# **2003 NINTH CIRCUIT ENVIRONMENTAL REVIEW: CASE SUMMARY**

Summer, 2004

**Reporter**

34 Envtl. L. 837 \*

**Length:** 57768 words

**Text**

**[\*837]**

I. Environmental Quality

A. Clean Air Act

1. Oxygenated Fuels Ass'n, Inc. v. Davis, 331 F.3d 665 (9th Cir. 2003).

Oxygenated Fuels Association (OFA) sued former California Governor Gray Davis and Alan C. Lloyd, Chairman of the California Air Resources Board (collectively California), claiming that California's law banning the use of methyl tertiary-butyl ether (MTBE) as an oxygenator in gasoline was preempted by the Clean Air Act (CAA) [[1]](#footnote-2)1 and should therefore be enjoined. The district court granted California's motion to dismiss the suit for failure to state a claim, finding that California's MTBE ban was expressly exempted from preemption by CAA section 211(c)(4)(A), [[2]](#footnote-3)3 The Ninth Circuit affirmed the district court decision, finding that although the MTBE ban was not expressly exempted from preemption by the CAA, it did not conflict with the purpose of the CAA, so was not preempted.

Congress enacted the CAA "to protect and enhance the quality of the Nation's air." [[3]](#footnote-4)4 The CAA relies on reductions in motor vehicle emissions to help achieve this goal. As part of the effort to reduce motor vehicle emissions, the CAA requires gasoline in some parts of the country to contain 2% oxygen by weight. [[4]](#footnote-5)5 MTBE is one of the two most widely used chemicals added to gasoline to achieve that objective. The California legislature, having determined that MTBE pollutes groundwater, banned its use as a fuel additive in California as of December 31, 2002. [[5]](#footnote-6)6 OFA, a trade association representing MTBE producers, argued that federal law, rather than state law, governs the regulation of oxygenators, and therefore the California ban was illegal.

**[\*838]** The Ninth Circuit reviewed the district court's dismissal for failure to state a claim de novo. To determine preemption, the Ninth Circuit looked for guidance from the United States Supreme Court, which has recognized three situations in which federal law may preempt state law: 1) when Congress states explicitly that it does, 2) in fields that "Congress intended the Federal Government to occupy exclusively," and 3) when the state law "actually conflicts" with the federal law. [[6]](#footnote-7)7 In addition, federal law does not preempt state law if Congress states explicitly that it does not.

California argued that CAA section 211(c)(4)(B) [[7]](#footnote-8)8 explicitly exempted the state from CAA preemption. This provision states that California "may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive." [[8]](#footnote-9)9 OFA argued that, because MTBE was not banned "for the purpose of motor vehicle emission control," the ban did not fall under the section 211(c)(4)(B) exemption. [[9]](#footnote-10)10 California responded that the exemption still applied because the MTBE ban was part of its overall regulatory scheme for emissions control. Unlike the district court, the Ninth Circuit agreed with OFA's argument. In reaching this conclusion, the Ninth Circuit looked to Supreme Court analyses in two other preemption cases. [[10]](#footnote-11)11 It noted that in both cases, the Supreme Court analyzed the purpose of the challenged provisions themselves, rather than the purpose of the overall regulatory scheme. Using this model, the court held that the correct object of preemption analysis in this case was the law banning MTBE itself rather than California's emissions regulatory scheme as a whole. The Ninth Circuit concluded that, because the purpose of the MTBE ban was to protect groundwater, and the exemption only reaches California laws enacted "for the purpose of motor vehicle emission control," [[11]](#footnote-12)12 the ban was not covered by the exemption.

OFA next contended that the state MTBE ban was impliedly preempted by the federal CAA because, by "standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," [[12]](#footnote-13)13 it conflicts with the goals of the CAA. OFA presented two arguments in support of this contention: first, that legislative history indicates Congress required the government to remain neutral on the subject of oxygenate additives, thus giving gasoline producers an unrestricted **[\*839]** choice of oxygenate fuel additives (the "oxygenate neutrality" argument); second, that Congress "meant to ensure an adequate and reasonably priced supply of oxygenated gasoline," [[13]](#footnote-14)14 which the MTBE ban disrupts by increasing the price of gasoline (the "market disruption" argument).

Responding to the "oxygenate neutrality" argument, the court pointed out that the plain language of the CAA gives primary responsibility for the control of air pollution to state and local governments. Finding the text of the CAA "relatively clear" on this point, [[14]](#footnote-15)15 the court was reluctant to rely on legislative history. The court nonetheless reviewed the legislative history presented by OFA, and found evidence that Congress intended the federal government to remain neutral on the subject of oxygenate additives. The court found no evidence, however, that state governments were required to remain neutral. The court noted, moreover, that both the Ninth Circuit [[15]](#footnote-16)17 have ruled that state governments need not remain neutral, and indeed, have the authority to "choose between oxygenates." [[16]](#footnote-17)18 The court then distinguished the Supreme Court's ruling in Geier v. American Honda Motor Co. [[17]](#footnote-18)19 Noting that Geier required state law to defer to a federal standard, the Ninth Circuit found that in the present case there was no federal standard to which to defer because EPA had not set a standard requiring the use of MTBE. The court thus rejected the argument that the federal CAA requirement for "oxygenate neutrality" implicitly preempts the state MTBE ban.

In addressing OFA's "market disruption" argument, the Ninth Circuit acknowledged that it was required to determine whether the effects of the state MTBE ban interfere with the goals of the CAA. [[18]](#footnote-19)20 Pointing out that the main goal of the CAA is to reduce air pollution, the court questioned OFA's assertion that "a smoothly functioning gasoline market and inexpensive gasoline" [[19]](#footnote-20)21 are also goals of the CAA. The court noted that it had found no reference to such goals in the text of the CAA and that OFA had offered no support for its assertion. The court further noted that it must "presume that Congress did not intend to preempt areas of law that fall within the traditional exercise of the police powers of the states." [[20]](#footnote-21)22 A court can find **[\*840]** preemption in such areas only when it has "clear evidence" that Congress intended to preempt. [[21]](#footnote-22)23 The Ninth Circuit determined that environmental regulation is an area of traditional state control, and found no clear evidence that Congress intended to preempt the ability of states to adopt environmental measures that may cause higher gasoline prices. Thus, the court rejected OFA's argument, finding that increases in the price of gasoline resulting from California's MTBE ban do not frustrate the goals of the CAA and thus are not implicitly preempted by the CAA.

Having found that California's MTBE ban was not preempted by the federal CAA, the Ninth Circuit affirmed the lower court's ruling granting California's motion to dismiss OFA's suit for failure to state a claim.

2. Reno-Sparks Indian Colony v. United States Environmental Protection Agency, 336 F.3d 899 (9th Cir. 2003).

Reno-Sparks Indian Colony and Great Basin Mine Watch (collectively Reno-Sparks) petitioned the Ninth Circuit for review of the 2002 Nevada Rule [[22]](#footnote-23)24 promulgated by the Environmental Protection Agency (EPA). Reno-Sparks challenged parts I and II of the 2002 Nevada Rule, which define the terms "rest of state" or "entire state" as comprising multiple baseline areas, as arbitrary, capricious, and not in accordance with the law under the Administrative Procedure Act (APA). [[23]](#footnote-24)25 The Ninth Circuit held that the 2002 Nevada Rule is not arbitrary or capricious under the APA, and that the 2002 Nevada Rule correctly applied the "rest of state" or "entire state" reference to an area encompassing over 250 baseline areas within Nevada which were established when EPA implicitly accepted the baseline areas proposed by the State of Nevada in 1977.

The 1977 amendments to the Clean Air Act [[24]](#footnote-25)26 established baseline areas within each state after requesting state proposals for the boundaries of such baseline areas. The baseline date for a given area "is established when a major stationary source or major modification located in that baseline area submits an application for a permit under the appropriate regulations." [[25]](#footnote-26)27 The Clean Air Act has several sets of standards with respect to air quality, including the Prevention of Significant Deterioration (PSD) program and the National Ambient Air Quality Standards (NAAQS). NAAQS are the standards that are commonly required for compliance with the Clean Air Act. The purpose of the PSD standards is to maintain the air quality in areas that had very clean air at the beginning of the program. Generally, areas designated under the NAAQS program are allowed to have higher levels of pollution than areas designated under the PSD standards. The PSD standards apply **[\*841]** only in areas that have been previously classified as attainment or unclassifiable. Until the baseline date has been established, minor sources operating in the baseline area are subject to NAAQS and not the PSD program. The EPA rule listing official designations and baseline areas for Nevada and other states listed nonattainment areas separately, and then lumped together the portion of the state in attainment into a "rest of state" or "whole state" category shown on only one line.

In December 2001, ***Oil***-Dri Corporation proposed mining in Nevada near land belonging to the Reno-Sparks Indian Colony. Because the baseline area around the colony had not been triggered as of the date of the proposal, ***Oil***-Dri was not required to comply with the PSD regulations of the Clean Air Act. Reno-Sparks Indian Colony requested that EPA "subject ***Oil***-Dri to the PSD regulations of the Clean Air Act," [[26]](#footnote-27)28 because the terms "rest of state" and "entire state" indicated the baseline area was a large area encompassing almost the entire state, and therefore it had been triggered by previous applications from major sources.

In response to this request, EPA promulgated the 2002 Nevada Rule, which states that the terms "rest of state" and "entire state" refer not just to one large baseline area but to over 250 separate baseline areas. [[27]](#footnote-28)29 Reno-Sparks then filed this request for review, arguing that the 2002 Nevada Rule was arbitrary and capricious under the APA.

The APA standard of review applicable to the Nevada Rule is that, unless the rule is "arbitrary, capricious, or otherwise not in accordance with the law," it should be upheld. [[28]](#footnote-29)30 To determine whether Part I of the 2002 Nevada Rule was valid, the Ninth Circuit analyzed "(1) whether Nevada initially proposed the creation of 254 baseline areas in its 1977 submission to the EPA; (2) whether the EPA adopted Nevada's recommendation with respect to baseline areas; and (3) whether any intervening regulatory action by the EPA changed the nature of Nevada's baseline area designations." [[29]](#footnote-30)31

Focusing on Nevada's original proposal for baseline areas, the court found support for EPA's interpretation. In 1977, Nevada submitted to EPA a proposal that created baseline areas corresponding with already defined hydrographic areas that called for 254 separate baseline areas. EPA offered an internal memo and statement in its 1979 rule that showed it had adopted the classifications in Nevada's 1977 proposal. In addition, EPA began to use these designations without making any changes to the boundaries of the areas. EPA tables indicating the amount of pollutant in each baseline area for each state use asterisks when EPA changed a state's designation of a baseline area. The "rest of state" or "entire state" designations within the table for Nevada did not contain an asterisk, which indicated EPA had not combined any of the separate baseline areas that Nevada had proposed. [[30]](#footnote-31)32 **[\*842]** Further, the court found that for 254 separate baseline areas in Nevada, EPA had consolidated the classification that applied to most of the baseline areas, and labeled it "rest of state" or "entire state" to avoid having to list 254 separate areas with the same levels of pollutants. EPA used the term "rest of state" or "entire state" only once in each table, indicating that it did not intend "rest of state" or "entire state" to apply to more than one area.

Reno-Sparks contended that a 1991 EPA regulation "stated that the term "rest of state' should be "assumed' to constitute a single baseline area." [[31]](#footnote-32)33 Specifically, the regulation states that "with respect to areas identified as "Rest of State' it should be assumed that such reference comprises a single area designation for PSD baseline area purposes." [[32]](#footnote-33)34 Although Reno-Sparks argued that this definition of "rest of state" should be applied to the "rest of state" designation for Nevada, the Ninth Circuit ruled that because the 1991 rule was not directed specifically at Nevada, did not purport to change the Nevada regulations, stated an assumption rather than a mandate, and contained no comment regarding its effect upon Nevada (implying that no one at EPA thought this definition of "rest of state" would be applied to Nevada), EPA was reasonable and not arbitrary or capricious in reaching its conclusion that the "rest of state" definition within the 1991 rule did not change the baseline areas in Nevada. Therefore, the Ninth Circuit concluded that Nevada's 1977 submission to EPA did propose the creation of 254 baseline areas, that EPA did adopt the baseline areas that Nevada had recommended, and that EPA had taken no regulatory action that would change the nature of these baseline area designations.

Part II of the Nevada Rule is titled "Clarification of the[particulate matter-10 micrometer (PM-10)] table" and discusses the controversy regarding the meaning of "rest of state" within the table, then states that "the term "rest of state' refers to the hydrographic areas that had been approved by EPA as [total suspended particulate (TSP)] baseline areas in the State of Nevada." [[33]](#footnote-34)35 In order to determine the validity of Part II of the 2002 Nevada Rule, the Ninth Circuit considered the regulatory history of PM-10. Originally the Clean Air Act required the measurement of TSP in the air; in 1993 this was changed to PM-10, which is a measure of particulate matter 10 micrometers or less in diameter. At that time EPA decided to use the same baseline areas for PM-10 as were already used for TSP. Although Reno-Sparks argued that a November 13, 2002 rule proposed to ""redesignate the current single unclassifiable area for [PM-10] into numerous individual areas to be consistent with area definitions for other pollutants,'" [[34]](#footnote-35)36 the Ninth Circuit looked to the commentary surrounding the November 13 Rule. The court found that EPA responded to comments, stating that ""the State's 253 hydrographic areas had already been established as the PSD baseline areas **[\*843]** for particulate matter… . Today's rule has no effect on the PSD baseline areas for PM-10 in the State.'" [[35]](#footnote-36)37 Based on this comment, the Ninth Circuit concluded that the baseline areas in Nevada have always been divided in substantially the same way, and that there is not one large "rest of state" baseline area.

Finally, the Ninth Circuit ruled that EPA had not acted in violation of the APA by promulgating the 2002 Nevada Rule without allowing for notice and comment. Since the 2002 Nevada Rule clarified the existing law rather than changing existing law or creating new law, the court held the rule was "interpretive rather than legislative," and that the APA does not require notice or opportunity to comment before the enactment of interpretive rules. [[36]](#footnote-37)38 Thus, the Ninth Circuit held that EPA's interpretation of the Clean Air Act in Parts I and II of the 2002 Nevada Rule was not arbitrary, capricious, or contrary to the law under the APA and therefore denied Reno-Sparks's petition for review of the 2002 Nevada Rule.

3. Sierra Club v. United States Environmental Protection Agency, 346 F.3d 955 (9th Cir. 2003), amended by 352 F.3d 1186 (9th Cir. 2003), cert. denied, 124 S. Ct. 2873 (2004).

The Sierra Club challenged the issuance of a final rule by the United States Environmental Protection Agency (EPA) which stated that nonattainment of National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) in a planning area in California was a result of emissions from Mexico. In its rule, EPA decided that the planning area had attained NAAQS and labeled the area as in "attainment" under the Clean Air Act (CAA). [[37]](#footnote-38)39 The Ninth Circuit agreed with the Sierra Club that EPA's decision was contrary to the scientific evidence EPA used to make its decision. The court found that further proceedings would not be useful and, as a result, vacated EPA's order and remanded the case to EPA with the instruction to reclassify the planning area as a "serious" nonattainment area.

Under the CAA, states are required to meet standards for levels of particulate matter. [[38]](#footnote-39)40 One requirement is that the PM concentration in an attainment area cannot exceed 150 g/m[su'3'] for more than one day per year (24-hour standard). [[39]](#footnote-40)41 The other requirement is that the PM concentration cannot exceed a mean of 50 g/m[su'3'] for the entire year (annual standard). [[40]](#footnote-41)42 Areas that exceed the 24-hour standard for PM more than one day a year, or exceed the annual standard for the year, are classified as "nonattainment" areas. [[41]](#footnote-42)44 For moderate attainment areas, EPA gives the state a deadline by which it must **[\*844]** meet the NAAQS. [[42]](#footnote-43)45 If the state does not meet this deadline, the area is reclassified as serious [[43]](#footnote-44)47 However, if the state demonstrates that emissions from other countries are the source of the nonattainment, the area will not be reclassified as a nonattainment area. [[44]](#footnote-45)48

At issue in this challenge was the Imperial Valley Planning Area, an area of southeast California bordered by Mexico. EPA classified Imperial Valley as a moderate nonattainment area, and according to the CAA, California had until December 31, 1994 to comply with the PM NAAQS or be classified as a serious nonattainment area. [[45]](#footnote-46)49

When EPA failed to take action during the six years after the attainment date of December 31, 1994, Sierra Club sued EPA in the District Court for the District of Columbia to reclassify the Imperial Valley as a serious nonattainment area. In a consent decree, EPA agreed to make its Imperial Valley determination by October 9, 2001. On August 10, 2001, EPA gave notice that it intended to issue a rule that California had proven that Imperial Valley had exceeded the PM NAAQS only because of emissions from Mexico. This determination was based on wind direction and other sources of evidence. Sierra Club commented on the proposed rule and stated that the evidence cited by EPA did not prove California's contention, that California assumed but did not show causation between emissions from Mexico and CAA violations, and that California did not give reasons for exceeding the PM NAAQS after December 31, 1994. EPA rejected Sierra Club's comments and issued a final rule on October 19, 2001 that emissions from Mexico had caused the PM NAAQS exceedences in the Imperial Valley. Sierra Club petitioned the Ninth Circuit to review EPA's determination under the Administrative Procedure Act (APA). [[46]](#footnote-47)50

The court reviewed EPA's rule under the APA's arbitrary and capricious standard [[47]](#footnote-48)51 to determine whether EPA could "articulate[] a rational connection between the facts found and the choice made." [[48]](#footnote-49)52 Although the court gave deference to EPA's interpretation of technical information, it agreed with Sierra Club that EPA's evidence failed to show that emissions from Mexico caused the PM NAAQS to be exceeded. The court focused on wind data for two days in 1993 when the PM NAAQS were not met.

The court first addressed whether it had to find that emissions from Mexico caused the exceedances on either or both days to vacate EPA's finding. Because the air quality monitor sampled the air on every sixth day, the number of days the PM exceeded NAAQS was adjusted to account for **[\*845]** this sampling rate. Therefore, if the court found that emissions from Mexico did not cause either of the two exceedances, the 24-hour standard was actually exceeded 4.3 days per year. If emissions from Mexico did not cause one of the exceedances, the total was actually 2.14 days per year. As a result, the court had to find that emissions from Mexico caused both exceedances to find that Imperial Valley complied with the CAA 24-hour standards.

For EPA's theory about the emissions to be true, winds on those days must have been blowing from Mexico into California, or from the south. EPA's evidence showed that winds on those days were predominantly from the northwest and only nominally from the south or southwest. The Ninth Circuit found that EPA's definition of southerly winds was "at the least, expansive and, at most, positively incorrect." [[49]](#footnote-50)53 In addition, the southerly winds identified by EPA were from the west-southwest and did not show that the winds came from the area of Mexico that EPA claimed was the source of the emissions. The evidence did not prove EPA's theory that the emissions came from Mexico and, as a result, did not excuse Imperial Valley from NAAQS violations. The court decided that further proceedings would not be helpful because, based on EPA's evidence, emissions from Mexico could not have caused the PM exceedances. The Ninth Circuit granted Sierra Club's petition for review, vacated EPA's final rule, and remanded the case to EPA with instructions to label the Imperial Valley a serious nonattainment area.

B. Clean Water Act

1. Northern Plains Resource Council v. Fidelity Exploration and Development Co., 325 F.3d 1155 (9th Cir. 2003), cert. denied, 124 S. Ct. 434 (2003).

Northern Plains Resource Council (NPRC) appealed after the district court granted summary judgment to Fidelity Exploration and Development Company (Fidelity). NPRC brought a citizen suit under the Clean Water Act (CWA) [[50]](#footnote-51)54 against Fidelity alleging illegal discharges into the navigable waters of the United States. The Ninth Circuit reversed the grant of summary judgment to Fidelity and remanded to the district court for entry of summary judgment in favor of NPRC.

Fidelity extracts coal bed methane gas from the Powder River Basin in Montana. The extraction process involves pumping large quantities of groundwater (coal bed methane groundwater, hereinafter CBM water) - groundwater that contains several pollutants listed by Environmental Protection Agency (EPA) regulations [[51]](#footnote-52)55 - to the surface. CBM water is characterized by high concentrations of minerals, measurable quantities of **[\*846]** metals such as arsenic and lead, as well as a Sodium Absorption Rate (SAR) 40 to 60 times greater than that of nearby surface waters.

In 1998, Fidelity contacted the Montana Department of Environmental Quality (MDEQ) about the possibility of discharging CBM water into the Tongue River and Squirrel Creek. MDEQ informed Fidelity by letter that there was no need to seek a Montana Pollution Discharge Elimination System (MPDES) permit. MDEQ cited an exemption in the Montana Code that allowed discharges of unaltered groundwater. [[52]](#footnote-53)56 However, MDEQ also warned Fidelity that EPA did not agree with this permit exclusion because EPA believed the provision excluded discharges that might otherwise be covered by the CWA. Though Fidelity sought an MPDES permit in 1999 anyway, the company had already begun discharging unaltered CBM water into the Tongue River without a permit.

In 2000, NPRC sent a Notice of Intent to Sue to Fidelity, MDEQ, and EPA, alleging unpermitted discharges. The parties filed cross motions for summary judgment stipulating that out of the five elements necessary to prove a violation of the CWA (discharge, of a pollutant, from a point source, to a navigable water, without a permit), the only element at issue was whether the CBM water constituted a pollutant. The district court held that the CBM groundwater was not a pollutant under the CWA, and alternatively, even if the groundwater was considered a pollutant, that Montana State law exempted Fidelity's discharges for permit requirements. The district court granted summary judgment in favor of Fidelity.

The Ninth Circuit reviewed the grant of summary judgment de novo. The court first addressed the issue of whether CBM water constitutes a "pollutant" under the CWA. Fidelity argued that because "unaltered groundwater" was not specifically listed, their groundwater did not constitute a "pollutant" for the purposes of the CWA. [[53]](#footnote-54)57 The court rejected this argument based on the plain language of the statute. Referring to the dictionary definitions of both "industry" and "waste," the court found that CBM water falls into the category of industrial waste. [[54]](#footnote-55)58 Industry is "the commercial production and sale of goods and services" and waste is defined as "any useless byproduct of a process." [[55]](#footnote-56)59 Thus Fidelity's CBM water constituted "industrial waste" because Fidelity was in the business of producing methane gas for commercial purposes and because their production method created the byproduct of CBM water. As industrial waste, the court held that the CBM water was clearly a pollutant for the purposes of the CWA.

The Ninth Circuit gave two additional reasons for holding that Fidelity's CBM water was a pollutant under the CWA. First, Fidelity's CBM water was "produced water" under EPA regulations. These regulations define "produced water" as "water … brought up from the hydrocarbon-bearing **[\*847]** strata during the extraction of ***oil*** and gas." [[56]](#footnote-57)60 The court determined that CBM water met this definition because it is pumped up from coal bed seams to extract methane gas. The court then held that the CWA only exempts produced water from permitting requirements where it is disposed of in a well and does not degrade other water bodies. [[57]](#footnote-58)61 The court decided that Fidelity's discharge did not meet this exemption because it discharged directly into a navigable water rather than a state approved well.

Second, the Ninth Circuit held that the classification of the CBM water as a pollutant would be consistent with the CWA's definition of pollution - "the manmade or man-induced alteration of the chemical, physical, biological, or radiological integrity of water." [[58]](#footnote-59)63 and reasoned that allowing the exemption of "massive pumping of salty, industrial waste water into protected water … to the detriment of farmers and ranchers" would contravene the purposes of the CWA. [[59]](#footnote-60)64 Moreover, the Ninth Circuit repudiated the district court's holding - and Fidelity's arguments - that the discharges did not constitute a pollutant because the CBM water was unaltered. Specifically the Ninth Circuit addressed the reliance of both Fidelity and the district court on Association to Protect Hammersly, Eld, & Totten Inlets v. Taylor Resources, Inc. (APHETI) [[60]](#footnote-61)65 for the proposition that any discharge of unaltered water would not qualify as a pollutant. The Ninth Circuit clarified that the holding in APHETI dealt only with the meaning of "biological materials." [[61]](#footnote-62)66 The court explained that APHETI could not be read to require human transformation of every material before it would constitute a pollutant. The court held that the unaltered state of Fidelity's CBM water was inconsequential when the water itself contained contaminants.

The Ninth Circuit then considered whether Montana law exempted Fidelity's CBM water from the permit requirements under the CWA. Fidelity argued, and the district court agreed, that EPA had implicitly approved the CBM water exemption by authorizing the Montana program. The Ninth Circuit held that the CWA did not grant even EPA the authority to create exemptions for discharges "otherwise subject to the CWA." [[62]](#footnote-63)67 Because EPA has no such exemption power, the court reasoned that EPA could not approve such an exemption through the state authorization process.

The court then examined the issue of whether Montana alone could create an exemption from the permit requirements of the CWA. The court **[\*848]** held that Montana state law cannot impose restrictions on the CWA unless the statute clearly provides this authority; and the court did not find such a grant of authority in the CWA. [[63]](#footnote-64)69 precluded any serious argument that Montana state law could contradict or limit the scope of the CWA. Thus, the court held that the Montana exemption was invalid. The Ninth Circuit reversed the grant of summary judgment to Fidelity, and remanded for an entry of summary judgment for NPRC.

2. Environmental Defense Center, Inc. v. United States Environmental Protection Agency, 344 F.3d 832 (9th Cir. 2003), cert. denied, 124 S. Ct. 2811 (2004).

Environmental, industrial, and municipal groups challenged a final rule issued by the United States Environmental Protection Agency (EPA) under the Clean Water Act (CWA) [[64]](#footnote-65)70 in three independent actions in three federal courts of appeals. The actions were consolidated and heard before a Ninth Circuit panel. After the panel issued its opinion, [[65]](#footnote-66)71 petitioners requested rehearing en banc. The Ninth Circuit panel vacated its previous opinion, replaced it with this opinion, and denied the petition for rehearing with one judge dissenting.

The Texas Cities Coalition on Stormwater and the Texas Counties Stormwater Coalition (collectively municipal petitioners), the Environmental Defense Center and the Natural Resources Defense Council (collectively environmental petitioners), and the American Forest and Paper Association and the National Association of Home Builders (collectively industrial petitioners) challenged EPA's Phase II rule instructing certain small construction sites and small municipal storm sewer systems to comply with the requirements of the CWA's National Pollutant Discharge Elimination System (NPDES). [[66]](#footnote-67)72 After considering the petitioners' 22 challenges, the Ninth Circuit remanded the rule to EPA to address three parts of the rule relating to issuing notices of intent for general permits and a fourth part of the rule pertaining to forest roads. The court dismissed all other challenges to the rule.

Stormwater runoff is a major source of water pollution in the United States. Stormwater contains contaminants from industrial facilities, construction sites, and urban development, as well as from illicit discharges into sewer systems. The CWA requires any person who discharges pollutants from a "point source" into the nation's waters to obtain an NPDES permit. [[67]](#footnote-68)73 Point sources include "any discernible, confined and discrete conveyance" **[\*849]** such as a pipe, well, or vessel, and include storm sewers. [[68]](#footnote-69)74 Congress amended the CWA in 1987 to regulate stormwater runoff pollution and require that any person conducting industrial activity and discharging stormwater into medium or large-sized municipal sewer systems obtain an NPDES permit. [[69]](#footnote-70)75 This legislation was to be implemented in two phases: Phase I, promulgated in 1990, regulates large discharge sources, leaving to Phase II the regulation of sources of discharge not covered under Phase I. [[70]](#footnote-71)76 EPA's Phase II Rule requires NPDES permits for discharges from small municipal separate storm sewer systems (MS4s) and from small construction sites - those between one and five acres in size. [[71]](#footnote-72)77 A small MS4 can obtain a permit to discharge by submitting an individual management plan covering six specified categories, [[72]](#footnote-73)78 by submitting a notice of intent that it will comply with a general permit that already exists, [[73]](#footnote-74)79 or by seeking a permit that does not require the MS4 to regulate a third party. [[74]](#footnote-75)80 Small construction sites can apply either for an individual permit or for coverage under an existing general permit. [[75]](#footnote-76)81 When EPA issued its final Phase II rule in October 1999, various challenges from industries, municipalities, and environmental groups arose, culminating in this appeal.

The Ninth Circuit has jurisdiction to review EPA regulations under section 509 of the CWA. [[76]](#footnote-77)82 The court began by evaluating the municipal petitioners' challenge that EPA exceeded its statutory and constitutional authority by forcing small MS4s to regulate third parties in order to receive a permit under the Phase II Rule. The municipal petitioners first claimed that EPA exceeded its authority under the CWA because Congress did not explicitly include permitting as an element of the program to regulate small MS4s, and thus intended to exclude permitting from EPA's authorized duties. CWA section 402(p)(6) [[77]](#footnote-78)83 of the CWA outlines EPA's duty to create a program to regulate the Phase II point sources. The Ninth Circuit stated that although permits were not listed in the statute, the language was nonexclusive and Congress's silence was more reasonably interpreted as giving EPA the flexibility not to use permits, rather than barring EPA from using permits, especially given the temporary moratorium on permits for Phase II dischargers also outlined in the statute. [[78]](#footnote-79)84 The court also dismissed the municipal petitioners' argument that the structure of the CWA implies that permits are only required for large and medium MS4s. The court stated **[\*850]** that the wording of CWA section 402(p)(3) [[79]](#footnote-80)85 of the CWA could be interpreted as applying the permit requirement to all types of MS4s, and concluded that EPA did not exceed its statutory authority in requiring permits as part of the Phase II Rule.

The municipal petitioners also raised two constitutional challenges to the Phase II Rule. They first argued the rule violated the Tenth Amendment by requiring MS4s to regulate third parties. Under the Tenth Amendment, the federal government cannot compel states to implement federal regulatory programs, including compelling states to regulate third parties. The federal government can, however, "encourage states and municipalities to implement federal regulatory programs." [[80]](#footnote-81)86 In this case, the Phase II Rule gives a small MS4 three choices by which it can obtain a permit: giving EPA a notice of intent that it will comply with an existing general permit, applying for an individual permit, or applying for an individualized permit under the program for large and medium-sized MS4s. The first two options require the MS4 to implement six "Minimum Measures," which include eliminating illicit discharges and reducing pollution from construction sites and development activities. [[81]](#footnote-82)87 The municipal petitioners contended that these requirements unconstitutionally forced them to regulate third parties. However, the Ninth Circuit held that because MS4s could choose to apply for a permit under Phase I without implementing the Minimum Measures, the permit system did not "compel" the state and thus did not violate the Tenth Amendment. [[82]](#footnote-83)88

The Ninth Circuit also rejected the municipal petitioners' argument that the Phase II Rule violated the First Amendment [[83]](#footnote-84)89 because one of the Minimum Measures required small MS4s to educate the community about the impacts of stormwater pollution on water bodies. [[84]](#footnote-85)90 They claimed that EPA's regulation forced them to deliver messages they might not want to deliver. The Ninth Circuit characterized the permit requirements as a regulatory scheme, distinguishable from protected speech. Relying on three characteristics outlined in Glickman v. Wileman Brothers and Elliott, Inc., [[85]](#footnote-86)91 the court held that the Phase II Rule did not violate the First Amendment. First, the court found that the Phase II Rule did not restrain the MS4s' freedom to communicate a message to an audience. In addition, the rule did **[\*851]** not force the MS4s to endorse any political or ideological positions. Finally, while the regulation may require some type of speech, it did not compel the MS4s to engage in any particular speech.

The municipal petitioners' final argument was that EPA did not follow the notice and comment procedures of informal rule-making under the Administrative Procedure Act (APA). [[86]](#footnote-87)93 which the court has interpreted to mean that a final rule be anticipated from reading the proposed rule. [[87]](#footnote-88)94 The municipal petitioners claimed that the Phase II Rule was not a "logical outgrowth" of EPA's proposed rule because the proposed rule did not contain the alternative of obtaining a permit under the Phase I permitting scheme. [[88]](#footnote-89)95 The Ninth Circuit held that the alternative permitting option contained elements that were all described within the proposed rule, and that the municipal petitioners had the opportunity to object to aspects of the Phase II Rule during the notice and comment period.

