# **2001 NINTH CIRCUIT ENVIROMENTAL REVIEW: CASE SUMMARIES**

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**[\*605]**

I. Environmental Quality

A. Clean Air Act

1. Hall v. Norton, 266 F.3d 969 (9th Cir. 2001), infra Part V.B.

2. Hall v. United States Environmental Protection Agency, 273 F.3d 1146 (9th Cir. 2001).

Robert Hall petitioned a decision by the Environmental Protection Agency (EPA) approving revisions to Clark County, Nevada's air quality plan. The Ninth Circuit held that EPA applied an incorrect standard in reviewing the air quality plan. However, the Ninth Circuit also found that EPA provided reasonable hearing and notice, the agency's revisions after publication of the initial notice were permissible, and that no prejudice resulted from the state's failure to forward the proposed revisions to EPA within sixty days as required by statute. Hall's petition was granted in part, denied in part, and remanded to EPA.

The Clean Air Act (CAA) [[1]](#footnote-2)1 states that EPA shall set National Ambient Air Quality Standards (NAAQS), which are designed to prevent and control air pollution. [[2]](#footnote-3)2 To effectuate this objective, the CAA requires each state to submit a State Implementation Plan (SIP) detailing how that state will achieve the established air quality standards. [[3]](#footnote-4)3 While the CAA gives each state latitude in selecting the means to achieve these objectives, the Act requires each state to regulate emissions from new stationary sources and automobiles, and to enforce minimum emissions control standards for these sources. These SIPs are subject to EPA review.

Congress has established NAAQS objectives since 1970, but amendments to the CAA in 1977 and 1990 have steadily pushed back the deadlines for those objectives. The 1990 Amendments included minimum emission controls for new stationary sources that differed from those established in the 1981 Amendments. [[4]](#footnote-5)4

Hall challenged EPA's decision to approve revisions to the SIP that would modify emissions standards for new stationary source emissions. Addressing Hall's challenge, the Ninth Circuit examined EPA's SIP review **[\*606]** responsibility and whether the revisions interfered with the current attainment requirements of the CAA. In briefs filed with the court, EPA justified its approval of the SIP based on its interpretation of section 110(l) of the CAA: [[5]](#footnote-6)5 ""If the SIP revision does not relax the existing SIP … then the SIP revision does not "interfere' with attainment [or] reasonable further progress … requirements and no further inquiry is needed.'" [[6]](#footnote-7)6 EPA then stated that the revised SIP did not relax the air quality rules approved in 1981, and therefore, it would not interfere with reasonable further progress towards or attainment of the NAAQS.

To determine the validity of this assertion, the Ninth Circuit first looked at EPA precedent to determine EPA's review responsibility under section 110(l) of the CAA. EPA first argued that its interpretation of section 110(l) was owed deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron). [[7]](#footnote-8)7 EPA also argued for deference because its interpretation served as the basis of other EPA final rules regarding SIPs. The court, however, noted that even if previous final rules substantiated EPA's interpretation of section 110(l), every previously promulgated rule explicitly denied any precedential effect. The Ninth Circuit stated that interpretations of the CAA presented in rules that lack "force of law" are not entitled to Chevron deference. The court similarly denied deference on any other ground. The court found that in simply not relaxing preexisting rules the agency did not necessarily establish "non-interference," despite EPA's claim to the contrary. Instead, the court endorsed case-by-case review of SIP revisions.

Next, the Ninth Circuit analyzed section 110(l) of the CAA to determine whether EPA's interpretation was statutorily correct. Because the text of section 110(l) of the CAA does not set out EPA's review responsibility, the court examined the history of the provisions which spoke to that responsibility.

The court noted that prior to the 1990 Amendments EPA interpreted SIP review provisions to mean that revisions could be approved if they did not "interfere with the attainment or maintenance of [NAAQS]." [[8]](#footnote-9)8 EPA disapproved plans if the revisions would not allow for attainment of the national standards. [[9]](#footnote-10)9 EPA reiterated this non-interference position in the SIP Preamble for 1977 Amendments, [[10]](#footnote-11)10 and Congress incorporated it into the 1990 Amendments of the CAA. [[11]](#footnote-12)11 Thus, EPA's review responsibility, the Ninth Circuit noted, was to determine whether a particular component of the SIP **[\*607]** complied with the NAAQS and whether the revised SIP would suffice to meet the required reductions in air pollution. [[12]](#footnote-13)12 The court elaborated upon this interpretation by noting that this determination cannot be made in a vacuum, but must be determined in relation to the SIP as a whole.

After determining EPA's review responsibility, the Ninth Circuit quickly noted that EPA did not arrive at the "no-relaxation" rule by empirically analyzing the existing level of pollution as compared with national standards, but instead premised it on necessary statutory equivalence between the non-relaxation requirements of the 1981 rules and non-interference with present attainment requirements. EPA established the 1981 rules as a baseline and determined that all revisions that minimally complied with those rules constituted non-interference. The court dismissed this method, stating that there is "no necessary correlation between maintaining the stringency of the 1981 rules and meeting the post-1990 attainment requirements of the Act." [[13]](#footnote-14)13

After determining that EPA applied an incorrect standard in reviewing the revised SIP, the Ninth Circuit turned to whether EPA adequately published the rules and revisions of the revised SIP. The court documented the steps taken by EPA, including notice in local newspapers, a notice of proposed rulemaking, and publication of the final rule, and determined that those steps provided the public with an adequate opportunity to comment.

The Ninth Circuit then examined whether continued revision was permissible after EPA's initial proposed rulemaking. EPA published a notice of proposed rulemaking in 1995, and Clark County later received extensive comments from the public and suggestions from EPA. Following notice and comment, EPA made its final approval of the revised new source review program. Hall contended that no comments should have been accepted between the time of the proposed rulemaking and the announcement of the final rule. Hall noted that nothing in the Administrative Procedure Act (APA) [[14]](#footnote-15)14 requires EPA to seek comments on a revised final rule. However, the court highlighted the fallacy of this argument, noting that notice and comment rulemaking is by design intended conceivably to alter the proposed rule upon receipt of public input. Because the public had opportunity to comment on the numerous drafts preceding the final rule and because no statutory right entitled Hall to comment on the revised final rule, continued revision was permissible.

Lastly, the court briefly addressed whether Nevada's failure to submit the SIP revisions to EPA within sixty days of approval by the county constituted prejudice warranting reversal of EPA's decision. Because Hall failed to demonstrate any prejudice resulting from this transgression, the Ninth Circuit determined that no action was warranted.

**[\*608]**

3. United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001), infra Part III.

B. Clean Water Act

1. Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001), cert. granted, 70 U.S.L.W. 376 (U.S. June 10, 2002) (No. 01-1243).

Angelo K. Tsakopoulos (Tsakopoulos) appealed the district court's ruling [[15]](#footnote-16)15 that, as the owner of Borden Ranch, he had violated the Clean Water Act (CWA) [[16]](#footnote-17)16 on 358 separate occasions. The district court had levied a $ 500,000 fine against Tsakapoulos and required him to restore four acres of wetlands. The Ninth Circuit affirmed the district court's holding that Tsakopoulos had violated the CWA (except with respect to vernal pools) and remanded the case for a recalculation of civil penalties in light of the exclusion of the vernal pools.

Tsakopoulos purchased the 8400-acre Borden Ranch in California's Central Valley in 1993. At the time the ranch was purchased, the property consisted largely of various types of wetlands: vernal pools, swales, and intermittent drainages. One common element of these various wetlands is a restrictive layer at their base that serves to contain the surface water within the area of the vernal pool, swale or drainage, and to prevent that water from percolating downwards through the soil. This restrictive layer also inhibits or prevents the downward growth of roots from crops.

To make his property amenable to orchard and vineyard farming, Tsakopoulos began deep ripping the wetlands on his property. Deep ripping is a process by which large prongs are dragged behind a bulldozer or tractor through the earth, perforating the restrictive layers at the bottom of the wetlands. Once these blades have perforated the restrictive layer in the wetlands, the water drains from beneath the restrictive layer. Any crop planted above the restrictive layer is thus able to send roots deep into the soil.

Tsakopoulos began deep ripping in the fall of 1993. After he began, the Army Corps of Engineers (Corps) issued him a retroactive permit in exchange for various mitigation measures. In the fall of 1994 and again in 1995, Tsakopoulos engaged in deep ripping in protected wetlands that he did not have a permit to alter. In response, the Corps issued cease and desist orders after both of these incidents, and in May of 1996 the Corps and the Environmental Protection Agency (EPA) entered into an administrative order on consent with Tsakopoulos by which Tsakopoulos would refrain from further wetlands violations and set aside a 1368-acre preserve.

Following these incidents, the Corps and EPA, in a regulatory guidance letter issued in late 1996, distinguished deep ripping from normal plowing activity. Subsequently, the Corps again determined that Tsakopoulos had **[\*609]** continued deep ripping wetlands on his property and issued an administrative order. Tsakopoulos then filed a lawsuit challenging the authority of both the Corps and EPA to regulate deep ripping, and the United States counterclaimed for injunctive relief and civil penalties for CWA violations.

The district court held that Tsakopoulos violated the CWA by deep ripping vernal pools and drainages. The court assessed a $ 500,000 fine and ordered Tsakopoulos to restore four acres of wetlands. Following the district court's final order, Tsakopoulos appealed.

The Ninth Circuit analyzed the appeal in four stages. First, the court considered whether the Corps had jurisdiction over deep ripping activity in wetlands. The court began by noting that the CWA prohibited the "discharge of any pollutant" [[17]](#footnote-18)17 from any point source into the waters of the United States. The Ninth Circuit recognized that wetlands adjacent to navigable waters traditionally have been considered within the purview of the CWA, for these purposes. Furthermore, under the CWA pollutant includes "dredged spoil, … biological materials, … rock, [and] sand," [[18]](#footnote-19)18 and a discharge is "any addition of any pollutant to navigable waters from any point source." [[19]](#footnote-20)19 Finally, the Ninth Circuit noted that "it is unlawful to discharge pollutants into wetlands without a permit from the Army Corps of Engineers." [[20]](#footnote-21)20

The court disagreed with Tsakopoulos's contention that a process such as deep ripping, which moves material already in the wetland without adding other materials, did not amount to the addition of a pollutant under the terms of the CWA. The court recalled Rybachek v. United States Environmental Protection Agency, [[21]](#footnote-22)21 which held that removing material from a stream in a placer mining process and then returning the material to the stream constituted the addition of a pollutant. [[22]](#footnote-23)22 The court also noted United States v. Deaton, [[23]](#footnote-24)23 a Fourth Circuit decision holding that the process of "sidecasting," whereby previously dredged material returned to the wetland of origin constitutes an addition of a pollutant under the CWA. [[24]](#footnote-25)24 The court was unable to distinguish the instant case from Rybachek and Deaton, and thus it concluded that deep ripping as performed by Tsakapoulos qualified as a discharge of a pollutant under the CWA.

After establishing that redepositing material in a wetland through deep ripping is the discharging of a pollutant for the purposes of the CWA, the court briefly addressed whether the machinery used in the deep ripping process served as a point source. Noting that the CWA broadly defines point **[\*610]** source [[25]](#footnote-26)25 and that bulldozers and tractors are considered point sources, [[26]](#footnote-27)26 the Ninth Circuit concluded that bulldozers and tractors pulling large metal prongs through the wetlands constituted a point source.

In its final examination of Corps jurisdiction over the deep ripping process, the Ninth Circuit examined the "normal farming" exception of the CWA. [[27]](#footnote-28)27 While recognizing that activities such as plowing might qualify for this exemption, the court noted the "recapture" provision of the exemption, which requires permits for those activities that alter a navigable water body for a purpose to "which it was not previously subject." [[28]](#footnote-29)28 Because deep ripping functions to "bring[] an area of the navigable waters into a use to which it was not previously subject," [[29]](#footnote-30)29 that activity is governed by the recapture provision, and therefore a permit is required. With the normal farming exception dispatched, the Ninth Circuit concluded that the Corps and EPA had jurisdiction over Tsakapoulos's deep ripping activities.

The Ninth Circuit then reversed the district court's holding that CWA violations occurred in the vernal pools on the ranch. This reversal was based on Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), [[30]](#footnote-31)30 which had been announced after the district court issued its decision. [[31]](#footnote-32)31 In SWANCC, the Supreme Court held that the Corps' assertion of jurisdiction over intrastate waters used by migratory birds but not bordering navigable waterways exceeded the Corps' authority as provided by the CWA. [[32]](#footnote-33)32 By definition, vernal pools do not border navigable waterways; consequently, the vernal pools on Tsakapoulos's ranch, as isolated bodies of water, were not within the Corps' jurisdiction. Accordingly, the Ninth Circuit reversed this portion of the district court's findings.

Next, the Ninth Circuit examined the district court's factual findings. Tsakapoulos maintained that the United States offered no evidence that deep ripping had occurred on the ranch. The appellate court noted that in fact ample evidence had been provided, including eyewitness testimony, documentary evidence, Tsakopoulos's own testimony, and expert testimony showing that the restrictive layer had been ripped up. The district court had considered sufficient evidence to warrant its decision, and the Ninth Circuit found no error by the district court.

The Ninth Circuit evaluated the civil penalties assessed against Tsakapoulos. Tsakapoulos challenged the penalties on three fronts, none of which swayed the Ninth Circuit. Tsakapoulos first argued that the language of the CWA, which allows for $ 25,000 penalties "per day for each violation" [[33]](#footnote-34)33 **[\*611]** capped the total penalties at $ 25,000 for any one day, regardless of how many violations occurred on that day. After examining slightly similar cases throughout the country, [[34]](#footnote-35)34 the appellate court agreed with the district court that for each pass of the deep ripping mechanism, a separate and distinct CWA violation occurred. The Ninth Circuit then noted that because the deep ripping of vernal pools was no longer under Corps jurisdiction, the case would be remanded for a recalculation of damages, if necessary.

Tsakapoulos then argued that, in light of a previous consent decree between EPA and the Simpson Timber Company (which had deep ripped 987 acres but was subject only to a $ 30,000 penalty), the penalty assessed against Tsakapoulos was unfairly disproportionate. The Ninth Circuit agreed with the district court that consent decrees and judgments are distinct animals and thus the Simpson decree was irrelevant. Additionally, the appellate court noted that Tsakapoulos had knowingly assumed the risk inherent in litigation in lieu of settlement.

Finally, in response to Tsakapoulos's argument that his good faith, the trivial nature of the violations, and uncertainty concerning governmental regulatory authority warranted a reduced penalty, the Ninth Circuit deferred to the discretion of the district court while also noting that the penalty assessed was significantly lower than that allowable under the CWA.

The dissent took issue with the majority's conclusion that the return of deeply plowed material to the wetland constitutes an addition of a pollutant. Citing National Mining Ass'n v. United States Army Corps of Engineers, [[35]](#footnote-36)35 the dissent argued that because Congress addressed in the CWA only the "discharge" or "addition" of pollutants, the Corps had no authority to regulate the redeposit of the dredged materials to the wetland. The dissent reasoned that Rybachek [[36]](#footnote-37)36 was distinguishable from the case at bar because Rybachek's holding was premised on returning mining material to a different location in the river from which it was removed. Similarly, Deaton [[37]](#footnote-38)37 did not apply because plowing is not equivalent to dredging and redepositing dredged spoil. Finally, the dissent added that those unintended deep ripping acts that occurred should have been exempt as normal farming activity because they fell outside the scope of the "recapture provision" of the CWA. [[38]](#footnote-39)38

**[\*612]**

2. Sierra Club v. Whitman, 268 F.3d 898 (9th Cir. 2001).

The Ninth Circuit held that the Environmental Protection Agency (EPA) did not have a mandatory duty to make findings when provided with information regarding violations of the Clean Water Act (CWA). [[39]](#footnote-40)39 Furthermore, EPA does not have a mandatory enforcement duty even after a violation has been found.

The Grand Canyon chapter of the Sierra Club (the Club) sued EPA under the CWA for failure to take action against the City of Nogales and the International Boundary and Water Commission (Boundary Commission) for operating a wastewater treatment plant that was allegedly polluting the Santa Cruz River. The treatment plant is located in Arizona near the United States-Mexico border and serves nearly 200,000 people in Nogales, Arizona, and Nogales, Sonora, Mexico. At the time of suit the plant operated under an expired permit issued by EPA, and according to reports submitted by the Boundary Commission to EPA, had violated its permit limitations 128 times in the past five years.

The Club sought enforcement action from EPA under the citizen suit provision of the CWA. [[40]](#footnote-41)40 Although the Club, Nogales and the Boundary Commission reached a settlement, the resulting consent decree was not binding on EPA. Thus the Club's claim against the agency was preserved. The CWA citizen suit provision authorizes any citizen to sue EPA "where there is alleged a failure of the Administrator to perform any act or duty … which is not discretionary." [[41]](#footnote-42)41 EPA argued that its decision not to enforce was discretionary. The district court agreed and dismissed for lack of jurisdiction, and the Club appealed.

The Ninth Circuit separately addressed whether EPA had a duty to make findings and whether the agency had a duty to take enforcement action. As it did in Friends of the Cowlitz v. FERC, [[42]](#footnote-43)42 the court cited Heckler v. Chaney [[43]](#footnote-44)43 for the "traditional presumption" that an agency retains unreviewable prosecutorial discretion unless Congress has indicated otherwise. [[44]](#footnote-45)44 Although this presumption of agency discretion can be overcome, the language of the CWA does not impose on EPA a mandatory duty to investigate alleged violations or to make findings. The Club based its claim on section 309(a)(3) of the CWA, which states that "whenever on the basis of any information available to him the Administrator finds that any person is in violation … he shall issue an order requiring such person to comply." [[45]](#footnote-46)45 However, the court concluded that this section concerns the duty of the Administrator only after a finding has been made; it does not create an initial duty to investigate. Furthermore, requiring EPA to investigate every complaint could interfere with the agency's ability to investigate and enforce **[\*613]** the most serious violations.

Likewise, regarding enforcement, the court was unwilling to intrude on EPA's expertise in ordering agency priorities. Even when EPA finds a violation, the seemingly mandatory "shall" [[46]](#footnote-47)46 in section 309 merely authorizes rather than commands EPA to take enforcement action. "Particularly when used in a statute that prospectively affects government action, "shall' is sometimes the equivalent of "may.'" [[47]](#footnote-48)47 The statutory structure of the CWA demonstrates that enforcement is at the discretion of the EPA. That is, by providing for citizen suits, Congress acknowledged that EPA would not always act. The court found further support for EPA's prosecutorial discretion in the Act's legislative history. [[48]](#footnote-49)48

Finding that EPA did not fail to perform any non-discretionary duty, the Ninth Circuit affirmed the district court in dismissing the Club's citizen suit for lack of subject matter jurisdiction.

C. ***Oil*** Pollution Act

1. Edwardsen v. United States Department of the Interior, 268 F.3d 781 (9th Cir. 2001), infra Part I.F.

D. CERCLA

1. Pritikin v. Department of Energy, 254 F.3d 791 (9th Cir. 2001), cert. denied, 70 U.S.L.W (2002), infra Part V.B.

2. Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001), cert. denied, 70 U.S.L.W. 3614 (U.S. Apr. 1, 2002) (No. 01-1091).

On rehearing en banc, the Ninth Circuit upheld summary judgment for the defendants who claimed that cleanup efforts by plaintiff Carson Harbor were not necessary. Although genuine issues of material fact remained as to whether plaintiff's response costs were necessary, defendants Carson Harbor Village Mobile Home Park, Richard G. Braley, and Walker Smith, Jr. (collectively Partnership Defendants) were not potentially responsible parties (PRPs) as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). [[49]](#footnote-50)49 The Ninth Circuit upheld summary judgment for defendants on state claims, while reversing summary judgment for defendants with respect to plaintiff's claim for indemnity.

Carson Harbor Village (Carson Harbor) purchased a mobile home park from the Partnership Defendants. Prior to and during part of Partnership Defendants' ownership of the property, Unocal Corporation (Unocal) held a **[\*614]** leasehold in the property to extract, store, and refine petroleum products. While refinancing the property in 1993, Carson Harbor discovered on the property hazardous substances of a petroleum nature. Studies indicated that the material had existed on the property for several decades. Subsequently, contamination was found in surrounding soils and on-property wetlands. Carson Harbor notified the appropriate agencies, initiated and completed a cleanup, and then sued the Partnership Defendants, the Cities of Carson and Compton and unincorporated areas within Los Angeles County (Government Defendants), and Unocal for relief under CERCLA, the Resource Conservation and Recovery Act (RCRA), [[50]](#footnote-51)50 the Clean Water Act, [[51]](#footnote-52)51 and state common law claims. The district court rejected every claim brought by Carson Harbor. Carson Harbor appealed the CERCLA claim, the state-law claims against Government Defendants, and the indemnity claim against the Partnership Defendants.

The Ninth Circuit first addressed whether, under CERCLA, the costs incurred by Carson Harbor were "necessary" and therefore recoverable in a CERCLA action. The court found that the district court erred in focusing on whether Carson Harbor had an ulterior motive to remediate the property instead of whether the contamination posed a threat to human health or the environment. The Ninth Circuit deemed the latter question key to determining whether a cleanup is necessary. Because various testimony indicated that the contamination posed a potential threat, a genuine issue of material fact existed, and summary judgment for defendants was improper.

The court then turned to whether the Partnership Defendants were PRPs within the meaning of section 107(a) of CERCLA. [[52]](#footnote-53)52 Partnership Defendants would be PRPs if a disposal occurred on the property during the time they owned the property. In determining what qualifies as a disposal under CERCLA, the Ninth Circuit examined at length possible definitions using circuit court interpretations, plain meaning analysis, and the Act's legislative history.

The Ninth Circuit began by noting the continuum of definitions amongst the circuits. At one end of the continuum, the Sixth Circuit requires active disposal on the part of an actor. [[53]](#footnote-54)53 At the other end, the Fourth Circuit found that passive migration of contaminants from an underground storage tank (UST) without any other explicit action also qualified as disposal. [[54]](#footnote-55)54 The Ninth Circuit rejected any definition that rested on a passive/active distinction.

The court noted that unlike situations involving underground storage tanks (USTs), no release occurred in the case at bar. Nor was the gradual contamination of the property akin to a disposal. The Ninth Circuit thus determined that the passive migration that occurred during the Partnership **[\*615]** Defendants' ownership of the property was not a disposal within the meaning of CERCLA. However, after adopting this construction, the court sounded a note of caution. While the passive soil migration that occurred during the Partnership Defendants' ownership was not a disposal, other forms of passive migration, even those occurring without the benefit of human intervention, might still be classified as disposals under CERCLA.

The Ninth Circuit found support for its holding and its determination that other kinds of passive migration might constitute a disposal under CERCLA. For example, the court noted that one purpose of CERCLA is to encourage prompt and effective cleanup of abandoned storage tanks. In so finding, the court did not limit suits against owners of USTs that release pollutants into surrounding soil. However, by limiting liability for passive migration, the Ninth Circuit avoided absurd results, such as holding subsequent landowners equally as culpable as landowners who cause an initial spill. Also, allowing unchecked liability for passive soil migration would moot the innocent landowner defense. Legislative history also supported the Ninth Circuit's determinations that active roles were usually required to constitute a disposal, but that passive migration in the context of USTs also could amount to a disposal.

The Ninth Circuit then held that a nuisance cause of action cannot be premised on statutory authority affirmed the district court's grant of summary judgment to the Government Defendants. Finally, because a genuine issue of material fact existed as to whether the plaintiff's cleanup costs were necessary under CERCLA, the court reversed the grant of summary judgment for the Partnership Defendants on the indemnity claim.

Judge Fletcher concurred in part and dissented in part. While agreeing that the plaintiff's cleanup costs were necessary, Fletcher concluded that the majority erred in its characterization of what constitutes a disposal under CERCLA. Disposal, according to Fletcher, is defined foremost by its contemporary, common meaning. As the water passing through the wetlands carried the hazardous waste to the surrounding lands, the waste was deposited on those lands. Because, under CERCLA, a disposal includes a deposit, [[55]](#footnote-56)55 this process, which occurred during the Partnership Defendant's ownership of the property, was one of disposal.

