d at 1000, (citing *Kraayenbrink*, 620 F.3d at 1199). The court in *Kraayenbrink* found that when the only opportunity to challenge a final nationwide program lies before the court, standing should be found. *Kraayenbrink*, 620 F.3d at 1199 (examining the fitness of the issue for judicial decision and hardship to the parties of withholding court consideration for standing).

412 Despite finding that the IRR could adversely affect caribou, the BiOp found the Long Range Management Plan adequately addressed any potential concerns. In addition, IPNF established a record of using best available science to carry out caribou friendly activities, such as location of old growth tree stands and vegetation management plans suitable for caribou recovery.

413 *Jayne*, 706 F.3d at 1002 ("[t]he Access Amendment will establish standards and guidelines pertaining to wheeled, motorized use within areas occupied by grizzly bears within these ecosystems").

rationale.[414] The court explained that FWS justifiably relied on assurances from IPNF's supervisor. The Ninth Circuit stated that steps being taken to protect the grizzly bear were sufficient and administrative protection proceedings were already underway. The court rejected the plaintiffs' additional argument that because Kootenai National Forest supervisor had not written a similar letter, FWS's determination was improper. The court reasoned that because forthcoming standards to protect listed species made in the IPNF letters applied to both forests, this argument was precluded.

The court next addressed the plaintiffs' NEPA claim. To comply with NEPA, USFS was required to take a "hard look" at environmental impacts of the IRR.[415] Plaintiffs argued that USFS relied on the inaccurate assumption that logging and road building under the two more lenient IRR themes would not result in significantly increased logging or road building. Although USFS took into account past, present, and future logging projects, it based its determination that an increase in permanent roads was unlikely primarily because of its "flat budget trend and high interest in responding to fire risk."[416] Citing deference accorded an agency in matters of its own budget,[417] the court found that USFS's determination did not violate NEPA. The court further found that USFS intended to read the IRR narrowly, such that significant increased logging was unlikely.

Next, the court addressed the plaintiffs' contention that USFS violated NEPA because it did not conduct a site-specific analysis on possible phosphate mining operations. The court explained that absent an irreversible and irretrievable commitment to build roads for mining operations, there was no violation. Because USFS retained discretion to deny a proposed project and because no regulations constrained its discretion, the court held no irretrievable commitment of resources had occurred. Moreover, the court held that the site-specific analysis of mitigation measures was sufficient for the known single mining project.

Finally, the court found that USFS did not arbitrarily rely on the Wyoming Wilderness Act when it opened Idaho's Winegar Hole Roadless Area to logging. Even though the court found the agency acted with less than "ideal clarity,"[418] it did not act arbitrarily or capriciously in its assignment of Winegar Hole to the Primitive theme. As such, the Ninth Circuit found the

414 The Court explained its role was merely to ensure the agency had not: "1) relied on factors which Congress has not intended it to consider, 2) entirely failed to consider an important aspect of the problem, or 3) offered an explanation for its decision that runs counter to the evidence before the agency or an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 1004 (internal quotations omitted).

415 Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005).

416 *Jayne*, 706 F.3d at 1006.

417 Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991) (holding that an agency's construction of its own regulations is entitled to substantial deference).

418 *Jayne*, 706 F.3d at 1009.

agencies complied with NEPA and ESA and granted the defendant's motion for summary judgment.

27. Center for Biological Diversity v. Salazar, 706 F.3d 1085 (9th Cir. 2013).

The Center for Biological Diversity (CBD)[419] brought suit against the United States Bureau of Land Management (BLM) claiming violations of the National Environmental Policy Act (NEPA),[420] the Federal Land Policy and Management Act (FLPMA),[421] and BLM's own regulations[422] by allowing mining operations to recommence without requiring a new plan of operations and NEPA analysis. In reviewing the case de novo, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the District of Arizona's dismissal of all claims.

The uranium mining operations took place at the Arizona 1 Mine in Mohave County, Arizona (the mine). On May 9, 1988, BLM approved the mine's plan of operations, which governed the interim management of the mine if there was an extended period of non-operation before its completion. Because of a substantial drop in uranium prices, Energy Fuels Nuclear, Inc., the operator of the mine, ceased mining activities in 1992 and placed the mine on standby management status.[423] In May 1997, while still on hold, International Uranium Corporation, USA, acquired the mine. In 2007, International Uranium Corporation combined with Denison.