After reviewing the municipal petitioners' arguments, the court next turned its attention to the environmental petitioners' arguments. The environmental petitioners argued that the permit system allowed municipalities to obtain permits in a way that creates "an impermissible self-regulatory system" because it lacked proper agency and public oversight. [[89]](#footnote-90)96 The Phase II Rule allowed dischargers to obtain permission to discharge under an existing general permit by filing a notice of intent (NOI) and addressing the Minimum Measures. [[90]](#footnote-91)97 The NOIs, which are not reviewed by EPA prior to discharge, contain a pollution control program to "reduce pollutants to the "maximum extent practicable.'" [[91]](#footnote-92)98 The environmental petitioners claimed that granting permits based on these unreviewed NOIs violated the CWA because EPA failed to assure that the dischargers are actually reducing pollution to "the maximum extent practicable." [[92]](#footnote-93)99

The court agreed with the environmental petitioners, finding that the Phase II Rule was contrary to congressional intent. The court applied the test from Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. [[93]](#footnote-94)100 to determine whether Congress's intent was unambiguously expressed in the CWA, and if that intent was not clear, whether EPA's interpretation of the CWA was reasonable. [[94]](#footnote-95)101 The Ninth Circuit found that Congress's intent was clear in the language of the CWA and that EPA could not issue discharge permits unless the permits contained controls that would "reduce the **[\*852]** discharge of pollutants to the maximum extent practicable." [[95]](#footnote-96)102 The permits for small MS4s under the Phase II Rule did not contain these controls because there was no review to determine whether the measures a small MS4 implemented would actually reduce discharges appropriately. The Ninth Circuit rejected this portion of the Phase II Rule because it was in opposition to Congress's intent.

The court then addressed the environmental petitioners' argument that the Phase II Rule did not give the public notice or opportunity to be heard regarding the NOIs. The CWA requires that permit applications and permits issued under the NPDES permit system be available to the public [[96]](#footnote-97)104 The Ninth Circuit noted that Congress clearly required the CWA's public notice and hearing provisions to apply to NOIs because NOIs function as permit applications, subject to these requirements. The court then considered whether the NOIs were actually available to the public and found that they were not. Although one of the Minimum Measures addressed public participation, dischargers were only required to design a program that complies with state, tribal, and local constraints. The Ninth Circuit also found the existence of the Freedom of Information Act [[97]](#footnote-98)105 was not enough to satisfy the public availability requirement because that Act only applies to documents in EPA's possession, not those in the possession of state, tribal, or local authorities. Likewise, the court found the availability of NOIs under state freedom of information acts insufficient to comply with the CWA because states varied in their public records laws. Holding that certain and uniform availability of NOIs under the Phase II Rule was lacking, the court vacated the part of the Phase II Rule applicable to issuing NOIs under the general permit option.

The environmental petitioners also challenged EPA's failure to designate particular industrial sources of stormwater pollution (Group A sources) and forest roads as major sources of stormwater pollution as arbitrary and capricious. The arbitrary and capricious standard [[98]](#footnote-99)106 requires the agency to articulate "a rational connection between the facts found and the conclusions made." [[99]](#footnote-100)107 When evaluating the possible targets of the Phase II Rule, EPA considered additional categories of dischargers other than small MS4s and construction sites. Group A facilities were not regulated under Phase I for administrative reasons, but were very similar to facilities that were regulated under Phase I. [[100]](#footnote-101)108 The environmental petitioners claimed the Group A facilities should have been included under the Phase II Rule because their stormwater discharges are the same as facilities regulated in **[\*853]** Phase I, and thus EPA's decision not to regulate those facilities was arbitrary and capricious. The court found that EPA had provided rational reasons for deciding not to regulate Group A facilities under Phase II but instead decided to allow local and regional authorities to regulate those dischargers. The court was "troubled" that EPA made this decision on an administrative basis, [[101]](#footnote-102)109 but deferred to EPA's regulation because the CWA does not require EPA to regulate Group A sources under the Phase II Rule.

The Ninth Circuit next addressed the environmental petitioners' claim that EPA's decision not to regulate forest roads under the Phase II Rule was arbitrary and capricious. The petitioners claimed the decision was contrary to the evidence EPA had collected showing that forest roads are a serious source of erosion. EPA claimed that the Ninth Circuit did not have jurisdiction to consider this claim because the environmental petitioners' suit was not timely under the CWA, [[102]](#footnote-103)110 and the environmental petitioners did not comment on this issue extensively enough during notice and comment to confer jurisdiction. [[103]](#footnote-104)111 EPA pointed to the sivicultural regulations it established in 1976 that defined road runoff as nonpoint sources to support the agency's claim that the suit was untimely. The court, however, noted that the challenge was not to the 1976 regulations, but to the Phase II Rule, and that the challenge was timely. The court also found that the comments during the rulemaking period were substantive, giving the court jurisdiction, in addition to EPA's knowledge about the problem of forest road erosion when it conducted its rulemaking. The court remanded this issue to EPA to allow the agency to make a decision about the forest roads and provide support for its decision.

The court then turned to the industry petitioners' arguments. As a preliminary matter, the Ninth Circuit examined whether one of the petitioners, the American Forestry and Paper Association (AFPA), had standing to bring its claims. The court held that AFPA did not have standing because it could not prove that it had suffered a cognizable injury. Although AFPA demonstrated an interest in forest roads, EPA had not yet regulated those roads and thus AFPA had not been injured. The court proceeded to consider claims of the National Association of Home Builders, which did have standing.

The Ninth Circuit first addressed the industry petitioners' argument that the CWA required EPA to consult with states on the Phase II Rule, [[104]](#footnote-105)112 and EPA had not done so. The industry petitioners claimed that, although EPA circulated drafts of the rule to the states, this action did not meet the consultation requirement for four reasons: 1) the drafts were circulated too far in advance of the rulemaking, 2) EPA based its rulemaking on information from sources other than the states, 3) the consultation should have gone beyond notice and comment because Congress intended to add extra requirements with the consultation requirement, and 4) consultation **[\*854]** on the Phase II Rule after it was promulgated was ineffective. The court concluded that EPA did fulfill the consultation requirement because it submitted a draft of the first report on the rule to the states and other stakeholders and revised the Phase II Rule with the comments it received from that process. EPA also established a committee - comprised of representatives from the National Association of Home Builders, the states, industry groups, and environmental groups - which provided comments on the creation of the Phase II Rule. The court held that this exhibited substantial consultation and fulfilled the requirements of the CWA.

The court next addressed a series of challenges to the designation of small MS4s and construction sites subject to the Phase II Rule. The industry petitioners, joined by the municipal petitioners, argued that the EPA improperly designated small MS4s and construction sites for regulation under the Phase II Rule by basing its determination on factors other than those uncovered by the studies conducted pursuant to CWA section 402(p)(5). [[105]](#footnote-106)113 The industry petitioners claimed that EPA based its decision on public comments received after a court invalidated the original size of construction sites covered in the Phase I Rule, as well as extra research discussed in the final Phase II Rule, both factors not derived from section 402(p)(5) studies. EPA countered that the CWA did not limit it to relying only on the section 402(p)(5) studies and that the agency reinforced those studies with other information. In analyzing this claim, the Ninth Circuit addressed the preliminary challenge to the standing of the industry petitioners raised by the Natural Resources Defense Council (NRDC). NRDC argued that the industry petitioners did not have standing because the petitioners could not prove that they would be regulated as a result of the procedural injury they claimed. The court held that while industry petitioners could not prove that they would have avoided regulation if EPA had followed the proper procedure, the potential of that outcome established procedural injury sufficient to give them standing. Turning to the merits of the industry petitioners' claim, the court then held that Congress did not intend to limit EPA to only the section 402(p)(5) studies, and affirmed the Phase II Rule on this claim.

The municipal petitioners also argued that EPA's decision to use the Census Bureau's definitions of urbanized areas to designate small MS4s for regulation under the Phase II Rule was arbitrary and capricious. The petitioners claimed that EPA did not demonstrate a quantified basis for its choice and that the agency did not have evidence that urbanized areas, which are areas of high population density, should be regulated under the Phase II Rule. The agency's decision was based on a record showing a connection between urban stormwater runoff and water pollution. The court found that absolute accuracy about the population of an area regulated under Phase II was not necessary. The court treated EPA's decision with "great deference" because it was based on a technical analysis, and held that the agency's decision was proper. [[106]](#footnote-107)114

**[\*855]** The industry and municipal petitioners both argued that EPA's application of the Phase II Rule to construction sites between one and five acres was arbitrary and capricious. In an earlier case, the Ninth Circuit remanded EPA's decision to regulate construction sites of at least five acres. [[107]](#footnote-108)115 The petitioners claimed that the new Phase II Rule definition was a reaction to the earlier remand decision and was not supported by scientific data. The petitioners claimed that the uncompromising inclusion of all small construction sites was arbitrary because EPA did not take the frequency of harmful impacts into account, consider that the harm small construction sites cause is in the aggregate, or address the wide variation in impact from construction sites. EPA countered that the evidence unequivocally showed that small construction sites have negative impacts on water quality and defended its use of studies on large construction sites to extrapolate to small construction sites. The Ninth Circuit applied the substantial evidence standard to determine whether EPA showed enough evidence that a reasonable person could accept the evidence as supporting EPA's conclusion. The court found EPA's explanations for its decision consistent with the evidence and held that the decision was not arbitrary or capricious.

The court then considered the industry petitioners' argument that EPA impermissibly supplemented the permit regulations by allowing waivers for small construction sites that are unlikely to have negative impacts on water quality. The petitioners claimed that this program shifted the burden to operators of construction sites to prove they will not negatively impact water quality, and that this shift was unreasonable given that EPA had not established that specific sites would have negative impacts. The court reviewed this claim under the arbitrary and capricious standard and found the waiver system reasonable.

The court likewise held that EPA's decision to regulate all small construction sites was reasonable. The industry petitioners claimed that EPA's regulation of all small construction sites was impermissible because the agency had declined to regulate other potential sources of stormwater discharge due to insufficient information on them, but then decided to regulate small construction sites based on no more information than it had for other sources. The petitioners argued that this decision was arbitrary and capricious because EPA used a different standard for regulating construction sites than it did for other sources. Again the court deferred to EPA's decision, noting that the industry petitioners had no evidence that pollution from sources EPA decided not to regulate was similar to pollution from small construction sites.

The court next addressed a challenge to EPA's authority to add new sources of pollution to Phase II regulation in the future. The industry petitioners objected to EPA's ability to retain authority to regulate stormwater dischargers not regulated under the Phase II Rule in the future, [[108]](#footnote-109)116 claiming that CWA section 402(p)(6) of the CWA did not authorize **[\*856]** a case-by-case determination of regulatory authority or allow EPA to have continuing authority to regulate new sources. Furthermore, petitioners noted that the Phase II Rule allows EPA to add future designations without consulting with states and without reliance on the section 402(p)(5) studies. The court accorded Chevron deference to EPA's decision, finding that section 402(p)(6) broadly authorizes EPA to protect against water pollution and that section 402(p)(2)(5) allows EPA to conduct a case-by-case analysis of polluters. The court found that the plain language of the statute supports EPA's interpretation because section 402(p)(2)(5) states that EPA has continuing authority to designate dischargers to regulate. The court also found the industry petitioners' claim was not ripe because EPA had not yet designated a source under this authority.

Industry petitioners alternatively argued that EPA's retention of future designation authority violates the nondelegation doctrine. The petitioners argued that if the CWA did actually authorize EPA to regulate dischargers in the future, then Congress unconstitutionally gave EPA its legislative power. The petitioners relied on American Trucking Ass'ns v. United States Environmental Protection Agency (American Trucking) [[109]](#footnote-110)117 where the D.C. Circuit held an EPA regulation invalid because although EPA had a reasonable basis for establishing the standards it did, had "articulated no "intelligible principle' to channel its application of these factors," therefore violating the nondelegation doctrine. [[110]](#footnote-111)118 The Ninth Circuit held that the industry petitioners' argument failed because American Trucking was reversed by the Supreme Court in Whitman v. American Trucking Ass'ns. [[111]](#footnote-112)119 The Supreme Court rejected the concept that an agency can make a statute a constitutional delegation through its interpretation. Therefore, the question is not whether EPA unconstitutionally interpreted the relevant portion of the CWA, but whether section 402(p)(2)(5) itself is unconstitutional. Even though the industry petitioners did not raise this question of constitutionality, the court held that the CWA is a constitutional delegation.

Industry petitioners then argued that the retained authority violated the APA, claiming that EPA did not provide the notice required of it before promulgating the rule. [[112]](#footnote-113)120 The petitioners point to the discrepancy between the proposed rule, which would have allowed EPA to designate targets of regulation on a case-by-case basis where the discharge played a role in a violation, and the final rule, which allowed EPA to designate targets of regulation on a case-by-case basis where "the discharge, or category of discharges within a geographic area" played a role in a violation. [[113]](#footnote-114)121 The court again applied the logical outgrowth standard and determined that EPA gave notice that it was considering future designations based on geographic area and the petitioners had an opportunity to comment on this.

**[\*857]** Finally, the court addressed the industry petitioners' argument that EPA failed to fulfill the requirements of the Regulatory Flexibility Act (RFA). [[114]](#footnote-115)122 The RFA compels federal agencies to conduct an analysis of the effects a proposed rule would have on small business entities, unless the rule will not have "a significant economic impact on a substantial number of small entities." [[115]](#footnote-116)123 The agency must have a factual basis for claiming that the rule will not have this effect. EPA made that claim in this case but voluntarily complied with the RFA. The industry petitioners claimed the Phase II Rule would result in significant costs and EPA failed to consider the effect of the rule on all small entities affected. EPA and intervenor NRDC argued that the industry petitioners considered the total costs of the rule, not only the costs small entities would bear, and that EPA only had to comply with the RFA if it found that the Phase II Rule would affect a substantial number of small entities. The Ninth Circuit agreed with EPA and held that it was not required to conduct an analysis under the RFA. The court also stated that even if EPA was required to the conduct the analysis, it substantially assessed the rule's impacts on small entities. Any noncompliance with the RFA would have been harmless error.

In summary, the Ninth Circuit remanded four aspects of the Phase II Rule to EPA: 1) EPA's failure to make review of NOIs mandatory under the general permit option, 2) EPA's failure to make the NOIs public, 3) EPA's failure to subject NOIs to public hearing, and 4) EPA's failure to include forest roads in the Phase II Rule. The court dismissed the petitioners' other arguments.

Judge Tallman concurred with the majority's opinion with the exception of the court's decisions that the general permit system of the Phase II Rule was arbitrary and capricious. Judge Tallman viewed EPA's general permit system with NOIs as a reasonable interpretation of its authority under the CWA. He first determined that the CWA does not clearly show Congress's intent regarding a general permit system or how to treat NOIs. In light of unclear congressional intent, he argued, the court should defer to EPA's expertise on the subject. Judge Tallman pointed out that a general permit system had been approved by the D.C. Circuit and, if the general permit system was allowed, the public hearings for NOIs were not necessary. Under the general permit system, EPA is not required to review every NOI because the general permit is the source of the dischargers' obligations. Judge Tallman objected to the majority's failure to defer to EPA's decision and claimed that the court was making policy rather than ruling on a dispute.

C. National Environmental Policy Act

1. Citizens for Better Forestry v. United States Department of Agriculture, 341 F.3d 961 (9th Cir. 2003), infra Part II.C.

**[\*858]**

2. Forest Guardians v. United States Forest Service, 329 F.3d 1089 (9th Cir. 2003), infra Part II.C.

3. Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003), clarified by 366 F.3d 731 (9th Cir. 2004), infra Part II.E.

4. Laub v. United States Department of the Interior, 342 F.3d 1080 (9th Cir. 2003).

Laub, two other farmers, United States, and the California Farm Bureau Federation (collectively Plaintiffs) sued the Department of the Interior, other federal agencies and individuals in their capacities as officers of federal agencies (collectively federal defendants), and California state agencies and individuals in their capacities as officers of California state agencies (collectively state defendants) under the National Environmental Policy Act (NEPA), [[116]](#footnote-117)124 challenging an environmental impact statement (EIS) for water use in the California Bay-Delta area. The Ninth Circuit held that, even though the site in question had not yet been developed, plaintiffs' claim was ripe, and that further discovery was necessary on the issue of whether the state's participation was independent of federal control and therefore not governed by NEPA.

The CALFED Bay-Delta program (CALFED), operated by multiple state and federal governmental entities, oversaw management and regulation of the San Francisco Bay/Sacramento-San Joaquin Delta estuary. In 1995 and 1996, the agencies agreed that CALFED would prepare an assessment of environmental impact that would satisfy both the EIS requirement of NEPA and the environmental impacts report (EIR) requirement of the California Environmental Quality Act (CEQA). [[117]](#footnote-118)125 In July 2000, CALFED issued an EIS/EIR which offered a "Preferred Program Alternative which, among other actions, would convert agricultural lands to other uses, including habitat, levee improvements, and water storage." [[118]](#footnote-119)126 A Record of Decision (ROD), issued in August 2000, certified the EIS/EIR. The ROD included agreements entered into by the state and federal governments in order to manage water in the California Bay-Delta.

Plaintiffs alleged that defendants violated NEPA and CEQA in three ways: first, by not considering any reasonable alternatives to the project; second, by not considering the direct, indirect and cumulative impacts of the project; and finally, by not fully analyzing mitigation options. The district court dismissed plaintiffs' CEQA claims based on the Eleventh Amendment; plaintiffs did not appeal this decision. The district court then dismissed without prejudice plaintiffs' NEPA complaint on three bases: 1) plaintiffs' claim was not ripe against the federal agencies because they were not **[\*859]** challenging a final agency action, 2) the court did not have subject matter jurisdiction over the NEPA claim against the state defendants because it was not a federal action, and 3) further discovery or briefing was not necessary to determine the amount of federal involvement. On appeal, the Ninth Circuit addressed these three issues as well as plaintiffs' standing, which the federal defendants had raised for the first time. The Ninth Circuit properly considered standing on appeal because standing implicates jurisdiction.

In order to have standing under Lujan v. Defenders of Wildlife (Lujan), [[119]](#footnote-120)127 plaintiffs must have a concrete, particularized, and actual or imminent injury-in-fact that is causally connected to the action, and must be redressable. The Ninth Circuit determined that Plaintiffs in this case had standing because they fulfilled the injury requirement of Lujan and the relaxed causation and redressability requirements of procedural standing cases. Plaintiffs satisfied the injury requirement by alleging individualized injury in their complaint. Plaintiffs satisfied the relaxed causation requirement by alleging injury (water shortage on the west side of the San Joaquin Valley leading to west-side users considering east-side water sources such as those belonging to the individual plaintiffs) that was a direct result of the implementation of CALFED. Plaintiffs did not have to show redressability or immediacy because plaintiffs alleged a procedural injury which, if unremedied, would affect a separate interest of the plaintiffs - a challenge which invoked procedural standing and its more relaxed requirements.

The Ninth Circuit next determined that plaintiffs' claims were ripe because, even though the agency action had not yet occurred, "the question of whether an agency has complied with NEPA's procedural requirements in formulating a programmatic EIS is immediately ripe for review before any site-specific action is taken." [[120]](#footnote-121)129 in which the Ninth Circuit found that a challenge to an EIS was ripe before the agency action was final because if the federal agency action was not challenged until after its completion there would be very few, if any, remedies available to the plaintiffs. In Mumma, the process of the environmental impact analysis was tiered, meaning that once an issue was addressed it would not be fully analyzed in subsequent analyses - instead subsequent analyses referred back to the original document addressing the issue. Therefore, one site-specific statement, such as the Preferred Program Alternative in this case, would "determine the scope of future site-specific proposals." [[121]](#footnote-122)130

The Ninth Circuit also referred to Salmon River Concerned Citizens v. Robertson (Salmon River), [[122]](#footnote-123)131 in which it held that an agency action was reviewable before it had commenced, in support of the finding that plaintiffs' claim was ripe. The Ninth Circuit rejected the district court's reliance on **[\*860]** Ohio Forestry Ass'n v. Sierra Club (Ohio Forestry) [[123]](#footnote-124)132 because, after the decision in Ohio Forestry, the Ninth Circuit distinguished substantive challenges from procedural challenges, and determined that procedural challenges under NEPA are ripe once a programmatic EIS has been issued. Similarly, the Ninth Circuit rejected the federal defendants' reliance on Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District (Rapid Transit) [[124]](#footnote-125)133 because "in Rapid Transit there was no tiering between the two stages of the program. Thus, funding approval at stage one did not commit the agency to design approval at stage two." [[125]](#footnote-126)134 In contrast, tiering occurred between the multiple stages of the program in Laub, and the ROD was the agency's final decision with respect to NEPA and CEQA. This closer relationship between the stages made Laub distinguishable from Rapid Transit and allowed the claim in Laub to be ripe as opposed to the unripe claim in Rapid Transit. The Ninth Circuit reversed the district court and found that plaintiffs' claims were ripe.

Finally, the court addressed plaintiffs' challenge to state land and water acquisitions under NEPA. In a related challenge, plaintiffs also argued that the district court wrongly decided to disallow discovery on the issue of whether the state defendants were subject to NEPA. To enjoin the state defendants for a claim under NEPA, plaintiffs had to show that the state and federal projects were so intertwined as to be considered a single federal action. The Ninth Circuit analyzed whether a claim constituted a federal action on a case-by-case, fact-specific basis. [[126]](#footnote-127)135 However, the Ninth Circuit found the district court dismissed the claim once it determined that the federal government had an advisory role without analyzing the facts and determining whether CALFED constituted a federal action, the Ninth Circuit remanded this issue to the district court. The state defendants claimed that their actions were independent of CALFED, and so they were not subject to NEPA. The standard of review for challenges to denial of discovery is actual and substantial prejudice. To succeed, the party challenging the discovery ruling must show that there would be a reasonable probability that, with discovery, the outcome of the case would have been different. The Ninth Circuit found that there was a reasonable probability that, had more discovery been allowed, the outcome on this issue would have been different. The Ninth Circuit therefore reversed the district court on the discovery issue.

The Ninth Circuit reversed the district court on the issues of ripeness and remanded the case to the district court for further discovery regarding the level of federal involvement in CALFED.

**[\*861]**

5. Bell v. Bonneville Power Administration, 340 F.3d 945 (9th Cir. 2003).

The Utility Reform Project and three of its members (collectively Bell) petitioned for Ninth Circuit review of amendments to power sale contracts between Bonneville Power Administration (BPA) and several direct service industries (DSIs). The Ninth Circuit denied Bell's petitions for review.

BPA is a federal agency authorized to market virtually all of the power generated by federal power facilities in the Pacific Northwest. [[127]](#footnote-128)136 BPA entered into contracts with DSIs, industrial companies that require a great deal of electricity to operate, to sell power at a designated rate. An energy crisis began after these contracts were made, creating a low power supply as well as high energy prices for BPA, which buys power in the spot market. The original contracts did not give BPA the power to restrict the amount of power it sold to the DSIs and, as a result of the energy crisis, BPA was contractually obligated to buy power at high prices and sell it at lower prices to the DSIs. As one way of dealing with this crisis, BPA paid the DSIs to amend the original contracts to excuse BPA from the original contract obligations to supply the DSIs with power at the lower contract rate. Bell challenged these contract amendments on five grounds.

The court had jurisdiction over Bell's petition pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), [[128]](#footnote-129)137 and, although one of the contract amendments had been performed, Bell's challenge was not moot because it was capable of repetition but evading review. The court found that it lacked jurisdiction to review one of the amendments because Bell did not petition the court to review that amendment within the ninety-day window that the Northwest Power Act allows after execution of the amendments. [[129]](#footnote-130)138 The Ninth Circuit analyzed BPA's decision according to the "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" standard, [[130]](#footnote-131)140

Bell first argued that BPA exceeded its statutory authority by amending the contracts. The court found that the amendments were within BPA's authority, because the administrator of BPA has broad statutory authority to amend contracts "upon such terms and conditions and in such manner as he may deem necessary." [[131]](#footnote-132)141

The court next addressed Bell's argument that BPA's decision to amend the contracts was arbitrary and capricious because the DSIs would have reduced their power use even without the contract amendments. The court, deferring to BPA's discretion, stated that it would not second-guess the agency's "winning business decisions," especially in light of the unusual market conditions that would have caused financial ruin if BPA fulfilled the **[\*862]** terms of the original contract. [[132]](#footnote-133)142 Thus, the Ninth Circuit held that BPA's decision was not arbitrary or capricious.

Third, the court discussed Bell's argument that the contract amendments unlawfully created a power discount, in contravention of the Northwest Power Act. [[133]](#footnote-134)143 The administrator of BPA is required to follow specific procedures, including publishing the proposed rates in the Federal Register and holding at least one hearing, before establishing a power rate. [[134]](#footnote-135)144 Bell claimed that the amendments constituted a rate change because they resulted in discounts to the DSIs since the money paid to the DSIs for the amendments was "inextricably linked" to the original rate. [[135]](#footnote-136)145 The Ninth Circuit did not discuss the validity of Bell's "inextricably linked" theory because it held that the original contracts' ratemaking provisions were not linked to the amendments for three reasons: 1) the amendments were separate in time from the original contracts, 2) the amendments occurred in dramatically different power market environments from the original contracts, and 3) the amendments had separate consideration from the original contracts. For the amendment to truly be considered a discount of the original contract, BPA would have to get little or no additional consideration for the money it paid to the DSIs. But in this case, BPA received valuable consideration in the form of curtailed power. The court relied on its rationale in Association of Public Agency Customers v. Bonneville Power Administration (APAC), [[136]](#footnote-137)146 where DSIs paid BPA to reduce their power purchases from BPA. In that case, the Ninth Circuit held that the fee was not for the sale of power, and therefore was not a rate. [[137]](#footnote-138)147 Based on that reasoning, the court found that the current contract amendments also were not rates subject to ratemaking procedures.

Bell also argued that one of BPA's amended contracts violated the resource acquisition provisions of the Northwest Power Act because the amended contract included a provision whereby BPA made plans to facilitate new wind resources. [[138]](#footnote-139)148 The Ninth Circuit did not address the substance of Bell's argument because it held that the claim was not ripe for review. The contract in question merely provided for future negotiations over a resource. Because BPA had not acquired a resource, the resource acquisition provisions did not apply and the Ninth Circuit dismissed the argument.

Finally, the court discussed Bell's argument that BPA violated the National Environmental Policy Act (NEPA) [[139]](#footnote-140)149 by not conducting an environmental analysis or an environmental impact statement prior to amending the contracts. The Ninth Circuit did not address this argument because it found that Bell did not have standing to bring this claim. A **[\*863]** claimant under NEPA must establish an injury in fact, causation, and redressability in order to have standing to sue. [[140]](#footnote-141)150 Bell failed to demonstrate the element of causation because he did not show that his enjoyment of the land would be lessened if BPA did not complete an environmental analysis. Bell's claims that the DSIs would have gone out of business, therefore avoiding environmental injury, and that the amendments drained funds that BPA should have used for environmental efforts were not supported by facts and did not prove causation. Bell also attempted to rely on APAC, where the Ninth Circuit found that the plaintiffs had standing. The Ninth Circuit rejected the argument because the standing decision in APAC was not precedential and the type of amendments at issue in this case were not at issue in APAC. The Ninth Circuit denied all of Bell's petitions for review.

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

Selkirk Conservation Alliance, Sierra Club, Kettle Range Conservation Group, Idaho Conservation League, and Pend Oreille Environmental Team (collectively Selkirk) brought action against Harv Forsgren in his official capacity as Regional Forester of the Pacific Northwest region, other United States Forest Service (USFS) and United States Fish and Wildlife Service (FWS) officials, and Stimson Lumber Company (collectively Stimson), alleging that USFS and FWS violated the Endangered Species Act (ESA) [[141]](#footnote-142)152 by granting a road-building easement (Stimson project) through the Colville National Forest. The district court granted summary judgment in favor of USFS and FWS, and Selkirk appealed. The Ninth Circuit reviewed the actions of USFS and FWS under the Administrative Procedure Act (APA), [[142]](#footnote-143)153 found that the agencies did not act in an arbitrary and capricious manner in approving the Stimson project, and affirmed the district court's summary judgment in favor of Stimson.

Stimson Lumber Company owns six plots of land within the Colville National Forest, five of which are completely surrounded by the National Forest. The remaining plot is logically accessible only through national forest land. Stimson sought an easement from USFS under 16 U.S.C. section 3210(a) [[143]](#footnote-144)154 to build roads into the area to facilitate a logging operation. The Stimson project was located in an area of critical habitat for area grizzly bear (Ursus arctos horribilis), which are listed as threatened under the ESA. Once the parties discerned that there was a listed species in the proposed development area, USFS followed the consultation requirement of the ESA by consulting with FWS, and FWS issued a draft biological opinion that indicated that the Stimson project would jeopardize area grizzly bear. FWS **[\*864]** put the biological opinion on hold while Stimson's predecessor in interest began working with USFS and FWS to create an agreement that would allow the development by incorporating measures designed to protect the endangered species in the area. In 1997, after two years of meetings and research, the agencies and Stimson entered into the conservation agreement. FWS released its final biological opinion after the 1997 conservation agreement was reached; this opinion indicated the proposed action would not jeopardize the grizzly bears in the area. Selkirk issued five challenges to the agencies' decision to grant the easement under the ESA and NEPA. Selkirk argued that the reliance of both agencies on the conservation agreement as a sufficient mitigation measure violated the ESA, and challenged the 2001 Biological Opinion for failure to consider reasonably foreseeable activities. Under NEPA, Selkirk challenged the geographical scope, temporal scope, and the cumulative impact analysis of the environmental impact statement (EIS).

The ESA requires agencies to use the "best scientific and commercial data available" in evaluating whether a government action will jeopardize endangered species. [[144]](#footnote-145)155 The Ninth Circuit found that FWS and USFS properly followed the ESA in relying on the conservation agreement as a mitigation measure. The Ninth Circuit cited Friends of Endangered Species, Inc. v. Jantzen [[145]](#footnote-146)157 for the principle that agencies may act in compliance with environmental laws even if they rely on private agreements as mitigation measures. Selkirk, argued that even if FWS could consider the conservation agreement, it failed its duty to rely on the best science by finding the agreement mitigated adverse effects on grizzly bear. The Ninth Circuit noted that the agencies conducted meetings, did research, consulted with each other and with the developer, and considered mitigation. The Ninth Circuit concluded that the agencies' reliance on the conservation agreement as the best available scientific data was valid because the agencies "conducted a reasonable evaluation of the relevant information and reached a conclusion that, although disputable, was not "arbitrary and capricious.'" [[146]](#footnote-147)158

The Ninth Circuit also held that FWS did not violate the ESA in issuing its 2001 biological opinion. Selkirk challenged this biological opinion as inadequate because it relied on the conservation agreement for consideration of cumulative effects and did not consider future activities that Stimson might undertake. The Ninth Circuit again deferred to the agency expertise of FWS. In its biological opinion, FWS addressed mitigation measures in the conservation agreement and incorporated that agreement as part of the Stimson project. Determining that the ESA does not require the agency to use a particular means of assessing cumulative impacts, the Ninth Circuit held that FWS did not act in an arbitrary and capricious manner by **[\*865]** using the conservation agreement as the best scientific and commercial data available.

The Ninth Circuit next addressed Selkirk's three challenges to the EIS and decided that USFS properly followed NEPA in issuing the EIS for the Stimson project. NEPA requires agencies to submit an EIS before taking "major federal action" that "significantly [affects] the quality of the human environment." [[147]](#footnote-148)159 Selkirk challenged the EIS as inadequate for 1) failing to adequately consider cumulative impacts because the physical area which the EIS analyzed left out adjacent projects by Stimson in the Idaho Panhandle National Forest (IPNF) and other areas, 2) failing to consider possible future logging activity by Stimson, and 3) adopting the shortest temporal scope of the EIS which had been identified as sub-optimal by USFS scientists.