According to the dissent, holding the Partnership Defendants liable as PRPs would help accomplish two of CERCLA's purposes: ensuring the prompt and effective cleanup of waste disposal sites and assuring that those responsible for the contamination bear the costs of remediation. The majority's decision, argued Fletcher, instead will encourage landowners who discover contamination on their property to sell their property and thus evade any liability. This, Fletcher stated, does not promote prompt and effective cleanup of contamination. Furthermore, in the case at bar, Unocal continued to operate its petroleum plant on the property while the Partnership Defendants were owners. Fletcher stated that the absurdity of the majority's holding is manifest in the result of the case: The Partnership Defendants, who had reason to know of the disposal, were not held **[\*616]** responsible for cleanup costs, while the plaintiff, who had no reason to suspect contamination, was left to pay for part of the cleanup. Finally, Fletcher noted that CERCLA is not a fault-based scheme of liability; liability is strict and is based on property ownership at the time the disposal occurs. According to Fletcher, because passive soil migration is a form of disposal, summary judgment to the Partnership Defendants should be reversed.

3. United States v. Shell ***Oil*** Co., No. 00-55077, 2002 WL 1396519 (9th Cir. June 28, 2002).

The plaintiffs appealed and the defendants cross-appealed the district court's decision regarding Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [[56]](#footnote-57)56 liability for the cleanup of the McColl Superfund Site in Fullerton, California. The Ninth Circuit upheld the district court's finding that the United States waived its sovereign immunity under 42 U.S.C. 9620(a)(1). However, the Ninth Circuit reversed the district court's finding of liability against the United States, holding that the United States was not an "arranger" of non-benzol hazardous wastes under 42 U.S.C. 9607(a)(3). [[57]](#footnote-58)57 Because of this holding, the United States's appeal of the allocation of liability between it and the defendants for the non-benzol waste was moot. The Ninth Circuit affirmed the district court's allocation of one hundred percent of the clean up costs to the United States for benzol waste. Finally, the Ninth Circuit upheld the district court's rejection of defendants' claim that they were exempt from liability because they qualified for the "act of war" defense. [[58]](#footnote-59)58

The ***oil*** company defendants (***Oil*** Companies) operated high-octane gasoline fuel refineries during World War II. The United States was the primary consumer of this fuel, also know as "avgas," which it needed to operate its airplanes during the war. Because of its dependence on avgas, the United States exercised control over avgas production. Government agencies, including the War Production Board (WPB) and the Petroleum Administration of War (PAW), could seize ***oil*** companies or order the production of gas. [[59]](#footnote-60)59 However, the government primarily procured avgas through contractual agreements. Although the government encouraged production maximization through programs to assist avgas producers financially and to encourage exchange of avgas components between producers, the ***Oil*** Companies owned and managed the facilities themselves. They also sought contracts independently and profited from these contracts.

The major increase in avgas production during World War II led to a significant increase in hazardous waste byproducts, including spent alkylation acid and acid sludge. The government was aware of the acid **[\*617]** waste increase, and it made some efforts to deal with the problem by, for example, facilitating a storage tank lease. However, it also declined to provide the resources to build new acid reprocessing facilities, despite the fact that existing facilities were inadequate to deal with the increased production. Faced with a choice between stopping production and dumping, the ***Oil*** Companies chose to dump large amounts of acid waste at the McColl Superfund Site. There was no evidence that the government was aware of any dumping contracts the ***Oil*** Companies had with the site, nor did the government order or approve this dumping. Prior to its cleanup, the site contained approximately 100,000 cubic yards of hazardous wastes.

The government eventually cleaned up the site, and after the cleanup was complete, the United States and the State of California brought suit to recover the approximately $ 100,000,000 cleanup cost. The ***Oil*** Companies filed a counter-claim alleging that the United States was responsible for the costs. In response to a motion for summary judgment, the district court rejected the ***Oil*** Companies' claim that the "act of war" defense applied to the companies and found that the companies were liable as arrangers. [[60]](#footnote-61)60 However, after trial the court allocated one hundred percent of the cleanup costs to the United States, [[61]](#footnote-62)61 having determined in summary judgment that the United States had waived its sovereign immunity and that the United States was liable as an arranger of non-benzol wastes under CERCLA. [[62]](#footnote-63)62 The United States had conceded that it was an arranger of the benzol wastes at the site. [[63]](#footnote-64)63 The United States appealed, and the ***Oil*** Companies cross-appealed.

The Ninth Circuit first addressed the United States's claim that it had not waived sovereign immunity for liability under CERCLA. The United States acknowledged that section 120(a)(1) of CERCLA waived sovereign immunity for some CERCLA claims. [[64]](#footnote-65)64 The United States, however, argued that the waiver was limited to claims involving federally owned facilities engaged in nongovernmental activities. The Ninth Circuit rejected this narrow interpretation of the waiver. To be subject to suit, the government must unambiguously waive sovereign immunity. The Ninth Circuit indicated that section 120(a)(1) provides a clear waiver of immunity that the Supreme Court has acknowledged. [[65]](#footnote-66)65 The Ninth Circuit rejected the government's claim that because the heading for section 9620 is "Federal facilities" the waiver must apply only to these facilities. The court explained that the section's text is not so limiting and that the heading was added to CERCLA **[\*618]** after the waiver language had already been codified. [[66]](#footnote-67)66 The court also indicated that the United States has been held liable in the past for activities other than nongovernmental activities, such as military installation cleanups. The court held that the waiver under section 9620 extends to any liability that could be found under 42 U.S.C. 9607.

The court next addressed the United States's argument that under CERCLA, it was not an "arranger" of non-benzol waste. Persons liable under CERCLA include "any person who … arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances." [[67]](#footnote-68)67 Accordingly, arrangers are included in the list of persons liable. Although the ***Oil*** Companies had argued that the United States was liable under a broad theory of arranger liability rather than as a traditional direct arranger, the district court found that the United States could be liable as a direct arranger. [[68]](#footnote-69)68 The district court described a direct arranger as one engaged in a transaction where "the sole purpose of the transaction is to arrange for the treatment or disposal of the hazardous wastes." [[69]](#footnote-70)69 In so finding, the lower court relied on a letter from PAW concerning a proposed acid reprocessing plant. PAW declined to get involved with acid waste disposal but indicated that the problem was being left to WPB. The court also relied on the government's attempts to facilitate a storage tank lease, although the government was not itself the lessee. On appeal, the Ninth Circuit indicated "[a] direct arranger must have direct involvement in arrangements for the disposal of waste" [[70]](#footnote-71)70 and held that these facts were not sufficient for a finding of direct arranger liability against the United States.

The Ninth Circuit also rejected the ***Oil*** Companies' claim that the United States was liable for the non-benzol wastes under a broader theory of arranger liability. The ***Oil*** Companies argued that because the United States had sufficient control over the avgas production process, the United States should be liable as an arranger of the non-benzol hazardous waste that resulted from the production. The Ninth Circuit declined to find any bright line test for this broader theory and instead compared the facts of the case with four other cases concerning arranger liability.

The court first distinguished United States v. Aceto Agricultural Chemicals Corp. (Aceto). [[71]](#footnote-72)71 In that case, pesticide manufacturers were found liable as arrangers when the manufacturers sent the ingredients to another corporation's plant to produce the pesticides, and the other plant generated **[\*619]** hazardous waste. [[72]](#footnote-73)72 The Ninth Circuit distinguished the instant case from Aceto because in Aceto the manufacturers owned the ingredients and the pesticides at all times whereas the United States never owned the raw materials for the avgas and only purchased the avgas after its production was complete. In addition, unlike the manufacturers in Aceto, the United States did not attempt to avoid responsibility for its waste by contracting out the portion of the manufacturing process in which the waste was generated.

The court next distinguished United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO). [[73]](#footnote-74)73 In that case, the president and vice-president of a company were found liable as arrangers when the vice-president permitted the burial of chemical waste from the plant. [[74]](#footnote-75)74 The Ninth Circuit rejected the ***Oil*** Companies' claim that NEPACCO stood for the proposition that mere authority to control, rather than ownership or actual control, is sufficient to find arranger liability. The court explained that in NEPACCO, the vice-president exercised actual control and the president was his superior in the corporation, but that the United States in the present case "neither exercised control, nor had the direct ability to control" the waste, and "there was never a United States employee in a position comparable to [the vice-president's in NEPACCO]." [[75]](#footnote-76)75

The court found that the case before it was more comparable to FMC Corp. v. United States Department of Commerce [[76]](#footnote-77)76 and United States v. Vertac Chemical Corp. [[77]](#footnote-78)77 According to the court, in FMC, the United States had exercised significantly more control over rayon production during World War II than it did over avgas production in this case. In FMC, the government's role included installing government-owned equipment and building its own plant to supply sulfuric acid for the process. [[78]](#footnote-79)78 Nevertheless, the FMC court split evenly as to whether the United States was an arranger. Because the Third Circuit in FMC found that on the facts before it arranger liability was a close question, the Ninth Circuit found that the facts in the present case were not enough to call the issue of arranger liability a close question.

The Ninth Circuit found the facts in the case at hand most similar to those in Vertac Chemical. [[79]](#footnote-80)79 In Vertac Chemical, the Eighth Circuit found no arranger liability against the United States for its purchase of Agent Orange from a plant during the Vietnam War, even though the United States had required another company to supply the plant with raw materials and should have known that the production of Agent Orange would generate waste. [[80]](#footnote-81)80 After comparing the facts of the present case with Vertac Chemical, as well **[\*620]** as Aceto, [[81]](#footnote-82)81 NEPACCO, [[82]](#footnote-83)82 and FMC, [[83]](#footnote-84)83 the Ninth Circuit concluded that the United States was not an arranger of the non-benzol wastes. The court consequently held moot the United States's appeal regarding allocation of cleanup costs for the non-benzol wastes.

The court next addressed the United States's claim that the district court erred in allocating one hundred percent of the cleanup costs for the benzol wastes to the United States. Although the United States conceded that it was an arranger of the benzol waste, it did not concede that it should be allocated the entire costs of the benzol waste cleanup. [[84]](#footnote-85)84 Under CERCLA, a district court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." [[85]](#footnote-86)85 The Ninth Circuit explained that it could overturn the district court's allocation only for abuse of discretion or for clear error. The district court allocated one hundred percent of the benzol waste clean up costs to the United States for the same reasons that it allocated one hundred percent of the non-benzol waste clean up costs to the United States - because during the war the United States was willing to pay the costs of obtaining avgas, and the cleanup costs could be considered a part of the war effort. In addition, the United States did not provide needed transportation or resources to limit the dumping of hazardous wastes. The Ninth Circuit affirmed the district court's allocation of liability, finding the district court justified in relying upon the equitable factors it chose.

Finally, the court rejected the ***Oil*** Companies' claim of an "act of war" defense. Although section 107 of CERCLA provides such a defense, [[86]](#footnote-87)86 the court found that the defense was a narrow one. [[87]](#footnote-88)87 The court did not accept the ***Oil*** Companies' argument that the defense extended to the United States's involvement in wartime production of avgas. In addition, even if there had been an applicable "act of war," the ***Oil*** Companies failed to show that any such act was the sole cause, as the defense requires.

**[\*621]**

E. RCRA

1. United States v. Elias, 269 F.3d 1003 (9th Cir. 2001), petition for cert. filed, 70 U.S.L.W. (U.S. Apr. 4, 2002) (No. 01-1502).

The Ninth Circuit affirmed the defendant's conviction and 204-month sentence for violating the "knowing endangerment" provision of the Resource Conservation and Recovery Act (RCRA). [[88]](#footnote-89)88 The court emphasized that EPA does not yield its enforcement powers when it authorizes a state enforcement program under RCRA. The court vacated a large restitution award because restitution is not sanctioned for RCRA knowing endangerment violations under federal sentencing guidelines. [[89]](#footnote-90)89

Elias owned a fertilizer company in Idaho and held a patent on a cyanide leaching process. He ordered four employees to clean cyanide-laced sludge out of a holding tank without providing safety equipment. The employees experienced adverse health effects during their first attempt. Despite the apparent hazard, Elias refused the employees' requests for safety equipment. During the second attempt, one employee collapsed and was in danger of dying when medical help arrived. Elias subsequently lied to paramedics and authorities about the possibility of the tank containing cyanide and ordered a new employee to move and bury the sludge without taking safety precautions.

Elias was tried and convicted on four counts. The knowing endangerment offense was the most serious, carrying penalties of up to $ 250,000 and/or fifteen years in prison. [[90]](#footnote-91)90 On appeal, Elias contended that the United States ceded enforcement authority to Idaho when EPA authorized Idaho's hazardous waste program under RCRA, and therefore three of the four counts of his indictment should be dismissed because they alleged federal, rather than state, offenses.

Elias cited Harmon Industries, Inc. v. Browner (Harmon) [[91]](#footnote-92)91 for the proposition that federal law was supplanted. In Harmon, the Eighth Circuit held that a consent decree between a state and a violator bound EPA because RCRA provides that actions taken by a state under an EPA-authorized program have the "same force and effect" [[92]](#footnote-93)92 as action taken by EPA. [[93]](#footnote-94)93 The Ninth Circuit distinguished Harmon, reading it to control only when, not whether, EPA can bring a civil action in federal court. Although RCRA provides that states will be the primary enforcers of RCRA, EPA loses none of its enforcement powers by authorizing a state program and is free to act when the state has not.

Instead, the court found another Ninth Circuit decision, Wyckoff Co. v. EPA, [[94]](#footnote-95)94 to be controlling. In Wyckoff, defendants sought to enjoin an EPA **[\*622]** civil enforcement action, arguing that RCRA authorizes state programs to be carried out "in lieu of" the federal program and that therefore Congress meant to revoke EPA's enforcement power in states with authorized programs. [[95]](#footnote-96)95 As in Wyckoff, the court in Elias found no such congressional intent in RCRA. Therefore, EPA's interpretation that the agency retains enforcement authority was reasonable and entitled to deference.

Finally, Elias argued that the single sample of cyanide sludge EPA used to incriminate him did not accurately reflect the level of the tank's contamination; that EPA's regulation regarding acceptable levels of cyanide was unconstitutionally vague; and that the jury instruction regarding intention was contradictory, and thus a new trial was warranted. The court found that EPA's sample of the sludge taken outside the tank reflected the characteristics of the tank waste that led to the employee's collapse, making further sampling irrelevant. Further, the court found that the EPA regulation classifying cyanide as a reactive waste was not vague because Elias had the specialized knowledge required to understand it. [[96]](#footnote-97)96 Regarding the jury instruction, the court found no error because the potential for confusion in the definition of "intention" was such that it "would only afflict law students or lawyers." [[97]](#footnote-98)97

F. National Environmental Policy Act

1. Hall v. Norton, 266 F.3d 969 (9th Cir. 2001), infra Part V.B.

2. Edwardsen v. United States Department of the Interior, 268 F.3d 781 (9th Cir. 2001).

Six Inupiat Eskimos and Greenpeace, Inc. sought review of the Secretary of the Interior's decision to permit ***oil*** production by BP Exploration Alaska, Inc. (BPXA) in the Beaufort Sea off the Alaska coast. The petitioners challenged the adequacy of a final environmental impact statement (EIS) as required by the National Environmental Policy Act (NEPA) [[98]](#footnote-99)98 and compliance with the spill response plan requirements of the ***Oil*** Pollution Act of 1990 (OPA). [[99]](#footnote-100)99 While the Ninth Circuit had jurisdiction to hear the NEPA claims, the court lacked jurisdiction to review the OPA claim. [[100]](#footnote-101)100

The Beaufort Sea's waters and shores provide habitat for caribou and **[\*623]** the endangered bowhead whale on which the Inupiat Eskimo have subsisted for more than four thousand years. In 1979, Alaska and the United States sold leases to the Northstar ***oil*** field, a reserve extending from two to eight miles off the northern coast of Alaska in the Beaufort Sea and containing 158 million barrels of ***oil***. BPXA acquired lease rights from the previous lessees in 1995. BPXA then applied for approval of a fifteen-year plan to: 1) produce ***oil***, proposing to reconstruct and expand an artificial gravel island, Seal Island, on state submerged lands in the Northstar reserve; 2) drill ***oil*** and gas production wells, gas injection wells, and waste disposal wells from Seal Island into federal portions of the Northstar reserve; 3) transport ***oil*** from Seal Island to the shore using a buried six-mile pipeline; 4) transport gas to the shore using a second pipeline buried in the same trench as the ***oil*** pipeline; 5) transport ***oil*** overland to the Trans-Alaska pipeline in an above-ground eleven-mile pipeline; 6) transport ***oil*** in the Trans-Alaska pipeline to Valdez, Alaska; and 7) transport ***oil*** in tankers from Valdez to ports in the western United States and abroad.

BPXA applied for permits from the United States Army Corps of Engineers (Corps) as required by section 404 of the Clean Water Act (CWA) [[101]](#footnote-102)101 and section 10 of the Rivers and Harbors Appropriations Act of 1899. [[102]](#footnote-103)102 BPXA also applied to the Department of Interior's Minerals Management Service (MMS) for approval of the Development and Production Plan (DPP) as required by the Outer Continental Shelf Lands Act (OCSLA). [[103]](#footnote-104)103 Because issuing the permit constituted a "major Federal action[]," under NEPA [[104]](#footnote-105)104 in 1995 the Corps required preparation of an EIS. In 1996 MMS and the Environmental Protection Agency (EPA) concurred that an EIS was necessary. Acting as the lead agency, the Corps prepared a single EIS in conjunction with MMS, EPA, United States Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS). In July 1999, MMS relied on the EIS in approving the BPXA DDP, and in October 1999 the petitioners sought review in the Ninth Circuit of MMS's decision to approve the DDP.

The petitioners alleged two EIS deficiencies with respect to the DDP: 1) the EIS failed to address adequately direct and indirect effects; and 2) the EIS failed to address adequately cumulative impacts. First, the petitioners argued that the EIS inadequately addressed direct and indirect effects of the DDP because DDP itself did not include a "site-specific ***oil*** spill trajectory analysis." [[105]](#footnote-106)105 The court responded that the OCSLA regulations promulgated by MMS do not require a lessee to conduct such a site-specific analysis when analyzing environmental impacts. However, MMS regulations do require that the "worst case" estimate of environmental impacts in the event of an ***oil*** spill involve "an appropriate trajectory analysis specific to the area in **[\*624]** which the facility is located." [[106]](#footnote-107)106 The petitioners also faulted the worst-case analysis for its reliance on data generated during a previous MMS ***oil*** spill-risk analysis conducted for a federal sale in an area overlapping the Northstar reserve. The court rejected this argument, holding that MMS "made a reasoned judgment that the data was relevant." [[107]](#footnote-108)107 Although FWS also objected to the EIS omission of a site-specific analysis, the Ninth Circuit held that MMS took the requisite "hard look" with respect to direct and indirect effects of Northstar. [[108]](#footnote-109)108

The petitioners next alleged that the EIS inadequately analyzed cumulative impacts of the DDP because MMS did not follow the methodology outlined in the Council of Environmental Quality's guidance handbook. [[109]](#footnote-110)109 The court rejected the petitioners' reliance on the handbook, calling the handbook not legally binding. The court then considered five areas where the petitioners alleged deficient cumulative impacts analysis: freshwater, gravel, air quality, vegetation, and subsistence.

First, the petitioners alleged that the EIS failed to consider the cumulative impacts on freshwater resulting from drawdowns of millions of gallons to build the icy roads. Although the petitioners properly noted that the EIS "overlooked" the 5.9 to 7.8 million gallons of water required to connect Seal Island to the coast, the court was "not persuaded...that such omission [was] material." [[110]](#footnote-111)110 Correcting the amount of water withdrawn brought the total to 18.9 to 22.8 million gallons, which was still less than the 100 million-gallon limit imposed by Alaska for withdrawals from the Kuparuk Deadarm mine site, the probable source of freshwater for the BPXA icy roads. The petitioners further alleged that the cumulative impacts analysis failed to consider the combined effects of other drawdowns in conjunction with the proposed BPXA drawdowns. Although the court agreed that the EIS "could have explained existing drawdowns," the court found no evidence to suggest that such other drawdowns existed. [[111]](#footnote-112)111 Accordingly, the Ninth Circuit refused to hold that the omission rendered the EIS inadequate. Finally, the petitioners alleged that the EIS inadequately analyzed the effects of the drawdowns on birds and vegetation. Because the EIS stated that impacts on water quality were negligible, the court concluded that the absence of further discussion was reasonable.

Second, the petitioners alleged that the EIS failed to consider the cumulative impacts of past and ongoing gravel extraction in conjunction with the proposed extraction to construct Seal Island. Because the EIS compared the impacts of gravel extraction from several alternative sites and concluded that extraction from existing sites could disrupt whale migration and fish and bird habitat, the court held that the EIS adequately addressed **[\*625]** the environmental impacts of gravel extraction.

Third, the petitioners claimed that the EIS was inadequate with respect to cumulative effects on air quality because the EIS failed to analyze the effects of future industrial development on Arctic haze. The court rejected this claim, holding that the EIS could conclude that European pollution caused Arctic haze and thus failure to analyze impacts of the BPXA project on Arctic haze was "reasonable." [[112]](#footnote-113)112 The petitioners also alleged that the EIS improperly concluded that impacts on air quality would be insignificant because pollutant concentrations would remain below National Ambient Air Quality Standards (NAAQS). [[113]](#footnote-114)113 However, because the area already met NAAQS, the petitioners argued that the EIS should analyze degradation of air quality. The court rejected this claim as well, stating that once BPXA commenced construction and drilling, those activities would trigger review under the Clean Air Act (CAA) [[114]](#footnote-115)114 provisions governing the prevention of significant deterioration in NAAQS attainment areas. [[115]](#footnote-116)115 The petitioners also challenged the EIS because it failed to discuss new PM2.5 or ozone standards. Noting that the new standards had not taken effect, the court determined that the EIS's air-quality analysis was reasonable.

Fourth, the petitioners alleged that the EIS failed to analyze the cumulative effects on birds and caribou of past wetland destruction in conjunction with the effects of proposed wetland destruction. The court compared the proposed two-acre tundra "consumption" with past tundra losses of fourteen square miles to determine that the EIS could reasonably conclude that cumulative tundra loss ""would be small.'" [[116]](#footnote-117)116

Fifth, the petitioners claimed that the EIS failed to address adequately the impacts of the BPXA proposal on Inupiat subsistence hunting. Because the EIS examined impacts on bowhead whales and caribou, the court held that the EIS's reliance on elevating the pipeline to mitigate significant effects on caribou harvests was reasonable. Turning to the OPA claims, the Ninth Circuit determined that it lacked jurisdiction to review the claims because OPA provisions confer jurisdiction to review spill response plans on the district court.

3. Churchill County v. Norton, 276 F.3d 1060 (9th Cir. 2001), amended by 282 F.3d 1055 (9th Cir. 2002), petition for cert. filed (June 6, 2002) (No. 01-1800).

The Fish and Wildlife Service (FWS) issued a final environmental impact statement (FEIS) concerning its implementation of section 206(a) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Settlement **[\*626]** Act). [[117]](#footnote-118)117 As mandated under section 206(a) of the Settlement Act, FWS developed a plan to acquire water and water rights to protect approximately 25,000 wetland acres in the Lahontan Valley in Nevada. After FWS published the FEIS for the plan, Churchill County and the City of Fallon, Nevada sued Norton and others claiming FWS had violated the National Environmental Policy Act (NEPA). [[118]](#footnote-119)118 The plaintiffs challenged FWS's decision not to prepare a comprehensive environmental impact statement (EIS) that would have analyzed the cumulative impacts of the Settlement Act's interrelated provisions concerning water allocation. The plaintiffs also claimed that the analysis in the FEIS was inadequate. The Ninth Circuit upheld the district court's decision to grant the defendants' motions for summary judgment.