In 2007, Denison notified BLM that it intended to restart mining operations. Denison obtained current Arizona Aquifer Protection and Air Quality Control permits and updated its financial guarantees with the Arizona Department of Environmental Equality and BLM. Denison updated its financial guarantee, accepting a bond necessary for restoration, and obtained a Permit to Use Right-of-Way from Mohave County to perform needed improvements on the road to access the mine. The road also provided public access to recreational areas. The county obtained a Free Use Permit from BLM to harvest gravel that BLM granted pursuant to a categorical exclusion to NEPA.[424]

Before mining fully resumed in November 2009, CBD claimed the 1988 operations plan was ineffective. In April 2010, the district court denied a preliminary injunction and a Ninth Circuit panel affirmed. After more extensive proceedings, the district court granted summary judgment to BLM

419 Appellants also included Grand Canyon Trust, Sierra Club, Kaibab Band of Paiute Indians, and Havasupai Tribe.

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

421 Federal Land Police and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006).

422 43 C.F.R. § 3809 (2012).

423 Ctr. for Biological Diversity v. Salazar, 706 F.3d 1085, 1088 (9th Cir. 2013) (noting that the mine remained inactive until 2007, but the interim management portion of the 1988 plan of operations was followed throughout).

424 40 C.F.R. § 1508.4 (2012) ("Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required") (implementing 42 U.S.C. 4332(2)(C) (2006)).

for all claims, except for the Free Use Permit to remove gravel—which it remanded to BLM. After further explanation by BLM, the district court found that the categorical exclusion for the gravel permit was not arbitrary and capricious, and dismissed that claim as well.

The Ninth Circuit first discussed BLM's argument that the denial of the preliminary injunction should be established as the law of the case as to all issues. The law of the case doctrine only applies, however, when the same or a higher court has already decided an issue.[425] The Ninth Circuit found that a preliminary injunction did not constitute the law of the case. The decision not to grant the injunction was not a conclusion as to any legal or factual question and thus could not become the law of the case. The Ninth Circuit further noted that appellants failed to raise serious questions on the merits. The prior panel also never intended the affirmation of the injunction to become the law of the case.

CBD argued that the 1988 plan of operations had become ineffective, relying on regulations specifying that the plan only remained effective so long as "conducting operations."[426] The Ninth Circuit disagreed with a restrictive view of the regulations and stated that temporary closures do not result in ineffective plans. The regulatory scheme explicitly provided for periods of temporary closures, and delineated BLM termination procedures of operation plans should mining operations be abandoned.[427] As such, the court found that CBD's interpretation would render much of the regulations meaningless. The Ninth Circuit determined that the regulations provided for temporary closures and that none of the regulations required approval of a new operation plan before regular mining activities could recommence. BLM's interpretation did not suggest the plan would "continue in perpetuity."[428] The Ninth Circuit concluded that because the regulations provide for temporary suspension and for BLM termination of operations, BLM's decision to allow the resumption of mining was not a NEPA violation.

CBD attempted to argue that the failure to supplement the 1988 environmental assessment led to reliance on a stale and outdated plan. While the Ninth Circuit found the 1988 plan triggered NEPA it also found the environmental analysis by BLM was sufficient and supplementation was not necessary because there was no ongoing major Federal action. CBD argued that BLM's permit issuances and the approval of the reclamation bond were

425 The law of the case doctrine provides that "a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." Gonzalez v. Arizona, 677 F.3d 383, 389 n.4 (9th Cir. 2012).

426 43 C.F.R. § 3809.423 (2012) ("Your plan of operations remains in effect as long as you are *conducting operations*, unless BLM suspends or revokes your plan of operations for failure to comply with this subpart.") (emphasis added).

427 *Id.* § 3809.401(b)(5) (interim plans are required to provide for periods of temporary closure to prevent degradation mines); *id.* § 3809.424 (owner/operator must follow interim plan when operations are stopped); *Ctr. for Biological Diversity*, 706 F.3d at 1092 (the regulatory scheme does not mean that a temporary closure of a mine results in an ineffective plan of operations).

428 *Ctr. for Biological Diversity*, 706 F.3d at 1094.

prerequisites to mining and constituted a major Federal action, which triggered a NEPA analysis. The Ninth Circuit concluded that none of the actions affected the 1988 plan approval and therefore the actions did not trigger NEPA. The court found the approval of the reclamation bond was within the category of post-approval monitoring and compliance activities that do not trigger NEPA.