In considering geographical scope of the EIS, the Ninth Circuit cited Kleppe v. Sierra Club [[148]](#footnote-149)160 for the premise that the court must defer to agency judgment, but noted that ***Kern*** v. United States Bureau of Land Management [[149]](#footnote-150)161 requires the agency to ""consider cumulative impacts in determining the scope of an EIS.'" [[150]](#footnote-151)162 Thus the court could not blindly defer to the agency, but instead must analyze whether the agency considered cumulative impacts when deciding what geographic area the EIS will encompass. The Ninth Circuit concluded that, under the rule of Kleppe and ***Kern***, USFS adequately considered cumulative impacts because USFS rationally explained its decision to exclude the IPNF from the scope of assessment. While it initially considered using a larger area including the IPNF for the EIS, USFS determined that using such a large area for the analysis might artificially minimize the predicted impact of the Stimson project, and thus chose the smaller geographical scope. The Ninth Circuit distinguished Selkirk's cumulative impacts argument from two recent Ninth Circuit cases in which the court decided that USFS had erred in its choice of geographic area for analysis, Native Ecosystems Council v. Dombeck (Native Ecosystems) [[151]](#footnote-152)164 The Ninth Circuit held that Selkirk was distinguishable from Native Ecosystems and ISC because in Selkirk USFS "did "provide support for' and "justify' its decision" regarding the choice of geographic area, which USFS had not done in either Native Ecosystems or ISC. [[152]](#footnote-153)165 For example, in Native Ecosystems, the Ninth Circuit held that USFS should have considered a nearby sheep grazing area that was also an area where many grizzly bear died when setting the scope of its EIS. The Ninth Circuit contrasted this "population sink" with the IPNF in Selkirk on the basis that the IPNF was **[\*866]** not known as a place where grizzly bear tend to die and thus was substantially different from the population sink in Native Ecosystems.

The Ninth Circuit next addressed Selkirk's concern that USFS failed to contemplate the impact of future Stimson activities in the EIS and determined that reliance on Stimson's compliance with the conservation agreement made analysis of every possible future operation unnecessary. Selkirk argued that the EIS failed to include all of Stimson's planned development concerning forest practices applications. The Ninth Circuit noted that the EIS presumed perpetual logging on all Stimson land and included analyses of most pending forest practice applications along with the effects of the conservation agreement. Because USFS had exhaustively considered the effects of the conservation agreement and had considered most of Selkirk's planned development, the Ninth Circuit did not require it to "list, map, and discuss every pending Stimson harvest plan." [[153]](#footnote-154)166 The court held that what USFS had considered for purposes of the EIS constituted a reasonable evaluation of foreseeable consequences.

Finally, the Ninth Circuit addressed Selkirk's concern about the temporal scope of the EIS. After considering a three, five, and ten year scope, USFS chose a three year scope for the EIS. The court held this decision was not arbitrary or capricious because it was rationally based on the fluctuating nature of the Washington State forest management rules at the time the EIS was drafted. Although the court found that the temporal scope for the EIS was a hard choice, it deferred to the not unreasonable decision of USFS, the expert agency in this field.

In closing, the Ninth Circuit noted that environmental statutes such as the ESA and NEPA create a balance between preservation of the environment and protection of private property by delineating specific requirements for federal agency action and concluded that USFS and FWS complied with these requirements. The Ninth Circuit noted it had faith in the enforcement of the conservation agreement and affirmed the district court's grant of summary judgment against Selkirk.

7. Center for Biological Diversity v. United States Forest Service, 349 F.3d 1157 (9th Cir. 2003).

The Center for Biological Diversity and the Sierra Club (collectively the Center) alleged that the final environmental impact statement (EIS) of the United States Forest Service (USFS) was in violation of the National Environmental Policy Act (NEPA) [[154]](#footnote-155)167 and NEPA's implementing regulations because the EIS improperly concluded that the northern goshawk (Accipiter gentilis) was a habitat generalist. The district court granted summary judgment to USFS. The Ninth Circuit reversed the district court's grant of summary judgment and remanded to the district court, directing the district court to remand the final EIS to USFS.

**[\*867]** USFS created the Northern Goshawk Scientific Committee (the Committee) to review the habitat management needs of the northern goshawk in the Southwestern Region of the United States in response to concerns about impact from logging. The Committee published a report entitled Management Recommendations for the Northern Goshawk in the Southwestern United States (MNRG), which stated the goshawk was a habitat generalist, meaning it can survive in different types of forest and does not need a particular type of forest in order to survive. USFS then published notice of its intent to prepare an EIS for the Southwestern Region in order to incorporate management of the northern goshawk into forest and land management in the area, and received comments challenging the finding that the goshawk was a habitat generalist. Both the Arizona Game and Fish Department (AGFD) and the United States Fish and Wildlife Service (FWS) submitted comments, including scientific information that directly controverted the MNRG's conclusion that the northern goshawk was a habitat generalist. USFS responded to AGFD and FWS in letters, citing studies showing the northern goshawk to occupy many different types of forests. USFS created a Goshawk Interagency Implementation Team to analyze the findings and recommendations of the MNRG and to propose revisions to the recommendations.

In 1994, USFS issued a draft EIS with five different alternatives. This draft EIS noted that the recommendations of the MNRG were included in all five alternatives, and therefore each alternative encompassed the best scientific data available. The draft EIS summarized the comments that USFS had received, but did not specifically address the comments that argued that the northern goshawk was not a habitat generalist. After issuing the draft EIS, USFS accepted more comments. Citing various scientific studies, AGFD, the New Mexico Department of Game and Fish, a wildlife biologist working for USFS who had published research on the northern goshawk, and the Center for Biological Diversity renewed the challenge to USFS's determination that the northern goshawk was a habitat generalist. The state agencies noted that they were renewing this challenge because the issue had not been sufficiently addressed in the draft EIS.

USFS's final EIS included minor changes from the draft EIS, added a sixth alternative to respond to the Mexican Spotted Owl Recovery Plan, and included a section that contained and responded to the comments that USFS had received on the draft EIS, but again did not address the comments challenging its conclusion that the northern goshawk was a habitat generalist.

The Center challenged the final EIS on three grounds: 1) inadequate analysis of the controversy over whether the northern goshawk was a habitat generalist, 2) failure to discuss scientific studies with results contrary to USFS's finding that the northern goshawk was a habitat generalist, and 3) failure to respond to comments on the scientific debate over whether the northern goshawk is a habitat specialist or a habitat generalist. The Ninth Circuit reviewed the district court's grant of summary **[\*868]** judgment de novo, and USFS's compliance with NEPA under the Administrative Procedure Act (APA) [[155]](#footnote-156)168 standard requiring that agency actions be set aside if prescribed legal procedures are not followed. In ***Kern*** v. United States Bureau of Land Management, [[156]](#footnote-157)169 the Ninth Circuit adopted a rule of reason standard to analyze the adequacy and thoroughness of the discussion of environmental consequences in the EIS.

The Ninth Circuit held that USFS violated NEPA because it did not consider or address the scientific evidence that the northern goshawk was not a habitat generalist. The Ninth Circuit noted that NEPA required the agency to consider all the important aspects of a proposed action that would have an effect on the environment and inform the public that it has carried out this analysis. Although NEPA does not require USFS to make a particular decision, it does require USFS to address all the available scientific information. In addition, one of NEPA's implementing regulations, 40 C.F.R. section 1502.9(b), requires USFS to "disclose and discuss responsible opposing viewpoints." [[157]](#footnote-158)170 The Ninth Circuit held that, since USFS did not discuss in its final EIS the scientific viewpoint that the northern goshawk was a habitat specialist, it violated 40 C.F.R. section 1502.9(b): "The Final EIS failed to disclose and discuss responsible opposing scientific viewpoints in the final statement itself in violation of NEPA and the implementing regulations." [[158]](#footnote-159)171 The Ninth Circuit rejected USFS's argument that its summary comment stating that opposing views existed sufficiently addressed the debate over whether the northern goshawk was a habitat generalist. The Ninth Circuit also rejected USFS's argument that the habitat generalist controversy was sufficiently addressed by documents in the record, and noted that NEPA and its accompanying regulations required "the agency [to] disclose responsible opposing scientific opinion and indicate its response in the text of the final statement itself." [[159]](#footnote-160)172

The Ninth Circuit remanded the case to the district court, and directed the district court to remand the final EIS to USFS.

D. Resource Conservation and Recovery Act

1. Kasza v. Whitman, 325 F.3d 1178 (9th Cir. 2003).

Former employees of a classified Air Force facility brought an action against the Air Force and the United States Environmental Protection Agency (EPA), alleging violations of the Resource Conservation and Recovery Act (RCRA). [[160]](#footnote-161)173 The district court granted summary judgment for the Air Force, found the action against EPA moot, and granted the **[\*869]** employees' motion for attorney fees. Kasza and Frost (collectively employees) appealed, and EPA cross-appealed. The Ninth Circuit affirmed in part, reversed in part, and remanded. On remand in both Kasza v. Whitman and Frost v. Rumsfeld the district court unsealed a court transcript after approving redaction of parts of the transcript. On remand in Frost v. Rumsfeld the district court denied the employees' motions for attorney fees. The employees appealed the redaction of the transcript and the denial of attorney fees. The Ninth Circuit affirmed the district court's actions in redacting the transcript and denying attorney fees.

This case started as two separate suits. In Kasza v. Browner, [[161]](#footnote-162)174 Kasza brought a citizen suit under RCRA against EPA alleging the agency had failed to carry out its nondiscretionary duties of inspection, inventory, and public disclosure and seeking declaratory and injunctive relief. [[162]](#footnote-163)176 Frost (the widow of a former employee) and other employees brought a citizen suit against the Air Force under RCRA alleging the Air Force violated numerous provisions of RCRA related to reporting, inventory, and disposal of hazardous waste and seeking declaratory and injunctive relief. [[163]](#footnote-164)177 The appeals from Kasza and Frost were combined.

The Ninth Circuit affirmed the denial of attorney fees because the party asking for attorney fees, Frost, was not a prevailing party. Under RCRA, attorney fees are awarded only to the "prevailing or substantially prevailing party." [[164]](#footnote-165)178 The Ninth Circuit found that Frost did not qualify as a substantially prevailing party because there was no "gain by judgment or consent decree a material alteration of the legal relationship of the parties." [[165]](#footnote-166)179

Kasza argued that the district court did not properly adhere to the remand order because it limited its consideration to the transcript, rather than examining other materials the remand order had unsealed. The Ninth Circuit rejected Kasza's argument because "Kasza's argument on the original appeal focused on the transcript, as did her argument on remand" and Kasza failed to ask for more. [[166]](#footnote-167)180 Kasza also argued that the court did not thoroughly evaluate the proposed redactions. The Ninth Circuit reviewed the redactions under an abuse of discretion standard. The Ninth Circuit held that the district court did not abuse its discretion in choosing portions of the transcript to redact because the court had already found the material subject to the state secrets privilege. The Ninth Circuit also rejected Kasza's argument that the district court should have given her hearings regarding the merits of the specific redactions. The Ninth Circuit rejected this argument because Kasza had already lost the state secrets privilege argument in Kasza v. Browner; [[167]](#footnote-168)181 therefore, the issue had already been litigated and decided. **[\*870]** Finally, Kasza and DR Partners doing business as Las Vegas Review-Journal (intervenors) argued that the First Amendment right of access to court records mandated the disclosure of the redacted information. The Ninth Circuit rejected this claim, stating that the risk of harm to national security had already been established in Browner and the district court had acted within its discretion.

The Ninth Circuit affirmed the findings of the district court in rejecting the award of attorney fees to the employees and approving the order for redaction of court transcripts.

Judge Wood wrote a separate concurrence urging the government either to release information that might help the plaintiffs or to enter into a settlement.

2. Zurich American Insurance Co. v. Whittier Properties Inc., 356 F.3d 1132 (9th Cir. 2004).

Whittier Properties (Whittier) appealed from the district court's grant of summary judgment in favor of Zurich American Insurance Company (Zurich). The district court held that Whittier materially misrepresented information when applying to Zurich for insurance coverage of underground storage tanks (USTs). As a result, the district court held that Zurich could rescind the insurance policy, thereby freeing itself from any liability incurred as a result of that policy. The Ninth Circuit reversed and remanded, holding that regulations promulgated by the United States Environmental Protection Agency (EPA) precluded rescission of an insurance policy that covered USTs. [[168]](#footnote-169)182

Whittier owned and operated a gas station near Sterling, Alaska. Originally, the station was served by two 10,000 gallon USTs. In 1993, a contractor working on these tanks discovered evidence of contamination around the tank fill pipes and dispenser locations. In August 1995, when Whittier replaced its existing system with a single 20,000 gallon tank, a contractor on the replacement project also encountered petroleum contamination. Whittier chose to proceed with the tank replacement without removing the contaminated soils. In October 1995, New Horizons, an environmental contractor, prepared a site assessment of the gas station's premises, including the UST system. Finding contamination, New Horizons notified the Alaska Department of Environmental Conservation (ADEC). Though both New Horizons and the ADEC advocated cleanup of the contamination, Whittier took no action.

In November 1999, Whittier applied for a "Storage Tank System Third-Party Liability and Corrective Action Policy" from Zurich. On the application, Whittier's owner Yovonne Baker indicated she was unaware of any prior contamination. Zurich issued the policy, incurring a coverage obligation for any contamination from the 20,000 gallon tank after December 1997. In 2000, Whittier closed the gas station; one year later, Gilfilliam Engineering and Environmental Testing (Gilfilliam) investigated the site for **[\*871]** environmental contamination. Gilfilliam found serious contamination of the soil and nearly a foot of petroleum products floating on top of the site's groundwater which had also spread to adjacent properties. When informed of the potential claims resulting from this contamination, Zurich filed suit in district court. Zurich demanded rescission of the policy on the grounds that Whittier had misrepresented information regarding prior contamination of the site. The district court granted Zurich's motion for summary judgment, allowing rescission of the policy on the grounds of Whittier's misrepresentation pursuant to a state statute. [[169]](#footnote-170)183 The district court held that rescission was permissible under state law because EPA's UST regulations limited only prospective cancellation, not rescission. Whittier appealed.

The Ninth Circuit reviewed the grant of summary judgment de novo, viewing the facts in the light most favorable to Zurich and assuming for review that Whittier had materially misrepresented information on its policy application. Thus, the court proceeded to address the question as to whether the EPA's UST regulations precluded rescission of the insurance policy.

Under Alaska Statutes section 21.42.110, a policy may be rescinded for misrepresentation when that omission or incorrect statement was fraudulent, material to the risk assumed by the insurer, or if the insurer would not have issued the same policy if that information had been known. However, federal regulations promulgated by EPA place limits on the cancellation of policies for USTs, requiring notification of cancellation before that cancellation is effective. [[170]](#footnote-171)184 The Ninth Circuit examined the state and federal regulations and noted that while the federal regulations allow for the implementation of an approved state program, Alaska has not submitted such a program, and the federal regulations remained in full effect. Moreover, Alaska had passed its own regulations concerning the operation of USTs and insurance policy terminations that were very similar to and referenced the federal regulations. [[171]](#footnote-172)185

The EPA's regulations also include provisions governing the cancellation of a UST insurance policy upon the insured's misconduct. [[172]](#footnote-173)186 Specifically, the regulations provide that "cancellation or any other termination … for … misrepresentation" will not be effective unless preceded by written notice and a minimum of a ten-day period after the receipt of that notice. [[173]](#footnote-174)187 Zurich argued, and the district court held, that this regulation related only to prospective cancellation and was not applicable to rescission of policies. Thus the district court applied the state law requiring rescission of policies based on misrepresentation. The Ninth Circuit disagreed, holding that EPA regulations, which Alaska specifically incorporated into its own law, [[174]](#footnote-175)188 included rescission in the definition of cancellation. Furthermore, the court found that prospective cancellation of a **[\*872]** UST policy was exclusively governed by the EPA regulations. In both instances the court deferred to EPA's interpretation, expounded in its amicus brief, that the regulations precluded rescission and were intended to be the sole remedy for a UST policy provider. As a result, the Ninth Circuit vacated the district court's grant of summary judgment and remanded the case for consideration of Zurich's remaining arguments for summary judgment as well as policy interpretation.

3. Covington v. Jefferson County, 358 F.3d 626 (9th Cir. 2004).

The Covingtons sued Jefferson County, Idaho (County) and the District 7 Health Department (D7HD) under the Clean Air Act (CAA) [[175]](#footnote-176)190 alleging that actions at the county dump across the street from their home violated both statutes. The Covingtons own property in Jefferson County, Idaho. In 1995, an existing gravel pit across the street from their home was converted to a solid waste landfill under the ownership and operation of Jefferson County. In Idaho, such landfills are overseen by District Health Departments; this particular landfill falls within the oversight of D7HD. The Covingtons made a series of complaints to both Jefferson County and D7HD regarding the operation of the landfill, including mismanagement of discarded appliances (white goods), fires occurring at the dump, and disposal of leaking batteries and ***oil*** cans. Although D7HD approved an Operational Plan and conducted numerous inspections, the Covingtons' concerns were not resolved to their satisfaction and they brought a citizen suit under the CAA and RCRA in 2001. This suit alleged that the landfill violated the CAA through noncompliance with federal requirements for disposal of ozone-depleting substances, and violated RCRA by contravening state regulations, not meeting federal requirements for open dumps, and allowing disposal of prohibited non-containerized liquid hazardous waste. The district court found that the Covingtons had standing under RCRA but did not have standing under the CAA. The district court then awarded summary judgment to the defendants on all three RCRA claims. The Covingtons appealed the district court's CAA standing determination and its grant of summary judgment on the RCRA claims; the defendants cross-appealed the district court's RCRA standing determination.

As a preliminary matter, the Ninth Circuit addressed an argument raised by D7HD concerning subject matter jurisdiction. Under RCRA, a citizen suit requires notice as a jurisdictional matter: For present violations, a 60-day notice is required, whereas a suit against any person alleged to have contributed to past or present violations requires a 90-day notice. [[176]](#footnote-177)191 The Covingtons gave notice to D7HD on May 17, 2001 and filed their complaint on July 25, 2001 - comprising a 60-day but not a 90-day period. D7HD thus **[\*873]** argued that the court lacked jurisdiction over some if not all RCRA claims. The Ninth Circuit held that it had subject matter jurisdiction over the RCRA claims because 1) current violations fell within the 60-day period, and 2) RCRA contains an exception to the notice provision for subchapter III claims, relating to the leaching of hazardous waste as alleged by the Covingtons. [[177]](#footnote-178)193 the Ninth Circuit held that the notice exemption applied to all claims in a "hybrid" suit that contains claims based on subchapter III and other claims as long as the claims arose from the same "closely related" circumstances. [[178]](#footnote-179)194 Thus, the court determined it had subject matter jurisdiction over all RCRA claims.

The Ninth Circuit then determined that the Covingtons had standing to bring their claims under both RCRA and the CAA. The Ninth Circuit outlined the requirements for standing under Article III of the Constitution as a concrete and particularized injury in fact that is actual or imminent, a result of the conduct of the defendant, and redressable. The Ninth Circuit held that the Covingtons showed sufficient evidence of injury in fact under RCRA because they gave evidence that the alleged violation would affect their enjoyment of their home and land due to increased risks of fires, scavengers, and groundwater contamination, in addition to aesthetic injury. The Ninth Circuit noted that the Covingtons also showed causation and redressability as to both Jefferson County and D7HD. Because the County operated the landfill, it caused the injury, and that injury could be redressed by requiring the County to comply with RCRA. D7HD had the ability to suspend operations or compel compliance via inspections at the landfill, and so its inaction met both causation and redressability requirements. The Ninth Circuit rejected D7HD's argument that new state regulations rendered moot any possible remedy, because RCRA claims can be brought for prior violations and the agency retained its regulatory authority in spite of new regulations. Thus the court affirmed the district court's determination that the Covingtons had standing under RCRA.

The Ninth Circuit disagreed with the district court's determination that the Covingtons lacked standing to bring a claim for a leak of ozone-depleting material under the CAA. The Ninth Circuit noted that since the Covingtons brought a procedural claim, they had only to prove a relaxed version of the redressability and imminence of injury requirements. The Ninth Circuit found the Covingtons' evidence of leakage of white goods at the landfill demonstrated injury in fact under the CAA because the potential for harm to the Covingtons' property caused loss of enjoyment. The Ninth Circuit held that evidence provided which showed that the landfill did not follow CAA procedure by either preventing or documenting leaks sufficed to show causation under the CAA. Just as the fines that RCRA provides for violations of the Act were sufficient evidence of redressability under RCRA, the fine and penalty provisions of the CAA showed redressability under the CAA **[\*874]** because those penalties were created to compel compliance by the defendants. Thus, the court held that the Covingtons also had standing to bring suit under the CAA.

Having determined the standing issues, the court turned its attention to the substantive RCRA claims. The Covingtons first argued that the district court failed to consider applicable state regulations in determining whether a violation of RCRA had occurred. Under Ashoff v. City of Ukiah, [[179]](#footnote-180)195 RCRA authorizes citizen suits for violations of state waste management regulations even after the Environmental Protection Agency (EPA) has authorized a state program, as long as the state standards are not tougher than federal standards. [[180]](#footnote-181)196 Therefore, the Ninth Circuit held that the district court should have addressed whether the Idaho standards were more stringent than federal standards in its discussion of whether the landfill violated RCRA, since Idaho law expressly prohibits regulations that are more stringent than RCRA regulations. [[181]](#footnote-182)198 and open burning regulations, [[182]](#footnote-183)199 both of which the Ninth Circuit held were not more stringent than the requirements of RCRA. The Ninth Circuit analyzed the Idaho regulations as to cover on the basis of frequency and amount, and found that even though Idaho's regulations specified six inches of cover at the end of every operating day and the federal regulations required periodic cover but did not specify the amount of cover, the Idaho cover regulations had the same reasoning behind them as did the federal regulations and therefore were not more stringent than the federal regulations. Furthermore, the Ninth Circuit noted that the district court disregarded the Covingtons' proof of violations of the Idaho cover regulations at the landfill, and ruled that summary judgment was inappropriate as unresolved issues of material fact remained. Similarly, the Ninth Circuit decided that Idaho's open burning regulations were very similar to the federal open burning regulations, as both prohibited open burning and provided narrow exceptions to that prohibition; therefore the Ninth Circuit held that summary judgment was inappropriate on the open burning issue because there were unresolved issues of material fact. However, the Ninth Circuit rejected the Covingtons' similar arguments as to Idaho regulations regarding groundwater contamination and explosive gas, because the Covingtons did not point to any state regulations controlling these two issues.

The Ninth Circuit then addressed whether the County and D7HD violated federal open dump regulations under RCRA. The Covingtons presented five potential violations under federal regulations: groundwater contamination, covers, open burning, explosive gases, and access control. The Ninth Circuit upheld the district court's grant of summary judgment for **[\*875]** the defendants regarding the Covingtons' allegation that the landfill violated RCRA by contaminating their drinking water because there was not enough evidence of contamination to survive summary judgment. However, the Ninth Circuit reversed the district court's grant of summary judgment for the defendants regarding the Covingtons' allegations that the landfill violated RCRA's cover requirement, ban on open burning, ban on explosive gas buildup, and ban on open access to dumping sites. The Ninth Circuit decided that, based on the Covington's evidence and inspection reports, there was sufficient controversy over whether the landfill met RCRA's cover requirement to conclude summary judgment was not appropriate. In addition, the court believed that the evidence of fires at the landfill presented a question of fact concerning whether the landfill had engaged in burnings that did not fit the narrow exceptions of RCRA. Although the Covingtons could not provide any evidence of the presence of explosive gas, the Ninth Circuit determined this was due solely to the landfill's lack of monitoring for such gas. The Covingtons had established that the landfill received items that could produce explosive gases, so there was a rebuttable presumption that such gas did exist. The court reached this conclusion because plaintiffs in similar suits would otherwise never be able to provide evidence of explosive gas when the operators had failed to monitor for the presence of such gases. Finally, the Ninth Circuit held that the Covingtons presented enough evidence to survive summary judgment on the question of access control to the landfill. The district court found both that access was controlled to an extent and that no public safety issues had arisen from public access. The Ninth Circuit disagreed, deciding that the evidence could lead a fact finder to conclude the partially uncontrolled access led to a public hazard - namely one of the fires which the County claimed was caused by entry of an unauthorized person. Overall, the Ninth Circuit dismissed the Covingtons' claim concerning water contamination but remanded the other four issues for hearing on the merits.

The Ninth Circuit last addressed the Covingtons' claim that the County and D7DH had violated RCRA by allowing the disposal of noncontainerized liquid hazardous waste in the landfill. The district court determined that RCRA's provision prohibiting the disposal of noncontainerized hazardous liquid in a landfill [[183]](#footnote-184)200 did not have any substantive requirements and thus could not be enforced through citizen suit. While the Ninth Circuit noted that before the 1984 amendments RCRA did not have any substantive requirements, it pointed out that the 1984 amendments added substantive requirements to RCRA. The Ninth Circuit stated the statute was substantive because it proscribed conduct, therefore creating a duty to not carry out such conduct. In addition, the court pointed to the scheme Congress intended, prohibiting some waste disposal and permitting other waste disposal. Finding that refusing to enforce such a regulation would contravene the regulatory framework, the Ninth Circuit upheld the right of the Covingtons to claim a violation of the provision via citizen suit. Thus, overall the Ninth Circuit determined the Covingtons had standing under both **[\*876]** RCRA and the CAA, and remanded the majority of the RCRA claims to the district court for further proceedings.

Circuit Judge Gould concurred and wrote separately to identify alternative grounds for standing the Covingtons might have under the portion of the CAA regarding chlorofluorocarbon (CFC) disposal and ozone degradation. Pointing out the atmospheric lifespan of ozone-depleting gases, Judge Gould would find injury because the degradation of the ozone layer would affect all life on earth. Even though this type of injury is not as specific as the general requirement for injury in fact, Judge Gould noted that so long as injury is concrete, it can provide injury in fact for the purpose of standing, and "a widespread injury, in itself, is no bar to constitutional standing." [[184]](#footnote-185)201 Judge Gould also noted that the scientific link between CFCs and ozone depletion would satisfy the causation requirement for standing, and that since the release of CFCs creates the risk of greater exposure to radiation, the injury was imminent. Finally, Judge Gould noted that the CAA's penalties satisfied the redressability requirement by deterring violations.

II. Natural Resources

A. Endangered Species Act

1. Center for Biological Diversity v. Badgley, 335 F.3d 1097 (9th Cir. 2003).

The Center for Biological Diversity and eighteen other nonprofit organizations (collectively the Center) sued the United States Fish and Wildlife Service (FWS), claiming that FWS's decision not to list the northern goshawk (Accipiter gentilis), as threatened or endangered under the Endangered Species Act (ESA) [[185]](#footnote-186)202 was arbitrary and capricious. The district court granted summary judgment in favor of FWS and the Ninth Circuit affirmed, determining that FWS's decision not to list the goshawk was "amply supported by evidence in the record." [[186]](#footnote-187)203

The Center began petitioning FWS to list the goshawk as endangered in Utah, Colorado, New Mexico, and Arizona in July of 1991. That September, the Center requested to expand the scope of its petition from those four states to "the entire forested area of the United States west of the 100th meridian." [[187]](#footnote-188)204 FWS responded to the Center's petition in June 1992 with a 90-day finding that the petition did not present evidence that the goshawk was a listable species under the ESA, or that the goshawk population west of the 100th meridian was distinct from the population east of the 100th meridian. The Center then filed an action against FWS in the District Court of Arizona in response to FWS's 90-day finding. The district court held that FWS did not have a clear definition of a distinct population and that FWS's finding on the **[\*877]** Center's petition was arbitrary and capricious. The court remanded the case to FWS for a new finding. In this new 90-day finding, FWS again found that the Center did not present evidence that the listing of the goshawk was justified because the petition included more than one subspecies of goshawk and therefore "did not meet the definition of a distinct population eligible for listing under the ESA." [[188]](#footnote-189)205 The Center filed another action against FWS as a result of this second negative finding. The district court again found that FWS was arbitrary and capricious in both rejecting the Center's petition before the Center could conform to the rule governing subspecies, and in enforcing the "only one subspecies" policy. [[189]](#footnote-190)206 The court ordered FWS to promulgate a new 90-day finding.

FWS issued a third finding on September 29, 1997, stating that the Center presented sufficient evidence to show that the goshawk may be endangered or threatened west of the 100th meridian. FWS assembled a team of wildlife biologists with special expertise in goshawks to conduct a status review on the goshawk. After compiling data on goshawk locations and habitat, the status review team determined that the goshawk population was "relatively stable," despite the fact that goshawk habitat had declined since European settlement of the West. [[190]](#footnote-191)207 The team had insufficient data to determine whether goshawk habitat was continuing this trend of decline.

Based on this status review, FWS published a finding on June 22, 1998, stating that its study showed that listing the goshawk as endangered or threatened was "not warranted." [[191]](#footnote-192)208 The Center sued FWS, claiming that FWS's finding that listing the goshawk was "not warranted" was arbitrary and capricious. The district court granted FWS's motion for summary judgment.

On appeal, the Ninth Circuit reviewed FWS's decision not to list the goshawk under the Administrative Procedure Act. [[192]](#footnote-193)210 to determine whether FWS "considered the relevant factors and articulated a rational connection between the facts found and the choice made" in making its decision. [[193]](#footnote-194)211 In determining FWS's decision not to be arbitrary and capricious, the Ninth Circuit considered that FWS used information from a status review team with expertise in the area of goshawks, which conducted a comprehensive review of scientific data in the field. The court determined FWS's finding that the goshawk was not endangered or threatened was not arbitrary and capricious. Holding FWS's decision adequately supported by evidence, the Ninth Circuit affirmed summary judgment in favor of FWS.

**[\*878]**

2. Citizens for Better Forestry v. United States Department of Agriculture, 341 F.3d 961 (9th Cir. 2003), infra Part II.C.

3. Forest Guardians v. United States Forest Service, 329 F.3d 1089 (9th Cir. 2003), infra Part II.C.

4. National Ass'n of Home Builders v. Norton, 340 F.3d 835 (9th Cir. 2003).

The National Association of Home Builders, Southern Arizona Home Builders Association, and the Home Builders Association of Central Arizona (collectively Home Builders) brought suit against the Environmental Protection Agency (EPA) challenging the designation of the Arizona population of the cactus ferruginous pygmy owl (Glaucidium brasilianum cactorum) as a distinct population segment (DPS) under the Endangered Species Act (ESA). [[194]](#footnote-195)212 The Ninth Circuit, finding the Arizona pygmy owl population distinct but not significant, reversed the district court grant of summary judgment for the United States Fish and Wildlife Service (FWS) and remanded the case to district court.

The cactus ferruginous pygmy owl occupies territory stretching east to west from Texas to Arizona and north to south from central Arizona to central Mexico. FWS determined that although these owls were once common in Arizona, that state now is home to only 20 to 40 individuals. FWS further concluded that Arizona's population of pygmy owls comprises a DPS that should be listed as endangered under the ESA. To qualify as a DPS, a population must be both discrete and significant "in relation to the remainder of the species to which it belongs." [[195]](#footnote-196)213 Home Builders challenged the designation of the Arizona pygmy owls as a separate DPS, but the district court upheld the listing. On appeal, Home Builders alleged that the designation of Arizona pygmy owls as a DPS violated FWS's DPS Policy [[196]](#footnote-197)214 governing DPS listings.

Home Builders' suit in district court included a claim against the designation of critical habitat as well as the claim against the listing of the Arizona owl as a separate DPS. The district court remanded the critical habitat portion of the claim to FWS and certified the DPS designation as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. [[197]](#footnote-198)215 Rule 54 (b) states, "when more than one claim for relief is presented in an action, … the court may direct the entry of a final judgment as to one … of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." [[198]](#footnote-199)216 The Ninth Circuit had earlier remanded the case to the district court because that court had failed to make an express determination that there was no **[\*879]** just reason for delay. On remand, the district court stated there was no just reason for delay because the listing rule was a different administrative action from the critical habitat designation and was based on a different administrative record.