Congress passed the Settlement Act to resolve disputes concerning water rights in the Truckee and Carson Rivers. [[119]](#footnote-120)119 The Act's purposes include consideration of state interests, fish and wildlife needs, municipal uses, and the Pyramid Lake Pauite Tribe's interests. [[120]](#footnote-121)120 Among those impacted by allocation decisions for these rivers are the residents of Churchill County - particularly those in the City of Fallon, who rely on the rivers for agricultural irrigation water. Irrigation water also recharges the wells used by the city for its municipal water system.

Various provisions of the Settlement Act address issues of water allocation and harms resulting from overuse. For example, section 205 requires the Secretary of the Interior to establish an agreement with California and Nevada for managing the Truckee River basin's reservoirs. [[121]](#footnote-122)121 Section 209 requires revision of the Newlands Reclamation Project, a Bureau of Reclamation project to irrigate a large portion of the land in the Fallon area. [[122]](#footnote-123)122 Section 206(a) in particular attempts to remedy the harm caused to the Lahontan Valley Wetlands by water overusage. The diversion of water from the Carson River for agricultural use has limited the inflow available to these wetlands, causing many of them to dry up. Under section 206(a), the Secretary of Interior must acquire water and water rights adequate to maintain about 25,000 acres of wetlands. [[123]](#footnote-124)123 To meet this requirement, FWS chose from five alternative plans detailed in its draft environmental impact statement. Under the selected plan, FWS would purchase up to 55,000 acre-feet of water rights from willing sellers. Other methods of acquiring water included using treated sewage water and conserved Navy water if available. The chosen alternative was intended to limit the impacts upon agricultural water needs.

The City of Fallon was concerned that the Settlement Act could limit the water supply to the city. Plaintiffs argued that FWS's actions violated **[\*627]** NEPA for two reasons: 1) FWS should have prepared a programmatic EIS concerning all provisions of the Settlement Act that related to water allocation and usage for the Newlands Project; and 2) the FEIS was inadequate because it failed to address effectively cumulative impacts, it failed to address sufficiently groundwater impacts because it relied on incomplete studies, and it severed the wetland conservation from the analysis.

In response to the first claim, the Ninth Circuit held that FWS's decision not to prepare a programmatic EIS was not arbitrary and capricious. The district court had decided that sections 205, 206, 207, 209, and 210(b)(16) of the Settlement Act were not closely related or connected actions, and FWS was not required to analyze the sections' impacts in a comprehensive EIS. Federal regulations require that very closely related actions be analyzed in a single EIS. [[124]](#footnote-125)124 Regulations also require a programmatic EIS for programs that include "systematic and connected agency decisions allocating agency resources to implement a specific statutory program." [[125]](#footnote-126)125 Nevertheless, the court indicated that according to Kleppe v. Sierra Club, [[126]](#footnote-127)126 a programmatic EIS is not required where an actual proposal for broad action had not been made. [[127]](#footnote-128)127 However, where several proposals are before an agency, the agency must consider their impacts together if the impacts will cumulatively impact a region. Federal regulations also require consideration of cumulative actions in one EIS. [[128]](#footnote-129)128 The Ninth Circuit discussed three additional cases [[129]](#footnote-130)129 in which the law concerning programmatic EISs since Kleppe has developed.

In this case, the plaintiffs argued that the interrelated provisions of the Settlement Act were a regional plan for water use of the Truckee and Carson rivers. The court agreed that these provisions all concerned water allocation and that different sections will claim Newland Project water, potentially creating cumulative impacts. In addition, the court indicated that several agency actions concerning these provisions were "proposals" as defined by NEPA. [[130]](#footnote-131)130 The Ninth Circuit concluded that it would have been reasonable for the agencies to have analyzed the interrelated Settlement Act provisions in a comprehensive EIS. Nevertheless, the court found that the decision to prepare a comprehensive EIS belonged to the FWS and that the FWS's decision was not arbitrary because the agency had not broken implementation of the Settlement Act into separate actions to minimize the significance of cumulative impacts.

In response to the plaintiffs' second claim concerning the adequacy of the FEIS, the Ninth Circuit held that FWS sufficiently analyzed the impacts of the plan to acquire water rights. The court rejected the plaintiffs' claim **[\*628]** that FWS did not assess the cumulative impacts of other foreseeable Settlement Act implementation actions in the FEIS. The court explained that FWS was required to analyze specifically the cumulative impacts of past, present, and future actions so that it could decide if and how to reduce such impacts. The Ninth Circuit found the FEIS's analysis legally sufficient, noting that the FEIS discussed the effects of relevant Settlement Act provisions upon a variety of environmental resources.

The court also rejected the plaintiffs' claim that the FEIS was inadequate because of an insufficient analysis of groundwater impacts. Although FWS indicated that additional studies of groundwater resources were necessary, the court concluded that the current studies upon which FWS relied, including a study of recharge areas and a groundwater conceptual model, were sufficient for the FEIS analysis. Finally, the court indicated that the plaintiffs failed to demonstrate that FWS's decision to exclude the wetlands conservation plan in the FEIS was arbitrary and capricious.

In a concurring opinion, Judge Sneed explained that while a comprehensive EIS was not required, an EIS was necessary to find a comprehensive resolution of the water allocation issues involved.

4. ***Kern*** v. United States Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002).

The plaintiffs appealed the district court's grant of summary judgment to defendant United States Bureau of Land Management (BLM). The plaintiffs had challenged the adequacy of an environmental impact statement (EIS) and an environmental assessment (EA) for the Coos Bay Resource Management Plan (RMP) and the Sandy-Remote Analysis Area respectively, both of which were within the Coos Bay District. The district court found that the EIS claim was not ripe and it rejected the EA challenge, granting summary judgment to defendants on both claims. On appeal, the Ninth Circuit held the EIS claim ripe and both the EIS and EA inadequate under the National Environmental Policy Act (NEPA). [[131]](#footnote-132)131 The court thus reversed the district court and directed summary judgment be entered for the plaintiffs.

When timber sales were slated to for Coos Bay RMP and the Sandy-Remote Analysis Area, the plaintiffs challenged the sufficiency under NEPA of the EIS and the EA for the respective sales. Germane to the plaintiffs' challenge was whether BLM had sufficiently considered possible spreading of the root fungus Phytophthora lateralis to the area's Port Orford Cedars. The fungus was susceptible to spreading due to logging activities, and cedars infected by the fungus usually die. The defendants first argued that the plaintiffs' challenge was premature under Ohio Forestry Ass'n v. Sierra Club (Ohio Forestry). [[132]](#footnote-133)132

The Ninth Circuit distinguished the immediate case from Ohio Forestry. **[\*629]** Whereas the plaintiffs in Ohio Forestry alleged that the relevant RMP violated the National Forest Management Act (NFMA), [[133]](#footnote-134)133 (the statute requiring the RMP), the plaintiffs in the instant case claimed that the EIS violated NEPA. NEPA confers procedural rights, and because the plaintiffs alleged a procedural injury, the instant claim possessed the imminency that Ohio Forestry lacked and therefore was ripe.

The defendants then argued that under NEPA, they were not required to include as part of the EIS a detailed environmental analysis of the fungus and the cedar until resources were committed to the sale. The Ninth Circuit disagreed, noting that one function of the EIS is to evaluate environmental consequences of contemplated plans. The plaintiffs claimed that the EIS was inadequate because it merely "tiered" [[134]](#footnote-135)134 to the Port Orford Cedar Management Guidelines ("Guidelines"), a document never subjected to NEPA review. While tiering is generally permitted, tiering to a document not subjected to NEPA review is not permitted. Without the Guidelines, the EIS was left with a two-sentence discussion of the fungus's potential impact on the cedars, which the Ninth Circuit deemed inadequate.

Next, the plaintiffs challenged the adequacy of the Sandy-Remote EA. Of the three claims raised by the plaintiffs, the Ninth Circuit agreed with two. The court held that the EA improperly tiered to the Guidelines and also failed to address the cumulative impact of the timber sale and "other "reasonably foreseeable future actions' on the Cedar." [[135]](#footnote-136)135 Specifically, but not exclusively, the Ninth Circuit found that BLM should have considered all reasonably foreseeable timber sales under the RMP for the district. In addition to the cumulative impact analysis required for the RMP for the Coos Bay District, the Ninth Circuit required BLM to conduct a cumulative impact analysis in all EAs for the site-specific project in the Coos Bay District. Because the Sandy-Remote EA did not consider cumulative impacts from all reasonably foreseeable actions and because the Coos Bay EIS was inadequate under NEPA, the Ninth Circuit reversed the district court decisions and remanded with instructions that summary judgment be entered for the plaintiffs on both issues. The dissent considered the cumulative impacts analysis in the EA for the Sandy-Remote Area permissibly limited to the area itself and concluded that the EA was not, therefore, an arbitrary and capricious limitation on the scope of the analysis.

G. Waste Management

1. AGG Enterprises v. Washington County, 281 F.3d 1324 (9th Cir. 2002), petition for cert. filed, (U.S. June 6, 2002) (No. 01-1805).

**[\*630]** The district court granted AGG Enterprises (AGG) a permanent injunction against the city of Beaverton (Beaverton), Oregon and Washington County, Oregon (defendants) enjoining the defendants "from enforcing their trash-hauling regulations against plaintiff … AGG." [[136]](#footnote-137)136 The district court found that 14501(c) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) [[137]](#footnote-138)137 preempted local regulation of "motor carriers" [[138]](#footnote-139)138 hauling mixed solid waste. The defendants appealed, and the Ninth Circuit reversed, vacated the injunction, and remanded.

AGG collected construction refuse, including loads of mixed solid waste (MSW), which contained garbage and recyclable waste. The MSW that AGG collected consisted of between fifty and ninety percent recyclable materials. The remaining portion was trash. AGG brought its loads of MSW to a material recovery facility that sorted the MSW, recycled the recyclable materials, and disposed of the trash. AGG operated in Beaverton, a city that regulates trash collection by using exclusive franchises. To haul trash in Beaverton or in Washington County, a hauler must have a license or certificate from these defendants. Because AGG did not have a license, Beaverton issued AGG a citation. After Beaverton indicated that it would not take action on AGG's application for a garbage-hauling license, AGG brought suit against the defendants seeking a permanent injunction. The district court granted the injunction, holding that the defendants could not enforce their trash-hauling regulations against AGG because the MSW that AGG hauled was property. Therefore, because the FAAAA limited local regulation of motor carriers hauling property, the FAAAA preempted the defendants' regulation of AGG.

On appeal, the defendants argued that Congress did not intend to preempt local regulation of MSW collection when it passed the FAAAA. The Ninth Circuit agreed. According to the court, federal preemption of local law "may be either express or implied." [[139]](#footnote-140)139 Congress's intent to preempt can be explicitly expressed in the statute's language or implied through the statute's structure and purpose. [[140]](#footnote-141)140 The court indicated, however, that a presumption exists against federal preemption, [[141]](#footnote-142)141 particularly in areas that are traditionally locally regulated, including areas usually controlled by local police power. [[142]](#footnote-143)142 The court explained that garbage collection typically has been regulated locally, and that the court previously indicated that local regulation was important to protect health and safety in local **[\*631]** communities. [[143]](#footnote-144)143 The court stated that to find that the FAAAA preempted local regulation of MSW collection, it must find a "clear and manifest" congressional intent to preempt. [[144]](#footnote-145)144

To determine whether Congress intended to preempt local regulation of hauling MSW, the court examined the text of the FAAAA as well as the Act's structure and purpose. According to section 14501(c) of the FAAAA, a "political subdivision of a State … may not … enforce a … regulation … related to a price, route, or service of any motor carrier … with respect to the transportation of property." [[145]](#footnote-146)145 The court pointed out that Congress did not define the word "property" in the statute. Therefore, the court examined the legislative history of the FAAAA to determine whether Congress intended the FAAAA to preempt local regulation of MSW. The court explained that the legislative history indicated that garbage collectors would not be covered by section 14501(c). [[146]](#footnote-147)146 According to the legislative history, at the time the FAAAA was passed, the Department of Transportation believed that, according to Interstate Commerce Commission (ICC) case law, garbage was not property. [[147]](#footnote-148)147 Congress believed that section 14501(c) would not cover garbage haulers. [[148]](#footnote-149)148 According to the Ninth Circuit, however, ICC case law was "equivocal as to whether [garbage] could be "property'" [[149]](#footnote-150)149 Nevertheless, the court explained that in determining Congress's intent, it was only important whether Congress believed that the FAAAA would preempt local regulation of garbage at the time it was passed, not whether ICC case law actually found that garbage could be property.

AGG argued that MSW was property under ICC case law and therefore, according to section 14501(c), could not be locally regulated, regardless of Congress's intent at the time of passing the FAAAA. The court rejected this argument, finding that even if portions of the MSW were recyclable and thus might be property, at least ten to twenty percent of the MSW was garbage. Therefore AGG hauled thousands of tons of garbage. The Ninth Circuit did not find a "clear and manifest" intent of Congress to preempt local regulation of garbage hauling, even if the garbage contained recyclables. [[150]](#footnote-151)150 As AGG's MSW contained a large amount of trash, the court held that Congress did not intend to preempt local regulation of AGG's MSW collection.

The court pointed out that its decision was consistent with the California Court of Appeals' decision in Pleasant Hill Bayshore Disposal, Inc. **[\*632]** v. Chip-It Recycling, Inc. (Pleasant Hill). [[151]](#footnote-152)151 The Ninth Circuit agreed with the Pleasant Hill conclusion that there was "nothing in the language or legislative history of [section 601(c) of the FAAAA] giving the least credence to [the MSW hauler's] claim that Congress intended to make itself the sole authority in a field where local authority has been traditionally accepted as preeminent." [[152]](#footnote-153)152 The Ninth Circuit reversed the district court's decision, vacated its injunction, and remanded the case.

H. FIFRA

1. Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199 (9th Cir. 2002), infra Part.V.G.

II. Natural Resources

A. Endangered Species Act

1. Environmental Protection Information Center v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001).

At issue in this case was whether the Fish and Wildlife Service (FWS) retained sufficient discretionary control over an incidental take permit issued to Simpson Timber to require FWS to reinitiate consultation with itself when two additional species found on Simpson Timber's land were listed as threatened after the permit was issued. The Environmental Protection Information Center (EPIC) sued to enjoin logging on Simpson's 380,000 acres of timberland until FWS reinitiated and completed consultation regarding the potential effect of Simpson's incidental take permit for the northern spotted owl on the newly listed marbled murrelet and coho salmon. The district court dismissed EPIC's claim on Simpson's 12(b)(6) motion. The Ninth Circuit reviewed the matter de novo and affirmed the district court's dismissal.

Regulations implementing section 7 of the Endangered Species Act (ESA) [[153]](#footnote-154)153 require an agency to reinitiate consultation where "discretionary Federal involvement or control over the action has been retained or is authorized by law and ...if a new species is listed or critical habitat designated that may be affected by the identified action." [[154]](#footnote-155)154 In the present case the identified action was the thirty-year incidental take permit issued by FWS to Simpson Timber in 1992 allowing Simpson to take a limited number of northern spotted owls during logging operations.

The court concluded that determining whether FWS retained discretionary involvement or control over Simpson's incidental take permit **[\*633]** turned on whether the agency had retained the power to "implement measures that inure to the benefit of the protected species." [[155]](#footnote-156)155 The court found that nothing in the permit documents gave FWS authority to implement measures to benefit species other than the spotted owl.

The permit documents in question included FWS's biological opinion letter and the habitat conservation plan (HCP) and implementation agreement (IA) submitted by Simpson as conditions of the permit. EPIC argued that a passage in the HCP wherein Simpson promised to submit timber harvest plans (THPs) designed to ""ensure compatibility with the habitat requirements of other species … considered sensitive by state and federal regulatory agencies'" required Simpson to implement measures to benefit any species listed after the HCP was granted. [[156]](#footnote-157)156 The court rejected this argument because the passage applied only to species listed when the permit was issued. The court also rejected EPIC's argument that a regulation allowing FWS "to amend any permit for just cause" [[157]](#footnote-158)157 provided the federal discretion triggering FWS's duty to reinitiate consultation, stating that the discretion must have been retained by the permit language in the first place for this regulation to have effect.

Finally, the court pointed out that although the conditions of Simpson's incidental take permit did not require FWS to reinitiate consultation regarding the marbled murrelet or coho salmon, Simpson is not allowed under the ESA to take those species. Furthermore, under section 9 of the ESA, either FWS or EPIC could seek relief if the marbled murrelet or coho salmon were threatened with imminent harm by Simpson's logging activities. In such a circumstance FWS would have the authority to revoke Simpson's spotted owl permit because activities covered by the permit were being conducted in violation of the ESA.

The dissent argued that the majority impermissibly read a new requirement into the ESA regulation quoted above, a requirement unwarranted by statute, unsupported by the permit documents, and inconsistent with Ninth Circuit precedent. The dissent stated that the ESA regulation "does not require the parties to anticipate the specific purpose for which discretion may be exercised in order for there to be sufficient discretionary control that it can benefit a newly listed species." [[158]](#footnote-159)158

The dissent identified multiple sources of discretion authorizing FWS to reconsider Simpson's permit. Specifically, a regulatory phrase written into the permit "reserved the right to amend any permit for just cause at any time during its term." [[159]](#footnote-160)159 The implementation agreement stated that nothing in the permit limited the government's authority or responsibility to fulfill its **[\*634]** responsibilities under the ESA. [[160]](#footnote-161)160 The dissent concluded that "these sources of discretion, together with the promises made by Simpson in its HCP, provide sufficient remedial authority for FWS to implement measures that inure to the benefit of the marbled murrelet and coho salmon," [[161]](#footnote-162)161 thereby satisfying the condition of retained federal discretion that triggers FWS's duty to reinitiate consultation.

2. Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001).

The plaintiffs, environmental groups and individuals, (Defenders) appealed a district court decision upholding a decision of the Secretary of the Interior (the Secretary) to withdraw a proposed rule to list the flat-tailed horned lizard as a threatened species under the Endangered Species Act (ESA). [[162]](#footnote-163)162 The flat-tailed horned lizard, Phrynosoma mcallii, is a desert-dwelling species that inhabits areas of California, Arizona, and Mexico. In 1993 the Secretary published a proposed rule to protect the species under the ESA, about eleven years after the Secretary first identified it as a candidate for listing. Following a May 1997 district court order compelling the Secretary to decide the lizard's status, on July 15, 1997 the Secretary issued her decision not to designate the lizard as a threatened species. Defenders challenged the decision in district court. The district court granted summary judgment for the Secretary, holding that the Secretary reasonably relied on a conservation agreement signed by a group of federal and state agencies to decide that none of the statutory factors that would require the listing of the lizard were present. [[163]](#footnote-164)163 On appeal, the Ninth Circuit reversed the district court's ruling, holding that the Secretary's decision to withdraw the rule was arbitrary and capricious.

The ESA provides five factors upon which the Secretary should base her decision to designate a species as threatened. [[164]](#footnote-165)164 Defenders argued that up to four of these five factors were present. The Secretary countered that even if the species faced significant threats on private lands, public land would provide significant habitat for the species, and that measures undertaken on public land would protect the species adequately. In particular, the Secretary indicated that a recent conservation agreement, signed by a group of federal and state agencies, would reduce threats to the lizard. The conservation agreement created a management strategy for the lizard that included the designation of five "management areas" in which **[\*635]** specific actions, such as population monitoring, would be undertaken to protect the lizard.

In analyzing these arguments, the Ninth Circuit focused on the meaning of the statutory phrase "in danger of extinction throughout … a significant portion of its range." [[165]](#footnote-166)165 The ESA defines a species as endangered if it "is in danger of extinction throughout all or a significant portion of its range." [[166]](#footnote-167)166 A threatened species is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." [[167]](#footnote-168)167 The Secretary's final decision withdrawing the proposed rule did not consider whether the lizard was extinct, endangered, or likely to become endangered in "a significant portion of its range." [[168]](#footnote-169)168 Instead, based upon her interpretation of the phrase "extinction throughout … a significant portion of its range," [[169]](#footnote-170)169 the Secretary argued on appeal, that a species is threatened only if the entire species is threatened, either because the species is currently threatened over all of its range or because the portions of its range in which the species is extinct, endangered, or threatened are significant enough that the entire species is likely to become threatened. Therefore, because of the large amount of available public land, the danger to the lizard on private land was not significant enough to threaten the entire species.

The court disagreed with the Secretary's interpretation of the phrase. The court stated that the Secretary's explanation would render the statute redundant because a species threatened over "a significant portion of its range" would also be a species threatened "throughout all … of its range." [[170]](#footnote-171)170 The court explained that it must "follow a "natural reading ..., which would give effect to all of [the statute's] provisions.'" [[171]](#footnote-172)171 Therefore, the court could not interpret the term "all" and the phrase "a significant portion" to mean the same thing. The Secretary also argued that Congress included the "significant portion of its range" language in an attempt to conserve species at an early stage, before facing endangerment throughout its entire range. The court disagreed, stating that Congress addressed the need to conserve a species early - before it becomes close to extinction - by creating the "threatened" designation in addition to the "endangered" designation.

However, the court also did not agree with Defenders' interpretation of the phrase. Defenders used a quantitative approach, arguing that the lizard is threatened in "a substantial portion of its range" because it is projected to lose eighty-two percent of its habitat. [[172]](#footnote-173)172 Defenders argued that because other courts had held that smaller losses of habitat were sufficient to necessitate listing of other species, the lizard also should be listed. The Ninth Circuit **[\*636]** disagreed because (1) the argument suggested a species necessarily would be threatened or endangered simply because a certain percentage of the species range was lost, and (2) had Congress intended to use quantitative criteria to determine when to designate a species as endangered or threatened, it would have included the criteria in the statute.

The Ninth Circuit turned to legislative history to determine what Congress intended the phrase "extinction throughout ...a significant portion of its range" to mean. [[173]](#footnote-174)173 The court explained that Congress used this language to expand the definition of "endangered" that had been used in previous endangered species acts. Congress intended to provide a means by which the Secretary can designate a species as endangered or threatened in one portion of its range while using a different designation, or declining to the list the species at all, in another portion of its range. Based upon this interpretation of the phrase, the court determined that when the Secretary determined that the lizard should not be listed as threatened she overlooked a crucial consideration: whether the lizard's range on private lands is a "significant portion of its range" and if so, whether the lizard is therefore in danger of "extinction throughout … a significant portion of its range." [[174]](#footnote-175)174 The Secretary also failed to consider whether the lizard might be threatened in one state or subportion of a state, but not in another state.

In addition, the court criticized the Secretary's reliance on the conservation agreement. The court stated that the Secretary failed to address how each management area would benefit the species, especially considering that implementation of some of the management areas had been delayed. The Secretary's explanation of the conservation agreement's benefits was not adequate to address the possibility that the lizard might be threatened throughout "a significant portion of its range." [[175]](#footnote-176)175

Based upon the Secretary's inadequate explanation of the benefits of the conservation agreement and the Secretary's failure to address whether the lizard was threatened throughout "a significant portion of its range," [[176]](#footnote-177)176 the Ninth Circuit held that the Secretary's decision to withdraw the proposed rule to list the lizard as threatened was arbitrary and capricious. The Ninth Circuit reversed the district court and remanded to the Secretary for reconsideration.