CBD then challenged BLM's categorical exclusion grant of the Free Use Permit to Mohave County for gravel removal. CBD did not challenge the creation of the exclusion, but did challenge BLM's choice to limit the scope of the NEPA analysis when it invoked the exclusion. Relying on *Wong v. Bush,*[429] the Ninth Circuit noted the full NEPA analysis does not apply when an action falls within a categorical exclusion. The court explained that after invoking an exclusion, BLM only had to determine whether there were "extraordinary circumstances" that would prevent use of the exclusion.[430] The Ninth Circuit concluded that BLM had sufficiently explained how they determined there would be no "cumulatively significant" environmental effects that would preclude using the categorical exclusion. The court relied on BLM's determination that gravel lost from extraction under the permit would be naturally replenished, and that the gravel was already part of an approved project. Additionally, there were other sources of gravel that could be used to maintain the road.

Finally, the court concluded that CBD's argument that BLM had violated its own regulations by providing Denison with free gravel was unfounded because the permit had been granted to Mohave County, not Denison.

In conclusion, the Ninth Circuit affirmed the district court's summary judgment and upheld BLM's invocation of the categorical exclusion.

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429 Wong v. Bush, 542 F.3d 732, 737 (9th Cir. 2008) (holding as a general principle that "where an agency action falls under a categorical exclusion, it need not comply with the requirements for preparation of an EIS.").

430 40 C.F.R. § 1508.4 (2012) ("Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect").

28. San Luis Unit Food Producers v. United States, 709 F.3d 798 (9th Cir. 2013).

The San Luis Unit Food Producers (Farmers)[431] brought action against the San Luis Unit of the Central Valley Project (CVP), a United States Bureau of Reclamation (BOR) project, to compel BOR to provide irrigation districts with more water than BOR currently provides. The Farmers argued that several statutes required BOR to provide irrigators with sufficient water before it provided water to other parties for other purposes. The United States District Court for the Eastern District of California granted BOR's motion for summary judgment on the pleadings. On appeal, reviewing claims de novo, the United States Court of Appeals for the Ninth Circuit held that BOR had discretion to allocate the San Luis water, and the Farmers failed to establish a claim under the Administrative Procedure Act (APA).[432]

CVP is a system of dams, levees, canals, and related infrastructure that distributes water throughout California's Central Valley. In 1992, Congress amended the Central Valley Project Act[433] with the Central Valley Project Improvement Act, which reprioritized uses to provide: first, river regulation and improvement of navigation and flood control; second, irrigation and domestic uses and fish and wildlife mitigation protection and restoration purposes; and third, power and fish and wildlife enhancement.[434] In 1960 Congress authorized construction and operation of the San Luis Unit (Unit) as an integral part of the CVP. The principle purpose of the Unit was to furnish water for irrigation. It also serves four incidental purposes including fish and wildlife benefits.

The Reclamation Act[435] authorized BOR to contract for the use of reclamation water for various purposes, including irrigation. Once BOR contracts with an irrigation district, the district may then contract with users including Farmers. In the last several years, BOR has provided less water for allocation and allowed a significant volume of water to flow naturally rather than capturing it for use.

The Farmers did not challenge a discrete action or decision. Rather the farmers claimed that BOR had failed to deliver an adequate supply of water, which amounted to a failure of an agency to act under the APA. Under § 706(1) of the APA, a court may dismiss a claim that fails to assert that an agency failed to take a required discrete agency action for lack of

431 Plaintiffs San Luis Unit Food Producers include: El Dorado Farms; Laguna Excelsiour Farms, LLC; JLK; Ryan Family Farms LP; Marlu Farms; Simcot Farms; Brad Gleason; Ross Allen; California Pistachio LLC; Double B. Farms; Buster Allen, Inc.; Truk Station LLC; C.S. Stefanopoulos; Elena Stefanopoulous; D.D. Stefanopoulous; Pagona Stefanopoulous; Universal Land Co.; Cort Blackburn; Laura Blackburn; MC Farms LLC; Marty Acquistapace; and Curtis Stubblefield.

432 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

433 Central Valley Project Act, Pub. L. No. 75-392, § 2, 50 Stat. 844 (1937).

434 Central Valley Project Improvement Act, Pub. L. No. 102-575, § 2, 106 Stat. 4706 (1992).

435 The Reclamation Act, 43 U.S.C. §§ 423e, 521 (2006).

jurisdiction. Farmers made claims pursuant to four different statutes arguing that the statutes imposed a duty on BOR to operate the CVP in a manner that provided the Farmers' preferred amount of water.