The Ninth Circuit reviewed the district court's grant of summary judgment de novo, construing the evidence in the light most favorable to Home Builders as the nonmoving parties in the district court case. As part of its de novo review, the Ninth Circuit reviewed the actions of FWS to determine whether they were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." [[199]](#footnote-200)217 In determining whether FWS's actions were arbitrary or capricious, the court looked to whether FWS had "considered the relevant factors and articulated a rational connection between the facts found and the choice made." [[200]](#footnote-201)218

FWS used the DPS designations "to provide different levels of protection to different populations of the same species" [[201]](#footnote-202)219 as the need required. Because the ESA does not define the term "distinct population segment," FWS, in conjunction with the National Marine Fisheries Service (NFMS) promulgated a set of rules, the DPS Policy, to define the term. To include only populations necessary to conserve a species's genetic diversity, the DPS Policy limits the designation of a DPS to those populations that are both discrete and significant.

FWS found the Arizona population of the pygmy owl to be discrete because "it is delimited by international governmental boundaries within which differences in … conservation status … exist that are significant in light of section 4(a)(1)(D) of the [ESA]." [[202]](#footnote-203)220 The Ninth Circuit concurred, noting that an agency is entitled to deference in the interpretation of its own regulations unless the interpretation is "plainly erroneous." As a result, the Ninth Circuit deferred to FWS's interpretation in this case that "differences in conservation status" means "differences in the number of owls" on either side of the U.S.-Mexican border. [[203]](#footnote-204)221

FWS gave two reasons for finding the Arizona population of the pygmy owl to be significant. First, loss of the Arizona population would result in a significant gap in the range of the species that the remaining population would not fill. The Ninth Circuit agreed that the void created by the loss of the Arizona population would qualify as a gap, even though it is at one end of the owl's range. The court found, however, that this gap would not be significant. In making this determination the court evaluated four factors: 1) decrease in the genetic variability of the species, 2) reduction in the current range of the species, 3) reduction in the historic range of the species, and 4) extirpation of the species from the United States.

**[\*880]** Looking at the first factor, the court found that FWS failed to provide evidence in the listing rule for genetic differences between the Mexico and Arizona populations of the pygmy owl. Therefore, the court had no basis for determining that the loss of the Arizona owls would decrease the genetic variability of the species. The court dismissed the second factor by concluding that the Arizona portion of the owl's range is a small portion of the owl's total range, and the number of Arizona owls is small in proportion to the total number of owls, so losing the Arizona population would not constitute a significant reduction in the species's current range.

Looking at the third factor, the court determined that loss of historical range means loss of "major geographical areas in which [a species] is no longer viable but once was." [[204]](#footnote-205)222 The court noted that FWS failed to provide a reasoned basis for finding Arizona to be a major geographical area in the historical range of the pygmy owl, characterizing it rather as at the "periphery of the western pygmy-owls' historical range." [[205]](#footnote-206)223 The court therefore refused to "make up for deficiencies in the agency's decision" [[206]](#footnote-207)224 or, given the lack of evidence, to defer to FWS. Finally, the court determined that extirpation of the pygmy owl from the United States is not itself significant unless some other factor renders the loss significant to the species as a whole. In this case the court found no such other factor. Having rejected all four arguments, the court found that the gap left by the loss of the Arizona owl population would not be significant and therefore would not provide a basis for finding the Arizona owl population significant.

The second reason FWS put forth for the significance of the Arizona owl population is that it "differs markedly from other populations of the species in its genetic characteristics." [[207]](#footnote-208)225 The court looked to the evidence FWS introduced in the listing rule, which showed little or no genetic differences between the Arizona population of pygmy owls and the Mexico population and only "the potential for genetic distinctness" between the Arizona population and the Texas population. [[208]](#footnote-209)226 The court ruled that this lack of evidence of actual, appreciable genetic differences between the Arizona owls and other populations made it impossible to use genetic differences as a basis for finding the Arizona population significant.

Thus, citing Congress's admonition that "the authority to list DPS's [sic] be used "… sparingly,'" [[209]](#footnote-210)227 the Ninth Circuit determined that the Arizona population of the ferruginous pygmy owl is not a significant population and does not merit protection under the ESA as a distinct population segment. With this ruling, the court reversed the district court's grant of summary judgment for FWS and remanded the case "for further proceedings consistent with this opinion." [[210]](#footnote-211)228

**[\*881]**

5. Turtle Island Restoration Network v. National Marine Fisheries Service, 340 F.3d 969 (9th Cir. 2003).

The Turtle Island Restoration Network and the Center for Biological Diversity (collectively the Center) sued the National Marine Fisheries Service (NMFS), claiming that NMFS violated the Endangered Species Act (ESA). [[211]](#footnote-212)229 The Center claimed that by issuing longline fishing permits to United States fishing vessels without completing agency consultations, NMFS violated ESA section 7. [[212]](#footnote-213)231 by issuing permits that would result in a "take" of endangered or threatened species. The district court found that NMFS did not violate section 7 of the ESA and that section 9 was not implicated because NMFS did not have discretion over longline fishing permits. [[213]](#footnote-214)232 Therefore the district court granted summary judgment to NMFS. The Center appealed to the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. section 1291. The Ninth Circuit reversed the district court's section 7 decision, finding that NMFS must conduct consultations before issuing longline fishing permits. On the section 9 claim, the Ninth Circuit found that NMFS had discretion in issuing the fishing permits and remanded that portion of the claim back to NMFS for further proceedings.

Longline fishing is used to catch migratory fish, specifically swordfish. The fishing vessels pull a line several miles long, with additional attached lines with baited hooks. Most U.S. longline fishing vessels were based in Hawaii until 1999, when a district court issued a preliminary injunction against longline fishing. [[214]](#footnote-215)233 NMFS issued a biological opinion that longline fishing permitted under the Hawaii Fishery Management Plan put several species of sea turtles protected under the ESA at risk of extinction. [[215]](#footnote-216)234 Subsequently, NMFS revised the Hawaii Fisheries Management Plan, restricting longline fishing, which in turn caused many fishing vessels to move to California ports. The Center then challenged use of longline fishing in California waters.

One way that the United States regulates fishing vessels is through the High Seas Fishing Compliance Act (Compliance Act). [[216]](#footnote-217)235 The Compliance Act established a permitting, reporting, and regulatory system for U.S. vessels **[\*882]** fishing on the high seas. [[217]](#footnote-218)236 Vessels are required to obtain permits to fish on the high seas, and NMFS is authorized to issue these permits. [[218]](#footnote-219)237

The Center sent the Secretary of Commerce a 60-day notice of their intent to sue under the ESA. [[219]](#footnote-220)238 The Center first claimed that NMFS violated section 7 of the ESA by not completing consultations to determine the effects of longline fishing on protected sea turtles. Under section 7, federal agencies must consult with NMFS before engaging in any discretionary action that may affect protected marine species. [[220]](#footnote-221)239 When NMFS is the agency participating in the discretionary action, it must consult with itself to fulfill this requirement. [[221]](#footnote-222)240 In this consultation, NMFS is to determine whether the discretionary action will threaten a protected species or destroy its critical habitat and identify "reasonable and prudent" alternatives to avoid these effects. [[222]](#footnote-223)241 The Center claimed that NMFS's lack of consultation prior to issuing permits under the Compliance Act violated section 7.

In its letter, the Center argued that NMFS's granting of permits under the Compliance Act would result in a "take" of threatened or endangered sea turtles under the ESA. The ESA prohibits a take of any protected species. [[223]](#footnote-224)242 The Center contended that NMFS was liable for takes by the fishing vessels authorized by the Service.

NMFS replied to the Center's letter, stating that the Service lacked discretion in issuing longline fishing permits, and that, as a result, the ESA consultation requirements did not apply to issuing the permits. In addition, NMFS was planning a management program for migratory fish on the high seas and the agency would complete a consultation during that process to assess the impact of longline fisheries on protected species. In response to NMFS's reply, the Center filed suit. The district court agreed with NMFS that the Service lacked discretion over issuing permits and was not required to consult under Section 7. [[224]](#footnote-225)243 The district court also found that the Compliance Act did not grant NMFS the authority to place conditions on those permits. [[225]](#footnote-226)244 As a result, NMFS could not violate the ESA for takes of listed species committed by the recipients of the Service's permits. The district court granted summary judgment to NMFS. [[226]](#footnote-227)245

The Ninth Circuit reviewed the district court's grant of summary judgment de novo to determine whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[227]](#footnote-228)246 To address both the section 7 and the section 9 claims, the court had **[\*883]** to answer the question of whether NMFS participated in "agency action" under the ESA by issuing longline fishing permits under the Compliance Act. Because agency action is broadly defined to include activities funded or authorized by an agency, the issuance of fishing permits to vessels clearly falls under the definition of agency action. [[228]](#footnote-229)247

The court next examined whether NMFS's action was discretionary and whether it therefore implicated compliance requirements of section 7 of the ESA. The court examined the language of the Compliance Act, stating that the United States has obligations "including but not limited to" ensuring proper vessel marking and permit reporting. [[229]](#footnote-230)248 The Ninth Circuit held that, by adding that language, Congress recognized that NMFS may have other obligations under the Compliance Act and gave the Service permission to exercise its discretion to fulfill those other obligations.

After determining that the language of the Compliance Act gave NMFS discretion to act, the court applied the test from Chevron, U.S.A. Inc. v. Natural Resources Defense Council (Chevron) [[230]](#footnote-231)249 to decide whether the court should defer to NMFS's interpretation of the statute. To apply the Chevron test, the court first examines the statute to determine whether Congress's intent is clear. If the intent is not clear, the court then decides whether the agency's interpretation of the statute is reasonable. After examining the language of the Compliance Act, the court found that Congress clearly gave NMFS the discretion to condition permits in order to protect species. Holding that the Service's interpretation "[was] contrary to the unambiguous language of the statute," the Ninth Circuit found it did not deserve deference. [[231]](#footnote-232)250 The implementing legislation of the Compliance Act also shows Congress intended NMFS to take measures to protect and conserve marine species.

NMFS relied on Sierra Club v. Babbitt [[232]](#footnote-233)252 and Environmental Protection Information Center v. Simpson Timber [[233]](#footnote-234)253 to argue that it was not required to meet the consultation provision of section 7. In those cases, the Ninth Circuit found that the consultation requirements of the ESA did not apply because the agency actions had been completed and were not ongoing. The court distinguished permitting in this case because it is ongoing agency action over which NMFS retains discretion. The court analogized this case to Pacific Rivers Council v. Thomas, [[234]](#footnote-235)254 where the court decided that fifteen-year forest management plans had an ongoing effect after they were adopted and thus, constituted ongoing agency action.

The Ninth Circuit held that the Compliance Act gives NMFS discretion over issuing permits. Therefore, the court reversed the district court and held that the agency must comply with the ESA consultation requirements in **[\*884]** section 7 prior to issuing permits. The court also remanded the section 9 claims to the district court because the court found that the Service has discretion in issuing the permits.

B. Fish and Wildlife

1. Clausen v. M/V New Carissa, 339 F.3d 1049 (9th Cir. 2003), infra Part V.C.

2. Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Administration, 342 F.3d 924 (9th Cir. 2003).

Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce Tribe (collectively Tribes), environmental groups, and the State of Oregon (Tribes, environmental groups, and the State of Oregon collectively petitioners) petitioned for review of various actions of Bonneville Power Administration (BPA), alleging that BPA failed to properly treat fish and wildlife on par with power. The Ninth Circuit rejected all of the petitions, dismissing some based on lack of jurisdiction and denying others on the merits.

BPA is a federal agency charged with marketing electricity in the Pacific Northwest. The BPA Administrator is required by the Northwest Power Act (NPA) [[235]](#footnote-236)256 Petitioners challenged numerous BPA actions on the basis that the agency did not provide this equitable treatment. The Ninth Circuit reviews BPA's interpretation of its organic statutes under the arbitrary and capricious standard of review of the Administrative Procedure Act (APA). [[236]](#footnote-237)257

The Ninth Circuit dismissed a number of petitioners' claims due to lack of jurisdiction under the NPA. As well as challenging "unreasonable delay" extending over a period of 22 years, the Tribes also targeted specific decisions made by BPA in 1995, 1997, 1998, and 2002. [[237]](#footnote-238)258 The Ninth Circuit determined it did not have jurisdiction over the claims related to the 1995, 1997, and 1998 decisions because the NPA provides a ninety-day limit for judicial review, [[238]](#footnote-239)259 and the Tribes did not bring their petitions for review until 2001. The Ninth Circuit held that it did not have jurisdiction over the 2002 decision because that decision was not final at the time the Tribes brought their petition. The Ninth Circuit also concluded that it had no jurisdiction over the Tribes' claim of unreasonable delay because the NPA only gives the court jurisdiction over BPA's final actions, and the 22 years of inaction that the Tribes alleged was not a final action under NPA.

**[\*885]** Similarly, the Ninth Circuit held that it did not have jurisdiction to address the environmental groups' claim that BPA violated the equitable treatment mandate by declaring power emergencies because those power emergencies were declared more than 90 days before the petitions were brought. The Ninth Circuit also held that it did not have jurisdiction to address the State of Oregon's claim that BPA should have used a treasury payment deferral because BPA made the decision in March of 2001 and the petitions were filed in November of 2001. Finally, the Ninth Circuit concluded that it had no jurisdiction over the environmentalists' challenge to BPA's statutory authority to declare power emergencies because BPA declared power emergencies in January and April and the petitions were not filed until November.

The Ninth Circuit also considered providing the remedy of a writ of mandamus to the Tribes in order to address the claim of unreasonable delay and preserve its future jurisdiction. However, the Ninth Circuit found that a writ of mandamus was not warranted because the writs are only used in connection with agency matters if the circumstances are extraordinary. In this case, the circumstances were not extraordinary, and the Tribes did not meet the requirements for a writ set out in Bauman v. United States District Court, [[239]](#footnote-240)260 which requires the petitioners to show that they have inadequate means to attain relief, the agency decision is "clearly erroneous as a matter of law," and petitioners will be irreparably injured by the agency decision. [[240]](#footnote-241)261 Here, the Tribes had a means to obtain relief, BPA's decision was not clearly wrong, and the Tribes did not show an irreparable injury, so the Tribes did not fulfill the extraordinary circumstances requirement or the Bauman requirements for a writ to be issued.

The Ninth Circuit dismissed petitioners' argument that BPA's 2001 Decision Document violated the equitable treatment mandate of the NPA, finding that the 2001 Decision Document recognized the mandate and provided a reasoned, reviewable explanation that it was acting in an equitable manner under Northwest Environmental Defense Center v. Bonneville Power Administration (NEDC). [[241]](#footnote-242)262 The Ninth Circuit noted that, in order to prove that BPA violated the equitable treatment mandate, petitioners would have to show that "overall, BPA treats fish second to power." [[242]](#footnote-243)263 Additionally, the Ninth Circuit noted that BPA "provided a list in the Decision Document of the current and future "adjustments to planning and operations in 2001 that directly addressed Tribal concerns.'" [[243]](#footnote-244)264 The Ninth Circuit held that petitioners' claim that the 2001 Decision Document violated the equitable treatment mandate was not ripe because it was a "cautionary announcement" and "did not declare any additional power emergencies." [[244]](#footnote-245)265 The Ninth Circuit also rejected Oregon's challenge that the **[\*886]** Decision Document arbitrarily and capriciously relied on the Northwest Power Planning Council's program. The Ninth Circuit found that under NEDC BPA was required to consider the Council's program in its analysis, and thus BPA's reliance on the Council's program was not arbitrary or capricious. The Ninth Circuit found that the environmental groups' challenge to the Decision Document's grant of power to declare power emergencies was not ripe because the ability to declare power emergencies was not a final agency action.

The Tribes argued in their reply brief that BPA was acting inconsistently with the Council's program. The environmental groups argued in a letter that the 2000 Biological Opinion (BiOp) of the National Marine Fisheries Service (NMFS) arbitrarily and capriciously failed to satisfy the consultation requirement of the Endangered Species Act (ESA). [[245]](#footnote-246)266 The Ninth Circuit rejected both of these arguments because petitioners did not raise them in their principal briefs.

The Ninth Circuit dismissed most of petitioners' claims for lack of jurisdiction, and denied the rest of the petitions on the merits.

3. Wilderness Society v. United States Fish and Wildlife Service, 353 F.3d 1051 (9th Cir. 2003) (en banc), amended by 360 F.3d 1374 (9th Cir. 2004) (en banc).

Wilderness Society and the Alaska Center for the Environment (collectively Wilderness Society) appealed a district court's decision granting summary judgment in favor of the United States Fish and Wildlife Service (FWS). Wilderness Society challenged FWS's grant of a permit to the Cook Inlet Aquaculture Association (CIAA) to conduct a sockeye salmon (Oncorhyncus nerka) enhancement project in the Kenai National Wildlife Refuge in Alaska, arguing that the enhancement project permit violated the Wilderness Act [[246]](#footnote-247)267 and the National Wildlife Refuge Administration Act of 1966 (Refuge Act). [[247]](#footnote-248)268 A panel of the Ninth Circuit affirmed the district court's decision in 2002. [[248]](#footnote-249)269 Upon rehearing en banc, the Ninth Circuit reversed the district court's ruling, set aside the FWS permit, and enjoined the operation of the enhancement project. Because the court granted relief on the basis of the Wilderness Act, the court did not address Wilderness Society's claim under the Refuge Act.

The Alaska Department of Fish and Game (ADFG) began conducting salmon research projects in 1974 in Tustumena Lake. ADFG incubated sockeye salmon eggs in a hatchery and released the resulting fry into Tustumena Lake. In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), [[249]](#footnote-250)270 and formed the Kenai National Wildlife **[\*887]** Refuge and the Kenai Wilderness, both of which include Tustumena Lake. After passage of ANILCA, FWS notified ADFG that special permits would be required for ongoing projects, including the salmon enhancement project, conducted in the Kenai Refuge. FWS and ADFG entered an understanding in 1985 allowing ADFG to obtain an annual special use permit to continue the salmon enhancement project, in order to study disease in the fish and the effect of stocking salmon on the fish native to Tustumena Lake. The agencies agreed that they would decide by 1993 whether to end the research project or to elevate it to the status of a commercial fishing operation. The project became an operational enhancement project, and the ADFG contracted with CIAA, a nonprofit corporation that represents commercial fishermen and engages in salmon enhancement, to staff and run the hatchery and the program. Because the project potentially violated the Wilderness Act and ANILCA, FWS recommended evaluation of the project under the National Environmental Policy Act. [[250]](#footnote-251)271 Accordingly, in August 1997, CIAA and FWS released a draft environmental assessment (EA) and a mitigated finding of no significant impact.

In the same month, the Kenai Refuge Manager addressed possible legal problems with the enhancement project as it related to the Wilderness Act in a Wilderness Act consistency review. The Manager questioned whether the project could be reconciled with the Wilderness Act's mandate to preserve wilderness and its prohibition on commercial enterprises in wilderness areas. The Manager dismissed these concerns and decided that as long as the project did not significantly conflict with the goals of the Wilderness Act, the project was not required to contribute to achieving the Act's purposes. In a compatibility determination, the Manager stated that the project did not support the refuge's goals, but was not incompatible with them. FWS subsequently issued a special use permit to CIAA for the project. Wilderness Society brought this challenge against the issuance of that permit.

The Ninth Circuit first determined what level of deference should be accorded the FWS decision to allow the enhancement project. The court decided that the decision should get Skidmore deference, from Skidmore v. Swift & Co., [[251]](#footnote-252)273 rather than the broader Chevron deference, from Chevron, U.S.A., Inc. v. Natural Resources Defense Council (Chevron). [[252]](#footnote-253)274 Under Chevron, if the "intent of Congress is clear, that is the end of the matter," and the agency must effectuate that intent. [[253]](#footnote-254)275 If, however, the statute is unclear or silent as to the issue in question, the court must defer to the agency's decision as long as the decision is a reasonable construction of the statute. Chevron, however, was decided in a case of notice-and-comment rulemaking. Mead is used to determine what other kinds of agency decisions get Chevron deference. In Mead, the Supreme Court explained that a decision deserves **[\*888]** Chevron deference when the agency has the statutory ability to make rules with the force of law, and the agency decision in question was made pursuant to that authority. An agency decision that does not meet that standard deserves the deference set forth in Skidmore v. Swift & Co., or Skidmore deference, which is less deferential to the agency's decision than Chevron deference. The court considers how thorough the agency's consideration of the matter was, how valid its reasoning was, and whether it is consistent with prior and later decisions to determine the persuasiveness of the agency's position. The Ninth Circuit adopted an analysis using these principles whereby it would use the first step of the Chevron test to determine whether Congress's intent in both the Wilderness Act and Refuge Act was clear and whether the enhancement project undermined congressional intent. If the court found that the statutes were ambiguous, it would give the FWS decision Chevron deference if its interpretation had the "force of law." [[254]](#footnote-255)276 If the interpretation did not have the force of law, it would give the decision Skidmore deference.

The court first analyzed whether the Wilderness Act's statement that "there shall be no commercial enterprise … within any wilderness area" [[255]](#footnote-256)277 was clear and whether the enhancement project violated that prohibition. The Wilderness Act does not define the term "commercial enterprise," so the court considered the common sense meaning of the term and determined "that a commercial enterprise is a project or undertaking of or relating to commerce." [[256]](#footnote-257)278 The court also considered the Wilderness Act's mandate to preserve the wilderness and exclude commerce from the wilderness, and found that the enhancement project did not develop the goals of the Wilderness Act. In addition, the court considered the statutory structure of the Wilderness Act and found that its ban on commercial enterprises within wilderness areas showed Congress's desire to keep commercial enterprises out unless specific exceptions apply. The Ninth Circuit concluded that Congress clearly did not want a commercial enterprise in wilderness areas, regardless of its form or its minimal intrusion.

Once the court decided Congress's intent to prohibit commercial enterprises was clear, it addressed the question of whether the enhancement project was a commercial enterprise. While the district court focused on the fact that CIAA was a nonprofit organization and that the enhancement project would have a limited impact on the wilderness to make its decision, the Ninth Circuit considered the purpose and effect of the project, relying on the District Court for the District of Columbia's rationale in Sierra Club v. Lyng [[257]](#footnote-258)279 to guide its analysis. In Lyng, the United States Forest Service (USFS) planned to control pine beetles in wilderness areas by cutting trees and spraying chemicals. Although the Wilderness Act allows the Secretary of **[\*889]** Agriculture to take measures to control insects, [[258]](#footnote-259)280 the district court found that the true purpose of the program was to safeguard commercial timber interests and, in light of this purpose, required the Secretary to justify the beetle program in accordance with the Wilderness Act's goals. In Wilderness Society v. United States Fish and Wildlife Service, [[259]](#footnote-260)281 the Ninth Circuit decided that the purpose of the enhancement project was to "advance commercial interests of Cook Inlet fishermen by swelling the salmon runs from which they will eventually make their catch." [[260]](#footnote-261)282 The court relied on a memorandum from the Kenai Refuge Manager and a FWS briefing statement to support the conclusion that the primary purpose of the enhancement project was to benefit commercial fishing, with incidental benefits for sporting and recreation. Therefore, the enhancement project was an impermissible commercial enterprise.

Having determined that the purpose and effect of the enhancement project was commercial, the Ninth Circuit rejected other FWS arguments that the district court had accepted. First, the fact that CIAA was a nonprofit did not control because its activities were supported by the fishing industry, and the court recognized that nonprofit organizations can carry out commercial activities. Second, the state of Alaska's prior involvement with the enhancement project was irrelevant because the state regulation of an industry does not strip its commercial nature. Third, the fact that the benefit of the enhancement project would be outside the Kenai Wilderness did not change the outcome because essential parts of the project would occur within the wilderness area. Finally, the court discounted any tradeoffs Congress made in enacting the Wilderness Act by assuming that those tradeoffs would have been incorporated into the Act to give effect to them. The Ninth Circuit concluded the enhancement project was a commercial enterprise within the bounds of the wilderness area and violated the Wilderness Act.

Moreover, the Ninth Circuit found that, even assuming that the exclusion of commercial enterprises in the Wilderness Act was ambiguous, it would have reached the same conclusion. The court held that the agency's decision to issue a permit was not "the exercise of a congressionally delegated legislative function" and accordingly not entitled to Chevron deference. [[261]](#footnote-262)283 The court discussed the underlying documents related to this decision - the environmental assessment, mitigated finding of no significant impact, wilderness act consistency review, and compatibility determination - and found that two of the documents contained legal analysis, but none addressed general principles of law. The documents used to make the permit decision were not intended to have the force of law. Therefore, per Mead, the court applied Skidmore deference to the permit decision. Assuming arguendo that the ban on commercial enterprise was ambiguous, the Ninth Circuit found that the FWS permit contradicts a clear **[\*890]** statutory mandate by allowing a project with the primary purpose to assist economic enterprise. In addition, the documents used by FWS to make its decision failed to thoroughly analyze whether the project was a commercial enterprise. The court considered the factors in Skidmore and found that the FWS position in this case was not persuasive; its decision was not valid or reflective of special agency knowledge, and was not based on a thorough analysis. Because the court was not persuaded by the agency's analysis, it held that the enhancement project would be impermissible even if the term "commercial enterprise" were ambiguous, granted the Wilderness Society's motion for summary judgment, set aside the FWS permit, and remanded to the district court to determine the scope of the injunction with discretion to create a resolution as to the current year's stock of sockeye salmon fry.

C. Forests

1. Citizens for Better Forestry v. United States Department of Agriculture, 341 F.3d 961 (9th Cir. 2003).

Citizens for Better Forestry and eleven other environmental organizations (collectively environmental groups) sued the United States Department of Agriculture and the United States Forest Service (collectively USDA) alleging procedural violations of the National Environmental Policy Act (NEPA) [[262]](#footnote-263)285 in the promulgation of new regulations for the management of national forests (2000 Rule). The suit was brought under the provisions of the Administrative Procedure Act (APA). [[263]](#footnote-264)286 In a reversal of the lower court, the Ninth Circuit granted the environmental groups standing to sue and ruled that their claims were ripe for review. The court then remanded the case to the district court for a decision on the merits.

The Forest and Rangeland Renewable Resources Planning Act of 1974 [[264]](#footnote-265)288 govern the management of national forests and grasslands in the United States. These acts prescribe a three-tiered system of management: 1) at the highest level, national uniform regulations that govern the development of regional and local plans; 2) at the middle level, regional land and resource management plans (LRMPs) that cover large units of national forest; and 3) at the local level, site-specific plans prepared for each specific action. According to NFMA, "site-specific plans … must be consistent with both sets of higher-level rules." [[265]](#footnote-266)289 On October 5, 1999 USDA published proposed changes to the national regulations and asked the public to submit comments until February 10, 2000. The proposed rule did not include any **[\*891]** analysis of the effects of the new regulations on the environment. Rather, USDA prepared a separate environmental assessment (EA) and finding of no significant impact dated July 21, 2000. These documents were not published in the Federal Register and were never open for public comment. While USDA held hearings on the substance of the new rule, it did not hold hearings on the environmental impacts of the rule. Nor did USDA consult with the Secretaries of the Interior or Commerce or prepare a biological assessment of the rule's impact on endangered species as required by the ESA.

The final regulations were published on November 9, 2000. [[266]](#footnote-267)290 The new regulations reduce protection of endangered species from the requirement that USDA "insure continued species existence" [[267]](#footnote-268)291 to the requirement that USDA "provide a high likelihood that conditions will be capable of supporting over time the viability of a species." [[268]](#footnote-269)292 The new rule also eliminates the requirement for regional guides as well as many of the minimum specific management requirements, including limits on clear-cutting. [[269]](#footnote-270)293 Finally, the new rule replaces the post-decision appeal process with a pre-decision objection process and reduces the time for public comment from 90 days to 30 days. The environmental groups brought suit in district court challenging the substance of the 2000 Rule, claiming that USDA's procedures violated NEPA and the ESA. Because the substantive challenge has been stayed pending revisions to the 2000 Rule currently in process, the court only considered the procedural challenge.

The first issue before the court was whether the environmental groups had standing to sue. Constitutional standing must be established by finding that a plaintiff has concrete interests at stake, has suffered an injury in fact caused by defendants' actions, and the injury can be redressed by the court. When the alleged injury is procedural, as it is here, plaintiffs must show that "it is reasonably probable that the challenged action will threaten their concrete interests." [[270]](#footnote-271)294 The Ninth Circuit found that USDA's "complete failure to involve or even inform the public" [[271]](#footnote-272)295 about the EA worked a procedural injury on The environmental groups, who have concrete interests at stake because their members observe nature and wildlife in national forests. [[272]](#footnote-273)296 The injury "consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their **[\*892]** decisions on the environment." [[273]](#footnote-274)297 USDA argued that the 2000 Plan does not itself injure The environmental groups because it has no direct effect on the environment. Moreover, all LRMPs and site-specific plans that do affect the environment will be subject to the NEPA process, and The environmental groups will have the opportunity to comment on those documents. The Court pointed out that it had rejected this line of reasoning in at least three cases [[274]](#footnote-275)298 on the basis that the rights and duties of the parties at the regional and site-specific levels are defined by conditions imposed at the higher level. To find otherwise would be to render the national level regulations useless and superfluous. Furthermore, the Court noted that if The environmental groups could not challenge the national regulations at this time, those regulations would forever escape review. The court then found that USDA's actions were the cause of The environmental groups's grievance and that allowing public participation in the environmental review of the 2000 Rule would redress that injury.

In addition to constitutional standing, plaintiffs must meet associational and APA requirements for standing. To meet the requirements for associational standing, plaintiff organizations must have members who would "have standing to sue in their own right," [[275]](#footnote-276)299 the interests of the organization must be germane to the interests at stake in the lawsuit, and the lawsuit must not require the participation of individual members. The court determined that the environmental organizations bringing suit had associational standing. Many of their members had been harmed individually and would thus have standing to sue on their own. The interests at stake in this case were environmental and were thus germane to The environmental groups's interests. Finally, the suit neither required nor would benefit from the participation of individual members. To meet the APA requirements for standing a plaintiff must prove that the agency action under review is final and that the plaintiff's interests fall within the zone of interests protected by the agency action. The court found that The environmental groups met these requirements because the publication of the 2000 Rule represented final agency action and The environmental groups, as protectors of the environment, are within the zone of interest protected by NEPA.

The second issue before the court was whether or not the claim was ripe for review. In Ohio Forestry Ass'n v. Sierra Club, [[276]](#footnote-277)300 the Supreme Court articulated a three-pronged test for ripeness in administrative cases: "1) whether delayed review would cause hardship to the plaintiffs; 2) whether judicial intervention would inappropriately interfere with further administrative action; and 3) whether the courts would benefit from further factual development of the issues presented." [[277]](#footnote-278)301 Using this test, the Ninth **[\*893]** Circuit determined that The environmental groups's claim was ripe. First, delayed review would be a hardship to The environmental groups because some LRMPs are being revised to comply with the new plan and USDA has already implemented the 30-day public protest process. Second, judicial intervention would not interfere with further administrative action because the 2000 Rule has been finalized. Third, the facts need no further development. The Ninth Circuit found support for its determination in the Supreme Court statement that a NEPA injury becomes ripe when the procedural violation occurs, and "the claim can never get riper." [[278]](#footnote-279)302

Based on its rulings that The environmental groups had standing to sue and that the claim was ripe, the Ninth Circuit reversed the district court's grant of partial summary judgment in favor of the USDA and remanded the case to the district court for a decision on the merits.

2. Forest Guardians v. United States Forest Service, 329 F.3d 1089 (9th Cir. 2003).

Forest Guardians and the White Mountain Conservation League (collectively environmental groups) challenged the adoption of grazing-related allotment plans within a national forest by the United States Forest Service (USFS). Finding that USFS did not act in an arbitrary or capricious manner in adopting the grazing-related allotment plans, the district court granted summary judgment in favor of USFS. The Ninth Circuit dismissed in part based on mootness and affirmed in part.