3. Pacific Coast Federation of Fishermen's Ass'ns v. National Marine Fisheries Service, 265 F.3d 1028 (9th Cir. 2001).

The Ninth Circuit affirmed in part and vacated in part a decision by the district court for the Western District of Washington to grant declaratory and injunctive relief to the Pacific Coast Federation of Fishermen's Associations **[\*637]** and five other environmental organizations (Fishermen). Fishermen challenged as defective the biological opinions issued by the National Marine Fisheries Service (NMFS) in conjunction with twenty-three timber sales proposed for the Umpqua River Basin. Fishermen successfully alleged that under the Endangered Species Act, [[177]](#footnote-178)177 NMFS acted arbitrarily and capriciously in reaching its "no jeopardy" conclusion with respect to the potential effects of the proposed timber sales on the Umpqua River cutthroat trout and the Oregon Coast coho salmon. [[178]](#footnote-179)178

Douglas Timber Operators (Douglas) and the Northwest Forestry Association were intervenor-defendants in the original suit [[179]](#footnote-180)179 who, upon appeal, alleged that the biological opinions issued by NMFS were not final appealable agency decisions under the Administrative Procedure Act. [[180]](#footnote-181)180 Douglas reasoned that because the United States Bureau of Land Management (BLM) and the United States Forest Service (USFS) had approved the timber sales, BLM and USFS, not NMFS, were the proper defendants. Thus, Douglas argued that venue in the Western District of Washington was improper because both agencies have headquarters in Portland, within the District of Oregon.

The Ninth Circuit rejected Douglas's argument to find that venue was proper, applying the reasoning of Bennett v. Spear, [[181]](#footnote-182)181 which held that a jeopardy opinion was a final appealable agency action. Although Bennett dealt with a "jeopardy" opinion, the Ninth Circuit found "no authority for the proposition that while a "jeopardy' opinion is reviewable as a final agency action, a "no jeopardy' opinion is not final and reviewable." [[182]](#footnote-183)182 The Ninth Circuit then applied the Bennett two-part test to determine whether NMFS's "no jeopardy" biological opinions were final agency actions. The court found that NMFS's biological opinions marked the "consummation" of the consultation process and altered the "legal regime" by granting "immunity to the proposed actions of other agencies required to obtain an NMFS opinion before proceeding with their own actions." [[183]](#footnote-184)183

The Ninth Circuit then turned to the aspects of Fishermen's claim challenged by NMFS on appeal, namely whether NMFS had acted arbitrarily **[\*638]** and capriciously by (1) assessing each proposed timber sale's compliance with the Aquatic Conservation Strategy (ACS) of the Northwest Forest Plan only at the watershed level, thereby ignoring local and cumulative impacts; (2) focusing on long-term rather than short-term ACS compliance; and (3) determining that logging in riparian reserves would not violate ACS standards.

In its determination of ACS consistency, NMFS used a watershed level of analysis rather than a project-site level of analysis. Thus, project degradation undetected at the watershed scale was presumed consistent with the ACS, and NMFS used this presumption to justify its "no jeopardy" determination. Fishermen alleged this watershed analysis effectively "masked all project level degradation" and ignored the cumulative impacts of the proposed timber sales. [[184]](#footnote-185)184 NMFS argued that the watershed scale was proper because the overall objective of the ACS, as paraphrased by the Ninth Circuit, is "to maintain and restore ecosystem health at watershed and landscape scales to protect habitat for fish and other riparian-dependent species and resources and restore currently degraded habitats." [[185]](#footnote-186)185 The Ninth Circuit rejected NMFS's narrow reading of the purpose of the ACS, stating that preventing project site degradation and restoring habitat could not be achieved if "cumulative effects of individual projects on small tributaries within watersheds" were ignored. [[186]](#footnote-187)186 In fact, the court found "no proof" that NMFS evaluated the cumulative impacts of the proposed timber sales when it reached its no jeopardy opinion at the regional watershed level. [[187]](#footnote-188)187 The court then warned that if NMFS did not aggregate the impacts of individual projects, then NMFS's ACS consistency determination at the watershed level assumed that "no project will ever lead to jeopardy of a listed species." [[188]](#footnote-189)188 The Ninth Circuit affirmed the district court, holding that when NMFS ignores local degradations with significant cumulative impacts it acts arbitrarily and capriciously.

Fishermen also alleged that NMFS's use of a ten-to twenty-year time frame to assess ACS consistency ignored the short-term environmental impacts of the proposed timber sales and led to the false presumption that passive mitigation would alleviate adverse effects on fish habitat. Again, the Ninth Circuit affirmed the district court, finding "nothing in the record to authorize NMFS to assume away significant habitat degradation." [[189]](#footnote-190)189 Recognizing that anadromous fish have uniquely fragile life histories, the court found that the lengthy time frame used by NMFS in its ACS consistency analysis was inadequate because ten years of habitat degradation could lead to the "total extinction of the subspecies that formerly returned to a particular creek for spawning." [[190]](#footnote-191)190 The Ninth Circuit pointed to an earlier programmatic biological opinion in which NMFS **[\*639]** recognized the vulnerability of anadromous species of the Umpqua River, stating that ""even a low level of additional impact...may reduce the likelihood of survival and recovery.'" [[191]](#footnote-192)191 The Ninth Circuit found NMFS's "choice not to assess degradation over a time frame that takes into account the actual behavior of the species in danger" unjustifiable. [[192]](#footnote-193)192 With respect to passive mitigation, NMFS had predicted that any short-term or local effects of the timber sales would be mitigated over the next decade by regrowth. Fishermen alleged, and both the district court and Ninth Circuit agreed, that scientific evidence did not support the conclusion that passive mitigation through regrowth would adequately mitigate degradation due to the timber sales and ensure that "fish that never hatched could return to the recovered spawning habitat." [[193]](#footnote-194)193

Finally, with respect to Fishermen's third claim, the Ninth Circuit vacated the district court's holding that NMFS had acted arbitrarily and capriciously in concluding that the proposed riparian reserve sales were consistent with ACS objectives. In upholding NMFS's ACS consistency determination with respect to these three timber sales, the Ninth Circuit acknowledged that one of the challenged timber sales fell under a "research exception" while the biological opinion stated that the other two proposed timber sales "were "not likely to adversely affect'" either salmonid species. [[194]](#footnote-195)194

4. Arizona Cattle Growers' Ass'n v. United States Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001).

In two actions, plaintiffs challenged the United States Fish and Wildlife Service's (FWS) issuance of incidental take statements (ITSs) under the Endangered Species Act [[195]](#footnote-196)195 (ESA) in connection with cattle grazing permits issued by the Bureau of Land Management (BLM) and the United States Forest Service (USFS). The Ninth Circuit affirmed the district court's decision in the first action, setting aside the ITSs as arbitrary and capricious. The Ninth Circuit affirmed in part and reversed in part the district court's decision in the second action, holding that all five of the challenged ITSs were arbitrary and capricious. The Ninth Circuit held that (1) a finding of incidental take must be made before FWS may issue an ITS; (2) FWS's issuance of ITSs with land-use conditions was arbitrary and capricious when FWS failed to provide evidence that the endangered species were present on the land or that the permits would result in any take; and (3) FWS's creation of overly vague terms and conditions was arbitrary and capricious.

In the first action, FWS had issued a biological opinion (BiOp) concluding that a rancher's grazing permits on BLM lands were unlikely to jeopardize or modify the critical habitat of twenty species of plants and **[\*640]** animals. In connection with the BiOp, FWS issued ITSs for certain species, including the razorback sucker and the cactus ferruginous pygmy-owl. The plaintiffs challenged the statements and their terms and conditions for these two species, and the district court granted the plaintiffs' motion for summary judgment, finding both statements arbitrary and capricious because FWS failed to provide evidence that the species existed on the relevant grazing allotments. [[196]](#footnote-197)196

In the second action, FWS issued twenty-two ITSs in connection with grazing permits on USFS public lands. The plaintiffs filed suit objecting to six of these statements for six different allotments: the Cow Flat, East Eagle, Montana, Sears-Club/Chalk Mountain, Sheep Springs, and Wildbunch allotments. The district court found that FWS was arbitrary and capricious in issuing all of the ITSs except the ITS for the Cow Flat Allotment because FWS did not demonstrate that a take of the species involved was reasonably certain to occur. The court granted summary judgment as to those allotments. The court also granted FWS's motion for summary judgment regarding the Cow Flat ITS, holding that the conditions of the ITS were not arbitrary and capricious. FWS appealed the decisions under both actions, except for the decision regarding the Sheep Springs allotment, and the Arizona Cattle Growers' Association appealed the court's decision in the second action regarding the Cow Flat Allotment.

The Ninth Circuit first addressed FWS's claim that the word "taking" should be interpreted more broadly in section 7 of the ESA [[197]](#footnote-198)197 than in section 9. [[198]](#footnote-199)198 The court rejected this claim under a Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc. [[199]](#footnote-200)199 analysis, holding that Congress had clearly spoken to the issue and that "taking" had the same meaning in both sections. FWS claimed that because section 7 (which requires government agencies to monitor their actions to limit harm to listed species) has a more protective purpose than section 9 (which imposes penalties for "taking" listed species) the term "taking" should have a broader meaning in section 7. Thus, a section 7 take might include possible or likely future harm rather than actual harm. However, the court found that, based upon the structure and legislative history of the relevant provisions, Congress indicated to the contrary. The court indicated that Congress added the ITS [[200]](#footnote-201)200 to create a "safe harbor provision" whereby a "taking" that occurs incidental to an action already approved under section 7 would not subject the actor to penalties. [[201]](#footnote-202)201 According to the court, a section 7 definition of "taking" other than the section 9 definition would not require this "safe harbor, **[\*641]** provision." [[202]](#footnote-203)202 The court also pointed out that FWS's broad interpretation of "taking" under section 7 would allow FWS to regulate land use when no "taking" that would violate section 9 had occurred.

The court next addressed FWS's argument that under the ESA, it must issue an ITS whenever it issues a "no jeopardy" BiOp. The Ninth Circuit held that this interpretation was "contrary to clear congressional intent." [[203]](#footnote-204)203 Under section 7 of the ESA, FWS produces a BiOp after formal consultation to determine whether an agency's action is "likely to jeopardize the continued existence" of a listed species. [[204]](#footnote-205)204 When FWS finds no jeopardy, an accompanying ITS provides measures necessary to limit the impact of takings that occur from the action. [[205]](#footnote-206)205

FWS claimed that the requirement that it provide "a written statement that … specifies the impact of such incidental taking on the species" [[206]](#footnote-207)206 meant that whenever FWS issues a "no jeopardy" opinion, it must provide a statement. The Ninth Circuit relied upon the canon of statutory construction that words must be interpreted in context to find that a statement is required only when FWS first finds that there will be an actual take. The court pointed out that its interpretation was consistent with the ESA's implementing regulations, which indicate that an ITS is provided "if such take may occur." [[207]](#footnote-208)207 The court also explained that its interpretation was consistent with the legislative intent that the incidental take provision be used as a safe harbor because a safe harbor would not be necessary if no take had occurred. Finally, the court refused to defer to FWS's internal consultation handbook, which also stated that an ITS should be issued regardless of whether a take will occur. The court found that the handbook's guideline was contrary to the plain meaning of the ESA and its regulations.

In rejecting FWS's interpretation of the ITS provisions, the court held that "it is arbitrary and capricious to issue an ITS when the Fish and Wildlife Service has no rational basis to conclude that a take will occur incident to the otherwise lawful activity." [[208]](#footnote-209)208 The court then examined each ITS to determine whether each was arbitrary and capricious. The court held that the ITS issued for the razorback sucker in connection with the first action was arbitrary and capricious because there was no evidence that the fish was present in the grazing allotment concerned. Within the last few years, no sightings of the fish had been reported. Any harm that would result to the fish because of habitat modification caused by grazing was speculative. The court indicated that FWS should not use ITSs to deal with prospective harm, and that related regulations demonstrated that FWS should reinitiate consultation if new harms are revealed after initial consultation. [[209]](#footnote-210)209

The Ninth Circuit found the ITS for the cactus ferruginous pygmy-owl **[\*642]** arbitrary and capricious for similar reasons. FWS had not established that the owl existed in the involved allotment. Although FWS argued that new surveys demonstrated the presence of the owls, the court replied that it could not look beyond the administrative record and that FWS could deal with this new evidence by reinitiating consultation.

The court next held the ITSs from Arizona Cattle Growers' second action arbitrary and capricious for the Montana, Sears-Club/Chalk Mountain, East Eagle, and Wildbunch Allotments. The court indicated that the harms detailed in these statements were too speculative or lacked sufficient evidence. In the Montana Allotment, FWS anticipated harm to the Sonora chub even though cattle were excluded from the area that fish actually inhabited. For the Sears-Club/Chalk Mountain Allotment, the Gila topminnow existed only in an adjacent spring; the court stated that the potential for reintroduction or recolonization of the spring on the Sears-Club/Chalk Mountain Allotment was too speculative. Evidence was insufficient to prove that the loach minnow or spikedace existed in the East Eagle Allotment. Finally, regarding the Wildbunch Allotment, the court found any evidence of harm to loach minnow caused by increased sedimentation from grazing to be too general. Again, the loach minnow did not actually use any portion of the allotment where grazing would actually occur.

The court, however, found that the ITS for the Cow Flat Allotment contained adequate evidence of the loach minnow's presence in the area, and the court declined to reject the statements as arbitrary and capricious for failure to show a take. According to the court, "the specificity of the Service's data, as well as the articulated causal connections between the activity and the "actual killing or injury' of a protected species distinguished" this statement from the others. [[210]](#footnote-211)210

Nevertheless, the court found the Cow Flat Allotment's ITS arbitrary and capricious because it did not adequately indicate the amount of anticipated take or set forth a clear standard indicating when take would exceed that allowed. FWS had determined that incidental take of the loach minnow would be exceeded if ecological conditions did not improve after grazing began. The court explained that although FWS was not required to provide a numerical limit on take, the condition FWS set forth was too vague. In addition FWS failed to discuss adequately how this condition was causally related to takings of the species.

The court overturned the district court's conclusion that the Cow Flat Allotment's ITS was not arbitrary and capricious; thus the Ninth Circuit found all the challenged ITSs arbitrary and capricious.

4. Biodiversity Legal Foundation v. Badgley, 284 F.3d 1046 (9th Cir. 2002).

Eight environmental groups and several individuals (collectively "Biodiversity Legal Foundation") [[211]](#footnote-212)211 appealed a district court decision [[212]](#footnote-213)212 that **[\*643]** the United States Fish and Wildlife Service (FWS) has discretion under section 4 of the Endangered Species Act (ESA) [[213]](#footnote-214)213 to make initial findings beyond the twelve-month deadline imposed for final listing determinations under the ESA. [[214]](#footnote-215)214 The Ninth Circuit reversed, holding that "the only way to interpret [section 4](b)(3)(A) [[215]](#footnote-216)215 in harmony with [section 4](b)(3)(B) [[216]](#footnote-217)216 is by limiting the [FWS's] discretion" under the former subsection by the deadline imposed in the latter. [[217]](#footnote-218)217 FWS cross-appealed the district court's denial of its request for additional time to make final determinations. The district court had based its decision on a lack of equitable discretion to refrain from issuing injunctive relief. The Ninth Circuit affirmed that decision, holding that the "ESA forecloses the exercise of discretion when the agency misses ESA-imposed deadlines." [[218]](#footnote-219)218

In February 1995, Biodiversity Legal Foundation (BLF) filed a petition to list the Spalding's Catchfly as an endangered species. When BLF initiated suit in 1999, [[219]](#footnote-220)219 FWS had yet to make an initial determination. In July 1995, BLF filed a petition to list the southern California population segment of the Mountain Yellow Legged Frog as an endangered or threatened species; by 1999 FWS had yet to make a final determination. In 1997, BLF petitioned to list the Great Basin Redband Trout as an endangered or threatened species; by 1999 FWS had yet to make a final determination. In 1998, BLF petitioned to list the Yellow Billed Cuckoo as endangered; by 1999 FWS had yet to act on the petition.

The Ninth Circuit began its decision with an overview of the ESA's framework, relying on Oregon Natural Resources Council, Inc. v. Kantor [[220]](#footnote-221)220 to note that while FWS has discretion to extend initial determinations beyond ninety days, FWS must make a final determination within twelve **[\*644]** months of receiving the listing petition. The court then considered FWS's allegations that BLF lacked standing and that BLF's claims were moot because FWS had made final decisions to list the species at issue. With respect to standing, the court held that BLF's "desire to use, observe, and study the stated plant and animal species is undeniably a cognizable interest for purposes of standing," [[221]](#footnote-222)221 and BLF faces "specific and concrete" injury because FWS's failure to list the species at issue would "result in continued threats to their existence." [[222]](#footnote-223)222 The court also recognized that BLF had standing to challenge the general pattern of delay under the listing program and determined that the Declaratory Judgment Act [[223]](#footnote-224)223 gave the district court authority to grant declaratory relief because of the controversy concerning the proper interpretation the ESA's listing timeline and the number of analogous suits pending in other federal courts. With respect to mootness, the Ninth Circuit again rejected FWS's claims, reiterating that BLF sought two remedies: to compel FWS to make the listing determinations and to declare that section 4 requires FWS to make final determinations within twelve months of receiving a petition. In response to the district court order, FWS completed the listing decisions. However, the Ninth Circuit noted that FWS's interpretation of the ESA allowed the agency to "delay action indefinitely." [[224]](#footnote-225)224

The court then addressed BLF's claims. It rejected FWS's interpretation of the section 4 provisions as contrary to clear congressional intent to shorten the process for listing species. According to FWS, the 90-day time limit in section 4(b)(3)(A) is independent of the one-year time limit in section 4(b)(3)(B), and if the agency decides that an initial determination is impracticable, the agency may delay making a listing decision indefinitely. The court decided that such an interpretation would render section 4(b)(3)(B) inoperative, and the only way to give effect to both subsections of the ESA is to apply the one-year deadline to both the initial and final determinations. Ultimately, the Ninth Circuit decided that Congress intended to limit the flexibility of initial determination deadlines by imposing firm deadlines for final determinations.

Finally, the Ninth Circuit turned to FWS's allegations on cross-appeal, namely that the district court erred in determining that it had no discretion with respect to enjoining FWS to meet its statutory deadlines. FWS also argued that the court should consider FWS priorities when deciding whether the agency's action was "unlawfully withheld" or "unreasonably delayed." [[225]](#footnote-226)225 The district court had relied on the holdings in Forest Guardians v. Babbitt [[226]](#footnote-227)226 to decide that when the agency fails to comply with a nondiscretionary statutory deadline, the agency has unlawfully withheld action and the **[\*645]** Administrative Procedure Act [[227]](#footnote-228)227 requires the court to issue an injunction. In deciding whether the district court erred in granting the injunction, the Ninth Circuit reviewed the decision for abuse of discretion [[228]](#footnote-229)228 while reviewing the legal rulings on which the district court relied de novo. [[229]](#footnote-230)229 Although a statutory violation does not automatically lead to an injunction, the "test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute." [[230]](#footnote-231)230 Because Congress had already balanced the equities "in favor of affording endangered species the highest of priorities," [[231]](#footnote-232)231 the court had no discretion to consider FWS priorities before issuing the injunction.

B. Fish and Wildlife

1. Myers v. American Triumph F/V, 260 F.3d 1067 (9th Cir. 2001).

The plaintiffs appealed the district court's dismissal of their in rem class action suit in admiralty against a fishing vessel, the F/V American Triumph (the Vessel). The United States Coast Guard issued a certificate of documentation and fishery endorsement (Certificate) to the Vessel in 1986. The Certificate permitted the Vessel to engage in the fishing trade. In 1998, the Coast Guard determined that the Vessel did not meet the requirements for a vessel used in United States fisheries [[232]](#footnote-233)232 and issued a notice of intent to cancel the Certificate. However, before the Coast Guard invalidated the Certificate, Congress passed the American Fisheries Act (Act). [[233]](#footnote-234)233 The Act contained a provision excepting the Vessel from the normal requirements that would have prohibited the Vessel from participating in the fishing trade. [[234]](#footnote-235)234 Despite the renewed validity of the Vessel's Certificate, the plaintiff brought an admiralty action against the Vessel for conversion of fish, and for intentional and negligent interference with business opportunity, misrepresentation, and unjust enrichment. The district court dismissed the action. On appeal, the Ninth Circuit held that "the Vessel had an incontrovertible right to take fish during the years in question" and affirmed the district court's decision. [[235]](#footnote-236)235

The court focused on whether the Vessel's certificate entitled the Vessel to engage in the fishing trade during the period that the plaintiff claimed the vessel was converting fish. The Coast Guard issues certificates to vessels pursuant to 46 U.S.C. 12101-12122. [[236]](#footnote-237)236 These statutory sections provide the **[\*646]** qualifications a vessel must meet to engage in a specific trade, and in particular, the fishing trade. [[237]](#footnote-238)237 In addition, section 12104(2) states that once a certificate is issued, it is "conclusive evidence of qualification to be employed in [the fishing] trade." [[238]](#footnote-239)238 The court stated that this section is not open for judicial interpretation because the language of the statute clearly states that a certificate is incontrovertible evidence that the vessel is entitled to engage in the fishing trade and the canons of statutory construction prohibit the court from looking further than the text to determine the meaning of a clear statute. The court stated that by passing this statute, Congress limited the ability of parties to challenge a vessel's right to fish once the vessel has obtained a certificate. Therefore, the Ninth Circuit affirmed the district court, holding that plaintiffs did not have a private right of action to challenge the Vessel's taking of fish under the Certificate.

2. Midwater Trawlers Co-operative v. Department of Commerce, 282 F.3d 710 (9th Cir. 2002), infra Part IV.2.

3. United States v. LeVeque, 283 F.3d 1098 (9th Cir. 2002), infra Part III.3.

C. Forests

1. Pacific Coast Federation of Fishermen's Ass'ns v. National Marine Fisheries Service, 265 F.3d 1028 (9th Cir. 2001), supra Part II.A.

D. Water Law

1. Churchill County v. Norton, 276 F.3d 1060 (9th Cir. 2001), amended by 282 F.3d 1055 (9th Cir. 2002), petition for cert. filed (June 6, 2002) (No. 01-1800), supra Part I.F.

2. United States v. Morros, 268 F.3d 695 (9th Cir. 2001), infra Part V.I.

E. Hydroelectric Power

1. Friends of the Cowlitz v. FERC, 253 F.3d 1161 (9th Cir. 2001), amended by 282 F.3d 609 (9th Cir. 2002).

Two citizen groups, Friends of the Cowlitz and CPR-Fish, appealed an order by the Federal Energy Regulatory Commission (FERC) dismissing their request for enforcement action against the city of Tacoma (Tacoma). The Ninth Circuit dismissed the appeal because FERC's prosecutorial discretion under the Federal Power Act (FPA) [[239]](#footnote-240)239 allows the agency to reject third-party requests for investigation or enforcement.

Tacoma owns and operates hydropower dams on the Cowlitz River in **[\*647]** southwestern Washington under a license granted by FERC in 1951. In response to fierce opposition to licensing of the dams in the 1950s, Tacoma agreed to mitigate damage to salmon runs. Accordingly, FERC included mitigation measures in Tacoma's hydropower license. These measures are enforced by FERC and are legally binding in federal court. Third parties may also petition FERC to take enforcement action, and FERC's denial of such a petition is appealable in federal circuit court. In this case, FERC denied Cowlitz and CPR-Fish's petition for enforcement. The two groups appealed.

The petitioners argued that FERC's dismissal of their enforcement petition without a hearing was arbitrary because FERC's explanation did not correspond with the facts on record. In support of their claim, petitioners introduced evidence contradicting FERC's assertion that Tacoma had constructed the necessary fishways. Petitioners further argued that Tacoma had violated the terms of an agreement made pursuant to an article of the FERC license that required Tacoma to cooperate with the Washington Department of Fisheries and Wildlife. Specifically, the petitioners alleged that Tacoma had violated this agreement by failing to meet targeted fish-return levels during preceding years and had failed to build a second hatchery to correct those deficits. In response, FERC pointed out that the agreement was never formally incorporated into the license, and therefore was not binding on Tacoma.

The court agreed with the petitioners that Tacoma had continuously violated its license to the detriment of fish stocks. In light of these material issues of fact, FERC's dismissal of petitioners' request for enforcement action violated the agency's own summary judgment standard. [[240]](#footnote-241)240 The court also rejected FERC's argument that the agreement did not have binding effect, on the grounds that the agreement was the only manifestation of the cooperation between Tacoma and other agencies mandated by the license article.