First, the court held that the Secretary is authorized to supply water for purposes other than irrigation, provided that it is not detrimental to a prior appropriator.[436] The court also noted that the statute does not describe any action BOR is required to take, and therefore the claim fails for lack of a discrete statutory duty. Second, the court held that the CVP Act does not indicate that BOR must take any nondiscretionary action. The Ninth Circuit dismissed the Farmers' argument that CVP water must be used for irrigation and other uses before use for nonirrigation purposes. Third, the court found that neither section 1(a) of the San Luis Act nor prior case law imposed a duty to distribute a particular amount of water for irrigation.[437] Finally, the court determined that no part of section 491 of the Reclamation Act[438] imposes particular action in the management of projects, and decisions on how to operate CVP are left up to BOR.

The Ninth Circuit then responded to arguments that BOR violated a duty to exercise water rights within the Unit. First, the court dismissed the argument that BOR's failure to release more water for irrigation violated section 1702 of the California Water Code.[439] Under the plain meaning of the code, BOR is required to make a "no injury" finding prior to approving a change in water permit but is not required to act in a specific way. Second, the court dismissed the Farmers' reliance on section 8 of the Reclamation Act.[440] The court noted that section 8 is too vague be construed as a congressional directive and that the Farmers are not entitled to any specific amount. Lastly, the court held that statutes related to construction of the San Luis Unit imposed no requirement on BOR to deliver a certain amount of irrigation water.

Finally, the court found that Congress unmistakably vested in BOR the discretion to determine how to best recoup the costs of projects. It thus did not impose on BOR an obligation to sell irrigation water to recoup costs as the Farmers had argued.

Ultimately the Ninth Circuit held that while BOR is obligated to meet all obligations under State and Federal law, it is not obligated to provide irrigation water to Farmers. Because there is no discrete action that BOR

436 *Id.* § 521.

437 *See* Firebaugh Canal Co. v. United States, 203 F.3d 568, 578 (9th Cir. 2000) (holding that *Firebaugh* did not stand for the imposition of a duty to distribute a certain amount of water. Although *Firebaugh* was decided before *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the court declined to determine whether providing drainage service constituted a discrete agency action.).

438 43 U.S.C. § 491 (2006).

439 Injury to Legal User of Water, CAL. WATER CODE § 1702 (West 2013).

440 43 U.S.C. § 372 (2006) ("The right to the use of water acquired under [the Reclamation Act] shall be appurtenant to the land irrigated, and *beneficial use shall be the basis, the measure, and the limit of the right*") (emphasis added).

failed to take, the Ninth Circuit dismissed BOR's argument for lack of subject matter jurisdiction.

29. Cetacean Research v. Sea Shepherd Conservation Society, 708 F.3d 1099 (9th Cir. 2013).

Japanese researchers who hunt whales in the southern Pacific Ocean (Cetacean) sought a preliminary injunction against Sea Shepherd Conservation Society (Sea Shepherd) under the Alien Tort Statute.[441] Cetacean contended that Sea Shepherd violated international agreements that regulate conduct on the high seas. In short, Cetacean claimed that Sea Shepherd engaged in piracy. Sea Shepherd regularly confronted Cetacean with vicious tactics.[442] It was uncontested that these acts "could seriously impair [Cetacean's] ability to navigate."[443] The District Court for the Western District of Washington denied Cetacean's request for a preliminary injunction and dismissed Cetacean's claims. The United States Court of Appeals for the Ninth Circuit reversed on both counts.

The Ninth Circuit reviewed the question of whether Sea Shepherd committed acts of piracy under the de novo standard of review. Under the United Nations Convention on the Law of the Sea (UNCLOS) and the High Seas Convention, piracy requires "illegal acts of *violence* . . . for *private ends* . . . directed . . . on the high seas, against another ship."[444] The court held that Sea Shepherd had used violent means for private ends and therefore committed acts of piracy. Disagreeing with the district court's narrow definition of private ends, the Ninth Circuit stated that private ends encompassed all things not done for the public good. The court then found that environmental activism pursued for moral, personal, or philosophical reasons by illegitimate means qualified as private ends due to the rich history of piracy law. The Ninth Circuit also disagreed with the district court's narrow interpretation of the word "violence," holding that the plain meaning of violence includes malicious acts directed at inanimate objects.

Turning to Cetacean's request for a preliminary injunction, the Ninth Circuit reviewed the district court's denial of a preliminary injunction for abuse of discretion. The court applied a four factor test: 1) whether the plaintiff is likely to succeed on the merits; 2) whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief; 3) whether the

441 Alien Tort Claims Act, 28 U.S.C. § 1350 (2006) (providing cause of action by an alien for "a tort . . . committed in violation of the law of nations or a treaty of the United States").

442 Tactics employed by Sea Shepherd were known to include ship ramming, hurling glass containers of acid at other ships, dragging metal-reinforced ropes to damage propellers and rudders, launching smoke bombs and flares with hooks, and pointing high-powered laser beams at other ships. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 708 F.3d 1099, 1101 (9th Cir. 2013).