The land at issue in this case is located in the Apache-Sitgreaves National Forest in central eastern Arizona. USFS is required to follow the Forest and Rangeland Renewable Resources Planning Act, [[279]](#footnote-280)304 the Multiple-Use Sustained-Yield Act (MUSYA), [[280]](#footnote-281)306 and the Endangered Species Act (ESA). [[281]](#footnote-282)307 Furthermore, USFS is required to develop a land and resource management plan (LRMP) for each unit in the National Forest System in accordance with USFS regulations.

The LRMP for the Apache-Sitgreaves National Forest included provisions allowing grazing of livestock on certain allotments of land in the forest. To decide whether grazing should be permitted in particular allotments and how that grazing should be managed, in 1996 USFS created allotment management plans for six of the grazing allotments. The allotments were analyzed in two groups, one made up of two allotments, Red Hill and Grandfather (collectively Red Hill), and the other consisting of **[\*894]** four allotments, Cow Flat, Foote Creek, PS and Stone Creek (collectively Cow Flat). Based on these analyses, USFS decided that the existing grazing permits for these areas did not comply with the LRMP and existing environmental laws and needed revision. USFS subsequently cancelled the permits for the Red Hill and Cow Flat allotment groups and issued new ten-year permits for the allotments, which included a reduction over a three-year period in how many cattle were allowed to graze in those areas ("phased-in reduction"). [[282]](#footnote-283)308 These permits allocated all of the available forage to the cattle. Additionally, in order to try out different management options, USFS reserved the right to increase the number of grazing cattle on the allotments via temporary permits.

The LRMP is used to aid USFS in deciding whether to approve site-specific actions. Under NFMA, proposed actions must be consistent with LRMPs, and USFS must consider the economic and environmental aspects of different sorts of management. NEPA requires USFS to prepare an environmental impact statement (EIS) for every ""major Federal action … significantly affecting the quality of the human environment.'" [[283]](#footnote-284)309 The ESA requires that USFS consult with the United States Fish and Wildlife Service (FWS) to ensure that agency action will not jeopardize listed species or destroy or modify critical habitat for listed species. [[284]](#footnote-285)310

On appeal, The environmental groups challenged the actions of USFS on three grounds. First, The environmental groups alleged that in creating the phased-in reduction, in allocating all available forage to the cattle, and in reserving temporary permitting power, USFS violated NFMA by failing to act in a manner consistent with the Forest Plan. Second, the environmental groups alleged that USFS violated a 1999 biological opinion (BiOp) which said unreduced cattle grazing would result in an ESA "take." Third, the environmental groups challenged the district court's summary judgment in favor of USFS and also the exclusion by the district court of post-June 1, 1999 monitoring data including evidence of overgrazing in the allotments at issue. USFS filed a mootness motion relating to some of the environmental groups' claims between the filing of the briefs and the oral argument. After the oral argument, the environmental groups responded, denying that any of its claims were moot.

USFS argued that the environmental groups' NFMA claims were moot because the three-year period of the phased-in reduction scheme for Red Hill and Cow Flat had expired by the time the plaintiffs brought this action (this case was argued and submitted February 14, 2002, and the three-year periods all expired before March 1, 2002). In addition USFS issued a Decision Notice stating that the agency would follow its manual in using the temporary permitting power making the validity of the permit moot. USFS also asserted that the environmental groups's BiOp claim was moot because the 1999 BiOp had been superseded. Alternatively, USFS argued it had already conducted the consultation required by the 1999 BiOp, and the **[\*895]** environmental groups failed to give proper notice of the ESA claims in its intent to sue letter.

The Ninth Circuit first addressed the mootness claims. The Ninth Circuit granted all of the environmental groups' motions except for the motion regarding the phased-in reduction in grazing. The environmental groups challenged the USFS's use of temporary permits for range management and argued that the temporary permits issue fell under the voluntary cessation exception to the mootness doctrine because, although USFS issued a Clarification to Decision Notice which only allowed the issuance of temporary permits if those permits are "consistent with the policy and purpose of temporary grazing permits set forth in the Service Manual," USFS never deleted the original Decision Notice that granted it the power to issue temporary permits. [[285]](#footnote-286)311 The Ninth Circuit held that the temporary permit claim was moot because the Clarification to Decision Notice sufficiently narrowed the latitude that USFS had in issuing the temporary permits. The court also held that the temporary permit claim did not fall under the voluntary cessation exception to the mootness doctrine, stating that USFS was unlikely to grant permits that go against the letter and policy of the clarified Decision Notice.

The Ninth Circuit then held that the environmental groups' ESA claims were moot because both the section 7 claim and the section 9 claim were based on the 1999 BiOp, and the court determined the 1999 BiOp was superceded by a 1998 Biological Assessment and Evaluation (BAE). [[286]](#footnote-287)312 The court stated "when one [BiOp] supersedes another, a challenge to the superseded [BiOp] is moot," [[287]](#footnote-288)313 and therefore any claims based on challenges to the superseded BiOp were moot as well. Thus, the environmental groups' challenge to the exclusion of the evidence of overgrazing in the post-June 1, 1999 monitoring data was moot. As it was able to dismiss the ESA claims on the basis of mootness, the Ninth Circuit did not reach USFS's jurisdiction or reconsultation arguments. The Ninth Circuit held that the phased-in reduction claim was still live because the claim could be redressed by ordering USFS to fix the problem and allow the land to recover, even though the time the case was before the court, the three-year period had ended.

Having addressed the mootness issues, the Ninth Circuit then evaluated the environmental groups' substantive claims. The Ninth Circuit reviewed the environmental groups's allegations of violations of NFMA and the ESA under an arbitrary and capricious standard, with deference to USFS's interpretation of its regulations. The environmental groups challenged the phased-in reduction scheme as not consistent with the LRMP under NFMA. The Ninth Circuit agreed with the decision of the district court and upheld the phased-in reduction scheme as not arbitrary or capricious but disagreed with the district court's reasoning. The district court upheld the phased-in reduction scheme because the regulations allowed USFS to ""modify' the **[\*896]** number of livestock allowed" in a permitted area. [[288]](#footnote-289)314 The Ninth Circuit said that permission to modify does not equate to permission to cancel, and therefore upheld the phased-in reduction scheme under 36 C.F.R. section 222.3, which allows USFS to issue permits that limit the number of livestock a person can hold under that permit. [[289]](#footnote-290)315 The Ninth Circuit held that "the phased-in reduction scheme is a reasonable response to the [LRMP's] requirement that capacity and permitted use be balanced, and [USFS's] burden to consider the permittees when making management decisions." [[290]](#footnote-291)316

The Ninth Circuit also upheld USFS's actions in allocating all of the available forage to livestock. The environmental groups challenged this action as a violation of NFMA's requirement that the agency consider wildlife needs. The court determined that even though there were wild ungulate populations in the area, the allocation of all available forage to livestock was not plainly erroneous or against USFS regulations because USFS considered the wild ungulates in setting livestock range timing and closely monitored foraging. The environmental groups argued that this monitoring cannot hide the fact that the ten-year permit gave all of the grazing capacity to livestock and none to wildlife. However, the Ninth Circuit held that USFS's monitoring program was not arbitrary or capricious because USFS made a rational connection between the facts and its implementation of the monitoring program in light of the difficulty in estimating the number and range of wild ungulates.

The Ninth Circuit dismissed as moot the environmental groups' claims regarding the ESA, the temporary permits, and the district court's exclusion of monitoring data from after June 1, 1999. The Ninth Circuit affirmed the district court's summary judgment for USFS on the claims regarding allocation of all the forage to cattle, the monitoring program, and the phased-in reduction scheme.

Judge Paez concurred in all of the opinion except for the portion supporting USFS's allocation of all of the available grazing land to cattle and method of assessing grazing capacity of the land. Judge Paez stated that "by allotting 100 percent of the available forage to livestock, USFS failed to comply with [provisions] of the LRMP … and thus violated … NFMA." [[291]](#footnote-292)317 According to Judge Paez, the forest plan clearly required USFS to consider wildlife grazing before permits; the allocation and the monitoring program were inconsistent with the LRMP and should have been held arbitrary and capricious.

3. Earth Island Institute v. United States Forest Service, 351 F.3d 1291 (9th Cir. 2003).

Earth Island Institute (EII), an environmental group, appealed the denial of a preliminary injunction to forestall implementation of a post-fire **[\*897]** restoration project by the United States Forest Service (USFS) on the grounds that the timber sales involved in the project violated the National Environmental Policy Act (NEPA) [[292]](#footnote-293)319 On appeal, the Ninth Circuit held that the district court had imposed an erroneously high burden of proof on EII, and that under the proper legal standard EII had shown a reasonable probability of success on the merits of some of its claims. Although the Ninth Circuit normally would not have reached the merits of the case in its review of a preliminary injunction, the court reviewed the merits de novo because the premise on which the district court relied was at issue. Thus, the Ninth Circuit reversed and remanded the case to the district court, noting that the district court should consider the public interest involved in forest preservation.

All national forests in the Sierra Nevada range, including the Eldorado National Forest, are subject to the Sierra Nevada Framework (the Framework), which requires USFS to establish 300-acre Protected Activity Centers (PACs) where logging is limited. [[293]](#footnote-294)320 These PACs are required around all sites where the California spotted owl (Strix occidentalis occidentalis) is known or suspected to nest. [[294]](#footnote-295)321 In the Eldorado National Forest, USFS is also required by the Framework to establish 1000-acre Home Range Core Areas (HRCAs) surrounding each PAC, in which logging is restricted to trees under twelve inches in diameter. [[295]](#footnote-296)322 Even if there are no spotted owls actually occupying the PAC, USFS must maintain the PAC unless the habitat is destroyed and protocol-compliant surveys confirm that spotted owls no longer live in the PAC. If a PAC is destroyed by fire, USFS must try to create a replacement PAC elsewhere within the relevant HRCA.

In 2001, the "Star Fire" burned thousands of acres in the Eldorado and Tahoe National Forests. The Star Fire was a stand replacing fire - a fire that occurs in a relatively uniform area of forest and can be prevented by clearing out fuel in the form of woody debris and dead trees. In the year following the Star Fire, USFS made and carried out plans for management of the burned areas to prevent more fires. One such plan was the Star Fire Restoration Project (the Project), which affected land within the Eldorado National Forest. As part of the Project, USFS issued a draft environmental impact statement (EIS) proposing logging in the Eldorado National Forest. After public comment, USFS released a final EIS (FEIS) recommending logging to prevent another fire like the Star Fire. The FEIS prohibited logging of any trees with green canopy that lay within the two affected PACs: PAC055 and PAC075. USFS concluded that, due to destruction of most of the two HRCAs in which PAC055 and PAC075 were located, neither PAC could be reestablished within its HRCA, and therefore the FEIS also recommended **[\*898]** deleting both PACs from the forest plan. USFS subsequently sold the project areas to Sierra Pacific Industries in two timber salvage sales. EII challenged the FEIS and the resultant timber sale under NEPA on three bases: 1) USFS used improper data in creating the FEIS, 2) USFS should have done a combined EIS for the Eldorado and Tahoe National Forests, and 3) USFS should have considered cumulative impacts on the California spotted owl from actions that would take place in the Tahoe National Forest.

Generally the Ninth Circuit conducts its review of preliminary injunctions without considering the merits of the case or whether the district court correctly applied the law. However, "when the district court is alleged to have relied on an erroneous legal premise, [the Ninth Circuit will] review the underlying issues of law de novo." [[296]](#footnote-297)323 The Ninth Circuit found that the district court relied on an erroneous legal premise when it required EII to 1) establish that the project would lead to actual harm, 2) show that current measures would not protect the California spotted owl, and 3) identify a real probability of irreparable harm. The Ninth Circuit noted these premises were improper because, for a court to issue a preliminary injunction, it need only find that plaintiffs will probably succeed on the merits and that some possibility of irreparable harm exists if the action is allowed to go forward.

EII first argued that USFS used improper scientific data regarding levels of fuel loads and tree mortality, as well as factually incorrect data in its FEIS. The court found that USFS properly addressed the existing science and challenges regarding its assessment of the level of fuel loads and tree mortality. The Ninth Circuit also noted that if EII could convince the district court that USFS used factually incorrect data then it could win the case on the merits, and so the district court should consider evidence of invalid data on remand.

EII also argued that USFS was required by NEPA to prepare a single EIS for the Star Fire-related projects in the Eldorado and Tahoe National Forests. Applying the independent utility test, the Ninth Circuit found that the actions in Eldorado and Tahoe national forest were not sufficiently connected as to require a single EIS. [[297]](#footnote-298)324 The Ninth Circuit also found that the actions were not sufficiently cumulative or similar to require preparation of a single EIS. EII also alleged that the Eldorado study should have considered cumulative impacts on Eldorado spotted owls that would result from actions in the Tahoe National Forest. The Ninth Circuit found that "the Eldorado FEIS never assessed the potential role of the remaining suitable habitat within the former HRCA for a maintained Tahoe PAC075 despite the acknowledged presence of owls in the area," an omission amounting to "an insufficient consideration of cumulative impact under NEPA." [[298]](#footnote-299)325 The Ninth **[\*899]** Circuit concluded that EII would probably succeed on the merits of its claim that USFS violated the forest plan by failing to actually survey the PACs. Furthermore, the court noted that it had held in past cases that logging plans may constitute irreparable injury because they can have far-reaching environmental consequences. [[299]](#footnote-300)326 The Ninth Circuit stated that EII would probably not succeed on the merits of its claims regarding USFS's conclusions on potential fuel loads and tree mortality because the FEIS expressly discussed existing information and the reason to accept or not incorporate that information.

EII also challenged three USFS actions as violating the Framework and therefore violating NFMA. The challenged actions included 1) allowing logging of trees over twenty inches in diameter, 2) delisting the PACs, and 3) failing to readjust the boundaries of PAC055 and PAC075. The Ninth Circuit found USFS reasonable in allowing logging of trees over twenty inches in diameter because USFS had rationally distinguished that guideline as pertaining to undergrowth thinning rather than salvage after a fire. However, the Ninth Circuit found that EII had established a probability of success on the PAC claims by showing that USFS did not conduct the surveys that would allow it to stop maintaining the PACs by showing that the PACs were no longer occupied by California spotted owls. EII presented an owl expert's testimony concerning owl occupancy, and showed USFS surveys had in fact found a spotted owl pair in PAC075. USFS indicated it had found the habitat unsuitable for spotted owls, but the Ninth Circuit reviewed the Framework and found that this did not constitute compliance with the forest plan because the forest plan required USFS to do actual surveys to ascertain the absence of spotted owls before deciding to cease maintenance of the PACs.

Judge Noonan concurred and wrote separately to argue that because USFS had a financial interest in the timber sale, the agency was inherently biased and potentially disqualified from approving such a sale. Judge Noonan suggested that USFS should not have been allowed to approve the timber sale unless the potential for bias, evaluated based on the percentage of yearly USFS budget derived from timber sales, was low.

Judge Clifton dissented on the basis that the district court used the proper standard for denial of a preliminary injunction and assigned the proper burden of proof to EII. Judge Clifton found that the district court properly denied the preliminary injunction because no actual or irreparable injury would result from its denial. Judge Clifton stated that, contrary to the findings of the majority, the district court considered the public interests in the timber sale decisions. Furthermore, Judge Clifton found that EII and the majority overemphasized USFS's ability to predict what would happen in other parts of the forest.

**[\*900]**

D. Water Law

1. United States v. Alpine Land & Reservoir Co., 340 F.3d 903 (9th Cir. 2003).

The United States and the Pyramid Lake Paiute Tribe (Tribe) challenged the Nevada State Engineer's decision to approve landowners' applications to change the place of use of water rights on their farms. The appeals of three landowners, whose applications for change of place of use of water rights had been denied, were consolidated in this appeal.

The Ninth Circuit affirmed the portions of the district court's decision upholding the State Engineer's denials of applications to change the place of use of water rights and upholding the State Engineer's determination of the date of contract for the water rights. The Ninth Circuit reversed the portion of the district court ruling accepting dirt-lined ditches as beneficial uses of water and remanded all applications for which transfers had been approved.

This case continues litigation on the intrafarm transfer of place of use of water rights begun in the 1980s. Farmers within the Newlands Reclamation Project (Project) claim the right to transfer the use of water rights from one place on their farms to another. The United States and the Tribe believe the farmers are illegally trying to transfer water rights they have forfeited or abandoned. All the water rights at issue take water from the Truckee River, the only source of water for Pyramid Lake, a central feature of the Paiute Indian Reservation. Over the years, the withdrawal of water from the Truckee River lowered the level of Pyramid Lake, thereby endangering indigenous fish.

Farmers within the Project obtain water rights by entering into written contracts with the United States Reclamation Service. These rights, which attach to the land on which the water is used, allow a farmer to use water on a designated number of "irrigable acres" [[300]](#footnote-301)327 on a farm. A farmer may transfer the place of use of perfected water rights by applying with the State Engineer. To perfect a water right, the farmer must put the water to beneficial use. Unperfected water rights are subject to Nevada's laws of abandonment and forfeiture. Abandonment occurs when the holder of a water right demonstrates an intent to abandon the right. Intent to abandon is a question of fact that must be determined from all the surrounding circumstances including, among other things, non-use, improvement inconsistent with irrigation, and failure to pay taxes or assessments. [[301]](#footnote-302)328 Forfeiture comes into play when water rights have not been used for five consecutive years. [[302]](#footnote-303)329 Water rights obtained prior to enactment of the forfeiture act in 1913, however, are exempt from the forfeiture law. [[303]](#footnote-304)330

**[\*901]** In a prior case, United States v. Alpine Land & Reservoir Co. (Alpine IV), [[304]](#footnote-305)331 the district court affirmed the Nevada State Engineer's ruling that for equitable reasons, applications for intrafarm transfers were exempt from Nevada's abandonment and forfeiture laws. [[305]](#footnote-306)332 The Ninth Circuit reversed on appeal in United States v. Alpine Land & Reservoir Co. (Alpine V). [[306]](#footnote-307)333 However, in accordance with Alpine IV and before Alpine V, the State Engineer approved thirty intrafarm transfers. A number of those approvals are included in this appeal, and most of the determinations in this case apply the rulings made originally in Alpine V.

First, the Ninth Circuit affirmed the State Engineer's determinations of the contract dates on which landowners acquired water rights. The court found that the State Engineer, following the dictates of Alpine V, set the contract dates as the date on which each landowner "took affirmative steps to appropriate water," [[307]](#footnote-308)334 rather than 1902 when the Project began. The Ninth Circuit then ruled that here, as in Alpine V, decisions on whether or not intrafarm transfers of water rights are eligible for equitable relief from Nevada's forfeiture laws must be made on a case-by-case basis. Finding that there was insufficient information in the record to allow the court to make the case-by-case determinations, it remanded the cases to either the State Engineer or the district court. The court further pointed out that, in each case, "any equitable considerations must be balanced against the negative consequences to the Tribe resulting from any increased diversions of water." [[308]](#footnote-309)335

Again following its ruling in Alpine V, the court found that abandonment of water rights must be determined on a case-by-case basis. Because the information necessary to make the case-by-case determinations was not in the record, the court remanded the cases for further consideration of abandonment. The court reiterated Nevada law that nonuse does not set up a presumption of intent to abandon, and that intent to abandon is a question of fact that must be determined from all the surrounding circumstances including nonuse, improvements inconsistent with irrigation, and failure to pay taxes or assessments. After acknowledging the tension between the standards for intent to abandon set in United States v. Orr Water Ditch Co. [[309]](#footnote-310)337 the Court decided that if there is no other proof of lack of intent to abandon a water right, there must be proof of continuous use. If other proof does exist, "then proof of continuous use is not necessarily compelled." [[310]](#footnote-311)338

**[\*902]** Next the court addressed the 1973-1984 Department of the Interior moratorium on transfers of place of use of water rights. During that period, the government continued to accept and process applications but did not approve them. Farmers, asserting that in some cases they were unable to use their water rights because they were unable to transfer the place of use as a result of this moratorium, asked for a blanket equitable exemption for nonuse. As in Alpine V, the Ninth Circuit rejected this argument because, in many cases, the period of nonuse did not coincide with the time of the moratorium. The court required that in order to qualify for an equitable exemption for nonuse during the moratorium period, each landowner must show he applied for a transfer or inquired about a transfer during that time.

Finally, the Ninth Circuit found that, because the right to use water attaches to the land where the water is used and not the land through which the water passes, the flow of water through a dirt-lined ditch does not constitute a beneficial use unless the water is used for lateral root irrigation.

The Ninth Circuit's ruling thus affirmed the denials of applications for intrafarm changes in the place of use of water rights and upheld the State Engineer's determinations of the dates of contracts of water rights. In conformance with its determinations in Alpine V, the Ninth Circuit then remanded all applications for which transfers had been granted for case-by-case determinations of whether the water rights in question had been perfected and, if not, whether they had been forfeited or abandoned. Finally, the Ninth Circuit, reversing the district court, found that dirt-lined ditches are generally not beneficial uses of water attaching to the land through which the ditches pass.

On remand, the State Engineer must follow the ruling in Alpine V that intrafarm transfers are not per se exempted from forfeiture and abandonment laws. In determining abandonment, the State Engineer must look at all the surrounding circumstances. In determining forfeiture, the State Engineer must balance the interests of the applicants against the interest of the Tribe in minimizing diversions from Pyramid Lake. In determining non-use during the moratorium period (1973-1984), the State Engineer must look at whether the farmer applied to transfer place of use or inquired about a transfer. The State Engineer must not generally consider water flowing through a dirt-lined ditch to have been put to a beneficial use with respect to the land through which the ditch runs.

2. United States v. Alpine Land and Reservoir Co., 341 F.3d 1172 (9th Cir. 2003).

Churchill County, Nevada (County) and the City of Fallon, Nevada (City) brought this action against the State Engineer of Nevada, claiming that he violated Nevada state law when he approved eight applications to transfer the place of use of water rights acquired by the United States Fish and Wildlife Service (FWS). [[311]](#footnote-312)339 The district court, finding that the State **[\*903]** Engineer's conclusions were supported by substantial evidence, upheld the State Engineer's approval of the water rights transfers. The Ninth Circuit affirmed the district court's decision.

For at least 4,000 years, the Carson River created wetlands where it flowed out of the mountains into the Lahontan Valley. The Reclamation Act, [[312]](#footnote-313)340 passed by Congress in 1902, required that water from the Carson and Truckee Rivers be held in reservoirs behind dams to provide water for irrigation of 200,000 acres - now known as the Newlands Reclamation Project - located in Churchill County near Fallon, Nevada. Over the past 100 years, these authorized diversions of water from the Carson River have substantially dried up the Lahontan Valley wetlands. In 1990, to address this as well as other water allocation problems in the area, Congress passed the Fallon Paiute Shoshone Indian Tribal Water Rights Settlement Act of 1990 (Settlement Act). [[313]](#footnote-314)341 Section 206(a) of Title II of this Act requires the Secretary of the Interior to acquire and manage sufficient water and water rights to support 25,000 acres of wetlands in the Lahontan Valley. [[314]](#footnote-315)342 Acquired water must be applied directly to wetlands, and transfers of water rights must be made in accordance with state law. The entire program is expected to take 20 years and involve 75,000 acre-feet of water rights. The water rights in question in this case were acquired by the FWS from willing sellers pursuant to the Settlement Act [[315]](#footnote-316)343 for the purpose of supporting wetlands in the Lahontan Valley. The City and the County asserted that transferring the place of use of the water rights would reduce the recharge to the water table, endangering the municipal water supply and causing domestic wells to dry up.

After acquiring the necessary water rights, FWS submitted applications to the State Engineer to transfer the place of use of the first eight of those rights. Concerned that the acquisition and transfer program would endanger local water supplies, the City and the County filed suit against the Secretary of the Interior, alleging the Secretary violated the National Environmental Policy Act (NEPA) [[316]](#footnote-317)344 by failing to prepare a programmatic environmental impact statement assessing the cumulative impacts of the acquisition and transfer program. [[317]](#footnote-318)345 After losing that case in the Ninth Circuit, and while a petition for certiorari was pending with the United States Supreme Court, the County and the City filed this suit, claiming the Nevada State Engineer violated Nevada state law by approving the transfers without requiring an assessment of the cumulative impacts of the Settlement Act program. In addition, the City and the County asserted that the State Engineer should **[\*904]** have withheld action on the transfer applications pending the Supreme Court's decision on this issue.

Nevada state law required the Ninth Circuit to uphold the State Engineer's factual determinations if they were supported by substantial evidence and to uphold his legal conclusions unless they were contrary to law.

The court first addressed the petitioners' claim that the State Engineer's actions interfered with existing water rights. The City and County provided no evidence regarding the effects of the eight transfers contested in this suit. Instead, they relied on evidence that pertained to the effects of the entire acquisition and transfer program. The Ninth Circuit first determined the focus should be solely on the effects of the eight transfers. The Ninth Circuit then decided that because none of the existing places of use of the water rights contributed to recharging the aquifer, transferring use to the wetlands area would not affect local ground water levels, [[318]](#footnote-319)346 and thus would not conflict with existing water rights.

Next, the court examined petitioners' claim that the water rights transfers were detrimental to the public interest. Relying on guidelines provided by the Nevada Supreme Court in Pyramid Lake Paiute Tribe of Indians v. Washoe County (Pyramid Lake), [[319]](#footnote-320)347 the Ninth Circuit decided the eight transfers of water rights did not adversely affect the public interest. [[320]](#footnote-321)348 Again, the City and the County centered their arguments around the entire program and presented no evidence that the eight transfers in particular would adversely affect the public interest. In contrast, the United States presented substantial evidence refuting claims that transferring the eight specific water rights would have adverse effects on air pollution and dust hazards. [[321]](#footnote-322)349 The Ninth Circuit determined that the City and County's view was more expansive than Nevada's interpretation of "public interest," and the Nevada Supreme Court had made it clear that any expansion of the definition of public interest beyond the interpretation in Pyramid Lake would have to come from the state legislature. [[322]](#footnote-323)350 The Ninth Circuit also determined that concerns for the public interest did not require the State Engineer to study the cumulative impacts of the acquisition and transfer **[\*905]** program prior to approving a transfer. Nevada state law leaves the State Engineer with discretion in deciding whether to require studies should be done before water rights are transferred. [[323]](#footnote-324)351

The Ninth Circuit next examined petitioners' claim that the State Engineer abused his discretion by not requiring further study of the cumulative impacts of the acquisition and transfer program. The court determined that the five studies and the final environmental impact statement (EIS) addressing the ground water situation in the Lahontan Valley (prepared by FWS in compliance with the Settlement Act) which were considered by the State Engineer as well as the ten witnesses presented by the State Engineer provided substantial evidence that he had adequately reviewed the situation and found that no new studies were needed. Furthermore, the court determined that Nevada state law does not require a comprehensive assessment of the potential effects of future water transfer applications. Nevada law requires the State Engineer to evaluate the need for a study in relation only to each individual transfer application. [[324]](#footnote-325)352 In Pyramid Lake, the Nevada Supreme Court confirmed that the State Engineer is obligated only to address each transfer application as it comes up, "and is not in a position to interfere with the decisions and responsibilities of [others]." [[325]](#footnote-326)353 Cumulative impact analysis under NEPA is the duty of the Secretary of the Interior, and not the State Engineer. [[326]](#footnote-327)354

Finally, the court addressed the argument that the State Engineer should have stayed his approval of the transfers pending the outcome of the County's case against the Secretary of the Interior. The Ninth Circuit found that, under section 533.370(2)(b) of the Nevada Revised Statutes, the State Engineer has discretion to determine whether to withhold action pending the outcome of related litigation. The court found that the State Engineer did not abuse his discretion when he approved the transfers before the County's case against the Secretary of the Interior was final. This question is now moot, as the Supreme Court's October 7, 2002 denial of certiorari rendered the Ninth Circuit's decision in that case final.

The Ninth Circuit affirmed the district court's decision to approve the Nevada State Engineer's authorization of eight transfers of place of use of water rights, finding it to be supported by substantial evidence and not contrary to law.

**[\*906]**

3. United States v. Braren, 338 F.3d 971 (9th Cir. 2003).

The State of Oregon and the Brarens, the landowners, appealed the district court's declaration of tribal water rights involved in an Oregon state adjudication. Oregon argued that the claims were not ripe and that the district court should have abstained from review until final action had been taken in the state's adjudication of water rights in the Klamath Basin. The Brarens contested the district court's declaration clarifying the tribal water rights. The Ninth Circuit agreed with Oregon that the dispute was not ripe and thus did not reach the question of abstention or the district court's declaration on the merits of the case.

Water rights within the Klamath Basin have been the subject of dispute between the United States, Oregon, the Klamath Tribes (Tribes), and many individual landowners over the last twenty-five years. In 1979, in United States v. Adair (Adair I), [[327]](#footnote-328)355 the district court addressed many of the issues involved, including the nature and scope of water rights granted to the Tribes by treaty. Though it retained jurisdiction over the case, the court left the allocation of all Klamath Basin water rights to Oregon. [[328]](#footnote-329)356 This arrangement - with the court announcing standards and the state applying and quantifying the rights - was approved by the Ninth Circuit in United States v. Adair (Adair II). [[329]](#footnote-330)357 Thus, Oregon proceeded with an extensive state adjudication pursuant to the standards set out for allocation by the district court.

In 1999, Oregon's Water Resources Department (Water Department) Adjudicator issued a "Summary and Preliminary Evaluation." In the announcement, the Adjudicator indicated that the standard for evaluating the tribal claims would not include water rights sufficient to support the gathering of plants. [[330]](#footnote-331)358 By 2001, 5,654 contests had been filed and five cases had been initiated as a result, consolidating 2,267 of those contests. According to Oregon procedures, these cases would be heard by an administrative panel where parties would have the opportunity to initiate discovery, file motions, subpoena witnesses, testify, and submit documentary evidence. [[331]](#footnote-332)359 After the hearing panel issues proposed orders, the Water Department would review those orders and issues its own resolution of the entire adjudication in its "Findings of Fact and an Order of Determination." [[332]](#footnote-333)360

However, in 2001, the United States and the Tribes filed suit, seeking a declaratory judgment that the Tribes, by treaty, had a water right to support the gathering of plants. Though Oregon argued that the case was not ripe, the district court announced a process for deciding the tribal water rights and held the individual defendants were precluded by the conclusive **[\*907]** decisions in both Adair I and Adair II from arguing the Tribes had lost their treaty rights to hunt, fish, and gather. [[333]](#footnote-334)361

On appeal, Oregon renewed its position that the case was not ripe and that the district court should have abstained from deciding the case, based on a theory announced in Colorado River Water Conservation District v. United States. [[334]](#footnote-335)362 The Brarens were the only individual landowners named as defendants in the original action to appeal the merits of the district court's declaration. [[335]](#footnote-336)363

The Ninth Circuit addressed the ripeness question first. The Ninth Circuit reviews ripeness de novo and in two parts: first, the constitutional component and then any prudential issues. [[336]](#footnote-337)364 The constitutional ripeness of a declaratory judgment action "depends upon whether the facts alleged … show that there is a substantial controversy … of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." [[337]](#footnote-338)365 The court held that this case clearly satisfied the constitutional ripeness test because the Water Department adopted a standard for Tribal water rights that allegedly conflicted with the holding of Adair I and Adair II.

The Ninth Circuit then examined the prudential component of ripeness. In deciding whether the claims were prudentially ripe, the court considered first whether the issues were fit for a judicial decision and then whether withholding consideration would impose hardship on the parties. [[338]](#footnote-339)366 Primarily, the court wanted to ensure that the declaratory judgment procedures would not be used to preempt or prejudice issues before the Water Department. [[339]](#footnote-340)367

Fitness for judicial decision depends on whether the issues presented are primarily legal - meaning no further factual record is necessary - and whether the challenged action is sufficiently final. [[340]](#footnote-341)368 Based on these two elements, the Ninth Circuit held that this dispute did not meet the fitness requirement. First, the court determined the issues still required factual development. The court held that the record did not show the standard that the Water Department would actually apply. [[341]](#footnote-342)369 While the United States and the Tribes alleged that the Preliminary Evaluation established an erroneous standard, the Water Department was not bound to apply that standard. Indeed, the court pointed out that the contest panels, the Water Department, and the Oregon courts might all apply different standards. [[342]](#footnote-343)370 Second, the court determined the Water Department's action was "nowhere near **[\*908]** final." [[343]](#footnote-344)371 The adjudication required at least two more steps before it would be clear what standard the Water Department would adopt. For instance, the court pointed out the contest panels might not follow the standard set out in the Preliminary Evaluation and the Water Department could set aside the conclusions of those panels.