Despite holding that FERC's summary dismissal of the petitioners' complaint was "plainly erroneous as a matter of law," the Ninth Circuit dismissed the case rather than remanding the Commission's order. [[241]](#footnote-242)241 The court used the reasoning in the Supreme Court case Heckler v. Chaney [[242]](#footnote-243)242 to conclude that even if Tacoma's violations of the dam license were ongoing, FERC's decision not to prosecute was an "agency action … committed to agency discretion by law" under the Administrative Procedure Act, and hence not subject to judicial review. [[243]](#footnote-244)243 The petitioners' argument that FERC at least had an obligation to investigate alleged license violations also failed because FERC's investigatorial discretion is unreviewable for the same reason.

**[\*648]**

2. United States v. Morros, 268 F.3d 695 (9th Cir. 2001), infra Part V.I.

III. Environmental Crimes

1. United States v. Elias, 269 F.3d 1003 (9th Cir. 2001), petition for cert. filed, 70 U.S.L.W. (U.S. Apr. 4, 2002) (No. 01-1502), supra Part I.E.

2. United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001).

Thomas Pearson was convicted for criminal violations of sections 112(f)(4), [[244]](#footnote-245)244 112(h), [[245]](#footnote-246)245 and 113 (c)(1) [[246]](#footnote-247)246 of the Clean Air Act (CAA). [[247]](#footnote-248)247 Pearson appealed, contending that the district court gave improper jury instructions concerning the charged offense elements, the district court improperly sustained objections to Pearson's testimony during direct examination, and the United States Sentencing Guidelines [[248]](#footnote-249)248 were misapplied. The Ninth Circuit affirmed the district court's decision.

In 1995 the Navy contracted with Metcalf Grimm, who in turn subcontracted with Environmental Maintenance Service (EMS), to remove asbestos from the central heating plant at the Whidbey Island Naval Air Station. The removal occurred in three phases, the last of which was the subject of the litigation. Pearson was hired as a certified asbestos supervisor by EMS to oversee this third phase. The third phase involved removal of asbestos from boilers and other equipment. During this phase plastic sheeting was used around the clean-up area to contain the asbestos, machines were used to lower the air pressure in the containment area thereby preventing off site asbestos diffusion, and workers wore respiratory protection.

Under the CAA regulations, asbestos also must be wetted before removal. [[249]](#footnote-250)249 However, according to witness testimony, dry asbestos was "all over the place," some of the air machines were clogged, and bags of asbestos were outside the containment area. [[250]](#footnote-251)250 As a result, Pearson was charged with two counts of knowingly causing asbestos removal in violation of the CAA. The maximum penalty under the statute for each count is five years imprisonment. [[251]](#footnote-252)251

Pearson argued that he was not involved with the asbestos removal and was only involved with the demolition phase of the project. The district court acquitted Pearson of Count 1, but convicted Pearson of Count 2 and instructed the jury to find that Pearson was acting as a supervisor. At the sentencing hearing, the district court set the base offense level at eight for **[\*649]** Pearson's conviction under section 7413 of the CAA. [[252]](#footnote-253)252 The base level was enhanced by four for discharge of hazardous waste [[253]](#footnote-254)253 and enhanced by nine for causing risk of serious bodily injury or death. [[254]](#footnote-255)254 The district court further enhanced the base level by two for Pearson's leadership role in the offense, [[255]](#footnote-256)255 refusing to reduce the sentence in exchange for Pearson's acknowledgment of responsibility. [[256]](#footnote-257)256 At this point, the base level offense had been adjusted to a level twenty-three. Next, the district court applied downward factors, reducing the base level by two for the degree of harm, [[257]](#footnote-258)257 by five levels based on the degree of risk, [[258]](#footnote-259)258 and by four levels based on aberrant behavior. Ultimately, the base level offense was adjusted to twelve, resulting in a potential sentence of ten to sixteen months. Pearson was sentenced to the minimum of ten months and a subsequent three-year supervised release.

On appeal, Pearson argued that the district court applied the wrong definition of "supervisor" and that "he did not have enough authority to be liable as a "supervisor' under the CAA." [[259]](#footnote-260)259 Both the district court and the Ninth Circuit applied the "substantial control" standard, which requires a defendant to have the "ability to direct the manner in which work is performed and the authority to correct problems." [[260]](#footnote-261)260 Thus, because a "supervisor" is not necessarily the individual with the highest authority, the Ninth Circuit held that the district court did not abuse its discretion in instructing the jury to apply the "substantial control" standard in determining Pearson's liability as a supervisor.

Pearson also argued that a jury could find that while acting as a supervisor he also acted under orders from his employer. Pearson contended that because he was an employee carrying out orders, he could not be held liable as an operator under the CAA's criminal provisions unless he was in knowing and willful violation of the Act. [[261]](#footnote-262)261 Although the Ninth Circuit agreed that a jury could reasonably find that an individual who qualifies as a supervisor under section 7412 also could qualify as an employee under section 7413(h), Pearson failed to raise and meet his burden of establishing that he was an employee because he contended no involvement in the asbestos clean-up. Thus, the district court did not err in excluding instructions to the jury on the issue of whether Pearson acted as an employee.

Pearson also claimed that the district court erred by not properly **[\*650]** defining "owner or operator" for the jury. [[262]](#footnote-263)262 In the jury instructions, the district court emphasized the supervisory aspect of the owner/operator definition. The Ninth Circuit held that the jury instructions were sufficient, particularly in light of the "supervisory aspect of the charged offense." [[263]](#footnote-264)263

Pearson's second claim alleged that the district court prevented him from answering the charges against him when the court sustained several objections raised by his counsel during Pearson's direct examination. The Ninth Circuit examined the questions at issue and the defense Pearson raised. Finding that the questions and the defense were unrelated, the Ninth Circuit determined that the district court had not prevented Pearson from receiving a fair trial. [[264]](#footnote-265)264

Finally, Pearson argued that the district court improperly enhanced his sentence because the facts did not support a determination that hazardous substances had been discharged. Pearson also alleged that the district court abused its discretion in denying him an evidentiary hearing. In its de novo review, the Ninth Circuit determined first that the district court had not abused its discretion under Rule 32 (c)(1) of the Federal Rules of Criminal Procedure when it denied Pearson's request. As the Ninth Circuit noted, the district court allowed Pearson's counsel to present objections in a pre-sentence report, and the district court made findings with respect to each objection. The Ninth Circuit then determined that the district court's inference that hazardous waste had been released into the outside air was not clearly erroneous because witnesses had testified that bags had asbestos dust on their exterior and drains had been clogged with asbestos fibers. Accordingly, the Ninth Circuit held that district court's enhancement under U.S.S.G. section 2Q1.2(b)(1)(B) was proper. Similarly, because Pearson's non-compliance with work practice standards resulted in improper storage and removal of asbestos as well as potential worker exposure to asbestos-related health risks, [[265]](#footnote-266)265 the Ninth Circuit held that the district court's enhancement under U.S.S.G. section 2Q1.2(b)(2) was proper.

3. United States v. LeVeque, 283 F.3d 1098 (9th Cir. 2002).

Dennis LeVeque, a licensed hunting outfitter in Montana, and John Moore, a licensed hunting guide in Montana, were convicted in district court **[\*651]** of mail fraud in connection with an application they filed to obtain an out-of-state hunting license for a client. [[266]](#footnote-267)266 Moore was also convicted of violating the Lacey Act [[267]](#footnote-268)267 and of conspiracy to violate the Lacey Act in connection with an elk illegally killed by Moore's client. [[268]](#footnote-269)268 LeVeque and Moore appealed the convictions, and the Ninth Circuit reversed and remanded for retrial on the mail fraud count. The Ninth Circuit also reversed Moore's convictions for conspiracy and violation of the Lacey Act.

Moore organized a six-day elk hunting trip in Montana for three clients, including R. E. McMaster. Because McMaster was not chosen in a lottery drawing for an out-of-state hunting license, Montana required him to apply for the license by hiring an outfitter. Although Moore was a licensed hunting guide, he was not a licensed outfitter. Moore, however, had an agreement with LeVeque whereby he would pay LeVeque $ 10,000 if LeVeque brought Moore's clients onto a ranch to hunt. As a licensed outfitter, LeVeque sponsored the application for McMaster's license. In the application, LeVeque certified that he had received a deposit from McMaster and that he had given McMaster a rate sheet and a sheet explaining the deposit refund policy. Both certifications were false. McMaster subsequently received the hunting license based on this application.

LeVeque and Moore were indicted on one count of mail fraud, and in a superseding indictment were charged with fraudulently scheming to obtain money or property in the form of fees for the hunt and McMaster's hunting license. After they were convicted, LeVeque and Moore appealed, challenging the sufficiency of the evidence for their convictions. The defendants first argued that they were improperly convicted of mail fraud because a hunting license is not "property" and therefore cannot form the basis of a conviction under section 1341 of the mail fraud statute. [[269]](#footnote-270)269 Relying on Cleveland v. United States, [[270]](#footnote-271)270 the Ninth Circuit agreed that section 1341 does not cover hunting licenses and therefore, the defendants should not have been convicted under section 1341 for acquiring the license by fraud. The Ninth Circuit indicated, however, that the defendants could be convicted under section 1341 for acquiring hunting fees from McMaster by fraudulently applying for the hunting license. Nevertheless, the court found that the basis of the jury's determination that the defendants were guilty of violating section 1341 was unclear.

The court thus decided to examine the issue of whether there was sufficient evidence to sustain the defendants' convictions for acquiring hunting fees by fraud. Defendants argued that their misrepresentations to McMaster in connection with obtaining the hunting license were immaterial. The court rejected this argument. The defendants represented to McMaster **[\*652]** that they could sponsor an application for McMaster to obtain a license. This representation was false because "the financial arrangement between Moore and LeVeque precluded LeVeque from submitting an application on McMaster's behalf that complied with Montana law." [[271]](#footnote-272)271 According to the court, the defendants' misrepresentation was material because McMaster relied on the misrepresentation, as he believed that he could legally obtain a license through the defendants. The court found that there was sufficient evidence to find that McMaster reasonably relied on the misrepresentation because a reasonable hunter would not hire an outfitter who could not sponsor his nonresident hunting license.

The court next addressed the defendants' argument that they did not act with the intent to defraud McMaster. The Ninth Circuit rejected this argument, holding that there was sufficient evidence from which the jury could conclude that the defendants intended to defraud McMaster. The court indicated that a jury could find that the defendants knew they could not legally submit an application for McMaster's license and that they intended to file the application anyway in an attempt to obtain fees from McMaster. The Ninth Circuit concluded that although enough evidence existed to convict the defendants based upon their attempts to obtain money from McMaster, because the jury did not clarify whether it based the conviction on the defendants' attempt to obtain the hunting license or acquire money from McMaster, the case should be remanded. The court indicated that on remand, the jury would need to find mail fraud based upon the defendants' attempts to obtain hunting fees.

Moore also challenged his convictions for conspiracy and violation of the Lacey Act. During the six-day elk hunt, McMaster killed a bull elk. McMaster was hunting on a ranch where hunters could kill only "brow tine" bull elks. [[272]](#footnote-273)272 The hunting guides, Moore and his assistant, failed to inform McMaster of the hunting restriction, and the elk that McMaster killed was a non-brow tine bull elk. McMaster later shipped the elk hide across state lines. Moore was later convicted of violating the Lacey Act in connection with the interstate shipment of the elk hide [[273]](#footnote-274)273 and of conspiracy to violate the Lacey Act.

On appeal, Moore argued that the evidence was insufficient to convict him on these two counts. The Ninth Circuit agreed. The court first explained that although providing hunting guiding services is a "sale" under the Lacey Act, [[274]](#footnote-275)274 to convict a defendant for a felony violation under the Lacey Act for interstate shipment of the elk hide, the prosecution was required to prove that Moore had actual knowledge that the taking of the elk violated a state law, although the prosecution did not have to prove that Moore knew which state law was violated. [[275]](#footnote-276)275 The only evidence of Moore's state of mind was a **[\*653]** phone message for McMaster after the violation occurred; the prosecution presented no evidence concerning Moore's state of mind at the time of the violation. Finding that this evidence was insufficient to sustain a felony conviction, the court reversed the conviction on the interstate transport count.

Moore also challenged his conviction of conspiracy under the Lacey Act, arguing that there was insufficient evidence for the conviction. The Ninth Circuit agreed. To convict a defendant for conspiracy under the Lacey Act, the prosecution must show that there was an agreement between two people to violate the law. [[276]](#footnote-277)276 The prosecution, however, failed to present any evidence of an express agreement between Moore and his assistant or McMaster, or any evidence whereby the jury could have inferred an agreement. Because the court found that there was insufficient evidence to convict Moore of conspiracy under the Lacey Act, the Ninth Circuit reversed on this count.

IV. Native American Issues

1. United States ex rel. Fort Mojave Indian Tribe v. Byrne, 279 F.3d 677 (9th Cir. 2002), amended and superseded by No. 00-16008, 2002 WL 1060836 (9th Cir. May 29, 2002).

The Ninth Circuit considered whether the district court had jurisdiction over a quiet title claim and ejection action, and whether the district court properly concluded that disputed property was in the state of California. The court reversed on both issues.

The United States brought an action in district court to quiet title on behalf of the Fort Mojave Indian Tribe, alleging that the disputed property was attached by accretion [[277]](#footnote-278)277 to land held in trust for the Tribe by the United States government. The defendant landowners were successors in title to a 1905 patent and asserted ownership of the disputed property under that patent. The defendants alleged that prior to 1905, avulsive [[278]](#footnote-279)278 movement shifted the Colorado River to the patent boundary. The district court concluded that it lacked jurisdiction because the disputed property had become part of California rather than Arizona during avulsion of the Colorado River in 1857. Despite its decision that it lacked jurisdiction, the **[\*654]** district court decided the merits of the case, concluding that the disputed property belonged to the private landowners.

The Ninth Circuit reversed on the jurisdictional issue, noting that the Interstate Compact Defining the Boundary Between the States of Arizona and California [[279]](#footnote-280)279 set the boundary along the centerline of the channel of the Colorado River. The Ninth Circuit determined that the disputed property lay east of the river, in Arizona rather than California.

The Ninth Circuit then addressed the ownership issue, concluding that the district court erred in considering pre-patent avulsive movements. Because California did not hold legal title to the disputed land until 1905, any river movements before that date were irrelevant for the purpose of establishing title. The private landowners argued that title vested in 1850 with California statehood and enactment of the Swamp and Overflowed Lands Act (Swamp Act). [[280]](#footnote-281)280 Under the Swamp Act, the Secretary of the Interior patented any unsold swamp or overflowed lands to the states. [[281]](#footnote-282)281 The Ninth Circuit discussed a series of Supreme Court decisions [[282]](#footnote-283)282 concerning the Swamp Act, noting that these cases principally held that patents remain with the government until issued. The Ninth Circuit held that the "controlling date" [[283]](#footnote-284)283 in a quiet title claim based on the position of a river is the patent date. The court concluded that the district court erred in its analysis, and because both accretions and avulsions had occurred after the patent date, the court remanded the case to the district court to determine title ownership.

2. Midwater Trawlers Co-operative v. Department of Commerce, 282 F.3d 710 (9th Cir. 2002).

The states of Oregon and Washington as well as fishing industry groups appealed a decision by the district court that the National Marine Fisheries Service (NMFS) did not act arbitrarily in allocating Pacific whiting fish to the Makah Indian Tribe. The Ninth Circuit affirmed in part and reversed in part.

In 1996, NMFS promulgated regulations limiting on the number of Pacific whiting to be taken annually and establishing a framework for allocating these fish to the Hoh, Makah, Quileute, and Quinault Tribes. [[284]](#footnote-285)284 Several treaties from the mid 1800s, known collectively as the Stevens Treaties, had reserved certain fishing rights to these tribes. [[285]](#footnote-286)285 In previous cases, the court had construed treaty language as reserving to the Tribes "fifty percent of the salmon and other free-swimming fish in the waters **[\*655]** controlled by Washington State." [[286]](#footnote-287)286 In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) [[287]](#footnote-288)287 to protect U.S. fisheries by extending the fisheries zone up to two hundred miles from the coast and by providing for fisheries management within this 200-mile zone. [[288]](#footnote-289)288 The Magnuson-Stevens Act authorizes NMFS to issue fishery management regulations, [[289]](#footnote-290)289 but such regulations must be consistent with applicable law defining tribal treaty fishing rights. [[290]](#footnote-291)290 NMFS's 1996 regulations identified areas extending forty miles off the coast as "usual and accustomed" fishing areas for the Tribes (including the Makah) [[291]](#footnote-292)291 and then allocated 15,000 metric tons of Pacific whiting to the Makah.

The states and fishing industry challenged this allocation in the United States District Court for the District of Oregon. The case was transferred to the United States District Court for the Western District of Washington and dismissed in 1997 because the plaintiffs failed to join the Tribes as necessary and indispensable parties. In 1999, the Ninth Circuit reversed the dismissal and remanded to the Washington federal district court for further proceedings. [[292]](#footnote-293)292 In 1999, Midwater Trawlers Cooperative and the state of Oregon challenged a 1999 NMFS regulation allocating 32,500 metric tons of Pacific whiting to the Makah. [[293]](#footnote-294)293 The case was brought in Oregon federal district court but later transferred to Washington federal district court and consolidated with the 1996 remanded suit. In 2000, the district court granted summary judgment for NMFS, holding that NMFS had not acted arbitrarily and capriciously by recognizing a tribal right to fish for Pacific whiting because the Stevens Treaties constitute applicable law under the Magnuson-Stevens Act, recognizing "usual and accustomed" fishing areas extending more than three miles from Washington's coast, or allocating whiting in 1999.

The plaintiffs argued that no "applicable law" applied under the Magnuson-Stevens Act because the courts had yet to expressly adjudicate tribal treaty rights with respect to Pacific whiting. The court rejected this "fish by fish" [[294]](#footnote-295)294 approach and determined that because the "right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish' without any species limitation." [[295]](#footnote-296)295 The plaintiffs also **[\*656]** argued that the courts had yet to adjudicate the extension of "usual and accustomed" fishing areas from three miles to forty miles off the coast. The court rejected the plaintiffs' argument, finding nothing in the treaties or in the case law to suggest a geographic limitation on the tribal fishing grounds. In fact, in Makah Indian Tribe v. Verity, [[296]](#footnote-297)296 the Ninth Circuit specifically held that the Makah had a treaty right to fish up to forty miles off the coast. [[297]](#footnote-298)297

The court also concluded that the 1999 allocation of Pacific whiting to the Makah Tribe was inconsistent with the scientific standards outlined in the Magnuson-Stevens Act. [[298]](#footnote-299)298 In Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, [[299]](#footnote-300)299 the Supreme Court provided a framework for determining the rightful allocation of fish pursuant to a tribal treaty fishing right. [[300]](#footnote-301)300 First, divide the harvestable portion of the run passing through "usual and accustomed" fishing areas into equal treaty and non-treaty shares. Then reduce the treaty share if the tribal needs may be met by fewer fish. [[301]](#footnote-302)301 The harvestable portion is that portion of fish that will not cause "demonstrable harm to the actual conservation of the fish." [[302]](#footnote-303)302 Initially, NMFS sought to determine allocation based on a percentage of the Pacific whiting in the Makah's usual and accustomed fishing area, which was adjusted by a multiplier to correct for interannual variation in harvest rates. NMFS concluded that the Makah were entitled to between 13,000 and 18,000 metric tons, or 6.5% of the harvest available to all U.S. fishermen. In an earlier case, United States v. Washington, [[303]](#footnote-304)303 the district court had rejected this methodology because the approach was contrary to the conservation principles outlined in the Magnuson-Stevens Act. [[304]](#footnote-305)304 NMFS and the Makah later reached a settlement with respect to Pacific whiting, and NMFS allocated 15,000 metric tons to the tribe. For 1997 and 1998, the Makah proposed an allocation of 10.8% of the harvest available; NMFS approved this proposal after finding no significant environmental impact. In 1998, the Makah proposed a five-year compromise of an allocation not to exceed 17.5% of the harvest available in any one year. In 1999, NMFS allocated 32,500 metric tons, or 14% of the harvest available, based on the Makah proposal; again, NMFS approved the Makah proposal after finding no significant environmental impact.

The Ninth Circuit rejected the 1999 allocation as "devoid of any stated **[\*657]** scientific rationale" [[305]](#footnote-306)305 and determined that underlying the Magnuson-Stevens Act was Congress's intent that NMFS use the "best available scientific information" [[306]](#footnote-307)306 when making conservation and management decisions. Rejecting the allocations as a "product of pure political compromise," [[307]](#footnote-308)307 the Ninth Circuit reversed and remanded to NMFS either to reallocate the Pacific whiting using best available science or justify the current allocation.

V. Litigation Issues

A. Civil Procedure

1. Southwest Center for Biological Diversity v. Berg, 268 F.3d 810 (9th Cir. 2001).

The Ninth Circuit ruled on a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure. The applicants to intervene included a construction company and four national and local building trade associations (Applicants). They wished to join a suit filed by environmental groups (Plaintiffs) regarding a comprehensive land management plan developed by the city of San Diego in cooperation with the Department of the Interior and other federal agencies. Plaintiffs challenged the formation, approval, and implementation of the plan under the Endangered Species Act (ESA). [[308]](#footnote-309)308 Applicants appealed the district court's denial of their motion to intervene, arguing that they qualified as intervenors under Rule 24 because they were third-party beneficiaries to the land management plan.

The Ninth Circuit applied a four-part test under Rule 24(a), as set out in Northwest Forest Resource Council v. Glickman (NFRC). [[309]](#footnote-310)309 Timeliness, the first requirement of the test, was easily met. Under the second requirement, an applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action. The court adopted a standard found in other circuits that "courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene … and declarations supporting the motion as true absent sham, frivolity, or other objections." [[310]](#footnote-311)310 Based on Applicants' submissions, the court concluded that because projects being developed by one of the Applicants were "in the pipeline for design and mitigation assurances and approval" under the land management plan at issue, this status created sufficient legally protectable interests to support intervention. [[311]](#footnote-312)311 It was sufficient that these projects were included in an "approved negotiated project" list, even though the developer had not technically attained third-party beneficiary status under the relevant land **[\*658]** management plan. [[312]](#footnote-313)312

The third requirement of the NFRC test is that the applicant's interest must be substantially affected by the disposition of the action. The court concluded that invalidation or partial revocation of the land management plan as a result of the suit would impair or impede the protectable interest that Applicants had demonstrated. Under the final requirement of the NFRC test, the applicant's interest must not be adequately represented by the existing parties in the lawsuit. A minimal showing by the prospective intervenor is sufficient, and the prospective intervenor need not anticipate trial strategy. Because the City stated that it would not represent Applicants' interests, and because federal agencies cannot be expected to protect private interests, the court concluded that adequate representation was sufficiently in doubt. With all requirements of the NFRC test satisfied, the Ninth Circuit reversed the district court and held that Applicants were entitled to intervene as a matter of right.