443 *Id.* at 1103.

444 United Nations Convention on the Law of the Sea art. 101(a)(i), Dec. 10, 1982, 1833 U.N.T.S 397 (emphasis added); Convention on the High Seas art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

balance of equities tips in the plaintiff's favor; and 4) whether an injunction is in the public interest.[445]

The merits of Cetacean's case required success under at least one of three international agreements: the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),[446] UNCLOS,[447] and the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS).[448] The court reviewed the district court's likelihood of success findings under these three international agreements. Article 3 of the SUA Convention prohibits "endangering" safe navigation. The court concluded that under this standard, Sea Shepherd needed only to create dangerous conditions, even if harmful consequences never actually occurred. The Ninth Circuit stated that because Sea Shepherd used metal-reinforced prop-fouling ropes, it had clearly created such dangerous conditions. The court then concluded that the district court's incorrect characterization of UNCLOS's definition of "violence" and "private ends" further meant that it abused its discretion as to issuing a preliminary injunction under that agreement. Finally, the Ninth Circuit upheld the lower court's conclusion that because Sea Shepherd deliberately navigated close to other ships, it violated COLREGS.

Next, the court briefly turned to the second and third factors of preliminary injunction. First, the court overturned the district court's determination that injury was possible but unlikely. Relying on Shepherd's record of ramming and sinking ships and practice of navigating toward ships in dangerous ways, the Ninth Circuit found that the district court abused its discretion in finding injury unlikely. For the third prong, balance of the equities, the court agreed with the district court that the equities favored Cetacean because absence of an injunction would allow Sea Shepherd to continue harassing Cetacean.

Finally, the court turned to the fourth factor, public interest analysis. The court identified two primary public interest issues: health of the marine ecosystem and safety of shipping in international waterways. For ecosystem health, the court used the Whaling Convention Act and the Marine Mammal Protection Act to control its analysis. Both laws allow whaling under scientific permits. For waterway safety, the court recognized UNCLOS, the SUA Convention, and COLREGS—all of which require safe navigation—to control its analysis. Because the district court further addressed comity and maintenance of harmonious international relations, the Ninth Circuit analyzed these issues as well.

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

446 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, Mar. 10, 1988, S. Treaty Doc. No. 101–1, 1678 U.N.T.S. 222.

447 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 387.

448 The International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 18. COLREGS outlines collision avoidance standards. The Ninth Circuit reviewed the district court's dismissal of Cetacean's piracy claims de novo. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 708 F.3d 1099, 1106 (9th Cir. 2013).

The Ninth Circuit concluded that enjoining Sea Shepherd would not inject the court into an international political issue, but rather would send the message that piracy is not tolerated. As to comity, the court explained that an Australian decree that Cetacean did not engage in whaling in Antarctic waters was not owed comity because the United States does not recognize Australia's claim over waters in questions. If the federal court had implicitly recognized Australia's judgment, it would have impermissibly tread in the province of the Executive. Further, the Australian court order addressed only Cetacean and not Sea Shepherd.

Although the four-factor analysis clearly weighed in favor of granting Cetacean's request for a preliminary injunction, the Ninth Circuit also addressed whether Cetacean's "unclean hands" militated against granting this injunction. The district court held that Cetacean's hands were unclean because it flouted Australia's court order. The Ninth Circuit, however, explained that, as far as United States courts are concerned, Cetacean's hands were clean because the United States does not recognize Australia's jurisdiction over the Antarctic waters in question.

Finally, the majority ordered a new district court judge to be drawn at random for remand of this case. The Ninth Circuit noted dubious impartiality by the district court judge and retained jurisdiction over any further appeals or writs.

Circuit Court Judge M. Smith concurred in part and dissented in part. While Judge Smith concurred with the reasoning and judgment of the panel, he dissented in the reassignment of a different district court judge. Applying the three-part test typically employed for district judge reassignment,[449] he found the district court judge could act on the Ninth Circuit's clear opinion without prejudice, that reassignment was unnecessary to preserve an appearance of justice, and that reassignment would entail waste and duplication out of proportion to any benefits of preserving the appearance of fairness.[450]

449 The three-part test is: "1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, 2) whether reassignment is advisable to preserve the appearance of justice, and 3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Inst. of Cetacean Research*, 708 F.3d at 1106 (J. Smith, concurring in part and dissenting in part).

450 *Id.* (quoting *United States v. Wolf Child*, 699 F.3d 1082, 1102 (9th Cir. 2012)).

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