The Ninth Circuit further held that there would be no hardship to the parties if the court withheld judicial action. The court reasoned that the ultimate relief sought by the parties - the distribution of their share of water - could not be granted until the termination of the adjudication. Thus, declaratory relief beyond the standards already set out by the courts in Adair I and Adair II would be futile.

Finally, the Ninth Circuit distinguished the current dispute from those at issue in Adair I and Adair II. In those cases, the dispute was over whether the Tribes had any right to water in the Klamath Basin - a purely legal issue. In contrast, this dispute was solely about the standard to determine the extent of the Tribe's water rights for purposes of allocation. These questions, the court decided, could not be sufficiently addressed until the conclusion of the adjudicatory process. The Ninth Circuit vacated the district court's opinion and remanded for an order to stay federal proceedings pending the completion of the state adjudicatory process, including the related appellate review.

4. United States v. Clifford Matley Family Trust, 354 F.3d 1154 (9th Cir. 2004).

The United States and the Pyramid Lade Paiute Tribe of Indians (collectively appellants) requested an evidentiary hearing in district court concerning the court-appointed Water Master's report recommending approval of a petition by the Matley family to reclassify its Nevada farm from bottom land to bench land for the purposes of water allocation. The district court remanded the Matley's petition to the Water Master, instructing him to consider the evidence presented by the Tribe and the United States and to hold an evidentiary hearing if necessary. The Water Master reconsidered the petition in light of the new evidence without holding a hearing and again recommended approval. The district court adopted the Water Master's report and approved the reclassification, again without an evidentiary hearing. The Ninth Circuit determined that an evidentiary hearing was not required, but found that the legal standard used by the Water Master was incorrect and remanded the matter for reconsideration under the correct legal standard.

In the early 1900s, pursuant to the Reclamation Act, [[344]](#footnote-345)372 the Department of the Interior (DOI) withdrew about 200,000 acres of land in western Nevada from public entry, reclaimed it using water from the Truckee and Carson Rivers, and "restored the lands to entry pursuant to the homestead **[\*909]** laws." [[345]](#footnote-346)373 The reclaimed area, called the Newlands Reclamation Project (Project), includes the land occupied by the Matley family farm. Today, allocation of water from the Truckee River is governed by the Orr Ditch Decree, [[346]](#footnote-347)374 and allocation of water from the Carson River is governed by the Alpine Decree. [[347]](#footnote-348)375 Both decrees divide Project land into either "bench" land or "bottom" land. [[348]](#footnote-349)376 Bench lands, which have faster-draining soils than bottom lands, are entitled to more water than bottom lands. In 1986, DOI adopted a classification scheme, based largely on soil characteristics, for determining which land qualifies as bench land and which qualifies as bottom land. After eight years of litigation, DOI's classification scheme was upheld in the 1994 Order [[349]](#footnote-350)377 with the caveat that landowners could challenge the classification of their land if they could show that the consequent decrease in water allocation had resulted in a reduction in crop yield. At that time, the classification scheme was applied and water allocations were changed accordingly. In August 1996, the Matleys petitioned to change the classification of their land from bottom land to bench land, claiming their crop yield had decreased since their water allocation had been reduced as a result of the classification of the land as bottom land.

Upon receiving a petition for reclassification, the Water Master is required to notify the Tribe or counsel for the United States. The Tribe's interest in reclassification lies in the fact that the Truckee River is the only source of water for Pyramid Lake, a central feature of the Paiute Indian Reservation. [[350]](#footnote-351)378 Over the years, the withdrawal of water from the Truckee River has lowered the level of Pyramid Lake, endangering indigenous fish and thus jeopardizing Tribal interests. [[351]](#footnote-352)379 In this case, however, the Water Master neglected to notify either the Tribe or counsel for the United States before issuing a report recommending the petition be approved. When the Tribe and counsel for the United States learned of the report, they objected and requested an evidentiary hearing in district court. The district court ordered the Water Master to consider the Tribe's evidence and hold a hearing if necessary. The Water Master considered the evidence but did not hold a hearing, and issued an amended report, again recommending approval of the reclassification. The district court approved the reclassification. The Tribe and the United States appealed, claiming the lack of a hearing violated their procedural and constitutional rights, and that the Water Master had applied the incorrect legal standard for reclassification. The Ninth Circuit reviewed the district court's holding de novo.

Appellants first claimed that "Federal Rule of Civil Procedure 53 required the Water Master to allow discovery and hold an evidentiary **[\*910]** hearing." [[352]](#footnote-353)380 The Ninth Circuit noted that Federal Rule of Civil Procedure (FRCP) 53(c) requires a court-appointed master to act in accordance with the "specifications and limitations stated in the order" referring the proceedings to the master. [[353]](#footnote-354)381 The court identified the relevant orders in this case as the Orr Ditch Decree, the Alpine Decree, and the 1994 Order, pointing out that none of these orders prescribe the procedures a Water Master is to use in carrying out his duties. The court concluded that, although FRCP 53 gives the Water Master the authority to allow discovery and hold an evidentiary hearing, it did not require him to do so. The court found support for this conclusion in the history of the rule. FRCP 53 derives from Equity Rules 62 and 65. The court found that Rule 62 gave a court-appointed master discretion to "direct the mode" of the proceeding in front of him by determining the kind of proof required and the manner in which it could be presented. [[354]](#footnote-355)382 Rule 65 allowed a master to examine witnesses viva voce, through written interrogatories, or both, as the case required. Both rules gave the special master "substantial discretion" to determine the procedures to use in any given case. [[355]](#footnote-356)383 Because the orders appointing the Water Master said nothing regarding procedure and both the language and history of FRCP Rule 53 gave a special master considerable discretion in determining his procedures, the Ninth Circuit concluded that the Water Master was not required to allow discovery or hold an evidentiary hearing.

Appellants next claimed that the lack of an evidentiary hearing violated their rights under the United States Constitution by depriving them of property without due process. The Tribe argued that meaningful protection of its property interests was only possible in an evidentiary hearing in which it would be allowed to cross examine witnesses. The Ninth Circuit found that while the reclassification deprived the Tribe of property interests in water, the procedures used were adequate. The court determined that "although due process guarantees "some kind of hearing,'" it does not guarantee a full evidentiary hearing. [[356]](#footnote-357)384 After "weighing the "administrative burden and other societal costs,'" the court found that a full evidentiary hearing with witness and cross examination was not required in a ruling reclassifying water rights. [[357]](#footnote-358)385 Because Appellants had been given notice of the Matley's petition and an opportunity to have their evidence reviewed, constitutional due process requirements were satisfied.

Finally, the Ninth Circuit considered appellants' claim that the Water Master used the incorrect legal standard in reclassifying the Matley's land. The Water Master had applied the standard that any reduction in crop yield justified reclassification of bottom land to bench land. The court noted that under the Reclamation Act, the amount of water that can be acquired by any one appropriator is limited to the amount the appropriator can put to **[\*911]** beneficial use, called the appropriator's "water duty." [[358]](#footnote-359)386 The court pointed out that, although the definition of "water duty" includes the right to "a maximum amount of crops," the principles of beneficial use require in addition that the use of the water not be ""unreasonable' considering alternative uses of the water." [[359]](#footnote-360)387 The court determined that a use is unreasonable "if the marginal gain is too small … compared with … the benefits that could be gained" by applying the water elsewhere. [[360]](#footnote-361)388 Combining these considerations, the court concluded that a de minimis decrease in crop yield resulting from classification of land as bottom land did not justify reclassification of the land as bench land. The court announced a new standard: to justify a reclassification of bottom land to bench land, a reduction in crop yield must be "reasonably significant." [[361]](#footnote-362)389

The Ninth Circuit thus upheld the district court's determination that the Water Master's procedures for review of reclassification petitions provided adequate protection for appellants' rights, but reversed the approval of the Matley's reclassification petition, holding the Water Master had used the incorrect legal standard. The court identified a new legal standard, and remanded the case for reconsideration under that new standard.

Circuit Judge Sneed filed a separate opinion, concurring that the Water Master's procedures were not defective but dissenting on the legal standard used. Judge Sneed advocated vacating the 1994 Order allowing the Water Master to reclassify land based on a reduction in crop yield. He pointed out that DOI developed its soil-based water allocation system to alleviate recurring subsurface drainage problems that had plagued the Project from the start. According to DOI, irrigating the bottom land in the Project raises the water table until it "saturates the root zone and damages the crops." [[362]](#footnote-363)390 Thus, lower crop yields can result from too much water as well as too little water and should not be a basis for a reclassification that increases water allocation. In Judge Sneed's opinion, the district court impermissibly substituted its own judgment for the expert judgment of DOI in allowing reclassifications based on depressed crop yield. Accordingly, Judge Sneed called for the Ninth Circuit to vacate the 1994 Order and to remand this case to the district court for review consistent with that determination.

**[\*912]**

E. Wild and Scenic Rivers Act

1. Center for Biological Diversity v. Veneman, 335 F.3d 849 (9th Cir. 2003).

The Center for Biological Diversity and the Central Arizona Paddlers Club (collectively Center) sued the United States Forest Service (USFS) for violating the Wild and Scenic Rivers Act (WSRA). [[363]](#footnote-364)391 The Center claimed USFS failed to consider 57 rivers in Arizona that qualify for inclusion in the Wild and Scenic River System (WSRS) when planning the development of federal land. The district court dismissed the Center's suit for lack of subject matter jurisdiction. The Ninth Circuit had jurisdiction over the case pursuant to 28 U.S.C. section 1291. The Ninth Circuit reversed and remanded the case to the district court, holding USFS had a duty under the WSRA to consider the rivers and that the Center alleged facts evincing that USFS did not fulfill this requirement. As a result, the district court had the subject matter jurisdiction to hear the Center's claim.

Congress passed the WSRA in 1968 to protect certain segments of rivers from damming and development for generating electrified power. To be eligible for protection under the WSRA, a river must 1) flow freely and 2) possess at least one outstandingly remarkable value. [[364]](#footnote-365)392 The outstandingly remarkable values include "scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." [[365]](#footnote-366)393 A river fulfilling these two characteristics may be designated scenic, recreational, or wild by either an act of Congress or by application from a state governor. [[366]](#footnote-367)394

In 1993, at the request of the Arizona congressional delegation, USFS conducted a study that identified 57 Arizona river segments that qualified as potential wild and scenic or recreational rivers and published its findings in a report (1993 Report). Under the WSRA, potentially wild and scenic rivers must be considered "in all planning for the … development of water and related land resources … by all Federal agencies." [[367]](#footnote-368)395 The Center claimed that USFS failed to take these 57 rivers into account when making development plans in violation of the WSRA. Because the WSRA does not provide for an independent cause of action, the Center brought suit under the Administrative Procedure Act (APA). [[368]](#footnote-369)396 The district court found that the Center did not prove final agency action necessary for APA review and dismissed for lack of subject matter jurisdiction. The Ninth Circuit reviewed this dismissal de novo.

First, the Ninth Circuit addressed the Center's argument that the 1993 Report constituted "final agency action." Under the APA, the court only intervenes when final agency action takes effect. [[369]](#footnote-370)397 The court stated that an **[\*913]** agency action must signify the completion of the agency's decision-making process to be considered final. The Ninth Circuit determined that the 1993 Report represented only the first step in the process of designation under the WSRA and therefore was not final agency action.

The Ninth Circuit next turned to the Center's alternative argument that the court has subject matter jurisdiction over the Center's claim because USFS unlawfully withheld action by not considering the rivers in planning. The APA allows a claimant to ask a court to compel "agency action unlawfully withheld or unreasonably delayed." [[370]](#footnote-371)398 To prove its right to bring suit under this provision, the Center had to prove the WSRA required USFS to act. The three steps to designating a river under the WSRA are: 1) USFS determines whether the river flows freely and possesses at least one outstandingly remarkable value, 2) the applicable federal agency determines whether the river is suitable for designation when other factors are taken into account, and 3) Congress decides whether to designate the river. The WSRA requires federal agencies to consider potential wild, scenic, and recreational rivers in developing resources. [[371]](#footnote-372)399

USFS argued the 1993 Report did not officially identify potential wild and scenic rivers, so it had no mandatory duty under the WSRA to consider them. USFS also contended that the WSRA does not contain an express statutory duty to protect rivers until they are labeled wild and scenic, and the 57 rivers had not been labeled as such. To overcome these arguments and establish a right to review, the Center had to prove that USFS had a statutory mandate to consider the rivers, and that USFS did not comply with that agency mandate.

To prove that USFS had a statutory mandate, the Center pointed to the language of the WSRA which states that USFS "shall" consider the effect use and development plans for land and water would have on "potential" wild and scenic rivers. [[372]](#footnote-373)400 The Ninth Circuit first determined that the 1993 Report identified potential rivers as required by the WSRA. The court rejected USFS's argument that it does not typically identify wild and scenic rivers by this method because the WSRA does not require particular methods for identifying potential rivers. In addition, USFS could not identify any substantive flaws with the 1993 Report, the Report identified statutory requirements for river eligibility, and the rivers in the report were listed on the Nationwide Rivers Inventory.

Second, the court found that USFS's duty to consider those potential rivers was a mandatory requirement. To do so, it relied on its reasoning outlined in Montana Wilderness Ass'n v. United States Forest Service, [[373]](#footnote-374)402 which required USFS to maintain possible wilderness study areas in their existing condition, imposed a duty of USFS action. USFS had a **[\*914]** "nondiscretionary, mandatory duty" to ""maintain' wilderness character and potential," enforceable via the APA. [[374]](#footnote-375)403 The court distinguished this mandatory duty from the general policy statements analyzed in ONRC Action v. Bureau of Land Management. [[375]](#footnote-376)404 The requirement to consider rivers was not a general instruction to USFS or a statement of policy, but a mandatory requirement analogous to that in Montana Wilderness Ass'n. The court determined that this duty to consider "potential" rivers did not preclude USFS from taking action with federal land, but did require the agency to consider the impact of the action prior to taking it. Therefore, the court held that USFS had a mandatory duty to consider the 57 rivers in planning decisions.

Finally, the court discussed whether the Center alleged facts in its complaint that established USFS's failure to satisfy its duty to consider the rivers. The court found that the Center alleged the requisite facts in this case. Although USFS claimed it has a policy of addressing potential wild and scenic rivers, the court "rejected this type of generalized defense" as it had in Montana Wilderness Ass'n. [[376]](#footnote-377)405 In addition, the court held that USFS's intention to act the next time it revises its forest plans could not substitute for the agency actually considering the rivers. The Ninth Circuit concluded that USFS had a mandatory duty to consider the rivers in the 1993 Report, pursuant to the WSRA, and that USFS did not perform this duty. Therefore, the Center satisfied the standard of review under the APA and proved that the court had subject matter jurisdiction over the claim. The Ninth Circuit reversed the dismissal of the action for lack of subject matter jurisdiction and remanded to the district court.

2. Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003).

Two environmental groups, Friends of the Yosemite Valley and Mariposans for Environmentally Friendly Growth (collectively environmental groups), sued the National Park Service (NPS) for alleged deficiencies in the creation of the Merced River Wild and Scenic Comprehensive Management Plan (CMP). After a denial of declaratory and injunctive relief, the environmental groups appealed on the grounds that the Merced CMP violated the Wild and Scenic Rivers Act (WSRA), [[377]](#footnote-378)407

Under the WSRA, designated river segments are governed by conservation measures to protect their natural condition. Upon listing, WSRA requires the administering agency to establish detailed boundaries around the protected river and prepare a CMP within three years. [[378]](#footnote-379)408 The WSRA further sets out elements that a CMP must cover, such as "resource **[\*915]** protection, development of lands and facilities, user capacities, and other management practices necessary." [[379]](#footnote-380)409 The statute also mandates that the administering agency "cooperate with … the Environmental Protection Agency and … state water pollution control agencies." [[380]](#footnote-381)410

In 1987 Congress designated portions of the Merced River as a Wild and Scenic River Segment (WSRS). Responding to a court order in Sierra Club v. Babbitt, [[381]](#footnote-382)411 NPS issued the Merced CMP in November of 2000. The environmental groups claimed the CMP violated the prior district court's ruling, WSRA, NEPA and the Administrative Procedure Act (APA), [[382]](#footnote-383)412 and alleged that NPS failed to cooperate with the applicable water pollution control agencies. The district court rejected all of the environmental groups' claims. [[383]](#footnote-384)413

On appeal, the environmental groups asserted four separate deficiencies in the Merced CMP. First, the environmental groups alleged the CMP failed to adequately address "user capacity," a required element of a plan under the WSRA. Second, they claimed that the boundaries set around the El Portal section of the river failed to ensure protection of the wild and scenic characteristics of the river. Third, they claimed that the programmatic nature of the CMP, which incorporated a final environmental impact statement (EIS), violated the WSRA, the regulations implementing the WSRA, and NEPA because it did not allow for the incorporation of sufficiently specific data. Finally, the environmental groups alleged that NPS had failed to meet the WSRA's mandate of cooperation with federal and state water pollution control agencies to prevent pollution of the river. The Ninth Circuit reversed and remanded to the district court on the issues of user capacity and the El Portal boundaries, but affirmed the district court's holdings on the sufficiency of both the data within the CMP and the NPS's cooperation with other water pollution control agencies.

The Ninth Circuit reviewed the district court's factual findings for clear error and its conclusions of law de novo. The court reviewed NPS's actions under the APA's arbitrary and capricious standard. [[384]](#footnote-385)414 The court first addressed the question of whether the CMP adequately addressed the issue of user capacity. NPS asserted the Visitor Experience and Resource Protection (VERP) section of the Merced CMP adequately addressed user capacity by setting desired standards for river conditions over a five-year period. The Ninth Circuit held NPS's VERP approach invalid because it failed to establish any specific numerical measurement of the number of visitors the area could sustain while maintaining the river's inherent characteristics. Looking at the plain meaning of "user capacity," the court **[\*916]** held that the statute required an administering agency to address maximum visitor capacity in the CMP.

The court saw further support for this interpretation in the 1982 guidelines published by the Secretary of Agriculture and the Secretary of the Interior. [[385]](#footnote-386)415 The court read these guidelines as requiring a CMP to include explicit, quantifiable limits on use. The VERP method failed to deal or discuss the visitor capacity of the Merced section because it relied on monitoring environmental impact. Thus, NPS would take action only where it appeared the desired standards were not being met, rather than making an overall capacity determination. The court then remanded this issue to NPS with instructions to adopt specific limits on use.

The Ninth Circuit also rejected the WSRA boundaries NPS had set for an area along the Merced River and within Yosemite National Park's administrative area, known as El Portal. Drawing on Eighth Circuit case law, [[386]](#footnote-387)416 the Ninth Circuit held that the WSRA boundaries must protect and enhance the outstandingly remarkable values (ORVs) which had caused the river to be listed. The El Portal boundaries violated this statutory mandate because they were drawn too narrowly, excluding specific ORVs. Thus, the court remanded to NPS with instructions to redraw the El Portal boundaries to include the specific ORVs within the WSRS.

The Ninth Circuit upheld the district court's determination that the CMP and EIS contained sufficient data to comply with both the WSRA and NEPA. The Ninth Circuit first considered the WSRA standard for data incorporated into a CMP. WSRA mandates merely that the CMP be comprehensive. [[387]](#footnote-388)417 The Ninth Circuit found that "the three-volume CMP, purportedly based upon "the best data available … [and] including nearly 100 years of study' … falls well within the ordinary meaning of comprehensive." [[388]](#footnote-389)418

The Ninth Circuit then analyzed the CMP under NEPA. The court distinguished two levels of administrative action: 1) the programmatic stage, where the agency is developing alternative management scenarios for larger areas, and 2) the implementation stage, where an agency is dealing with individual projects. [[389]](#footnote-390)419 NEPA requires a full analysis of site specific impacts only when the agency has reached the implementation stage, where concrete proposals have been made. [[390]](#footnote-391)420 The court reasoned that the CMP fit within the programmatic stage because it merely laid out broad guidelines for future actions taken within the designated corridor. Thus, since the CMP was just a **[\*917]** guidance document, the court held that NPS had not abused its discretion because there were sufficiently specific data in the CMP's EIS.

To address the environmental groups' allegation that NPS failed to cooperate with other water pollution control agencies as mandated by section 1283 of the WSRA, the Ninth Circuit first dealt with its jurisdiction over the claim. NPS argued on appeal that the Clean Water Act (CWA), [[391]](#footnote-392)421 specifically the sixty day notice requirement, preempted the plaintiffs' claims under section 1283 of the WSRA. The court concluded jurisdiction was proper because the statutory provisions had two different, coexisting goals. The CWA citizen suit provisions were aimed at bringing statutory violations to the attention of the agency and giving the agency a chance to remedy the situation. [[392]](#footnote-393)422 In contrast, the environmental groups' allegation of failure to cooperate with appropriate water pollution control agencies addressed the NPS's failure to avoid violations. The court determined that the difference in these goals ensured that the notice requirements of the CWA were not frustrated by the environmental groups' section 1283 claim. NPS also asserted that jurisdiction was not proper because there was no final agency action to review. The Ninth Circuit held that NPS had waived this objection because it was not raised before the district court.

The Ninth Circuit went on to find that NPS did not violate its statutory mandate to cooperate with water pollution control agencies. The environmental groups argued that the Ninth Circuit's determination that this question involved a finding of fact on the part of the district court, not the application of a legal standard, was central to this ruling. Thus, the district court's determination was reviewed for clear error. The district court had found the NPS's performance, while not stellar, did not constitute "such an abysmal level" as to be categorized as not cooperating with the water pollution agencies. [[393]](#footnote-394)423 The Ninth Circuit decided this conclusion was supported by the record. The Ninth Circuit then remanded the case tothe district court to enter the necessary orders requiring NPS to correct the deficiencies in both the user capacity of the CMP and the WSRS boundaries at the El Portal site.

F. Wetlands

1. Big Meadows Grazing Ass'n v. United States ex. rel. Veneman, 344 F.3d 940 (9th Cir. 2003).

Big Meadows Grazing Association (Association) sued the United States claiming it violated the statutes governing the Wetlands Reserve Program [[394]](#footnote-395)424 by implementing a wetlands easement conservation plan on the Association's property without obtaining the Association's consent. The **[\*918]** Ninth Circuit, affirming the district court, granted summary judgment in favor of the government.

As part of its Wetlands Reserve Program, the United States Department of Agriculture (USDA) purchased a conservation easement from the Association to "restore, manage, maintain and enhance" [[395]](#footnote-396)425 1,812 acres of wetlands on the Association's property in Flathead County, Montana. The Association claimed, at the time of the transaction, the government planned to implement a wetlands conservation program costing about $ 80,000. By 2001, the USDA's plan included building a dam and was projected to cost more than $ 486,000. The Association refused to consent to the plan, claiming it was radically different from the plan to which it agreed when it sold the easement. In November, 2001, USDA informed the Association that its consent was not necessary and began implementing the plan. The Association filed this suit in response.

Section 3837a(a) of U.S.C. Title 16 requires the government to enter into an agreement with a landowner before implementing a wetlands conservation plan. [[396]](#footnote-397)426 The Association asserts that this provision requires the government to obtain the landowner's consent to a specific conservation plan before implementing it. The Ninth Circuit held that the statutory language required only consent to some kind of conservation plan, not consent to the specific terms of a particular conservation plan. The court also pointed out that the Association's easement transferred to the United States all rights to the property except "record title, the right of quiet enjoyment, the right to prevent trespass and control public access, the right to undeveloped recreational uses, and the right to subsurface resources." [[397]](#footnote-398)427 These terms do not allow the Association the right to veto a conservation plan. The court found support for its conclusions in 16 U.S.C. section 3837a(c), which gives the landowner no role in developing the conservation plan to be implemented on his or her property, and 16 U.S.C. section 3837a(b), which requires the landowner to provide for a conservation plan that "includes such additional provisions as the Secretary determines are desirable." [[398]](#footnote-399)428 The Association also argued that 16 U.S.C. section 3837a(a) and (b) require that a landowner's agreement to a conservation plan take place in a separate transaction from his or her agreement to an easement. The court determined that nothing in these provisions prohibits a conservation plan from being contained in the easement such that agreement to the easement is agreement to the conservation plan.

The court found the regulations implementing the Wetlands Reserve Program to be consistent with its ruling. Like the statute, the regulations require only that the landowner consent to some conservation plan, not a **[\*919]** specific conservation plan. [[399]](#footnote-400)429 The references in the regulations to "associated contracts" and "related agreements," [[400]](#footnote-401)430 suggest that separate agreements may exist but do not require them.

The Association's final argument was that USDA's Wetlands Reserve Program Manual requires the landowner's consent to a conservation plan. The court refused to review this allegation because the Manual, as an agency interpretive statement, is not binding or legally enforceable.

Thus, after looking at the statutory and regulatory language, the Ninth Circuit found that the government acted lawfully in implementing its wetlands conservation plan, and upheld the district court's decision to grant summary judgment for the government.

III. Environmental Crimes

1. United States v. MacDonald, 339 F.3d 1080 (9th Cir. 2003).

MacDonald challenged the enhancement of his sentence by the district court for conspiracy to manufacture methamphetamine due to the unlawful discharge of a hazardous substance. The Ninth Circuit affirmed the enhancement of MacDonald's sentence.

MacDonald pled guilty to the charge of conspiracy to manufacture methamphetamine. The plea agreement set a base offense level with reductions, and the Presentence Report included a recommended two-level enhancement of the sentence for the disposal of hazardous materials. [[401]](#footnote-402)431 MacDonald objected to the two-level enhancement to his sentence. Finding that the district court did not clearly err or abuse its discretion in enhancing MacDonald's sentence under the U.S. Sentencing Guidelines (Guidelines), the Ninth Circuit affirmed MacDonald's sentence, including the two-level addition for unlawful discharge of a hazardous substance.

MacDonald was convicted of conspiring to manufacture methamphetamine on public land. Both the state's witnesses and MacDonald's witnesses indicated that hazardous wastes were poured onto the ground at the campsite where the crime occurred. MacDonald argued that the quantity of hazardous waste poured onto the ground was not sufficient to cause a toxic effect and therefore the two-level enhancement did not apply to his case.

**[\*920]** The Ninth Circuit noted that the Guidelines require that the courts "increase the base offense level [of a defendant] by two levels "if the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous substance.'" [[402]](#footnote-403)432 The comments accompanying the Guidelines provide that subsection 5(A) is applicable if the conduct involved in the offense was a violation covered by section 3008(d) of the Resource Conservation and Recovery Act of 1976 (RCRA) [[403]](#footnote-404)433 or other environmental statutes. RCRA "criminalizes a range of activities related to the unlawful generation, transportation, storage, treatment, and disposal of a "hazardous waste' identified or listed under RCRA" [[404]](#footnote-405)434 and delegates to the United States Environmental Protection Agency (EPA) responsibility for identifying and listing the items considered hazardous waste. EPA has listed hazardous wastes including naptha and acetone. The Government's expert stated that the crime involved an illegal disposal of naptha or acetone. The testimony of MacDonald's expert related only to toxicity levels for the soil that had already been cleaned up, and therefore the Ninth Circuit stated that the testimony of MacDonald's expert "does not undermine or contradict [the government's expert's] conclusion that there was a disposal of waste covered by RCRA." [[405]](#footnote-406)435

MacDonald challenged the two-level addition to his sentence on the theory that the amount of waste poured onto the ground was not sufficient to cause a toxic effect. The Ninth Circuit found MacDonald's interpretation of the statute misguided. In order to qualify as an emission of hazardous waste, a discharge need only contain a material that EPA considers to be hazardous waste or to have the characteristics of a hazardous waste - it does not matter how much of the material is contained in the discharge or whether that discharge alone could cause a toxic effect.

The Ninth Circuit reviewed the district court's findings of fact for clear error, and reviewed the district court's application of the enhancement provision of the Guidelines under an abuse of discretion standard. The Ninth Circuit determined that the district court did not commit clear error in holding that the enhanced sentencing guidelines applied to MacDonald because there was unlawful discharge or disposal of a hazardous substance under RCRA at two of the places where the methamphetamine was produced. The court also determined that the district court did not commit an abuse of discretion by applying the enhanced guidelines to MacDonald. Therefore the Ninth Circuit affirmed MacDonald's enhanced sentence under RCRA.

**[\*921]**

IV. Native American Issues

1. United States v. Braren, 338 F.3d 971 (9th Cir. 2003), supra Part II.D.

V. Litigation Issues

A. Civil Procedure

1. Clausen v. M/V New Carissa, 339 F.3d 1049 (9th Cir. 2003), infra Part V.C.

B. Standing, Ripeness, and Mootness

1. Bell v. Bonneville Power Administration, 340 F.3d 945 (9th Cir. 2003), supra Part I.C.

C. Attorney Fees

1. Clausen v. M/V New Carissa, 339 F.3d 1049 (9th Cir. 2003).

The owners of the freighter M/V New Carissa appealed an award of damages, attorney fees, and expenses to the Clausens, owners of a commercial oyster farm. On appeal, the owners of the New Carissa (ship's owners) argued the testimony offered by the Clausens' expert failed to meet the standard set out in Daubert v. Merrell Dow Pharmaceuticals (Daubert I), [[406]](#footnote-407)436 and thus was inadmissible. They further argued that the Oregon ***Oil*** Spill Act [[407]](#footnote-408)437 did not provide for an award of attorney fees, but rather contemplated only those expenses incurred prior the filing of a court action. Finally, they asserted the district court erred in awarding expert witness fees. The Ninth Circuit affirmed the district court's judgment to allow the Clausens' expert testimony as well as the grant of attorney fees and expert witness expenses.

In 1999 the New Carissa, a Japanese-owned ship, flagged in Panama, ran aground near Coos Bay, Oregon. At the time the freighter was carrying 400,000 gallons of fuel. Though extreme measures were taken to prevent an ***oil*** spill, eventually about 70,000 gallons leaked into the ocean, some of which soon turned up in Coos Bay. Particularly troubling was the detection of ***oil*** in oyster beds - oysters being a central commodity in the local economy. Due to the detection of the ***oil***, the United States Department of Agriculture closed the Bay's oyster farms. Ten million dollars worth of oysters had been seeded that year alone within the Bay. Over 3.5 million oysters eventually died. The Clausens brought claims against the ship's owners under the federal ***Oil*** Pollution Act [[408]](#footnote-409)439 Both statutes impose strict liability on a party **[\*922]** found responsible for an ***oil*** spill. Thus, the central issue at the district court level was whether the ***oil*** spill caused the oysters' deaths. After the district court judge refused to exclude testimony from the plaintiff's expert witness, Dr. Elston, the jury heard testimony from both Dr. Elston and the defendant's expert witness, Dr. Neff. While Dr. Neff believed the deaths were brought on by the low salinity from heavy rainfall, Dr. Elston ruled out low salinity and placed the blame squarely on contact toxicity from the ***oil***. As a result, the jury awarded the Clausens $ 1.4 million dollars. The Clausens then asked the district court for an award of attorney fees and expenses, including the cost of their expert witness, under the Oregon ***Oil*** Spill Act. [[409]](#footnote-410)440 The district court granted $ 651,382.30 in attorney fees and expenses, including the expert witness costs of $ 149,170.05.