B. Standing and Mootness

1. Pritikin v. Department of Energy, 254 F.3d 791 (9th Cir. 2001), cert. denied, 70 U.S.L.W. 3515 (2002).

Pritikin appealed the district court's award of summary judgment to the Department of Energy (DOE). Pritkin had filed a citizen suit alleging that the DOE had violated provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [[313]](#footnote-314)313 and the Administrative Procedure Act (APA). [[314]](#footnote-315)314 Pritikin sought a declaration that, under CERCLA, DOE was required to fund a medical monitoring program by the Agency for Toxic Substances and Disease Registry (ATSDR) to screen the population near the Hanford Nuclear Reservation. [[315]](#footnote-316)315 Pritikin also sought to enjoin the DOE to include the Hanford medical monitoring costs in any future budget requests, reallocate current funds towards medical monitoring, and report to Congress DOE's failure to fund the ATSDR medical monitoring program in compliance with CERCLA. The district court found that it lacked subject matter jurisdiction because Pritikin did not meet the necessary requirements under CERCLA for bringing a citizen's suit [[316]](#footnote-317)316 and **[\*659]** because there was no final agency decision that could be appealed. The Ninth Circuit affirmed but relied on an alternative line of reasoning, finding that Pritikin lacked constitutional standing. [[317]](#footnote-318)317

The Ninth Circuit, citing Lujan v. Defenders of Wildlife (Defenders), [[318]](#footnote-319)318 outlined the three criteria for constitutional standing: injury, causation, and redressability. DOE did not challenge the injury prong of the standing test. Pritikin was born near the Hanford facility and lived there for ten years. Her in utero and childhood exposure to Hanford's hazardous substances damaged her thyroid gland and endocrine system. The court agreed that Pritikin was "qualified to participate in ATSDR's medical monitoring program." [[319]](#footnote-320)319 The court recognized that Pritikin's inability to receive the medical screening proscribed by the Hanford monitoring program was a "cognizable injury." [[320]](#footnote-321)320

However, the Ninth Circuit found that Pritikin failed to satisfy the latter two requirements for constitutional standing. With respect to causation, Pritikin alleged that DOE did not take the necessary steps to "eliminate or substantially mitigate the significant risk to human health" [[321]](#footnote-322)321 because DOE had an affirmative duty to provide the necessary medical monitoring funds to ATSDR. The court rejected Pritikin's reasoning, relying on Simon v. Eastern Kentucky Welfare Rights Organization, [[322]](#footnote-323)322 Duquesne Light Co. v. EPA, [[323]](#footnote-324)323 and Area Transportation, Inc. v. Ettinger [[324]](#footnote-325)324 to determine that Pritikin's injuries were caused by the independent action of a third party. The court suggested that ATSDR was the appropriate defendant for Pritikin's suit because ATSDR is the "party with the statutory power and duty to act." [[325]](#footnote-326)325 The court also noted that ATSDR is not required to wait for DOE funding before acting because ATSDR can seek alternative funds. The **[\*660]** court found that Pritikin's claim that ATSDR could not conduct medical monitoring without DOE funding was "highly speculative and dependent on uncertain actions by [ATDSR]" [[326]](#footnote-327)326 and not directly traceable to DOE inaction.

With respect to the requirement of redressability, the Ninth Circuit also found Pritikin's claim deficient. The court specifically addressed the issue of whether requiring DOE to fund the ATSDR medical monitoring program would result in its implementation. In its analysis, the court returned to Defenders to assess Pritikin's ability to demonstrate redressability. In Defenders, the Supreme Court determined that because other federal agencies were not bound by the Secretary's regulation, compelling the Secretary of the Interior to act would not force those agencies to engage in consultation. [[327]](#footnote-328)327 Therefore, the plaintiffs who challenged the Secretary's failure to act lacked standing. Pritikin distinguished her case from Defenders by noting that unlike the agencies in Defenders, ATSDR was required by statute to act once it found a "significant increased risk of adverse health effects," [[328]](#footnote-329)328 and that funding by DOE would force implementation of the medical monitoring program. The Ninth Circuit rejected Pritikin's characterization, noting that even if DOE provided the necessary funding, ATSDR could still refuse to conduct the medical monitoring.

Next, Pritikin argued that Defenders was distinguishable because in her case DOE was liable for the full cost of the medical monitoring, while in Defenders the Department of the Interior was liable only for a fraction of the costs of the projects in question. The Ninth Circuit rejected this argument as well, pointing out that ATSDR is free to seek alternative sources of funding. Finally, Pritikin alleged that her claim challenged a particular agency action while the plaintiffs in Defenders challenged a general agency action. The court again dismissed her argument, noting that the specificity of the challenged action does not determine redressibility.

At the end of the opinion, the Ninth Circuit specifically noted that it was not addressing the question of "whether Pritikin would have standing if ATSDR were named as a party in this action." [[329]](#footnote-330)329

2. Hall v. Norton, 266 F.3d 969 (9th Cir. 2001).

The Ninth Circuit ruled on requirements for standing under the National Environmental Policy Act (NEPA) [[330]](#footnote-331)330 in a case concerning an exchange of public land in the Las Vegas Valley. In 1996, the Bureau of Land Management (BLM) entered into a non-binding agreement with Del Webb, a private developer, regarding an exchange of 4,975 acres of federal land for private land considered by the agency to be environmentally sensitive. Del Webb planned to build 11,200 homes on the land it received from BLM. In compliance with NEPA, the BLM prepared an environmental assessment **[\*661]** (EA). The EA acknowledged that the Las Vegas Valley was a nonattainment area under the Clean Air Act (CAA) [[331]](#footnote-332)331 for carbon monoxide and particulate matter, and the EA included estimates of the additional emissions the Del Webb development would generate. Based on the EA, BLM returned a finding of no significant impact (FONSI), allowing the land exchange to go forward.

Hall filed suit in federal district court alleging that BLM failed to comply with NEPA and that the exchange would violate the conformity provision of the CAA. [[332]](#footnote-333)332 BLM moved for summary judgment. In response to BLM's motion, Hall submitted an affidavit averring that he resided in the Las Vegas Valley, that since moving to the area he had developed a persistent cough due to dust and air pollution, that previous BLM land exchanges and private development had resulted in increased emissions, and that he regularly traveled throughout areas of the valley that had registered unsafe levels of air pollution. Because land exchanges are exempted from conformity challenges by EPA regulation, [[333]](#footnote-334)333 the district court dismissed the CAA claim for lack of jurisdiction. Nationally applicable regulations can be challenged only in the Court of Appeals for the District of Columbia. [[334]](#footnote-335)334 The district court dismissed Hall's NEPA claim for lack of standing because Hall failed to provide specific facts linking his respiratory ailment to the land to be exchanged. Hall appealed both claims.

On review, the Ninth Circuit concluded that Hall had standing for the following reasons. First, "evidence of a credible threat to the plaintiff's physical well-being from airborne pollutants falls well within the range of injuries to cognizable interests that may confer standing." [[335]](#footnote-336)335 Second, because the rights Hall asserted under NEPA were procedural rights, the court's inquiry into the imminence of threatened harm was "less demanding." [[336]](#footnote-337)336 Hall did not have to show that further study and analysis by the government would have resulted in a different conclusion. Third, with regard to the causation issue, the court found that Hall needed only to establish the reasonable probability that the challenged action would threaten his concrete interest, a degree of certainty less than that required to succeed on the merits of a tort claim. Finally, Hall's claim did not rely on conjecture about the behavior of other parties or on conjecture about whether Del Webb's actions would worsen pollutant levels in the valley. For these reasons, in light of his affidavit, Hall's claim that he would be affected negatively by the land exchange was reasonable.

The Ninth Circuit reversed the district court in part, holding that Hall had standing for his NEPA claim, and affirmed in part, holding that the district court lacked subject matter jurisdiction over the CAA claim.

**[\*662]**

3. Biodiversity Legal Foundation v. Badgley, 284 F.3d 1046 (9th Cir. 2002), supra Part II.A.

C. Ripeness

1. ***Kern*** v. United States Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002), supra Part I.F.

D. Administrative Law

1. Friends of the Cowlitz v. FERC, 253 F.3d 1161 (9th Cir. 2001), amended by 282 F.3d 609 (9th Cir. 2002), supra Part II.E.

2. Pacific Coast Federation of Fishermen's Ass'ns v. National Marine Fisheries Service, 265 F.3d 1028 (9th Cir. 2001), supra Part II.A.

3. Hall v. United States Environmental Protection Agency, 273 F.3d 1146 (9th Cir. 2001), supra Part I.A.

E. Punitive Damages

1. In re the Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).

In the latest chapter of the fallout resulting from the Exxon Valdez's infamous spill, Exxon Corporation and Exxon Shipping Company (Exxon) appealed a jury award of $ 5 billion in punitive damages to plaintiff fishermen, landowners, and others adversely affected by the spill. Exxon and the Captain of the Exxon Valdez, Joseph Hazelwood (Hazelwood) brought additional appeals. The plaintiffs also cross-appealed a number of issues including the district court's grant of summary judgment to the defendants regarding the viability of a claim brought by entities that had suffered purely economic injury.

The Ninth Circuit held that imposing punitive damages against Exxon was appropriate. However, it determined that in light of recent Supreme Court decisions, [[337]](#footnote-338)337 $ 5 billion was excessive and remanded. Summary judgment against those plaintiffs who suffered only economic injuries was improper, and the circuit court remanded the claims to determine whether those plaintiffs could establish damages allowed under state law. All other appeals were denied.

On March 24, 1989, the ***oil*** tanker Exxon Valdez, laden with crude ***oil***, ran aground on Bligh Reef in Prince William Sound and disgorged eleven million gallons of ***oil*** into the waters of the sound. The third mate was in charge of navigating the vessel at the time. Acting against established law and protocol, a very intoxicated Captain Hazelwood [[338]](#footnote-339)338 had ordered the third **[\*663]** mate to guide the ship out of the sound. As the extensive harm from the resulting spill became apparent, the state of Alaska, the United States, and various private parties filed lawsuits. A previous consent decree between Alaska and the United States accounted for reparations for environmental damage. Private parties suing for economic injuries were awarded $ 287 million for compensatory damages, $ 5 billion punitive damages against Exxon, and $ 5000 punitive damages against Hazelwood.

The Ninth Circuit began by examining whether punitive damages were permissible against defendants Exxon and Hazelwood. Exxon claimed that, owing to its considerable expenditures to date, punitive damages served no purpose. [[339]](#footnote-340)339 The court disagreed, finding no precedent for this assertion. The Ninth Circuit also dismissed the argument that punitive damages are not allowable in admiralty law.

The court subsequently dismissed the argument that the consent decree between Alaska and the United States created res judicata and thus barred punitive damages. Pointing to a saving clause and language in the decree characterizing the $ 900 million as compensatory and remedial, the rights of the plaintiffs to bring private actions were retained and res judicata was inapplicable. However, the consent decree did settle damages attributable to environmental degradation and the general public. Therefore, res judicata barred any punitive damages pertaining to those wrongs.

Exxon, citing Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, [[340]](#footnote-341)340 argued that common law punitive damages were impermissible, as they were preempted by the Clean Water Act (CWA). [[341]](#footnote-342)341 The Ninth Circuit pointed out that the Supreme Court's limitation on common law claims under color of the citizen suit provision of the CWA [[342]](#footnote-343)342 applied only to situations in which those claims were for violations of the CWA itself, as opposed to other acts or another statute. [[343]](#footnote-344)343 Such was not the case here because the action was grounded entirely in common law. The court also stated that because the CWA does not expressly limit private causes of action it is reasonable to believe that common law actions are still available. Finally, whereas certain common law remedies for effluent violations were preempted by the CWA if they conflicted with an administrative remedy addressing the same violation, [[344]](#footnote-345)344 no administrative decisions addressed plaintiffs' claims; therefore no conflict existed.

**[\*664]** The circuit court then addressed the standard of proof necessary to demonstrate whether an action is malicious or reckless. Because a preponderance of the evidence is generally the standard of proof in a federal civil action, and because the Supreme Court held permissible those standards when part of state law, [[345]](#footnote-346)345 jury instructions to apply the preponderance of the evidence standard did not constitute an abuse of discretion. Exxon's argument that vicarious liability was an impermissible means of assigning punitive damages under the Supreme Court's ruling in The Amiable Nancy [[346]](#footnote-347)346 also failed. While that decision rested on a finding that the corporation did not have notice of or ratify the behavior of its agent, Exxon had notice that Hazelwood had resumed drinking after treatment for alcoholism but nonetheless gave him command of a supertanker.

Exxon next argued that insufficient evidence existed for a jury to award punitive damages. The Ninth Circuit denied any deficiency of proof in reference to Hazelwood, noting a jury could have reasonably concluded that, among other things, Hazelwood was extremely careless. Again noting Exxon's knowledge of Hazelwood's alcoholism, the court held that a jury could award punitive damages.

The Ninth Circuit then turned to the amount of the punitive damage award. Noting that it is compelled to examine jury awards of punitive damages, [[347]](#footnote-348)347 the court identified two recent Supreme Court decisions setting out the criteria for determining appropriate punitive damages awards. BMW of North America, Inc. v. Gore [[348]](#footnote-349)348 established three guideposts: the degree of reprehensibility of the person's conduct, the ratio of the award to the harm inflicted on the plaintiff, and the difference between the award and the civil or criminal penalties in comparable cases. [[349]](#footnote-350)349 An appellate court must review de novo the district court's determinations. [[350]](#footnote-351)350 If applying these guideposts reveals a gross disproportion between the compensatory and punitive damages, the punitive damages violate due process and are considered excessive because the defendant lacked notice of the severity of penalties.

Examining the reprehensibility of Exxon's actions, the circuit court noted an absence of intent to cause the spill, violence, trickery, or deceit on the part of the Exxon executives. Furthermore, punitive damages are less appropriate for economic injuries (the basis of this claim) than for injuries involving human health or safety. [[351]](#footnote-352)351 The Ninth Circuit also noted that Exxon responded immediately to mitigate the damage of the spill, which should discount the reprehensibility. Those factors, combined with the disparity between the punitive damages awarded against Hazelwood, who directly caused the spill, and those awarded against Exxon, indicate a miscalculation of reprehensibility.

**[\*665]** The court also found disproportionate the ratio of awarded punitive damages to compensatory damages. The court noted that a ratio of between twelve to one and seventeen to one greatly exceeded the four to one ratio the Supreme Court considered appropriate [[352]](#footnote-353)352 and would deter enterprise in ***oil*** shipping, an activity having significant social value. For comparable penalties, the court cited 18 U.S.C. 3571, the Trans-Alaska Pipeline Act, [[353]](#footnote-354)353 and the ***Oil*** Pollution Act [[354]](#footnote-355)354 to arrive at a set of parameters that, on remand, the district court could use to set an appropriate level of punitive damages. [[355]](#footnote-356)355

The court then examined allegations that the jury had considered evidence derived outside of the proceedings. The court found no basis for overturning the district court's finding that such misconduct had not occurred. Exxon argued that compensatory awards for chum salmon and setnetter fishermen were indefensible but cited no applicable law. Because of the degree of uncertainty permeating any jury calculation of those damages, the court refused to overturn the district court's decision.

Hazelwood separately appealed the admissibility of the results of a blood test taken eleven hours after the spill and the individual disability report. While noting the remarkable mishandlings of the blood specimen, the district court nonetheless believed that doubt as to the origin of the specimens would be detected by the laboratory technicians; thus, the court allowed the specimen to be admitted. The district court had found nothing to prevent admission of the disability report, and the Ninth Circuit agreed.

On cross-appeal of the district court's grant of summary judgment, the plaintiffs argued that economic injury alone entitled them to economic recovery. The circuit court first noted that no act of Congress controlled the case at bar, and therefore maritime law could be pre-empted only if state law allowed recovery for purely economic damage. The court remanded for a determination of the appropriateness of such damages based on a balancing test of strong state interest in providing remedies for harm caused by ***oil*** spills against federal legislation that seemed also to also contemplate such remedies. [[356]](#footnote-357)356 The court denied the plaintiffs' conditional cross-appeals to admit further evidence of Hazelwood's alcoholism.

F. Evidence

1. In re the Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001), supra Part V.E.

G. Preemption

1. In re the Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001), supra Part V.E.

**[\*666]**

2. Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199 (9th Cir. 2002).

The Ninth Circuit held that a plaintiff's state law claim for damages based on unenforced violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) [[357]](#footnote-358)357 was preempted because allowing such claims would interfere with agency discretion and unduly burden regulated entities. FIFRA is a comprehensive regulatory scheme controlling the use, sale, and labeling of pesticides. FIFRA prohibits the knowing falsification of any application for the registration of a pesticide [[358]](#footnote-359)358 and provides that EPA must approve all labels proposed by manufacturers. [[359]](#footnote-360)359 FIFRA expressly forbids a state from imposing any requirements for labeling or packaging that are in addition to, or different from, those required by the Act. [[360]](#footnote-361)360

DowElanco manufactures the pesticide Vikane. During application of Vikane, food and drugs must be removed or protectively sealed in nylon polymer bags. When Nathan Kimmel, Inc. (Kimmel) informed DowElanco of its intention to manufacture these bags in competition with DowElanco's brand, DowElanco petitioned EPA under FIFRA for a change in Vikane's labeling. On the basis of allegedly erroneous information submitted by DowElanco, EPA approved the new label, which prohibited consumer use of Kimmel's product, thereby securing DowElanco's market advantage.

Kimmel sued DowElanco in federal court under diversity jurisdiction on a state tort law claim for injunctive relief and damages. The district court dismissed Kimmel's complaint on a 12(b)(6) motion, holding that FIFRA preempted state law. The Ninth Circuit affirmed the district court "because ordinary conflict preemption principles dictated that Kimmel's state law claim [was] impliedly preempted by FIFRA." [[361]](#footnote-362)361

The court relied on a recent Supreme Court decision, Buckman Co. v. Plaintiffs' Legal Committee. [[362]](#footnote-363)362 In Buckman, the plaintiff sued in state court to recover for medical injuries caused by bone screws, alleging that the manufacturer's regulatory consultant had made fraudulent representations to gain FDA approval to market the screws. [[363]](#footnote-364)363 The Court in Buckman held that allowing fraud-on-the-FDA claims for private injury under state tort law would interfere with FDA's balancing of competing statutory objectives. [[364]](#footnote-365)364 Further, allowing state law claims would burden applicants seeking FDA approval in ways not contemplated by Congress by exposing those applicants to diverse state standards. [[365]](#footnote-366)365

Following the Buckman Court's reasoning, the Ninth Circuit found that allowing Kimmel's state claims based on a FIFRA violation would interfere **[\*667]** with EPA's policy objectives and enforcement discretion. Although EPA did not challenge DowElanco's misrepresentations, it was for the agency, not a jury, to police FIFRA's labeling requirements. Because Kimmel's state law claim was based solely on alleged violations of FIFRA under EPA's purview, the court held the claim preempted. The court noted that Kimmel might be able to bring an administrative action within EPA or sue EPA itself under the Administrative Procedure Act. [[366]](#footnote-367)366

3. AGG Enterprises v. Washington County, 281 F.3d 1324 (9th Cir. 2002), petition for cert. filed (U.S. June 6, 2002) (No. 01-1805), supra Part I.G.

H. Jurisdiction

1. United States v. Morros, 268 F.3d 695 (9th Cir. 2001), infra Part V.I.

I. Abstention

1. United States v. Morros, 268 F.3d 695 (9th Cir. 2001).

In a suit surrounding the proposed nuclear waste repository at Nevada's Yucca Mountain, the United States sued the state of Nevada and the state engineer of Nevada because the defendants denied the plaintiff's water permit applications. The United States District Court for the State of Nevada abstained from deciding the question, and the United States appealed. The Ninth Circuit vacated the district court's decision and remanded the case for adjudication on the merits. A dissent was filed by Circuit Judge Hug.

In designating Yucca Mountain the national nuclear waste repository, the United States applied for several water permits that were instrumental in the planned operation of the facility. The decision to approve the permits fell on the state engineer, who could deny the permits for any of three reasons: a lack of unappropriated water, a conflict with existing water rights, or a determination that the proposed use might be detrimental to the public interest. Based on Nevada Revised Statute 459.910, [[367]](#footnote-368)367 which prohibited the storage of high-level nuclear waste in the state, the state engineer found the water use would conflict with state law and would be inherently detrimental to the public interest. The state engineer consequently denied the permits. The United States sued in district court, but the district court abstained from deciding the case based on the Pullman, [[368]](#footnote-369)368 Burford, [[369]](#footnote-370)369 and Colorado River [[370]](#footnote-371)370 doctrines.

The Ninth Circuit first examined whether the district court had jurisdiction based on the existence of a federal question. Noting that the United States complaint sought acknowledgment that the Nuclear Waste **[\*668]** Policy Act (NWPA) [[371]](#footnote-372)371 preempts Nevada Revised Statute 459.910 under the Supremacy Clause, an order requiring the state engineer to contemplate the United States's permit applications without reference to the Nevada statute, and a finding that the state engineer's ruling was arbitrary and capricious, the Ninth Circuit found these pleadings conferred federal question jurisdiction.

The circuit court disagreed with the district court's rationale. The district court held that the United States's constitutional claim was misplaced because the state engineer's decision was not based on Nevada statutory law, but on the public interest, which was merely reflected in the state statute. As a result, the decision could not be preempted under the Supremacy Clause. The Ninth Circuit did not address this novel argument, but instead held that federal question jurisdiction is determined by the "legal construction of [the plaintiff's] allegations." [[372]](#footnote-373)372 Because the plaintiff clearly couched its complaint as a federal question, the district court could either exercise jurisdiction or dismiss the suit as insubstantial. The Ninth Circuit found that the plaintiff's preemption argument was far from insubstantial and that independent subject matter jurisdiction existed under 28 U.S.C. 1345. [[373]](#footnote-374)373

Turning to the question of abstention, the Ninth Circuit lined up the Pullman, Burford, Colorado River, and Younger [[374]](#footnote-375)374 doctrines, reviewed the facts de novo, and methodically dismissed each doctrine as inapplicable. The Ninth Circuit noted that Pullman abstention is appropriate only when three conditions are met: (1) The federal plaintiff's complaint must require resolution of a sensitive question of federal constitutional law; (2) that question must be susceptible to being mooted or narrowed by a definitive ruling on state law issues; and (3) the possibly determinative state law must be unclear. [[375]](#footnote-376)375 The court found that those conditions were not satisfied in the immediate case. The court noted that while Pullman abstention required the court to resolve a sensitive question of federal constitutional law, the case before the Ninth Circuit presented no substantial constitutional issues. Furthermore, Pullman abstention required unclear state law, a condition the Ninth Circuit found did not plague the state of Nevada.

Burford abstention is proper where a complicated state regulatory scheme renders federal judicial rulings of little assistance. [[376]](#footnote-377)376 The Ninth Circuit found that the requirements for Burford abstention were not met in **[\*669]** the plaintiff's case because complex state law issues did not exist. The court also noted that Burford abstention was not appropriate because the United States's case was based on preemption.

The district court primarily cited Colorado River [[377]](#footnote-378)377 as its basis from abstaining from deciding the case. Abstention based on this doctrine was not warranted because, while Colorado River recognized a need for unified state adjudication when sanctioned by Congress, [[378]](#footnote-379)378 Congress did not in this instance express a preference for unified action. Additionally, the facts of Colorado River were dissimilar from the facts before the Ninth Circuit, making application of the doctrine inappropriate. Finally, unlike Colorado River, which involved a state law claim pursued in federal court, this case was based on federal law that the state sought to adjudicate in state court. To this, the Ninth Circuit noted, "it would be surprising indeed if Congress had passed a law expressing a preference for state adjudication of federal preemption issues." [[379]](#footnote-380)379

While the district court did not base abstention on the Younger doctrine, the Ninth Circuit nonetheless explained why it was inapplicable. Younger abstention is designed to "avoid unnecessary conflict between state and federal governments." [[380]](#footnote-381)380 The court noted that there had already been a lengthy history of conflict between Nevada and the United States on the issue of nuclear waste, and therefore abstention based on this doctrine would be "disingenuous." [[381]](#footnote-382)381

The dissent felt that Younger was applicable. Because state proceedings implicating important state interests had been initiated, and those proceedings provided an opportunity to raise federal questions, Younger's three-pronged test was satisfied. Consequently, the dissent would have abstained under color of the Younger doctrine.