The Ninth Circuit reviewed the district court's decision to admit the testimony of the Dr. Elston for abuse of discretion. Referring to the Supreme Court's analysis of Federal Rule of Evidence 702 in Daubert I, [[410]](#footnote-411)441 the Ninth Circuit concluded that scientific evidence must be "relevant and reliable" to be admissible. [[411]](#footnote-412)442 In Daubert I, the Supreme Court laid out a list of four factors to be considered in determining reliability: "(1) whether the scientific theory or technique can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the scientific community." [[412]](#footnote-413)443 However, this list is non-exclusive and the Ninth Circuit also looked to Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II). [[413]](#footnote-414)444 In Daubert II the Ninth Circuit isolated its primary criteria for deciding the question of reliability. The first factor was whether the subject of an expert's testimony came "naturally and directly out of research they have conducted independent of the litigation." [[414]](#footnote-415)445 If the expert's opinions were developed solely for litigation, the court decided that the expert's conclusion must be supported by research and analysis that had been subjected to "normal scientific scrutiny through peer review and publication." [[415]](#footnote-416)446

The court pointed out that in this case, neither Dr. Elston nor Dr. Neff's testimony met the criteria set out in Daubert II as both were developed for the litigation and neither was published. However, the Ninth Circuit ruled that this did not make admission of their testimony necessarily erroneous. The court again referred to Daubert II where the Ninth Circuit had concluded that admission of the testimony might still be proper provided there was a reasonable explanation for the lack of publication and the expert could sufficiently explain how they reached their conclusions. [[416]](#footnote-417)447 The court decided that Dr. Elston had provided sufficient **[\*923]** explanation in this case because his methodology - differential diagnosis - was a universally accepted scientific method. [[417]](#footnote-418)448

The ship's owners claimed that Dr. Elston's particular use of differential diagnosis was faulty because he had erred by including contact toxicity as a potential cause. The ship's owners argued that because the threshold of ***oil*** needed to cause harm to oysters had not been established, Dr. Elston's conclusions were not based on "scientific knowledge." [[418]](#footnote-419)449 The court disagreed, ruling that even though the level had not been specifically established for oysters, Dr. Elston's theory was still supported by scholarly work. In differential diagnosis, Dr. Elston's first step was to assemble a list of potential causes that are generally capable of producing the oysters symptoms or mortality. The Ninth Circuit ruled Dr. Elston had supported his inclusion of contact toxicity with numerous factors: the temporal and geographic proximity of the ***oil*** spill, the fact that every oyster tested by the government was found to contain the ship's ***oil***, and that contact with ***oil*** could result in gill lesions in shellfish, like those found in the Coos Bay oysters. Thus Dr. Elston's inclusion of contact toxicity was supported by "a variety of objective, verifiable evidence." [[419]](#footnote-420)450

The court also looked at Dr. Elston's process of elimination. His conclusion was based on combination of factors including analysis of data relating to the historic rainfall patterns of Coos Bay and chemical data taken by the government in response to the New Carissa's spill. He ruled out low salinity - the conclusion of Dr. Neff - because the oysters did not display any of the symptoms associated with that cause of death. Thus, because he provided clear reasoning in support of his conclusion that the ***oil***, not low salinity, was the root cause, the Ninth Circuit held that the district court did not abuse its discretion in admitting Dr. Elston's testimony.

The ship's owners also challenged the district court's award of attorney fees under the Oregon ***Oil*** Spill Act, arguing that the Act supported only attorney fees incurred prior to litigation. The Ninth Circuit reviewed this issue de novo. The court first noted that the damages provisions of the Oregon ***Oil*** Spill Act were written extremely broadly, indicating the Oregon legislature contemplated extensive recovery for damage caused by an ***oil*** spill. "Damages include attorney fees of any kind for which the liability may exist under the laws of this state resulting from, arising out of or related to the discharge of ***oil***." [[420]](#footnote-421)451 The court noted that the ship's owners' interpretation would have the effect of reading the attorney fees provision out of the statute. The ship's owners also argued that in other statutes where the Oregon legislature has intended to shift attorney fees, it has done so **[\*924]** explicitly. The Ninth Circuit held that the legislature was not limited to one manner of including attorney fees. Moreover, the court looked to the legislative history of the Act and concluded the Oregon Legislature specifically defined the damages provision broadly enough to include attorney fees.

Finally, the ship's owners contested the award of expert witness fees. The ship's owners argued that recovery of costs in federal court should be governed by federal law - which, in this case, would have precluded the award of expert witness costs. Ultimately the court held that this was a choice between a federal procedural cost provision, 28 U.S.C. section 1821(b), and a substantive state damages provision that allowed for the recovery of litigation costs as an element of compensatory damages. The court decided that the cost provisions of the Oregon ***Oil*** Spill Act were substantive law because under the statute "cost of any kind" was part of a plaintiff's compensatory damages, a right bound up with the right of action. [[421]](#footnote-422)453 federal courts sitting in diversity jurisdiction apply state substantive law and federal procedures. Under the Erie doctrine, the Ninth Circuit held that the Oregon ***Oil*** Spill Act trumped the federal procedural statute and the award of expert witness fees was proper. Thus the Ninth Circuit affirmed the district court on all three issues presented on appeal.

2. Kasza v. Whitman, 325 F.3d 1178 (9th Cir. 2003), supra Part I.D.

D. Res Judicata

1. City of Martinez v. Texaco Trading & Transportation, Inc., 353 F.3d 758 (9th Cir. 2003).

The City of Martinez, California (the City) filed seventeen claims against Texaco Trading and Transportation, Inc. (Texaco) for damages to Mococo Marsh resulting from ***oil*** spilled from a Texaco ***oil*** pipeline. The district court found the City's suit barred by res judicata after a criminal suit brought against Texaco by the California Department of Fish and Game (DFG) and arising from the same incident resulted in a civil settlement. The Ninth Circuit affirmed in part and reversed in part, determining that the City's claims on behalf of the public interest were barred by res judicata, but the City's private easement claims were not.

In January 1997, the City obtained an open space and conservation easement in a portion of Mococo Marsh. In November 1997, somewhere between 44.32 and 331.15 barrels of ***oil*** leaked from a pipeline owned by Texaco into the marsh. After Texaco completed cleanup operations, the Contra Costa County District Attorney filed a criminal misdemeanor complaint against Texaco alleging the ***oil*** spill had violated California's Fish and Game Code section 5650(a). This complaint eventually ended in a civil **[\*925]** settlement requiring Texaco to pay $ 138,292.80 to DFG. The Deputy District Attorney told the City it need not participate in the settlement negotiations, as it would have a separate opportunity to pursue its claims. When the City filed its civil complaint against Texaco however, the district court granted summary judgment for Texaco, finding all of the City's claims barred by res judicata.

The Ninth Circuit reviewed the district court's grant of summary judgment de novo, applying California law to determine whether res judicata applied in this case. The court identified three elements that must be in place before res judicata can bar a plaintiff's suit: 1) the issues resolved in the first suit must be identical to the issues raised in the second suit, 2) the first suit must result in a final judgment on the merits, and 3) either the plaintiff or a party in privity with the plaintiff must have been a party to the first suit. California also recognizes a public interest exception to res judicata permitting "relitigation of an issue of law concerning a public entity's ongoing statutory obligations that affect individuals and members of the public not specifically before the court in the first litigation." [[422]](#footnote-423)454

Under California law, in order for issues to be identical, they must involve the breach of the same "primary rights." [[423]](#footnote-424)455 The court found that the City's property interest in Mococo Marsh was a distinct primary right that had not been resolved in the earlier suit. Specifically, the City was entitled to bring its claims for damages under California Civil Code sections 815.1 and 815.3(b) for "the loss of scenic, aesthetic, or environmental value to the real property subject to the easement." [[424]](#footnote-425)456 The City was also entitled to bring its claim that the ***oil*** spill had decreased the value of the easement.

The court distinguished the decision in Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n. [[425]](#footnote-426)457 In that decision, the California Court of Appeals barred a new plaintiff's claims on the basis of res judicata, but implied that the claim would not have been barred if the new plaintiff had claimed private property rights separate from those already adjudicated. Here, those of the City's claims arising from its private property interests in the easement were private property rights that had not been adjudicated in DFG's criminal complaint against Texaco. The court pointed out that the City did not receive any of the money awarded in Texaco's settlement with DFG. Moreover, the criminal court would not have had jurisdiction over the City's claims, so they could not have been raised in the earlier criminal proceeding. The court ruled, however, that those of the City's claims brought on behalf of the public interest were barred. The DFG was "statutorily authorized to take the lead in responding to ***oil*** spills," [[426]](#footnote-427)458 and was therefore assumed to have adequately represented the public in the prior proceeding.

**[\*926]** The court then turned to the issue of privity. The court found that the City was in privity with DFG with respect to the public interest claims but not with respect to the easement claims. For the purposes of res judicata, privity requires parties' interests to be so similar that one party could act as the "virtual representative" [[427]](#footnote-428)460 authorized DFG to act on behalf of the public in resolving the ***oil*** spill dispute, and reasoned that in its settlement DFG had therefore virtually represented the City's claims on behalf of the public. However, DFG did not have authority to settle the City's private property damage claims, and so the court found that it was not in privity with the City with respect to those claims. Moreover, the court noted that "by informing the City that the settlement would not preclude it from later raising its civil claims, DFG made clear that it did not think it was representing the City's [private property] interests." [[428]](#footnote-429)461 Finally, the court determined that it would be unfair to disallow the City's private property claims because the City had been told it need not participate in the earlier proceeding.

The Ninth Circuit thus affirmed the district court's ruling that res judicata barred the City's claims on behalf of the public, but reversed and remanded with respect to the City's private property claims, finding that those claims had "never been addressed by any court." [[429]](#footnote-430)462

E. Jurisdiction

1. Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Administration, 342 F.3d 924 (9th Cir. 2003), supra Part II.B.

2. Alsea Valley Alliance v. Department of Commerce, 358 F.3d 1181 (9th Cir. 2004).

Alsea Valley Alliance (Alsea) challenged a National Marine Fisheries Service (NMFS) final rule listing an evolutionarily significant unit of coho salmon as threatened under the Endangered Species Act (ESA). [[430]](#footnote-431)463 The United States District Court for the District of Oregon allowed the Oregon Natural Resources Council and other groups (collectively ONRC) to intervene in a suit brought by Alsea against NMFS. Concerned that NMFS would not appeal the district court's decision, ONRC intervened after the district court invalidated the final rule and remanded the rule to NMFS for reconsideration. In its appeal to the Ninth Circuit, ONRC contested the district court's invalidation of the final rule; at the same time, Alsea appealed the order allowing ONRC to intervene in its suit. The Ninth Circuit dismissed both appeals for lack of jurisdiction.

**[\*927]** The suit originated when NMFS enacted a final rule designating naturally spawned coho salmon in the Oregon coast evolutionarily significant unit as threatened. The rule failed to include or consider hatchery spawned salmon. Alsea challenged this rule under the Administrative Procedure Act, [[431]](#footnote-432)464 and the district court found that NMFS's distinction between naturally spawned and hatchery spawned coho salmon was arbitrary and capricious. [[432]](#footnote-433)465 The district court granted summary judgment to Alsea and remanded the rule to NMFS to consider the best scientific data available in its listing decision. NMFS complied with the district court order without contesting the remand order. [[433]](#footnote-434)466 ONRC, desiring to appeal the district court's order in light of NMFS's choice not to do so, motioned to intervene as of right according to Federal Rule of Civil Procedure 24(a)(2). This rule allows a party to intervene when it has an interest in the action, resolution of the action may damage the party's ability to protect its interest, and the existing parties do not represent the intervening party's interest. [[434]](#footnote-435)467 The district court allowed ONRC to intervene for appeal purposes only, because NMFS failed to represent ONRC's interests. The Ninth Circuit stayed the district court's remand of the final rule pending appeal and addressed both ONRC's appeal of the remand order and Alsea's appeal of the intervention order in this action.

The court first addressed the remand order. It stated appellate courts have jurisdiction over final decisions, and that a remand order is usually not a final decision. [[435]](#footnote-436)468 The three requirements a remand order must meet to be considered final are: "(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." [[436]](#footnote-437)469 The court did not address the first two requirements because it found that the third was absent. The court noted that in previous cases where it found that review would be foreclosed without an immediate appeal, the agency, rather than the plaintiffs, appealed the remand order. Because an agency cannot appeal its own decision after the remand order, the order is effectively final for the agency. In this case, the court stated, ONRC has the ability to challenge any decision NMFS makes. First, NMFS may grant ONRC relief in its decision on remand. In addition, actions taken by NMFS are subject to judicial review after they are completed. Thus if ONRC is not satisfied by NMFS's final decision, it can bring suit to challenge NMFS after the agency makes a decision.

ONRC attempted to argue that the district court's decision to set aside NMFS's listing of the coho salmon was a separately appealable decision **[\*928]** from declaring the delisting arbitrary and capricious thus making the issue appealable immediately as a final decision. In support of its argument, ONRC cited cases in which the appellate court allowed a regulation to stand while issuing a remand order. The Ninth Circuit distinguished this situation because the previous appellate courts issued the remand order, whereas in this case the district court issued the order. Therefore, the court lacked jurisdiction over the entire remand order.

ONRC alternatively argued that the remand order is subject to an interlocutory appeal under 28 U.S.C. section 1292(a)(1) because the order had the effect of an injunction. The court explained that an order is appealable if it has the practical effect of an injunction, has major and possibly irreversible consequences, and an immediate appeal is the only way to challenge it. [[437]](#footnote-438)470 The court held that the district court's summary judgment decision did not meet the first requirement because the decision did not force NMFS to remove the coho salmon from the ESA list. The decision simply precluded enforcement of the decision as it stood when the district court reviewed it, and did not have the effect of an injunction.

The Ninth Circuit summarily disposed of Alsea's appeal of the intervention order. Reasoning that an order allowing intervention is interlocutory and not a final order, the court thus stated the order could only be reviewable upon appeal of a final judgment. Because there was no final judgment in this case, the court dismissed the appeal of the intervention order. In conclusion, the court dismissed both appeals for lack of jurisdiction and dissolved the stay of remand to NMFS.

Environmental Law

Copyright (c) 2004 Lewis & Clark Law School

**End of Document**

1. 1 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-2)
2. 3 Oxygenated Fuels Ass'n v. Davis, 163 F. Supp. 2d 1182, 1186-87 (E.D. Cal. 2001). [↑](#footnote-ref-3)
3. 4 42 U.S.C. 7401(b)(1) (2000). [↑](#footnote-ref-4)
4. 5 Id. 7545(k)(2)(B). [↑](#footnote-ref-5)
5. 6 Cal. Code Regs. tit. 13, 2262.6 (2003). [↑](#footnote-ref-6)
6. 7 English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990). [↑](#footnote-ref-7)
7. 8 42 U.S.C. 7545(c)(4)(B). [↑](#footnote-ref-8)
8. 9 Id. [↑](#footnote-ref-9)
9. 10 Id. [↑](#footnote-ref-10)
10. 11 See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983) (analyzing California's moratorium on building nuclear power plants on its own rather than as a part of an overall approach to energy policy to find that, because it had a nonsafety rationale, the moratorium was not preempted); Dept. of Treasury v. Fabe, 508 U.S. 491 (1993) (analyzing Ohio's bankruptcy priority rules themselves rather than as part of an overall approach to regulating insurance to find that, because these rules were for the purpose of regulating insurance, they were not preempted). [↑](#footnote-ref-11)
11. 12 42 U.S.C. 7545(c)(4)(B) (2000). [↑](#footnote-ref-12)
12. 13 Oxygenated Fuels Ass'n, 331 F.3d 665, 670 (9th Cir. 2003) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). [↑](#footnote-ref-13)
13. 14 Id. [↑](#footnote-ref-14)
14. 15 Id. at 677. [↑](#footnote-ref-15)
15. 17 Id. (citing Nevada State Implementation Plan Revision, Clark County, 64 Fed. Reg. 29,573, 29,575 (June 2, 1999) (EPA regulations allowing Nevada to require 3.5% minimum oxygen content for wintertime gasoline)). [↑](#footnote-ref-16)
16. 18 Id. [↑](#footnote-ref-17)
17. 19 529 U.S. 861 (2000) (finding state tort law concerning airbags in passenger cars preempted by the Federal Motor Vehicle Safety Standard). [↑](#footnote-ref-18)
18. 20 Oxygenated Fuels Ass'n, 331 F.3d at 672 (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 107 (1992)). [↑](#footnote-ref-19)
19. 21 Id. at 673. [↑](#footnote-ref-20)
20. 22 Id. (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). [↑](#footnote-ref-21)
21. 23 Id. [↑](#footnote-ref-22)
22. 24 Designations of Areas for Air Quality Planning Purposes; State of Nevada; Technical Correction, 67 Fed. Reg. 12,474 (Mar. 19, 2002) (codified at 40 C.F.R. pt. 81) [hereinafter 2002 Nevada Rule]. [↑](#footnote-ref-23)
23. 25 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-24)
24. 26 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-25)
25. 27 Reno-Sparks Indian Colony v. United States Envtl. Prot. Agency (Reno-Sparks), 336 F.3d 899, 903 (9th Cir. 2003). [↑](#footnote-ref-26)
26. 28 Id. at 904. [↑](#footnote-ref-27)
27. 29 2002 Nevada Rule, 67 Fed. Reg. 12,474, 12,475 (Mar. 19, 2002) (codified at 40 C.F.R. pt. 81). [↑](#footnote-ref-28)
28. 30 5 U.S.C. 706 (2000). [↑](#footnote-ref-29)
29. 31 Reno-Sparks, 336 F.3d at 906. [↑](#footnote-ref-30)
30. 32 See 40 C.F.R. 81.329 (2003) (listing designated baseline areas for Nevada). [↑](#footnote-ref-31)
31. 33 Reno-Sparks, 336 F.3d at 907 (citing 40 C.F.R. 81.300(b) (2003)). [↑](#footnote-ref-32)
32. 34 40 C.F.R. 81.300(b) (2003). [↑](#footnote-ref-33)
33. 35 2002 Nevada Rule, 67 Fed. Reg. 12,474, 12476 (Mar. 19, 2002) (codified at 40 C.F.R. pt. 81). [↑](#footnote-ref-34)
34. 36 Reno-Sparks, 336 F.3d at 908 (quoting Designation of Areas for Air Quality Planning Purposes; Redesignation of Particulate Matter Unclassifiable Areas; Redesignation of Hydrographic Area 61 for Particulate Matter, Sulfur Dioxide, and Nitrogen Dioxide; State of Nevada, 67 Fed. Reg. 68,769, 68,769 (Nov. 13, 2002) (codified at 40 C.F.R. pt. 81) [hereinafter Nov. 13 Rule]). [↑](#footnote-ref-35)
35. 37 Id. at 909 (quoting Nov. 13 Rule, 67 Fed. Reg. at 68,770). [↑](#footnote-ref-36)
36. 38 Id. [↑](#footnote-ref-37)
37. 39 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-38)
38. 40 Id. 7407(a), 7410(a). [↑](#footnote-ref-39)
39. 41 40 C.F.R. 50.6(a) (2003). [↑](#footnote-ref-40)
40. 42 Id. 50.6(b). [↑](#footnote-ref-41)
41. 44 42 U.S.C. 7513 (2000). [↑](#footnote-ref-42)
42. 45 Id. 7513(c)(1). [↑](#footnote-ref-43)
43. 47 Id. 7513(c)(2), 7513a(b). [↑](#footnote-ref-44)
44. 48 Id. 7513(b)(2). [↑](#footnote-ref-45)
45. 49 Id. 7513. [↑](#footnote-ref-46)
46. 50 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-47)
47. 51 Id. 706(2)(A). [↑](#footnote-ref-48)
48. 52 Sierra Club v. United States Envtl. Prot. Agency, 346 F.3d 955, 961 (9th Cir. 2003) (quoting Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001)), amended by 352 F.3d 1186 (9th Cir. 2003), cert. denied, 124 S. Ct. 2873 (2004). [↑](#footnote-ref-49)
49. 53 Id. at 962. [↑](#footnote-ref-50)
50. 54 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-51)
51. 55 N. Plains Res. Council v. Fidelity Exploration & Dev. Co. (NPRC), 325 F.3d 1155, 1157 (9th Cir. 2003), cert. denied, 124 S. Ct. 434 (2003). [↑](#footnote-ref-52)
52. 56 Mont. Code Ann. 75-5-401(1)(b) (1998). [↑](#footnote-ref-53)
53. 57 NPRC, 325 F.3d at 1160. [↑](#footnote-ref-54)
54. 58 Id. at 1161. [↑](#footnote-ref-55)
55. 59 Id. (quoting American Heritage Dictionary 672, 1447 (1979)). [↑](#footnote-ref-56)
56. 60 40 C.F.R. 435.41(bb) (2003). [↑](#footnote-ref-57)
57. 61 33 U.S.C. 1362(6)(B) (2000); see Sierra Club, Lone Star Chapter v. Cedar Point ***Oil*** Co., 73 F.3d 546, 568 (5th Cir. 1996) (holding that where "produced water" does not meet exemption criteria, the water constitutes a pollutant). [↑](#footnote-ref-58)
58. 63 Id. 1313(d)(4)(B); 40 C.F.R. 131.12(d) (2003) (antidegredation policy regulation). The court also referred to PUD No. 1 v. Washington Department of Ecology, 511 U.S. 700, 705 (1994), for the proposition that the antidegredation policy required state water quality standards to prevent further degradation of U.S. waters. [↑](#footnote-ref-59)
59. 64 NPRC, 325 F.3d at 1162. [↑](#footnote-ref-60)
60. 65 299 F.3d 1007 (9th Cir. 2002). [↑](#footnote-ref-61)
61. 66 Id. at 1016. [↑](#footnote-ref-62)
62. 67 NPRC, 325 F.3d at 1164. [↑](#footnote-ref-63)
63. 69 U.S. Const. art. VI, cl. 2. [↑](#footnote-ref-64)
64. 70 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-65)
65. 71 The original opinion, published at 319 F.3d 398 (9th Cir. 2003), was vacated. [↑](#footnote-ref-66)
66. 72 33 U.S.C. 1311(a), 1342 (2000). [↑](#footnote-ref-67)
67. 73 Envtl. Def. Ctr., Inc. v. United States Envtl. Prot. Agency, 344 F.3d 832, 841 (9th Cir. 2003), cert. denied, 124 S. Ct. 2811 (2004). [↑](#footnote-ref-68)
68. 74 33 U.S.C. 1362(14) (2000); See Natural Res. Def. Council v. United States Envtl. Prot. Agency, 966 F.2d 1292, 1295 (9th Cir. 1992) (identifying storm sewers as point sources). [↑](#footnote-ref-69)
69. 75 33 U.S.C. 1342(p)(2) (2000). [↑](#footnote-ref-70)
70. 76 Id. 1342(p). [↑](#footnote-ref-71)
71. 77 40 C.F.R. 122.26(a)(9)(i)(A)-(B) (2000). [↑](#footnote-ref-72)
72. 78 Id. 122.34. [↑](#footnote-ref-73)
73. 79 Id. 122.33(b). [↑](#footnote-ref-74)
74. 80 Id. 122.33(b)(2)(ii), 122.26(d). [↑](#footnote-ref-75)
75. 81 Id. 122.26(c). [↑](#footnote-ref-76)
76. 82 33 U.S.C. 1369(b)(1) (2000). [↑](#footnote-ref-77)
77. 83 Id. 1342(p)(6). [↑](#footnote-ref-78)
78. 84 Id. 1342(p)(1). The court noted that if EPA had no authority to apply the NPDES to small MS4s, then the section would be rendered meaningless. [↑](#footnote-ref-79)
79. 85 Id. 1342(p)(3).'] [↑](#footnote-ref-80)
80. 86 Envtl. Def. Ctr., Inc. v. United States Envtl. Prot. Agency, 344 F.3d 832, 847 (9th Cir. 2003) (emphasis in original). [↑](#footnote-ref-81)
81. 87 40 C.F.R. 122.34 (2003). [↑](#footnote-ref-82)
82. 88 The court compared the situation in this case to the Fifth Circuit case, City of Abilene v. United States Environmental Protection Agency, 325 F.3d 657 (5th Cir. 2003), reh'g denied, 2003 WL 21418155 (5th Cir. 2003). That case involved a challenge of the Phase I Rule regulating medium and large-sized municipalities. The cities of Abilene and Irving, Texas, claimed that the conditions of their permits involved regulating third parties and were unconstitutional. The Fifth Circuit found that the cities had alternatives to the particular permit system they chose. As a result, the cities were ultimately in control of implementing the federal program. Id. at 662-63. [↑](#footnote-ref-83)
83. 89 U.S. Const. amend. I. [↑](#footnote-ref-84)
84. 90 Even the Phase I option required an educational component. Envtl. Def. Ctr., 344 F.3d at 849 n.28. [↑](#footnote-ref-85)
85. 91 521 U.S. 457 (1997). [↑](#footnote-ref-86)
86. 93 Id. 553. [↑](#footnote-ref-87)
87. 94 Envtl. Def. Ctr., 344 F.3d at 851 (citing Hodge v. Dalton, 107 F.3d 705, 712 (9th Cir. 1997)). [↑](#footnote-ref-88)
88. 95 Id. [↑](#footnote-ref-89)
89. 96 Id. at 855. [↑](#footnote-ref-90)
90. 97 40 C.F.R. 122.33(b) (2000) (allowing EPA to regulate a group of similar dischargers through general permits). [↑](#footnote-ref-91)
91. 98 Id. 122.34(a). [↑](#footnote-ref-92)
92. 99 Id. [↑](#footnote-ref-93)
93. 100 467 U.S. 837, 842-44 (1984). [↑](#footnote-ref-94)
94. 101 Envtl. Def. Ctr., 344 F.3d at 852. [↑](#footnote-ref-95)
95. 102 33 U.S.C. 1342(p) (2000). [↑](#footnote-ref-96)
96. 104 Id. 1342(a)(1). [↑](#footnote-ref-97)
97. 105 5 U.S.C. 552-552b (2000). [↑](#footnote-ref-98)
98. 106 5 U.S.C. 706(2)(A) (2000). [↑](#footnote-ref-99)
99. 107 Envtl. Def. Ctr., Inc. v. United States Envtl. Prot. Agency, 344 F.3d 832, 858 n.36 (9th Cir. 2003) (citing Washington v. Daley, 173 F.3d 1158, 1169 (9th Cir. 1999)). [↑](#footnote-ref-100)
100. 108 Group A facilities include auxiliary facilities such as local trucking for small grocery stores, maintenance of construction equipment, and publicly owned small water treatment facilities. [↑](#footnote-ref-101)
101. 109 Envtl. Def. Ctr., 344 F.3d at 859. [↑](#footnote-ref-102)
102. 110 Id. at 862 (referring to 33 U.S.C. 1369(b)(1) (2000)). [↑](#footnote-ref-103)
103. 111 Id. at 863. [↑](#footnote-ref-104)
104. 112 33 U.S.C. 1342(p)(5)-(6) (2000). [↑](#footnote-ref-105)
105. 113 Id. 1342(p)(5). [↑](#footnote-ref-106)
106. 114 Envtl. Def. Ctr., 344 F.3d at 869. [↑](#footnote-ref-107)
107. 115 Natural Res. Def. Council v. United States Envtl. Prot. Agency, 966 F.2d 1292, 1306 (9th Cir. 1992). [↑](#footnote-ref-108)
108. 116 See 40 C.F.R. 122.26(a)(9) (2000) (establishing guidelines for permitting discharges composed entirely of storm water). [↑](#footnote-ref-109)
109. 117 175 F.3d 1027 (D.C. Cir. 1999), rev'd, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001). [↑](#footnote-ref-110)
110. 118 Envtl. Def. Ctr., 344 F.3d at 876 (quoting American Trucking, 175 F.3d at 1034). [↑](#footnote-ref-111)
111. 119 531 U.S. 457 (2001). [↑](#footnote-ref-112)
112. 120 5 U.S.C. 553(b)(3) (2000). [↑](#footnote-ref-113)
113. 121 40 C.F.R. 122.26(a)(9)(i)(D) (2003). [↑](#footnote-ref-114)
114. 122 5 U.S.C. 601-612 (2000). [↑](#footnote-ref-115)
115. 123 Id. 605. [↑](#footnote-ref-116)
116. 124 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370f (2000). [↑](#footnote-ref-117)
117. 125 Cal. Pub. Res. Code 21000-21177 (West 2002). The EIR requirement can be found at id. 21100, 21151. [↑](#footnote-ref-118)
118. 126 Laub v. United States Dep't of the Interior, 342 F.3d 1080, 1083 (9th Cir. 2003) (quotation omitted). [↑](#footnote-ref-119)
119. 127 504 U.S. 555 (1992). [↑](#footnote-ref-120)
120. 129 956 F.2d 1508 (9th Cir. 1992). [↑](#footnote-ref-121)
121. 130 Laub, 342 F.3d at 1089. [↑](#footnote-ref-122)
122. 131 32 F.3d 1346 (9th Cir. 1994). [↑](#footnote-ref-123)
123. 132 523 U.S. 726 (1998). [↑](#footnote-ref-124)
124. 133 752 F.2d 373 (9th Cir. 1985). [↑](#footnote-ref-125)
125. 134 Laub, 342 F.3d at 1091. [↑](#footnote-ref-126)
126. 135 Id. at 1092 (citing Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 329 (9th Cir. 1975)). [↑](#footnote-ref-127)
127. 136 Federal Columbia River Transmission System Act, 16 U.S.C. 838f (2000). [↑](#footnote-ref-128)
128. 137 Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. 839-839h (2000). The court had jurisdiction pursuant to id. 839f(e). [↑](#footnote-ref-129)
129. 138 Id. 839f(e)(5). [↑](#footnote-ref-130)
130. 140 16 U.S.C. 832 (2000). [↑](#footnote-ref-131)
131. 141 Bonneville Project Act of 1937, 16 U.S.C. 832f(a) (2000). [↑](#footnote-ref-132)
132. 142 Bell v. Bonneville Power Admin., 340 F.3d 945, 949 (9th Cir. 2003). [↑](#footnote-ref-133)
133. 143 16 U.S.C. 839e(i) (2000). [↑](#footnote-ref-134)
134. 144 Id. [↑](#footnote-ref-135)
135. 145 Bell, 340 F.3d at 949. [↑](#footnote-ref-136)
136. 146 126 F.3d 1158 (9th Cir. 1997). [↑](#footnote-ref-137)
137. 147 Id. at 1176-77. [↑](#footnote-ref-138)
138. 148 See 16 U.S.C. 839d(c)(1) (2000) (outlining procedures for acquiring major resources). [↑](#footnote-ref-139)
139. 149 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-140)
140. 150 Cantrell v. City of Long Beach, 241 F.3d 674, 679 (9th Cir. 2001). [↑](#footnote-ref-141)
141. 152 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-142)
142. 153 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-143)
143. 154 Under 16 U.S.C. 3210(a) (2000), USFS is required to provide private landowners with access to property that is completely surrounded by federally owned land. [↑](#footnote-ref-144)
144. 155 16 U.S.C. 1536(a)(2) (2000). [↑](#footnote-ref-145)
145. 157 268 F.3d 781 (9th Cir. 2001). [↑](#footnote-ref-146)
146. 158 Selkirk Conservation Alliance v. Forsgren (Selkirk), 336 F.3d 944, 956 (9th Cir. 2003) (citation omitted). [↑](#footnote-ref-147)
147. 159 42 U.S.C. 4332 (2000). [↑](#footnote-ref-148)
148. 160 427 U.S. 390 (1976). [↑](#footnote-ref-149)
149. 161 284 F.3d 1062 (9th Cir. 2002). [↑](#footnote-ref-150)
150. 162 Selkirk, 336 F.3d at 958 (quoting ***Kern*** v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1076 (9th Cir. 2002)). [↑](#footnote-ref-151)
151. 164 305 F.3d 957 (9th Cir. 2002). [↑](#footnote-ref-152)
152. 165 Selkirk, 336 F.3d at 959 (quoting Native Ecosystems, 304 F.3d at 902, and ISC, 305 F.3d at 974). [↑](#footnote-ref-153)
153. 166 Id. at 961. [↑](#footnote-ref-154)
154. 167 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-155)
155. 168 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-156)
156. 169 284 F.3d 1062 (9th Cir. 2002). [↑](#footnote-ref-157)
157. 170 Ctr. for Biological Diversity v. United States Forest Serv., 349 F.3d 1157, 1168 (9th Cir. 2003). [↑](#footnote-ref-158)
158. 171 Id. at 1169. [↑](#footnote-ref-159)
159. 172 Id. (citing 40 C.F.R. 1502.9(b) (2003)). [↑](#footnote-ref-160)
160. 173 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-161)
161. 174 932 F. Supp. 254 (D. Nev. 1996), rev'd, 133 F.3d 1159 (9th Cir. 1998). [↑](#footnote-ref-162)
162. 176 919 F. Supp. 1459 (D. Nev. 1996), aff'd sub nom. Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998). [↑](#footnote-ref-163)
163. 177 Id. at 1462-63. [↑](#footnote-ref-164)
164. 178 42 U.S.C. 6972(e) (2000). [↑](#footnote-ref-165)
165. 179 Kasza v. Whitman, 325 F.3d 1178, 1180 (9th Cir. 2003). [↑](#footnote-ref-166)
166. 180 Id. [↑](#footnote-ref-167)
167. 181 133 F.3d 1159, 1168-70 (9th Cir. 1998). [↑](#footnote-ref-168)
168. 182 See 42 U.S.C. 6991b; 40 C.F.R. 280. [↑](#footnote-ref-169)
169. 183 Alaska Stat. 21.42.110(2), (3) (Michie 2003). [↑](#footnote-ref-170)
170. 184 40 C.F.R. 280.97(b) (2003). [↑](#footnote-ref-171)
171. 185 See, e.g., Alaska Admin. Code tit. 18, 78.910 (2003). [↑](#footnote-ref-172)
172. 186 40 C.F.R. 280.97(b) (2003). [↑](#footnote-ref-173)
173. 187 Id. [↑](#footnote-ref-174)
174. 188 Alaska Admin. Code tit. 18, 78.910 (2003). [↑](#footnote-ref-175)
175. 190 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-176)
176. 191 42 U.S.C. 6972(b)(1)(A), (b)(2)(A) (2002). [↑](#footnote-ref-177)
177. 193 935 F.2d 1343, 1352 (2d Cir. 1991). [↑](#footnote-ref-178)
178. 194 Id. [↑](#footnote-ref-179)
179. 195 130 F.3d 409 (9th Cir. 1997). [↑](#footnote-ref-180)
180. 196 Id. at 411-12. [↑](#footnote-ref-181)
181. 198 Idaho Environmental, Health, and Safety Regulations 58.01.06.006.03 (2002) (requiring six inch cover over landfill at end of each day). [↑](#footnote-ref-182)
182. 199 Id. 58.01.01.603.01, 58.01.06.010(d)(ii) (prohibiting open burning except when infrequently used for agricultural materials or emergency cleanup operations). [↑](#footnote-ref-183)
183. 200 42 U.S.C. 6924 (2000). [↑](#footnote-ref-184)
184. 201 Covington v. Jefferson County, 358 F.3d 626, 655 (9th Cir. 2004). [↑](#footnote-ref-185)
185. 202 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-186)
186. 203 Ctr. for Biological Diversity v. Badgley, 335 F.3d 1097, 1101 (9th Cir. 2003). [↑](#footnote-ref-187)
187. 204 Id. at 1098. [↑](#footnote-ref-188)
188. 205 Id. at 1099. [↑](#footnote-ref-189)
189. 206 Id. [↑](#footnote-ref-190)
190. 207 Id. at 1100. [↑](#footnote-ref-191)
191. 208 Id. [↑](#footnote-ref-192)
192. 210 760 F.2d 976 (9th Cir. 1985). [↑](#footnote-ref-193)
193. 211 Ctr. for Biological Diversity, 335 F.3d at 1100 (citing Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985) (quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105 (1983))). [↑](#footnote-ref-194)
194. 212 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-195)
195. 213 Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 839 (9th Cir. 2003) (quoting Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy), 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996)). [↑](#footnote-ref-196)
196. 214 61 Fed. Reg. 4722. [↑](#footnote-ref-197)
197. 215 Fed. R. Civ. P. 54(b). [↑](#footnote-ref-198)
198. 216 Id. [↑](#footnote-ref-199)
199. 217 Administrative Procedure Act 10(e), 5 U.S.C. 706 (2000). [↑](#footnote-ref-200)
200. 218 Nat'l Ass'n of Home Builders, 340 F.3d at 841 (quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983)). [↑](#footnote-ref-201)
201. 219 Id. at 842. [↑](#footnote-ref-202)
202. 220 Id. (quoting DPS Policy, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996)). [↑](#footnote-ref-203)
203. 221 Id. at 843. [↑](#footnote-ref-204)
204. 222 Id. at 848 (quoting Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001)). [↑](#footnote-ref-205)
205. 223 Id. at 849. [↑](#footnote-ref-206)
206. 224 Id. (quoting Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517, 1525 (9th Cir. 1995)). [↑](#footnote-ref-207)
207. 225 Id. at 850 (quoting DPS Policy, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996)). [↑](#footnote-ref-208)
208. 226 Id. at 851. [↑](#footnote-ref-209)
209. 227 Id. at 852 (quoting DPS Policy, 61 Fed. Reg. at 4725). [↑](#footnote-ref-210)
210. 228 Id. [↑](#footnote-ref-211)
211. 229 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-212)
212. 231 Id. 1538. [↑](#footnote-ref-213)
213. 232 Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv., No. C-01-1706 VRW, 2001 WL 1602707, at 3-4 (N.D. Cal. Nov. 28, 2001), rev'd, Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969 (9th Cir. 2003). [↑](#footnote-ref-214)
214. 233 Ctr. for Marine Conservation v. Nat'l Marine Fisheries Serv., No. 99-00152 DAE, 2001 WL 34077401 (D. Haw. March 30, 2001). [↑](#footnote-ref-215)
215. 234 Id. at 1. [↑](#footnote-ref-216)
216. 235 High Seas Fishing Compliance Act of 1995, 16 U.S.C. 5501-5509 (2000). [↑](#footnote-ref-217)
217. 236 Id. 5501(2). [↑](#footnote-ref-218)
218. 237 50 C.F.R. 300.11-300.15 (2000). [↑](#footnote-ref-219)
219. 238 16 U.S.C. 1540(g)(2)(A) (2000). [↑](#footnote-ref-220)
220. 239 Id. 1536(a)(2); 50 C.F.R. 402.14, 407.01(b) (2003). [↑](#footnote-ref-221)
221. 240 16 U.S.C. 1536(a)(2) (2000). [↑](#footnote-ref-222)
222. 241 Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv. (Turtle Island), 340 F.3d 969, 974 (9th Cir. 2003). [↑](#footnote-ref-223)
223. 242 16 U.S.C. 1538(a)(1)(2000). [↑](#footnote-ref-224)
224. 243 Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv., No. C-01-1706 VRW, 2001 WL 1602707, at 3 (N.D. Cal., Nov. 28, 2001), rev'd, Turtle Island, 340 F.3d 969 (9th Cir. 2003). [↑](#footnote-ref-225)
225. 244 Id. [↑](#footnote-ref-226)
226. 245 Id. at 4. [↑](#footnote-ref-227)
227. 246 Administrative Procedure Act 10(e), 5 U.S.C. 706 (2000). [↑](#footnote-ref-228)
228. 247 50 C.F.R. 402.02 (2003). [↑](#footnote-ref-229)
229. 248 16 U.S.C. 5503(d) (2000). [↑](#footnote-ref-230)
230. 249 467 U.S. 837, 842-43 (1984). [↑](#footnote-ref-231)
231. 250 Turtle Island, 340 F.3d 969, 975 (9th Cir. 2003). [↑](#footnote-ref-232)
232. 252 65 F.3d 1502 (9th Cir. 1995). [↑](#footnote-ref-233)
233. 253 255 F.3d 1073 (9th Cir. 2001). [↑](#footnote-ref-234)
234. 254 30 F.3d 1050 (9th Cir. 1994), cert. denied 514 U.S. 1082 (1995). [↑](#footnote-ref-235)
235. 256 Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin. (Confederated Tribes), 342 F.3d 924, 928 (9th Cir. 2003) (citing 16 U.S.C. 839b(h)(11)(A)(i)) (2000). [↑](#footnote-ref-236)
236. 257 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-237)
237. 258 Confederated Tribes, 342 F.3d at 928-929. [↑](#footnote-ref-238)
238. 259 16 U.S.C. 839f(e)(5) (2000). [↑](#footnote-ref-239)
239. 260 557 F.2d 650 (9th Cir. 1977). [↑](#footnote-ref-240)
240. 261 Id. at 654-655. [↑](#footnote-ref-241)
241. 262 117 F.3d 1520 (9th Cir. 1997). [↑](#footnote-ref-242)
242. 263 Confederated Tribes, 342 F.3d at 931 (citing NEDC, 117 F.3d at 1533). [↑](#footnote-ref-243)
243. 264 Id. at 932. [↑](#footnote-ref-244)
244. 265 Id. at 933. [↑](#footnote-ref-245)
245. 266 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-246)
246. 267 16 U.S.C. 1131-1136 (2000). [↑](#footnote-ref-247)
247. 268 16 U.S.C. 668dd-668ee (2000). [↑](#footnote-ref-248)
248. 269 Wilderness Soc'y v. United States Fish & Wildlife Serv., 316 F.3d 913 (9th Cir. 2003), vacated by 340 F.3d 768 (9th Cir. 2003) [↑](#footnote-ref-249)
249. 270 16 U.S.C. 3101-3233 (2000). [↑](#footnote-ref-250)
250. 271 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-251)
251. 273 533 U.S. 218 (2001). [↑](#footnote-ref-252)
252. 274 467 U.S. 837 (1984). [↑](#footnote-ref-253)
253. 275 Id. at 842-43. [↑](#footnote-ref-254)
254. 276 Wilderness Soc'y v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc), amended by 360 F.3d 1374 (9th Cir. 2004) (en banc). [↑](#footnote-ref-255)
255. 277 16 U.S.C. 1133(c) (2000). [↑](#footnote-ref-256)
256. 278 Wilderness Soc'y, 353 F.3d at 1061. [↑](#footnote-ref-257)
257. 279 662 F. Supp. 40 (D.D.C. 1987). [↑](#footnote-ref-258)
258. 280 16 U.S.C. 1133(d)(1) (2000). [↑](#footnote-ref-259)
259. 281 353 F.3d 913 (9th Cir. 2003). [↑](#footnote-ref-260)
260. 282 Wilderness Soc'y, 353 F.3d at 1064. [↑](#footnote-ref-261)
261. 283 Id. at 1067. [↑](#footnote-ref-262)
262. 285 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-263)
263. 286 5 U.S.C. 551-559, 701--06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-264)
264. 288 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-265)
265. 289 Id. 1604(i). [↑](#footnote-ref-266)
266. 290 National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514, 67,514 (Nov. 9, 2000) (codified at 36 C.F.R. pts. 217, 219). [↑](#footnote-ref-267)
267. 291 Citizens for Better Forestry v. United States Dep't of Agric, 341 F.3d 961, 968 (9th Cir. 2003). [↑](#footnote-ref-268)
268. 292 National Forest System Land and Resource Management Planning, 65 Fed. Reg. at 67,527. [↑](#footnote-ref-269)
269. 293 Id. at 67,575. [↑](#footnote-ref-270)
270. 294 Citizens for Better Forestry, 341 F.3d at 969. [↑](#footnote-ref-271)
271. 295 Id. at 970. [↑](#footnote-ref-272)
272. 296 Throughout its analysis, the Ninth Circuit addressed only the NEPA claim, stating in a footnote that this analysis was "equally applicable to claims of any procedural environmental injury," including those of the ESA. Id at 971, n.6. [↑](#footnote-ref-273)
273. 297 West v. Sec'y of Dep't of Transp., 206 F.3d 920, 930 n.14 (9th Cir. 2000). [↑](#footnote-ref-274)
274. 298 Res. Ltd. v. Robertson, 35 F.3d 1300 (9th Cir. 1994); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992). [↑](#footnote-ref-275)
275. 299 Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1019 (9th Cir. 2003), rev'd, 124 S. Ct. 2204 (2004). [↑](#footnote-ref-276)
276. 300 523 U.S. 726 (1998). [↑](#footnote-ref-277)
277. 301 Id. at 732. [↑](#footnote-ref-278)
278. 302 Id. at 736. [↑](#footnote-ref-279)
279. 304 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-280)
280. 306 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-281)
281. 307 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-282)
282. 308 Forest Guardians v. United States Forest Serv., 329 F.3d 1089, 1094 (9th Cir. 2003). [↑](#footnote-ref-283)
283. 309 Id. at 1093 (quoting 42 U.S.C. 4332(c) (2000)). [↑](#footnote-ref-284)
284. 310 16 U.S.C. 1536(a)(2) (2000). [↑](#footnote-ref-285)
285. 311 Forest Guardians, 329 F.3d at 1094-95. [↑](#footnote-ref-286)
286. 312 The court acknowledged that this sounded "implausible" but held USFS intended the 1998 study to cover the relevant time period. Id. at 1095. [↑](#footnote-ref-287)
287. 313 Id. at 1096 (citation omitted). [↑](#footnote-ref-288)
288. 314 Id. at 1097 (quoting 36 C.F.R. 222.4(a)(8) (2000)) (emphasis in original). [↑](#footnote-ref-289)
289. 315 36 C.F.R. 222.3 (2003). [↑](#footnote-ref-290)
290. 316 Forest Guardians, 329 F.3d at 1098. [↑](#footnote-ref-291)
291. 317 Id. at 1100 (citations omitted). [↑](#footnote-ref-292)
292. 319 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-293)
293. 320 Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291, 1296 (9th Cir. 2003) (summarizing the Sierra Nevada Framework provisions protecting the spotted owl). [↑](#footnote-ref-294)
294. 321 Id. [↑](#footnote-ref-295)
295. 322 Id. [↑](#footnote-ref-296)
296. 323 Earth Island Inst., 351 F.3d at 1298 (citing Does 1-5 v. Chandler, 83 F.3d 1150, 1152 (9th Cir. 2002)). [↑](#footnote-ref-297)
297. 324 Native Ecosystems Council v. Dombeck, 304 F.3d 886, 894 (9th Cir. 2002) (determining that when two projects would take place independent of each other, they are not so related as to be considered connected for NEPA assessment). [↑](#footnote-ref-298)
298. 325 Earth Island Inst., 351 F.3d at 1307. [↑](#footnote-ref-299)
299. 326 Id. at 1299. [↑](#footnote-ref-300)
300. 327 United States v. Alpine Land & Reservoir Co. (Alpine VI), 340 F.3d 903, 924 (9th Cir. 2003). [↑](#footnote-ref-301)
301. 328 United States v. Alpine Land & Reservoir Co. (Alpine V), 291 F.3d 1062, 1072 (9th Cir. 2002). [↑](#footnote-ref-302)
302. 329 Nev. Rev. Stat. 533.060(2) (surface water); Nev. Rev. Stat. 534.090 (ground water). [↑](#footnote-ref-303)
303. 330 Nev. Rev. Stat. 533.085. [↑](#footnote-ref-304)
304. 331 27 F. Supp. 2d 1230 (D. Nev. 1998). [↑](#footnote-ref-305)
305. 332 Id. at 1231. [↑](#footnote-ref-306)
306. 333 291 F.3d 1062. [↑](#footnote-ref-307)
307. 334 Alpine VI, 340 F.3d 903, 915 (9th Cir. 2003) (internal quotations omitted). [↑](#footnote-ref-308)
308. 335 Id. at 915 (internal quotations omitted). [↑](#footnote-ref-309)
309. 337 Alpine V, 291 F.3d at 1077 (holding that proof of lack of intent to abandon requires proof of continuous use). [↑](#footnote-ref-310)
310. 338 Alpine VI, 340 F.3d at 917. [↑](#footnote-ref-311)
311. 339 Nev. Rev. Stat. 533.370(3) (2000) (stating that, "where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights … or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the requested permit"). [↑](#footnote-ref-312)
312. 340 National Irrigation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (codified as amended at 43 U.S.C. 372, 373, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, 498 (2000)). [↑](#footnote-ref-313)
313. 341 Pub. L. No. 101-618, 104 Stat. 3289. [↑](#footnote-ref-314)
314. 342 Id. at 206(a), 104 Stat. at 3308. [↑](#footnote-ref-315)
315. 343 Id. [↑](#footnote-ref-316)
316. 344 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-317)
317. 345 Churchill County v. Norton, 276 F.3d 1060, 1065 (9th Cir. 2001), cert. denied, 537 U.S. 822 (2002). [↑](#footnote-ref-318)
318. 346 The existing place of use of one of the water rights was under a paved roadway; that of another was under a housing development. Because the land served by these two rights is no longer capable of being irrigated, and because the alleged interference with existing water rights involves interference with the recharge of ground water through the removal of water from irrigation ditches, changing the place of use of these water rights would have no effect on recharging ground water levels. The existing places of use of the remaining six were not within a significant recharge area. [↑](#footnote-ref-319)
319. 347 918 P.2d 697, 698-99 (Nev. 1996). [↑](#footnote-ref-320)
320. 348 Pyramid Lake gives thirteen policy considerations for determining public interest. Considerations relevant here include whether the appropriation of the water right is for beneficial use and whether, in the State Engineer's judgment, the reduction of static water in a given area is reasonable. Id. at 699. [↑](#footnote-ref-321)
321. 349 The FWS presented evidence that soil quality and vegetation have improved enough to eliminate any possibility of air pollution caused by dust from the transfer of place of use of these eight water rights. [↑](#footnote-ref-322)
322. 350 Pyramid Lake, 918 P.2d at 700-01. [↑](#footnote-ref-323)
323. 351 Nev. Rev. Stat. 532.165 (2000). Nevada law says the State Engineer "shall … conduct necessary studies" but the determination of what studies are necessary is up to the State Engineer. Id. 533.368(1) (the only section of Nevada water law discussing the need for studies, saying the decision to require a study is up to the discretion of the State Engineer: "if the State Engineer determines that a … study is necessary … [he] shall advise the applicant of the need for the study."). [↑](#footnote-ref-324)
324. 352 Id. at 533.368(1). [↑](#footnote-ref-325)
325. 353 Pyramid Lake, 918 P.2d at 699-701 (emphasis in original). [↑](#footnote-ref-326)
326. 354 Id. [↑](#footnote-ref-327)
327. 355 478 F. Supp. 336 (D. Or. 1979), aff'd, 732 F.2d 1394 (9th Cir. 1983). [↑](#footnote-ref-328)
328. 356 Id. at 349-50. [↑](#footnote-ref-329)
329. 357 723 F.2d 1394, 1419-20 (9th Cir. 1983). [↑](#footnote-ref-330)
330. 358 United States v. Braren, 338 F.3d 971, 973 (9th Cir. 2003). [↑](#footnote-ref-331)
331. 359 Or. Admin. R. 137-003-0515, 137-003-0501 to -0700 (2003). [↑](#footnote-ref-332)
332. 360 Or. Rev. Stat. 539.130 (2000). [↑](#footnote-ref-333)
333. 361 United States v. Adair, 187 F. Supp. 2d 1273, 1275 (D. Or. 2002), vacated by United States v. Braren, 338 F.3d 971 (9th Cir. 2003). [↑](#footnote-ref-334)
334. 362 424 U.S. 800 (1976). [↑](#footnote-ref-335)
335. 363 Braren, 338 F.3d at 974. [↑](#footnote-ref-336)
336. 364 Id. at 974-75. [↑](#footnote-ref-337)
337. 365 Id. at 975 (quoting Maryland Cas. Co. v. Pac. Coal & ***Oil*** Co., 312 U.S. 270, 273 (1941)) (internal quotations omitted)). [↑](#footnote-ref-338)
338. 366 Id. at 975. [↑](#footnote-ref-339)
339. 367 Id. (quoting Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 246 (1952)). [↑](#footnote-ref-340)
340. 368 Winter v. Calif. Med. Review, Inc., 900 F.2d 1322, 1325 (9th Cir. 1989). [↑](#footnote-ref-341)
341. 369 Braren, 338 F.3d at 976. [↑](#footnote-ref-342)
342. 370 Id. [↑](#footnote-ref-343)
343. 371 Id. [↑](#footnote-ref-344)
344. 372 National Irrigation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (codified as amended at 43 U.S.C. 372, 373, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, 498 (2000)). [↑](#footnote-ref-345)
345. 373 United States v. Clifford Matley Family Trust, 354 F.3d 1154, 1158 (9th Cir. 2004) (quoting Nevada v. United States, 463 U.S. 110, 115 (1983)). [↑](#footnote-ref-346)
346. 374 United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev. 1944). [↑](#footnote-ref-347)
347. 375 United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nev. 1980). [↑](#footnote-ref-348)
348. 376 Clifford Matley Family Trust, 354 F.3d at 1159. [↑](#footnote-ref-349)
349. 377 United States v. Alpine Land & Reservoir Co., No. D-185-HDM (D. Nev. Aug. 8, 1994). [↑](#footnote-ref-350)
350. 378 United States v. Alpine Land & Reservoir Co., 340 F.3d 903, 910 (9th Cir. 2003). [↑](#footnote-ref-351)
351. 379 Id. [↑](#footnote-ref-352)
352. 380 Clifford Matley Family Trust, 354 F.3d at 1159. [↑](#footnote-ref-353)
353. 381 Fed. R. Civ. P. 53(c). [↑](#footnote-ref-354)
354. 382 Clifford Matley Family Trust, 354 F.3d at 1160. [↑](#footnote-ref-355)
355. 383 Id. [↑](#footnote-ref-356)
356. 384 Id. at 1162 (quoting Memphis Light, Gas & Water Dev. v. Craft, 436 U.S. 1, 16 (1978)). [↑](#footnote-ref-357)
357. 385 Id. (citing Mathews v. Eldridge, 424 U.S. 319, 347 (1976)). [↑](#footnote-ref-358)
358. 386 Id. at 1163 (quoting United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 853 (9th Cir. 1983) (defining water duty as "that measure of water, which by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of crops as ordinarily are grown thereon")). [↑](#footnote-ref-359)
359. 387 Id. at 1164 (quoting United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983)). [↑](#footnote-ref-360)
360. 388 Id. [↑](#footnote-ref-361)
361. 389 Id. at 1165. [↑](#footnote-ref-362)
362. 390 Id. at 1166 (internal quotations omitted) (Sneed, J., dissenting). [↑](#footnote-ref-363)
363. 391 16 U.S.C. 1271-1287 (2000). [↑](#footnote-ref-364)
364. 392 Id. 1273(b). [↑](#footnote-ref-365)
365. 393 Id. 1271. [↑](#footnote-ref-366)
366. 394 Id. 1273(a). [↑](#footnote-ref-367)
367. 395 Id. 1276(d)(1). [↑](#footnote-ref-368)
368. 396 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). The suit was brought under id. 706. [↑](#footnote-ref-369)
369. 397 Ctr. for Biological Diversity v. Veneman, 335 F.3d 849, 853 (9th Cir. 2003). [↑](#footnote-ref-370)
370. 398 5 U.S.C. 706(1) (2000). [↑](#footnote-ref-371)
371. 399 16 U.S.C. 1276(d)(1) (2000). [↑](#footnote-ref-372)
372. 400 Id. [↑](#footnote-ref-373)
373. 402 Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243 (repealed). [↑](#footnote-ref-374)
374. 403 Ctr. for Biological Diversity v. Veneman, 335 F.3d 849, 856 (9th Cir. 2003) (quoting Mont. Wilderness Ass'n, Inc. v. United States Forest Serv., 314 F.3d 1146, 1151 (9th Cir. 2003)). [↑](#footnote-ref-375)
375. 404 150 F.3d 1132 (9th Cir. 1998). [↑](#footnote-ref-376)
376. 405 Ctr. for Biological Diversity, 335 F.3d at 857. [↑](#footnote-ref-377)
377. 407 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-378)
378. 408 16 U.S.C. 1274(b), (d) (2000). [↑](#footnote-ref-379)
379. 409 Id. 1274(d). [↑](#footnote-ref-380)
380. 410 Id. 1283(c). [↑](#footnote-ref-381)
381. 411 69 F. Supp. 2d 1202 (E.D. Cal. 1999). [↑](#footnote-ref-382)
382. 412 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-383)
383. 413 Friends of Yosemite Valley v. Norton, 194 F. Supp. 2d 1066, 1127-28 (E.D. Cal. 2002), aff'd in part, rev'd in part, 348 F.3d 789 (9th Cir. 2003), clarified by 366 F.3d 731 (9th Cir. 2004). [↑](#footnote-ref-384)
384. 414 Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003), clarified by 366 F.3d 731 (9th Cir. 2004); see 5 U.S.C. 706 (2000) (establishing arbitrary and capricious standard of review). [↑](#footnote-ref-385)
385. 415 National Wild and Scenic Rivers System: Final Revised Guidelines for Eligibility, Classification, and Management of River Areas, 47 Fed. Reg. 39,454 (Sept. 7, 1982). [↑](#footnote-ref-386)
386. 416 The Ninth Circuit cited Sokol v. Kennedy, 210 F.3d 876, 879 (8th Cir. 2000) (holding the setting of WSRA boundaries to be an administrative act subject to the WSRA's mandate to protect outstandingly remarkable values (ORVs)). [↑](#footnote-ref-387)
387. 417 16 U.S.C. 1274(d)(1) (2000). [↑](#footnote-ref-388)
388. 418 Friends of Yosemite Valley, 348 F.3d at 799. [↑](#footnote-ref-389)
389. 419 Id. at 800 (citing Ecology Ctr. Inc. v. United States Forest Serv., 192 F.3d 922, 923 (9th Cir. 1999)). [↑](#footnote-ref-390)
390. 420 California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (interpreting 42 U.S.C. 4332(2)(c)). [↑](#footnote-ref-391)
391. 421 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-392)
392. 422 Brem-Air Disposal v. Cohen, 156 F.3d 1002, 1005 (9th Cir. 1998) (holding that the notice requirement reflected Congress's intent to allow the agency to react to the alleged violation before suit is filed). [↑](#footnote-ref-393)
393. 423 Friends of Yosemite Valley v. Norton, 194 F. Supp. 2d 1066, 1116 (E.D. Cal. 2002), aff'd in part, rev'd in part, 348 F.3d 789 (9th Cir. 2003), clarified by 366 F.3d 731 (9th Cir. 2004). [↑](#footnote-ref-394)
394. 424 16 U.S.C. 3837(a)(2000). [↑](#footnote-ref-395)
395. 425 Big Meadows Grazing Ass'n v. United States ex rel. Veneman, 344 F.3d 940, 942 (9th Cir. 2003) (internal quotation omitted). [↑](#footnote-ref-396)
396. 426 16 U.S.C. 3837a(a) (2000) states, "To be eligible to place land into the wetland reserve under this subpart, the owner of such land shall enter into an agreement with the Secretary - (1) to grant an easement on such land to the Secretary; [and] (2) to implement a wetland easement conservation plan as provided for in this section." [↑](#footnote-ref-397)
397. 427 Big Meadows Grazing Ass'n, 344 F.3d at 943. [↑](#footnote-ref-398)
398. 428 16 U.S.C. 3837a(b) (2000). [↑](#footnote-ref-399)
399. 429 7 C.F.R. 1467.4(a) (2003) ("To participate in WRP, a landowner will agree to the implementation of a Wetlands Reserve Plan of Operations (WRPO)."); id. 1467.12(b) ("Modifications to the WRPO which are substantial and affect provisions of the easement will require agreement from the landowner and require execution of an amended easement."). [↑](#footnote-ref-400)
400. 430 Id. 1467.10(d) ("The landowner shall: (1) Comply with the terms of the easement, (2) Comply with all terms and conditions of any associated contract [and] (3) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the easement in accordance with the terms of the easement and related agreements"); id. 1467.12(b) ("Modifications to the WRPO which are substantial and affect provisions of the easement will require agreement from the landowner and require execution of an amended easement."). [↑](#footnote-ref-401)
401. 431 See U.S. Sentencing Guidelines Manual 2D1.1(b)(5)(A) (2002) (requiring two-level enhancement for crimes involving disposal of hazardous materials). [↑](#footnote-ref-402)
402. 432 United States v. MacDonald, 339 F.3d 1080, 1081 (9th Cir. 2003) (quoting U.S. Sentencing Guidelines Manual 2D1.1(b)(5)(A) (2002)). [↑](#footnote-ref-403)
403. 433 42 U.S.C. 6901-6992(k) (2000) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992). RCRA section 3008(d) is codified at id. 6928(d). [↑](#footnote-ref-404)
404. 434 MacDonald, 399 F.3d at 1082 (quoting 42 U.S.C. 6903(5) (2000)) (citations omitted). [↑](#footnote-ref-405)
405. 435 Id. at 1083. [↑](#footnote-ref-406)
406. 436 509 U.S. 579 (1993). [↑](#footnote-ref-407)
407. 437 Or. Rev. Stat. 468B.300 (2001). [↑](#footnote-ref-408)
408. 439 Or. Rev. Stat. 468B.305 (2001). [↑](#footnote-ref-409)
409. 440 Id. 468B.310(1), 300(6). [↑](#footnote-ref-410)
410. 441 509 U.S. 579, 594-97 (1993). [↑](#footnote-ref-411)
411. 442 Clausen v. M/V New Carissa, 339 F.3d 1049, 1056 (9th Cir. 2003). [↑](#footnote-ref-412)
412. 443 Id. [↑](#footnote-ref-413)
413. 444 43 F.3d 1311 (9th Cir. 1995). [↑](#footnote-ref-414)
414. 445 Id. at 1317. [↑](#footnote-ref-415)
415. 446 Id. at 1318. [↑](#footnote-ref-416)
416. 447 Id. at 1319. [↑](#footnote-ref-417)
417. 448 Clausen, 339 F.3d at 1058 (citing Kennedy v. Collagen Corp., 161 F.3d 1226 (9th Cir. 1998) (finding that a reliable differential diagnosis meets the requirements of Daubert II)). [↑](#footnote-ref-418)
418. 449 Id. [↑](#footnote-ref-419)
419. 450 Id. [↑](#footnote-ref-420)
420. 451 Id. at 1062 (quoting the Oregon ***Oil*** Spill Act, Or. Rev. Stat. 468B.300(6) (2001) (internal quotation and emphasis omitted)). [↑](#footnote-ref-421)
421. 453 304 U.S. 64 (1938). [↑](#footnote-ref-422)
422. 454 City of Martinez v. Texaco Trading and Transp., Inc., 353 F.3d 758, 762 (9th Cir. 2003) (quoting San Diego Police Officers' Ass'n v. City of San Diego Civil Serv. Comm'n, Cal. Rptr. 2d 248, 251 (Cal. Ct. App. 2002)). [↑](#footnote-ref-423)
423. 455 Id. [↑](#footnote-ref-424)
424. 456 Id. at 763 (quoting Cal. Civ. Code 815.1, .3(b) (West 2000)). [↑](#footnote-ref-425)
425. 457 71 Cal. Rptr. 2d 77 (Cal. Ct. App. 1998). [↑](#footnote-ref-426)
426. 458 City of Martinez, 353 F.3d at 763 n.3. [↑](#footnote-ref-427)
427. 460 Cal. Gov't Code 8670.7(a) (West 2000). [↑](#footnote-ref-428)
428. 461 City of Martinez, 353 F.3d at 764. [↑](#footnote-ref-429)
429. 462 Id. [↑](#footnote-ref-430)
430. 463 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-431)
431. 464 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-432)
432. 465 Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001), appeal dismissed, 358 F.3d 1181 (9th Cir. 2004). [↑](#footnote-ref-433)
433. 466 The agency enacted an action plan to review its salmon hatchery policy and salmon listing procedures. [↑](#footnote-ref-434)
434. 467 Fed. R. Civ. P. 24(a)(2). [↑](#footnote-ref-435)
435. 468 28 U.S.C. 1292 (2000). [↑](#footnote-ref-436)
436. 469 Collord v. United States Dep't of the Interior, 154 F.3d 933, 935 (9th Cir. 1998). [↑](#footnote-ref-437)
437. 470 Calderon v. United States Dist. Court for the Cent. Dist. of Cal., 137 F.3d 1420, 1422 n.2 (9th Cir. 1998) (citing Carson v. Am. Brands Inc., 450 U.S. 79, 83 (1981)). [↑](#footnote-ref-438)