Environmental Law

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1. 1 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-2)
2. 2 Id. 7409(b)(1). [↑](#footnote-ref-3)
3. 3 Id. 7407(a). [↑](#footnote-ref-4)
4. 4 See, e.g., S. Rep. No. 101-228, at 24-25, reprinted in 1990 U.S.C.C.A.N. at 3410-11 (discussing minimum controls). [↑](#footnote-ref-5)
5. 5The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress … or any other applicable requirement of this chapter." 42 U.S.C. 7410(l) (2000). [↑](#footnote-ref-6)
6. 6 Hall v. United States Envtl. Prot. Agency, 273 F.3d 1146, 1155 (9th Cir. 2001) (quoting EPA's supplemental brief). [↑](#footnote-ref-7)
7. 7 467 U.S. 837 (1984). [↑](#footnote-ref-8)
8. 8 Train v. Natural Res. Def. Council, 421 U.S. 60, 74 (1975). [↑](#footnote-ref-9)
9. 9 Id. [↑](#footnote-ref-10)
10. 10 General Preamble for Proposed Rulemaking on Approval of State Implementation Plan Revisions for Nonattainment Areas, 44 Fed. Reg. 20,372, 20,375 (Apr. 4, 1979). [↑](#footnote-ref-11)
11. 11 Clean Air Act, 42 U.S.C. 7410(l) (2000). [↑](#footnote-ref-12)
12. 12 Train, 421 U.S. at 79. [↑](#footnote-ref-13)
13. 13 Hall, 273 F.3d at 1161. [↑](#footnote-ref-14)
14. 14 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-15)
15. 15 Borden Ranch P'ship v. United States Army Corps of Eng'rs, No. CIV.S-97-0858, 1999 WL 1797329 (E.D. Cal. Nov. 8, 1999). [↑](#footnote-ref-16)
16. 16 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-17)
17. 17 Id. 1311(a). [↑](#footnote-ref-18)
18. 18 Id. 1362(6). [↑](#footnote-ref-19)
19. 19 Id. 1362(12). [↑](#footnote-ref-20)
20. 20 Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810, 814 (9th Cir. 2001) (citing 33 U.S.C. 1344(a), (d) (2000)), cert. granted, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1243). [↑](#footnote-ref-21)
21. 21 904 F.2d 1276 (9th Cir. 1990). [↑](#footnote-ref-22)
22. 22 Id. at 1285. [↑](#footnote-ref-23)
23. 23 209 F.3d 331 (4th Cir. 2000). [↑](#footnote-ref-24)
24. 24 Id. at 335-37. [↑](#footnote-ref-25)
25. 25 33 U.S.C. 1362(6) (2000). [↑](#footnote-ref-26)
26. 26 Borden Ranch P'ship, 261 F.3d at 815. [↑](#footnote-ref-27)
27. 27 33 U.S.C. 1344(f)(1)(A) (2000). [↑](#footnote-ref-28)
28. 28 Id. 1344(f)(2). [↑](#footnote-ref-29)
29. 29 Id. [↑](#footnote-ref-30)
30. 30 531 U.S. 159 (2001). [↑](#footnote-ref-31)
31. 31 Borden Ranch P'ship v. United States Army Corps of Eng'rs, No. CIV.S-97-0858, 1999 WL 1797329 (E.D. Cal. Nov. 8, 1999). [↑](#footnote-ref-32)
32. 32 SWANCC, 531 U.S. at 174. [↑](#footnote-ref-33)
33. 33 33 U.S.C. 1319(d) (2000). [↑](#footnote-ref-34)
34. 34 Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 308 n.8 (4th Cir. 1986) (declining to address "whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of the [the penalty amount] for that day"), vacated on other grounds, 484 U.S. 49 (1987); Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1138 (11th Cir. 1990) ("the daily maximum penalty applies separately to each violation of an express limitation"); United States v. Smithfield Foods, Inc., 191 F.3d 516, 528 (4th Cir. 1999) (each permit violation "[is] a separate and distinct infraction for purposes of [the] penalty calculation"). [↑](#footnote-ref-35)
35. 35 145 F.3d 1399 (D.C. Cir. 1998). [↑](#footnote-ref-36)
36. 36 Rybachek, 904 F.2d 1276 (9th Cir. 1990). [↑](#footnote-ref-37)
37. 37 Deaton, 209 F.3d 331 (4th Cir. 2000). [↑](#footnote-ref-38)
38. 38Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, … shall be required to have a permit under this section." 33 U.S.C. 1344(f)(2) (2000) (emphasis added). [↑](#footnote-ref-39)
39. 39 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-40)
40. 40 Id. 1365(a)(2). [↑](#footnote-ref-41)
41. 41 Id. [↑](#footnote-ref-42)
42. 42 253 F.3d 1161, 1167 (9th Cir. 2001), amended by 282 F.3d 609 (9th Cir. 2002). [↑](#footnote-ref-43)
43. 43 470 U.S. 821 (1985). [↑](#footnote-ref-44)
44. 44 Sierra Club v. Whitman, 268 F.3d 898, 902 (9th Cir. 2001). [↑](#footnote-ref-45)
45. 45 33 U.S.C. 1319(a)(3) (2000). [↑](#footnote-ref-46)
46. 46 Id. [↑](#footnote-ref-47)
47. 47 Sierra Club v. Whitman, 268 F.3d at 904. [↑](#footnote-ref-48)
48. 48 The court noted that the Conference Committee rejected the Senate bill (which would have mandated the bringing of a civil action by the Administrator) in favor of the House version, which merely authorized civil proceedings. [↑](#footnote-ref-49)
49. 49 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601-9675 (2000). [↑](#footnote-ref-50)
50. 50 Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901-6992k (2000) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992). [↑](#footnote-ref-51)
51. 51 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-52)
52. 52 42 U.S.C. 9607(a) (2000). [↑](#footnote-ref-53)
53. 53 United States v. 150 Acres of Land, 204 F.3d 698, 704 (6th Cir. 2000). [↑](#footnote-ref-54)
54. 54 Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992). [↑](#footnote-ref-55)
55. 55 42 U.S.C. 6903(3) (2000). [↑](#footnote-ref-56)
56. 56 42 U.S.C. 9601-9675 (2000). [↑](#footnote-ref-57)
57. 57 This section states that "any person who … arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances … shall be liable" 42 U.S.C. 9607(a)(3). [↑](#footnote-ref-58)
58. 58 42 U.S.C 9607(b)(2) (2000). [↑](#footnote-ref-59)
59. 59 President Roosevelt created these agencies to supervise production during the war. [↑](#footnote-ref-60)
60. 60 United States v. Shell ***Oil*** Co. (Shell I), 841 F. Supp. 962, 969-73 (C.D. Cal. 1993). [↑](#footnote-ref-61)
61. 61 United States v. Shell ***Oil*** Co. (Shell III), 13 F. Supp. 2d 1018, 1030 (C.D. Cal. 1998). [↑](#footnote-ref-62)
62. 62 United States v. Shell ***Oil*** Co. (Shell II), No. 91-0589, 1995 U.S. Dist. LEXIS 19778 at 6-9, 14-19 (C.D. Cal. Sept. 18, 1995). [↑](#footnote-ref-63)
63. 63 Id. at 14-19. [↑](#footnote-ref-64)
64. 64 Section 120(a)(1) of CERCLA provides that "each department, agency, and instrumentality of the United States … shall be subject to, and comply with [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." 42 U.S.C 9620(a)(1) (1994). [↑](#footnote-ref-65)
65. 65 Pennsylvania v. Union Gas Co., 491 U.S. 1, 10 (1989), overruled on other grounds by Seminole Tribe v. Florida, 517 U.S. 44 (1996). [↑](#footnote-ref-66)
66. 66 The 1986 amendments added the section about federal facilities. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 120, 100 Stat. 1613, 1666 (1986). The waiver language was already present, however. See 42 U.S.C. 9607(g) (1982) (containing language similar to that of 42 U.S.C. 9620(a)(1) (2000)). [↑](#footnote-ref-67)
67. 67 42 U.S.C. 9607(a)(3) (1994). [↑](#footnote-ref-68)
68. 68 Shell II, 1995 U.S. Dist. LEXIS 19778, at 18-19. [↑](#footnote-ref-69)
69. 69 Id. at 19. [↑](#footnote-ref-70)
70. 70 United States v. Shell ***Oil*** Co. (Shell ***Oil*** Co.), No. 00-55077, 2002 WL 1396519, at 8 (9th Cir. June 28, 2002). [↑](#footnote-ref-71)
71. 71 872 F.2d 1373 (8th Cir. 1989). [↑](#footnote-ref-72)
72. 72 Id. at 1384. [↑](#footnote-ref-73)
73. 73 810 F.2d 726 (8th Cir. 1986). [↑](#footnote-ref-74)
74. 74 Id. at 743, 745. [↑](#footnote-ref-75)
75. 75 Shell ***Oil*** Co., 2002 WL 1396519, at 11. [↑](#footnote-ref-76)
76. 76 29 F.3d 833 (3d Cir. 1994). [↑](#footnote-ref-77)
77. 77 46 F.3d 803 (8th Cir. 1995). [↑](#footnote-ref-78)
78. 78 FMC, 29 F.3d at 846. [↑](#footnote-ref-79)
79. 79 46 F.3d 803. [↑](#footnote-ref-80)
80. 80 Id. at 811. [↑](#footnote-ref-81)
81. 81 872 F.2d 1373 (8th Cir. 1989). [↑](#footnote-ref-82)
82. 82 810 F.2d 726 (8th Cir. 1986). [↑](#footnote-ref-83)
83. 83 29 F.3d 833 (3d Cir. 1994). [↑](#footnote-ref-84)
84. 84 The district court had originally believed that the United States conceded that it was liable for one hundred percent of the benzol waste cleanup costs. Shell III, 13 F. Supp. 2d 1018, 1024 (C.D. Cal. 1998). However, although the United States admitted that it was an arranger of the benzol wastes, it argued that it did not concede liability for the entire cost of the cleanup of the benzol wastes. In response to this argument, the district court issued an unpublished order stating that the court allocated one hundred percent of the cleanup costs to the United States for the benzol wastes, even if the United States did not concede liability. [↑](#footnote-ref-85)
85. 85 42 U.S.C. 9613(f)(1) (2000). [↑](#footnote-ref-86)
86. 86 Id. 9607(b)(2). [↑](#footnote-ref-87)
87. 87 For example, the Ninth Circuit stated that, according to the district court, CERCLA's legislative history emphasized that defenses to CERCLA should be narrowly construed. See Shell I, 841 F. Supp. 962, 971 (C.D. Cal. 1993) (discussing legislative history). The Ninth Circuit also relied on cases in other contexts. See Farbwerke Vormals Meister Lucius & Bruning v. Chem. Found. Inc., 283 U.S. 152, 161 (1931) (distinguishing acts between two parties and acts of the United States alone). [↑](#footnote-ref-88)
88. 88 Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6928(e) (2000). [↑](#footnote-ref-89)
89. 89 18 U.S.C. 3663 (2000). [↑](#footnote-ref-90)
90. 90 42 U.S.C. 6928(e) (2000). [↑](#footnote-ref-91)
91. 91 191 F.3d 894 (8th Cir. 1999). [↑](#footnote-ref-92)
92. 92 42 U.S.C. 6926(b) (2000). [↑](#footnote-ref-93)
93. 93 Harmon, 191 F.3d at 902. [↑](#footnote-ref-94)
94. 94 796 F.2d 1197 (9th Cir. 1986). [↑](#footnote-ref-95)
95. 95 Wyckoff, 796 F.2d at 1199 (citing 42 U.S.C. 6926(d) (2000)). [↑](#footnote-ref-96)
96. 96 40 C.F.R. 261.23(a) (2000). [↑](#footnote-ref-97)
97. 97 United States v. Elias, 269 F.3d 1003, 1018 (9th Cir. 2001), petition for cert. filed, 70 U.S.L.W. (U.S. Apr. 4, 2002) (No. 01-1502). [↑](#footnote-ref-98)
98. 98 National Environmental Policy Act of 1969, 42 4321-4370e (2000). Environmental impact statements are required by section 102(c). Id. 4332(C). [↑](#footnote-ref-99)
99. 99 33 U.S.C. 2701-2761 (2000). Requirements for ***oil*** spill plans must comply with 311(j) of the Federal Water Pollution Control Act, 33 U.S.C. 1321(j) (2000). [↑](#footnote-ref-100)
100. 100 Proper jurisdiction for OPA claims concerning compliance of ***oil*** spill response plans with 311(j) of the Federal Water Pollution Control Act lies in the district court. 33 U.S.C. 1321(n) (2000). [↑](#footnote-ref-101)
101. 101 33 U.S.C. 1344 (2000). [↑](#footnote-ref-102)
102. 102 33 U.S.C. 403 (2000). [↑](#footnote-ref-103)
103. 103 43 U.S.C. 1351 (2000). [↑](#footnote-ref-104)
104. 104 National Environmental Policy Act, 42 U.S.C. 4332(C) (2000). [↑](#footnote-ref-105)
105. 105 Edwardsen v. United States Dep't of the Interior, 268 F.3d 781, 785 (9th Cir. 2001). [↑](#footnote-ref-106)
106. 106 30 C.F.R. 254.26, 254.26(b) (2000). [↑](#footnote-ref-107)
107. 107 Edwardsen, 268 F.3d at 786. [↑](#footnote-ref-108)
108. 108 Id. [↑](#footnote-ref-109)
109. 109 The Council on Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act, iii (1997), at http://ceq.eh.doe.gov/nepa/ccenepa/ ccenepa.htm (last visited Mar. 5, 2002). [↑](#footnote-ref-110)
110. 110 Edwardsen, 268 F.3d at 787. [↑](#footnote-ref-111)
111. 111 Id. [↑](#footnote-ref-112)
112. 112 Id. at 789. [↑](#footnote-ref-113)
113. 113 NAAQS for select pollutants are required by section 109 of the Clean Air Act. 42 U.S.C. 7409 (2000). [↑](#footnote-ref-114)
114. 114 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-115)
115. 115 Edwardsen, 268 F.3d at 783. Section 167 of the CAA requires EPA to review projects to ensure prevention of significant deterioration in NAAQS attainment areas. 42 U.S.C. 7477 (2000). [↑](#footnote-ref-116)
116. 116 Edwardsen, 268 F.3d at 790 (quoting EIS). [↑](#footnote-ref-117)
117. 117 Pub. L. No. 101-618, 206(a), 104 Stat. 3289, 3308 (1990). [↑](#footnote-ref-118)
118. 118 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-119)
119. 119 Pub. L. No. 101-618, 201-210, 104 Stat. 3289, 3294-3324 (1990). [↑](#footnote-ref-120)
120. 120 Id. 202 at 3294. [↑](#footnote-ref-121)
121. 121 Id. 205 at 3304. [↑](#footnote-ref-122)
122. 122 Id. 209 at 3317. The Bureau of Reclamation began this project after the passage of the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (1902) as part of the plan to reclaim land using irrigation. [↑](#footnote-ref-123)
123. 123 Pub. L. No. 101-618, 206(a), 104 Stat. 3289, 3308 (1990). [↑](#footnote-ref-124)
124. 124 40 C.F.R. 1502.4(a) (2001). [↑](#footnote-ref-125)
125. 125 Id. 1508.18(b)(3). [↑](#footnote-ref-126)
126. 126 427 U.S. 390 (1976). [↑](#footnote-ref-127)
127. 127 Id. at 406. [↑](#footnote-ref-128)
128. 128 40 C.F.R. 1508.25(a)(2) (2001). [↑](#footnote-ref-129)
129. 129 Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n, 677 F.2d 883 (D.C. Cir. 1981); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985); City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990). [↑](#footnote-ref-130)
130. 130 40 C.F.R. 1508.23 (2001). [↑](#footnote-ref-131)
131. 131 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-132)
132. 132 523 U.S. 726 (1998). [↑](#footnote-ref-133)
133. 133 National Forest Management Act of 1976, 16 U.S.C. 472a, 521b, 1600, 1611-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). [↑](#footnote-ref-134)
134. 134 Tiering avoids "detailed discussion by referring to another document containing the required discussion." ***Kern*** v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002). [↑](#footnote-ref-135)
135. 135 Id. at 1074 (quoting 40 C.F.R. 1508.7 (2001)). [↑](#footnote-ref-136)
136. 136 AGG Enters. v. Washington County, 281 F.3d 1324, 1326 (9th Cir. 2002), petition for cert. filed, 70 U.S.L.W. 3790 (U.S. June 6, 2002) (No. 01-1805). [↑](#footnote-ref-137)
137. 137 49 U.S.C. 14501(c) (2000). [↑](#footnote-ref-138)
138. 138 Id. [↑](#footnote-ref-139)
139. 139 AGG Enterprises, 281 F.3d at 1327 (quoting Branco v. UFCW-Northern California Employers Joint Pension Plan, 279 F.3d 1154, 1157 (9th Cir. 2002)). [↑](#footnote-ref-140)
140. 140 Id. [↑](#footnote-ref-141)
141. 141 Id. (citing New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995)). [↑](#footnote-ref-142)
142. 142 Id.; Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). [↑](#footnote-ref-143)
143. 143 Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995). [↑](#footnote-ref-144)
144. 144 Travelers Ins. Co, 514 U.S. at 655 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1997)). [↑](#footnote-ref-145)
145. 145 Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. 14501(c)(1) (2000). [↑](#footnote-ref-146)
146. 146 H.R. Conf. Rep. No. 103-677, at 85 (1994), reprinted in 1994 U.S.S.C.A.N. 1715, 1757. [↑](#footnote-ref-147)
147. 147 Id. [↑](#footnote-ref-148)
148. 148 Id. [↑](#footnote-ref-149)
149. 149 AGG Enterprises, 281 F.3d 1324, 1329 (9th Cir. 2002) (citing Woodfeathers, Inc. v. Washington County, Oregon, 180 F.3d 1017, 1022 (9th Cir. 1999)), petition for cert. filed, (U.S. June 6, 2002) (No. 01-1805). [↑](#footnote-ref-150)
150. 150 Id. at 1330. [↑](#footnote-ref-151)
151. 151 91 Cal. App. 4th 678 (Cal. Ct. App. 2001). [↑](#footnote-ref-152)
152. 152 AGG Enterprises, 281 F.3d at 1330 (alterations in original) (quoting Pleasant Hill, 91 Cal. App. 4th 678, 717 (Cal. Ct. App. 2001)). [↑](#footnote-ref-153)
153. 153 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-154)
154. 154 50 C.F.R. 402.16 (2001). [↑](#footnote-ref-155)
155. 155 Envtl. Prot. Info. Ctr. v. Simpson Timber Co. (EPIC), 255 F.3d 1073, 1080 (9th Cir. 2001) (quoting Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995)). The court found that Sierra Club, not Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994), as EPIC contended, controlled the case. [↑](#footnote-ref-156)
156. 156 Id. at 1080-81 (quoting the HCP at 195). [↑](#footnote-ref-157)
157. 157 50 C.F.R. 13.23(b) (2001). [↑](#footnote-ref-158)
158. 158 EPIC, 255 F.3d at 1085. [↑](#footnote-ref-159)
159. 159 50 C.F.R. 13.23 (2001). [↑](#footnote-ref-160)
160. 160 The dissent identified ESA section 7 as imposing a "separate, affirmative duty" on FWS to assure that agency actions will not harm listed species. EPIC, 255 F.3d at 1085. [↑](#footnote-ref-161)
161. 161 Id. at 1084-85. Simpson promised to submit THPs that included measures to protect "other species of concern." Id. at 1085. [↑](#footnote-ref-162)
162. 162 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-163)
163. 163 When determining whether to list a species as threatened or endangered the Secretary considers: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." Id. 1533(a)(1) (2000). [↑](#footnote-ref-164)
164. 164 Id. [↑](#footnote-ref-165)
165. 165 Id. 1532(6). [↑](#footnote-ref-166)
166. 166 Id. [↑](#footnote-ref-167)
167. 167 Id. 1532(20). [↑](#footnote-ref-168)
168. 168 Id. 1532(6). [↑](#footnote-ref-169)
169. 169 Id. [↑](#footnote-ref-170)
170. 170 Id. [↑](#footnote-ref-171)
171. 171 Defenders of Wildlife v. Norton, 258 F.3d 1136, 1142 (9th Cir. 2001) (emphasis in original) (quoting United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 549 (1996)). [↑](#footnote-ref-172)
172. 172 Id. at 1143. [↑](#footnote-ref-173)
173. 173 Id. at 1144-45 (citing H.R. Rep. No. 93-412, at 10 (1973) (acknowledging a change from former definition of endangered species, which included only species that faced worldwide extinction)). [↑](#footnote-ref-174)
174. 174 Id. at 1145-46 (quoting 16 U.S.C. 1532(6) (2000)). [↑](#footnote-ref-175)
175. 175 16 U.S.C. 1532(6) (2000). [↑](#footnote-ref-176)
176. 176 Id. [↑](#footnote-ref-177)
177. 177 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-178)
178. 178 The Court's opinion notes that "at the time that the biological opinions were issued and this litigation was originally filed," both the Umpqua cutthroat trout and the Oregon Coast coho salmon were federally listed. Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1031 n.1 (9th Cir. 2001). After this suit was commenced, the Umpqua cutthroat was delisted. The court noted that NMFS is "still required to have completed the biological opinions for the coho salmon," and the cutthroat delisting had "no affect on the case at bar." Id. In a recent turn of events, however, a federal district court has set aside the Oregon Coast coho salmon listing, finding NMFS's action "arbitrary and capricious." Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001) (finding that NMFS listing "arbitrarily excludes "hatchery spawned' coho"). [↑](#footnote-ref-179)
179. 179 Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., 71 F. Supp. 2d 1063 (W.D. Wash. 1999). [↑](#footnote-ref-180)
180. 180 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-181)
181. 181 520 U.S. 154 (1997). [↑](#footnote-ref-182)
182. 182 Pac. Coast Fed'n of Fishermen's Ass'ns, 265 F.3d at 1033. [↑](#footnote-ref-183)
183. 183 Id. at 1033-34. [↑](#footnote-ref-184)
184. 184 Id. at 1035. [↑](#footnote-ref-185)
185. 185 Id. at 1036. [↑](#footnote-ref-186)
186. 186 Id. [↑](#footnote-ref-187)
187. 187 Id. [↑](#footnote-ref-188)
188. 188 Id. at 1037. [↑](#footnote-ref-189)
189. 189 Id. [↑](#footnote-ref-190)
190. 190 Id. [↑](#footnote-ref-191)
191. 191 Id. at 1038 (quoting Programmatic Biological Opinion for the Northwest Forest Plan (1997)). [↑](#footnote-ref-192)
192. 192 Id. [↑](#footnote-ref-193)
193. 193 Id. [↑](#footnote-ref-194)
194. 194 Id. (quoting NMFS). [↑](#footnote-ref-195)
195. 195 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-196)
196. 196 Ariz. Cattle Growers' Ass'n v. United States Fish and Wildlife Serv., 63 F. Supp. 2d 1034, 1045 (D. Ariz. 1998). [↑](#footnote-ref-197)
197. 197 16 U.S.C. 1536 (2000). [↑](#footnote-ref-198)
198. 198 Id. 1538. [↑](#footnote-ref-199)
199. 199 467 U.S. 837 (1984). [↑](#footnote-ref-200)
200. 200 16 U.S.C. 1536(b)(4) (2000). [↑](#footnote-ref-201)
201. 201 Ariz. Cattle Growers' Ass'n v. United States Fish and Wildlife Serv., 273 F.3d 1229, 1239-40 (9th Cir. 2001). See H.R. Rep. No. 97-567, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2826 (indicating that incidental taking would otherwise be a violation of section 9). [↑](#footnote-ref-202)
202. 202 Ariz. Cattle Growers' Ass'n, 273 F.3d at 1240. [↑](#footnote-ref-203)
203. 203 Id. at 1241. [↑](#footnote-ref-204)
204. 204 16 U.S.C. 1536(b) (2000). [↑](#footnote-ref-205)
205. 205 Id. 1536(b)(4). [↑](#footnote-ref-206)
206. 206 Id. [↑](#footnote-ref-207)
207. 207 50 C.F.R. 402.14(g)(7) (2001). [↑](#footnote-ref-208)
208. 208 Ariz. Cattle Growers' Ass'n, 273 F.3d at 1242. [↑](#footnote-ref-209)
209. 209 50 C.F.R. 402.16 (2001). [↑](#footnote-ref-210)
210. 210 Ariz. Cattle Growers' Ass'n, 273 F.3d at 1248. [↑](#footnote-ref-211)
211. 211 Appellants were Biodiversity Legal Foundation, Montana Native Plant Society-Flathead Chapter, Washington Native Plant Society-Northeast Chapter, Peter Lesica from the Southwest Center for Biological Diversity, Bonnie Dombrowski from the Maricopa Audubon Society, Huachuca Audubon Society, Utah Environmental Congress, Oregon Natural Desert Association, Oregon Trout, Native Fish Society, and Oregon Chapter of Trout Unlimited. [↑](#footnote-ref-212)
212. 212 Biodiversity Legal Found. v. Badgley, No. CIV 98-1093-KI, 1999 WL 1042567 (D. Or. Nov. 17, 1999). [↑](#footnote-ref-213)
213. 213 Endangered Species Act of 1973, 16 U.S.C. 1533 (2000). [↑](#footnote-ref-214)
214. 214 Biodiversity Legal Found., 1999 WL 1042567, at 5. [↑](#footnote-ref-215)
215. 215 Section 4(b)(3)(A) states in part that "to the maximum extent practicable, within 90 days after receiving the petition of an interested person" to list a species under the ESA, the Secretary "shall make a finding as to whether the petition presents substantial … information indicating that the petitioned action may be warranted." 16 U.S.C. 1333(b)(3)(A) (2000) (emphasis added). The court refers to this provision as an "initial finding or determination." Biodiversity Legal Found. v. Badgley (Biodiversity Legal Found. II), 284 F.3d 1046, 1051 n.3 (9th Cir. 2002). [↑](#footnote-ref-216)
216. 216 Section 4(b)(3)(B) states in part that "within 12 months after receiving a petition that is found under [4(b)(2)(A)] to present substantial information indicating that the petitioned action may be warranted, the Secretary shall" find that the petitioned action is either unwarranted, warranted, or warranted but precluded. 16 U.S.C. 1333(b)(3)(B) (2000) (emphasis added). The court refers to this provision as a "final determination." Biodiversity Legal Found. II, 281 F.3d at 1051 n.4. [↑](#footnote-ref-217)
217. 217 Id. at 1050. [↑](#footnote-ref-218)
218. 218 Id. [↑](#footnote-ref-219)
219. 219 Biodiversity Legal Found., 1999 WL 1042567. [↑](#footnote-ref-220)
220. 220 99 F.3d 334, 338-39 (9th Cir. 1996). [↑](#footnote-ref-221)
221. 221 Biodiversity Legal Found. II, 284 F.3d at 1052-53 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992)). [↑](#footnote-ref-222)
222. 222 Id. at 1053. [↑](#footnote-ref-223)
223. 223 28 U.S.C. 2201(a) (2000). [↑](#footnote-ref-224)
224. 224 Biodiversity Legal Found. II, 284 F.3d at 1054. [↑](#footnote-ref-225)
225. 225 Id. at 1056. [↑](#footnote-ref-226)
226. 226 174 F.3d 1178, 1191 (10th Cir. 1999). [↑](#footnote-ref-227)
227. 227 5 U.S.C. 701-706 (2000). [↑](#footnote-ref-228)
228. 228 Biodiversity Legal Found. II, 284 F.3d at 1056 (citing Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998)). [↑](#footnote-ref-229)
229. 229 Id. (citing Hilao v. Estate of Marcos, 95 F.3d 848, 851 (9th Cir. 1996)). [↑](#footnote-ref-230)
230. 230 Id. at 1056-57 (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978)). [↑](#footnote-ref-231)
231. 231 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978). [↑](#footnote-ref-232)
232. 232 See 46 U.S.C. 12108(a)(3) (2000) (requiring vessels to be rebuilt in the United States). [↑](#footnote-ref-233)
233. 233 American Fisheries Act, Pub. L. 105-277, div. C, title II, 112 Stat. 2681-616 (1998). [↑](#footnote-ref-234)
234. 234 16 U.S.C. 1851 (notes) (2000). [↑](#footnote-ref-235)
235. 235 Myers v. American Triumph F/V, 260 F.3d 1067, 1070 (9th Cir. 2001). [↑](#footnote-ref-236)
236. 236 46 U.S.C. 12101-12122 (2000). [↑](#footnote-ref-237)
237. 237 46 U.S.C. 12108(a) (2000). [↑](#footnote-ref-238)
238. 238 46 U.S.C. 12104(2) (2000). [↑](#footnote-ref-239)
239. 239 16 U.S.C. 791-828c (2000). [↑](#footnote-ref-240)
240. 240 18 C.F.R. 385.217(b) (2001) (stating if there is "no genuine issue of fact material to the decision" then the Commission may "summarily dispose" of the complaint). [↑](#footnote-ref-241)
241. 241 Friends of the Cowlitz v. FERC, 253 F.3d 1161, 1169 (9th Cir. 2001), amended by 282 F.3d 609 (9th Cir. 2002). [↑](#footnote-ref-242)
242. 242 470 U.S. 821, 832 (1985). "An agency's decision not to take enforcement action should be presumed immune from judicial review under [5 U.S.C.] 701(a)(2)." Id. [↑](#footnote-ref-243)
243. 243 Administrative Procedure Act, 5 U.S.C. 701(a)(2) (2000). [↑](#footnote-ref-244)
244. 244 42 U.S.C. 7412(f)(4) (2000). [↑](#footnote-ref-245)
245. 245 Id. 7412(h). [↑](#footnote-ref-246)
246. 246 Id. 7413(c)(1). [↑](#footnote-ref-247)
247. 247 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-248)
248. 248 U.S. Sentencing Guidelines Manual 2Q1.2(b)(1)(B), 2Q1.2(b)(2) (1998). [↑](#footnote-ref-249)
249. 249 40 C.F.R. 61.141 (2001). [↑](#footnote-ref-250)
250. 250 United States v. Pearson, 274 F.3d 1225, 1229 (9th Cir. 2001). [↑](#footnote-ref-251)
251. 251 42 U.S.C. 7413(c)(1) (2000). [↑](#footnote-ref-252)
252. 252 U.S. Sentencing Guidelines Manual 2Q1.2 (1998). [↑](#footnote-ref-253)
253. 253 Id. 2Q1.2(b)(1)(B). [↑](#footnote-ref-254)
254. 254 Id. 2Q1.2(b)(2). [↑](#footnote-ref-255)
255. 255 Id. 3B1.1. [↑](#footnote-ref-256)
256. 256 Id. 3E1.1. [↑](#footnote-ref-257)
257. 257 Id. 2Q1.2, cmt. n.5. [↑](#footnote-ref-258)
258. 258 Id. 2Q1.2, cmt. n.6. [↑](#footnote-ref-259)
259. 259 Pearson, 274 F.3d 1225, 1230 (9th Cir. 2001). [↑](#footnote-ref-260)
260. 260 Id. at 1231 (citing United States v. Walsh, 8 F.3d 659, 662-63 (9th Cir. 1993), and United States v. Dipentino, 242 F.3d 1090, 1096 (9th Cir. 2001)). [↑](#footnote-ref-261)
261. 261 Clean Air Act, 42 U.S.C. 7413(h) (2000). [↑](#footnote-ref-262)
262. 262 Id. 7412(a)(9) (2000) (""owner or operator' means any person who owns, leases, operates, or controls or supervises"); 40 C.F.R. 61.141 (2001) (an "owner or operator" is one who "owns, leases, operates, controls, or supervises the demolition or renovation operation, or both,"); 40 C.F.R. 61.145(a) (2001) (statutory requirements apply to "each owner or operator of a demolition or renovation activity, including the removal of [regulated asbestos-containing materials]"). [↑](#footnote-ref-263)
263. 263 Pearson, 274 F.3d at 1233. [↑](#footnote-ref-264)
264. 264 According to the Ninth Circuit, the questions asked on direct examination involved Pearson's knowledge of falling asbestos, while Pearson's defense focused on his role during the asbestos removal. [↑](#footnote-ref-265)
265. 265 See Occupational Safety and Health Administration, Fact Sheet No. 03-06 Better Protection Against Asbestos in the Workplace (1993), available at http://www.osha-slc.gov/OshDoc/Fact data/FSNO93-06.html (stating that OSHA regulations require employers to reduce employee exposure to asbestos to the lowest level attainable). [↑](#footnote-ref-266)
266. 266 Defendants were convicted of mail fraud under 18 U.S.C. 2, 1341 (2000). [↑](#footnote-ref-267)
267. 267 16 U.S.C 701 (2000). [↑](#footnote-ref-268)
268. 268 Moore was convicted under 18 U.S.C. 371, 16 U.S.C. 3372 (a)(2)(A), and 16 U.S.C 3373(d)(1)(B) (2000). [↑](#footnote-ref-269)
269. 269 18 U.S.C. 1341 (2000). According to section 1341, mail may not be used to further "any scheme or artifice to defraud, or for obtaining money or property by means of false of fraudulent pretenses, representations, or promises." Id. [↑](#footnote-ref-270)
270. 270 531 U.S. 12, 26-27 (2000). [↑](#footnote-ref-271)
271. 271 United States v. LeVeque, 283 F.3d 1098, 1104 (9th Cir. 2002). [↑](#footnote-ref-272)
272. 272 Id. at 1101. Brow tine refers to a specific antler configuration on the elk. [↑](#footnote-ref-273)
273. 273 Under the Lacey Act, "it is unlawful for any person … to … transport, [or] sell … in interstate … commerce … any … wildlife taken … in violation of any law or regulation of any State." 16 U.S.C. 3372(a)(2)(A) (2000). [↑](#footnote-ref-274)
274. 274 Id. 3372(c)(1)(A). [↑](#footnote-ref-275)
275. 275 16 U.S.C. 3373(d)(1)(B) (2000). [↑](#footnote-ref-276)
276. 276 18 U.S.C. 371 (2000). [↑](#footnote-ref-277)
277. 277 The Ninth Circuit defines "accretion" as "the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain." State v. Jacobs, 380 P.2d 998, 1000-01 (Ariz. 1963). When a river shifts by accretion, any property boundary set by the river moves with it to the center of the new channel. [↑](#footnote-ref-278)
278. 278 The Ninth Circuit defines "avulsion" as a phenomena that occurs when a river "abandons its old course and adopts a new one "suddenly or in such a manner as not to destroy the identity of the land between the old and new channels.'" United States ex rel. Fort Mojave Indian Tribe v. Byrne, 279 F.3d 677, 680 (9th Cir. 2002) (quoting Jacobs, 380 P.2d at 1001), amended and superseded by No. 00-16008, 2002 WL 1060836 (9th Cir. May 29, 2002). When a river shifts by avulsion, any property boundary set by the river remains in the center of the original channel. Id. [↑](#footnote-ref-279)
279. 279 Act of Aug. 11, 1966, Pub. L. No. 89-531, 80 Stat. 340. [↑](#footnote-ref-280)
280. 280 43 U.S.C. 982 (2000). [↑](#footnote-ref-281)
281. 281 Id. 983. [↑](#footnote-ref-282)
282. 282 United States v. O'Donnell, 303 U.S. 501 (1938); Little v. Williams, 231 U.S. 335 (1913); Niles v. Cedar Point Club, 175 U.S. 300 (1899); Brown v. Hitchcock, 173 U.S. 473 (1899); Mich. Land and Lumber Co. v. Rust, 168 U.S. 589 (1897). [↑](#footnote-ref-283)
283. 283 United States v. 62.57 Acres of Land in Yuma County, Ariz., 449 F.2d 5, 8 (9th Cir. 1971). [↑](#footnote-ref-284)
284. 284 50 C.F.R. 660.324 (2002). [↑](#footnote-ref-285)
285. 285 See Midwater Trawlers Co-op. v. Dep't of Commerce, 282 F.3d 710, 714 n.1 (9th Cir. 2002) (listing the individual Stevens Treaties by name and the tribes that were party to each). [↑](#footnote-ref-286)
286. 286 United States v. Washington 135 F.3d 618 (9th Cir. 1998), amended and superceded by 157 F.3d 630, 639 (9th Cir. 1998). [↑](#footnote-ref-287)
287. 287 16 U.S.C. 1801-1883 (2000). [↑](#footnote-ref-288)
288. 288 H.R. Rep. No. 94-445, at 21 (1975), reprinted in 1976 U.S.C.C.A.N. 593, 593-94. [↑](#footnote-ref-289)
289. 289 16 U.S.C. 1853(c), 1855(d) (2000). [↑](#footnote-ref-290)
290. 290 Midwater Trawlers Co-op., 282 F.3d at 715 (citing Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995)). [↑](#footnote-ref-291)
291. 291 Id. (citing Washington v. Daley, 173 F.3d 1158, 1163 (9th Cir. 1999)). [↑](#footnote-ref-292)
292. 292 Daley, 173 F.3d at 1169. [↑](#footnote-ref-293)
293. 293 Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Final 1999 ABC, OY, and Tribal and Nontribal Allocations for Pacific Whiting, 64 Fed. Reg. 27,928, 27,930 (Mar. 24, 1999) (to be codified at 50 C.F.R. pt. 600 at 660). [↑](#footnote-ref-294)
294. 294 Midwater Trawlers Co-op., 282 F.3d at 716. [↑](#footnote-ref-295)
295. 295 United States v. Washington, 157 F.3d 630, 644 (9th Cir. 1998) (quoting United States v. Washington, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994)). The Ninth Circuit noted that in fact the Makah had submitted "undisputed evidence" establishing that the tribe had harvested Pacific whiting at treaty time. Midwater Trawlers Co-op., 282 F.3d at 717 n.4. [↑](#footnote-ref-296)
296. 296 910 F.2d 555 (9th Cir. 1990). [↑](#footnote-ref-297)
297. 297 Id. at 556. [↑](#footnote-ref-298)
298. 298 The Magnuson-Stevens Act requires NMFS to base fishery conservation and management on the "best scientific information available." 16 U.S.C. 1851(a)(2) (2000). [↑](#footnote-ref-299)
299. 299 443 U.S. 658 (1979) modified sub nom. Washington v. United States, 444 U.S. 816 (1979). [↑](#footnote-ref-300)
300. 300 Id. at 685. [↑](#footnote-ref-301)
301. 301 Id. [↑](#footnote-ref-302)
302. 302 United States v. Washington, 384 F. Supp. 312, 415 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975). [↑](#footnote-ref-303)
303. 303 Id. [↑](#footnote-ref-304)
304. 304 Midwater Trawlers Co-op., 282 F.3d at 719 (citing United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974) in which the allocation was calculated for halibut). [↑](#footnote-ref-305)
305. 305 Id. at 720. [↑](#footnote-ref-306)
306. 306 16 U.S.C. 1851(a)(2) (2000). [↑](#footnote-ref-307)
307. 307 Midwater Trawlers Co-op., 282 F.3d at 720. [↑](#footnote-ref-308)
308. 308 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-309)
309. 309 82 F.3d 825, 836 (9th Cir. 1996). [↑](#footnote-ref-310)
310. 310 Southwest Ctr. for Biological Diversity, 268 F.3d 810, 820 (9th Cir. 2001). [↑](#footnote-ref-311)
311. 311 Id. at 821. [↑](#footnote-ref-312)
312. 312 Id. at 820. [↑](#footnote-ref-313)
313. 313 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601-9675 (2000). [↑](#footnote-ref-314)
314. 314 5 U.S.C. 702 (creating right to judicial review for person who has suffered a legal wrong because of agency action). [↑](#footnote-ref-315)
315. 315 42 U.S.C. 9604(i)(9) specifies that once a "significant increased risk of adverse health effects in humans from exposure to hazardous substances" is apparent, ATSDR must implement a medical monitoring program to screen the population at risk. According to this court opinion, ATSDR and DOE had entered into formal agreements to allocate funding for the ATSDR medical monitoring program. When DOE headquarters transferred its Hanford funding responsibility to a field office, that office refused to fund the ATSDR medical monitoring program. [↑](#footnote-ref-316)
316. 316 42 U.S.C. 9659(a)(1) (requiring that the person sued be in violation of a "requirement"); 42 U.S.C. 9659 (a)(2) (requiring failure of agency to perform a "duty"). [↑](#footnote-ref-317)
317. 317 Interestingly, neither party raised the issue of standing in the district court. [↑](#footnote-ref-318)
318. 318 504 U.S. 555, 560-61 (1992) (establishing elements necessary for constitutional standing). [↑](#footnote-ref-319)
319. 319 Pritikin v. Dep't of Energy, 254 F.3d 791, 794 (9th Cir. 2001), cert. denied, 70 U.S.L.W. 3515 (2002). [↑](#footnote-ref-320)
320. 320 Id. at 797. [↑](#footnote-ref-321)
321. 321 Pritikin, 254 F.3d at 797 (quoting 42 U.S.C. 9604(i)(11) (2000)). [↑](#footnote-ref-322)
322. 322 426 U.S. 26 (1976). The Ninth Circuit summarized this case as follows: Indigents unsuccessfully alleged that a combined agency ruling to provide tax benefits to nonprofit hospitals offering indigents medical care only on an emergency basis forced hospitals to deny them care. The Supreme Court found the indigents' claim to be too "speculative" because there was no evidence that the ruling issued by the agencies had forced hospitals to deny indigents medical care. Therefore, the indigents lacked standing. Pritikin, 254 F.3d at 798. [↑](#footnote-ref-323)
323. 323 166 F.3d 609 (3d Cir. 1999). The Ninth Circuit summarized this case as follows: A utility company unsuccessfully challenged EPA's approval of a state's implementation of the Clean Air Act because the state's implementation led to a loss of emission reduction credits. The Third Circuit found the utility company lacked standing because EPA did not have control over how the state had defined its implementation plan. Pritikin, 254 F.3d at 798. [↑](#footnote-ref-324)
324. 324 219 F.3d 671 (7th Cir. 2000). The Ninth Circuit summarized this case as follows: A school bus service unsuccessfully challenged an agency's decision not to force a rival bus service to disgorge federal grants illegally received on the basis that the funds would give the rival bus service a competitive advantage. The Seventh Circuit found that it was too speculative to find a causal connection between the "less harsh sanctions" and the "competitive injury" alleged. Pritikin, 254 F.3d at 799. [↑](#footnote-ref-325)
325. 325 Id. at 798. [↑](#footnote-ref-326)
326. 326 Area Transp. Inc., 219 F.3d at 673. [↑](#footnote-ref-327)
327. 327 Defenders, 504 U.S. 555, 571 (1992). [↑](#footnote-ref-328)
328. 328 Pritikin, 254 F.3d at 800. [↑](#footnote-ref-329)
329. 329 Id. at 801 n.11. [↑](#footnote-ref-330)
330. 330 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-331)
331. 331 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-332)
332. 332 Id. 7506(c)(1). [↑](#footnote-ref-333)
333. 333 40 C.F.R. 93.153(c)(2)(xiv) (2001). [↑](#footnote-ref-334)
334. 334 42 U.S.C. 7607(b)(1). [↑](#footnote-ref-335)
335. 335 Hall v. Norton, 266 F.3d 969, 976 (9th Cir. 2001). [↑](#footnote-ref-336)
336. 336 Id. [↑](#footnote-ref-337)
337. 337 BMW of North America v. Gore, 517 U.S. 559 (1996); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001). [↑](#footnote-ref-338)
338. 338 Testimony revealed that Hazelwood had consumed at least 10 ounces of alcohol before boarding the Exxon Valdez. [↑](#footnote-ref-339)
339. 339 Exxon spent $ 125 million in fines and restitution awards and another $ 2.1 billion in clean-up costs. [↑](#footnote-ref-340)
340. 340 453 U.S. 1 (1981). [↑](#footnote-ref-341)
341. 341 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-342)
342. 342 Id. 1365(e). "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief ..." Id. [↑](#footnote-ref-343)
343. 343 On this issue, the Supreme Court stated, "it is doubtful that the phrase "any statute' includes the very statute in which this statement was contained." National Sea Clammers, 453 U.S. at 15-16. [↑](#footnote-ref-344)
344. 344 See Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that a federal district court could not impose and enforce more stringent effluent limitations than those established by the agency charged with enforcing the CWA; thus, the Act preempted the common law remedy). [↑](#footnote-ref-345)
345. 345 Honda Motor Co. v. Oberg, 512 U.S. 415, 433 (1994). [↑](#footnote-ref-346)
346. 346 16 U.S. (3 Wheat.) 546 (1818). [↑](#footnote-ref-347)
347. 347 Honda Motor Co., 512 U.S. at 432. [↑](#footnote-ref-348)
348. 348 517 U.S. 559 (1996). [↑](#footnote-ref-349)
349. 349 Id. at 575-85. [↑](#footnote-ref-350)
350. 350 Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001). [↑](#footnote-ref-351)
351. 351 While the spill endangered human health and safety, those issues were resolved in the consent decree with Alaska and the United States. [↑](#footnote-ref-352)
352. 352 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991). [↑](#footnote-ref-353)
353. 353 Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651-1656 (2000). [↑](#footnote-ref-354)
354. 354 ***Oil*** Pollution Act of 1990, 33 U.S.C. 2701-2761 (2000). [↑](#footnote-ref-355)
355. 355 Those parameters ranged between $ 150 million and $ 1.03 billion. [↑](#footnote-ref-356)
356. 356 ***Oil*** Pollution Act of 1990, 33 U.S.C. 2701-2718 (2000); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651-1656 (2000). [↑](#footnote-ref-357)
357. 357 7 U.S.C. 136-136y (2000). [↑](#footnote-ref-358)
358. 358 Id. 136j(a)(2)(M). [↑](#footnote-ref-359)
359. 359 Id. 136a(c)(1)(C). [↑](#footnote-ref-360)
360. 360 Id. 136v(b). [↑](#footnote-ref-361)
361. 361 Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199, 1204 (9th Cir. 2002). [↑](#footnote-ref-362)
362. 362 531 U.S. 341 (2001). [↑](#footnote-ref-363)
363. 363 Id. at 343. [↑](#footnote-ref-364)
364. 364 Id. at 348. [↑](#footnote-ref-365)
365. 365 Id. at 348-53. [↑](#footnote-ref-366)
366. 366 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-367)
367. 367 Nev. Rev. Stat. 459.910(1) (2001). [↑](#footnote-ref-368)
368. 368 Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). [↑](#footnote-ref-369)
369. 369 Burford v. Sun ***Oil*** Co., 319 U.S. 315 (1943). [↑](#footnote-ref-370)
370. 370 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). [↑](#footnote-ref-371)
371. 371 Nuclear Waste Policy Act Amendments of 1987, 42 U.S.C. 10101-10270 (2000). [↑](#footnote-ref-372)
372. 372 Ultramar America Ltd. v. Dwelle, 900 F.2d 1412, 1414 (9th Cir. 1990) (alterations in original) (quoting Tennessee v. Union & Planters' Bank, 152 U.S. 454, 460 (1894)). [↑](#footnote-ref-373)
373. 373 28 U.S.C. 1345 (2000). [↑](#footnote-ref-374)
374. 374 Younger v. Harris, 401 U.S. 37 (1971). [↑](#footnote-ref-375)
375. 375 United States v. Morros, 268 F.3d 695, 703-704 (9th Cir. 2001). [↑](#footnote-ref-376)
376. 376 Knudsen Corp. v. Nevada State Dairy Comm., 676 F.2d 374, 376 (9th Cir. 1982). Under Burford, courts may decline to rule on an essential local issue arising out of a complicated state regulatory scheme where (1) the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; (2) federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and (3) federal review might disrupt state efforts to establish a coherent policy. Id. at 377. [↑](#footnote-ref-377)
377. 377 424 U.S. 800 (1976). In Colorado River, the Supreme Court found that "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions...These principles rest on considerations of wise judicial administration, giving regarding to conservation of judicial resources and comprehensive disposition of the litigation." Id. at 817. [↑](#footnote-ref-378)
378. 378 United States v. Morros, 268 F.3d 695, 706-707 (9th Cir. 2001). [↑](#footnote-ref-379)
379. 379 Id. at 707. [↑](#footnote-ref-380)
380. 380 Id. [↑](#footnote-ref-381)
381. 381 Id. at 708. [↑](#footnote-ref-382)